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Aug 18 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

HONORABLE W. YOUNG, Circuit Court Judge

Case No. 2019-000148

Tymika Jones Alston and Harold Alston individually
And as Parents and Guardians on behalf of their minor child,
J.A., ... Appellants

v.

Donald Richard Torres d/b/a DMT Construction Co., Inc.,
L&L Electric, Inc. and Eduardo Moreno d/b/a E.S. Moreno
Construction, Defendants,
Of which Donald Richard Torres d/b/a DMT Construction Co.,
Is the Respondent .....Respondent

RECORD ON APPEAL

RECEIVED
SEP 03 2019
SC Court of Appeals

Donald Gist, Esquire
Aaron Wallace, Esquire
Gist Law Firm, PA
Columbia, SC 29203
(803) 771-8007
Attorneys for Appellants

Helen Hiser, Esquire
Geoff W. Gibbn, Esquire
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(864) 239-4000
Attorneys for Respondent

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully Submitted,

Donald Gist, Esquire
Aaron Wallace, Esquire
Gist Law Firm, PA
4400 North Main Street
Columbia, SC 29203
(803) 771-8007
Attorneys for Appellants

August 31, 2019

November 1, 2011 Consent Order to 40(J) Case

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2010CP4004307

Tymika Jones Alston
Harold Alston
PLAINTIFF(S)

Willow Creek Construction Inc
Oscar Torres
DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 1 November 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Deandrea Gist Benjamin
Donald Gist
ATTORNEY(S) FOR THE PLAINTIFF(S)

Thomas Frank Dougall
Gerald Thomas Chase
Adelaide D. Kline
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

RICHLAND COUNTY
2011 NOV -1 AM 9:34
JEANETTE W. McBRIDE
CLERK OF COURT

SCRCP Form 4C (10/2011)

ROA4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON,	)	CIVIL ACTION NO.: 2010-CP-40-4307
Plaintiffs,	)	
vs.	)	
WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES,	)	CONSENT ORDER TO STRIKE CASE FROM THE DOCKET PURSUANT TO RULE 40(J) SCRCP
Defendants.	)	
WILLOW CREEK CONSTRUCTION, INC.,	)	
Third Party Plaintiff,	)	
vs.	)	
DONALD RICHARD TORRES d/b/a DMT CONSTRUCTION CO., INC.; L & L ELECTRIC INC., AND EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION,	)	
Third Party Defendants.	)	

RICHLAND COUNTY
FILED
2011 NOV -1 AM 9:30
JEANETTE W. McBRIDE
C.C.P. & G.S.

It appears that Plaintiffs have moved, and defendants have agreed, that the Complaint herein be stricken from the docket pursuant to Rule 40(j), SCRCP, as follows:

1. The parties have the right to move on or before one year of the date of this Order giving ten days notice to all other parties, that this case be restored to the docket.

ROA 5

2. Upon restoration of this case, the case will be returned to the roster with a new civil action number.

3. Upon restoration of this case, the pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action. The parties will not be required to refile pleadings or discovery in this matter.

4. The parties shall be allowed to conduct further discovery during such time as this case is stricken from the docket.

It is therefore ORDERED, ADJUDGED AND DECREED that this case shall be stricken from the docket pursuant to Rule 40(j), SCRCP.

IT IS SO ORDERED.

Judge Alison Renee Lee
Administrative Judge
Fifth Judicial Circuit

October 31, 2011.

Dated: October 21, 2011

Columbia, South Carolina

The parties hereby certify that no other parties have appeared in this action.

WE SO MOVE:

Donald Gist, Esq.
Gist Law Firm
Post Office Box 30007
Columbia, SC 29230

Attorney for Plaintiffs

WE CONSENT:

Thomas F. Dougall, Esq.
Dougall & Collins
1700 Woodcreek Farms Road
Elgin, SC 29045

Attorney for Defendant and Third-Party Plaintiff

ROA 6

WE CONSENT:

G. Thomas Chase (tfd by permission)

G. Thomas Chase, Esq.
McAngus Goudelock & Courie
Post Office Box 2980
Greenville, SC 29602

Attorney for Third-Party Defendant
Donald Richard Torres

ROA 7

October 11, 2012 Order Restoring Case to Trial Docket

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON	)	10-CP-40-04307
Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and Defendant.	)	ORDER TO RESTORE CASE TO ACTIVE TRIAL ROSTER

RICHLAND CO. C.C.P.
FILED
2012 OCT 11 PM 3:39
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before this court pursuant to a Motion to Restore filed by the Plaintiff. Plaintiff's counsel, with consent of Defendant, moved to have this case stricken from the trial docket pursuant to Rule 40(j), SCRCP, on October 21, 2011. This matter was struck from the active docket on October 31, 2011.

The Plaintiff is requesting that this matter be restored to the active trial roster and that a final hearing be scheduled in this matter.

NOW, THEREFORE, IT IS ACCORDINGLY ORDERED, ADJUDGED, AND DECREED

1. That this matter be restored to the active trial roster with a new civil action number.
2. That all pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action and that the parties will not be required to refile pleadings or discovery in this matter.
3. That a final hearing be scheduled in this matter.

AND IT IS SO ORDERED.

S/ James R. Barber III

Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

10/11, 2012

Order for Summary Judgment dated January 15, 2019

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012CP4006895R

Tymika Jones Alston et al
PLAINTIFF(S)

Willow Creek Construction Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

"Plaintiffs' Motion for Reconsideration of the Court's Decision to Grant Defendant's Motion for Summary Judgment," which was filed on October 22, 2015, is DENIED.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/15/2019 .

Harold Alston
[redacted]
Adelaide D. Kline for Willow Creek Construction Inc,Oscar Torres
E S Moreno Construction
Eduardo Moreno
L & L Electrical, Inc.

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2019 Jan 15 4:05 PM - RICHLAND - COMMON PLEAS - CASE#2012CP4006895R

R0A10

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2019 Jan 15 4:05 PM - RICHLAND - COMMON PLEAS - CASE#2012CP4006895R

ROA11

ELECTRONICALLY FILED - 2019 Jan 15 4:05 PM - RICHLAND - COMMON PLEAS - CASE#2012CP4006895R

Richland Common Pleas

Case Caption: Tymika Jones Alston , plaintiff, et al vs Willow Creek Construction Inc , defendant, et al

Case Number: 2012CP4006895R

Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, 5th Judicial Circuit

ROA 12

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4006895R

Tymika Jones Alston
Harold Alston
PLAINTIFF(S)

Willow Creek Construction Inc
Oscar Torres
DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

2015 NOV -2 PM 1:08

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 2 November 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Donald Gist | Aaron Vernon Wallace | Thomas Frank Dougall, Adelaide D. Kline | G Thomas Chase

ATTORNEY(S) FOR THE PLAINTIFF(S) | **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____ **Clerk of Court** Jeanette W McBride

SCRCP Form 4C (10/2011)

LOA 13

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **ORDER FOR SUMMARY JUDGMENT RELATED TO INDIVIDUAL CLAIMS OF TYMIKA JONES ALSTON AND HAROLD ALSTON**

2015 NOV -2 PM 12: 59
RICHLAND COUNTY
FILED
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before this Court on March 18, 2015, upon the Motion for Summary Judgment by Donald R. Torres d/b/a DMT Construction Co., Inc. ("DMT") pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. DMT was represented by G. Thomas Chase and Plaintiffs were represented by Donald Gist and Aaron V. Wallace. Based on the record presented, including oral argument, exhibits and the original and supplemental memorandum submitted by the parties, this Court makes the following findings and conclusions.

FACTUAL BACKGROUND

Tymika Jones Alston and Harold Alston are the owners of a home located at [redacted] in Blythewood, South Carolina. This case arises out of alleged defects, including the resultant growth of mold, from the construction of this home that was completed in April of 2007. Willow Creek Construction, Inc. ("Willow Creek") was the general contractor in the construction of the home. Oscar Torres ("Torres") was an employee of Willow Creek who acted, at a minimum, as the site superintendent for the construction of the home on behalf of Willow Creek. DMT was hired as a subcontractor by Willow Creek to perform framing in the construction of the home. Tymika Jones Alston and Harold Alston admittedly knew DMT was a

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subcontractor in the construction of the home. On April 5, 2007, Tymika Jones Alston and Harold Alston allegedly began noticing water leaking into the home and made complaints to Torres and Willow Creek multiple times regarding the water penetration issues in 2007. They notified Willow Creek and Torres of additional findings in March of 2008, had a mold test performed in November of 2008, and had a home inspection regarding alleged defects in December of 2008. Tymika Jones Alston and Harold Alston also complained of health issues in 2007 and 2008 due to living in the home. Plaintiffs, by and through counsel, admit they had notice of their potential claims related to the construction of the claim as of December 2008, at the latest.

Tymika Jones Alston and Harold Alston filed their original Complaint on June 29, 2010. The action was brought only against Willow Creek and Torres. They made claims for breach of contract, negligence, breach of the implied warranty of workmanlike service, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness for a particular purpose. As damages in this action, Tymika Jones Alston claimed personal bodily injury resulting in pain and suffering, past and future medical expenses and lost wages; Harold Alston claimed personal bodily injury resulting in pain and suffering, past and future medical expenses and lost wages; and they both claimed they incurred alternative living expenses due to the home being inhabitable, physical damage to the home requiring repair at a cost based on alleged code violations and construction defects, remediation of the home at a cost due to alleged code violations and construction defects, and diminution in the value of the home due to the same conditions.

On or around March 31, 2011, Willow Creek filed a Third-Party Complaint against DMT, L&L Electric Co., Inc., and Eduardo Moreno d/b/a/ E.S. Moreno Construction for indemnification and breach of contract. The Third-Party Complaint by Willow Creek was amended in July of 2011 and DMT remained only a Third-Party Defendant in the litigation.

In June of 2014, Tymika Jones Alston and Harold Alston reached an agreement at mediation with Willow Creek and Torres for them to enter a confession of judgment as to the amount of alleged repairs necessary to the home. Subsequent to this agreement, Plaintiffs filed an Amended Complaint on August 11, 2014 naming DMT as a primary defendant. At no point prior to the filing of Plaintiffs' Amended Complaint was DMT sought to be joined as a party against whom Plaintiffs made a direct claim in the litigation. Therefore, Tymika Jones Alston

ROA 15

and Harold Alston made no direct claims against DMT until over seven years after Plaintiffs initially noticed construction defect issues with their home.

Tymika Jones Alston and Harold Alston filed a Motion for Leave to File an Amended Complaint on May 22, 2014 wherein Plaintiffs sought to amend their complaint to add a personal bodily injury claim by [redacted], a minor, by and through Harold Alston and Tymika Alston, his parents. [redacted] was still a minor at the time the Amended Complaint was filed in August of 2014. DMT was still only a third-party Defendant at the time the motion was filed in May of 2014.

The mediation agreement between Tymika Jones Alston and Harold Alston and Willow Creek and Torres was not published to DMT. Rather, counsel for DMT obtained a copy of the mediation agreement for the first time on March 17, 2015 from counsel for Willow Creek because Plaintiffs' counsel objected to the production of the agreement by the mediator. Therefore, DMT did not know the express content until March 17, 2015.

On July 15, 2014, counsel for Tymika Jones Alston and Harold Alston sent an e-mail to counsel for DMT regarding the scheduling of the motion hearing on their pending motion to add Jaiden Alston as a party based on his personal bodily injury claim. This was the only motion pending at the time and is the only amendment discussed in the correspondence. Counsel for DMT consented for the amendment to add the minor child as a party based on the personal bodily injury claim being made by and through the parents. On August 11, 2014, counsel for the Alstons informed counsel for DMT that the Amended Complaint was filed on that date. Counsel for the Alstons requested that counsel accept service of the Amended Complaint on behalf of DMT. By response e-mail, counsel for DMT agreed to accept service of the Amended Complaint. The Amended Complaint was sent to counsel for DMT on August 12, 2014, but the pleading did not merely add the minor as a party. Rather, it added the minor as a party, did not include Willow Creek or Torres as parties, and for the first time made direct claims by the Alstons against DMT. By execution of an acceptance of service, Counsel for DMT accepted service of the Amended Complaint on behalf of DMT and expressly reserved all defenses. DMT filed a timely responsive pleading to the Amended Complaint, including the defenses of the Statute of Limitations and Laches. Subsequently, counsel for DMT filed the motion for summary judgment heard before this Court.

STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Staubes v. City of Folly Beach*, 331 S.C. 192, 500 S.E.2d 160 (1998); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleading, but must set forth or point to specific facts showing there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 477 U.S. 242, 248 (1986). A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If that party does not so respond, summary judgment should be entered against that party. *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988).

DISCUSSION

A. Summary judgment is appropriate based on the statute of limitations.

South Carolina Code § 15-3-530 establishes a three year statute of limitations for contract and negligence actions. For negligence actions, the statute of limitations begins to run from the date when the injury resulting from the wrongful conduct either is discovered or should have been discovered by the exercise of reasonable diligence. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 597 S.E. 2d 27 (Ct. App. 2004). The date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations. *Gillman v. City of Beaufort*, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006).

The Court notes that counsel for DMT has agreed that the personal bodily injury claim on behalf of the minor, [redacted], is not time barred under the statute of limitations. This Court agrees and, therefore, the personal bodily injury claim on behalf of the minor may continue. However, Tymika Jones Alston's and Harold Alston's individual claims, including allegations of resulting damages, against DMT are barred by the statute of limitations. Plaintiffs filed their Complaint against DMT at least three years after the statute of limitations had expired for their claims and, consequently, their Complaint must be dismissed. South Carolina courts have made the importance of abiding by statutes of limitations clear. "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered

judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights." *Moates v. Bobb*, 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996).

The fact that Willow Creek filed a Third Party Complaint against DMT has no bearing on the statute of limitations between Tymika Jones Alston, Harold Alston and DMT. *See, Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 2000)(counterclaim was time-barred by the statute of limitations when filed more than three years after the lawsuit began). "[I]t is well established that the statute of limitations operates as a defense to limit the remedy available from an existing cause of action, and unless the action is commenced before the expiration of the limitations period, the plaintiff's claim is barred." *Gillman v. City of Beaufort*, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006)(case against an indispensable party dismissed under Rule 19 of the South Carolina Rules of Civil Procedure for being time barred).

The South Carolina Supreme Court has noted that although statutes of limitations may result in plaintiffs being unable to find judicial relief, the public policy behind the statutes outweighs any hardships that plaintiffs endure when they have neglected to bring a timely suit. "The statute of limitations may sometimes work a great hardship in special cases, but under the principle that litigation and contention must have an ending, and that the repose and quiet of the many compensates for the loss of the few, such statutes have been adopted and strictly enforced in most countries as wise, and as contributing to the best interests of society." *Arial v. Arial*, 29 S.C. 84, 7 S.E. 35 (1888). Here, Plaintiffs have slept on their rights and neglected to bring in DMT before the expiration of the statute of limitations and, thus, their Complaint must be dismissed.

This bar by the statute of limitations includes Tymika Jones Alston's and Harold Alston's individual claims for breach of contract, negligence and negligent supervision, breach of the implied warranty of workmanlike service, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness for a particular purpose. This bar by the statute of limitations would therefore also preclude any claim for damages by Tymika Jones Alston for personal bodily injury resulting in pain and suffering, past and future medical expenses and lost

wages; any claim for damages by Harold Alston for personal bodily injury resulting in pain and suffering, past and future medical expenses and lost wages; and any claims by either for alternative living expenses due to the home being inhabitable, physical damage to the home requiring repair based on alleged code violations and construction defects, costs associated with remediation of the home based on alleged code violations and construction defects, and alleged diminution in the value of the home due to the same conditions. These are direct and consequential damages related to time barred property damage claims by them as the owners of the home at issue and related to their own personal bodily injury claims. Therefore, these damages may not be pursued in any claim brought on behalf of the minor [redacted]

B. <u>Summary Judgment is appropriate because Rule 15(c) of SCRCP does not apply to the Amended Complaint adding DMT as a Defendant after the statute of limitations had expired.</u>

Plaintiffs cannot amend their pleadings pursuant to Rule 15(c) of the South Carolina Rules of Civil Procedure to defeat the statute of limitations. Rule 15(c) holds that:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.
>
> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

Rule 15(c) only applies to the change of a party, not the addition of a party. *See, Jackson v. John Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000)(Plaintiff not allowed to amend pleadings under Rule 15(c) because Plaintiff did not simply correct a defendant's name or substitute one defendant for another. Rule 15(c) only relates to a change in party, not the addition of a defendant to an already existing defendant); *See, Gause v. Smithers*, 384 S.C. 130 (Ct. App. 2009)(Plaintiff not allowed to bring in the son as a defendant after the statute of limitations had run when the father was already named as a defendant because Rule 15(c) only

governs cases where a party is being changed, not added). Furthermore, Rule 15(c) does not apply because Plaintiffs did not did not serve an incorrectly named defendant and, therefore, Plaintiffs are not merely correcting a mistake as to identity. *Compare, Hughes v. Water World Water Slide*, 314 S.C. 211, 442 S.E.2d 584 (1994)(Plaintiff allowed to amend pursuant to Rule 15(c) because Plaintiff served using name on sign in front of business instead of proper corporate name and corporation had notice because served on president of the corporation).

C. Summary Judgment is appropriate because the responsive pleading included the proper affirmative defenses and the agreement to accept service of the complaint is not a waiver of affirmative defenses.

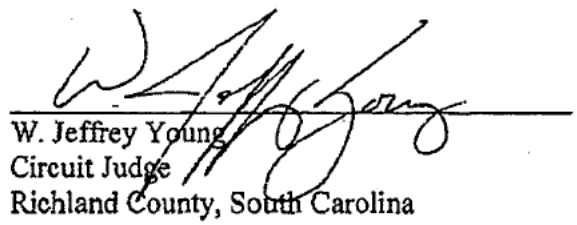
Plaintiffs contend DMT waived their affirmative defenses to the Amended Complaint by agreeing to accept service. This Court disagrees. Rule 4(j) of the South Carolina Rule of Civil Procedure provides only that "[n]o other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney . . ." The rule does not provide that acceptance of service of a pleading amounts to a waiver of affirmative defenses to the pleading other than related to the proof of service. Rather, as to affirmative defenses, Rule 8 and Rule 12 of the South Carolina Rules of Procedure govern when defenses, including, but not limited to, the statute of limitations and laches, are waived. In this case, the only agreement for acceptance of service before the Amended Complaint was sent related to a motion to add the personal bodily injury claim of [redacted] by and through his parents. The Amended Complaint that was submitted to counsel for DMT included the addition of the minor's bodily injury claim, but also included for the first time a direct claim by the Alstons against DMT. Therefore, pursuant to the previous agreement to accept the Amended Complaint regarding the addition of the minor as a party, but in protection that the acceptance of service of this hybrid Amended Complaint did not affect any defenses, counsel for DMT provided an acknowledgment of acceptance of service clearly preserving all other defenses. This submission was timely and clear. The timely Answer to the Amended Complaint included the affirmative defenses of statute of limitations and laches, as required by Rule 8 of the SCRCP, and, therefore, the defenses are properly before the Court. Plaintiff's counsel's only expectation from the acceptance of service should have been that the pleading would not have to be served through more formal means allowed under the rules of civil procedure. This is evident based on the correspondence submitted to and from counsel for claimants. Specifically, the correspondence

contains no evidence of any waiver regarding affirmative defenses or procedural defenses other than the sufficiency of service. Therefore, the acceptance of service did not act as a waiver of the defenses submitted only through the responsive pleading. *See, Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609 (2010)(affirmative defenses to a cause of action must generally be asserted in a party's responsive pleading).

CONCLUSION

Therefore, based on the discussion herein and the evidence presented to this Court, Defendants' motion for summary judgment as to the individual claims of Tymika Jones Alston and Harold Alston as set forth above is granted. Tymika Jones Alston and Harold Alston, as parents of the minor, may only proceed with the personal bodily injury claim of [redacted] against DMT because the statute of limitations had not run on that claim as of the filing and service of the Amended Complaint.

AND IT IS SO ORDERED.



W. Jeffrey Young
Circuit Judge
Richland County, South Carolina

October 19, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Tymika Jones Alston and Harold Alston Individually and as Parents and Guardians on behalf of their minor child [redacted])
Plaintiff(s))
)
vs.)
)
Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction)
Defendant(s))

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

C/A No: 2012-CP-40-6895R

2015 NOV -2 PM 12:59
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

Plaintiff's Attorney:	Defendant's Attorney:
Donald Gist, Esquire Address: 4400 North Main Street Columbia, South Carolina 29203 phone: (803) 771-8007 fax: (803) 771-0063 e-mail: donaldgist.gistlawfirm@gmail.com other:	G. Thomas Chase, S.C. Bar No. 66452 Address: McAngus, Goudelock & Courie, LLC Post Office Box 2980 55 East Camperdown Way, Suite 300 (29601) Greenville, South Carolina 29602 (864) 239-4000 Direct number: (864) 239-4008 Fax: (864) 242-3199 e-mail: tchase@mgclaw.com other:

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

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion/order attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — 10/7/15 Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION

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

W. Jeffrey Young
JUDGE
CODE: 2156 Date: 10.19.15

CLERK'S VERIFICATION

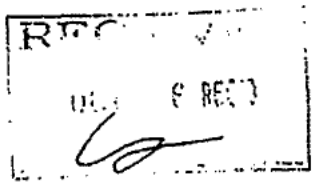
Collected by: Mette
Date Filed: 10/27/15

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

mgc | INSURANCE DEFENSE

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgclaw.com

October 23, 2015



The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child Jayden Alston vs. Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Carrier Claim No.: [redacted]
MGC File No.:

Dear Ms. McBride:

Please find enclosed for filing the original and two (2) copies of the Order for Summary Judgment Related to Individual Claims of Tymika Jones Alston and Harold Alston which has been signed by Judge Jeffrey Young in the above-captioned case. I would appreciate your returning a clocked-in copy of the same to me in the envelope provided.

Thanking you in advance for your assistance, I am

Very truly yours,

G. Thomas Chase

GTC/mbo
Enclosures
cc: Donald Gist, Esquire, Gist Law Firm (w/encl.)

Richland County Common Pleas

Clerk : Jeanette W. McBride
Richland County Judicial Center
Columbia, SC 29201
(803) 576-1999

Received From: Chase, G Thomas
PO Box 2980
Greenville, SC 29602

Date: 10/27/2015
Receipt #: 200052
Clerk: METTSB

Paying for: Alston, Tymika Jones
Transaction Type: Payment
Payment Type: Check $25.00

Reference #:26572
Comment:

Total Paid: $25.00

Non-Refundable

Case #	Caption	Previous Balance	Amount Paid	Balance Due
2012CP4006895R	Tymika Jones Alston , plaintiff, et al vs Willow Creek Construction Inc , defendant, et al	**$25.00**	**$25.00**	**$0.00**
Total Cases:	**1**	**$25.00**	**$25.00**	**$0.00**

ROA 24

June 24, 2010 Summons and Complaint

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

TYMIKA JONES ALSTON AND HAROLD ALSTON

Plaintiff(s)

vs.

WILLOW CREEK CONSTRUCTION, INC AND OSCAR TORRES

Defendant(s)

CIVIL ACTION COVERSHEET

2010CP4004350

RICHLAND COUNTY FILED 2010 JUN 29 PM 1:01 JEANETTE W. McBRIDE C.C.P. & G.S.

(Please Print)

Submitted By: ATTORNEY DEANDREA GIST
Address: 4400 NORTH MAIN STREET
COLUMBIA, SOUTH CAROLINA 29203

SC Bar #: 13957
Telephone #: 803-771-8003
Fax #: 803-771-0063
Other:
E-mail: AVAILAB

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

*If Action is Judgment/Settlement do not complete

- [x] JURY TRIAL demanded in complaint.
- [ ] NON-JURY TRIAL demanded in complaint.
- [ ] This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- [ ] This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- [ ] This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- [x] Constructions (100)
- [ ] Debt Collection (110)
- [ ] Employment (120)
- [ ] General (130)
- [ ] Breach of Contract (140)
- [ ] Other (199)

Torts - Professional Malpractice
- [ ] Dental Malpractice (200)
- [ ] Legal Malpractice (210)
- [ ] Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-CP-____
- [ ] Notice/ File Med Mal (230)
- [ ] Other (299)

Torts - Personal Injury
- [ ] Assault/Slander/Libel (300)
- [ ] Conversion (310)
- [ ] Motor Vehicle Accident (320)
- [ ] Premises Liability (330)
- [ ] Products Liability (340)
- [x] Personal Injury (350)
- [ ] Wrongful Death (360)
- [ ] Other (399)

Real Property
- [ ] Claim & Delivery (400)
- [ ] Condemnation (410)
- [ ] Foreclosure (420)
- [ ] Mechanic's Lien (430)
- [ ] Partition (440)
- [ ] Possession (450)
- [x] Building Code Violation (460)
- [ ] Other (499)

Inmate Petitions
- [ ] PCR (500)
- [ ] Mandamus (520)
- [ ] Habeas Corpus (530)
- [ ] Other (599)

Judgments/Settlements
- [ ] Death Settlement (700)
- [ ] Foreign Judgment (710)
- [ ] Magistrate's Judgment (720)
- [ ] Minor Settlement (730)
- [ ] Transcript Judgment (740)
- [ ] Lis Pendens (750)
- [ ] Transfer of Structured Settlement Payment Rights Application (760)
- [ ] Other (799)

Administrative Law/Relief
- [ ] Reinstate Driver's License (800)
- [ ] Judicial Review (810)
- [ ] Relief (820)
- [ ] Permanent Injunction (830)
- [ ] Forfeiture-Petition (840)
- [ ] Forfeiture—Consent Order (850)
- [ ] Other (899)

Appeals
- [ ] Arbitration (900)
- [ ] Magistrate-Civil (910)
- [ ] Magistrate-Criminal (920)
- [ ] Municipal (930)
- [ ] Probate Court (940)
- [ ] SCDOT (950)
- [ ] Worker's Comp (960)
- [ ] Zoning Board (970)
- [ ] Public Service Commission (990)
- [ ] Employment Security Comm (991)
- [ ] Other (999)

Special/Complex /Other
- [ ] Environmental (600)
- [ ] Automobile Arb. (610)
- [ ] Medical (620)
- [ ] Other (699)
- [ ] Pharmaceuticals (630)
- [ ] Unfair Trade Practices (640)
- [ ] Out-of State Depositions (650)
- [ ] Motion to Quash Subpoena in an Out-of-County Action (660)
- [ ] Sexual Predator (510)

...itting Party Signature: [signature]

Date: 6-24-10

...ous civil proceedings may be subject to sanctions pursuant to SCRCP Rule ...
...ceedings Sanctions Act S.C. Code ...

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON	10-CP-40-04307
Plaintiffs,	SUMMONS
vs.	
WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and	
Defendant.	

RICHLAND COUNTY
FILED
2010 JUN 29 PM 1:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: Oscar Torres, P.O. Box 955, Blythewood, SC 29016

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon the subscriber at Gist Law Firm, 4400 N. Main Street, P.O. Box 30007, Columbia, South Carolina 29230, within thirty (30) days after the service thereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff shall apply to the Court for a judgment by default against you for the relief demanded in the Complaint.

GIST LAW FIRM

DeAndrea Gist Benjamin
(SC Bar#: 13597)
4400 N. Main Street
P.O. Box 30007 (29230)
Columbia, SC 29203
803.771.8007
803.771.0063 (Fax)

Attorney for Plaintiff

June 29, 2010

ROA 26

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON	10-CP-40- 04307
Plaintiffs,	COMPLAINT
vs.	
WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and	
Defendant.	

RICHLAND COUNTY
FILED
2010 JUN 29 PM 1:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

NOW COMES the Plaintiffs, by and through counsel, for their complaint against Defendants and state as follow:

PARTIES & JURISDICTION

1. Plaintiffs Tymika Jones Alston and Harold Alston (hereafter "Plaintiffs") are Citizens and residents of Richland County, State of South Carolina and owners of real property located at [redacted] SC, Richland County, State of South Carolina, the residence which is the subject of this action.

2. Upon information and belief, Defendant Willow Creek Construction is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action.

3. Upon information and belief, Defendant Oscar Torres is a resident of Richland County, State of South Carolina and is the principal and owner of Willow Creek Construction. Defendant Torres was the residential contractor who built Plaintiff's home.

ROA 27

4. Upon information and belief, Defendants

5. Venue is proper in Richland County, State of South Carolina because at least one if not all Defendants maintains an office in Richland County and this action involves real estate in Richland County, State of South Carolina.

FACTUAL ALLEGATIONS

6. This case arises out of the construction of Plaintiffs' house located at 451 Apple Branch Court, Summer Pines Subdivision, Richland County, State of South Carolina.

7. Plaintiffs engaged Willow Creek Construction and Oscar Torres to construct their house with due care, in a workmanlike manner, and in accordance with the plans and specifications.

8. Defendant Willow Creek Construction completed the home in April 2007. Plaintiffs moved in the house on April 3, 2007.

9. On April 5, 2007, Plaintiffs' noticed that the bedroom wall was wet inside and out from the neighbor's sprinkler. Plaintiffs contacted the Defendant Construction Company regarding problem. Defendant Oscar Torres came out observed the problem and had the wall sanded and painted.

10. In July of 2007 after a heavy rain and thunderstorm, Plaintiffs once again noticed that the master bedroom wall was wet inside and out. They once again contacted the builder who in turn came back out sanded the wall and repainted it. They resealed the window and told them that everything was fine. At that time Plaintiffs were told by the builder that the problem was cured.

11. During the summer of 2007, Plaintiff Tymika Alston and the Plaintiffs'

RDA 28

son, Jaiden and Alston began experiencing medical problems. Specifically, swollen eyes, eye infections, bronchitis, and allergies. Plaintiff Tymika Alston and the minor child had no prior sinus or allergy issues. During this time Plaintiff Harold Alston was working out of the State and was only present in the house during the weekends. After weekend visits home, he would experience irritation in his eyes and sinus and allergy problems.

12. In November 2008, Plaintiffs' concerned about their deteriorating health and the problems that their son was experiencing hired a mold specialist to inspect the home. The Mold Specialist found that mold was airborne though out the house.

13. On December 5, 2008, Plaintiffs received a quote from CBS Builders to make repairs to window and mold treatment.

14. On February 27, 2009, Plaintiffs had the home inspected by Pinpoint Home and Commercial Inspections. The inspection revealed that the bedroom window was not the correct window and that it was a vinyl replacement window and was dissimilar from all other windows in the home.

15. On March 8, 2009, Plaintiffs notified the builder in writing of the mold problem and of the problem with the misfit window. The builder responded on March 20, 2009 and replaced the window on April 16, 2009.

16. After still experiencing significant medical problems, Plaintiffs ordered another inspection in August 2009. The inspection was performed by Southeastern Inspection Services. Numerous deficiencies, code violations and unsatisfactory work was noted. Some interior areas of the home were showing more than 30% moisture readings in the home. The inspector strongly suggested that Plaintiffs move out of the home for health reasons and concerns.

17. On September 1, 2009, Plaintiffs moved out of the house into an apartment. The house has been vacant since that time and inhabitable since that time.

18. Defendant's work was defective in all, but not limited to, the following particulars:

a. By failing to construct the house so as to prevent leaks of water into the interior;

b. By failing to install the proper window in the bedroom;

c. By failing to seal open joints where vertical and horizontal trim intersects with brick veneer;

d. By failing to install a rain diverter along the front roof above the entrance;

e. By failing to install or to properly install flashing at windows and doors;

f. By failing to properly seal the window jambs and heads in the master bedroom and front windows;

g. By failing to seal mounted light fixtures at garage and rear entrance;

h. By failing to investigate his subcontractors to determine if they were competent and capable of performing the work;

i. By failing to adequately supervise the work of his subcontractors;

j. By failing to discover defects in work performed by his subcontractors;

k. By failing to correct the problem regarding the misfit window after being first notified of the water leaking into the interior of the home;

l. By failing to correct defective work.

AS A FIRST CAUSE OF ACTION
(Breach of Contract)

19. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 18.

RA 30

20. The agreement between Plaintiffs and Defendant Oscar Torres and Willow Creek Construction required Defendants to build a dwelling house in accordance with the plans and specifications, applicable building codes industry standards and free from construction and structural defects.

21. Defendant breached this contract in the particulars previously described and the deficiencies outlined in Southeastern Inspection Services report dated August 11, 2009.

22. As a proximate and foreseeable result of Defendant's breach of contract, Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have also suffered bodily injury, which have caused Plaintiffs, and will cause Plaintiffs in the future, to incur medical expense, to suffer tremendous pain and suffering and to lose time from work and lost wages.

AS A SECOND CAUSE OF ACTION
(Negligence and Negligent Supervision)

23. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 22.

24. Each of the aforementioned Defendants assumed the duties outlined above.

25. Defendants owed Plaintiffs a duty to exercise due care in performing their duties outlined above.

26. Defendants breached these duties in the particulars previously described.

27. As a direct, foreseeable, and proximate result of Defendants' negligence, Plaintiff's have suffered physical damage to their House, as well as diminution in its value, as well as the home being inhabitable and are entitled to recover from the Defendant's all direct, consequential and punitive damages.

ROA 31

AS A THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service)

28. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 27.

29. When the above named Defendant's contracted to construct Plaintiff's residence, Defendants impliedly warranted to Plaintiffs that the house would be constructed in a workmanlike manner, free from defects, and in accordance with the plans and specifications.

30. Defendants breached this implied warranty in the particulars previously described.

31. As a proximate and foreseeable result of Defendants, breach of this implied warranty, Plaintiffs have suffered physical damage to the house, as well as diminution in its value.

AS A FOURTH CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability)

32. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 31.

33. Defendants sold and installed in Plaintiff's house a vinyl replacement window.

34. The window was not merchantable at the time of the sale. As a result water was able to penetrate the interior walls of the house, thus causing moisture and mold.

ROA 32

Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have had to relocate from the home due to the air quality in the home and incur expenses related to the relocation and living expenses.

AS A FIFTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose)

35. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 34.

36. Defendants at the time of the sale of the defective window had reason to know that Plaintiffs, or those who, for this limited purpose, could act for Plaintiffs, were relying on the skill or judgment of the Defendants to furnish a product that was the appropriate window for the house. Plaintiffs relied on Defendants' skill and judgment.

37. The window was not fit to be used in the House, thus causing water to be trapped in the walls of Plaintiff's house and cause moisture and mold throughout the home.

38. As a result of Defendants breach of their implied warranty, Plaintiffs have suffered physical damage to the House, as well as diminution in its value.

WHEREFORE, Plaintiff pray this Court issue an Order granting them judgment against Defendants jointly and severally, for the following relief:

1. For actual damages in an amount to be proven at trial;
2. For punitive damages;
3. For prejudgment and post judgment interest on Plaintiffs' damages;
4. For attorneys' fees and cost; and
5. For such other and further relief as this Court deems appropriate.

Signature on Next Page

ROA 33

Respectfully submitted,

DeAndrea Gist Benjamin #13597
Gist Law Firm
4400 North Main Street
P.O. Box 30007 (29230)
Columbia, SC 29203
(803) 771-8007
(803) 771-0063 (fax)
Deandreabenjamin@gistlawfirm.com

June 24, 2010

ROA 34

Willow Creek Construction's Third Party Complaint dated March 28, 2011

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES, Defendants.	CIVIL ACTION NO.: 2010-CP-40-04307 **DEFENDANT WILLOW CREEK CONSTRUCTION, INC.'S THIRD-PARTY COMPLAINT**
WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DONALD RICHARD TORRES d/b/a DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION, Third Party Defendants.	

NOW COMES the defendant and third-party plaintiff Willow Creek Construction, Inc. and would show unto the Court as follows:

1. Plaintiffs have filed a Complaint against third-party plaintiff alleging numerous problems and deficiencies with the construction of the subject residence and the windows that were installed.a [redacted] Blythewood, South Carolina, Richland County, State of South Carolina, the residence which is the subject of this action. A copy of the underlying plaintiffs' Complaint is attached hereto as Exhibit A.

2. Willow Creek has denied the allegations in the underlying plaintiffs' Complaint.

3. Third-Party Plaintiff Willow Creek Construction, Inc. (hereinafter "Willow Creek") is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action. Third-Party Plaintiff was the residential contractor who built Plaintiffs' home.

4. Upon information and belief, Third-Party Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc. (hereinafter "Richard Torres") is a business entity with its principal place of business in Blythewood, South Carolina and acted as a subcontractor for the third-party plaintiffs to perform framing work on the plaintiffs' home to include the installation of windows and doors and among other things, to install and properly flash and seal the window jambs and heads.

5. Upon information and belief, Third-Party Defendant L & L Electric Co., Inc. (hereinafter " L & L") is a corporation incorporated under the laws of the State of South Carolina with its registered agent as James. L. Legrand in Lugoff, South Carolina and acted as a subcontractor for the third-party plaintiff to provide electrical services and among other things to install light fixtures in and on the plaintiffs' home.

6. Upon information and belief, Third-Party Defendant Eduardo Moreno d/b/a E. S. Moreno Construction (hereinafter "Moreno") is a business entity with its principal place of business in Charlotte, North Carolina, and doing business in Richland County, South Carolina, and acted as a subcontractor for the third-party plaintiff to perform services among other things as the roofer.

7. However, to the extent that any of Plaintiffs' allegations are true, which is denied, then the Third-Party Defendants Richard Torres, L & L, and Moreno, upon information and belief, would be liable to Willow Creek Construction for any damages asserted by Plaintiffs in the underlying action.

FOR A FIRST CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

8. Willow Creek Construction, Inc. realleges and reiterates paragraphs 1-7 above as if fully set forth verbatim herein.
9. Third-Party Plaintiff entered into various agreements with the individuals or entities identified in paragraphs 4-6 above ("Third-Party Defendants") to provide labor or services for the construction of the plaintiffs' residence.
10. The plaintiffs have alleged numerous construction deficiencies in their Complaint, a copy of which is attached hereto and incorporated by reference herein, alleging that some of the third-party defendants negligently performed the construction of the home which the third-party plaintiff has denied.
11. If it is determined that the labor or services provided by any particular third-party defendant were deficient, defective, or failed to comply with any industry custom, practice or building code, then the particular third-party defendant would be liable to the third-party plaintiff for any damages caused by the particular third-party defendant.
12. If it is determined, as alleged above, that any particular third-party defendant should indemnify the third-party plaintiff, by legal indemnity, arising by express or implied contract, or equitable indemnity, arising by operation of law, then the third-party defendants should indemnify the third-party plaintiff for any settlement or judgment

which may include, but not be limited to, the principal amount of any settlement or judgment, costs, attorneys' fees and interested associated with this action.

FOR A SECOND CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

13. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

14. The plaintiffs have alleged, *inter alia*, that the third-party defendants have failed to properly construct the plaintiffs' home as more specifically alleged in plaintiffs' Complaint which is attached hereto and incorporated by reference herein.

15. If it is determined that a particular third-party defendant breached any duties imposed by law, industry standards or customs, or applicable building codes that may have arisen in the construction of the plaintiffs' home, then the third-party defendant was negligent or negligent *per se*.

16. If it is determined that any particular third-party defendant's negligence or negligence *per se* was a proximate cause of any damages arising out of or relating to the construction of the plaintiffs' home then that third-party defendant has damaged the third-party plaintiff.

17. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiff in settlement of plaintiffs' claims.

FOR A THIRD CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

18. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

19. The plaintiffs herein have alleged, *inter alia,* that the third-party defendants breached their warranties to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

20. Each third-party defendant expressly or impliedly warranted that its work would be done in a workmanlike manner complying with all applicable industry standards, customs, codes or laws.

21. If it is determined that a particular third-party defendant failed to perform its work in a workmanlike manner, then that particular third-party defendant has breached its express or implied warranty of workmanlike service.

22. If it is determined that a particular third-party defendants' breach of any warranty caused any damages then the third-party defendant has damaged the third-party plaintiff.

23. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiff, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

FOR A FOURTH CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

24. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein:

25. The plaintiffs herein have alleged, *inter alia,* that the third-party defendants breached their contract to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

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26. The third-party plaintiff entered into agreements with the third-party defendants to provide labor or services for the construction of the plaintiffs' home.

27. The terms of the agreements with the third-party defendants specifically or implicitly required each third-party defendant to provide construction services, or labor that, among other things, would produce a home free from substantial defects and otherwise in conformance with any contract documents, building codes and industry standards and customs.

28. If it is determined that a particular third-party defendant failed to perform its contract then the third-party defendants have breached their contract with the third-party plaintiff.

29. If it is determined that a breach of contract by a particular third-party defendant caused damages, then the third-party plaintiff has suffered damages.

30. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

WHEREFORE, the Defendant and Third-Party Plaintiff, Willow Creek Construction, Inc., having asserted its third-party Complaint against the third-party defendants, Willow Creek Construction, Inc., prays that it may be dismissed from this lawsuit with prejudice, that the Complaint be dismissed with prejudice, or alternatively that it be awarded damages on its Third-party Complaint and for such further relief as the court deems just and proper.

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Respectfully submitted;

DOUGALL & COLLINS

Thomas F. Dougall
Adelaide D. Kline
1700 Woodcreek Farms Road
Elgin, South Carolina 29045
(803) 865.8858 (TEL)
(803) 865.8944 (FAX)
tkline@dougallfirm.com

Attorneys for Defendants and Third-Party Plaintiff Willow Creek Construction, Inc.

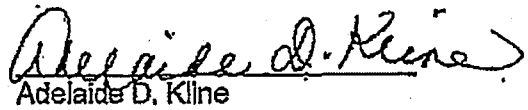
Columbia, South Carolina

March 28, 2011

CERTIFICATE OF SERVICE

This is to certify that the foregoing **Defendants' Third-Party Complaint and three Summonses for the Third-Party Complaint** were served in the above-referenced case by depositing a copy of the same in the United States Mail, postage prepaid, on the 29th day of March, 2011, addressed as follows:

DeAndrea Gist Benjamin, Esquire
Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, SC 29203
Attorneys for Plaintiffs



Adelaide D. Kline

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DMT's Answer to Third Party Complaint Dated June 24, 2011

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC., AND OSCAR TORRES, Defendants. and WILLOW CREEK CONSTRUCTION, INC., Third-Party Plaintiff, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Third-Party Defendants.	)	Civil Action No. 2010-CP-40-04307 **ANSWER TO THIRD PARTY COMPLAINT** **(Jury Trial Demanded)**

DMT Co., Inc., incorrectly identified as Donald Richard Torres d/b/a DMT Construction Co., Inc., (hereinafter "DMT") answers the Third-Party Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

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FOR A SECOND DEFENSE

2. Third-Party Defendant would respectfully show each and every cause of action set forth in the Third-Party Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Answering Paragraph 1, Third-Party Defendant admits only that Plaintiffs have filed a Complaint against Third-Party Plaintiff. As to the content of the Complaint, DMT refers to the actual Complaint by reference.

4. Paragraphs 2 and 3 are admitted upon information and belief.

5. Paragraph 4 is denied as worded. The proper Third-Party Defendant is DMT Co., Inc. DMT requests that an amended Third-Party summons and complaint be prepared identifying the proper entity and counsel agrees to accept service of the same. In the event an amended Third-Party Summons and Complaint is not prepared to reflect the proper entity, DMT retains and specifically preserves all Defenses to the Complaint, including any and all motions related to jurisdiction.

6. DMT admits paragraphs 5 and 6 upon information and belief.

7. Paragraph 7 is denied as to DMT.

8. Answering Paragraph 8, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

9. DMT denies the allegations of Paragraph 9 as specifically worded as they relate to DMT.

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10. Answering Paragraph 10, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

11. Paragraphs 11 and 12 are denied as relate to DMT.

12. Answering Paragraph 13, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

13. Answering Paragraph 14, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

14. Paragraph 15 and 16 appear to be statements of law and, therefore, no response is necessary. However, to the extent the paragraph can be interpreted to include an allegation of fact against DMT, the allegations are denied and strict proof demanded thereof.

15. Paragraph 17 is denied as to DMT.

16. Answering Paragraph 18, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

17. Answering Paragraph 19, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

18. Answering Paragraph 20, DMT denies they provided any warranties not implied by law to Plaintiffs and/or Third-Party Plaintiff. As to the warranties alleged to be implied by law, DMT submits the paragraph constitutes a statement of law requiring neither an admission nor denial.

19. Paragraphs 21, 22 and 23 are denied as to DMT.

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20. Answering Paragraph 24, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

21. Answering Paragraph 25, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

22. Paragraph 26 is denied as to DMT based upon defenses previously raised. Subject to those defenses, DMT admits that it entered into an agreement with Third-Party Plaintiff to perform certain labor or services associated with the home at issue.

23. Paragraph 27 is denied as to DMT as specifically worded.

24. Paragraphs 28, 29 and 30 are denied as to DMT.

25. DMT denies Third-Party Plaintiff is entitled to the prayer for relief against DMT under the facts and circumstances forming the basis of the Complaint.

FOR A FOURTH DEFENSE

26. Third-Party Defendant alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the sole negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff and, therefore, Third-Party Defendant is not liable to Plaintiffs and/or Third-Party Plaintiff for any sum whatsoever.

FOR A FIFTH DEFENSE

27. If Third Party Plaintiff is entitled to any recovery, which is denied, such recovery is due in whole or in part to acts and/or omissions of the Third Party Plaintiff and, therefore, the Third Party Plaintiff does not have clean hands and is not entitled to any indemnification from the Third Party Defendant.

FOR A SIXTH DEFENSE

28. Further answering said Third-Party Complaint, DMT would show that any injuries or damages sustained by Plaintiffs and/or Third-Party Plaintiff that Third-Party Plaintiff alleges were caused by an act or omission of DMT was either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR A SEVENTH DEFENSE

29. DMT submits that any alleged breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR A EIGHTH DEFENSE

30. DMT states that any and all work performed by it was performed consistent with, and according to, industry standards, and, therefore, Third-Party Plaintiff cannot recover in the action.

FOR A NINTH DEFENSE

31. Further answering said Third-Party Complaint, DMT alleges, upon information and belief, that any injuries and/or damages sustained by Plaintiff and/or Third-Party Plaintiff were due to and caused by the sole and negligent acts or omissions of some other person or persons other than DMT over whom DMT neither had nor exercised any authority or control and, therefore, DMT is not liable to Third-Party Plaintiff for any sum whatsoever.

FOR A TENTH DEFENSE

32. DMT pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff in the following particulars:

a) In failing to maintain the premises;

b) In failing to mitigate damages;

c) In failing to provide adequate notice;

d) In failing to make appropriate repairs;

e) In failing to provide proper materials;

f) In failing to act as reasonable and prudent persons would in the same or similar circumstances; and

g) Such other particulars as may be identified in the litigation.

Accordingly, Third-Party Defendant alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff was greater than the negligence, if any, which might be established against Third-Party Defendant and, therefore, Plaintiffs and/or Third-Party Plaintiff are barred from any recovery in this action. Third-Party Defendant further alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of Third-Party Defendant and, therefore, any amount of recovery awarded to Plaintiffs and/or Third-Party Plaintiff for the injuries and damages alleged in the Complaint and/or Third-Party Complaint shall be reduced by the Court by the percentage of negligence and/or willfulness attributed to Plaintiffs.

FOR AN ELEVENTH DEFENSE

33. DMT submits that even assuming DMT was careless, negligent in any respect, which is expressly denied, and even if any such conduct on its part operated as a greater than 50 percent cause of the damages and the Plaintiff's/Third-Party Plaintiff's resulting damages, if any, which is also expressly denied, Third-Party Defendant is entitled to a determination as to the percentage which the Third-Party Plaintiff or any other party's negligence, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount

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awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR AN TWELFTH DEFENSE

34. DMT asserts that any alleged remedies and/or warranties have been properly and effectively excluded, modified and are limited either by applicable contracts or by applicable law.

FOR A THIRTEENTH DEFENSE

35. Third-Party Defendant would show Plaintiffs and/or Third-Party Plaintiff failed to give Third-Party Defendant adequate notice of any applicable warranty claims or alleged deficiencies, thereby barring the claim in whole or in part.

FOR A FIFTEENTH DEFENSE

36. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that the subject property has either been destroyed or modified as such DMT pleads the doctrine of spoliation of evidence as a complete bar to the Third-Party Complaint.

FOR A SIXTEENTH DEFENSE

37. Upon information and belief, Third-Party Defendant would show the subject property has not been inspected for defects and/or maintained or repaired in proper condition, which caused or contributed to the injuries alleged in the Complaint. As a result, Third-Party Plaintiff may not recover against Third-Party Defendant.

FOR A SEVENTEENTH DEFENSE

38. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that Plaintiff and/or Third-Party Plaintiff failed to give DMT timely and reasonable notice of any alleged defects and/or timely and

reasonable opportunity to cure or correct any alleged defects as required by applicable law and/or contract. DMT asserts such lack of notice as a complete bar.

FOR AN EIGHTEENTH DEFENSE

39. Plaintiffs and/or Third-Party Plaintiff have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR A NINETEENTH DEFENSE

40. Third-Party Defendant would respectfully show that the applicable statute of limitations bars Plaintiffs from recovery in this action.

FOR A TWENTIETH DEFENSE

41. Third-Party Defendant asserts Plaintiffs' and/or Third-Party Plaintiff's claims are barred by the doctrine of waiver, laches and/or estoppel.

FOR A TWENTY-FIRST DEFENSE

42. Third-Party Defendant would show any claim for punitive damages cannot be had because any award of punitive damages would violate the Third-Party's Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

FOR A TWENTY-SECOND DEFENSE

43. Third-Party Defendant reserves the right to assert any other defense set forth and asserted by any other Defendant and/or Third-Party Defendant to this litigation or as developed by the evidence.

WHEREFORE, having fully answered, Third-Party Defendant prays that the Third-Party Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
Paul M. Newell II
Post Office Box 2980
75 Beattie Place, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR THIRD-PARTY
DEFENDANT, DONALD RICHARD TORREZ
D/B/A DMT CONSTRUCTION CO., INC.

June 24, 2011

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2010-CP-40-04307

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of June, 2011 served a copy of the foregoing Answer by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

DeAndrea G. Benjamin, Esquire
Gist Law Firm
5618 Colonial Drive
Columbia, South Carolina 29203
Attorney for Plaintiffs.

Adelaide Kline, Esquire
Law Office of Thomas Dougall
1700 Woodcreek Farms Road
Suite 100
Elgin, South Carolina 29045
Attorney for Willow Creek Construction, Inc.
And Attorney for Oscar Torres

Gail V. Inzero
Legal Assistant to G. Thomas Chase

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Willow Creek's Amended Third Party Summons and Complaint
Dated June 28, 2011

DOUGALL & COLLINS
ATTORNEYS AND COUNSELOR AT LAW

THOMAS F. DOUGALL
ALSO ADMITTED IN TEXAS
CERTIFIED MEDIATOR IN SC
WILLIAM A. COLLINS, JR.

ADELAIDE DENNIS KLINE
OF COUNSEL

June 29, 2011

The Honorable Jeanette McBride
Clerk of Court for Richland County
P. O. Box 2766
Columbia, SC 29202

Re: Tymika Jones Alston and Harold Alston vs. Willow Creek Construction, Inc. and Oscar Torres and Willow Creek Construction, Inc. vs. DMT Construction Co., Inc., L & L Electric Inc., and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2010-CP-40-04307

Dear Madame Clerk:

Enclosed please find for filing the original and one copy of Defendant's Amended Third-Party Complaint in the above-referenced matter. I am also enclosing the original and a copy of the Amended Third-Party Summons for DMT Construction, Co., Inc. Please file these pleadings in your usual course and return clocked-in copies to me in the return envelope provided for your convenience. Thank you for your assistance with this matter.

By copy of this letter I am serving all counsel of record with a copy of the same.

A Certificate of Service is also enclosed.

With kind regards,

Sincerely,

DOUGALL & COLLINS

Adelaide D. Kline

Adelaide D. Kline

cc: Donald Gist, Esquire
G. Thomas Chase, Esquire

ADK/mh

Enclosures.

1700 WOODCREEK FARMS ROAD, SUITE 100, ELGIN, SOUTH CAROLINA 29045 (803) 865-8858 (TEL) - (803) 865-8944 (FAX)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES, Defendants.	CIVIL ACTION NO.: 2010-CP-40-04307 **AMENDED THIRD-PARTY SUMMONS**
WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DMT CONSTRUCTION CO., INC., L & L ELECTRICAL INC., AND EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION, Third Party Defendant.	

TO: DEFENDANT DMT CONSTRUCTION CO., INC

YOU ARE HEREBY SUMMONED AND REQUIRED to appear and defend within thirty days from the date of service hereof and to answer the Amended Third-Party Complaint in this action. A copy of the Amended Third-Party Complaint is attached to this Amended Summons and is herewith served upon you. Your answer must be in writing and signed by you or your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the

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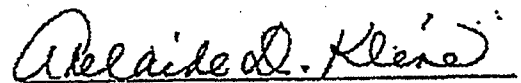
undersigned attorneys for the Third-Party Plaintiff within thirty days after the service hereof, exclusive of the day of service at 1700 Woodcreek Farms Rd., Elgin, SC 29045.

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and Amended Summons within thirty days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Amended Third-Party Complaint.

Respectfully submitted,

DOUGALL & COLLINS



Thomas F. Dougall
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Elgin, South Carolina 29045
(803) 865.8858 (TEL)
(803) 865.8944 (FAX)
tkline@dougallfirm.com

Attorneys for Defendant and Third-Party Plaintiffs

June 28, 2011

Columbia, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES, Defendants.	CIVIL ACTION NO.: 2010-CP-40-04307 **DEFENDANT WILLOW CREEK CONSTRUCTION, INC.'S AMENDED THIRD-PARTY COMPLAINT**
WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION, Third Party Defendants.	

NOW COMES the defendant and third-party plaintiff Willow Creek Construction, Inc. and would show unto the Court as follows:

1. Plaintiffs have filed a Complaint against third-party plaintiff alleging numerous problems and deficiencies with the construction of the subject residence and the windows that were installed a [redacted], South Carolina, Richland County, State of South Carolina, the residence which is the subject of this action. A copy of the underlying plaintiffs' Complaint is attached hereto as Exhibit A.

2. Willow Creek has denied the allegations in the underlying plaintiffs' Complaint.

3. Third-Party Plaintiff Willow Creek Construction, Inc. (hereinafter "Willow Creek") is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action. Third-Party Plaintiff was the residential contractor who built Plaintiffs' home.

4. Upon information and belief, Third-Party Defendant DMT Construction Co., Inc. (hereinafter "DMT Construction") is a business entity with its principal place of business in Blythewood, South Carolina and acted as a subcontractor for the third-party plaintiffs to perform framing work on the plaintiffs' home to include the installation of windows and doors and among other things, to install and properly flash and seal the window jambs and heads.

5. Upon information and belief, Third-Party Defendant L & L Electric Co., Inc. (hereinafter " L & L") is a corporation incorporated under the laws of the State of South Carolina with its registered agent as James. L. Legrand in Lugoff, South Carolina and acted as a subcontractor for the third-party plaintiff to provide electrical services and among other things to install light fixtures in and on the plaintiffs' home.

6. Upon information and belief, Third-Party Defendant Eduardo Moreno d/b/a E. S. Moreno Construction (hereinafter "Moreno") is a business entity with its principal place of business in Charlotte, North Carolina, and doing business in Richland County, South Carolina, and acted as a subcontractor for the third-party plaintiff to perform services among other things as the roofer.

7. However, to the extent that any of Plaintiffs' allegations are true, which is denied, then the Third-Party Defendants DMT Construction, L & L, and Moreno, upon information and belief, would be liable to Willow Creek Construction for any damages asserted by Plaintiffs in the underlying action.

FOR A FIRST CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

8. Willow Creek Construction, Inc. realleges and reiterates paragraphs 1-7 above as if fully set forth verbatim herein.
9. Third-Party Plaintiff entered into various agreements with the individuals or entities identified in paragraphs 4-6 above ("Third-Party Defendants") to provide labor or services for the construction of the plaintiffs' residence.
10. The plaintiffs have alleged numerous construction deficiencies in their Complaint, a copy of which is attached hereto and incorporated by reference herein, alleging that some of the third-party defendants negligently performed the construction of the home which the third-party plaintiff has denied.
11. If it is determined that the labor or services provided by any particular third-party defendant were deficient, defective, or failed to comply with any industry custom, practice or building code, then the particular third-party defendant would be liable to the third-party plaintiff for any damages caused by the particular third-party defendant.
12. If it is determined, as alleged above, that any particular third-party defendant should indemnify the third-party plaintiff, by legal indemnity, arising by express or implied contract, or equitable indemnity, arising by operation of law, then the third-party defendants should indemnify the third-party plaintiff for any settlement or judgment

which may include, but not be limited to, the principal amount of any settlement or judgment, costs, attorneys' fees and interested associated with this action.

FOR A SECOND CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

13. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

14. The plaintiffs have alleged, *inter alia*, that the third-party defendants have failed to properly construct the plaintiffs' home as more specifically alleged in plaintiffs' Complaint which is attached hereto and incorporated by reference herein.

15. If it is determined that a particular third-party defendant breached any duties imposed by law, industry standards or customs, or applicable building codes that may have arisen in the construction of the plaintiffs' home, then the third-party defendant was negligent or negligent *per se*.

16. If it is determined that any particular third-party defendant's negligence or negligence *per se* was a proximate cause of any damages arising out of or relating to the construction of the plaintiffs' home then that third-party defendant has damaged the third-party plaintiff.

17. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiff in settlement of plaintiffs' claims.

FOR A THIRD CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

18. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

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19. The plaintiffs herein have alleged, *inter alia*, that the third-party defendants breached their warranties to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

20. Each third-party defendant expressly or impliedly warranted that its work would be done in a workmanlike manner complying with all applicable industry standards, customs, codes or laws.

21. If it is determined that a particular third-party defendant failed to perform its work in a workmanlike manner, then that particular third-party defendant has breached its express or implied warranty of workmanlike service.

22. If it is determined that a particular third-party defendants' breach of any warranty caused any damages then the third-party defendant has damaged the third-party plaintiff.

23. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiff, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

FOR A FOURTH CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

24. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

25. The plaintiffs herein have alleged, *inter alia*, that the third-party defendants breached their contract to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

26. The third-party plaintiff entered into agreements with the third-party defendants to provide labor or services for the construction of the plaintiffs' home.

27. The terms of the agreements with the third-party defendants specifically or implicitly required each third-party defendant to provide construction services, or labor that, among other things, would produce a home free from substantial defects and otherwise in conformance with any contract documents, building codes and industry standards and customs.

28. If it is determined that a particular third-party defendant failed to perform its contract then the third-party defendants have breached their contract with the third-party plaintiff.

29. If it is determined that a breach of contract by a particular third-party defendant caused damages, then the third-party plaintiff has suffered damages.

30. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

WHEREFORE, the Defendant and Third-Party Plaintiff, Willow Creek Construction, Inc., having asserted its third-party Amended Complaint against the third-party defendants, Willow Creek Construction, Inc., prays that it may be dismissed from this lawsuit with prejudice, that the Complaint be dismissed with prejudice, or alternatively that it be awarded damages on its Third-party Amended Complaint and for such further relief as the court deems just and proper.

Respectfully submitted,

DOUGALL & COLLINS

Thomas F. Dougall
Adelaide D. Kline
1700 Woodcreek Farms Road
Elgin, South Carolina 29045
(803) 865.8858 (TEL)
(803) 865.8944 (FAX)
tkline@dougallfirm.com

Attorneys for Defendants and Third-Party Plaintiff Willow Creek Construction, Inc.

Columbia, South Carolina

June 28, 2011

DMT's June 8, 2011 Answer to Amended Third-Party Complaint

MGSC
McAngus Goudelock & Courie LLC
ATTORNEYS AT LAW

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgclaw.com
GREENVILLE

July 8, 2011

The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Tymika Jones Alston and Harold Alston v. Willow Creek Construction, Inc. and Oscar Torres and Willow Creek Construction, Inc., v. Donald Richard Torres d/b/a DMT Construction Co., Inc., L & L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No. 2010-CP-40-04307
Our File No.: [redacted]

Dear Ms. McBride:

Please find enclosed for filing the original and one (1) copy of our Answer to the Amended Third-Party Complaint in the above-captioned case. I would appreciate your returning a clocked-in copy of the same to me in the envelope provided.

By copy of this letter, I am serving counsel of record with the above-referenced Answer.

Thanking you in advance for your assistance, I am

Very truly yours,

G. Thomas Chase

GTC/mtb
Enclosures
cc: Donald Gist, Esquire, Gist Law Firm (w/encl.)
Adelaide Kline, Law Office of Thomas Dougall (w/encl.)

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC., AND OSCAR TORRES, Defendants. and WILLOW CREEK CONSTRUCTION, INC., Third-Party Plaintiff, vs. DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Third-Party Defendants.	)	Civil Action No. 2010-CP-40-04307 **ANSWER TO AMENDED THIRD-PARTY COMPLAINT** **(Jury Trial Demanded)**

Third-Party Defendant, DMT Construction Co., Inc., (hereinafter "DMT" and/or Third-Party Defendant") answers the Amended Third-Party Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

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FOR A SECOND DEFENSE

2. Third-Party Defendant would respectfully show each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Answering Paragraph 1, Third-Party Defendant admits only that Plaintiffs have filed a Complaint against Third-Party Plaintiff. As to the content of the Complaint, DMT refers to the actual Complaint by reference.

4. Paragraphs 2 and 3 are admitted upon information and belief.

5. Answering Paragraph 4, DMT admits that it is a business entity with its principal place of business in Blythewood, South Carolina. Additionally, DMT admits that it acted as a subcontractor in construction related to the Plaintiffs' home, including rough framing and setting of certain windows. DMT demands strict proof of facts inconsistent with or in addition to these specific admissions.

6. DMT admits Paragraphs 5 and 6 upon information and belief.

7. Paragraph 7 is denied as to DMT.

8. Answering Paragraph 8, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

9. DMT admits the allegations of Paragraph 9, upon information and belief, as relates to specific labor or services.

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10. Answering Paragraph 10, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

11. Paragraphs 11 and 12 are denied as relate to DMT.

12. Answering Paragraph 13, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

13. Answering Paragraph 14, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

14. Paragraphs 15 and 16 appear to be statements of law and, therefore, no response is necessary. However, to the extent the paragraphs can be interpreted to include an allegation of fact against DMT, the allegations are denied and strict proof demanded thereof.

15. Paragraph 17 is denied as to DMT.

16. Answering Paragraph 18, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

17. Answering Paragraph 19, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

18. Answering Paragraph 20, DMT denies they provided any warranties not implied by law to Plaintiffs and/or Third-Party Plaintiff. As to the warranties alleged to be implied by law, DMT submits the paragraph constitutes a statement of law requiring neither an admission nor denial.

19. Paragraphs 21, 22 and 23 are denied as to DMT.

20. Answering Paragraph 24, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

21. Answering Paragraph 25, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

22. DMT admits the allegations of Paragraph 26, upon information and belief, as relates to specific labor or services.

23. Paragraph 27 is denied as to DMT as specifically worded.

24. Paragraphs 28, 29 and 30 are denied as to DMT.

25. DMT denies Third-Party Plaintiff is entitled to the prayer for relief against DMT under the facts and circumstances forming the basis of the Complaint.

FOR A FOURTH DEFENSE

26. Third-Party Defendant alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the sole negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff and, therefore, Third-Party Defendant is not liable to Plaintiffs and/or Third-Party Plaintiff for any sum whatsoever.

FOR A FIFTH DEFENSE

27. If Third-Party Plaintiff is entitled to any recovery, which is denied, such recovery is due in whole or in part to acts and/or omissions of the Third-Party Plaintiff and, therefore, the Third-Party Plaintiff does not have clean hands and is not entitled to any indemnification from the Third-Party Defendant.

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FOR A SIXTH DEFENSE

28. Further answering said Third-Party Complaint, DMT would show that any injuries or damages sustained by Plaintiffs and/or Third-Party Plaintiff that Third-Party Plaintiff alleges were caused by an act or omission of DMT were either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR A SEVENTH DEFENSE

29. DMT submits that any alleged breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR AN EIGHTH DEFENSE

30. DMT states that any and all work performed by it was performed consistent with, and according to, manufacturer recommendations, industry standards and/or state of the art, and, therefore, Third-Party Plaintiff cannot recover in the action.

FOR A NINTH DEFENSE

31. Further answering said Third-Party Complaint, DMT alleges, upon information and belief, that any injuries and/or damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the sole and negligent acts or omissions of some other person or persons other than DMT over whom DMT neither had nor exercised any authority or control and, therefore, DMT is not liable to Third-Party Plaintiff for any sum whatsoever.

FOR A TENTH DEFENSE

32. DMT pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff in the following particulars:

a) In failing to maintain the premises;

b) In failing to mitigate damages;

c) In failing to provide adequate notice;

d) In failing to make appropriate repairs;

e) In failing to provide proper materials;

f) In failing to act as reasonable and prudent persons would in the same or similar circumstances; and

g) Such other particulars as may be identified in the litigation.

Accordingly, Third-Party Defendant alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff was greater than the negligence, if any, which might be established against Third-Party Defendant and, therefore, Plaintiffs and/or Third-Party Plaintiff are barred from any recovery in this action. Third-Party Defendant further alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of Third-Party Defendant and, therefore, any amount of recovery awarded to Plaintiffs and/or Third-Party Plaintiff for the injuries and damages alleged in the Complaint and/or Third-Party Complaint shall be reduced by the Court by the percentage of negligence and/or willfulness attributed to Plaintiffs.

FOR AN ELEVENTH DEFENSE

33. DMT submits that even assuming DMT was careless, negligent in any respect, which is expressly denied, and even if any such conduct on its part operated as a greater than 50 percent cause of the damages and the Plaintiffs'/Third-Party Plaintiff's resulting damages, if any, which is also expressly denied, Third-Party Defendant is entitled to a determination as to the

percentage which the Third-Party Plaintiff or any other party's negligence, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A TWELFTH DEFENSE

34. DMT asserts that any alleged remedies and/or warranties have been properly and effectively excluded, modified and are limited either by applicable contracts or by applicable law.

FOR A THIRTEENTH DEFENSE

35. Third-Party Defendant would show Plaintiffs and/or Third-Party Plaintiff failed to give Third-Party Defendant adequate notice of any applicable warranty claims or alleged deficiencies, thereby barring the claim in whole or in part.

FOR A FOURTEENTH DEFENSE

36. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that the subject property has either been destroyed or modified as such DMT pleads the doctrine of spoliation of evidence as a complete bar to the Third-Party Complaint.

FOR A FIFTEENTH DEFENSE

37. Upon information and belief, Third-Party Defendant would show the subject property has not been inspected for defects and/or maintained or repaired in proper condition, which caused or contributed to the injuries alleged in the Complaint. As a result, Third-Party Plaintiff may not recover against Third-Party Defendant.

FOR A SIXTEENTH DEFENSE

38. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that Plaintiffs and/or Third-Party Plaintiff failed to give DMT timely and reasonable notice of any alleged defects and/or timely and reasonable opportunity to cure or correct any alleged defects as required by applicable law and/or contract. DMT asserts such lack of notice as a complete bar.

FOR A SEVENTEENTH DEFENSE

39. Plaintiffs and/or Third-Party Plaintiff have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR AN EIGHTEENTH DEFENSE

40. Third-Party Defendant would respectfully show that the applicable statute of limitations bars Plaintiffs from recovery in this action.

FOR A NINETEENTH DEFENSE

41. Third-Party Defendant asserts Plaintiffs' and/or Third-Party Plaintiff's claims are barred by the doctrine of waiver, laches and/or estoppel.

FOR A TWENTIETH DEFENSE

42. Third-Party Defendant would show any claim for punitive damages cannot be had because any award of punitive damages would violate the Third-Party Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

FOR A TWENTY-FIRST DEFENSE

43. Third-Party Defendant reserves the right to assert any other defense set forth and asserted by any other Defendant and/or Third-Party Defendant to this litigation or as developed by the evidence.

WHEREFORE, having fully answered, Third-Party Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOODELOCK & COURIE, L.L.C.

G. Thomas Chase
Paul M. Newell, II
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75 Beattie Place, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR THIRD-PARTY DEFENDANT, DMT CONSTRUCTION CO., INC.

July 8, 2011

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2010-CP-40-04307

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of July, 2011 served a copy of the foregoing Answer to Amended Third-Party Complaint by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston
And Harold Alston

Adelaide Kline
Law Office of Thomas Dougall
1700 Woodcreek Farms Road
Suite 100
Elgin, South Carolina 29045
Attorney for Willow Creek Construction, Inc.
And Oscar Torres

Melinda Bouchillon

Melinda T. Bouchillon
Legal Assistant to G. Thomas Chase

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DMT's Answer to Amended Complaint Dated September 2, 2014

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **ANSWER TO AMENDED COMPLAINT** **(Jury Trial Demanded)**

Defendant, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., answers the Amended Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

FOR A SECOND DEFENSE

2. Defendant would respectfully show each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc. submit the Defendant is improperly named in the litigation. The proper Defendant is DMT Construction Co., Inc. Therefore, Defendant demands that a Second Amended Complaint be prepared naming the proper Defendant and counsel agrees to accept service of the same. In the event that a

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Second Amended Complaint is not prepared in the case, Defendant will move to dismiss the action for lack of jurisdiction as well as other available defenses.

FOR A FOURTH DEFENSE

4. As to Paragraph 1, Defendant is without knowledge or information sufficient to admit or deny whether Plaintiffs are citizens and residents of Richland County, South Carolina. Defendant admits, upon information and belief, that Plaintiffs are the owners of real property located at [redacted] Blythewood, South Carolina.

5. As to paragraph 2, Defendant admits [redacted] s the minor child of Plaintiffs and that, upon information and belief, he resides with his parents. Defendant is without knowledge or information sufficient to admit or deny if he resides in Richland County, South Carolina.

6. Defendant qualifiedly admits paragraph 3 in the following particulars: (1) Defendant admits that Willow Creek Construction, Inc. was at the time of the construction of Plaintiffs home and for some period thereafter a corporation organized and existing under the law of the state of South Carolina with its principal place of business in Richland County; and (2) Defendant further admits that Willow Creek Construction, Inc. was in the business of constructing dwelling houses and that the company constructed the residence that is the subject of the action.

7. Paragraph 4 is only qualifiedly admitted in the following particulars: (1) Defendant admits that Oscar Torres is a resident of Richland County, South Carolina; (2) upon information and belief only, Oscar Torres was a partner of Willow Creek Construction, Inc.; (3) Oscar Torres was the site supervisor for the construction of the home at issue on behalf of Willow Creek Construction, Inc. and (4) Willow Creek Construction, Inc. hired, by oral contract,

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DMT Construction Co., Inc. to perform certain work as a subcontractor for Willow Creek Construction, Inc. in the construction of the home purchased by Plaintiffs. As to other entities identified in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations inconsistent with or in addition to these qualified admissions.

8. Paragraph 5 is denied based on the improper name of Defendant. Subject to and without waiving this position, Defendant qualifiedly admits that DMT Construction Co., Inc. is a framing subcontractor that was hired by Willow Creek Construction, Inc. to perform certain work in the construction of the home later purchased by Plaintiffs. Defendant admits that Oscar Torres was the site superintendent for Willow Creek Construction, Inc. and that Oscar Torres worked on site with DMT Construction Co., Inc. in the performance of its specific aspect of the construction of the home, including providing instruction and oversight of the work. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations.

9. Defendant submits paragraph 6 is a statement of law requiring neither an admission nor denial.

10. Paragraph 7 is qualifiedly admitted to the extent the allegations relate to the construction of the home ultimately purchased by Plaintiffs. Defendant denies allegations inconsistent with or in addition to this qualified admission.

11. As to paragraph 8, Defendant is without knowledge or information sufficient to admit or deny the allegations.

12. Paragraph 9 is denied, including based on the name of the Defendant. Subject to this response, Defendant qualifiedly admits the paragraph only to the extent that Willow Creek

Construction, Inc., by and through its agent, orally contracted with DMT Construction Co., Inc. to act as a subcontractor for certain work in the construction of the home that was later purchased and is currently owned by Plaintiffs. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations in addition to or inconsistent with these express qualified admissions.

13. Paragraph 10 is denied as to Defendant both as to the name of the Defendant and the content of the paragraph as relates to Defendant. As to the content of the paragraph related to other named entities, Defendant is without knowledge or information sufficient to admit or deny the allegations.

14. Paragraph 11 is denied as relates to Defendant.

15. Paragraph 12 is denied as relates to Defendant.

16. As to Paragraphs 13, 14, 15, 16, 17, 18, and 19, Defendant is without knowledge or information sufficient to admit or deny the allegations.

17. Paragraph 20, including all subparts, is denied by Defendant.

18. As to Paragraph 21, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

19. Defendant submits paragraph 22 is a statement of law, in whole or in part, requiring neither an admission, nor denial. Subject to and without waiving this response, Defendant refers to any contract as the best evidence and denies any allegation inconsistent with or in addition to those provisions.

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20. Paragraph 23 is denied.

21. Paragraph 24 is denied.

22. As to Paragraph 25, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

23. Paragraph 26 is denied.

24. Defendant submits paragraph 27 is a statement of law requiring neither an admission, nor denial. To the extent the paragraph may be interpreted to include a statement of fact, those facts are denied.

25. Paragraphs 28 and 29 are denied.

26. As to Paragraph 30, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

27. Defendant submits paragraph 31 is a statement of law requiring neither an admission, nor denial.

28. Defendant denies paragraphs 32 and 33.

29. As to Paragraph 34, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every

previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

30. Paragraph 35 is denied.

31. Paragraph 36 is denied.

32. As to Paragraph 37, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

33. Defendant submits paragraph 38 contains a statement of law requiring neither an admission, nor denial. As to the remainder of the paragraph, it is denied.

34. Paragraphs 39 and 40 are denied.

35. Defendant denies Plaintiffs are entitled to the relief requested in the prayer.

FOR A FIFTH DEFENSE

36. Plaintiff's breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR A SIXTH DEFENSE

37. Plaintiffs lack standing to assert any breach of contract against Defendant because Plaintiffs were not a party to the oral contract between Defendant and Willow Creek Construction, Inc.

FOR A SEVENTH DEFENSE

38. FURTHER ANSWERING SAID COMPLAINT, Defendant alleges, upon information and belief, that any injury and damage sustained by Plaintiff were due to and caused

by the sole and negligent acts or omissions of some other person or persons other than Defendant over whom Defendant neither had nor exercised any authority or control, and, therefore, Defendant is not liable to Plaintiff for any sum whatsoever.

FOR AN EIGHTH DEFENSE

39. Assuming a contract exists between Plaintiffs and Defendant, and the same is denied and expressly contradicted by the evidence, Plaintiff failed to provide Defendant with proper and/or sufficient notice and, therefore, Plaintiff's warranty claims are barred.

FOR A NINTH DEFENSE

40. Defendant pleads the doctrines of laches, waiver and/or estoppel as a complete defense to this claim against Defendant.

FOR A TENTH DEFENSE

41. FURTHER ANSWERING SAID COMPLAINT, Defendant would show that any injuries or damages sustained by Plaintiffs that Plaintiffs allege were caused by an act or omission of this Defendant was either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR AN ELEVENTH DEFENSE

42. Plaintiffs have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR A TWELFTH DEFENSE

43. Defendant would show Plaintiffs failed to give Defendant timely notice of any alleged breach of implied warranty, and therefore, Plaintiffs may not recover against Defendant.

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FOR A THIRTEENTH DEFENSE

44. Defendant pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs in the following particulars:

a) In failing to take reasonable and prudent action to maintain the home;

b) In failing to act as a reasonable and prudent homeowner would have under the same or similar circumstances;

c) In failing to properly preserve home warranty bonds;

d) In failing to mitigate damages; and

e) Such other particulars as may be identified in the litigation.

Accordingly, Defendant alleges the negligence and recklessness of Plaintiffs was greater than the negligence, if any, which might be established against Defendant, and therefore Plaintiffs are barred from any recovery in this action. Defendant further alleges any injury and damage sustained by Plaintiffs was due to and caused by the negligence and/or wilfulness of Plaintiffs combining, concurring, and contributing with the negligence and/or wilfulness, if any, on the part of Defendant and, therefore, any amount of recovery awarded to Plaintiffs for the injuries and damages alleged in the Complaint shall be reduced by the Court by the percentage of negligence and/or wilfulness attributed to Plaintiffs.

FOR A FOURTEENTH DEFENSE

45. Defendant asserts that Plaintiff's causes of action against Defendant are barred by the applicable statute of limitations and should be dismissed.

FOR A FIFTEENTH DEFENSE

46. Defendants submit that even assuming Defendants were careless, negligent, grossly negligent, willful, wanton or reckless in any respect, which is expressly denied, and even if any such conduct on their part operated as a greater than 50 percent cause of the damages and the Plaintiff's resulting damages, if any, which is also expressly denied, Defendants are entitled to a determination as to the percentage which the Plaintiff's or other party's negligent, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A SIXTEENTH DEFENSE

47. The Defendant would show the claim for punitive damages cannot be had because any award of punitive damages would violate the Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

WHEREFORE, having fully answered, Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.

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ATTORNEYS FOR DEFENDANT, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC.

September 2, 2014

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R CERTIFICATE OF SERVICE

I certify that on this date, I have served a copy of Answer to Amended Complaint in this action on counsel of record by

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston

September 2, 2014
Date

Gail V. Inzero
Legal Assistant to G. Thomas Chase

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August 11, 2014 Amended Summons and Complaint by the Plaintiffs

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)

IN THE COURT OF COMMON PLEAS

Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted])
Plaintiff(s))

vs.)

Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction)
Defendant(s))

CIVIL ACTION COVERSHEET

2010-CP - 40- 04307

RICHLAND COUNTY FILED
2014 AUG 11 PM 1:31
JEANNETTE W. McBRIDE C.C.P. & G.S.

Submitted By: Donald Gist, Aaron Wallace
Address: 4400 North Main Street, Columbia SC 29203

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Telephone #: 803-771-8007
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Other:
E-mail: donaldgist@gistlawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20___-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts - Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☒ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ Date: 8/8/14

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Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

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FOR M(DATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenvil Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

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STATE OF SOUTH CAROLIN COUNTY OF RICHLAND	)	IN THE COURT OF COMI N PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON individually and as Parents and Guardians on behalf of their minor child [redacted]	)	2010-CP-40-04307
Plaintiffs,	)	AMENDED SUMMONS
vs.	)	
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction, Defendants.	)	

RICHLAND COUNTY
FILED
2014 AUG 11 PM 1:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO: Above Named Defendants

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon the subscriber at Gist Law Firm, 4400 N. Main Street, P.O. Box 30007, Columbia, South Carolina 29230, within thirty (30) days after the service thereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff shall apply to the Court for a judgment by default against you for the relief demanded in the Complaint.

GIST LAW FIRM

Donald Gist
Aaron Wallace
4400 N. Main Street
P.O. Box 30007 (29230)
Columbia, SC 29203
803.771.8007
803.771.0063 (Fax)
Attorneys for Plaintiffs

August 8, 2014

ROA 86

STATE OF SOUTH CAROLIN COUNTY OF RICHLAND	)	IN THE COURT OF COM N PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON individually and as Parents and Guardians on behalf of their minor child [redacted]	)	2010-CP-40-04307
Plaintiffs,	)	AMENDED COMPLAINT
vs.	)	Jury Trial Requested
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction, Defendants.	)	

RICHLAND COUNTY
FILED
2014 AUG 11 PM 1:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

NOW COMES the Plaintiffs, by and through counsel, for their complaint against Defendants and state as follow:

PARTIES & JURISDICTION

1. Plaintiffs Tymika Jones Alston and Harold Alston (hereafter "Plaintiffs") are Citizens and residents of Richland County, State of South Carolina and owners of real property located at [redacted] SC, Richland County, State of South Carolina, the residence which is the subject of this action.

2. Plaintiff [redacted] is the minor child of Plaintiff's Tymika Jones Alston and Harold Alston. Plaintiff [redacted] resides with his parents in Richland County, South Carolina.

3. Upon information and belief, Willow Creek Construction is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action.

4. Upon information an elief, Oscar Torres is a resident of Ric d County, State of South Carolina and is the principal and owner of Willow Creek Construction. Oscar Torres was the residential contractor who built Plaintiff's home and who hired Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction as subcontractors in the building of Plaintiff's home.

5. Upon information and belief, Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction are building subcontractors who acted in concert with and at the direction of Oscar Torres and Willow Creek Construction in the building of Plaintiff's home.

6. Venue is proper in Richland County, State of South Carolina because at least one if not all Defendants maintains an office in Richland County and this action involves real estate in Richland County, State of South Carolina.

FACTUAL ALLEGATIONS

7. This case arises out of the construction of Plaintiffs' house located at [redacted] Summer Pines Subdivision, Richland County, State of South Carolina.

8. Plaintiffs engaged Willow Creek Construction and Oscar Torres to construct their house with due care, in a workmanlike manner, and in accordance with the plans and specifications.

9. Oscar Torres engaged Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction to act as subcontractors in the building of Plaintiff's home.

10. Willow Creek Construction and Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno

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Construction completed the hom. n April 2007. Plaintiffs moved in the l e on April 3, 2007.

11. On April 5, 2007, Plaintiffs' noticed that the bedroom wall was wet inside and out from the neighbor's sprinkler. Plaintiffs contacted the Defendants regarding the problem. Oscar Torres came out observed the problem and had the wall sanded and painted.

12. In July of 2007 after a heavy rain and thunderstorm, Plaintiffs once again noticed that the master bedroom wall was wet inside and out. They once again contacted the builder who in turn came back out sanded the wall and repainted it. Defendants resealed the window and told them that everything was fine. At that time Plaintiffs were told by the builder that the problem was cured.

13. During the summer of 2007, Plaintiff Tymika Alston and the Plaintiffs' son, [redacted] and Alston began experiencing medical problems. Specifically, swollen eyes, eye infections, bronchitis, and allergies. Plaintiff Tymika Alston and the minor child had no prior sinus or allergy issues. During this time Plaintiff Harold Alston was working out of the State and was only present in the house during the weekends. After weekend visits home, he would experience irritation in his eyes and sinus and allergy problems.

14. In November 2008, Plaintiffs' concerned about their deteriorating health and the problems that their son was experiencing hired a mold specialist to inspect the home. The Mold Specialist found that mold was airborne though out the house.

15. On December 5, 2008, Plaintiffs received a quote from CBS Builders to make repairs to window and mold treatment.

16. On February 27, 2009, Plaintiffs had the home inspected by Pinpoint Home

and Commercial Inspections. The inspection revealed that the bedroom window was not the correct window and that it was a vinyl replacement window and was dissimilar from all other windows in the home.

17. On March 8, 2009, Plaintiffs notified the builder in writing of the mold problem and of the problem with the misfit window. The builder responded on March 20, 2009 and Defendant Donald Richard Torres replaced the window on April 16, 2009.

18. After still experiencing significant medical problems, Plaintiffs ordered another inspection in August 2009. The inspection was performed by Southeastern Inspection Services. Numerous deficiencies, code violations and unsatisfactory work was noted. Some interior areas of the home were showing more than 30% moisture readings in the home. The inspector strongly suggested that Plaintiffs move out of the home for health reasons and concerns.

19. On September 1, 2009, Plaintiffs moved out of the house into an apartment. The house has been vacant since that time and inhabitable since that time.

20. Defendant Donald Richard Torres' work was defective in all, but not limited to, the following particulars:

a. By failing to construct the house so as to prevent leaks of water into the interior;

b. By failing to install the proper window in the bedroom;

c. By failing to seal open joints where vertical and horizontal trim intersects with brick veneer;

d. By failing to install a rain diverter along the front roof above the entrance;

e. By failing to install or to properly install flashing at windows and doors;

f. By failing to properly seal the window jambs and heads in the master bedroom and front windows;

g. By failing to seal mounted light fixtures at garage and rear entrance;

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h. By failing to investigate his subcontractors to determine if they were competent and capable of performing the work;

i. By failing to adequately supervise the work of his subcontractors;

j. By failing to discover defects in work performed by his subcontractors;

k. By failing to correct the problem regarding the misfit window after being first notified of the water leaking into the interior of the home;

l. By failing to correct defective work.

AS A FIRST CAUSE OF ACTION
(Breach of Contract)

21. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 20.

22. The agreement between Plaintiffs and Oscar Torres and Willow Creek Construction required Defendants to build a dwelling house in accordance with the plans and specifications, applicable building codes industry standards and free from construction and structural defects. Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction were subcontractors hired pursuant to this agreement.

23. Defendant Donald Richard Torres breached this contract in the particulars previously described and the deficiencies outlined in Southeastern Inspection Services report dated August 11, 2009 and is therefore vicariously liable to Plaintiff

24. As a proximate and foreseeable result of Defendant's breach of contract, Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have also suffered bodily injury, which have caused Plaintiffs, and will cause Plaintiffs in the future, to incur medical expense, to suffer tremendous pain and suffering and to lose time from work and lost wages.

AS A SECOND CAUSE OF ACTION
(Negligence and Negligent Supervision)

25. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 24.

26. Each of the aforementioned Defendants assumed the duties outlined above.

27. Defendants owed Plaintiffs a duty to exercise due care in performing their duties outlined above.

28. Defendants breached these duties in the particulars previously described.

29. As a direct, foreseeable, and proximate result of Defendants' negligence, Plaintiff's have suffered physical damage to their House, as well as diminution in its value, as well as the home being inhabitable and are entitled to recover from the Defendant's all direct, consequential and punitive damages.

AS A THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service)

30. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 29.

31. When the above named Defendant's contracted to construct Plaintiff's residence, Defendants impliedly warranted to Plaintiffs that the house would be constructed in a workmanlike manner, free from defects, and in accordance with the plans and specifications.

32. Defendants breached this implied warranty in the particulars previously described.

33. As a proximate and foreseeable result of Defendants, breach of this implied warranty, Plaintiffs have suffered physical damage to the house, as well as diminution in its value.

AS A FOURTH CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability)

34. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 33.

35. Defendant Donald Richard Torres sold and installed in Plaintiff's house a vinyl replacement window.

36. The window was not merchantable at the time of the sale. As a result water was able to penetrate the interior walls of the house, thus causing moisture and mold. Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have had to relocate from the home due to the air quality in the home and incur expenses related to the relocation and living expenses.

AS A FIFITH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose)

37. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 36.

38. Defendants at the time of the sale of the defective window had reason to know that Plaintiffs, or those who, for this limited purpose, could act for Plaintiffs, were relying on the skill or judgment of Defendant Donald Richard Torres to furnish a product that was the appropriate window for the house. Plaintiffs relied on Defendants' skill and judgment.

39. The window was not fit to be used in the House, thus causing water to be trapped in the walls of Plaintiff's house and cause moisture and mold throughout the home.

40. As a result of Defendants breach of their implied warranty, Plaintiffs have suffered physical damage to the House, as well as diminution in its value.

WHEREFORE, Plaintiffs pray this Court issue an Order granting the judgment against Defendants jointly and severally, for the following relief:

1. For actual damages in an amount to be proven at trial;
2. For punitive damages;
3. For prejudgment and post judgment interest on Plaintiffs' damages;
4. For attorneys' fees and cost; and
5. For such other and further relief as this Court deems appropriate.

GIST LAW FIRM

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803.771.8007
803.771.0063 (Fax)

Attorneys for Plaintiffs

August 8, 2014

DMT's September 2, 2014 Answer to Amended Complaint

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **ANSWER TO AMENDED COMPLAINT** **(Jury Trial Demanded)**

Defendant, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., answers the Amended Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

FOR A SECOND DEFENSE

2. Defendant would respectfully show each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc. submit the Defendant is improperly named in the litigation. The proper Defendant is DMT Construction Co., Inc. Therefore, Defendant demands that a Second Amended Complaint be prepared naming the proper Defendant and counsel agrees to accept service of the same. In the event that a

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Second Amended Complaint is not prepared in the case, Defendant will move to dismiss the action for lack of jurisdiction as well as other available defenses.

FOR A FOURTH DEFENSE

4. As to Paragraph 1, Defendant is without knowledge or information sufficient to admit or deny whether Plaintiffs are citizens and residents of Richland County, South Carolina. Defendant admits, upon information and belief, that Plaintiffs are the owners of real property located at [redacted] South Carolina.

5. As to paragraph 2, Defendant admits [redacted] is the minor child of Plaintiffs and that, upon information and belief, he resides with his parents. Defendant is without knowledge or information sufficient to admit or deny if he resides in Richland County, South Carolina.

6. Defendant qualifiedly admits paragraph 3 in the following particulars: (1) Defendant admits that Willow Creek Construction, Inc. was at the time of the construction of Plaintiffs home and for some period thereafter a corporation organized and existing under the law of the state of South Carolina with its principal place of business in Richland County; and (2) Defendant further admits that Willow Creek Construction, Inc. was in the business of constructing dwelling houses and that the company constructed the residence that is the subject of the action.

7. Paragraph 4 is only qualifiedly admitted in the following particulars: (1) Defendant admits that Oscar Torres is a resident of Richland County, South Carolina; (2) upon information and belief only, Oscar Torres was a partner of Willow Creek Construction, Inc.; (3) Oscar Torres was the site supervisor for the construction of the home at issue on behalf of Willow Creek Construction, Inc. and (4) Willow Creek Construction, Inc. hired, by oral contract,

DMT Construction Co., Inc. to perform certain work as a subcontractor for Willow Creek Construction, Inc. in the construction of the home purchased by Plaintiffs. As to other entities identified in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations inconsistent with or in addition to these qualified admissions.

8. Paragraph 5 is denied based on the improper name of Defendant. Subject to and without waiving this position, Defendant qualifiedly admits that DMT Construction Co., Inc. is a framing subcontractor that was hired by Willow Creek Construction, Inc. to perform certain work in the construction of the home later purchased by Plaintiffs. Defendant admits that Oscar Torres was the site superintendent for Willow Creek Construction, Inc. and that Oscar Torres worked on site with DMT Construction Co., Inc. in the performance of its specific aspect of the construction of the home, including providing instruction and oversight of the work. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations.

9. Defendant submits paragraph 6 is a statement of law requiring neither an admission nor denial.

10. Paragraph 7 is qualifiedly admitted to the extent the allegations relate to the construction of the home ultimately purchased by Plaintiffs. Defendant denies allegations inconsistent with or in addition to this qualified admission.

11. As to paragraph 8, Defendant is without knowledge or information sufficient to admit or deny the allegations.

12. Paragraph 9 is denied, including based on the name of the Defendant. Subject to this response, Defendant qualifiedly admits the paragraph only to the extent that Willow Creek

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Construction, Inc., by and through its agent, orally contracted with DMT Construction Co., Inc. to act as a subcontractor for certain work in the construction of the home that was later purchased and is currently owned by Plaintiffs. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations in addition to or inconsistent with these express qualified admissions.

13. Paragraph 10 is denied as to Defendant both as to the name of the Defendant and the content of the paragraph as relates to Defendant. As to the content of the paragraph related to other named entities, Defendant is without knowledge or information sufficient to admit or deny the allegations.

14. Paragraph 11 is denied as relates to Defendant.

15. Paragraph 12 is denied as relates to Defendant.

16. As to Paragraphs 13, 14, 15, 16, 17, 18, and 19, Defendant is without knowledge or information sufficient to admit or deny the allegations.

17. Paragraph 20, including all subparts, is denied by Defendant.

18. As to Paragraph 21, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

19. Defendant submits paragraph 22 is a statement of law, in whole or in part, requiring neither an admission, nor denial. Subject to and without waiving this response, Defendant refers to any contract as the best evidence and denies any allegation inconsistent with or in addition to those provisions.

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20. Paragraph 23 is denied.

21. Paragraph 24 is denied.

22. As to Paragraph 25, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

23. Paragraph 26 is denied.

24. Defendant submits paragraph 27 is a statement of law requiring neither an admission, nor denial. To the extent the paragraph may be interpreted to include a statement of fact, those facts are denied.

25. Paragraphs 28 and 29 are denied.

26. As to Paragraph 30, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

27. Defendant submits paragraph 31 is a statement of law requiring neither an admission, nor denial.

28. Defendant denies paragraphs 32 and 33.

29. As to Paragraph 34, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every

previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

30. Paragraph 35 is denied.

31. Paragraph 36 is denied.

32. As to Paragraph 37, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

33. Defendant submits paragraph 38 contains a statement of law requiring neither an admission, nor denial. As to the remainder of the paragraph, it is denied.

34. Paragraphs 39 and 40 are denied.

35. Defendant denies Plaintiffs are entitled to the relief requested in the prayer.

FOR A FIFTH DEFENSE

36. Plaintiff's breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR A SIXTH DEFENSE

37. Plaintiffs lack standing to assert any breach of contract against Defendant because Plaintiffs were not a party to the oral contract between Defendant and Willow Creek Construction, Inc.

FOR A SEVENTH DEFENSE

38. FURTHER ANSWERING SAID COMPLAINT, Defendant alleges, upon information and belief, that any injury and damage sustained by Plaintiff were due to and caused

by the sole and negligent acts or omissions of some other person or persons other than Defendant over whom Defendant neither had nor exercised any authority or control, and, therefore, Defendant is not liable to Plaintiff for any sum whatsoever.

FOR AN EIGHTH DEFENSE

39. Assuming a contract exists between Plaintiffs and Defendant, and the same is denied and expressly contradicted by the evidence, Plaintiff failed to provide Defendant with proper and/or sufficient notice and, therefore, Plaintiff's warranty claims are barred.

FOR A NINTH DEFENSE

40. Defendant pleads the doctrines of laches, waiver and/or estoppel as a complete defense to this claim against Defendant.

FOR A TENTH DEFENSE

41. FURTHER ANSWERING SAID COMPLAINT, Defendant would show that any injuries or damages sustained by Plaintiffs that Plaintiffs allege were caused by an act or omission of this Defendant was either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR AN ELEVENTH DEFENSE

42. Plaintiffs have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR A TWELFTH DEFENSE

43. Defendant would show Plaintiffs failed to give Defendant timely notice of any alleged breach of implied warranty, and therefore, Plaintiffs may not recover against Defendant.

FOR A THIRTEENTH DEFENSE

44. Defendant pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs in the following particulars:

a) In failing to take reasonable and prudent action to maintain the home;

b) In failing to act as a reasonable and prudent homeowner would have under the same or similar circumstances;

c) In failing to properly preserve home warranty bonds;

d) In failing to mitigate damages; and

e) Such other particulars as may be identified in the litigation.

Accordingly, Defendant alleges the negligence and recklessness of Plaintiffs was greater than the negligence, if any, which might be established against Defendant, and therefore Plaintiffs are barred from any recovery in this action. Defendant further alleges any injury and damage sustained by Plaintiffs was due to and caused by the negligence and/or wilfulness of Plaintiffs combining, concurring, and contributing with the negligence and/or wilfulness, if any, on the part of Defendant and, therefore, any amount of recovery awarded to Plaintiffs for the injuries and damages alleged in the Complaint shall be reduced by the Court by the percentage of negligence and/or wilfulness attributed to Plaintiffs.

FOR A FOURTEENTH DEFENSE

45. Defendant asserts that Plaintiff's causes of action against Defendant are barred by the applicable statute of limitations and should be dismissed.

FOR A FIFTEENTH DEFENSE

46. Defendants submit that even assuming Defendants were careless, negligent, grossly negligent, willful, wanton or reckless in any respect, which is expressly denied, and even if any such conduct on their part operated as a greater than 50 percent cause of the damages and the Plaintiff's resulting damages, if any, which is also expressly denied, Defendants are entitled to a determination as to the percentage which the Plaintiff's or other party's negligent, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A SIXTEENTH DEFENSE

47. The Defendant would show the claim for punitive damages cannot be had because any award of punitive damages would violate the Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

WHEREFORE, having fully answered, Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
Bar No: 66452
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR DEFENDANT, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC.

September 2, 2014

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **CERTIFICATE OF SERVICE**

I certify that on this date, I have served a copy of Answer to Amended Complaint in this action on counsel of record by

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston

September 2, 2014
Date

Gail V. Inzero
Legal Assistant to G. Thomas Chase

Transcript of Hearing dated March 8, 2015

1 STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND)
3
4)
TYMIKA JONES ALSTON, ET)
5 AL,) TRANSCRIPT OF RECORD
) 2012-CP-40-06895R
6 PLAINTIFFS,)
) MARCH 8, 2015
7 -vs-) COLUMBIA, SOUTH CAROLINA
)
8 WILLOW CREEK)
CONSTRUCTION, INC., ET)
9 AL, (
)
10 DEFENDANTS.)
)
11)
12
13 B E F O R E:
14 THE HONORABLE W. YOUNG, JUDGE.
15
16 A P P E A R A N C E S:
17 DONALD GIST, ESQUIRE
ATTORNEY FOR THE PLAINTIFFS
18
AARON WALLACE, ESQUIRE
19 ATTORNEY FOR THE PLAINTIFFS
20 G. THOMAS CHASE, ESQUIRE
ATTORNEY FOR DEFENDANT DONALD RICHARD TORRES,
21 D/B/A DMT CONSTRUCTION CO., INC.
22
23
MICHAEL R. WATTS
24 CIRCUIT COURT REPORTER
25

1 INDEX

2

3 WITNESSES PAGE

4 (NO WITNESSES CALLED)

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EXHIBITS

NO.	DESCRIPTION	ID.	EV.
D-1	MEDIATION AGREEMENT	6	
D-2	EXCERPTS OF DEPOSITION	6	
D-3	EXCERPTS OF DEPOSITION	6	

1 (PROCEEDINGS, MARCH 18, 2015)

2 THE COURT: I believe this is Mr. Chase's motion
3 for summary judgment.

4 This is Tymika Jones Alston and Harold Alston,
5 individually as parents and guardians on behalf of their
6 minor child [redacted] versus Donald Richard Torres, who
7 had been doing business as DMT Construction, Incorporated, L
8 & L Electric, Incorporated, and Eduardo Moreno, doing
9 business as E.S. Moreno Construction under docket number
10 2012-CP-40-6895R.

11 This is as to the motion for summary judgment.

12 Present appearing is Mr. Donald Gist and Mr.
13 Thomas Chase and Frank Dougall and Adelaide Kline.

14 MR. CHASE: Well, I'll correct that. I'm Tom
15 Chase, Your Honor.

16 THE COURT: Okay.

17 MR. CHASE: If it please the court, at this point
18 Mr. Dougall and Ms. Kline are not present and I'll explain
19 it a little bit more about that, but there really is no
20 reason for them to be present, based on a settlement that
21 they represented one company and individual and they have
22 reached a settlement agreement with Mr. Gist and his client
23 and I'll put that kind of play into where we are in purposes
24 for the parties.

25 For the parties I do represent DMT and Mr. Donald

1 Richard Torres, and there are two other defendants in the
2 litigation at this point. I do not know the status
3 personally of whether or not they have been served or where
4 that stands, so those parties to my knowledge have not
5 actually appeared, either individually pro se or through
6 counsel and Mr. Gist can clarify that issue.
7 MR. GIST: Your Honor, with the court's
8 permission?
9 THE COURT: Yes.
10 MR. GIST: Good morning. How are you doing?
11 I would speak to L & L Electric, Inc. And Eduardo
12 Moreno. This was a lawsuit we brought against multiple
13 parties of construction of a home. We have not been able to
14 locate L & L Electric, nor have we been able to locate
15 Eduardo Moreno. All of these people were contractors for
16 a --
17 THE COURT: You have got statute of limitations
18 problems on those, don't you?
19 MR. GIST: Well --
20 THE COURT: I mean, two of the --
21 MR. GIST: We do. And to be honest --
22 THE COURT: This happened what, in 2008?
23 MR. GIST: 2008, and to be honest with you, in
24 terms of L & L Electric and Moreno, there is pretty much
25 from the -- there is no indication basically that we are

1 going to present there is any evidence that they did
2 anything wrong here, so we are not going to really proceed
3 against them. I think we are -- in the interest of judicial
4 economy not going to proceed against them. We are
5 proceeding against Donald Richard Torres, and with me this
6 morning is I have Aaron Wallace, an associate of my law
7 firm.
8 THE COURT: All right.
9 MR. GIST: Aaron is going to be arguing the motion
10 on behalf of my clients.
11 THE COURT: Okay.
12 Mr. Chase, you would be up first.
13 MR. CHASE: Yes, sir, Your Honor.
14 (Mediation Agreement marked as Defendant's Exhibit
15 No. 1 for identification).
16 (Excerpts of Deposition marked as Defendant's
17 Exhibit No. 2 for identification).
18 (Excerpts of Deposition marked as Defendant's
19 Exhibit No. 3 for identification.
20 THE COURT: I have got y'all's motion.
21 MR. CHASE: Okay.
22 MR. WALLACE: Your Honor, have you got the
23 attached copy? It may be easier for the court to use the
24 attached copy.
25 MR. CHASE: That's the additional submission that

1 was filed related to memorandum that is in addition to we
2 had a detailed motion but that is in support of that motion.
3 THE COURT: All right.
4 MR. WALLACE: Your Honor, I have got some
5 additional documents as well I would like to present that
6 are not included in the memorandum that I have got.
7 THE COURT: Yes, sir, Mr. Chase.
8 MR. CHASE: May it please court, Your Honor?
9 THE COURT: Yes.
10 MR. CHASE: By way of background, although it
11 is -- I will submit that it is detailed in my motion itself
12 and then a little bit less detailed in the memorandum, this
13 case arises out of allegations of defective construction of
14 a home. That home was purchased by the Alstons, whom Mr.
15 Gist represents. They purchased that home from Willow Creek
16 Construction and one of the owners of that company is Oscar
17 Torres.
18 Her home was finished and purchased in 2007, April
19 of 2007, and there is a detailed chronology of events that
20 occurred literally from that point forward of problems that
21 the Alstons had with the home. They began with water
22 penetration, water leak at the window. There were further
23 problems with -- there was -- a contractor came in, this
24 Willow Creek Construction through Oscar Torres, came back in
25 and looked at it. They continue to have problems. There

1 is --

2 THE COURT: November of 2008 that they called a

3 specialist?

4 MR. CHASE: They did call a specialist in. That's

5 correct, Your Honor.

6 THE COURT: There was a mold issue?

7 MR. CHASE: Yes.

8 And there is actually one of the exhibits to the

9 motion, if you look back at it, there is actually a timeline

10 that was prepared by the Alstons, and that is Exhibit 11 to

11 our motion for summary judgment. And then the actual

12 reports of these individual contractors that have come out

13 there are detailed in earlier exhibits.

14 But essentially what you have, Your Honor, is

15 complaints of -- complaints and treatment for alleged

16 medical conditions as early as the summer of 2007.

17 You have complaints to the general contractor,

18 which is Willow Creek and Oscar Torres, being made in the

19 summer of 2007.

20 Those complaints continued through 2008. And as

21 Your Honor correctly pointed out, based on additional

22 problems that they identified, they brought in not just one

23 expert to evaluate for inspection, but they brought in

24 multiple inspectors to look at the property to see what the

25 deal was with water penetration, issues with the

1 construction itself, including related to how the windows
2 were put in the --
3 THE COURT: Let me ask you. Have y'all come up to
4 an agreed date of incident?
5 MR. CHASE: Of --
6 THE COURT: I know these type of cases are
7 different from a car accident that happened on the 3rd of
8 March of 2000, whatever.
9 In mold cases, as with other type of cases where
10 things are progressive, what date is it to that point? Have
11 y'all come to an agreement by any chance?
12 MR. WALLACE: Well, Your Honor, we haven't agreed
13 on a date. It's our position that as of the date of the
14 inspection, CBS building inspection. If you look on the
15 chronology, that was December 5th, 2008. They are
16 indicating that there is some construction defects with
17 regard to the window.
18 DMT and Donald Torres was actually the
19 subcontractor who framed and installed the windows. With
20 respect to DMT, any acknowledge that our clients would have
21 accrued regarding damages to the window would have accrued
22 the time --
23 THE COURT: But the mold tests were in November of
24 2008.
25 MR. WALLACE: The mold test.

1 THE COURT: They realized there was some mold in
2 the house.
3 MR. WALLACE: Yes, Your Honor, but there was no
4 way for them to realize that in November the exact cause of
5 the mold. It was one --
6 THE COURT: When was that report issued by Mr.
7 Larry Harrison?
8 MR. WALLACE: That was December 2008.
9 MR. CHASE: December 5th of 2008.
10 MR. WALLACE: December 5th, 2008.
11 THE COURT: So that's when you knew there was mold
12 problems?
13 MR. WALLACE: Caused by the windows.
14 MR. CHASE: That's when -- that's when they have a
15 third party come in --
16 THE COURT: Right.
17 MR. CHASE: -- and confirm their concerns about
18 that they had a problem.
19 So December the 5th of 2008, it sounds like that
20 is at least the date that can be agreed on for purposes of
21 this motion.
22 THE COURT: Okay.
23 MR. CHASE: From that point forward there is a --
24 there are continued evaluations, and this really all
25 revolves around the same problems, continued issues with

1 home in that same time frame that we have discussed and has
2 been conceded.
3 We also, Your Honor, the pleadings themselves
4 actually support that statute of limitation time frame also,
5 when you look back to the original complaint that is filed
6 against Willow Creek and their response to it.
7 So then we are in a position of since there is a
8 clear violation of the statute of limitation, is there any
9 way for the plaintiffs to then say "well, we can bring you
10 into the litigation, despite the fact that the statute of
11 limitations is technically run." And we will submit that
12 the only method that the rules would potentially provide
13 would be under Rule 15, where you could relate -- the
14 argument is you could relate back to these pleadings.
15 Your Honor, we have -- in our brief we have laid
16 out the standard for Rule 15 (C), but it is abundantly clear
17 in this case the question is are they just substituting a
18 party? In other words, well, really, it should have been --
19 it shouldn't have been Willow Creek. It should have been
20 DMT Construction, or are they attempting to add a party.
21 Well, I think that when you look at the pleadings,
22 and then especially when you look at the mediation
23 agreement, this is not a case where the plaintiffs have
24 alleged mistake, so we are not dealing with corporate name
25 or there is some sort of an issue with how it's designated

1 and how it's not designated. We are dealing with them
2 reaching an agreement with a party, then seeking to bring
3 other people in, add them as parties, to see if they can
4 then collect from those parties. Well, if that is the
5 standard, we are adding parties in that manner, you would
6 have indefinite ability to settle, bring one third-party
7 defendant in, settle, bring another third-party defendant
8 in, settle, and on and on and on.
9 THE COURT: The purpose of the statute of
10 limitations is so that entities can move on, is that
11 correct? That after a certain point they know that they can
12 move on with their business without fear of a subsequent
13 lawsuit if something happened.
14 MR. CHASE: Absolutely.
15 And in this case where after the three years
16 statute of limitations has run, the plaintiffs have, for
17 whatever reason --
18 There are good strategic reasons not to move those
19 third-party defendants into the primary defendant situation.
20 And I will submit, Your Honor, for example, I had a case
21 where plaintiff's counsel said "I placed extreme pressure on
22 the general contractor under circumstances where I keep him
23 as the primary defendant, he's a viable defendant, he has
24 got his insurance, and it's all on him and he's going to
25 have to put the pressure on third-party defendants." That

1 happens all the time. So there are good reasons for doing
2 that.
3 And in this situation my client is proceeding for
4 three years -- over three years in the litigation without
5 their only exposure. And so they don't have the ability to
6 move on if this is allowed. They are actually four years
7 into -- now we are approaching four years into them being
8 into the litigation and now their circumstances having
9 completely changed. They are clearly prejudiced by that
10 change in position, and it's in direct contradiction to the
11 purpose of the statute of limitations, which we have
12 obviously, as Your Honor put, it does allow the parties --
13 in very basic terms, it allows them to move on, and the
14 public policy is there to support this. It is not --
15 You know, oftentimes you will hear the complaint,
16 "well, it doesn't allow my clients to be able to fully
17 recover." Well, that may be true, and the courts have said
18 that's really -- that doesn't really matter when you are
19 evaluating the statute of limitations. We have already
20 weighed that and we know that this is a situation where it
21 does allow people to move on. They have had their
22 opportunity and if they sit on that, then that's where we
23 are, but in this case we don't even have that, because they
24 have reached a full settlement agreement with the defendant
25 they have actually reached. So even if you consider equity

1 for some reason, for -- if that comes into play, they
2 actually are in a position where they have recovered. They
3 are going to get their house fixed. They have got someone
4 who is on the hook for that. They are just looking for
5 additional avenues after the statute of limitations to say
6 "hey, maybe we can get something else from someone else,
7 something else from someone else at this time."
8 I will submit that there is case law that is clear
9 that there is some that relate to, you know, the question is
10 well, they are in the litigation. Well, there is case law
11 that talks about if you don't bring a counterclaim within
12 the prescribed time for statute of limitations purposes, you
13 are barred. Well, they are in litigation. You know, that
14 doesn't relate back. How can this relate back? I mean,
15 this is even further removed, because in that case there is
16 direct litigation between those two parties. Here there is
17 no litigation between them. The only litigation was between
18 Willow Creek and my clients.
19 We also have some circumstances where, I would
20 submit, Your Honor, that laches at least for consideration,
21 because this is a classic example of sitting on your
22 potential rights under the circumstances, but we would
23 submit that that's really kind of a secondary issue,
24 because -- or basis, because the statute of limitations is
25 so clear under the circumstances and the methodology that is

1 being used to try to bring my client in as a primary
2 defendant at this time can't be allowed simply because of
3 the statute of limitations requirement that we have in the
4 State and the public policy that stand behind them.
5 THE COURT: All right.
6 MR. CHASE: Thank you, Your Honor.
7 THE COURT: Yes.
8 You are itching to get up.
9 MR. WALLACE: Your Honor, thank you.
10 Just as a preliminary matter, just to give the
11 court some background on the case, I actually wasn't
12 involved in the initial filing of the lawsuit. I came into
13 the law firm in 2012.
14 Initially at the time the lawsuit was originally
15 commenced, Judge Benjamin, I call her Judge Benjamin. I was
16 her former law clerk was involved in the case, as well as
17 Mr. Donald Gist appearing today.
18 Your Honor, initially -- and really I just want to
19 address at first the excerpts which were provided by Mr.
20 Chase to the court. Your Honor, the only probative value
21 for purposes of this hearing today of these excerpts is with
22 regard to the date of the statute of limitations of when my
23 client discovered damage to the house and we have already
24 agreed on the dates.
25 THE COURT: Y'all agree that December 5th is

1 the --

2 MR. WALLACE: Yes, Your Honor, 2008.

3 THE COURT: Operative dates where the dates start

4 with.

5 MR. WALLACE: Yes, Your Honor, we have no dispute

6 with regard to that.

7 But I do want to address that in August of 2014 we

8 did amend the complaint, and in that amendment we changed

9 the caption to include -- it was Tymika Jones Alston and

10 Harold Alston, individually, and as parents and guardians of

11 the minor child, Mr. [redacted] Your Honor, and [redacted]

12 [redacted] is this ten-year old, is now ten year old son of Mr.

13 Harold and Tymika Alston. He was essentially injured as a

14 direct result of the defendants actions in this case.

15 And, Your Honor, I have submitted to the court and

16 also provided to Mr. Chase a copy of the statute in South

17 Carolina, specifically Statute -- Your Honor, a few moments,

18 but Statute 15-3-40, Your Honor. And essentially what this

19 statute says, it says "if a person entitled to bring an

20 action mentioned in Article 5 of this chapter," which

21 includes this current action, "or an action under Chapter 78

22 of this Title, except for a penalty or forfeiture against

23 the sheriff or other officer for an escape, is at the time

24 the cause of action accrued either within the age of

25 18 years." That statute applies directly to Mr. [redacted]

1 [redacted] in this case. He was a minor then. He's a minor
2 now.
3 We can go on in reading the statute, it says "the
4 time of the disability is not a part of the time limited for
5 the commencement of the action, except that the period
6 within which the action must be brought cannot be extended
7 more than five years by any such disability, except
8 infancy," and infancy is a disability at issue in this case,
9 "nor in any case longer than one year after the disability
10 ceases."
11 The disability being infancy, that means that we
12 have actually got until Mr. [redacted] was 19 years old
13 to bring a claim on [redacted] behalf.
14 With respect to Mr. [redacted] we argue that
15 the statute itself provides -- the statute by itself means
16 that the statute of limitations hasn't run with respect --
17 THE COURT: What's your opinion on that?
18 MR. CHASE: Yes, sir, Your Honor.
19 I'm glad -- I'm actually glad that that's raised,
20 because I will agree, and it's actually a valid point, and
21 what we would say is this comes back to if we are just
22 talking about the individual personal injury claim of --
23 THE COURT: [redacted]
24 MR. CHASE: -- [redacted] has no ownership in
25 this home. I mean, he does not have the -- that has nothing

1 to do with him. And so for purposes of a construction
2 defect claim, if you look, the cause of action is then
3 individually in his parents.
4 I would agree, Your Honor, that as to certain
5 elements of [redacted] claim, and we may have to deal with
6 that at a later date because that has not been fully fleshed
7 out, that if he has, for example, some sort of ongoing issue
8 that it may allow for that personal injury claim to
9 continue.
10 But we would also submit that as to at a minimum
11 medical bills, those are the -- we would submit that those
12 are actually the parents, those are their responsibility,
13 and that they have at a minimum that the statute of
14 limitations come back in on that issue, but they have
15 certainly sat on their rights as relates to that child as to
16 any expenses that they may have accrued. So laches is a
17 huge issue.
18 So I -- Your Honor, I would agree that as to
19 certain aspects of the claim related to the interests of
20 [redacted], that that claim may -- would remain viable,
21 but I have not seen how that has been laid out yet.
22 THE COURT: Well, with that being the case,
23 wouldn't you think that maybe summary judgment at this point
24 is a little premature then?
25 MR. CHASE: Only --

1 THE COURT: Because -- well, I mean -- I mean, I
2 don't want to start parsing the case out and cutting out
3 "okay, I'm granting summary judgment on this part, but I'm
4 not going to grant it on this part," isn't it kind of --
5 wouldn't the wisdom be put -- we always get -- every time I
6 grant summary judgment I get reversed. Not really, but
7 those -- when you have some valid points in there, wouldn't
8 the better wisdom be to leave the case moving until you go
9 through some further discovery?
10 MR. CHASE: Judge --
11 THE COURT: -- to see if it works?
12 MR. CHASE: I apologize for starting --
13 THE COURT: No problem.
14 MR. CHASE: Judge, this is a case where we are
15 looking to get a date certain.
16 THE COURT: Okay.
17 MR. CHASE: I mean, one -- the defects in the home
18 clearly, one, they have had a recovery on.
19 THE COURT: Well, I mean -- that's what I mean.
20 If you get a day certain and have any more -- at least once
21 they present it, it may be a directed verdict.
22 MR. CHASE: Well, and that's where -- when there
23 is clarity on certain issues, there is no -- there is not
24 going to be any additional evidence that is generated as
25 relates to the home, the claim for personal injury by the

1 parents. I mean, that's abundantly clear. You can't wrap
2 that up with --
3 THE COURT: I don't know -- what I'm saying,
4 though, is they filed an amended complaint last August. Is
5 this thing on the trial roster? Is it --
6 MR. WALLACE: No.
7 MR. CHASE: It could be placed any time. That's
8 what we -- I mean, it's -- we are basically -- is it
9 potentially --
10 THE COURT: I mean, now because of that, isn't
11 this claim subject to the mandatory mediation too?
12 MR. CHASE: We have mediated it.
13 THE COURT: Y'all have mediated it?
14 MR. CHASE: We have mediated it.
15 THE COURT: Well, I'm talking about with Donald --
16 DMT.
17 MR. CHASE: We mediated it -- we actually --
18 THE COURT: Y'all a party to that?
19 MR. CHASE: We participated in the mediation
20 because we had to because we were a third-party defendant.
21 THE COURT: Okay.
22 MR. CHASE: We actually mediated this case twice,
23 Your Honor. The first time a settlement was reached and
24 then the plaintiffs backed out of it.
25 MR. WALLACE: Well, Your Honor --

1 MR. CHASE: And then -- and then we mediated it
2 again last summer and that's when this mediation agreement
3 was actually reached with the primary defendant in the
4 litigation. So the case has been mediated twice and it's
5 still under the same -- obviously it's under the same
6 number, so -- and all of the --
7 I will submit for purposes, just so there is at
8 least an understanding, that their claims relate to their
9 personal injuries, the parents personal injury.
10 If you look through the excerpts from the mother,
11 Tymika Alston, she's talking about "I had this, I had these
12 problems, I had --" there was issues where I "had /HO --
13 Harold Alston, the same thing. "I had these
14 personal injuries claims."
15 You look at the amended complaint, that is what
16 they are alleging. So for purposes of -- I don't think it's
17 parsing out inappropriate manner, because under
18 circumstances where if they were to amend the complaint and
19 say that they are merely bringing a personal injury claim on
20 behalf --
21 THE COURT: You have to have --
22 MR. CHASE: - [redacted] --
23 MR. WALLACE: Well, Your Honor, it's our position
24 that summary judgement is absolutely premature at this point
25 and there's evident that regarding the minor child.

1 I have got some e-mails I would also submit to the
2 court and in those e-mails on July 15th, 2014, I actually
3 discussed with Mr. Chase this very issue regarding the minor
4 child and regarding engaging in additional discovery. And I
5 did indicate "what's your position on consenting to my
6 amending the complaint and moving to having a hearing on the
7 matter," because we had originally filed a motion to amend
8 the complaint. The hearing date was approaching and we
9 consulted with Tom Chase to try to find out what his
10 client's position was and what his position was on us
11 amending the complaint and he indicated July 18th, 2014
12 "Aaron, we will consent to the amendment, provided we are in
13 agreement that the parents deposition may be reopened as to
14 the minor's claim. Let me know."
15 I come back and I replied "Dear Tom, we have no
16 objection to what you have proposed. If we have your
17 consent to the amendment of the complaint, we will inform
18 the court the matter has been resolved.
19 You have my consent."
20 Your Honor, we have not engaged in extensive
21 discovery regarding the minor child at this point.
22 Your Honor, Mr. Chase mentioned being involved in
23 this case, or being involved in mediation even prior to
24 2014, Your Honor. It's no dispute that his client has been
25 involved in this case since 2010.

1 THE COURT: Well, but he's then in a drastic
2 different position in that one. He was only on the hook if
3 somebody was else was on the hook. Now you are asking him
4 to be primarily on the hook.
5 MR. WALLACE: And he consented to that and with
6 prior amendment. He had every opportunity to come to the
7 hearing, to object to our amending the complaint. He didn't
8 do so. He consented to our amendment. We withdrew the
9 hearing request, so I would say he's waived any right --
10 MR. CHASE: Judge, let me -- I have let him be an
11 advocate, but that is -- let me -- let's just back it up.
12 The original motion, if you will look in the
13 pleadings, the motion was filed in the spring to add the
14 child as a plaintiff. That was the proposed amendment, to
15 add the child. At that time Willow Creek and Oscar Torres
16 are in the suit. We are only a third-party defendant.
17 This did not come up -- what happened is the
18 hearing gets set, so it's going to be heard and he says
19 "well, we are going to need to have a hearing on this."
20 And I said "no, we are not going to have a hearing
21 on it, because we don't need to have a hearing on it,
22 because, as Tom Dougall had said, he would agree to it also.
23 It was going to be granted because it was the minor's claim
24 and the statute of limitations would not have run.
25 But then what we do is he then -- he then changes

1 the pleadings to add us as a primary defendant and takes out
2 Willow Creek and Oscar Torres. And so what we are said was
3 "we will accept your service of this."
4 The amended complaint, if you go back to March, it
5 never proposed to put us as the primary defendant and that's
6 in the court record. It was to add the minor as a
7 plaintiff.
8 So then we get the pleadings and it says "we have
9 removed Willow Creek, we have removed Oscar Torres, and we
10 have moved you up in."
11 Now, when he sends me that, the only thing that
12 I'm consenting to as a third-party defendant to allow -- to
13 the motion that was filed before any of this came up was to
14 allow that to happen. I then get the amended -- this
15 pleading where we are moved into a primary defendant and
16 what I say is "I will accept service, but only if we
17 preserve every affirmative defense." And I could submit --
18 I can show you that -- that's probably a part of the record.
19 I can show you I had to personally hand write on that and I
20 communicated that to them. So they moved the goalposts.
21 And when they moved the goalposts by changing the pleadings,
22 I said "if you are going to move the goalposts, we preserve
23 every defense that we have in this suit."
24 THE COURT: Which is statute of limitations.
25 MR. CHASE: Which is statute of limitations, which

1 is our answer.

2 So if plaintiffs counsel is saying the only action

3 that is viable is related to -- if they agree and the only

4 action that is viable is the claim of the minor -- and we

5 are not talking about defects in the home. We are only

6 talking about --

7 THE COURT: His personal --

8 MR. CHASE: His personal injury claim, then that

9 is a completely different picture, and that makes -- that

10 actually would make sense, but they are not saying that.

11 They are saying let's drag this out further.

12 We're the ones who said well, we were going to

13 take the parents deposition. Well, you know what? We

14 haven't moved to take their deposition. That's our

15 decision, not their decision.

16 We have their minor's -- the minor's medical

17 records. We have pursued that. They have provided those

18 over to us.

19 We have taken the doctor's deposition as it

20 relates to not only Tymika Alston, but Harold Alston, but

21 also the child.

22 So for them to say that it hasn't been extensive

23 discovery performed, well, that's up to us to decide whether

24 or not we want to pursue any additional information related

25 to the minor's personal injury claim. So, I mean, I don't

1 understand that argument at all.

2 So if we are here and it's a matter of them saying

3 that's all we were going to pursue, then they have an

4 amended complaint that actually sets that out, arguably

5 would be appropriate, but not to continue -- I mean, we talk

6 about judicial economy. If we go to a trial -- just so you

7 know, Your Honor, if we try all this stuff and we wait until

8 directed verdict, I mean, you're -- this -- this thing is

9 much larger, as opposed to the minor's claim, personal

10 injury claim, from a judicial economy standpoint, when there

11 is no more evidence, they are saying -- even their argument

12 is hey, all we have got is -- all we have left is just some

13 minor's discovery. Okay. Well, that limits what we do in

14 front of the court. Now we are talking about maybe two days

15 of a trial. Otherwise, we are going to have huge motions

16 that are going to be in play. We will be right back here

17 doing the same -- we will be making the same arguments

18 related to the statute of limitations as it relates to the

19 construction defect, personal injury claim of Tymika Alston,

20 personal injury claim of Harold Alston.

21 THE COURT: All right.

22 Yes, sir.

23 MR. WALLACE: Your Honor, Mr. Chase's contention

24 that somebody moved the goalposts, Your Honor, nobody moved

25 the goalposts. The court has an e-mail right here. Nowhere

1 in this e-mail did he indicate that he is preserving the
2 statute of limitations.
3 Your Honor, it's our position that this was an
4 active waiver. If you look at my e-mail, I indicated --
5 THE COURT: Do you have a copy of that?
6 MR. WALLACE: Yes, Your Honor. I have a copy.
7 It's the packet that starts with the statute. And after the
8 statute I have got my e-mail correspondence there.
9 And I indicate many of these issues that we are
10 talking about today. I stated on the second sentence "Tom
11 Dougall indicated to me this morning that he has no problem
12 consenting to our amendment, but that he has no intention on
13 appearing at the hearing, as the case is settled with
14 respect to his client."
15 There was no issue of DMT not being aware that the
16 case was settled and that Willow Creek was no longer a party
17 to the action when he consented to the amendment of the
18 complaint. I think that's clear. It's clear in writing,
19 black and white --
20 THE COURT: Okay.
21 MR. WALLACE: -- in the e-mail that we have
22 provided.
23 MR. CHASE: Your Honor, I would refer to the
24 motion filed on May 22nd, 2014. This is the motion that was
25 on the court's docket. It was filed May 22nd, 2014, and I

1 can show it is "plaintiffs, by and through undersigned
2 counsel, move for an order granting leave for plaintiffs to
3 amend their complaint to add Harold Alston and Tymika Alston
4 as parents and guardians of their minor child [redacted]
5 as a party plaintiffs to this action pursuant to Rule 15(a)
6 19, 20 and 21," and they show the above ground.
7 It only relates to adding the minor as a party to
8 the case. That is what we consented to. That is not what
9 we got, what he sent to us.
10 And if I have to pull out the correspondence, I
11 certainly will, where I submit that to back to them where I
12 say we will accept it because they changed it. This is not
13 what their motion says. And they then changed who is going
14 to be a primary defendant. That was not their motion. And
15 so that is --
16 THE COURT: Do y'all have a copy of that motion,
17 because --
18 MR. CHASE: I do. I have it right here, Your
19 Honor.
20 MR. WALLACE: And, Your Honor, our position is
21 that -- I mean, this -- this is extremely clear. That
22 motion, which we withdrew based on Mr. Chase's
23 representation, was back in the early part of 2014.
24 With regards to the information when the statute
25 of limitations accrued, he pulled that out of a 2011

1 deposition of our plaintiff.

2 If he was going to bring a motion based on the

3 statute of limitations, he had -- and that amendment wasn't

4 right, he had six months to do so. But, nevertheless, we

5 participated in the continued discovery after the amendment

6 of the complaint. It's our position that this was a clear

7 waiver of the complaint.

8 And I have actually got some case law on that

9 issue, if I may approach.

10 THE COURT: What I'm going to do is I'm going to

11 take this matter under advisement, because there are some

12 real issues here. What I'm going to do is I'm going to let

13 you file briefs within ten days --

14 MR. WALLACE: Yes, Your Honor.

15 MR. CHASE: Yes, Your Honor.

16 THE COURT: -- and I'll rule on it. And you may

17 bring me whatever you need to.

18 MR. CHASE: Thank you, Your Honor.

19 For purposes of it, I'm going to add the

20 correspondence that I sent back to them saying the only way

21 that I will accept this is with these amendments, and they

22 sent it where I was accepting on behalf of all defendants.

23 I was --

24 THE COURT: It's a pretty specific motion was just

25 to add [redacted] and I agree that he should -- that I'm not so

1 sure about the other party, so -- but I'll give you ten days
2 to file your briefs on that.
3 MR. WALLACE: Thank you, Your Honor.
4 MR. CHASE: And, Your Honor, just so I know that
5 the briefs relate to the -- you want the additional
6 briefs --
7 THE COURT: No question, I think that for purposes
8 of the parents that I think the statute of limitations has
9 probably run, but it's really concerning [redacted] and those
10 issues, but I think the parents in bringing your guy is a
11 real problem here.
12 MR. WALLACE: And, Your Honor, just to clarify on
13 the record --
14 THE COURT: What y'all are doing is trying to take
15 conversations that happened outside of court to make those
16 part of the court records.
17 MR. WALLACE: Well, Your Honor, we have some case
18 law that support the waiver.
19 THE COURT: Yeah, you all have got a waiver
20 argument.
21 MR. WALLACE: Yes, Your Honor.
22 MR. CHASE: And that's what I wanted to make sure
23 of is what Your Honor is looking for. Is it related to just
24 the waiver issue, or is it that is one of issue that you
25 want to address?

1 THE COURT: That is the main issue.
2 MR. CHASE: Okay.
3 THE COURT: That is the main issue in this case as
4 to whether -- but I think the dates tend to go along with
5 your argument. It's clear dates on this and if you have any
6 law that says that if you replaced a third-party defendant
7 and they are still involved with it, then I will be glad to
8 read that. I'm not sure there is any out there.
9 MR. WALLACE: Yes, Your Honor, a quick question.
10 As it relates to this, just with regard to the parents, or
11 if you made a decision --
12 THE COURT: I think the parents have a real
13 problem, but I will let you argue it.
14 MR. WALLACE: Okay.
15 THE COURT: I think they have got a real problem.
16 MR. WALLACE: But you are not making a position on
17 the minor child at this time?
18 THE COURT: No, I think the minor child, I think
19 they consented that the minor child is actually a party to
20 the matter.
21 MR. WALLACE: Thank you, Your Honor.
22 THE COURT: I mean, he can have his own lawsuit
23 and that's really what I think it's paring down to is that
24 Jayden can go after anybody he wants to --
25 MR. WALLACE: Thank you.

1 MR. CHASE: Submit something?
2 THE COURT: Submit something in ten days, but I
3 will wait and give y'all an opportunity to talk.
4 MR. CHASE: Your Honor, could I ask just one thing
5 for your preferences? Do you want those sent in a -- would
6 you prefer it to be sent by paper?
7 THE COURT: I hate to do that, because I travel so
8 much I need to have the document.
9 MR. CHASE: Send it to your office?
10 THE COURT: In Sumter.
11 MR. CHASE: In Sumter, so that you will have it?
12 THE COURT: Yes.
13 MR. WALLACE: Okay. Thank you, Your Honor.
14 THE COURT: Thank you, gentlemen.
15 (END OF REQUESTED TRANSCRIPT OF RECORD)
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE

2 I, the undersigned, Michael R. Watts, Official Court
3 Reporter for the Seventh Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate and complete Transcript of Record of the
6 proceedings had and the evidence introduced in the trial of
7 the captioned case in the Court of Common Pleas for Richland
8 County, South Carolina, on the 18th day of March, 2015.
9 I do further certify that I am neither of kin, counsel
10 nor interest to any party hereto.
11
12
13 May 10, 2019
14
15
16 Michael R. Watts
17 Michael R. Watts
18 Circuit Court Reporter
19
20
21
22
23
24
25

July 27, 2011 Deposition Excerpts of Tymika Jones Alston's Deposition

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

2010-CP-40-04307

TYMIKA JONES ALSTON and HAROLD ALSTON,	WILLOW CREEK CONSTRUCTION, INC.; and OSCAR TORRES,
PLAINTIFFS,	THIRD-PARTY PLAINTIFFS,
VS.	VS.
WILLOW CREEK CONSTRUCTION, INC.; and OSCAR TORRES,	DONALD RICHARD TORRES, d/b/a DMT CONSTRUCTION, CO., INC.; L&L ELECTRIC, INC.; and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION,
DEFENDANT.	THIRD-PARTY DEFENDANTS.

DEPOSITION OF TYMIKA JONES ALSTON, TAKEN BEFORE DIANE GRUBOWSKI, A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 10:15 A.M., JULY 27th, 2011, AT THE LAW OFFICES OF THE GIST LAW FIRM, 4400 NORTH MAIN STREET, COLUMBIA, SOUTH CAROLINA.

COPY #071311

REPORTED BY DIANE GRUBOWSKI

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(803)771-4183 / conarco@aol.com

APPEARANCES

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FOR WILLOW CREEK:

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DOUGALL & COLLINS
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29045
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FOR DMT:

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McANGUS, GOUDELOCK &
COURIE, LLC
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GREENVILLE, SOUTH CAROLINA
(864) 239-4000
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REPORTED BY: DIANE GRUBOWSKI

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EXHIBITS

DEFENDANT'S EXHIBIT #1, Copies of medical work-ups, various dates
(6 PAGES) ---------- 95

DEFENDANT'S EXHIBIT #2, Copy of a consultation note from Carolina Allergy and Asthma Consultants, dated 7/25/2008
(2 PAGES) ---------- 109

DEFENDANT'S EXHIBIT #3, Copy of a letter dated 4/30/2009 from Robert A. Vande Stouwe to Tymika Jones
(1 PAGE) ---------- 112

PLAINTIFF'S EXHIBIT #1, Copy of a letter dated 8/22/2008 from Robert A. Vande Stouwe to Sean D. Fuller
(1 PAGE) ---------- 139

PLAINTIFF'S EXHIBIT #2, Copy of a document entitled "Mold Screening Report" dated 11/30/2008 with attached document entitled "Acceptable Ranges Graph"
(3 PAGES) ---------- 144

PLAINTIFF'S EXHIBIT #3, Copy of a letter dated 8/11/2009 from G. Allen Moore to Mr. and Mrs. Harold Alston, with attached statement
(5 PAGES) ---------- 150

1 I don't know if it was in there, but I know he
2 had given us all the citations, and it was
3 discussed about still having mold in the home,
4 and we didn't know. We thought it was rectified,
5 and then all the citations, so he recommended us
6 to move out of the home.
7 Q And that's why you moved out?
8 A Yes, according to his recommendation and the
9 fact that because we didn't know where the mold
10 -- it was still in the air return throughout the
11 home.
12 Q Frank Sander is CBS Builders?
13 A Yes.
14 Q He gave you an estimate to replace the window
15 in the master bedroom?
16 A Uh-huh.
17 Q Correct?
18 A Yes.
19 Q But you did not have him do that; correct?
20 A Yes. No, we didn't.
21 Q At this point, you called Mr. Torres?
22 A Yes.
23 Q At Willow Creek Construction?
24 A Yes.
25 Q What did Mr. Torres do?

1 mold inspector in November 20008. The mold
2 specialist found the mold was airborne throughout
3 the house. Is that an accurate statement?
4 A Yes.
5 Q On December 5th, 2008, you received a quote
6 from CBS Builders to make repairs to the window
7 and the mold treatment. February 27th, 2009,
8 "Plaintiffs had home inspected by Pinpoint Home
9 and Commercial Inspections. Inspection revealed
10 bedroom window was not the correct window. It
11 was a vinyl replacement window and was dissimilar
12 from all the other windows in the home." At that
13 point, you notified the builder of the mold
14 problem and of the problem with the misfit
15 window. The builder responded on March 20th,
16 2009, and replaced the window on April 16th,
17 2009; is that correct?
18 A Yes.
19 Q Then, in August, you had another inspection
20 by Southeastern Inspection Services. "Numerous
21 deficiencies, code violations and unsatisfactory
22 work was noted." Do you know what those were?
23 A Repeat the question.
24 Q "Numerous deficiencies, code violations and
25 unsatisfactory work was noted."

RA/42

1 A No.
2 Q -- of the mold exposure?
3 A No.
4 Q Has anyone told you, up through until today,
5 which is today's date, okay --
6 A Yes.
7 Q -- of July the 27th, 2011, that you are mold
8 contaminated free?
9 A No, nobody has told me that, that I'm mold
10 free. No, sir; I'm not.
11 Q When you talked to Mr. Torres, did Mr. Torres
12 tell you, "Oh, well, the problem here is that my
13 subcontractors didn't do a good job"?
14 A Yes, he said that. He --
15 Q He told you that?
16 A Yes, he did.
17 Q Did he tell you that Donald Torres was one of
18 his subcontractors?
19 A He mentioned DMT, yeah. He mentioned that.
20 I had never met him, but he mentioned that -- I
21 think he might have mentioned to me and my
22 husband. I think, when he came out, he mentioned
23 to him.
24 Q Okay. Well, your husband can testify to
25 that.

Certificate of Service of Interrogatories dated October 23, 2013
by the Office of G. Thomas Chase, Esquire

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC., AND OSCAR TORRES, Defendants. and WILLOW CREEK CONSTRUCTION, INC., Third-Party Plaintiff, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Third-Party Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No. 2010-CP-40-04307 CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 2013 served a copy of the foregoing Interrogatories by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

Donald Gist, Esquire
Gist Law Firm
5618 Colonial Drive
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston
And Harold Alston

Adelaide Kline, Esquire
Law Office of Thomas Dougall
1700 Woodcreek Farms Road
Suite 100
Elgin, South Carolina 29045
Attorney for Willow Creek
Construction, Inc. and Oscar Torres

Melinda Owens

Melinda B. Owens
Legal Assistant to G. Thomas Chase

ROA 145

Medical Authorization Request of G. Thomas Chase, Esquire to Plaintiff's dated August 28, 2014

mgc | INSURANCE DEFENSE

Reply To
ANGELA W. HOPE
Direct Dial: (864) 239-4011
angela.hope@mgclaw.com

August 28, 2014

CERTIFIED - RETURN RECEIPT REQUESTED
Gainesville Medical Center
14370 Lee Highway
Gainesville, Virginia 20155

RE: Tymika Jones Alston and Harold Alston v. Willow Creek Construction, Inc. and Oscar Torres and Willow Creek Construction, Inc., v. Donald Richard Torres d/b/a DMT Construction Co., Inc., L & L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Date of Incident: ***Incident Date***
Carrier Claim No.: [redacted]
MGC File No.:

Dear Sir or Madam:

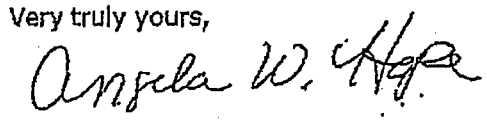
Please be advised that G. Thomas Chase represents Donald Richard Torres d/b/a DMT Construction Co., Inc., in the above-referenced case. Enclosed please find a duly executed Authorization for Release of Medical Records for a complete copy of any medical records, to include copies of any bills, that you have for the Plaintiff, Harold Alston. An Affidavit of Records Custodian is also enclosed, and you are requested to complete and return it with the records. The Affidavit should be signed in the presence of a notary.

Please forward the records to us as quickly as possible. We are happy to reimburse your office for reasonable expenses you incur in photocopying these records. If the records prove to be voluminous and the copying costs will exceed $50.00, do not copy these without calling me to discuss exactly which records we are interested in obtaining. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, we are advising counsel of record that these records have been requested from your office.

Thank you in advance for your cooperation in this matter, and with kind regards, I am

Very truly yours,



Angela W. Hope
Paralegal to G. Thomas Chase

/awh
Enclosures
cc: Donald Gist, Esquire, Gist Law Firm

AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS

TO WHOM IT MAY CONCERN:

I, Harold Alston, hereby request and authorize

Gainesville Medical Center
14370 Lee Hwy
Virginia, 20155

to release to any representative of McAngus, Goudelock & Courie, LLC, 55 East Camperdown Way, Suite 300, Greenville, South Carolina 29602 all medical records of every nature pertinent in any way to any medical treatment rendered to me, Harold Alston, including but not limited to the following:

1. All progress reports and summaries including admission histories and discharge summaries;
2. All clinical records
3. Results of all laboratory tests, including x-rays, CT scans, MRI's and EKG's;
4. Records of prescribed medications and treatments;
5. All correspondence between my doctors or their administrative staffs or the administrative staffs of all hospitals, clinics, or other medical treatment centers where I am, or have been, a patient or from whom I have received medical care;
6. All correspondence from insurance companies or their representatives concerning any claims made on my behalf for medical treatment or for benefits of any nature including, but not limited to, disability benefits, social security benefits, and Veterans Administration benefits;
7. All correspondence of any nature concerning any workers' compensation claims filed on my behalf;
8. All statements rendered for medical services and supplies;
9. All notes, correspondence, or other records of any nature made by my physicians, nurses or other persons concerning me, my condition or my treatment;
10. Copies of x-rays, CT scans and MRI films.

The purpose of the disclosure is at the request of the undersigned individual and this Authorization shall be deemed to comply with the requirements of HIPAA, specifically 45 C.F.R. §164.508. I understand that information disclosed pursuant to this Authorization may be subject to re-disclosure by the recipient and may no longer be protected by Federal law.

This Authorization shall expire upon final resolution of the pending claim. I understand that I may revoke this Authorization at any time by sending written notice to Gainsville Medical Center, and G. Thomas Chase or McAngus, Goudelock & Courie, LLC. However, I understand that revocation will not affect any disclosures made in reliance on this Authorization prior to my revocation.

Charges for copies of all records furnished shall be billed to McAngus, Goudelock & Courie, LLC.

A photocopy of the signed original of this Authorization shall be sufficient and acceptable to all persons and entities from whom these records are requested.

This is the 23 day of August, 2014.

Harold L. Alston

Signature: Harold Alston

[redacted]

Address

Date of Birth: [redacted]

Social Security: [redacted]

Treatment, payment, enrollment & eligibility for benefits may not be conditioned on the signing of this authorization. HA (initial here)

Plaintiff's October 11, 2012 Motion to Restore Case to Docket

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and Defendant.	)	10-CP-40-04307 PLAINTIFF'S MOTION TO RESTORE CASE TO ACTIVE TRIAL ROSTER

RICHLAND COUNTY
FILED
2012 OCT 11 PM 3 39
JEANETTE W. McBRIDE
C.C.P. & G.S.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through his undersigned attorney, moves this Court for an Order to Restore this case to the active trial roster. As grounds for this Motion, the Plaintiff would show this Honorable Court the following:

1. That Plaintiff's counsel, with consent of Defendant, moved to have this case stricken from the trial docket pursuant to Rule 40(j), SCRCP, on October 21, 2011, and Judge Alison Renee Lee signed a Consent Order striking this case from the trial roster on October 31, 2011.
2. That pursuant to Judge Lee's October 31, 2011 Order, the parties have the right to move on or before the expiration of one year after the date of the Consent Order striking this case giving ten days notice to all other parties, that this case be restored to the active trial roster.
3. That based on the foregoing, Plaintiff is informed and believes that good cause exists to restore this case to the active docket so that the final hearing can be scheduled and heard.

WHEREFORE, Plaintiff respectfully requests the following:

A. An Order restoring this case to the active trial roster with a new civil action number.

B.. That all pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action and that the parties will not be required to refile pleadings or discovery in this matter.

C. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

By: _____

Donald Gist
Gist Law Firm
Attorney for Plaintiff
4400 North Main Street
Columbia, SC 29201
(803) 771-8007

Columbia, South Carolina

October 11, 2012

Timeline of events provided at Summary Judgment Hearing by Plaintiffs

Chronological Time Line

Event	Date
Closing on the Home	April 3, 2007
Water Damage found in Master Bedroom	April 5, 2007
Notified Builders of the Water Damage	April 5, 2007
Builders responded and made the repairs	April 6, 2007
Medical issues started to arise- Tymika, [redacted] and Harold	June 8, 2007
Notified Builders of additional findings	July 23, 2007
Builders responded and made the repairs	July 27, 2007
Notified Builders of additional findings	March 31, 2008
1st Mold Test by Larry Harris- Certified	November 21, 2008
CBS Builders proposal-Window Problem	December 5, 2008
PinPoint Home & Commercial Inspection	February 27, 2009
Notified builder of new findings (MOLD, Window, etc)	March 8, 2009
Builders responded finally	March 20, 2009
Builders 1st choice w/ Oscar onsite	March 25, 2009
Company Rep...window manufacturer onsite	April 8, 2009
Builders replaced the window/ Certified Mold Insp onsite	April 16, 2009
Southeastern Inspection Services, Inc onsite	August 11, 2009
Alston Family vacated the home- [redacted].	September 1, 2009

Plaintiff's May 22, 2014 Motion for Leave to Amend Complaint

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2010-CP-40-04307
TYMIKA JONES ALSTON AND HAROLD ALSTON Plaintiff,	)	MOTION AND ORDER INFORMATION FORM AND COVERSHEET
vs.	)	
WILLOW CREEK CONSTRUCTION, INC., OSCAR TORRES, et. al. Defendant,	)	

RICHLAND COUNTY
FILED
2014 MAY 22 PM 2:15
JEANNETTE W. McBRIDE
C.C.P. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Donald Gist, Bar No. 13098 Address: GIST LAW FIRM, PA, 4400 N. MAIN STREET COLUMBIA, SC 29203 Phone: 803-771-8007Fax 803-771-0063 E-mail: dtommygist@yahoo.comOther: _____	G. Thomas Chase and Thomas F. Dougall, Bar No. _____ Address: G. Thomas Chase - McAngus, Goudelock & Courie, LLC, Post Office Box 2980, 75 Beattie Place, Suite 300 (29601), Greenville, South Carolina 29602 Thomas F. Dougall, Esquire, Dougall & Collins, Woodcreek Farms Road, Elgin, SC 29045 Phone: 864-239-4000 (Chase) and 803-865-8858 (Dougall) Fax803-865-8944 (Dougall) E-mail: tchase@mgclaw.com and, tdougall@dougallfirm.com Other: _____

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

ROA 153

SECTION I: Hearing Information

Nature of Motion: Motion to Add Parties

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

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

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

Signature of Attorney for ☒ Plaintiff / ☐ Defendant 5/22/14 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00

☐ EXEMPT: (check reason)

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

JUDGE'S SECTION

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

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: $ _____

☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND TYMIKA JONES ALSTON and HAROLD ALSTON Plaintiffs, v. WILLOW CREEK CONSTRUCTION, INC., OSCAR TORRES, AND Defendants. WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DONALD RICHARD TORRES d/b/a DMT CONSTRUCTION CO., INC., L&L ELECTRIC INC. and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION Third Party Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 10-CP-40-04307 **PLAINTIFFS MOTION FOR LEAVE TO FILE AMENDED COMPLAINT ADDING PARTIES**

RICHLAND COUNTY
FILED
2014 MAY 22 PM 2:45
JEANNETTE W. McBRIDE
C.C.P. & G.S.

TO: Defendant Willow Creek Construction, Inc. and Thomas F. Dougall, Esquire Attorney for Defendant and Third Party Defendant DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, and G. Thomas Chase, Esquire, Attorney for Third Party Defendants

COMES NOW Plaintiffs, by and through the undersigned counsel, and moves for an Order granting leave for Plaintiffs to amend their Complaint to add Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted], as a party Plaintiff to this action pursuant to South Carolina Rules of Civil Procedure 15(a), 19, 20 and 21 and shows grounds as follows:

1. This matter involves mold related injuries which occurred to Harold Alston, Tymika Alston, and their minor child, [redacted] based upon the negligent construction of the family home by Defendants.
2. The parties have displayed due diligence in the pursuit of discovery and have exchanged written discovery responses and documents and also taken the depositions of the Plaintiffs, Defendants, and treating physician in this case.
3. Through the course of the discovery exchange, the Plaintiff's learned of the serious long term injuries sustained by Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted] as a result of Defendant's negligence in this case. The injuries received by [redacted] as a result of Defendant's conduct are documented in the discovery documentation as well as the Deposition Testimony taken in this case. Therefore, Defendant's will suffer no prejudice as a result of this amendment to add [redacted] as a Plaintiff in this case.
4. There were no other means by which Plaintiffs could have gained knowledge of the extent of [redacted] long term medical injuries prior to discovery being taken in this case.
5. The absence of [redacted] as a Plaintiff in this case precludes complete relief from being accorded to the Plaintiffs. The Defendant would not be prejudiced in any way by adding said parties to this action.
6. A party may amend their pleading by leave of court or by written consent of the adverse party and leave shall be freely given when justice so requires and does not prejudice any other party. SCRCP 15(a).

Wherefore, Plaintiffs pray for leave to file an Amended Complaint to add Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted] as a Plaintiff in this action.

Respectfully submitted,

Donald Gist, Esquire
Gist Law Firm, PA
4400 N. Main Street
Columbia, SC 29203
Attorney for Plaintiff

May 22, 2014
Columbia, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)

IN THE COURT OF COMMON PLEAS

Tymika Jones Alston and Harold Alston Individually and as Parents and Guardiands on Behalf of Their Minor Child [redacted]
Plaintiff(s))

CIVIL ACTION COVERSHEET

2012-CP - 40- 6895R

vs.

Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Defendant(s))

Submitted By: Donald Gist, Esquire
Candice Grant, Esquire
Address: 4400 North Main Street
Columbia, South Carolina 29203

SC Bar #: 13098/101948
Telephone #: (803) 771-8007
Fax #: (803) 771-0063
Other:
E-mail: aaronwallace.gistlawfirm@gmail

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex/Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☒ Other (699)

Memo in Opposition to Summary Judgment

- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date: March 11, 2015**

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

ROA 159

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

ROA 160

Southeastern Inspection Services, Inc. August 11, 2009 Home Inspection Report

SOUTHEASTERN INSPECTION SERVICES, INC.
5455 CHAPLINS LANDING ROAD
HOLLYWOOD, SOUTH CAROLINA 29449
(843) 556-1867 / MOBILE: (843) 324-6803
FAX: (843) 556-1738

August 11, 2009

Mr. and Ms. Harold Alston
[redacted]

Subject: Inspection
2-Yr. Old Residence

Time: 10:00
Temp: 86
Weather/Ground Cond.:
clear/dry

Dear Mr. and Ms. Alston:

Thank you for giving me the opportunity to inspect your home for you today.

The home is a 2-story, slab-on-grade, with brick curtain wall, vinyl siding, and composition shingles--it has a 2-car garage. As reported, you closed and took possession of the home in October of 2007.

I reviewed the "Mold Screening Report" performed by Larry Harris of EnviroScreening, and dated 11/30/08. This report confirms the type of mold problems which exist in the home--the main problem here is that there is excessive moisture thruout the home and this promotes mold growth.

I also reviewed the inspection report of "Pinpoint Home & Commercial Inspections, LLC" dated 2/27/09, and the cost-proposal of "CBS Builders" dated 12/5/08 for performing window replacement and weather sealing and mold treatment

The following additional deficiencies, code violations, and unsatisfactory work was noted and I have provided a cost estimate for repairs/corrections as applicable:

1. Open joints where vinyl vertical and horizontal trim intersects brick veneer along front of house is not sealed--code violation. $ 350.00

PLAINTIFF'S EXHIBIT 3
Alston
7/27/11 DG

ROA 161

2. No rain diverter was installed along the front roof above the entrance. 75.00

3. Mortar/concrete overrun needs to be removed from the brick sill along the front entrance door, from the brick pavers below the front porch entrance, and in several areas around the brick curtain wall. 350.00

4. At each of the pigeon roof sections above the overhead garage door, the roof sheathing and open joints are showing and need to be thoroughly sealed. 125.00

5. The flashing around the windows cannot be inspected without removing the windows and the siding in the affected areas--because several windows (especially the frosted glass master bath window) appear to be the source of water intrusion, this needs to be performed by a Contractor with experience. At a minimum, open joint between the vinyl siding and window trim needs to be sealed along the jambs and head. The large frosted glass window at the master bath has lost its thermal seal and is one source of the water entering to the interior of the home (you have photos of this showing water on the interior sill/stool). Allowance: 3,800.00

Note: Mold inside the home cannot be eradicated until the source of all water intrusion is identified and corrected--some interior areas are showing more than 30% moisture readings at this time--moisture is what promotes mold growth.

6. At the front windows in the brick veneer, the open joint between the steel lintel above the windows and the window trim/frame has not been sealed--code violation. Also, the steel lintels were primed but never painted. 70.00

7. Open joint around base of two surface-mounted light fixtures at garage and rear entrance are not sealed--code violation. 40.00

8. Roof: at the rightside rear rake, shingle overhang is insufficient--code violation. 225.00

9. At the rear entrance, open joint between threshold and sill is not sealed--code violation. 20.00

10. Open joint between bath exhaust fan/louver and vinyl on upper rear wall is not sealed--code violation. 25.00

11. Raw wood showing inside door strike plates at front entrance and other doors is not painted. 20.00

12. Although the paint finish on the sheetrock and trim areas is better than I normally see on new homes, it still needs a little refinishing to improve the appearance around the foyer area. 220.00

13. The open joint around the base of all three toilets has not been sealed--code violation. 75.00

14. There is a large air leak at the head of the front door, above the strike jamb--code violation. 40.00

15. Master Bath: the on/off mixing valve at the shower stall is not anchored tightly in the wall cavity--code violation. 125.00

16. In the rightside hallway downstairs, the 4-plex light switch is behind the powder room door when the door is opened--code violation. 545.00

17. Air leaks are present along the bottom of the overhead door in the garage--this is apparently where excessive dust/sand is blowing in from high winds. 175.00

18. Kitchen: a. hot/cold/integral sink spray unit is loose at the base--code violation--$45.; b. the GFI electrical receptacle to the right of the range must be wired incorrectly or has a short--blows fixtures when plugged in and turned on--$45. 90.00

19. Bath: toilet base is not anchored tightly to floor--code violation. 40.00

20. Room Over Garage: at both attic access doors, batt insulation is missing along the head of the doors on the attic side--code violation. 60.00

21. Main Attic: a. weatherstripping is missing around the top of the access panel--code violation--$25.; b. no cardboard or plywood baffles were installed at the ends of the floor joists to deter blown insulation from spilling over--code violation--$175.; c. a small section of Armaflex insulation is missing at the refrigerant line at the air handler and taped section is not fully taped/sealed--code violation--$25.; d. OSB roof sheathing has been butted-tight at the joints--Mfgr's. black stamp on each piece of sheathing requires a 1/8" space between the panels at the ends and along the sides--two methods to correct are very expensive--recommend that Contractor and Owner negotiate on amount for Contractor to pay. 225.00

Cost estimate sub-total =	$ 6,529.00
Add 15% for cost overruns/concealed deficiencies, etc. =	+ 979.00
TOTAL COST ESTIMATE =	$ 7,508.00 *

* includes permits/fees, insurance, materials, labor, supervision, and overhead and profit.

Southeastern Inspection Services, Inc., does not perform any construction/repairs on any buildings.

Note: Because of the extensive work required to perform the above and to eradicate the home of any moisture, a major concern for the mold problem and health of the home owners, I strongly recommend that they seek other living quarters.

Please call if you have any questions or if I can be of further service.

Sincerely,

C. Allen Moore
President

CAM/smm

xc: FAX'd to C. Darryl Caldwell, Atty. at Law

SOUTHEASTERN INSPECTION SERVICES, INC.
5455 CHAPLINS LANDING ROAD
HOLLYWOOD, SOUTH CAROLINA 29449
(843) 556-1867 / MOBILE: (843) 324-6803
FAX: (843) 556-1738

S T A T E M E N T

August 11, 2009

Mr. and Ms. Harold Alston
[redacted]

Subject: Inspection
2-Yr. Old Residence

8-11-09 Inspection & Report w/Estimate $ ~~650.00~~ Bm
$ 525.00

DUE AS DISCUSSED

THANK YOU

G. Allen Moore
Pres./CEO

Licensed by State of SC
#G-10397

ROA 165

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC

148 WHITE ROCK LANE, LEXINGTON, SC 29072
803.917.1884

Summary for Harold & Tymika Alston

Tim Jacobson, License #877, your Home Inspector(s) started at 11:00am on Friday, February 27, 2009. The weather was cloudy and the temperature was in the mid 60's.

The structure at [redacted] is a two-story house with a two car garage. See Figures 1 & 2. The house faces east. It has 4 bedrooms and 2 full baths and a half bath. The areas of concern are broken down below as major and minor. Major concerns include items that are either costly to repair, costly or damaging if not repaired, or safety issues. Minor issues include items that require either some maintenance or have relatively small costs for repairs.
All directions are given facing the front door from the exterior.

Areas of Concern and Recommendations:

I. **Major:**

1. THE MASTER BEDROOM REAR WINDOW IS NOT THE CORRECT WINDOW. IT APPEARS TO BE A VINYL REPLACEMENT WINDOW AND IS DISSIMILAR FROM ALL THE OTHER WINDOWS. THIS SHOULD BE REPLACED WITH THE PROPER WINDOW AND THE VINYL SIDING WILL NEED TO BE REINSTALLED IN THIS AREA. IT HAS SIGNS OF REPAIRS AROUND THE EXTERIOR PANES THAT SHOULD NOT BE NEEDED FOR A 2 YEAR OLD WINDOW.
2. THERE IS A STRESS CRACK AT THE FRONT RIGHT CORNER OF THE GARAGE THAT SHOULD BE FURTHER EVALUATED.

II. **Minor:**

A. **Exterior:**

1. THE SHINGLES HAVE MINOR WEATHERING WITH NAIL POPS.
2. THE EXTERIOR CAULKING IS DETERIORATED OR MISSING BY THE 2 GARAGE FRONT AND 1 RIGHT SIDE EYEBROWS WHERE THE FASCIA MEETS THE SHINGLES. SEE FIGURE 3. THE GAP AT THE GARAGE FRONT RIGHT EYEBROW RIGHT CORNER HAS EXPOSED WOOD AND SHOULD ALSO BE SEALED. SEE FIGURE 4.

B. **Plumbing:**

1. IN THE KITCHEN, THE SINK FAUCET IS LOOSE, AND THE LEFT SINK DRAIN HAS A PIECE OF PAPER TO KEEP IT SEALED FROM FURTHER LEAKS. IT HAS ALREADY DAMAGED THE CABINET BASE.
2. IN THE 1/2 BATHROOM, THE COMMODE IS LOOSE.

C. **Electrical:**

D. **Heating & Air Conditioning:**

E. **Interior:**

F. **Attic & Crawlspace:**

III. **Informational comments:**

- SOME AREAS WERE NOT READILY ACCESSIBLE, VISIBLE OR WERE OBSTRUCTED AND COULD NOT BE PROPERLY INSPECTED.

Thank you for using PINPOINT Home & Commercial Inspections, LLC for your home inspection. Your business is appreciated.
For inspections after repairs are complete or any future needs, please call **PINPOINT**. 803.917.1884. I can also be reached by email @: PINPOINT721@gmail.com.

RDA 166

Pinpoint Home Inspection Report

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC
148 WHITE ROCK LANE, LEXINGTON, SC 29072
803.917.1884

Figure 1

Figure 2

Figure 3

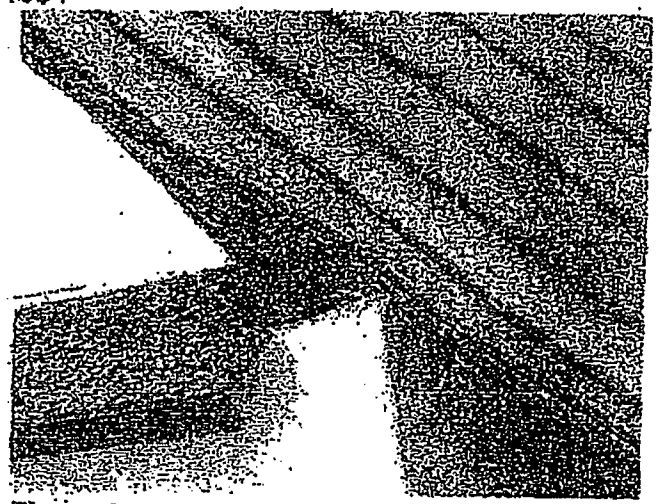


Figure 4

Figure 5

ROA 167

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC

148 WHITE ROCK LANE, LEXINGTON, SC 29072
803.917.1884

Real Estate Inspection Contract

Clients' Name(s): Harold & Tymika Alston
Inspection Address: [redacted]

Date: Friday, February 27, 2009
Time of Inspection: 11:00am

Home Phone: [redacted]
Cell Phone:
Work Phone:
Email: _____

PINPOINT Home and Commercial Inspections, LLC (PINPOINT) is hereby employed by Client to perform a limited visual inspection of apparent conditions in readily accessible areas existing at the time of inspection. Generally accepted professional inspection standards and methods shall be used. This home inspection is being performed in accordance with the standards of practice of the South Carolina Department of Labor, Licensing and Regulation - Residential Builders Commission. A copy of these guidelines is available from said Commission. Absolutely no warranties or guarantees are given or implied for any latent or concealed defects. Additionally, any repairs after the inspection may reveal defects that are not accessible at the time of inspection. PINPOINT is not liable for any defects or deficiencies that cannot be reasonably discovered during the limited visual inspection. As part of your home inspection the inspector will inspect and report on the following areas unless that area has been marked for exclusion from our services:

1. STRUCTURAL COMPONENTS - including foundation, floors, walls, columns, ceilings, and roofs.
2. EXTERIOR OF STRUCTURE - including wall claddings, entryway doors, decks, steps, eaves, driveways and a representative number of windows.
3. ROOFING - including roof coverings, roof drainage systems, flashing, skylights, and chimneys.
4. PLUMBING - including interior water supply and distribution system; interior drain waste and vent system, hot water system, fuel storage and distribution, and sump pump.
5. ELECTRICAL - including service entrance conductors, service equipment; main distribution panels, voltage ratings; a representative number of installed ceiling fans, lighting fixtures, switches and receptacles, ground fault circuit interrupters, and smoke detectors.
6. SYSTEM HEATING - including permanently installed heating system and its controls, chimneys, heat distribution system, including fans, pumps and ducts, and automatic safety controls.
7. CENTRAL AIR CONDITIONING - including normal operating control of the central air conditioning system and the distribution system.
8. INTERIOR - including walls, ceilings, floors, steps, a representative number of cabinets and a representative number of doors and windows.
9. INSULATION AND VENTILATION - including insulation vapor barriers, ventilation of attic and foundation, kitchen, bathroom and laundry venting systems, and the operation of any readily accessible attic ventilation fan when temperature permits.
10. BUILT-IN KITCHEN APPLIANCES - including the observation and operation of dishwasher, range, trash compactor, garbage disposal, ventilation equipment, permanently installed oven and microwave oven.

EXCLUSIONS OR SPECIAL CIRCUMSTANCES:
None

The price for this inspection with the exclusions identified shall be $225.00.
PAYMENT is due upon receipt of inspection report.

www.pinpointhomeinspections.com

ROA 168

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC

148 WHITE ROCK LANE, LEXINGTON, SC 29072

803.917.1884

Real Estate Inspection Contract

Clients' Name(s): Harold & Tymika Alston
Inspection Address:
[redacted]
Date: Friday, February 27, 2009.
Time of Inspection: 11:00am

Home Phone: [redacted]
Cell Phone: [redacted]
Work Phone: [redacted]
Email: _____

PINPOINT Home and Commercial Inspections, LLC (PINPOINT) is hereby employed by Client to perform a limited visual inspection of apparent conditions in readily accessible areas existing at the time of inspection. Generally accepted professional inspection standards and methods shall be used. This home inspection is being performed in accordance with the standards of practice of the South Carolina Department of Labor, Licensing and Regulation - Residential Builders Commission. A copy of these guidelines is available from said Commission. Absolutely no warranties or guarantees are given or implied for any latent or concealed defects. Additionally, any repairs after the inspection may reveal defects that are not accessible at the time of inspection. PINPOINT is not liable for any defects or deficiencies that cannot be reasonably discovered during the limited visual inspection. As part of your home inspection the inspector will inspect and report on the following areas unless that area has been marked for exclusion from our services:

1. STRUCTURAL COMPONENTS - Including foundation, floors, walls, columns, ceilings, and roofs.
2. EXTERIOR OF STRUCTURE - Including wall claddings, entryway doors, decks, steps, eaves, driveways and a representative number of windows.
3. ROOFING - Including roof coverings, roof drainage systems, flashing, skylights, and chimneys.
4. PLUMBING - including interior water supply and distribution system, interior drain waste and vent system, hot water system, fuel storage and distribution, and sump pump.
5. ELECTRICAL - including service entrance conductors, service equipment, main distribution panels, voltage ratings, a representative number of installed ceiling fans, lighting fixtures, switches and receptacles, ground fault circuit interrupters, and smoke detectors.
6. SYSTEM HEATING - including permanently installed heating system and its controls, chimneys, heat distribution system, including fans, pumps and ducts, and automatic safety controls.
7. CENTRAL AIR CONDITIONING - Including normal operating control of the central air conditioning system and the distribution system.
8. INTERIOR - Including walls, ceilings, floors, steps, a representative number of cabinets and a representative number of doors and windows.
9. INSULATION AND VENTILATION - including insulation vapor barriers, ventilation of attic and foundation, kitchen, bathroom and laundry venting systems, and the operation of any readily accessible attic ventilation fan when temperature permits.
10. BUILT-IN KITCHEN APPLIANCES - Including the observation and operation of dishwasher, range, trash compactor, garbage disposal, ventilation equipment, permanently installed oven and microwave oven.

EXCLUSIONS OR SPECIAL CIRCUMSTANCES:
None

The price for this inspection with the exclusions identified shall be **$225.00.**
PAYMENT is due upon receipt of inspection report.

www.pinpointhomeinspections.com

RDA 169

CBS Builder's Proposal

CBS Builders

FED. EMP. I.D. # 57-0840754

2821 Wales Rd.
Columbia, SC 29223

Phone: 803-736-9233
Fax: 803-699-5715
Pager: 803-414-2229

PROPOSAL

Proposal Submitted To:

Name Mr. & Mrs. Harold Alston
Street [redacted]
City [redacted]
State [redacted]
Phone [redacted]

Work To Be Performed At:

Stree [redacted]
City [redacted]
Start [redacted]
Completion Date 3 Working Days
Proposal Date 12-5-08

WE HEREBY PROPOSE TO FURNISH ALL THE MATERIALS AND PERFORM ALL THE LABOR NECESSARY FOR THE COMPLETION OF: Home Repair and Mold Treatment:

1. To Remove Vinyl Siding From Rear Section of Home:
2. To Reconstruct Present Rear Window, (1):
3. To Weather Seal and Wrap Rear Window:
4. To Weather Seal Rear Section of Base Roof:
5. To Treat Rear Wall of Bedroom For Mold:
6. To Treat Inside Bedroom For Mold:
7. To Treat Kitchen Sink Area For Mold:
8. To Replace Vinyl Siding To Rear of Home:
9. Mold Growth Present in Bedroom & Kitchen:
10. To Clean-up All Construction Waste:

All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial manner.
For the sum of: Twenty Three Hundred Eighty Dollars($): $2,380.00 With payment as follows:
$1500.00 when accepted and $880.00 when finished:

Any alteration or deviation from above specifications involving extra cost, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner is to carry fire, tornado and other necessary insurance on/for above work.

Respectfully Submitted: Frank Sanders Jr.

Accepted Date: _____
(Client)

Signature: _____
(Client)

Accepted Date: 12-5-08
(Builder)

Signature: [signature]
(Frank Sanders, Jr.)

DOA 170

Acceptance of Service dated August

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
Tymika Jones Alston and Harold Alston Individually and as Parents and Guardians On Behalf of Their Minor Child [redacted]	)	Civil Action No.: 2010-CP-40-04307
Plaintiffs,	)	
Vs.	)	Acceptance of Service
Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. And Eduardo Moreno d/b/a E.S. Moreno Construction,	)	
Defendant.	)	

I, G. Thomas Chase, of McAngus Goudelock & Courie, LLC, attorney for Defendant, ~~The~~ Donald Richard Torres and DMT Co., Inc. ~~d/b/a DMT Construction, Co, Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction,~~ in the above reference matter, hereby acknowledge receipt of the Amended Complaint in the above case and the Amended Summons issued by the Clerk.

On behalf of my client~~s~~ Donald Richard Torres and DMT ~~Construction~~ Co., Inc., I hereby waive any requirement for other service of the Amended Complaint in this action, while preserving all other defenses. ~~I agree to Answer or otherwise plead within twenty days pursuant to the Federal Rules of Civil Procedure. I understand that if I fail to file an Answer or other pleadings with the clerk of this court and serve the same upon the Plaintiff in accordance with the Rules of Civil Procedure within the time limits stated, I will be in default and Plaintiff may be afforded the relief demanded in the Amended Complaint without a trial or other hearing.~~

Attorney

8/18/14
Date

ROA 171

November 4, 2015 Motion to Stay Case

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]	)	Case No.: 2012-CP-400-6895R
Plaintiffs,	)	
vs.	)	
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Ins. and Eduardo Moreno d/b/a E.S. Moreno Construction,	)	
Defendants.	)	

2015 NOV -4 AM 11:24

CONSENT MOTION TO STAY CASE

Comes Now counsel for the Plaintiffs and Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc., and hereby respectfully moves this Honorable Court to Stay these proceedings.

In support of this Motion counsel avers as follows:

1. This action was originally filed on June 29, 2010 naming Harold and Tymika Alston as Plaintiffs and Willow Creek Construction and Oscar Torres as Defendants in the case.
2. Defendant Willow Creek Construction and Oscar Torres interpleaded Defendant Donald Torres d/b/a DMT Construction into the case as a Third Party Defendant in March 2011.

3. In June 2014, Plaintiff's reached a settlement in their action against Defendant Willow Creek Construction and Defendant Oscar Torres with certain contingencies associated with the settlement as consideration for the agreement.
4. Plaintiffs now contend that Defendant Willow Creek Construction and Oscar Torres breached the Settlement Agreement and have filed a separate action against Willow Creek Construction and Oscar Torres for breach of the Settlement Agreement. Plaintiffs have also indicated their intent to file a Motion to Compel against Willow Creek Construction and Oscar Torres to enforce the terms of the agreement.
5. Plaintiffs filed an Amended Complaint in August 2014 naming the Plaintiffs' minor child as an additional Plaintiff in this action and naming Donald Torres d/b/a DMT Construction Co. Inc. as a direct Defendant.
6. No other Defendant has been served with the Amended Complaint.
7. On October 19, 2015, Harold and Tymika Alston's case was dismissed on Summary Judgment against Defendant Donald Torres d/b/a DMT Construction Company, but their case on behalf of the minor child was allowed to proceed. Plaintiffs have filed a Motion for Reconsideration of this dismissal and have indicated their intent to file an appeal in the event their Motion for Reconsideration is denied.

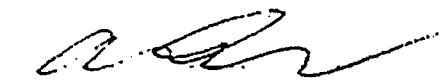
Counsel for Plaintiffs and Defendant Donald Torres d/b/a DMT Construction Company, Inc. contend that this case should be stayed until such time as there has been a final judicial determination as to whether Harold Alston and Tymika Alston are allowed to proceed with their claims as Individual Plaintiffs.

Counsel contends that, although the case on behalf of the minor child may proceed despite the summary judgment as to the individual claims of Harold and Tymika Alston, it

would, at a minimum, be contrary to the interests of judicial economy for the minor child's case to proceed to trial prior to a final judicial determination regarding the dismissal of his parents' case. As counsel for the Plaintiffs have indicated an intent to file an appeal regarding the Court's decision to dismiss Harold and Tymika Alston as Plaintiffs, to allow the child's case to proceed prior to a final judicial determination of this issue would create the possibility for a duplicative trial involving the same witnesses, evidence and discovery and would potentially prejudice both parties with duplicative costs and expenses, at a minimum, and even potentially lead to inconsistent verdicts. Despite the proposed stay, the counsel for the parties agree to continue with discovery in the case, where appropriate, during the proposed stay to facilitate an expeditious placement on the trial roster if Plaintiffs' individual claims are allowed to go forward based on their motion(s) and/or appeal.

WHEREFORE, undersigned counsel requests for a Stay of this action until a final judicial determination has been rendered with respect to whether Harold and Tymika Alston are allowed to proceed as Plaintiffs as to their individual claims in this action.

I Hereby Move,



Donald Gist, Esquire
Aaron Wallace, Esquire
Attorneys for Plaintiff
GIST LAW FIRM
Post Office Box 30007
Columbia, South Carolina 29230
(803) 771-8007

Dated: 10/29/15

I Hereby Move,

G. Tom Chase Signed w/consent by: Aaron Wallace

G. Tom Chase, Esquire
Attorneys for Defendant Donald Richard Torres d/b/a DMT Construction, Inc.
McAngus Goudelock & Courie, LLC
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Dated: 10/29/15

Cc: ALeeLC@sccourts.org; Tom Dougall; dtommygist@yahoo.com; tkline@dougallfirm.com; Tom Chase
Subject: Re: Tymika Jones Alston, et al. v. Willow Creek Construction, Inc., et al. (Case No. 2012-CP-40-06895

[Quoted text hidden]

Melinda Owens, *Legal Assistant*
melinda.owens@mgclaw.com
55 E. Camperdown Way Suite 300
Greenville, SC 29601
Main:864-239-4000 | Direct:864-239-4005 | Fax:864-242-3199
VCARD

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Lee, Alison Renee Law Clerk (Chadwick Devlin) <ALeeLC@sccourts.org> Thu, Oct 29, 2015 at 3:05 PM
To: Work <aaronwallace.gistlawfirm@gmail.com>, Melinda Owens <melinda.owens@mgclaw.com>
Cc: Tom Dougall <tdougall@dougallfirm.com>, "dtommygist@yahoo.com" <dtommygist@yahoo.com>, "tkline@dougallfirm.com" <tkline@dougallfirm.com>, Tom Chase <tchase@mgclaw.com>

Counsel:

Good afternoon. Judge Lee asked that I inquire into an Order that was to be prepared in this matter?

Thank you.

Chad

From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
Sent: Friday, October 23, 2015 1:56 PM
To: Melinda Owens
Cc: Lee, Alison Renee Law Clerk (Chadwick Devlin); Tom Dougall; dtommygist@yahoo.com; tkline@dougallfirm.com; Tom Chase
Subject: Re: Tymika Jones Alston, et al. v. Willow Creek Construction, Inc., et al. (Case No. 2012-CP-40-06895R)

[Quoted text hidden]

Tom Chase <tchase@mgclaw.com> Thu, Oct 2
To: "Lee, Alison Renee Law Clerk (Chadwick Devlin)" <ALeeLC@sccourts.org>, Work <aaronwallace.gistlawfirm@
Cc: Tom Dougall <tdougall@dougallfirm.com>, "dtommygist@yahoo.com" <dtommygist@yahoo.com>, "tkline@dc <tkline@dougallfirm.com>

Chad,

The motion and order for the stay prepared by Mr. Wallace have been approved by me and I have giv authorization to execute the motion on my behalf. Therefore, the documentation should be coming to Judge Lee

Tom Chase

From: Lee, Alison Renee Law Clerk (Chadwick Devlin) [mailto:ALeeLC@sccourts.org]
Sent: Thursday, October 29, 2015 3:05 PM
To: Work; Melinda Owens
Cc: Tom Dougall; dtommygist@yahoo.com; tkline@dougallfirm.com; Tom Chase
Subject: RE: Tymika Jones Alston, et al. v. Willow Creek Construction, Inc., et al. (Case No. 2012-CP-40-06895

[Quoted text hidden]

Tom Chase, *Attorney*
tchase@mgclaw.com
55 E. Camperdown Way Suite 300
Greenville, SC 29601
Main:864-239-4000 | Direct:864-239-4008 | Fax:864-242-3199
VCARD | BIO

This electronic mail may contain information that is confidential, attorney/client and/or work product privileged, prepared in anticipation c exempt from disclosure under applicable law. This transmission is intended solely for the individual or entity designated above. If you are recipient, you should understand that any distribution, copying, or use of the information is unauthorized and strictly prohibited. If you h electronic mail in error, please immediately notify the sender and destroy all copies which you may have of this communication.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]	)	CASE NO.
☒ Plaintiff	)	2012-CP-40-6895R
	)	
v.	)	MOTION INFORMATION FORM AND COVER SHEET
	)	
Donald Richard Torres D/B/A DMT Construction, Co. Inc., L&L Electric Ins. And Eduardo Moreno D/B/A E.S. Moreno Construction	)	
☐ Defendant.	)	

2012 NOV -4 AM 11:24

Plaintiff's Attorney:	Defendant's Attorney:
Donald Gist / Aaron Wallace, Bar No. 13098/100255 Address: 4400 North Main Street Columbia, South Carolina 29203 phone: (803) 771-8007 fax: (803) 771-0063 e-mail: aaronwallace.gistlawfirm@gmail.com other:	G. Thomas Chase, Bar No. Address: P.O. Box 2980, Greenville, SC 29602 phone: 864-239-4000 fax: e-mail: other:

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

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

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

Signature of Attorney for ☒Plaintiff / ☐Defendant — Date submitted: 10/29/15

SECTION III: Motion Fee

☐ PAID – AMOUNT:

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

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

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

☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

Defendant's November 10, 2015 Response to
Plaintiff's Motion for Reconsideration

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, v. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION**

2015 NOV 10 PM 3:41

Plaintiffs, by and through their counsel, have moved for reconsideration of this Court's Order granting summary judgment to Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc. (hereinafter "DMT" and/or "Defendant") as to the Tymika Jones Alston and Harold Alston individual claims. This memorandum of law is filed by Defendant in opposition.

STATEMENT OF FACTS

Defendant adopts the statement of facts used in the order for summary judgment.

ARGUMENT

A. Defendant has not Waived the Statute of Limitations Defense

Plaintiffs allege that the Court erred by failing to find that Defendant waived the Statute of Limitations Defense. In support of their contention, Plaintiffs argue that Defendant "has unequivocally waived the Statue of Limitations by express agreement," by consenting in an e-mail to Plaintiffs' Amended Complaint provided that the Plaintiffs' depositions may be reopened

as to the minor's claim. There are no South Carolina Rules of Civil Procedure, nor South Carolina cases, which hold that consenting to an Amended Complaint constitutes waiver of the statute of limitations. Further, the contingency provided in the e-mail regarding reopening the Plaintiffs' depositions as to the minor's claim is consistent with the fact that the only motion pending at that time was to amend the pleadings to add the minor to the action. No evidence exists that Defendant had knowledge that the Amended Complaint would attempt to add a direct claim against DMT, especially considering that Plaintiffs' counsel did not provide a copy of these pleading. In any event, Defendant's counsel eventually learned that the amended pleading included them as a direct Defendant when he received it, but then counsel only provided an acknowledgment of acceptance of service while clearly preserving all other defenses. Counsel for Plaintiffs never challenged this preservation of defenses. Defendant's timely Answer to the Amended Complaint then properly included the affirmative defense of the violation of the statute of limitations, as required by Rule 8 of the SCRCP. Therefore, no "express agreement" was entered by Defendant to waive the statute of limitations defense. To the contrary, the only agreement was for affirmative defenses to be preserved.

Plaintiffs further contend that Defendant waived the statute of limitations defense through its actions and inactions. Plaintiffs have not produced any South Carolina rules or cases that provide that participation in discovery waives affirmative defenses asserted in a responsive pleading. Rather, the case that Plaintiffs rely on, RWE NuKEM Corp. v. ENSR Corp., 644 S.E.2d 730, 373 S.C. 190 (2007), does not even address waiver of the statute of limitations during the discovery process, but rather waiver prior to suit being filed which is not at issue in this case. Understanding the lack of precedent, Plaintiffs claim waiver based on Defendant filing its motion for summary judgment five months after the Amended Complaint was filed and

Defendant continuing to participate in discovery after being put on notice of the direct claims by Plaintiffs against DMT. However, in the timeframe that Plaintiffs are referring to, Defendant had already pled the statute of limitations defense in its Answer to the Amended Complaint. Further, participating in discovery prior to filing a motion for summary judgment does not constitute waiver of any affirmative defenses pled in an Answer, including, but not limited to, the statute of limitations. To hold otherwise would contradict the rules of procedure, including the right to assert affirmative defenses. Additionally, even assuming without conceding Plaintiffs' position, the discovery Defendant is alleged to have "participated in" related to an assessment of the property by an engineer and contractor paid for by the carrier for Oscar Torres and Willow Creek Construction. Defendant did not set up the evaluation or request an evaluation of the property, but, rather, merely passively observed an expert examination by third parties. No credible argument can be made that this passive participation is considered to be inconsistent with the assertion of the statute of limitations defense. To the contrary, it can be argued to be ineffective representation of a client by failing to participate. Furthermore, no depositions were taken, which is the only potential discovery pointed to by counsel for Plaintiff from the e-mail relating to the motion to amend the complaint. It should also be noted that the third-party claim remained in place against Defendant until the dismissal, with prejudice, was filed September 29, 2014 and received in October, which is after the Answer to the Amended Complaint. (Exhibit "A"). Defendant certainly was prudent to make sure all claims under the third-party complaint were resolved against it prior to moving forward with a summary judgment action on a direct claim by Plaintiffs. Therefore, it is clear from the record that Defendant acted in a manner consistent with the intent to assert the defense of the statute of limitations.

B. The Statute of Limitations was not Tolled

Plaintiffs assert that the statute of limitations should be equitably tolled in this case, relying on Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348 (Ct.App. 2012). In that case, the court tolled the statute of limitations because prior to the expiration of the three year statute of limitations where the Appellants' officers controlled the POA board and the court found it unlikely that "an organization they controlled would have initiated an action against itself during this period." No similar facts exist in this case considering Plaintiffs are and have been wholly independent of Defendant from the date they knew or should have known they had a claim until today. Therefore, Plaintiffs have failed to present any reasons why the statute of limitations should be equitably tolled considering merely sitting on one's right to assert a claim beyond the statute of limitations does not form an equitable basis for tolling. Defendant's prior involvement in the case as a third-party defendant does not toll the statute period for Plaintiffs and, rather, proves their knowledge of the Defendant and the strategic decision to only pursue a direct action against Willow Creek and Oscar Torres. To hold that any third-party Defendant may be added after the statute of limitations would be contrary to the purpose of the statute of limitations set forth in Defendant's initial memorandum. Defendant timely asserted the statute of limitations defense in its responsive pleading and filed a Motion for Summary Judgment for the same. Therefore, the statute of limitations was properly enforced and summary judgment was properly granted.

CONCLUSION

The Court properly granted Defendant's motion for summary judgment. At the time the Amended Complaint was filed asserting the individual claims of Harold and Tymika Alston directly against Defendant, the statute of limitations had expired. Therefore, Defendant

respectfully requests the Court deny Plaintiffs' Motion for Reconsideration.

MCANGUS GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
Jeanmarie Tankersley
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR DEFENDANT, DMT CONSTRUCTION CO., INC.

November 3, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. WILLOW CREEK CONSTRUCTION AND OSCAR TORRES AND DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO. INC., Defendants.	)	Civil Action No. 2015-CP-40-2974 **CERTIFICATE OF SERVICE**

2015 NOV 10 PM 3:41

I certify that on this date, I have served a copy of Defendant's Response to Plaintiffs' Motion for Reconsideration in this action on counsel of record by

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed and via e-mail, addressed as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
donaldgist.gistlawfirm@gmail.com
Attorney for Plaintiffs

November 3, 2015
Date

Melinda Owens
Melinda B. Owens
Legal Assistant to G. Thomas Chase

mgc | INSURANCE DEFENSE

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgclaw.com

November 3, 2015

The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted] vs. Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Carrier Claim No.: [redacted]
MGC File No.:

Dear Ms. McBride:

Please find enclosed for filing the original and one (1) copy of Defendant's Response to Plaintiffs' Motion for Reconsideration in the above-captioned case. I would appreciate your returning a clocked-in copy of the same to me in the envelope provided.

By copy of this letter, I am providing a courtesy copy to Judge Young and serving counsel of record with the above-referenced Response to Plaintiffs' Motion for Reconsideration.

Thanking you in advance for your assistance, I am

Very truly yours,

G. Thomas Chase

GTC/mbo
Enclosures
cc: Honorable W. Jeffrey Young (w/encl.) (Via E-Mail)
Donald Gist, Esquire, Gist Law Firm (w/encl.)

Plaintiff's Motion for Reconsideration of the Court's decision granting Summary Judgment to Defendant October 22, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]	)	CASE NO.
☒ Plaintiff	)	2012-CP-40-400-6895R
	)	
v.	)	MOTION INFORMATION FORM AND COVER SHEET
	)	
Donald Richard Torres D/B/A DMT Construction, Co. Inc., L&L Electric Ins. And Eduardo Moreno D/B/A E.S. Moreno Construction	)	
☐ Defendant.	)	

2015 OCT 22 PM 4:01

Plaintiff's Attorney:	Defendant's Attorney:
Donald Gist / Aaron Wallace, Bar No. 13098/100255 Address: 4400 North Main Street Columbia, South Carolina 29203 phone: (803) 771-8007 fax: (803) 771-0063 e-mail: aaronwallace.gistlawfirm@gmail.com other:	G. Thomas Chase, Esquire, Bar No. Address: 55 E. Camperdown Way, Suite 300 Greenville, SC 23601 phone: 864-239-4000 fax: 864-242-3199 e-mail: tchase@mgclaw.com other:

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

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration

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

SECTION II: Motion Type

☐ Written motion attached

☐ Form Motion --

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

Signature of Attorney for ☐ Plaintiff / ☐ Defendant — Date submitted 10/21/15

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00

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

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

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

☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: Metts

Date Filed: 10/22/15

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]	)	Case No.: 2012-CP-400-6895R
Plaintiffs,	)	
vs.	)	**Plaintiffs' Motion for Reconsideration of the Court's Decision to Grant Defendant's Motion for Summary Judgment**
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Ins. and Eduardo Moreno d/b/a E.S. Moreno Construction,	)	
Defendants.	)	

2015 OCT 22 PM 4:01

TO: DEFENDANT DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC. AND THEIR ATTORNEY G. THOMAS CHASE, ESQUIRE

COMES NOW Plaintiffs, by and through the undersigned counsel, and moves for reconsideration of this Court's Order dismissing Tymika Jones Alston and Harold Alston as Plaintiffs, in the above captioned case, pursuant to the South Carolina Rules of Civil Procedure and the Common Law of South Carolina.

The Court dismissed Plaintiffs Tymika Jones Alston and Harold Alston from this action based on the statute of limitations under South Carolina Code § 15-3-530. The gravamen of this Court's holding is that Plaintiffs Tymika Jones Alston and Harold Alston failed to join the Defendant, in the original lawsuit, within the three year statute of limitations. Plaintiff respectfully submits that the Court's finding is in error.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court reconsider its decision to grant Defendant's Motion for Summary Judgment in this case and enter an order Denying Defendant's Motion for Summary Judgment.

Respectfully Submitted:

Donald Gist
Candice Grant
Aaron Wallace
Kiera Dillon
Gist Law Firm, PA
Post Office Box 30007
Columbia, South Carolina 29230
Tel.: (803) 771-8007
Fax: (803) 771-0063

Attorneys for Plaintiffs

October 21, 2015
Columbia, South Carolina

EXHIBIT 1

>> We will consent to the amendment provided we are in agreement that the parents depositions may be reopened as to the minor's claim. Let me know.
>>
>> Thanks
>>
>> Tom Chase
>>
>>> On Jul 15, 2014, at 11:49 AM, "Work" <aaronwallace.gistlawfirm@gmail.com> wrote:
>>>
>>> Tom,
>>>
>>> As you may be aware we have a Motion Hearing on Monday regarding our Motion to Amend the Complaint to add [redacted] to the caption.
>>>
>>> Tom Dougall indicated to me this morning that he has no problem consenting to our amendment, but that he has no intentions on appearing at the hearing as the case is settled with respect to his client.
>>>
>>> What is your position on consenting to our Amending the Complaint in lieu of a hearing on the matter?
>>>
>>> I think the law clearly allows for the amendment and with the statute of limitations being tolled due to [redacted] minority it would be in all parties best interest to resolve this matter during this case rather than with subsequent litigation.
>>>
>>> Please let me hear from you sometime during this week.
>>>
>>> If you are willing to consent to the Amendment, I will need to inform the Court in writing that the matter has been resolved.
>>>
>>> Thanks.
>>>
>>> Sincerely,
>>>
>>> Aaron Wallace
>>> Attorney at Law
>>>
>>>
>>>
>>>
>>> Sent from my iPhone
>

Tom Chase <tchase@mgclaw.com> Fri, Jul 18, 2014 at 2:48 PM
To: Work <aaronwallace.gistlawfirm@gmail.com>

Aaron,
Also, please update me on the progress of an expert getting to the property to evaluate remediation. I would like to send someone out there at the same time.

Thanks

Tom Chase

> On Jul 18, 2014, at 2:14 PM, "Work" <aaronwallace.gistlawfirm@gmail.com> wrote:
>
> Dear Tom:
>
> We have no objection to what you have proposed.
>
> If we have your consent to the Amendment of the Complaint, we will inform the court the Matter has been

ROA 191

>>>> Please let me hear from you sometime during this week.
>>>>
>>>> If you are willing to consent to the Amendment, I will need to inform the Court in writing that the matter has been resolved.
>>>>
>>>> Thanks.
>>>>
>>>> Sincerely,
>>>>
>>>> Aaron Wallace
>>>> Attorney at Law
>>>>
>>>>
>>>>
>>>>
>>>> Sent from my iPhone
>

Tom Chase <tchase@mgclaw.com> Tue, Jul 22, 2014 at 12:32 PM
To: Work <aaronwallace.gistlawfirm@gmail.com>

Ok. Thanks.

<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
[Tom Chase Attorney 864-239-4008 tchase@mgclaw.com]
<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>

-----Original Message-----
From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
Sent: Tuesday, July 22, 2014 12:24 PM
To: Tom Chase
Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Tom,

They have an expert. We touch basis with our clients to find out when he is scheduled to go out to the property.

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

> On Jul 21, 2014, at 5:50 PM, Tom Chase <tchase@mgclaw.com> wrote:
>
>
>
> Aaron,
> Can you please update me on the issue noted below?
> Thanks.
>
> Tom
>
> <http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>

ROA 192

EXHIBIT 2

Aaron Wallace <aaronwallace.gistlawfirm@gmail.com>

Alston Case

1 message

Work <aaronwallace.gistlawfirm@gmail.com>
To: candicegrant.gistlawfirm@gmail.com
Cc: Donald Gist <diommygist@yahoo.com>

Tue, Aug 12, 2014 at 7:42 AM

Dear Candice:

As we discussed yesterday, please serve lawyer and work on discovery after lawsuits are filed. Thanks.

Sincerely,

Aaron

Sent from my iPhone

Begin forwarded message:

> **From:** Tom Chase <tchase@mgclaw.com>
> **Date:** August 11, 2014 at 5:52:50 PM EDT
> **To:** 'Work' <aaronwallace.gistlawfirm@gmail.com>
> **Subject:** RE: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Aaron,
I will accept service of the Amended Complaint.
Please note that I will need the names of any proposed experts and their reports pursuant to our discovery requests. We are quickly approaching the trial date and I will need this information to allow for discovery depositions if necessary. Please also supplement any discovery related to the minor's claim.

<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
[Tom Chase Attorney 864-239-4008 tchase@mgclaw.com]<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>

-----Original Message-----
From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
Sent: Monday, August 11, 2014 3:11 PM
To: Tom Chase
Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Tom,

Good afternoon. We filed the Amended Complaint on today in this case. Are you willing to accept service on behalf of your client?

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

> On Aug 11, 2014, at 10:46 AM, Tom Chase <tchase@mgclaw.com> wrote:

Aaron,

When can we expect a report that is to be used for the determination of the Confession of Judgment?

discovery requests. We are quickly approaching the trial date and I will need this information to allow for discovery depositions if necessary. Please also supplement any discovery related to the minor's claim.

<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
[Tom Chase Attorney 864-239-4008 tchase@mgclaw.com]
<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>

-----Original Message-----
From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
Sent: Monday, August 11, 2014 3:11 PM
To: Tom Chase
Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Tom,

Good afternoon. We filed the Amended Complaint on today in this case. Are you willing to accept service on behalf of your client?

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

> On Aug 11, 2014, at 10:46 AM, Tom Chase <tchase@mgclaw.com> wrote:
>
>
>
> Aaron,
> When can we expect a report that is to be used for the determination of the Confession of Judgment?
> Thanks.
>
> <http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
> [Tom Chase Attorney 864-239-4008 tchase@mgclaw.com]
<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
>
>
>
> -----Original Message-----
> From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
> Sent: Monday, August 11, 2014 10:26 AM
> To: Tom Chase
> Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)
>
> Tom,
>
> Good Morning. Our clients have indicated to is that the property has already been inspected by their expert.
>
> Sincerely,
>
> Aaron Wallace
> Attorney at Law
>
> Sent from my iPhone
>
>> On Jul 22, 2014, at 12:32 PM, Tom Chase <tchase@mgclaw.com> wrote:

ROA 195

>>>>> Thanks.
>>>>>
>>>>> Sincerely,
>>>>>
>>>>> Aaron Wallace
>>>>> Attorney at Law
>>>>>
>>>>>
>>>>>
>>>>>
>>>>> Sent from my iPhone
>

Aaron Wallace <aaronwallace.gistlawfirm@gmail.com> Mon, Aug 11, 2014 at 11:10 AM
To: Tom Chase <tchase@mgclaw.com>

Tom,

I don't believe the Inspector's Report has been completed yet. Once we have received the report, we will be able to move forward accordingly.

Sincerely,

Aaron Wallace
Attorney at Law

On Mon, Aug 11, 2014 at 10:46 AM, Tom Chase <tchase@mgclaw.com> wrote:

Aaron,
When can we expect a report that is to be used for the determination of the Confession of Judgment?
Thanks.

<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
[Tom Chase Attorney 864-239-4008 tchase@mgclaw.com]
<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>

----Original Message----
From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
Sent: Monday, August 11, 2014 10:26 AM
To: Tom Chase
Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Tom,

Good Morning. Our clients have indicated to is that the property has already been inspected by their expert.

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

> On Jul 22, 2014, at 12:32 PM, Tom Chase <tchase@mgclaw.com> wrote:

EXHIBIT 3

Aaron Wallace <aaronwallace.gistlawfirm@gmail.com>

Tymika Jones Alston and Harold Alston v. Willow Creek Construction, In (Claim No.: MPI80262)

2 messages

Tom Chase <tchase@mgclaw.com> Mon, Sep 1, 2014 at 11:49 AM
To: Work <aaronwallace.gistlawfirm@gmail.com>

Aaron,

Good morning.

Pursuant to the discussion at the site inspection and our discovery requests, please produce a copy of any documentation, including field notes, photographs and reports, prepared by ABS pursuant to the preparation of the amount for the confession of judgment.

Thanks.

<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
[Tom Chase Attorney 864-239-4008 tchase@mgclaw.com]

Work <aaronwallace.gistlawfirm@gmail.com> Mon, Sep 1, 2014 at 1:13 PM
To: Candice Grant <candicegrant.gistlawfirm@gmail.com>

Sent from my iPhone

Begin forwarded message:

> **From:** Tom Chase <tchase@mgclaw.com>
> **Date:** September 1, 2014 at 11:49:20 AM EDT
> **To:** 'Work' <aaronwallace.gistlawfirm@gmail.com>
> **Subject: Tymika Jones Alston and Harold Alston v. Willow Creek Construction, In (Claim No.: MPI80262)**

[Quoted text hidden]

DOA 198

EXHIBIT 4

Aaron Wallace <aaronwallace.gistlawfirm@gmail.com>

RE: Tymika Jones Alston and Harold Alston vs. Donald Richard Torres et. al. (2010-CP-40-0430)

3 messages

Aaron Wallace <aaronwallace.gistlawfirm@gmail.com> Thu, Sep 11, 2014 at 2:46 PM
To: cmanninglc@sccourts.org
Cc: Tom Chase <tchase@mgclaw.com>, Donald Gist <dtommygist@yahoo.com>

Dear Ms. Goodstein:

Per our conversation this morning, our Office is available to convene a Status Conference in the above case at 10:00am on September 12, 2014. I have spoken with Opposing Counsel, G. Thomas Chase, who has indicated that he is also available at that time. Mr. Chase is cc'd on this email.

Please advise me as to whether Judge Manning is amenable to convening a Status Conference on this case at 10:00am on September 12, 2014.

Thank you.

Sincerely,

Aaron Wallace
Attorney at Law

Manning, L. Casey Law Clerk (Eve Goodstein) <CManningLC@sccourts.org> Thu, Sep 11, 2014 at 3:09 PM
To: Aaron Wallace <aaronwallace.gistlawfirm@gmail.com>
Cc: Tom Chase <tchase@mgclaw.com>, Donald Gist <dtommygist@yahoo.com>

Dear Counselors:

I have scheduled a status conference with Judge Manning in the above-referenced case for tomorrow morning at 10:00 am.

Thank you,

Eve

Eve S. Goodstein

Law Clerk to The Honorable L. Casey Manning

Fifth Judicial Circuit

Richland County Judicial Center

ROA 200

1701 Main Street, Room 214

Columbia, SC 29201

Office: (803) 576-1774

Fax: (803) 576-1744

From: Aaron Wallace [mailto:aaronwallace.gistlawfirm@gmail.com]
Sent: Thursday, September 11, 2014 2:47 PM
To: Manning, L. Casey Law Clerk (Eve Goodstein)
Cc: Tom Chase; Donald Gist
Subject: RE: Tymika Jones Alston and Harold Alston vs. Donald Richard Torres et. al. (2010-CP-40-0430)

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CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

Tom Chase <tchase@mgclaw.com> Thu, Sep 11, 2014 at 3:41 PM
To: "Manning, L. Casey Law Clerk (Eve Goodstein)" <CManningLC@sccourts.org>, Aaron Wallace <aaronwallace.gistlawfirm@gmail.com>
Cc: Donald Gist <dtommygist@yahoo.com>

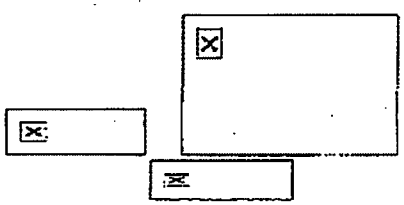
RDA 201

Eve,

Quick question. Would it be acceptable if I participated in the conference by telephone? I am prepared to travel down to participate, but was asked by my client to see if this was acceptable to save on costs.

Thanks in advance. Again, I am fully prepared to come down in person.

Tom Chase



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Plaintiff's Supplemental Memorandum in Opposition to DMT's Motion for Summary Judgment

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]	)	Case No.: 2012-CP-400-6895R
Plaintiffs, vs. Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction, Defendants.	)	Plaintiffs' Supplemental Memorandum in Opposition to Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment

RICHLAND COUNTY FILED 2015 MAR 26 AM 9:23 JEANETTE W. McBRIDE CLERK OF C.C.P.

I. INTRODUCTION

The Plaintiffs', Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted] hereby submits this Supplemental Memorandum in Response to Defendant, Donald Richard Torres d/b/a DMT Construction, Co., Inc.'s, (herein afterwards referred to as "Defendant") Motion for Summary Judgment. For the reasons set forth herein, the Plaintiffs' respectfully ask this Court to deny Defendant's motion on all grounds pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

II. STATEMENT OF FACTS AS INDICATED IN PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION

On June 29, 2010, Plaintiffs' filed a Complaint against Willow Creek Construction, Inc and Oscar Torres. In the Complaint, Plaintiffs' stated that they engaged Willow Creek Construction and Oscar Torres to construct their house with due care, in a workmanlike manner,

and in accordance with the plans and specifications. (Ex: 1 Plaintiffs' Summons and Complaint). Plaintiffs' moved in the house on April 3, 2007, however, on April 5, 2007 Plaintiffs' noticed that the bedroom wall was wet inside and out from the neighbor's sprinkler, and Plaintiffs' contacted Willow Creek Construction regarding the problem. (Ex: 1 Plaintiffs' Summons and Complaint). Oscar Torres, of Willow Creek Construction, had the wall sanded and painted, however after a heavy rain, in July 2007, the master bedroom became soaked with water, both inside and outside, and they had to contact the builder again, who then, after he sanded the wall and repainted it, assured the Plaintiffs' that everything was fine. (Ex: 1 Plaintiffs' Summons and Complaint).

However, in the summer of 2007, Plaintiffs' began experiencing medical problems to include: swollen eyes, eye infections, bronchitis, and allergies, and as a result, in November 2008, they sought a Mold Specialist to inspect the home. (Ex: 1 Plaintiffs' Summons and Complaint). The Mold Specialist found, after the inspection had concluded, that mold was airborne throughout the house, and as a result of this inspection on February 27, 2009, Plaintiffs' had the home inspected by Pinpoint Home and Commercial Inspections, which revealed that the bedroom window was not the correct window, it was a vinyl replacement window, and was dissimilar from all other windows in the home. (Ex: 1 Plaintiffs' Summons and Complaint). Plaintiffs' notified the builder, in writing, of the mold problem and the issue of the window not being the correct fit, the builder responded on March 29, 2009, and the window was replaced on April 16, 2009. Due to ongoing medical problems, Plaintiffs' ordered another inspection, in August 2009, which found that there were numerous deficiencies, code violations, unsatisfactory work on the house, and interior areas of the home showing more than thirty (30%) percent moisture readings, and, as a result, the Inspector strongly suggested Plaintiffs' move out of the

house for health reasons. (Ex: 1 Plaintiffs' Summons and Complaint). On September 1, 2009, Plaintiffs' followed the Inspector's advice and moved out of the house (which has been vacant since that time). Plaintiffs' then filed their Summons and Complaint on June 29, 2010.

On or about March 29, 2011 Willow Creek Construction, Inc. served its Third Party Complaint to the Defendant, and served a copy to the Plaintiff, as shown in the Certificate of Service. (Ex: 2 Willow Creek Construction, Inc.'s Third Party Complaint). On or about June 24, 2011, Defendant served a copy of its Answer to Willow Creek Construction, Inc. and Plaintiffs'. (Ex: 3 Answer to Third Party Complaint). Willow Creek Construction, Inc. Amended its Complaint and served it (to Defendant and Plaintiffs') on or about June 29, 2011, and Defendant Answered the Amended Complaint and served it, on or about, July 8, 2011. (Ex: 4 Willow Creek Construction Inc.'s Amended Third Party Complaint) (Ex: 5 Defendant's Answer to Amended Third Party Complaint). Plaintiffs' state that Defendant was an active participant in the lawsuit by doing the following:

(1) answering both Third Party Complaints,

(2) attending all Depositions conducted by Willow Creek Construction, Inc. and Plaintiffs',

(3) serving Plaintiffs' with Third Party Defendant's Requests for Production of Documents (Ex: 6 Defendant's Certificate of Service for the Defendant's Interrogatories Request to the Plaintiff),

(4) executing Authorization for Release of Medical Records (Ex: 7 Defendant's Request for Plaintiff Harold Alston's Medical Records,

(5) consenting to Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP (Ex: 8 Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP), and

(6) answering Plaintiffs' Amended Complaint (Ex:9 Defendant's Answer to Amended Complaint).

Plaintiffs' filed a Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) on November 1, 2011, which Defendant consented to when he signed the document. (Ex:8 Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP). On October 11, 2012 Plaintiffs' filed a motion to Restore the Case to the active trial roster, and the Court ordered that the case be restored to the roster on the same day. (Ex: 10 Plaintiffs' Motion to Restore Case to Active Trial Roster) (Ex:11 Order to Restore Case to Active Trial Roster). Plaintiffs', on May 22, 2014 filed a Motion for Leave to file an Amended Complaint adding parties. (Ex: 15 Plaintiffs' Motion for Leave to File Amended Complaint Adding Parties).

On August 11, 2014 Plaintiffs' filed an Amended Complaint. (Ex: 12 Plaintiff's Amended Complaint). Plaintiffs' state that the Amended Complaint is not a new Complaint because the Amended Complaint arose under the same facts and controversy as the original Complaint, and the Defendant was properly placed on notice of the lawsuit, when it was served with the Third Party Complaint, therefore Defendant has had, and in fact was, participating in discovery concerning this case. (Ex: 2 Willow Creek Construction, Inc.'s Third Party Complaint). Defendant answered the Amended Complaint and served it to the Plaintiffs', on or about September 2, 2014. (Ex: 13 Defendant's Answer to Amended Complaint).

III. SUPPLEMENTAL FACTS AND PROCEDURAL HISTORY

On or about January 2, 2015, Defendant filed its Motion for Summary Judgment indicating that the Statute of Limitations had expired against Plaintiff as it relates to Plaintiff's claims against Defendant.

On or about March 18, 2015, this Court conducted a hearing regarding Defendant's Motion for Summary Judgment. At the hearing the Court indicated that Defendant's Motion for

Summary Judgment must be denied as it relates to the claims of the Plaintiff's minor child based upon the applicability of SC. Code Ann. Sec. 15-3-40 to such claims.

At the hearing, the parties were in agreement that Plaintiffs Harold and Tymika Alston, knew or should have known, of potential claims against Defendant as of December 2008. Defense Counsel, during the hearing, submitted excerpts from Plaintiffs Harold and Tymika Alston's Depositions which were taken during the course of July 2011 in support of his contentions that the Statute of Limitations against Plaintiff, as it pertains to Defendant, would have therefore expired in December 2011.

The Court declined to issue a ruling on Defendant's Motion for Summary Judgment as it relates to Harold and Tymika Alston's claims and, instead, directed counsel for both parties to submit Supplemental Memorandums regarding the issue of whether Defendant waived the Statute of Limitations as a defense in this case with regard to such claims. As such, the issue of whether the Statute of Limitations applied to Plaintiff's Harold and Tymika Alston as it relates to this case is the only issue before the Court.

The Plaintiff hereby submits this Supplemental Memorandum in compliance with the Court's directives.

IV. STANDARD OF REVIEW

"The circuit court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rwe Nukem Corporation v. Ensr Corporation*, 644 S.E.2d 730, 373 S.C. 190 (S.C. 2007) (quoting Rule 56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any

triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). If triable issues exist, those issues must go to the jury for consideration. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991); *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct.App.2000).

V. LEGAL ARGUMENTS

A. Defendant's actions constitute a waiver of the Statute of Limitations by express Agreement and through actions inconsistent with any intention to invoke the Statute of Limitations.

The law is well settled in South Carolina that "[a] party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense." *RWE Nukem Corporation, f/k/ a WasteChem Corporation v. ENSR Corporation*, 373 S.C. at 197, 644 S.E.2d at 734. "Waiver is a question of fact for the finder of fact." *City of North Myrtle v. Lewis-Davis*, 599 S.E.2d 462 (S.C.App.2004).

Waiver is a question of fact for the finder of fact. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). Waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Id.* at 342–44, 415 S.E.2d at 387. It may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense. *Mende v. Conway Hospital, Inc.*, 304 S.C. 313, 404 S.E.2d 33 (1991).

In *RWE Nukem*, the Court was presented with the issue of waiver as it pertains to the Statute of Limitations. The parties in *RWE Nukem* were corporations operating pursuant to a

Management Services Agreement by which RWE Nukem employed ENSR Corporation to engage in administrative and management services. In this case, the court found that there were genuine issues of material fact regarding actions taken by the Defendant which breached the parties Management Services Agreement (specifically, the failure to timely provide commingled documents when requested). The court also explored the issue of whether the Defendant, through its actions and emails to the Plaintiff, waived the Statute of Limitations with respect to the Plaintiff, finding that there were genuine issues of material fact regarding whether the Defendant (in that case) acted in a manner inconsistent with an intention to assert the Statute of Limitations by continuing to search for the commingled documents and reassuring Plaintiffs of their rights to bring suit even after the Statute of Limitations allegedly would have expired. The Court declined to allow the Defendant to rely on the Statute of Limitations as the Defendant's conduct raised genuine issues of material fact regarding the issue of whether the Statute of Limitations was waived. Similarly, in the instant case, there are also genuine issues of material fact regarding the issue of waiver. Plaintiff contends that Defendant, acting by and through its counsel, waived the Statute of Limitations both expressly and through its actions and inactions.

The Defendant, in the instant case, has unequivocally waived the Statute of Limitations by express agreement. Specifically, the actions of Defendant, acting by and through its Attorney, which give rise to this waiver originate with the enclosed July 15-18, 2015 Email Chain where Defendant consents to amending the Complaint in this case to add the minor child as a party Plaintiff. Plaintiff's Counsel placed Counsel for Defendant on notice of his intentions to remove Willow Creek as a party, by the clear wording of the email. (Exhibit 1). Specifically, Plaintiff Counsel states in the second paragraph of the email that, "Tom Dougall indicated to me this morning that he has no problem consenting to our amendment and has no intentions on

appearing as the case is settled with respect to his client." (id.). Plaintiff's Counsel further goes on to inquire into Defense counsel's position on amending the Complaint by stating, "What is your position on consenting to our Amending the Complaint in lieu of a hearing on this matter"? (id).

In his July 18, 2014 response to Plaintiff's Counsel's July 15, 2015 email, Defense Counsel states, "We will consent to the amendment provided we are in agreement that the parent's depositions may be reopened as to the minor's claim." As a result of Defense Counsels assertions, Plaintiff's counsel canceled the Motion Hearing regarding Amending the Complaint. (Exhibit 3).

During the Course of the March 18, 2015 Hearing in front of this Court, Defense Counsel indicated that he 1.) believed he was only consenting to an amendment of the Complaint to add the minor child as a party, and 2.) that he preserved in writing all affirmative defenses to include the Statute of Limitations Defense. Both of Defendant's argument fails in light of the clear facts in this case.

With regard to Defendant's argument that he was only consenting to an amendment of the Complaint to add the minor child as a party, this argument fails because although Plaintiff's Motion to Amend does not expressly state that Defendant Willow Creek would be removed as a Defendant, the Amendment to the Complaint was subsequent to the Parent's Claims being settled and Defense Counsel was well aware of the fact that Defendant Willow Creek was no longer a party to the lawsuit. Plaintiff's counsel also reiterated the fact that the case was settled with respect to Willow Creek in his July 15, 2014 email to Defense Counsel. (Exhibit 1).

There is no evidence that Defense counsel preserved the Statute of Limitations through his communications with counsel. In fact, the email correspondence between counsels suggests

the exact opposite. They suggest a willingness to participate in continued litigation at continued costs to both parties.

In addition to waiving the Statute of Limitations by Agreement, Defendant also waived the Statute of Limitations through the actions and inactions of his Counsel. Although Defense Counsel stated at the March 18, 2015 Motion hearing that he was surprised that Plaintiff's Amended Complaint named his client as a direct Defendant, he, nevertheless, waited a full five months subsequent to Plaintiff's having filed the Amended Complaint and participated in further Discovery in the case prior to making any attempt to raise the Statute of Limitations by way of Motion. In fact, Defense counsel continued to participate in discovery regarding the Plaintiff's Claims, at cost to the Plaintiffs, even subsequent to his being placed on notice that his client had been sued directly by Plaintiff Harold and Tymika Alston. (Exhibit 2).

Plaintiff's Counsel's email chain with Defense Counsel during the month of August is very telling regarding Defense Counsel's position on raising the Statute of Limitations Defense as he states in his August 12, 2014 email, "Please note that I will need the names of any proposed experts and their reports pursuant to our discovery requests." (id). Defense counsel is clearly encouraging Plaintiff's Counsel to provide a response to Discovery Requests which had previously been served regarding Plaintiff Harold and Tymika Alston's Claims against his client. Presumably if Defense Counsel believed that Plaintiff's Harold and Tymika Alston no longer had the right to bring a Cause of Action against his client, he would have indicated so in his emails, but rather he continued to participate in Discovery without making any effort to raise the Statute of Limitations.

On August 12, 2014, in reliance on Defense Counsel's email statements, Plaintiff's Counsel emailed another associate at his Law Office regarding providing Defense Counsel with

continuing Discovery Responses. Defense Counsel's actions resulted in direct prejudice to Plaintiff's Harold and Tymika Alston as such additional discovery resulted in additional costs to the Plaintiffs.

In addition to Defense Counsel's assertions, actions, and inactions, which operate as a waiver of the Statute of Limitations as a defense, Defense Counsel's continuing conduct in this case indicates that he had no intentions on raising the Statute of Limitations as a defense with respect to Plaintiff Harold and Tymika Alston's claims.

On September 1, 2014, Defense Counsel emailed Plaintiff's Counsel regarding his continuing discovery requests and regarding building reports in connection with Plaintiff's Counsel's Settlement with Willow Creek which indicated a continuing participation in the litigation of Plaintiff Harold and Tymika Alston's Claims against his client. In addition, Defense Counsel attended an August 2014 on site inspection of the Alston's home in connection with these same claims. These actions are wholly inconsistent with any intentions to rely on the Statute of Limitations. (Exhibit 3).

Plaintiff's Counsel and Defense Counsel convened a Status Conference with the Honorable L. Casey Manning on or about September 12, 2014 regarding the case (subsequent to the Amended Complaint being filed and served), and at no time during this Conference did Defense Counsel indicate any intentions on relying on the Statute of Limitations as a Defense. In fact, the purpose of the Conference was to discuss scheduling matters regarding preparing this case for trial. (Exhibit 4).

Defendant should not be able to rely on the Statute of Limitations only when it is convenient and fail to act in a manner consistent with the intent to assert the Defense any other

time. It is Plaintiff's position that Defendant's actions in doing such act as a waiver to the Statute of Limitations as a Defense in this case.

B. Defendant cannot rely on the Doctrine of Laches as Defendant has not been prejudiced.

During the course of the March 18, 2015 hearing, Defense counsel asserted laches in support of his claim that the Statute of Limitations should apply in this case.

"Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of South Carolina, Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Laches connotes not only an undue lapse of time, but also negligence and the opportunity to have acted sooner. Id. "The party seeking to establish laches must show 1.) delay, 2.) unreasonable delay, and 3.) prejudice. *Hallums v. Hallums*, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988)."

Defendant has participated in this case for the past five years. Counsel for the Defendant has participated in every deposition, served discovery, attended walkthroughs of the property at issue, and was on notice of Plaintiff's allegations as early as March 29, 2011 as Willow Creek served Defendant with a copy of Plaintiff's Complaint at the same time it served its Third Party Complaint against Defendant. Defendant has had his deposition taken and participated in the taking of Plaintiff's deposition.

Defendant has fully had an opportunity to prepare for litigation in this case, and in fact, gave Plaintiff no notice that he had any intentions to do otherwise until filing his Summary

Judgment Motion asserting the Statute of Limitations in January 2015 (5 years after the action was originally commenced and 4 years subsequent to Defendant receiving Notice). Defendant cannot rely on the doctrine of laches because he has not been prejudiced in any way.

In fact it is the Plaintiffs who would be prejudiced, under the Doctrine of Laches, if the Defendant were granted the Motion for Summary Judgment based on the statute of limitations, because Plaintiffs' have engaged with the Defendant in the discovery process, they have incurred costs in preparation for trial, they hired expert witnesses to inspect the house in preparation for trial against the Defendant, and the Plaintiffs' have incurred attorney's fees in having to respond to the Defendant's discovery requests. Plaintiffs' state that allowing the Defendant to use the statute of limitations as a defense would be very prejudicial towards Plaintiffs, based on the facts above, and hereby requests that this Court dismiss Defendant's Motion for Summary Judgment based on the Doctrine of Laches.

C. The Doctrine of Equitable Tolling acts to Toll the Statute of Limitations as it pertains to the Plaintiffs in this case.

Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do. *Lee v. Southern Railway Co.*, 228 S.C. 240, 89 S.E.2d 431 (1955); *see Janasik, supra.* It may arise even though there was no intention by the party to relinquish or change any existing rights. *Janasik, supra.* The essential element of estoppel is prejudice to the party raising the defense. *Id.* As we noted in *Janasik,* "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Id.* 307 S.C. at 344, 415 S.E.2d at 388.

Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." 51 Am. Jur. 2d *Limitation of Actions* § 169

(2000). "Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." *Id.*

South Carolina law provides for tolling of the applicable limitations period by statute in certain circumstances. *See* S.C.Code Ann. § 15–3–30 (2005) (stating exceptions to the running of the statute of limitations when the defendant is out of the state); *id.* § 15–3–40 (providing exceptions for persons under a disability, including being underage or insane).

In addition to these statutory tolling mechanisms, however, "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. *Limitations of Actions* § 115 (2005). "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture Co.*, 135 N.M. 539, 91 P.3d 58, 66 (2004).

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Rodriguez v. Superior Court*, 176 Cal.App.4th 1461, 98 Cal.Rptr.3d 728 (2009). "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness.' " *Id.* at 736 (citation omitted).

The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. *Ocana,* 91 P.3d at 65; *see also* 54 C.J.S. *Limitations of Actions* § 115 ("The party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief."). *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, Supreme Court of South Carolina, December 14, 2009, 386 S.C. 108687 S.E.2d 29.

The Court addressed the issue of Equitable Tolling in the context of a construction defect case in *Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc., e. al.*, 397 S.C. 348, 725 S.E.2d 112 (2012), holding that the trial court could equitably toll the three-year statute of limitations for association of property owners to bring claims against a vendor, general contractor, and the corporate parent of the vendor and general contractor.

Specifically, the Plaintiff's were property owners who brought suit due to construction defects caused by the defendants in the construction of the plaintiff's condominium complex. The court, relying on *Hooper*, found that equitable tolling of the statute of limitations was justified and "stems for the judiciary's inherent power to formulate rules of procedure where justice demands it." (id). As the property owners were unable to bring suit regarding the construction defects until assuming control of the Homeowner's Board from defendants, the Court was justified in tolling the statute of limitations to allow them to bring suit.

In the instant case, the Defendant's actions in failing to raise the statute of limitations as a defense, and participating fully in discovery for the course of a five month period after the Complaint had been amended clearly is not behavior which should be rewarded through the technical dismissal of Plaintiff's case resulting in forfeiture.

The rules of justice necessitate that this case proceed on the merits as Defendant has participated in this case over the past four years. What is even more compelling is the fact that the Defendant has continued to participate in this case without asserting the Statute of Limitations through a Motion even subsequent to the Complaint being amended in August 2014 to name Defendant as a direct party.

Prior to Willow Creek being dismissed from the lawsuit, Defendant was subject to potential liability as it relates to the allegations in Plaintiff's Complaint. **Defendant should not**

now be able to escape liability on the sole basis of Plaintiffs having partially settled with Willow Creek as the Agreement has not been consummated and to do such is contrary to the interests of Judicial Economy. Any action by the Court, therefore, should also be stayed pending the litigation of the case of Jaiden Alston against this Defendant

In fact, as indicated above and in Plaintiff's Memorandum in opposition to Defendant's Motion for Summary Judgment, Defendant's involvement in this case was undisputed and pervasive to include: (1) answering both Third Party Complaints, (2) attending all Depositions conducted by Willow Creek Construction, Inc. and Plaintiffs', (3) serving Plaintiffs' with Third Party Defendant's Requests for Production of Documents, (4) executing Authorization for Release of Medical Records, (5) consenting to Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP and (6) answering Plaintiffs' Amended Complaint. **The Defendant is not prejudiced in this case as a result of Plaintiff's claims.** Despite being on direct notice of such claims since June 2011 when Defendant received both Plaintiff's Complaint and Willow Creek's Third Party Complaint, Defendant now attempts to assert the statute of limitations for the sole purpose of avoiding a trial on the merits. The Court has the power to equitably toll the statute of limitations to prevent such injustice from occurring.

The interests of justice and equity clearly weigh in favor of the Plaintiff in this case as Defendant's actions have resulted in costs to Plaintiff. As is indicated more fully above and in Plaintiff's Memorandum in Opposition to Defendant's Summary Judgment Motion, Defendant will suffer no prejudice from a trial on the merits as Defendant has had a full and fair opportunity to participate in discovery in this case over the past four years.

VI. Conclusion

Based on the foregoing reasons, Plaintiff hereby requests that the Court enter an Order denying the Defendants' Summary Judgment Motion.

Respectfully Submitted:

By: _____

Donald Gist, Esquire
Aaron Wallace, Esquire
GIST LAW FIRM, P.A.
4400 North Main Street
Columbia, South Carolina 29203
Telephone: (803) 771-8007
Fax: (803) 771-0063
Attorneys for Plaintiff

March 25, 2015
Columbia, South Carolina

Defendant's Memorandum in Support of DMT's Motion for Summary Judgment

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **MEMORANDUM IN SUPPORT OF DONALD R. TORRES D/B/A DMT CONSTRUCTION CO., INC.'S MOTION FOR SUMMARY JUDGMENT**

2015 OCT 18 P 10:02

The Defendant, Donald Richard Torres d/b/a DMT Construction Co., Inc. ("DMT"), by and through his counsel, has moved before this Court for an Order granting it summary judgment in the above-referenced case. This memorandum of law is filed in support of that motion.

STATEMENT OF FACTS

Plaintiffs Tymika Jones Alston and Harold Alston initiated this action by filing a Complaint on June 29, 2010 against Willow Creek Construction, Inc. and ("Willow Creek") and Oscar Torres. On or around March 31, 2011 Defendant Willow Creek filed a Third-Party Complaint against DMT, L&L Electric Co., Inc., and Eduardo Moreno d/b/a/ E.S. Moreno Construction for indemnification and breach of contract. The Third-Party Complaint was amended in July of 2011 with DMT remaining as a Third-Party Defendant. In June of 2014, Plaintiffs settled with the primary Defendants, Willow Creek and Oscar Torres, on an agreement of Willow Creek and Torres to enter a confession of judgment. Subsequent to this settlement, on

August 11, 2014, Plaintiffs filed an Amended Complaint naming DMT as a primary defendant. At no point prior to the filing of Plaintiffs' Amended Complaint was DMT joined as a party against whom Plaintiffs made a claim in the litigation.

This case arises out of alleged defects, including the growth of mold, from the construction of a home that was completed in April of 2007. Willow Creek was the general contractor in the construction of the home. DMT was hired as a subcontractor by Willow Creek to perform framing in the construction of the home. Plaintiffs knew Defendant was a subcontractor in the construction of the home. On April 5, 2007 Plaintiffs allegedly began noticing water leaking into the home and made complaints to Oscar Torres and Willow Creek multiple times regarding the issues in 2007. They notified Willow Creek and Oscar Torres of additional findings in March of 2008, had a mold test performed in November of 2008 and had a home inspection regarding alleged defects in December of 2008. Plaintiffs also complained of health issues in 2007 and 2008 due to living in the home. As previously mentioned, Plaintiffs original Complaint was filed in June of 2010, three years after the date when Plaintiffs first noticed problems. It was not until 2011, four years after Plaintiffs first noticed issues, that DMT was brought into the lawsuit. From 2011 until August of 2014, DMT was only involved in the lawsuit as a Third Party Defendant, with claims arising only from Willow Creek. There were no direct claims against DMT from Plaintiffs until August 11, 2014, seven years after Plaintiffs initially noticed issues with their home.

ARGUMENT

A. Standard for Summary Judgment

A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Staubes v. City of Folly Beach, 331 S.C. 192, 500 S.E.2d 160 (1998); Summer v. Carpenter, 328 S.C. 36, 492

S.E.2d 55 (1997). A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleading, but must set forth or point to specific facts showing there is a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 477 U.S. 242, 248 (1986). A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If that party does not so respond, summary judgment should be entered against that party. Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988).

B. Plaintiffs' Complaint is Barred by the Statute of Limitations

South Carolina Code § 15-3-530 establishes a three year statute of limitations for contract and negligence actions. For negligence actions, the statute of limitations begins to run from the date when the injury resulting from the wrongful conduct either is discovered or should have been discovered by the exercise of reasonable diligence. Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 597 S.E. 2d 27 (Ct. App. 2004). The date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of statute of limitations. Gillman v. City of Beaufort, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006).

Plaintiffs' claims against DMT are barred by the statute of limitations. Plaintiffs filed their Complaint against DMT well after the three year mark and, consequently, their Complaint must be dismissed. South Carolina courts have made the importance of abiding by statutes of limitations clear. "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights." Moates v. Bobb, 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996).

The fact that Willow Creek filed a Third Party Complaint against DMT has no bearing on the statute of limitations between Plaintiffs and DMT. In Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 2000), the South Carolina Court of Appeals held that a counterclaim was time-barred by the statute of limitations. In that case, a counterclaim for abuse of process was filed more than three years after the lawsuit began. It did not matter that there was an ongoing suit between the parties. In the present action, the facts are stronger for barring the claim than they were in Whitfield. Here, there was never a claim between Plaintiffs and DMT until Plaintiffs filed their Amended Complaint in August of 2014, even though the lawsuit was originally filed in 2010. Similarly, in Gillman v. City of Beaufort, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006), the Court of Appeals demonstrated the power of a statute of limitation when it dismissed a case against an indispensable party under Rule 19 of the South Carolina Rules of Civil Procedure for being time barred. The Court held, "it is well established that the statute of limitations operates as a defense to limit the remedy available from an existing cause of action, and unless the action is commenced before the expiration of the limitations period, the plaintiff's claim is barred."[1] It is apparent from these cases that when suits have already been initiated, or even when a party is indispensable, claims cannot be brought when the statute of limitations has expired.

The South Carolina Supreme Court has noted that although statutes of limitations may result in plaintiffs being unable to find judicial relief, the public policy behind the statutes outweigh any hardships that plaintiffs endure when they have neglected to bring a timely suit. "The statute of limitations may sometimes work a great hardship in special cases, but under the principle that litigation and contention must have an ending, and that the repose and quiet of the

[1] See also, Sandridge v. Folsom, 200 F.Supp. 15, 5 Fed.R.Serv.2d 193 (M.D.Tenn. 1959) (holding that an amendment bringing in an indispensable new party is, in effect, the commencement of a new action and it cannot be allowed after a statute of limitations has run).

many compensates for the loss of the few, such statutes have been adopted and strictly enforced in most countries as wise, and as contributing to the best interests of society." Arial v. Arial, 29 S.C. 84, 7 S.E. 35 (1888). Here, Plaintiffs have slept on their rights and neglected to bring in DMT before the expiration of the statute of limitations and, thus, their Complaint must be dismissed.

C. Rule 15(c) of the South Carolina Rules of Civil Procedure does not apply to this Case

Plaintiffs cannot amend their pleadings pursuant to Rule 15(c) of the South Carolina Rules of Civil Procedure to defeat the statute of limitations. Rule 15(c) holds that:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.
>
> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

The Rule is the same for the Federal Rule of Civil Procedure. The United States Supreme Court has held that the Rule requires that:

> (1) The basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period."[2]

South Carolina courts have made it clear that Rule 15(c) only applies to the change of a party, not the addition of a party. In Jackson v. John Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000), Plaintiff filed a suit against John Doe. Four 1/2 years later, Plaintiff amended her

[2] Hughes v. Water World Water Slide, 314 S.C. 211, 442 S.E.2d 584 (1994)

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pleadings to add a defendant that she believed may be John Doe. The court held, "Jackson did not simply correct the defendant's name or substitute one defendant for another. Rather, she *added* Milligan as a defendant because he *may* have been the driver...Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant...the addition of a party is not the same as a substitution or change of party" (emphasis in original). Similarly, in Gause v. Smithers, 384 S.C. 130 (Ct. App. 2009), the court held that Plaintiff was not allowed to bring in the son as a defendant after the statute of limitations had run when the father was already named as a defendant because Rule 15(c) only governs cases where a party is being changed, not added.

Rule 15(c) has also been used to allow a change in the defendant's name. For example, in Hughes v. Water World Water Slide, 314 S.C. 211, 442 S.E.2d 584 (1994), Plaintiff filed his Complaint within the statute of limitations and gave the Complaint to the sheriff for service, but had named the defendant as "Water World Water Slide, Inc." (which was based on the sign in front of the business) instead of "Wet World Inc." The original Complaint was served on the president of the corporation (who was also present when Plaintiff was injured). The court held the prongs of the test were met because although the corporate name was incorrect, the pleadings were served on the president of the corporation, they described an incident which occurred while the president was present, and the name on the original pleadings was a name used by the corporation.

In the present case, Plaintiffs did not serve an incorrectly named defendant and, therefore, Plaintiffs are not merely correcting a mistake as to identity. Therefore that use of Rule 15(c) does not apply to this case. Further, although DMT was a party to the action, it was only a third-party defendant and not a primary defendant. Plaintiffs are now trying to add DMT as a primary defendant, but they are not substituting DMT for Willow Creek because Plaintiffs pursued their

claim against Willow Creek and Oscar Torres to completion. Therefore, they are merely trying to add DMT as a party (along with others) in violation of the statute of limitations because Rule 15(c) is not applicable.

CONCLUSION

The statute of limitations has expired for any claims resulting from the alleged damage stemming from the construction of Plaintiffs' home. Plaintiffs had ample time and opportunity to bring a claim against DMT or to join it as a primary defendant. However, Plaintiffs slept on their rights and neglected to assert claims against DMT until after the statute of limitations had run. Allowing a claim now would result in undue hardship and prejudice for DMT. The statute of limitations cannot be defeated by Rule 15(c) of the South Carolina Rules of Civil Procedure because does it not speak to the addition of a defendant. For the reasons set forth herein, Defendant DMT requests that its motion for summary judgment be granted.

MCANGUS GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
Jeanmarie Tankersley
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR DEFENDANTS, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC.

March 17, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **CERTIFICATE OF SERVICE**

2015 MAR 18 AM 10:02

I certify that on this date, I have served a copy of Memorandum in Support of Donald R. Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment in this action on counsel of record by

☒ Email addressed to:

Email: donaldgist.gistlawfirm@gmail.com
Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston

March 17, 2015
Date

Melinda Owens
Melinda B. Owens
Legal Assistant to G. Thomas Chase

mgc | INSURANCE DEFENSE

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgclaw.com

March 18, 2015

VIA HAND DELIVERY
The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted] vs. Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Carrier Claim No.: MPI80262
MGC File No.: 20362.11008

Dear Ms. McBride:

Please find enclosed for filing the original and one (1) copy of the Memorandum in Support of Donald R. Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment in the above-captioned case. I would appreciate your returning a clocked-in copy of the same to me.

By copy of this letter, I am serving counsel of record with the above-referenced Memorandum and will be providing a courtesy copy to Judge Young via hand delivery.

Thanking you in advance for your assistance, I am

Very truly yours,

G. Thomas Chase

GTC/mbo
Enclosures
cc: Donald Gist, Esquire, Gist Law Firm (w/encl.) (Via Email)
Honorable W. Jeffrey Young (w/encl.) (Via Hand Delivery)

ROA 229

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]	)	Case No.: 2012-CP-400-6895R
Plaintiffs,	)	
vs.	)	
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction,	)	
Defendants.	)	

RICHLAND COUNTY
2015 MAR 11 PM 12:59

TABLE OF ATTACHMENTS

1. Plaintiffs' Summons and Complaint
2. Willow Creek Construction Inc.'s Third Party Complaint
3. Defendant's Answer to Third Party Complaint
4. Willow Creek Construction Inc.'s Amended Third Party Complaint
5. Defendant's Answer to Amended Third Party Complaint
6. Defendant's Third Party Defendant's Interrogatories Certificate of Service
7. Defendant's Request for Plaintiff Harold Alston's Medical Records
8. Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP
9. Defendant's Answer to Amended Complaint
10. Plaintiff's Motion to Restore Case to Active Trial Roster
11. Order to Restore Case to Active Trial Roster
12. Plaintiffs' Amended Complaint
13. Defendant's Answer to Amended Complaint
14. Chronological Time Line
15. Plaintiffs' Motion for Leave to File Amended Complaint Adding Parties

Exhibit 1

ROA 231

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

TYMIKA JONES ALSTON AND HAROLD ALSTON

Plaintiff(s)

vs.

WILLOW CREEK CONSTRUCTION, INC AND OSCAR TORRES

Defendant(s)

CIVIL ACTION COVERSHEET

2010 CP 4004300

RICHLAND COUNTY FILED 2010 JUN 29 PM 1:

JEANETTE W. McBRIDE C.C.P. & G.S.

(Please Print)

Submitted By: ATTORNEY DEANDREA GIST
Address: 4400 NORTH MAIN STREET
COLUMBIA, SOUTH CAROLINA 29203

SC Bar #: 13957
Telephone #: 803-771-800
Fax #: 803-771-0063
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filed out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- [x] JURY TRIAL demanded in complaint.
- [ ] NON-JURY TRIAL demanded in complaint.
- [ ] This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- [ ] This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- [ ] This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts
- [x] Constructions (100)
- [ ] Debt Collection (110)
- [ ] Employment (120)
- [ ] General (130)
- [ ] Breach of Contract (140)
- [ ] Other (199)

Torts - Professional Malpractice
- [ ] Dental Malpractice (200)
- [ ] Legal Malpractice (210)
- [ ] Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-CP-_____
- [ ] Notice/ File Med Mal (230)
- [ ] Other (299)

Torts – Personal Injury
- [ ] Assault/Slander/Libel (300)
- [ ] Conversion (310)
- [ ] Motor Vehicle Accident (320)
- [ ] Premises Liability (330)
- [ ] Products Liability (340)
- [x] Personal Injury (350)
- [ ] Wrongful Death (360)
- [ ] Other (399)

Real Property
- [ ] Claim & Delivery (400)
- [ ] Condemnation (410)
- [ ] Foreclosure (420)
- [ ] Mechanic's Lien (430)
- [ ] Partition (440)
- [ ] Possession (450)
- [ ] Building Code Violation (460)
- [ ] Other (499)

Inmate Petitions
- [ ] PCR (500)
- [ ] Mandamus (520)
- [ ] Habeas Corpus (530)
- [ ] Other (599)

Judgments/Settlements
- [ ] Death Settlement (700)
- [ ] Foreign Judgment (710)
- [ ] Magistrate's Judgment (720)
- [ ] Minor Settlement (730)
- [ ] Transcript Judgment (740)
- [ ] Lis Pendens (750)
- [ ] Transfer of Structured Settlement Payment Rights Application (760)
- [ ] Other (799)

Administrative Law/Relief
- [ ] Reinstate Driver's License (800)
- [ ] Judicial Review (810)
- [ ] Relief (820)
- [ ] Permanent Injunction (830)
- [ ] Forfeiture-Petition (840)
- [ ] Forfeiture—Consent Order (850)
- [ ] Other (899)

Appeals
- [ ] Arbitration (900)
- [ ] Magistrate-Civil (910)
- [ ] Magistrate-Criminal (920)
- [ ] Municipal (930)
- [ ] Probate Court (940)
- [ ] SCDOT (950)
- [ ] Worker's Comp (960)
- [ ] Zoning Board (970)
- [ ] Public Service Commission (990)
- [ ] Employment Security Comm (991)
- [ ] Other (999)

Special/Complex /Other
- [ ] Environmental (600)
- [ ] Automobile Arb. (610)
- [ ] Medical (620)
- [ ] Other (699)
- [ ] Pharmaceuticals (630)
- [ ] Unfair Trade Practices (640)
- [ ] Out-of State Depositions (650)
- [ ] Motion to Quash Subpoena in an Out-of-County Action (660)
- [ ] Sexual Predator (510)

itting Party Signature: [signature] Date: 6-24-10

lous civil proceedings may be subject to sanctions pursuant to SCRCP Rule 11 ...
ceedings Sanctions Act S.C. Code Ann. ...

ROA 232

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON	)	10-CP-40-04307
Plaintiffs,	)	SUMMONS
vs.	)	
WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and	)	
Defendant.	)	

RICHLAND COUNTY
FILED
2010 JUN 29 PM 1:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: Oscar Torres, P.O. Box 955, Blythewood, SC 29016

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon the subscriber at Gist Law Firm, 4400 N. Main Street, P.O. Box 30007, Columbia, South Carolina 29230, within thirty (30) days after the service thereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff shall apply to the Court for a judgment by default against you for the relief demanded in the Complaint.

GIST LAW FIRM

DeAndrea Gist Benjamin
(SC Bar#: 13597)
4400 N. Main Street
P.O. Box 30007 (29230)
Columbia, SC 29203
803.771.8007
803.771.0063 (Fax)

Attorney for Plaintiff

June 24, 2010

ROA 233

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON	)	10-CP-40- 04307
Plaintiffs,	)	COMPLAINT
vs.	)	
WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and	)	
Defendant.	)	

RICHLAND COUNTY
FILED
2010 JUN 29 PM 1:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

NOW COMES the Plaintiffs, by and through counsel, for their complaint against Defendants and state as follow:

PARTIES & JURISDICTION

1. Plaintiffs Tymika Jones Alston and Harold Alston (hereafter "Plaintiffs") are Citizens and residents of Richland County, State of South Carolina and owners of real property located at [redacted] Blythewood, SC, Richland County, State of South Carolina, the residence which is the subject of this action.

2. Upon information and belief, Defendant Willow Creek Construction is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action.

3. Upon information and belief, Defendant Oscar Torres is a resident of Richland County, State of South Carolina and is the principal and owner of Willow Creek Construction. Defendant Torres was the residential contractor who built Plaintiff's home.

4. Upon information and belief, Defendants

5. Venue is proper in Richland County, State of South Carolina because at least one if not all Defendants maintains an office in Richland County and this action involves real estate in Richland County, State of South Carolina.

FACTUAL ALLEGATIONS

6. This case arises out of the construction of Plaintiffs' house located at [redacted] Richland County, State of South Carolina.

7. Plaintiffs engaged Willow Creek Construction and Oscar Torres to construct their house with due care, in a workmanlike manner, and in accordance with the plans and specifications.

8. Defendant Willow Creek Construction completed the home in April 2007. Plaintiffs moved in the house on April 3, 2007.

9. On April 5, 2007, Plaintiffs' noticed that the bedroom wall was wet inside and out from the neighbor's sprinkler. Plaintiffs contacted the Defendant Construction Company regarding problem. Defendant Oscar Torres came out observed the problem and had the wall sanded and painted.

10. In July of 2007 after a heavy rain and thunderstorm, Plaintiffs once again noticed that the master bedroom wall was wet inside and out. They once again contacted the builder who in turn came back out sanded the wall and repainted it. They resealed the window and told them that everything was fine. At that time Plaintiffs were told by the builder that the problem was cured,

11. During the summer of 2007, Plaintiff Tymika Alston and the Plaintiffs'

son, [redacted] and Alston began experiencing medical problems. Specifically, swollen eyes, eye infections, bronchitis, and allergies. Plaintiff Tymika Alston and the minor child had no prior sinus or allergy issues. During this time Plaintiff Harold Alston was working out of the State and was only present in the house during the weekends. After weekend visits home, he would experience irritation in his eyes and sinus and allergy problems.

12. In November 2008, Plaintiffs' concerned about their deteriorating health and the problems that their son was experiencing hired a mold specialist to inspect the home. The Mold Specialist found that mold was airborne though out the house.

13. On December 5, 2008, Plaintiffs received a quote from CBS Builders to make repairs to window and mold treatment.

14. On February 27, 2009, Plaintiffs had the home inspected by Pinpoint Home and Commercial Inspections. The inspection revealed that the bedroom window was not the correct window and that it was a vinyl replacement window and was dissimilar from all other windows in the home.

15. On March 8, 2009, Plaintiffs notified the builder in writing of the mold problem and of the problem with the misfit window. The builder responded on March 20, 2009 and replaced the window on April 16, 2009.

16. After still experiencing significant medical problems, Plaintiffs ordered another inspection in August 2009. The inspection was performed by Southeastern Inspection Services. Numerous deficiencies, code violations and unsatisfactory work was noted. Some interior areas of the home were showing more than 30% moisture readings in the home. The inspector strongly suggested that Plaintiffs move out of the home for health reasons and concerns.

17. On September 1, 2009, Plaintiffs moved out of the house into an apartment. The house has been vacant since that time and inhabitable since that time.

18. Defendant's work was defective in all, but not limited to, the following particulars:

a. By failing to construct the house so as to prevent leaks of water into the interior;

b. By failing to install the proper window in the bedroom;

c. By failing to seal open joints where vertical and horizontal trim intersects with brick veneer;

d. By failing to install a rain diverter along the front roof above the entrance;

e. By failing to install or to properly install flashing at windows and doors;

f. By failing to properly seal the window jambs and heads in the master bedroom and front windows;

g. By failing to seal mounted light fixtures at garage and rear entrance;

h. By failing to investigate his subcontractors to determine if they were competent and capable of performing the work;

i. By failing to adequately supervise the work of his subcontractors;

j. By failing to discover defects in work performed by his subcontractors;

k. By failing to correct the problem regarding the misfit window after being first notified of the water leaking into the interior of the home;

l. By failing to correct defective work.

AS A FIRST CAUSE OF ACTION
(Breach of Contract)

19. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 18.

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20. The agreement between Plaintiffs and Defendant Oscar Torres and Willow Creek Construction required Defendants to build a dwelling house in accordance with the plans and specifications, applicable building codes industry standards and free from construction and structural defects.

21. Defendant breached this contract in the particulars previously described and the deficiencies outlined in Southeastern Inspection Services report dated August 11, 2009.

22. As a proximate and foreseeable result of Defendant's breach of contract, Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have also suffered bodily injury, which have caused Plaintiffs, and will cause Plaintiffs in the future, to incur medical expense, to suffer tremendous pain and suffering and to lose time from work and lost wages.

AS A SECOND CAUSE OF ACTION
(Negligence and Negligent Supervision)

23. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 22.

24. Each of the aforementioned Defendants assumed the duties outlined above.

25. Defendants owed Plaintiffs a duty to exercise due care in performing their duties outlined above.

26. Defendants breached these duties in the particulars previously described.

27. As a direct, foreseeable, and proximate result of Defendants' negligence, Plaintiff's have suffered physical damage to their House, as well as diminution in its value, as well as the home being inhabitable and are entitled to recover from the Defendant's all direct, consequential and punitive damages.

AS A THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service)

28. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 27.

29. When the above named Defendant's contracted to construct Plaintiff's residence, Defendants impliedly warranted to Plaintiffs that the house would be constructed in a workmanlike manner, free from defects, and in accordance with the plans and specifications.

30. Defendants breached this implied warranty in the particulars previously described.

31. As a proximate and foreseeable result of Defendants, breach of this implied warranty, Plaintiffs have suffered physical damage to the house, as well as diminution in its value.

AS A FOURTH CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability)

32. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 31.

33. Defendants sold and installed in Plaintiff's house a vinyl replacement window.

34. The window was not merchantable at the time of the sale. As a result water was able to penetrate the interior walls of the house, thus causing moisture and mold.

Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have had to relocate from the home due to the air quality in the home and incur expenses related to the relocation and living expenses.

AS A FIFTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose)

35. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 34.

36. Defendants at the time of the sale of the defective window had reason to know that Plaintiffs, or those who, for this limited purpose, could act for Plaintiffs, were relying on the skill or judgment of the Defendants to furnish a product that was the appropriate window for the house. Plaintiffs relied on Defendants' skill and judgment.

37. The window was not fit to be used in the House, thus causing water to be trapped in the walls of Plaintiff's house and cause moisture and mold throughout the home.

38. As a result of Defendants breach of their implied warranty, Plaintiffs have suffered physical damage to the House, as well as diminution in its value.

WHEREFORE, Plaintiff pray this Court issue an Order granting them judgment against Defendants jointly and severally, for the following relief:

1. For actual damages in an amount to be proven at trial;
2. For punitive damages;
3. For prejudgment and post judgment interest on Plaintiffs' damages;
4. For attorneys' fees and cost; and
5. For such other and further relief as this Court deems appropriate.

Signature on Next Page

ROA 241

Respectfully submitted,

DeAndrea Gist Benjamin #13597
Gist Law Firm
4400 North Main Street
P.O. Box 30007 (29230)
Columbia, SC 29203
(803) 771-8007
(803) 771-0063 (fax)
Deandreabenjamin@gistlawfirm.com

June 24, 2010

RA 242

Exhibit 2

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES, Defendants.	CIVIL ACTION NO.: 2010-CP-40-04307 **DEFENDANT WILLOW CREEK CONSTRUCTION, INC.'S THIRD-PARTY COMPLAINT**
WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DONALD RICHARD TORRES d/b/a DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION, Third Party Defendants.	

NOW COMES the defendant and third-party plaintiff Willow Creek Construction, Inc. and would show unto the Court as follows:

1. Plaintiffs have filed a Complaint against third-party plaintiff alleging numerous problems and deficiencies with the construction of the subject residence and the windows that were installed at [redacted] South Carolina, Richland County, State of South Carolina, the residence which is the subject of this action. A copy of the underlying plaintiffs' Complaint is attached hereto as Exhibit A.

2. Willow Creek has denied the allegations in the underlying plaintiffs' Complaint.
3. Third-Party Plaintiff Willow Creek Construction, Inc. (hereinafter "Willow Creek") is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action. Third-Party Plaintiff was the residential contractor who built Plaintiffs' home.
4. Upon information and belief, Third-Party Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc. (hereinafter "Richard Torres") is a business entity with its principal place of business in Blythewood, South Carolina and acted as a subcontractor for the third-party plaintiffs to perform framing work on the plaintiffs' home to include the installation of windows and doors and among other things, to install and properly flash and seal the window jambs and heads.
5. Upon information and belief, Third-Party Defendant L & L Electric Co., Inc. (hereinafter " L & L") is a corporation incorporated under the laws of the State of South Carolina with its registered agent as James. L. Legrand in Lugoff, South Carolina and acted as a subcontractor for the third-party plaintiff to provide electrical services and among other things to install light fixtures in and on the plaintiffs' home.
6. Upon information and belief, Third-Party Defendant Eduardo Moreno d/b/a E. S.. Moreno Construction (hereinafter "Moreno") is a business entity with its principal place of business in Charlotte, North Carolina, and doing business in Richland County, South Carolina, and acted as a subcontractor for the third-party plaintiff to perform services among other things as the roofer.

7. However, to the extent that any of Plaintiffs' allegations are true, which is denied, then the Third-Party Defendants Richard Torres, L & L, and Moreno, upon information and belief, would be liable to Willow Creek Construction for any damages asserted by Plaintiffs in the underlying action.

FOR A FIRST CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

8. Willow Creek Construction, Inc. realleges and reiterates paragraphs 1-7 above as if fully set forth verbatim herein.
9. Third-Party Plaintiff entered into various agreements with the individuals or entities identified in paragraphs 4-6 above ("Third-Party Defendants") to provide labor or services for the construction of the plaintiffs' residence.
10. The plaintiffs have alleged numerous construction deficiencies in their Complaint, a copy of which is attached hereto and incorporated by reference herein, alleging that some of the third-party defendants negligently performed the construction of the home which the third-party plaintiff has denied.
11. If it is determined that the labor or services provided by any particular third-party defendant were deficient, defective, or failed to comply with any industry custom, practice or building code, then the particular third-party defendant would be liable to the third-party plaintiff for any damages caused by the particular third-party defendant.
12. If it is determined, as alleged above, that any particular third-party defendant should indemnify the third-party plaintiff, by legal indemnity, arising by express or implied contract, or equitable indemnity, arising by operation of law, then the third-party defendants should indemnify the third-party plaintiff for any settlement or judgment

which may include, but not be limited to, the principal amount of any settlement or judgment, costs, attorneys' fees and interested associated with this action.

FOR A SECOND CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

13. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

14. The plaintiffs have alleged, *inter alia*, that the third-party defendants have failed to properly construct the plaintiffs' home as more specifically alleged in plaintiffs' Complaint which is attached hereto and incorporated by reference herein.

15. If it is determined that a particular third-party defendant breached any duties imposed by law, industry standards or customs, or applicable building codes that may have arisen in the construction of the plaintiffs' home, then the third-party defendant was negligent or negligent *per se*.

16. If it is determined that any particular third-party defendant's negligence or negligence *per se* was a proximate cause of any damages arising out of or relating to the construction of the plaintiffs' home then that third-party defendant has damaged the third-party plaintiff.

17. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiff in settlement of plaintiffs' claims.

FOR A THIRD CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

18. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

19. The plaintiffs herein have alleged, *inter alia*, that the third-party defendants breached their warranties to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

20. Each third-party defendant expressly or impliedly warranted that its work would be done in a workmanlike manner complying with all applicable industry standards, customs, codes or laws.

21. If it is determined that a particular third-party defendant failed to perform its work in a workmanlike manner, then that particular third-party defendant has breached its express or implied warranty of workmanlike service.

22. If it is determined that a particular third-party defendants' breach of any warranty caused any damages then the third-party defendant has damaged the third-party plaintiff.

23. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiff, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

FOR A FOURTH CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

24. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein:

25. The plaintiffs herein have alleged, *inter alia*, that the third-party defendants breached their contract to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

26. The third-party plaintiff entered into agreements with the third-party defendants to provide labor or services for the construction of the plaintiffs' home.

27. The terms of the agreements with the third-party defendants specifically or implicitly required each third-party defendant to provide construction services, or labor that, among other things, would produce a home free from substantial defects and otherwise in conformance with any contract documents, building codes and industry standards and customs.

28. If it is determined that a particular third-party defendant failed to perform its contract then the third-party defendants have breached their contract with the third-party plaintiff.

29. If it is determined that a breach of contract by a particular third-party defendant caused damages, then the third-party plaintiff has suffered damages.

30. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

WHEREFORE, the Defendant and Third-Party Plaintiff, Willow Creek Construction, Inc., having asserted its third-party Complaint against the third-party defendants, Willow Creek Construction, Inc., prays that it may be dismissed from this lawsuit with prejudice, that the Complaint be dismissed with prejudice, or alternatively that it be awarded damages on its Third-party Complaint and for such further relief as the court deems just and proper.

Respectfully submitted;

DOUGALL & COLLINS

Thomas F. Dougall
Adelaide D. Kline
1700 Woodcreek Farms Road
Elgin, South Carolina 29045
(803) 865.8858 (TEL)
(803) 865.8944 (FAX)
tkline@dougallfirm.com

Attorneys for Defendants and Third-Party Plaintiff Willow Creek Construction, Inc.

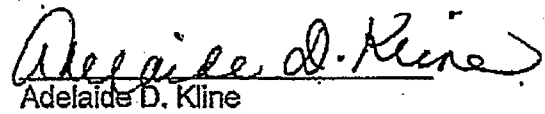
Columbia, South Carolina

March 28, 2011

CERTIFICATE OF SERVICE.

This is to certify that the foregoing **Defendants' Third-Party Complaint and three Summonses for the Third-Party Complaint** were served in the above-referenced case by depositing a copy of the same in the United States Mail, postage prepaid, on the 29th day of March, 2011, addressed as follows:

DeAndrea Gist Benjamin, Esquire
Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, SC 29203
Attorneys for Plaintiffs



Adelaide D. Kline

\\SERVER\UserDirs\TDK\15260-048\Discovery\CERTIFICATE OF SERVICE.S&3PD.032911.doc

Exhibit 3

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC., AND OSCAR TORRES, Defendants. and WILLOW CREEK CONSTRUCTION, INC., Third-Party Plaintiff, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Third-Party Defendants.	)	Civil Action No. 2010-CP-40-04307 **ANSWER TO THIRD PARTY COMPLAINT** **(Jury Trial Demanded)**

DMT Co., Inc., incorrectly identified as Donald Richard Torres d/b/a DMT Construction Co., Inc., (hereinafter "DMT") answers the Third-Party Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

ROA 253

FOR A SECOND DEFENSE

2. Third-Party Defendant would respectfully show each and every cause of action set forth in the Third-Party Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Answering Paragraph 1, Third-Party Defendant admits only that Plaintiffs have filed a Complaint against Third-Party Plaintiff. As to the content of the Complaint, DMT refers to the actual Complaint by reference.

4. Paragraphs 2 and 3 are admitted upon information and belief.

5. Paragraph 4 is denied as worded. The proper Third-Party Defendant is DMT Co., Inc. DMT requests that an amended Third-Party summons and complaint be prepared identifying the proper entity and counsel agrees to accept service of the same. In the event an amended Third-Party Summons and Complaint is not prepared to reflect the proper entity, DMT retains and specifically preserves all Defenses to the Complaint, including any and all motions related to jurisdiction.

6. DMT admits paragraphs 5 and 6 upon information and belief.

7. Paragraph 7 is denied as to DMT.

8. Answering Paragraph 8, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

9. DMT denies the allegations of Paragraph 9 as specifically worded as they relate to DMT.

10. Answering Paragraph 10, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

11. Paragraphs 11 and 12 are denied as relate to DMT.

12. Answering Paragraph 13, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

13. Answering Paragraph 14, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

14. Paragraph 15 and 16 appear to be statements of law and, therefore, no response is necessary. However, to the extent the paragraph can be interpreted to include an allegation of fact against DMT, the allegations are denied and strict proof demanded thereof.

15. Paragraph 17 is denied as to DMT.

16. Answering Paragraph 18, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

17. Answering Paragraph 19, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

18. Answering Paragraph 20, DMT denies they provided any warranties not implied by law to Plaintiffs and/or Third-Party Plaintiff. As to the warranties alleged to be implied by law, DMT submits the paragraph constitutes a statement of law requiring neither an admission nor denial.

19. Paragraphs 21, 22 and 23 are denied as to DMT.

20. Answering Paragraph 24, DMT submits the paragraph contains no allegation of fact requiring an admission nor denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

21. Answering Paragraph 25, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

22. Paragraph 26 is denied as to DMT based upon defenses previously raised. Subject to those defenses, DMT admits that it entered into an agreement with Third-Party Plaintiff to perform certain labor or services associated with the home at issue.

23. Paragraph 27 is denied as to DMT as specifically worded.

24. Paragraphs 28, 29 and 30 are denied as to DMT.

25. DMT denies Third-Party Plaintiff is entitled to the prayer for relief against DMT under the facts and circumstances forming the basis of the Complaint.

FOR A FOURTH DEFENSE

26. Third-Party Defendant alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the sole negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff and, therefore, Third-Party Defendant is not liable to Plaintiffs and/or Third-Party Plaintiff for any sum whatsoever.

FOR A FIFTH DEFENSE

27. If Third Party Plaintiff is entitled to any recovery, which is denied, such recovery is due in whole or in part to acts and/or omissions of the Third Party Plaintiff and, therefore, the Third Party Plaintiff does not have clean hands and is not entitled to any indemnification from the Third Party Defendant.

FOR A SIXTH DEFENSE

28. Further answering said Third-Party Complaint, DMT would show that any injuries or damages sustained by Plaintiffs and/or Third-Party Plaintiff that Third-Party Plaintiff alleges were caused by an act or omission of DMT was either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR A SEVENTH DEFENSE

29. DMT submits that any alleged breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR A EIGHTH DEFENSE

30. DMT states that any and all work performed by it was performed consistent with, and according to, industry standards, and, therefore, Third-Party Plaintiff cannot recover in the action.

FOR A NINTH DEFENSE

31. Further answering said Third-Party Complaint, DMT alleges, upon information and belief, that any injuries and/or damages sustained by Plaintiff and/or Third-Party Plaintiff were due to and caused by the sole and negligent acts or omissions of some other person or persons other than DMT over whom DMT neither had nor exercised any authority or control and, therefore, DMT is not liable to Third-Party Plaintiff for any sum whatsoever.

FOR A TENTH DEFENSE

32. DMT pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff in the following particulars:

a) In failing to maintain the premises;

b) In failing to mitigate damages;

c) In failing to provide adequate notice;

d) In failing to make appropriate repairs;

e) In failing to provide proper materials;

f) In failing to act as reasonable and prudent persons would in the same or similar circumstances; and

g) Such other particulars as may be identified in the litigation.

Accordingly, Third-Party Defendant alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff was greater than the negligence, if any, which might be established against Third-Party Defendant and, therefore, Plaintiffs and/or Third-Party Plaintiff are barred from any recovery in this action. Third-Party Defendant further alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of Third-Party Defendant and, therefore, any amount of recovery awarded to Plaintiffs and/or Third-Party Plaintiff for the injuries and damages alleged in the Complaint and/or Third-Party Complaint shall be reduced by the Court by the percentage of negligence and/or willfulness attributed to Plaintiffs.

FOR AN ELEVENTH DEFENSE

33. DMT submits that even assuming DMT was careless, negligent in any respect, which is expressly denied, and even if any such conduct on its part operated as a greater than 50 percent cause of the damages and the Plaintiff's/Third-Party Plaintiff's resulting damages, if any, which is also expressly denied, Third-Party Defendant is entitled to a determination as to the percentage which the Third-Party Plaintiff or any other party's negligence, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount

awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR AN TWELFTH DEFENSE

34. DMT asserts that any alleged remedies and/or warranties have been properly and effectively excluded, modified and are limited either by applicable contracts or by applicable law.

FOR A THIRTEENTH DEFENSE

35. Third-Party Defendant would show Plaintiffs and/or Third-Party Plaintiff failed to give Third-Party Defendant adequate notice of any applicable warranty claims or alleged deficiencies, thereby barring the claim in whole or in part.

FOR A FIFTEENTH DEFENSE

36. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that the subject property has either been destroyed or modified as such DMT pleads the doctrine of spoliation of evidence as a complete bar to the Third-Party Complaint.

FOR A SIXTEENTH DEFENSE

37. Upon information and belief, Third-Party Defendant would show the subject property has not been inspected for defects and/or maintained or repaired in proper condition, which caused or contributed to the injuries alleged in the Complaint. As a result, Third-Party Plaintiff may not recover against Third-Party Defendant.

FOR A SEVENTEENTH DEFENSE

38. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that Plaintiff and/or Third-Party Plaintiff failed to give DMT timely and reasonable notice of any alleged defects and/or timely and

reasonable opportunity to cure or correct any alleged defects as required by applicable law and/or contract. DMT asserts such lack of notice as a complete bar.

FOR AN EIGHTEENTH DEFENSE

39. Plaintiffs and/or Third-Party Plaintiff have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR A NINETEENTH DEFENSE

40. Third-Party Defendant would respectfully show that the applicable statute of limitations bars Plaintiffs from recovery in this action.

FOR A TWENTIETH DEFENSE

41. Third-Party Defendant asserts Plaintiffs' and/or Third-Party Plaintiff's claims are barred by the doctrine of waiver, laches and/or estoppel.

FOR A TWENTY-FIRST DEFENSE

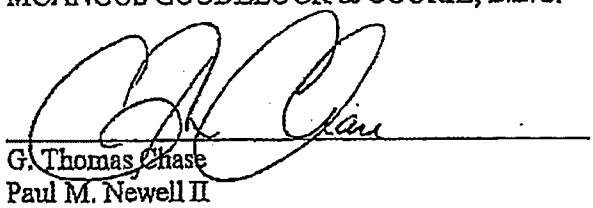
42. Third-Party Defendant would show any claim for punitive damages cannot be had because any award of punitive damages would violate the Third-Party's Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

FOR A TWENTY-SECOND DEFENSE

43. Third-Party Defendant reserves the right to assert any other defense set forth and asserted by any other Defendant and/or Third-Party Defendant to this litigation or as developed by the evidence.

WHEREFORE, having fully answered, Third-Party Defendant prays that the Third-Party Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.



G. Thomas Chase
Paul M. Newell II
Post Office Box 2980
75 Beattie Place, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR THIRD-PARTY
DEFENDANT, DONALD RICHARD TORREZ
D/B/A DMT CONSTRUCTION CO., INC.

June 24, 2011

ROA 261

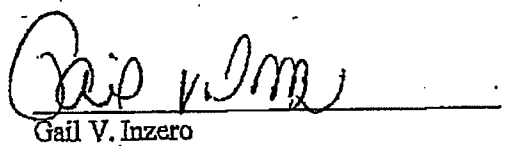
2010-CP-40-04307

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of June, 2011 served a copy of the foregoing Answer by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

DeAndrea G. Benjamin, Esquire
Gist Law Firm
5618 Colonial Drive
Columbia, South Carolina 29203
Attorney for Plaintiffs.

Adelaide Kline, Esquire
Law Office of Thomas Dougall
1700 Woodcreek Farms Road
Suite 100
Elgin, South Carolina 29045
Attorney for Willow Creek Construction, Inc.
And Attorney for Oscar Torres



Gail V. Inzero
Legal Assistant to G. Thomas Chase

Exhibit 4

DOUGALL & COLLINS
ATTORNEYS AND COUNSELOR AT LAW

THOMAS F. DOUGALL
ALSO ADMITTED IN TEXAS
CERTIFIED MEDIATOR IN SC
WILLIAM A. COLLINS, JR.

ADELAIDE DENNIS KLINE
OF COUNSEL

June 29, 2011

The Honorable Jeanette McBride
Clerk of Court for Richland County
P. O. Box 2766
Columbia, SC 29202

Re: Tymika Jones Alston and Harold Alston vs. Willlow Creek Construction, Inc. and Oscar Torres and Willow Creek Construction, Inc. vs. DMT Construction Co., Inc., L & L Electric Inc., and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2010-CP-40-04307

Dear Madame Clerk:

Enclosed please find for filing the original and one copy of Defendant's Amended Third-Party Complaint in the above-referenced matter. I am also enclosing the original and a copy of the Amended Third-Party Summons for DMT Construction, Co., Inc. Please file these pleadings in your usual course and return clocked-in copies to me in the return envelope provided for your convenience. Thank you for your assistance with this matter.

By copy of this letter I am serving all counsel of record with a copy of the same.

A Certificate of Service is also enclosed.

With kind regards,

Sincerely,

DOUGALL & COLLINS

Adelaide D. Kline

Adelaide D. Kline

cc: Donald Gist, Esquire
G. Thomas Chase, Esquire

ADK/mh

Enclosures.

1700 WOODCREEK FARMS ROAD, SUITE 100, ELGIN, SOUTH CAROLINA 29045 (803) 865-8858 (TEL) - (803) 865-8944 (FAX)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES, Defendants.	CIVIL ACTION NO.: 2010-CP-40-04307 **AMENDED THIRD-PARTY SUMMONS**
WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DMT CONSTRUCTION CO., INC., L & L ELECTRICAL INC., AND EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION, Third Party Defendant.	

TO: DEFENDANT DMT CONSTRUCTION CO., INC

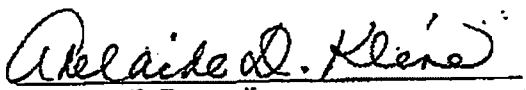
YOU ARE HEREBY SUMMONED AND REQUIRED to appear and defend within thirty days from the date of service hereof and to answer the Amended Third-Party Complaint in this action. A copy of the Amended Third-Party Complaint is attached to this Amended Summons and is herewith served upon you. Your answer must be in writing and signed by you or your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the

undersigned attorneys for the Third-Party Plaintiff within thirty days after the service hereof, exclusive of the day of service at 1700 Woodcreek Farms Rd., Elgin, SC 29045.

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and Amended Summons within thirty days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Amended Third-Party Complaint.

Respectfully submitted,

DOUGALL & COLLINS



Thomas F. Dougall
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Elgin, South Carolina 29045
(803) 865.8858 (TEL)
(803) 865.8944 (FAX)
tkline@dougallfirm.com

Attorneys for Defendant and Third-Party Plaintiffs

June 28, 2011

Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES, Defendants.	CIVIL ACTION NO.: 2010-CP-40-04307 **DEFENDANT WILLOW CREEK CONSTRUCTION, INC.'S AMENDED THIRD-PARTY COMPLAINT**
WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION, Third Party Defendants.	

NOW COMES the defendant and third-party plaintiff Willow Creek Construction, Inc. and would show unto the Court as follows:

1. Plaintiffs have filed a Complaint against third-party plaintiff alleging numerous problems and deficiencies with the construction of the subject residence and the windows that were installed at [redacted] South Carolina, Richland County, State of South Carolina, the residence which is the subject of this action. A copy of the underlying plaintiffs' Complaint is attached hereto as Exhibit A.

2. Willow Creek has denied the allegations in the underlying plaintiffs' Complaint.
3. Third-Party Plaintiff Willow Creek Construction, Inc. (hereinafter "Willow Creek") is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action. Third-Party Plaintiff was the residential contractor who built Plaintiffs' home.
4. Upon information and belief, Third-Party Defendant DMT Construction Co., Inc. (hereinafter "DMT Construction") is a business entity with its principal place of business in Blythewood, South Carolina and acted as a subcontractor for the third-party plaintiffs to perform framing work on the plaintiffs' home to include the installation of windows and doors and among other things, to install and properly flash and seal the window jambs and heads.
5. Upon information and belief, Third-Party Defendant L & L Electric Co., Inc. (hereinafter " L & L") is a corporation incorporated under the laws of the State of South Carolina with its registered agent as James. L. Legrand in Lugoff, South Carolina and acted as a subcontractor for the third-party plaintiff to provide electrical services and among other things to install light fixtures in and on the plaintiffs' home.
6. Upon information and belief, Third-Party Defendant Eduardo Moreno d/b/a E. S. Moreno Construction (hereinafter "Moreno") is a business entity with its principal place of business in Charlotte, North Carolina, and doing business in Richland County, South Carolina, and acted as a subcontractor for the third-party plaintiff to perform services among other things as the roofer.

7. However, to the extent that any of Plaintiffs' allegations are true, which is denied, then the Third-Party Defendants DMT Construction, L & L, and Moreno, upon information and belief, would be liable to Willow Creek Construction for any damages asserted by Plaintiffs in the underlying action.

FOR A FIRST CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

8. Willow Creek Construction, Inc. realleges and reiterates paragraphs 1-7 above as if fully set forth verbatim herein.
9. Third-Party Plaintiff entered into various agreements with the individuals or entities identified in paragraphs 4-6 above ("Third-Party Defendants") to provide labor or services for the construction of the plaintiffs' residence.
10. The plaintiffs have alleged numerous construction deficiencies in their Complaint, a copy of which is attached hereto and incorporated by reference herein, alleging that some of the third-party defendants negligently performed the construction of the home which the third-party plaintiff has denied.
11. If it is determined that the labor or services provided by any particular third-party defendant were deficient, defective, or failed to comply with any industry custom, practice or building code, then the particular third-party defendant would be liable to the third-party plaintiff for any damages caused by the particular third-party defendant.
12. If it is determined, as alleged above, that any particular third-party defendant should indemnify the third-party plaintiff, by legal indemnity, arising by express or implied contract, or equitable indemnity, arising by operation of law, then the third-party defendants should indemnify the third-party plaintiff for any settlement or judgment

which may include, but not be limited to, the principal amount of any settlement or judgment, costs, attorneys' fees and interested associated with this action.

FOR A SECOND CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

13. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

14. The plaintiffs have alleged, *Inter alia*, that the third-party defendants have failed to properly construct the plaintiffs' home as more specifically alleged in plaintiffs' Complaint which is attached hereto and incorporated by reference herein.

15. If it is determined that a particular third-party defendant breached any duties imposed by law, industry standards or customs, or applicable building codes that may have arisen in the construction of the plaintiffs' home, then the third-party defendant was negligent or negligent *per se*.

16. If it is determined that any particular third-party defendant's negligence or negligence *per se* was a proximate cause of any damages arising out of or relating to the construction of the plaintiffs' home then that third-party defendant has damaged the third-party plaintiff.

17. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiff in settlement of plaintiffs' claims.

FOR A THIRD CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

18. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

19. The plaintiffs herein have alleged, *inter alia*, that the third-party defendants breached their warranties to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

20. Each third-party defendant expressly or impliedly warranted that its work would be done in a workmanlike manner complying with all applicable industry standards, customs, codes or laws.

21. If it is determined that a particular third-party defendant failed to perform its work in a workmanlike manner, then that particular third-party defendant has breached its express or implied warranty of workmanlike service.

22. If it is determined that a particular third-party defendants' breach of any warranty caused any damages then the third-party defendant has damaged the third-party plaintiff.

23. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiff, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

FOR A FOURTH CAUSE OF ACTION AS TO THE THIRD-PARTY DEFENDANTS

24. Third-party plaintiff repeats and realleges the allegations contained in the foregoing paragraphs as fully as if said matters were repeated verbatim herein.

25. The plaintiffs herein have alleged, *inter alia*, that the third-party defendants breached their contract to the third-party plaintiff and plaintiffs as more specifically alleged in the Complaint which is attached hereto and incorporated by reference herein.

26. The third-party plaintiff entered into agreements with the third-party defendants to provide labor or services for the construction of the plaintiffs' home.

27. The terms of the agreements with the third-party defendants specifically or implicitly required each third-party defendant to provide construction services, or labor that, among other things, would produce a home free from substantial defects and otherwise in conformance with any contract documents, building codes and industry standards and customs.

28. If it is determined that a particular third-party defendant failed to perform its contract then the third-party defendants have breached their contract with the third-party plaintiff.

29. If it is determined that a breach of contract by a particular third-party defendant caused damages, then the third-party plaintiff has suffered damages.

30. Third-party plaintiff is then entitled to judgment for actual damages against any particular third-party defendant in the amount of any monies the third-party plaintiff may be adjudged to owe the plaintiffs, or which the third-party plaintiff may pay the plaintiffs in settlement of plaintiffs' claims.

WHEREFORE, the Defendant and Third-Party Plaintiff, Willow Creek Construction, Inc., having asserted its third-party Amended Complaint against the third-party defendants, Willow Creek Construction, Inc., prays that it may be dismissed from this lawsuit with prejudice, that the Complaint be dismissed with prejudice, or alternatively that it be awarded damages on its Third-party Amended Complaint and for such further relief as the court deems just and proper.

Respectfully submitted,

DOUGALL & COLLINS

Adelaide D. Kline

Thomas F. Dougall
Adelaide D. Kline
1700 Woodcreek Farms Road
Elgin, South Carolina 29045
(803) 865.8858 (TEL)
(803) 865.8944 (FAX)
tkline@dougallfirm.com

Attorneys for Defendants and Third-Party Plaintiff Willow Creek Construction, Inc.

Columbia, South Carolina

June 28, 2011

Exhibit 5

McAngus Goudelock & Courie LLC

ATTORNEYS AT LAW

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgclaw.com
GREENVILLE

July 8, 2011

The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Tymika Jones Alston and Harold Alston v. Willow Creek Construction, Inc. and Oscar Torres and Willow Creek Construction, Inc., v. Donald Richard Torres d/b/a DMT Construction Co., Inc., L & L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No. 2010-CP-40-04307
Our File No.: 20362.11008

Dear Ms. McBride:

Please find enclosed for filing the original and one (1) copy of our Answer to the Amended Third-Party Complaint in the above-captioned case. I would appreciate your returning a clocked-in copy of the same to me in the envelope provided.

By copy of this letter, I am serving counsel of record with the above-referenced Answer.

Thanking you in advance for your assistance, I am

Very truly yours,

G. Thomas Chase

GTC/mtb
Enclosures
cc: Donald Gist, Esquire, Gist Law Firm (w/encl.)
Adelaide Kline, Law Office of Thomas Dougall (w/encl.)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC., AND OSCAR TORRES, Defendants. and WILLOW CREEK CONSTRUCTION, INC., Third-Party Plaintiff, vs. DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Third-Party Defendants.	)	Civil Action No. 2010-CP-40-04307 **ANSWER TO AMENDED THIRD-PARTY COMPLAINT** **(Jury Trial Demanded)**

Third-Party Defendant, DMT Construction Co., Inc., (hereinafter "DMT" and/or Third-Party Defendant") answers the Amended Third-Party Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

FOR A SECOND DEFENSE

2. Third-Party Defendant would respectfully show each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Answering Paragraph 1, Third-Party Defendant admits only that Plaintiffs have filed a Complaint against Third-Party Plaintiff. As to the content of the Complaint, DMT refers to the actual Complaint by reference.

4. Paragraphs 2 and 3 are admitted upon information and belief.

5. Answering Paragraph 4, DMT admits that it is a business entity with its principal place of business in Blythewood, South Carolina. Additionally, DMT admits that it acted as a subcontractor in construction related to the Plaintiffs' home, including rough framing and setting of certain windows. DMT demands strict proof of facts inconsistent with or in addition to these specific admissions.

6. DMT admits Paragraphs 5 and 6 upon information and belief.

7. Paragraph 7 is denied as to DMT.

8. Answering Paragraph 8, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

9. DMT admits the allegations of Paragraph 9, upon information and belief, as relates to specific labor or services.

10. Answering Paragraph 10, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

11. Paragraphs 11 and 12 are denied as relate to DMT.

12. Answering Paragraph 13, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

13. Answering Paragraph 14, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

14. Paragraphs 15 and 16 appear to be statements of law and, therefore, no response is necessary. However, to the extent the paragraphs can be interpreted to include an allegation of fact against DMT, the allegations are denied and strict proof demanded thereof.

15. Paragraph 17 is denied as to DMT.

16. Answering Paragraph 18, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

17. Answering Paragraph 19, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

18. Answering Paragraph 20, DMT denies they provided any warranties not implied by law to Plaintiffs and/or Third-Party Plaintiff. As to the warranties alleged to be implied by law, DMT submits the paragraph constitutes a statement of law requiring neither an admission nor denial.

19. Paragraphs 21, 22 and 23 are denied as to DMT.

20. Answering Paragraph 24, DMT submits the paragraph contains no allegation of fact requiring an admission or denial by DMT. Subject to and notwithstanding this response and to the extent the paragraph can be interpreted to require a response, DMT incorporates and alleges all previous responses and defenses as if fully repeated in their entirety, where relevant.

21. Answering Paragraph 25, DMT refers to the actual Complaint filed by the primary Plaintiffs and denies any factual assertions inconsistent therewith.

22. DMT admits the allegations of Paragraph 26, upon information and belief, as relates to specific labor or services.

23. Paragraph 27 is denied as to DMT as specifically worded.

24. Paragraphs 28, 29 and 30 are denied as to DMT.

25. DMT denies Third-Party Plaintiff is entitled to the prayer for relief against DMT under the facts and circumstances forming the basis of the Complaint.

FOR A FOURTH DEFENSE

26. Third-Party Defendant alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the sole negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff and, therefore, Third-Party Defendant is not liable to Plaintiffs and/or Third-Party Plaintiff for any sum whatsoever.

FOR A FIFTH DEFENSE

27. If Third-Party Plaintiff is entitled to any recovery, which is denied, such recovery is due in whole or in part to acts and/or omissions of the Third-Party Plaintiff and, therefore, the Third-Party Plaintiff does not have clean hands and is not entitled to any indemnification from the Third-Party Defendant.

FOR A SIXTH DEFENSE

28. Further answering said Third-Party Complaint, DMT would show that any injuries or damages sustained by Plaintiffs and/or Third-Party Plaintiff that Third-Party Plaintiff alleges were caused by an act or omission of DMT were either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR A SEVENTH DEFENSE

29. DMT submits that any alleged breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR AN EIGHTH DEFENSE

30. DMT states that any and all work performed by it was performed consistent with, and according to, manufacturer recommendations, industry standards and/or state of the art, and, therefore, Third-Party Plaintiff cannot recover in the action.

FOR A NINTH DEFENSE

31. Further answering said Third-Party Complaint, DMT alleges, upon information and belief, that any injuries and/or damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the sole and negligent acts or omissions of some other person or persons other than DMT over whom DMT neither had nor exercised any authority or control and, therefore, DMT is not liable to Third-Party Plaintiff for any sum whatsoever.

FOR A TENTH DEFENSE

32. DMT pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff in the following particulars:

a) In failing to maintain the premises;

b) In failing to mitigate damages;

c) In failing to provide adequate notice;

d) In failing to make appropriate repairs;

e) In failing to provide proper materials;

f) In failing to act as reasonable and prudent persons would in the same or similar circumstances; and

g) Such other particulars as may be identified in the litigation.

Accordingly, Third-Party Defendant alleges the negligence and recklessness of Plaintiffs and/or Third-Party Plaintiff was greater than the negligence, if any, which might be established against Third-Party Defendant and, therefore, Plaintiffs and/or Third-Party Plaintiff are barred from any recovery in this action. Third-Party Defendant further alleges any injuries and damages sustained by Plaintiffs and/or Third-Party Plaintiff were due to and caused by the negligence and/or willfulness of Plaintiffs and/or Third-Party Plaintiff combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of Third-Party Defendant and, therefore, any amount of recovery awarded to Plaintiffs and/or Third-Party Plaintiff for the injuries and damages alleged in the Complaint and/or Third-Party Complaint shall be reduced by the Court by the percentage of negligence and/or willfulness attributed to Plaintiffs.

FOR AN ELEVENTH DEFENSE

33. DMT submits that even assuming DMT was careless, negligent in any respect, which is expressly denied, and even if any such conduct on its part operated as a greater than 50 percent cause of the damages and the Plaintiffs'/Third-Party Plaintiff's resulting damages, if any, which is also expressly denied, Third-Party Defendant is entitled to a determination as to the

percentage which the Third-Party Plaintiff or any other party's negligence, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A TWELFTH DEFENSE

34. DMT asserts that any alleged remedies and/or warranties have been properly and effectively excluded, modified and are limited either by applicable contracts or by applicable law.

FOR A THIRTEENTH DEFENSE

35. Third-Party Defendant would show Plaintiffs and/or Third-Party Plaintiff failed to give Third-Party Defendant adequate notice of any applicable warranty claims or alleged deficiencies, thereby barring the claim in whole or in part.

FOR A FOURTEENTH DEFENSE

36. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that the subject property has either been destroyed or modified as such DMT pleads the doctrine of spoliation of evidence as a complete bar to the Third-Party Complaint.

FOR A FIFTEENTH DEFENSE

37. Upon information and belief, Third-Party Defendant would show the subject property has not been inspected for defects and/or maintained or repaired in proper condition, which caused or contributed to the injuries alleged in the Complaint. As a result, Third-Party Plaintiff may not recover against Third-Party Defendant.

FOR A SIXTEENTH DEFENSE

38. To the extent DMT may be liable to Third-Party Plaintiff, which liability is denied, DMT would show upon information and belief that Plaintiffs and/or Third-Party Plaintiff failed to give DMT timely and reasonable notice of any alleged defects and/or timely and reasonable opportunity to cure or correct any alleged defects as required by applicable law and/or contract. DMT asserts such lack of notice as a complete bar.

FOR A SEVENTEENTH DEFENSE

39. Plaintiffs and/or Third-Party Plaintiff have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR AN EIGHTEENTH DEFENSE

40. Third-Party Defendant would respectfully show that the applicable statute of limitations bars Plaintiffs from recovery in this action.

FOR A NINETEENTH DEFENSE

41. Third-Party Defendant asserts Plaintiffs' and/or Third-Party Plaintiff's claims are barred by the doctrine of waiver, laches and/or estoppel.

FOR A TWENTIETH DEFENSE

42. Third-Party Defendant would show any claim for punitive damages cannot be had because any award of punitive damages would violate the Third-Party Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

FOR A TWENTY-FIRST DEFENSE

43. Third-Party Defendant reserves the right to assert any other defense set forth and asserted by any other Defendant and/or Third-Party Defendant to this litigation or as developed by the evidence.

WHEREFORE, having fully answered, Third-Party Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOODELOCK & COURIE, L.L.C.

G. Thomas Chase
Paul M. Newell, II
Post Office Box 2980
75 Beattie Place, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR THIRD-PARTY DEFENDANT, DMT CONSTRUCTION CO., INC.

July 8, 2011

2010-CP-40-04307

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of July, 2011 served a copy of the foregoing Answer to Amended Third-Party Complaint by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston
And Harold Alston

Adelaide Kline
Law Office of Thomas Dougall
1700 Woodcreek Farms Road
Suite 100
Elgin, South Carolina 29045
Attorney for Willow Creek Construction, Inc.
And Oscar Torres

Melinda Bouchillon

Melinda T. Bouchillon
Legal Assistant to G. Thomas Chase

Exhibit 6

STATE OF SOUTH CA ROLINA COUNTY OF RICHLAND TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC., AND OSCAR TORRES, Defendants. and WILLOW CREEK CONSTRUCTION, INC., Third-Party Plaintiff, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Third-Party Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No. 2010-CP-40-04307 **CERTIFICATE OF SERVICE**

I hereby certify that I have this 23rd day of October, 2013 served a copy of the foregoing Interrogatories by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

Donald Gist, Esquire
Gist Law Firm
5618 Colonial Drive
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston
And Harold Alston

Adelaide Kline, Esquire
Law Office of Thomas Dougall
1700 Woodcreek Farms Road
Suite 100
Elgin, South Carolina 29045
Attorney for Willow Creek
Construction, Inc. and Oscar Torres

Melinda Owens
Melinda B. Owens
Legal Assistant to G. Thomas Chase

Exhibit 7

mgc | INSURANCE DEFENSE

Reply To
ANGELA W. HOPE
Direct Dial: (864) 239-4011
angela.hope@mgclaw.com

August 28, 2014

CERTIFIED - RETURN RECEIPT REQUESTED
Gainesville Medical Center
14370 Lee Highway
Gainesville, Virginia 20155

RE: Tymika Jones Alston and Harold Alston v. Willow Creek Construction, Inc. and Oscar Torres and Willow Creek Construction, Inc., v. Donald Richard Torres d/b/a DMT Construction Co., Inc., L & L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Date of Incident: ***Incident Date***
Carrier Claim No.: MPI80262
MGC File No.: 20362.11008

Dear Sir or Madam:

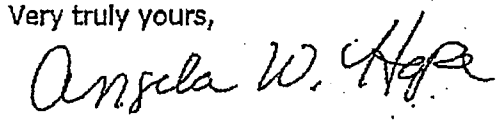
Please be advised that G. Thomas Chase represents Donald Richard Torres d/b/a DMT Construction Co., Inc., in the above-referenced case. Enclosed please find a duly executed Authorization for Release of Medical Records for a complete copy of any medical records, to include copies of any bills, that you have for the Plaintiff, Harold Alston. An Affidavit of Records Custodian is also enclosed, and you are requested to complete and return it with the records. The Affidavit should be signed in the presence of a notary.

Please forward the records to us as quickly as possible. We are happy to reimburse your office for reasonable expenses you incur in photocopying these records. If the records prove to be voluminous and the copying costs will exceed $50.00, do not copy these without calling me to discuss exactly which records we are interested in obtaining. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, we are advising counsel of record that these records have been requested from your office.

Thank you in advance for your cooperation in this matter, and with kind regards, I am

Very truly yours,



Angela W. Hope
Paralegal to G. Thomas Chase

/awh
Enclosures
cc: Donald Gist, Esquire, Gist Law Firm

AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS

TO WHOM IT MAY CONCERN:

I, **Harold Alston,** hereby request and authorize

Gainesville Medical Center
14370 Lee Hwy
Virginia, 20155

to release to any representative of **McAngus, Goudelock & Courie, LLC,** 55 East Camperdown Way, Suite 300, Greenville, South Carolina 29602 all medical records of every nature pertinent in any way to any medical treatment rendered to me, **Harold Alston,** including but not limited to the following:

1. All progress reports and summaries including admission histories and discharge summaries;
2. All clinical records
3. Results of all laboratory tests, including x-rays, CT scans, MRI's and EKG's;
4. Records of prescribed medications and treatments;
5. All correspondence between my doctors or their administrative staffs or the administrative staffs of all hospitals, clinics, or other medical treatment centers where I am, or have been, a patient or from whom I have received medical care;
6. All correspondence from insurance companies or their representatives concerning any claims made on my behalf for medical treatment or for benefits of any nature including, but not limited to, disability benefits, social security benefits, and Veterans Administration benefits;
7. All correspondence of any nature concerning any workers' compensation claims filed on my behalf;
8. All statements rendered for medical services and supplies;
9. All notes, correspondence, or other records of any nature made by my physicians, nurses or other persons concerning me, my condition or my treatment;
10. Copies of x-rays, CT scans and MRI films.

The purpose of the disclosure is at the request of the undersigned individual and this Authorization shall be deemed to comply with the requirements of HIPAA, specifically 45 C.F.R. §164.508. I understand that information disclosed pursuant to this Authorization may be subject to re-disclosure by the recipient and may no longer be protected by Federal law.

This Authorization shall expire upon final resolution of the pending claim. I understand that I may revoke this Authorization at any time by sending written notice to **Gainsville Medical Center,** and **G. Thomas Chase** or **McAngus, Goudelock & Courie, LLC.** However, I understand that revocation will not affect any disclosures made in reliance on this Authorization prior to my revocation.

Charges for copies of all records furnished shall be billed to **McAngus, Goudelock & Courie, LLC.**

A photocopy of the signed original of this Authorization shall be sufficient and acceptable to all persons and entities from whom these records are requested.

This is the 23 day of August, 2014.

Harold L. Alston

Signature: Harold Alston

[redacted]

Address

Date of Birth: [redacted]

Social Security: [redacted]

Treatment, payment, enrollment & eligibility for benefits may not be conditioned on the signing of this authorization. HA A. **(initial here)**

Exhibit 8

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2010CP4004307

Tymika Jones Alston
Harold Alston
PLAINTIFF(S)

Willow Creek Construction Inc
Oscar Torres
DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 1 November 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Deandrea Gist Benjamin
Donald Gist
ATTORNEY(S) FOR THE PLAINTIFF(S)

Thomas Frank Dougall
Gerald Thomas Chase
Adelaide D. Kline
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

RICHLAND COUNTY FILED 2011 NOV -1 AM 9:34 JEANETTE W. McBRIDE C.C.P. & G.S.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON,	)	CIVIL ACTION NO.: 2010-CP-40-4307
Plaintiffs,	)	
vs.	)	
WILLOW CREEK CONSTRUCTION, INC. and OSCAR TORRES,	)	CONSENT ORDER TO STRIKE CASE FROM THE DOCKET PURSUANT TO RULE 40(J) SCRCP
Defendants.	)	
WILLOW CREEK CONSTRUCTION, INC.,	)	
Third Party Plaintiff,	)	
vs.	)	
DONALD RICHARD TORRES d/b/a DMT CONSTRUCTION CO., INC.; L & L ELECTRIC INC., AND EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION,	)	
Third Party Defendants.	)	

RICHLAND COUNTY
FILED
2011 NOV -1 AM 9:30
JEANETTE W. McBRIDE
C.C.P. & G.S.

It appears that Plaintiffs have moved, and defendants have agreed, that the Complaint herein be stricken from the docket pursuant to Rule 40(j), SCRCP, as follows:

1. The parties have the right to move on or before one year of the date of this Order giving ten days notice to all other parties, that this case be restored to the docket.

2. Upon restoration of this case, the case will be returned to the roster with a new civil action number.

3. Upon restoration of this case, the pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action. The parties will not be required to refile pleadings or discovery in this matter.

4. The parties shall be allowed to conduct further discovery during such time as this case is stricken from the docket.

It is therefore ORDERED, ADJUDGED AND DECREED that this case shall be stricken from the docket pursuant to Rule 40(j), SCRCP.

IT IS SO ORDERED.

Judge Alison Renee Lee
Administrative Judge
Fifth Judicial Circuit

October 31, 2011.

Dated: October 31, 2011

Columbia, South Carolina

The parties hereby certify that no other parties have appeared in this action.

WE SO MOVE:

Donald Gist, Esq.
Gist Law Firm
Post Office Box 30007
Columbia, SC 29230

Attorney for Plaintiffs

WE CONSENT:

Thomas F. Dougall, Esq.
Dougall & Collins
1700 Woodcreek Farms Road
Elgin, SC 29045

Attorney for Defendant and Third-Party Plaintiff

WE CONSENT:

G. Thomas Chase (Ltd by permission)

G. Thomas Chase, Esq.
McAngus Goudelock & Courie
Post Office Box 2980
Greenville, SC 29602

Attorney for Third-Party Defendant
Donald Richard Torres

Exhibit 9

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **ANSWER TO AMENDED COMPLAINT (Jury Trial Demanded)**

Defendant, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., answers the Amended Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

FOR A SECOND DEFENSE

2. Defendant would respectfully show each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc. submit the Defendant is improperly named in the litigation. The proper Defendant is DMT Construction Co., Inc. Therefore, Defendant demands that a Second Amended Complaint be prepared naming the proper Defendant and counsel agrees to accept service of the same. In the event that a

ROA 300

Second Amended Complaint is not prepared in the case, Defendant will move to dismiss the action for lack of jurisdiction as well as other available defenses.

FOR A FOURTH DEFENSE

4. As to Paragraph 1, Defendant is without knowledge or information sufficient to admit or deny whether Plaintiffs are citizens and residents of Richland County, South Carolina. Defendant admits, upon information and belief, that Plaintiffs are the owners of real property located at [redacted] South Carolina.

5. As to paragraph 2, Defendant admits [redacted] is the minor child of Plaintiffs and that, upon information and belief, he resides with his parents. Defendant is without knowledge or information sufficient to admit or deny if he resides in Richland County, South Carolina.

6. Defendant qualifiedly admits paragraph 3 in the following particulars: (1) Defendant admits that Willow Creek Construction, Inc. was at the time of the construction of Plaintiffs home and for some period thereafter a corporation organized and existing under the law of the state of South Carolina with its principal place of business in Richland County; and (2) Defendant further admits that Willow Creek Construction, Inc. was in the business of constructing dwelling houses and that the company constructed the residence that is the subject of the action.

7. Paragraph 4 is only qualifiedly admitted in the following particulars: (1) Defendant admits that Oscar Torres is a resident of Richland County, South Carolina; (2) upon information and belief only, Oscar Torres was a partner of Willow Creek Construction, Inc.; (3) Oscar Torres was the site supervisor for the construction of the home at issue on behalf of Willow Creek Construction, Inc. and (4) Willow Creek Construction, Inc. hired, by oral contract,

DMT Construction Co., Inc. to perform certain work as a subcontractor for Willow Creek Construction, Inc. in the construction of the home purchased by Plaintiffs. As to other entities identified in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations inconsistent with or in addition to these qualified admissions.

8. Paragraph 5 is denied based on the improper name of Defendant. Subject to and without waiving this position, Defendant qualifiedly admits that DMT Construction Co., Inc. is a framing subcontractor that was hired by Willow Creek Construction, Inc. to perform certain work in the construction of the home later purchased by Plaintiffs. Defendant admits that Oscar Torres was the site superintendent for Willow Creek Construction, Inc. and that Oscar Torres worked on site with DMT Construction Co., Inc. in the performance of its specific aspect of the construction of the home, including providing instruction and oversight of the work. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations.

9. Defendant submits paragraph 6 is a statement of law requiring neither an admission nor denial.

10. Paragraph 7 is qualifiedly admitted to the extent the allegations relate to the construction of the home ultimately purchased by Plaintiffs. Defendant denies allegations inconsistent with or in addition to this qualified admission.

11. As to paragraph 8, Defendant is without knowledge or information sufficient to admit or deny the allegations.

12. Paragraph 9 is denied, including based on the name of the Defendant. Subject to this response, Defendant qualifiedly admits the paragraph only to the extent that Willow Creek

Construction, Inc., by and through its agent, orally contracted with DMT Construction Co., Inc. to act as a subcontractor for certain work in the construction of the home that was later purchased and is currently owned by Plaintiffs. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations in addition to or inconsistent with these express qualified admissions.

13. Paragraph 10 is denied as to Defendant both as to the name of the Defendant and the content of the paragraph as relates to Defendant. As to the content of the paragraph related to other named entities, Defendant is without knowledge or information sufficient to admit or deny the allegations.

14. Paragraph 11 is denied as relates to Defendant.

15. Paragraph 12 is denied as relates to Defendant.

16. As to Paragraphs 13, 14, 15, 16, 17, 18, and 19, Defendant is without knowledge or information sufficient to admit or deny the allegations.

17. Paragraph 20, including all subparts, is denied by Defendant.

18. As to Paragraph 21, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

19. Defendant submits paragraph 22 is a statement of law, in whole or in part, requiring neither an admission, nor denial. Subject to and without waiving this response, Defendant refers to any contract as the best evidence and denies any allegation inconsistent with or in addition to those provisions.

20. Paragraph 23 is denied.

21. Paragraph 24 is denied.

22. As to Paragraph 25, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

23. Paragraph 26 is denied.

24. Defendant submits paragraph 27 is a statement of law requiring neither an admission, nor denial. To the extent the paragraph may be interpreted to include a statement of fact, those facts are denied.

25. Paragraphs 28 and 29 are denied.

26. As to Paragraph 30, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

27. Defendant submits paragraph 31 is a statement of law requiring neither an admission, nor denial.

28. Defendant denies paragraphs 32 and 33.

29. As to Paragraph 34, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every

previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

30. Paragraph 35 is denied.

31. Paragraph 36 is denied.

32. As to Paragraph 37, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

33. Defendant submits paragraph 38 contains a statement of law requiring neither an admission, nor denial. As to the remainder of the paragraph, it is denied.

34. Paragraphs 39 and 40 are denied.

35. Defendant denies Plaintiffs are entitled to the relief requested in the prayer.

FOR A FIFTH DEFENSE

36. Plaintiff's breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR A SIXTH DEFENSE

37. Plaintiffs lack standing to assert any breach of contract against Defendant because Plaintiffs were not a party to the oral contract between Defendant and Willow Creek Construction, Inc.

FOR A SEVENTH DEFENSE

38. FURTHER ANSWERING SAID COMPLAINT, Defendant alleges, upon information and belief, that any injury and damage sustained by Plaintiff were due to and caused

by the sole and negligent acts or omissions of some other person or persons other than Defendant over whom Defendant neither had nor exercised any authority or control, and, therefore, Defendant is not liable to Plaintiff for any sum whatsoever.

FOR AN EIGHTH DEFENSE

39. Assuming a contract exists between Plaintiffs and Defendant, and the same is denied and expressly contradicted by the evidence, Plaintiff failed to provide Defendant with proper and/or sufficient notice and, therefore, Plaintiff's warranty claims are barred.

FOR A NINTH DEFENSE

40. Defendant pleads the doctrines of laches, waiver and/or estoppel as a complete defense to this claim against Defendant.

FOR A TENTH DEFENSE

41. FURTHER ANSWERING SAID COMPLAINT, Defendant would show that any injuries or damages sustained by Plaintiffs that Plaintiffs allege were caused by an act or omission of this Defendant was either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR AN ELEVENTH DEFENSE

42. Plaintiffs have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR A TWELFTH DEFENSE

43. Defendant would show Plaintiffs failed to give Defendant timely notice of any alleged breach of implied warranty, and therefore, Plaintiffs may not recover against Defendant.

FOR A THIRTEENTH DEFENSE

44. Defendant pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs in the following particulars:

a) In failing to take reasonable and prudent action to maintain the home;

b) In failing to act as a reasonable and prudent homeowner would have under the same or similar circumstances;

c) In failing to properly preserve home warranty bonds;

d) In failing to mitigate damages; and

e) Such other particulars as may be identified in the litigation.

Accordingly, Defendant alleges the negligence and recklessness of Plaintiffs was greater than the negligence, if any, which might be established against Defendant, and therefore Plaintiffs are barred from any recovery in this action. Defendant further alleges any injury and damage sustained by Plaintiffs was due to and caused by the negligence and/or wilfulness of Plaintiffs combining, concurring, and contributing with the negligence and/or wilfulness, if any, on the part of Defendant and, therefore, any amount of recovery awarded to Plaintiffs for the injuries and damages alleged in the Complaint shall be reduced by the Court by the percentage of negligence and/or wilfulness attributed to Plaintiffs.

FOR A FOURTEENTH DEFENSE

45. Defendant asserts that Plaintiff's causes of action against Defendant are barred by the applicable statute of limitations and should be dismissed.

FOR A FIFTEENTH DEFENSE

46. Defendants submit that even assuming Defendants were careless, negligent, grossly negligent, willful, wanton or reckless in any respect, which is expressly denied, and even if any such conduct on their part operated as a greater than 50 percent cause of the damages and the Plaintiff's resulting damages, if any, which is also expressly denied, Defendants are entitled to a determination as to the percentage which the Plaintiff's or other party's negligent, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A SIXTEENTH DEFENSE

47. The Defendant would show the claim for punitive damages cannot be had because any award of punitive damages would violate the Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

WHEREFORE, having fully answered, Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
Bar No: 66452
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR DEFENDANT, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC.

September 2, 2014

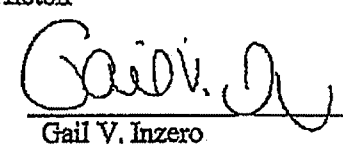
STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **CERTIFICATE OF SERVICE**

I certify that on this date, I have served a copy of Answer to Amended Complaint in this action on counsel of record by

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston

September 2, 2014
Date



Gail V. Inzero
Legal Assistant to G. Thomas Chase

Exhibit 10

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON	)	10-CP-40-04307
Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and	)	PLAINTIFF'S MOTION TO RESTORE CASE TO ACTIVE TRIAL ROSTER
Defendant.	)	

RICHLAND COUNTY
FILED
2012 OCT 11 PM 3:39
JEANNETTE W. McBRIDE
C.C.P. & G.S.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through his undersigned attorney, moves this Court for an Order to Restore this case to the active trial roster. As grounds for this Motion, the Plaintiff would show this Honorable Court the following:

1. That Plaintiff's counsel, with consent of Defendant, moved to have this case stricken from the trial docket pursuant to Rule 40(j), SCRCP, on October 21, 2011, and Judge Alison Renee Lee signed a Consent Order striking this case from the trial roster on October 31, 2011.
2. That pursuant to Judge Lee's October 31, 2011 Order, the parties have the right to move on or before the expiration of one year after the date of the Consent Order striking this case giving ten days notice to all other parties, that this case be restored to the active trial roster.
3. That based on the foregoing, Plaintiff is informed and believes that good cause exists to restore this case to the active docket so that the final hearing can be scheduled and heard.

WHEREFORE, Plaintiff respectfully requests the following:

A. An Order restoring this case to the active trial roster with a new civil action number.

B. That all pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action and that the parties will not be required to refile pleadings or discovery in this matter.

C. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

By: _____

Donald Gist
Gist Law Firm
Attorney for Plaintiff
4400 North Main Street
Columbia, SC 29201
(803) 771-8007

Columbia, South Carolina

October 11, 2012

Exhibit 11

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON	)	10-CP-40-04307
Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC, OSCAR TORRES, and	)	ORDER TO RESTORE CASE TO ACTIVE TRIAL ROSTER
Defendant.	)	

RICHLAND COUNTY
FILED
2012 OCT 11 PM 3:39
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before this court pursuant to a Motion to Restore filed by the Plaintiff. Plaintiff's counsel, with consent of Defendant, moved to have this case stricken from the trial docket pursuant to Rule 40(j), SCRCP, on October 21, 2011. This matter was struck from the active docket on October 31, 2011.

The Plaintiff is requesting that this matter be restored to the active trial roster and that a final hearing be scheduled in this matter.

NOW, THEREFORE, IT IS ACCORDINGLY ORDERED, ADJUDGED, AND DECREED

1. That this matter be restored to the active trial roster with a new civil action number.
2. That all pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action and that the parties will not be required to refile pleadings or discovery in this matter.
3. That a final hearing be scheduled in this matter.

AND IT IS SO ORDERED.

S/ James R. Barber III

Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

10/11, 2012

Exhibit 12

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)

IN THE COURT OF COMMON PLEAS

Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]
Plaintiff(s)

vs.

Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Defendant(s)

CIVIL ACTION COVERSHEET

2010-CP - 40- 04307

RICHLAND COUNTY FILED
2014 AUG 11 PM 1:31
JEANNETTE W. MCBRIDE C.C.P. & G.S.

Submitted By: Donald Gist, Aaron Wallace
Address: 4400 North Main Street, Columbia SC 29203

SC Bar #: 13098/100255
Telephone #: 803-771-8007
Fax #: 803-771-0063
Other:
E-mail: donaldgist@gistlawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☒ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: [signature] Date: 8/8/14

ROA 317

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, & the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR M('DATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenvil Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLIN COUNTY OF RICHLAND	)	IN THE COURT OF COMM N PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON individually and as Parents and Guardians on behalf of their minor child [redacted]	)	2010-CP-40-04307
Plaintiffs,	)	AMENDED SUMMONS
vs.	)	
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction, Defendants.	)	

RICHLAND COUNTY
FILED
2014 AUG 11 PM 1:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO: Above Named Defendants

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon the subscriber at Gist Law Firm, 4400 N. Main Street, P.O. Box 30007, Columbia, South Carolina 29230, within thirty (30) days after the service thereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff shall apply to the Court for a judgment by default against you for the relief demanded in the Complaint.

GIST LAW FIRM

Donald Gist
Aaron Wallace
4400 N. Main Street
P.O. Box 30007 (29230)
Columbia, SC 29203
803.771.8007
803.771.0063 (Fax)
Attorneys for Plaintiffs

August 8, 2014

ROA 320

STATE OF SOUTH CAROLIN COUNTY OF RICHLAND	)	IN THE COURT OF COM(N PLEAS FIFTH JUDICIAL CIRCUIT
TYMIKA JONES ALSTON and HAROLD ALSTON individually and as Parents and Guardians on behalf of their minor child [redacted]	)	2010-CP-40-04307
Plaintiffs,	)	AMENDED COMPLAINT
vs.	)	Jury Trial Requested
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction, Defendants.	)	

RICHLAND COUNTY FILED
2014 AUG 11 PM 1:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

NOW COMES the Plaintiffs, by and through counsel, for their complaint against Defendants and state as follow:

PARTIES & JURISDICTION

1. Plaintiffs Tymika Jones Alston and Harold Alston (hereafter "Plaintiffs") are Citizens and residents of Richland County, State of South Carolina and owners of real property located at [redacted] Richland County, State of South Carolina, the residence which is the subject of this action.

2. Plaintiff [redacted] is the minor child of Plaintiff's Tymika Jones Alston and Harold Alston. Plaintiff [redacted] resides with his parents in Richland County, South Carolina.

3. Upon information and belief, Willow Creek Construction is and at all times mentioned here a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina. Willow Creek Construction is in the business of constructing dwelling houses and constructed the residence which is the subject of this action.

4. Upon information and belief, Oscar Torres is a resident of Richland County, State of South Carolina and is the principal and owner of Willow Creek Construction. Oscar Torres was the residential contractor who built Plaintiff's home and who hired Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction as subcontractors in the building of Plaintiff's home.

5. Upon information and belief, Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction are building subcontractors who acted in concert with and at the direction of Oscar Torres and Willow Creek Construction in the building of Plaintiff's home.

6. Venue is proper in Richland County, State of South Carolina because at least one if not all Defendants maintains an office in Richland County and this action involves real estate in Richland County, State of South Carolina.

FACTUAL ALLEGATIONS

7. This case arises out of the construction of Plaintiffs' house located at [redacted] Richland County, State of South Carolina.

8. Plaintiffs engaged Willow Creek Construction and Oscar Torres to construct their house with due care, in a workmanlike manner, and in accordance with the plans and specifications.

9. Oscar Torres engaged Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction to act as subcontractors in the building of Plaintiff's home.

10. Willow Creek Construction and Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno

Construction completed the hom. _a April 2007. Plaintiffs moved in the l(.e on April 3, 2007.

11. On April 5, 2007, Plaintiffs' noticed that the bedroom wall was wet inside and out from the neighbor's sprinkler. Plaintiffs contacted the Defendants regarding the problem. Oscar Torres came out observed the problem and had the wall sanded and painted.

12. In July of 2007 after a heavy rain and thunderstorm, Plaintiffs once again noticed that the master bedroom wall was wet inside and out. They once again contacted the builder who in turn came back out sanded the wall and repainted it. Defendants resealed the window and told them that everything was fine. At that time Plaintiffs were told by the builder that the problem was cured.

13. During the summer of 2007, Plaintiff Tymika Alston and the Plaintiffs' son, [redacted] and Alston began experiencing medical problems. Specifically, swollen eyes, eye infections, bronchitis, and allergies. Plaintiff Tymika Alston and the minor child had no prior sinus or allergy issues. During this time Plaintiff Harold Alston was working out of the State and was only present in the house during the weekends. After weekend visits home, he would experience irritation in his eyes and sinus and allergy problems.

14. In November 2008, Plaintiffs' concerned about their deteriorating health and the problems that their son was experiencing hired a mold specialist to inspect the home. The Mold Specialist found that mold was airborne though out the house.

15. On December 5, 2008, Plaintiffs received a quote from CBS Builders to make repairs to window and mold treatment.

16. On February 27, 2009, Plaintiffs had the home inspected by Pinpoint Home

and Commercial Inspections. T[illegible] inspection revealed that the bedroom [illegible] low was not the correct window and that it was a vinyl replacement window and was dissimilar from all other windows in the home.

17. On March 8, 2009, Plaintiffs notified the builder in writing of the mold problem and of the problem with the misfit window. The builder responded on March 20, 2009 and Defendant Donald Richard Torres replaced the window on April 16, 2009.

18. After still experiencing significant medical problems, Plaintiffs ordered another inspection in August 2009. The inspection was performed by Southeastern Inspection Services. Numerous deficiencies, code violations and unsatisfactory work was noted. Some interior areas of the home were showing more than 30% moisture readings in the home. The inspector strongly suggested that Plaintiffs move out of the home for health reasons and concerns.

19. On September 1, 2009, Plaintiffs moved out of the house into an apartment. The house has been vacant since that time and inhabitable since that time.

20. Defendant Donald Richard Torres' work was defective in all, but not limited to, the following particulars:

a. By failing to construct the house so as to prevent leaks of water into the interior;

b. By failing to install the proper window in the bedroom;

c. By failing to seal open joints where vertical and horizontal trim intersects with brick veneer;

d. By failing to install a rain diverter along the front roof above the entrance;

e. By failing to install or to properly install flashing at windows and doors;

f. By failing to properly seal the window jambs and heads in the master bedroom and front windows;

g. By failing to seal mounted light fixtures at garage and rear entrance;

h. By failing to investigate his subcontractors to determine if they were competent and capable of performing the work;

i. By failing to adequately supervise the work of his subcontractors;

j. By failing to discover defects in work performed by his subcontractors;

k. By failing to correct the problem regarding the misfit window after being first notified of the water leaking into the interior of the home;

l. By failing to correct defective work.

AS A FIRST CAUSE OF ACTION
(Breach of Contract)

21. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 20.

22. The agreement between Plaintiffs and Oscar Torres and Willow Creek Construction required Defendants to build a dwelling house in accordance with the plans and specifications, applicable building codes industry standards and free from construction and structural defects. Defendant Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction were subcontractors hired pursuant to this agreement.

23. Defendant Donald Richard Torres breached this contract in the particulars previously described and the deficiencies outlined in Southeastern Inspection Services report dated August 11, 2009 and is therefore vicariously liable to Plaintiff

24. As a proximate and foreseeable result of Defendant's breach of contract, Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have also suffered bodily injury, which have caused Plaintiffs, and will cause Plaintiffs in the future, to incur medical expense, to suffer tremendous pain and suffering and to lose time from work and lost wages.

AS A SECOND CAUSE OF ACTION
(Negligence and Negligent Supervision)

25. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 24.

26. Each of the aforementioned Defendants assumed the duties outlined above.

27. Defendants owed Plaintiffs a duty to exercise due care in performing their duties outlined above.

28. Defendants breached these duties in the particulars previously described.

29. As a direct, foreseeable, and proximate result of Defendants' negligence, Plaintiff's have suffered physical damage to their House, as well as diminution in its value, as well as the home being inhabitable and are entitled to recover from the Defendant's all direct, consequential and punitive damages.

AS A THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service)

30. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 29.

31. When the above named Defendant's contracted to construct Plaintiff's residence, Defendants impliedly warranted to Plaintiffs that the house would be constructed in a workmanlike manner, free from defects, and in accordance with the plans and specifications.

32. Defendants breached this implied warranty in the particulars previously described.

33. As a proximate and foreseeable result of Defendants, breach of this implied warranty, Plaintiffs have suffered physical damage to the house, as well as diminution in its value.

AS A FOURTH CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability)

34. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 33.

35. Defendant Donald Richard Torres sold and installed in Plaintiff's house a vinyl replacement window.

36. The window was not merchantable at the time of the sale. As a result water was able to penetrate the interior walls of the house, thus causing moisture and mold. Plaintiffs have suffered physical damage to the House, as well as diminution in its value. Plaintiffs have had to relocate from the home due to the air quality in the home and incur expenses related to the relocation and living expenses.

AS A FIFTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose)

37. Plaintiffs reallege, as if fully set forth, each and every allegation in paragraphs 1 through 36.

38. Defendants at the time of the sale of the defective window had reason to know that Plaintiffs, or those who, for this limited purpose, could act for Plaintiffs, were relying on the skill or judgment of Defendant Donald Richard Torres to furnish a product that was the appropriate window for the house. Plaintiffs relied on Defendants' skill and judgment.

39. The window was not fit to be used in the House, thus causing water to be trapped in the walls of Plaintiff's house and cause moisture and mold throughout the home.

40. As a result of Defendants breach of their implied warranty, Plaintiffs have suffered physical damage to the House, as well as diminution in its value.

WHEREFORE, Plaintiff pray this Court issue an Order granting judgment against Defendants jointly and severally, for the following relief:

1. For actual damages in an amount to be proven at trial;
2. For punitive damages;
3. For prejudgment and post judgment interest on Plaintiffs' damages;
4. For attorneys' fees and cost; and
5. For such other and further relief as this Court deems appropriate.

GIST LAW FIRM

Donald Gist
Aaron Wallace
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P.O. Box 30007 (29230)
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803.771.8007
803.771.0063 (Fax)

Attorneys for Plaintiffs

August 8, 2014

Exhibit 13

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **ANSWER TO AMENDED COMPLAINT (Jury Trial Demanded)**

Defendant, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., answers the Amended Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted is denied.

FOR A SECOND DEFENSE

2. Defendant would respectfully show each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed.

FOR A THIRD DEFENSE

3. Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc. submit the Defendant is improperly named in the litigation. The proper Defendant is DMT Construction Co., Inc. Therefore, Defendant demands that a Second Amended Complaint be prepared naming the proper Defendant and counsel agrees to accept service of the same. In the event that a

LOA 330

Second Amended Complaint is not prepared in the case, Defendant will move to dismiss the action for lack of jurisdiction as well as other available defenses.

FOR A FOURTH DEFENSE

4. As to Paragraph 1, Defendant is without knowledge or information sufficient to admit or deny whether Plaintiffs are citizens and residents of Richland County, South Carolina. Defendant admits, upon information and belief, that Plaintiffs are the owners of real property located at [redacted] South Carolina.

5. As to paragraph 2, Defendant admits [redacted] is the minor child of Plaintiffs and that, upon information and belief, he resides with his parents. Defendant is without knowledge or information sufficient to admit or deny if he resides in Richland County, South Carolina.

6. Defendant qualifiedly admits paragraph 3 in the following particulars: (1) Defendant admits that Willow Creek Construction, Inc. was at the time of the construction of Plaintiffs home and for some period thereafter a corporation organized and existing under the law of the state of South Carolina with its principal place of business in Richland County; and (2) Defendant further admits that Willow Creek Construction, Inc. was in the business of constructing dwelling houses and that the company constructed the residence that is the subject of the action.

7. Paragraph 4 is only qualifiedly admitted in the following particulars: (1) Defendant admits that Oscar Torres is a resident of Richland County, South Carolina; (2) upon information and belief only, Oscar Torres was a partner of Willow Creek Construction, Inc.; (3) Oscar Torres was the site supervisor for the construction of the home at issue on behalf of Willow Creek Construction, Inc. and (4) Willow Creek Construction, Inc. hired, by oral contract,

DMT Construction Co., Inc. to perform certain work as a subcontractor for Willow Creek Construction, Inc. in the construction of the home purchased by Plaintiffs. As to other entities identified in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations inconsistent with or in addition to these qualified admissions.

8. Paragraph 5 is denied based on the improper name of Defendant. Subject to and without waiving this position, Defendant qualifiedly admits that DMT Construction Co., Inc. is a framing subcontractor that was hired by Willow Creek Construction, Inc. to perform certain work in the construction of the home later purchased by Plaintiffs. Defendant admits that Oscar Torres was the site superintendent for Willow Creek Construction, Inc. and that Oscar Torres worked on site with DMT Construction Co., Inc. in the performance of its specific aspect of the construction of the home, including providing instruction and oversight of the work. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations.

9. Defendant submits paragraph 6 is a statement of law requiring neither an admission nor denial.

10. Paragraph 7 is qualifiedly admitted to the extent the allegations relate to the construction of the home ultimately purchased by Plaintiffs. Defendant denies allegations inconsistent with or in addition to this qualified admission.

11. As to paragraph 8, Defendant is without knowledge or information sufficient to admit or deny the allegations.

12. Paragraph 9 is denied, including based on the name of the Defendant. Subject to this response, Defendant qualifiedly admits the paragraph only to the extent that Willow Creek

Construction, Inc., by and through its agent, orally contracted with DMT Construction Co., Inc. to act as a subcontractor for certain work in the construction of the home that was later purchased and is currently owned by Plaintiffs. As to the other named entities in the paragraph, Defendant is without knowledge or information sufficient to admit or deny the allegations. Defendant denies any allegations in addition to or inconsistent with these express qualified admissions.

13. Paragraph 10 is denied as to Defendant both as to the name of the Defendant and the content of the paragraph as relates to Defendant. As to the content of the paragraph related to other named entities, Defendant is without knowledge or information sufficient to admit or deny the allegations.

14. Paragraph 11 is denied as relates to Defendant.

15. Paragraph 12 is denied as relates to Defendant.

16. As to Paragraphs 13, 14, 15, 16, 17, 18, and 19, Defendant is without knowledge or information sufficient to admit or deny the allegations.

17. Paragraph 20, including all subparts, is denied by Defendant.

18. As to Paragraph 21, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

19. Defendant submits paragraph 22 is a statement of law, in whole or in part, requiring neither an admission, nor denial. Subject to and without waiving this response, Defendant refers to any contract as the best evidence and denies any allegation inconsistent with or in addition to those provisions.

20. Paragraph 23 is denied.

21. Paragraph 24 is denied.

22. As to Paragraph 25, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

23. Paragraph 26 is denied.

24. Defendant submits paragraph 27 is a statement of law requiring neither an admission, nor denial. To the extent the paragraph may be interpreted to include a statement of fact, those facts are denied.

25. Paragraphs 28 and 29 are denied.

26. As to Paragraph 30, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

27. Defendant submits paragraph 31 is a statement of law requiring neither an admission, nor denial.

28. Defendant denies paragraphs 32 and 33.

29. As to Paragraph 34, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every

previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

30. Paragraph 35 is denied.

31. Paragraph 36 is denied.

32. As to Paragraph 37, Defendant submits the paragraph contains no allegation of fact requiring an admission or denial. Subject to this response, but to the extent the paragraph may be interpreted to require a response, Defendant reasserts and re-alleges each and every previous defense and response to the preceding allegations as if set forth herein verbatim, where relevant.

33. Defendant submits paragraph 38 contains a statement of law requiring neither an admission, nor denial. As to the remainder of the paragraph, it is denied.

34. Paragraphs 39 and 40 are denied.

35. Defendant denies Plaintiffs are entitled to the relief requested in the prayer.

FOR A FIFTH DEFENSE

36. Plaintiff's breach of contract cause of action is barred by the statute of frauds and should be dismissed.

FOR A SIXTH DEFENSE

37. Plaintiffs lack standing to assert any breach of contract against Defendant because Plaintiffs were not a party to the oral contract between Defendant and Willow Creek Construction, Inc.

FOR A SEVENTH DEFENSE

38. FURTHER ANSWERING SAID COMPLAINT, Defendant alleges, upon information and belief, that any injury and damage sustained by Plaintiff were due to and caused

by the sole and negligent acts or omissions of some other person or persons other than Defendant over whom Defendant neither had nor exercised any authority or control, and, therefore, Defendant is not liable to Plaintiff for any sum whatsoever.

FOR AN EIGHTH DEFENSE

39. Assuming a contract exists between Plaintiffs and Defendant, and the same is denied and expressly contradicted by the evidence, Plaintiff failed to provide Defendant with proper and/or sufficient notice and, therefore, Plaintiff's warranty claims are barred.

FOR A NINTH DEFENSE

40. Defendant pleads the doctrines of laches, waiver and/or estoppel as a complete defense to this claim against Defendant.

FOR A TENTH DEFENSE

41. FURTHER ANSWERING SAID COMPLAINT, Defendant would show that any injuries or damages sustained by Plaintiffs that Plaintiffs allege were caused by an act or omission of this Defendant was either caused by an intervening efficient act, omission or event, or could not be avoided and was an unavoidable accident.

FOR AN ELEVENTH DEFENSE

42. Plaintiffs have failed to mitigate their damages and have incurred damages that were unnecessary or unreasonable in amount. Plaintiffs are, therefore, barred in whole or part from recovery in this case.

FOR A TWELFTH DEFENSE

43. Defendant would show Plaintiffs failed to give Defendant timely notice of any alleged breach of implied warranty, and therefore, Plaintiffs may not recover against Defendant.

FOR A THIRTEENTH DEFENSE

44. Defendant pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiffs in the following particulars:

a) In failing to take reasonable and prudent action to maintain the home;

b) In failing to act as a reasonable and prudent homeowner would have under the same or similar circumstances;

c) In failing to properly preserve home warranty bonds;

d) In failing to mitigate damages; and

e) Such other particulars as may be identified in the litigation.

Accordingly, Defendant alleges the negligence and recklessness of Plaintiffs was greater than the negligence, if any, which might be established against Defendant, and therefore Plaintiffs are barred from any recovery in this action. Defendant further alleges any injury and damage sustained by Plaintiffs was due to and caused by the negligence and/or wilfulness of Plaintiffs combining, concurring, and contributing with the negligence and/or wilfulness, if any, on the part of Defendant and, therefore, any amount of recovery awarded to Plaintiffs for the injuries and damages alleged in the Complaint shall be reduced by the Court by the percentage of negligence and/or wilfulness attributed to Plaintiffs.

FOR A FOURTEENTH DEFENSE

45. Defendant asserts that Plaintiff's causes of action against Defendant are barred by the applicable statute of limitations and should be dismissed.

FOR A FIFTEENTH DEFENSE

46. Defendants submit that even assuming Defendants were careless, negligent, grossly negligent, willful, wanton or reckless in any respect, which is expressly denied, and even if any such conduct on their part operated as a greater than 50 percent cause of the damages and the Plaintiff's resulting damages, if any, which is also expressly denied, Defendants are entitled to a determination as to the percentage which the Plaintiff's or other party's negligent, grossly negligent, reckless and/or willful conduct contributed to this incident and to a reduction of any amount awarded to it by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A SIXTEENTH DEFENSE

47. The Defendant would show the claim for punitive damages cannot be had because any award of punitive damages would violate the Defendant's equal protection and due process rights as guaranteed by the United States and South Carolina Constitutions.

WHEREFORE, having fully answered, Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
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Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR DEFENDANT, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC.

September 2, 2014

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON, Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L & L ELECTRIC INC., AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **CERTIFICATE OF SERVICE**

I certify that on this date, I have served a copy of Answer to Amended Complaint in this action on counsel of record by

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Attorney for Tymika Jones Alston

September 2, 2014
Date

Gail V. Inzero
Legal Assistant to G. Thomas Chase

Exhibit 14

Chronological Time Line

Event	Date
Closing on the Home	April 3, 2007
Water Damage found in Master Bedroom	April 5, 2007
Notified Builders of the Water Damage	April 5, 2007
Builders responded and made the repairs	April 6, 2007
Medical issues started to arise- Tymika, [redacted] and Harold	June 8, 2007
Notified Builders of additional findings	July 23, 2007
Builders responded and made the repairs	July 27, 2007
Notified Builders of additional findings	March 31, 2008
1st Mold Test by Larry Harris- Certified	November 21, 2008
CBS Builders proposal- Window Problem	December 5, 2008
PinPoint Home & Commercial Inspection	February 27, 2009
Notified builder of new findings (MOLD, Window, etc)	March 8, 2009
Builders responded finally	March 20, 2009
Builders 1st choice w/ Oscar onsite	March 25, 2009
Company Rep...window manufacturer onsite	April 8, 2009
Builders replaced the window/ Certified Mold Insp onsite	April 16, 2009
Southeastern Inspection Services, Inc onsite	August 11, 2009
Alston Family vacated the home- [redacted]	September 1, 2009

DOA 341

Exhibit 15

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CASE NO.: 2010-CP-40-04307
	)	
TYMIKA JONES ALSTON AND HAROLD ALSTON	)	MOTION AND ORDER INFORMATION
Plaintiff,	)	FORM AND COVERSHEET
vs.	)	
	)	
WILLOW CREEK CONSTRUCTION, INC., OSCAR TORRES, et. al.	)	
Defendant.	)	

RICHLAND COUNTY FILED
2014 MAY 22 PM 2:15
JEANNETTE W. McBRIDE
C.C.P. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Donald Gist, Bar No. 13098 Address: GIST LAW FIRM, PA, 4400 N. MAIN STREET COLUMBIA, SC 29203 Phone: 803-771-8007Fax 803-771-0063 E-mail: dtommygist@yahoo.comOther: _____	G. Thomas Chase and Thomas F. Dougall, Bar No. _____ Address: G. Thomas Chase - McAngus, Goudelock & Courie, LLC, Post Office Box 2980, 75 Beattie Place, Suite 300 (29601), Greenville, South Carolina 29602 Thomas F. Dougall, Esquire, Dougall & Collins, Woodcreek Farms Road, Elgin, SC 29045 Phone: 864-239-4000 (Chase) and 803-865-8858 (Dougall) Fax803-865-8944 (Dougall) E-mail: tchase@mgclaw.com and, tdougall@dougallfirm.com Other: _____

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

SECTION I: Hearing Information

Nature of Motion: Motion to Add Parties

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

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

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

Signature of Attorney for ☒ Plaintiff / ☐ Defendant 5/22/14 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00

☐ EXEMPT: (check reason)

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

JUDGE'S SECTION

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

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: $ _____

☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND TYMIKA JONES ALSTON and HAROLD ALSTON Plaintiffs, v. WILLOW CREEK CONSTRUCTION, INC., OSCAR TORRES, AND Defendants. WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DONALD RICHARD TORRES d/b/a DMT CONSTRUCTION CO., INC., L&L ELECTRIC INC. and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION Third Party Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 10-CP-40-04307 **PLAINTIFFS MOTION FOR LEAVE TO FILE AMENDED COMPLAINT ADDING PARTIES**

RICHLAND COUNTY
FILED
2014 MAY 22 PM 2:45
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO: Defendant Willow Creek Construction, Inc. and Thomas F. Dougall, Esquire Attorney for Defendant and Third Party Defendant DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, and G. Thomas Chase, Esquire, Attorney for Third Party Defendants

COMES NOW Plaintiffs, by and through the undersigned counsel, and moves for an Order granting leave for Plaintiffs to amend their Complaint to add Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted] as a party Plaintiff to this action pursuant to South Carolina Rules of Civil Procedure 15(a), 19, 20 and 21 and shows grounds as follows:

1. This matter involves mold related injuries which occurred to Harold Alston, Tymika Alston, and their minor child, [redacted] based upon the negligent construction of the family home by Defendants.
2. The parties have displayed due diligence in the pursuit of discovery and have exchanged written discovery responses and documents and also taken the depositions of the Plaintiffs, Defendants, and treating physician in this case.
3. Through the course of the discovery exchange, the Plaintiff's learned of the serious long term injuries sustained by Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted] as a result of Defendant's negligence in this case. The injuries received by [redacted] as a result of Defendant's conduct are documented in the discovery documentation as well as the Deposition Testimony taken in this case. Therefore, Defendant's will suffer no prejudice as a result of this amendment to add [redacted] as a Plaintiff in this case.
4. There were no other means by which Plaintiffs could have gained knowledge of the extent of [redacted] long term medical injuries prior to discovery being taken in this case.
5. The absence of [redacted] as a Plaintiff in this case precludes complete relief from being accorded to the Plaintiffs. The Defendant would not be prejudiced in any way by adding said parties to this action.
6. A party may amend their pleading by leave of court or by written consent of the adverse party and leave shall be freely given when justice so requires and does not prejudice any other party. SCRCP 15(a).

Wherefore, Plaintiffs pray for leave to file an Amended Complaint to add Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted]s a Plaintiff in this action.

Respectfully submitted,

Donald Gist, Esquire
Gist Law Firm, PA
4400 N. Main Street
Columbia, SC 29203
Attorney for Plaintiff

May 22, 2014
Columbia, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2012-CP - 40- 6895R

Tymika Jones Alston and Harold Alston Individually and as Parents and Guardiands on Behalf of Their Minor Child [redacted]

Plaintiff(s)

vs.

Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction

Defendant(s)

Submitted By: Donald Gist, Esquire
Candice Grant, Esquire
Address: 4400 North Main Street
Columbia, South Carolina 29203

SC Bar #: 13098/101948
Telephone #: (803) 771-8007
Fax #: (803) 771-0063
Other:
E-mail: aaronwallace.gistlawfirm@gmail

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

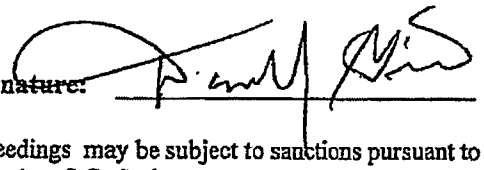
Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☒ Other (699)

  Memo in Opposition to Summary Judgment
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature:  **Date: March 11, 2015**

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

ROA 349

Plaintiff's Memorandum in Opposition to DMT's Motion for Summary Judgment

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]	)	Case No.: 2012-CP-400-6895R
Plaintiffs,	)	Plaintiffs' Memorandum in Opposition to Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment
vs.	)	
Donald Richard Torres d/b/a DMT Construction, Co. Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction,	)	
Defendants.	)	

2012 OCT 11 PM 12:59

I. INTRODUCTION

The Plaintiffs', Tymika Jones Alston, and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted] hereby submits this Memorandum in Response to Defendant, Donald Richard Torres d/b/a DMT Construction, Co., Inc.'s, (herein afterwards referred to as "Defendant") Motion for Summary Judgment. For the reasons set forth herein, the Plaintiffs' respectfully ask this Court to deny Defendant's motion on all grounds pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

II. STATEMENT OF FACTS

A. Defendant was Active Participant in the Original and Amended Lawsuit

On June 29, 2010, Plaintiffs' filed a Complaint against Willow Creek Construction, Inc and Oscar Torres. In the Complaint, Plaintiffs' stated that they engaged Willow Creek Construction and Oscar Torres to construct their house with due care, in a workmanlike manner, and in accordance with the plans and specifications. (Ex: 1 Plaintiffs' Summons and Complaint). Plaintiffs' moved in the house on April 3, 2007, however, on April 5, 2007 Plaintiffs' noticed that the bedroom wall was wet inside and out from the neighbor's sprinkler, and Plaintiffs' contacted Willow Creek Construction regarding the problem. (Ex: 1 Plaintiffs' Summons and Complaint). Oscar Torres, of Willow Creek Construction, had the wall sanded and painted, however after a heavy rain, in July 2007, the master bedroom became soaked with water, both inside and outside, and they had to contact the builder again, who then, after he sanded the wall and repainted it, assured the Plaintiffs' that everything was fine. (Ex: 1 Plaintiffs' Summons and Complaint).

However, in the summer of 2007, Plaintiffs' began experiencing medical problems to include: swollen eyes, eye infections, bronchitis, and allergies, and as a result, in November 2008, they sought a Mold Specialist to inspect the home. (Ex: 1 Plaintiffs' Summons and Complaint). The Mold Specialist found, after the inspection had concluded, that mold was airborne throughout the house, and as a result of this inspection on February 27, 2009, Plaintiffs' had the home inspected by Pinpoint Home and Commercial Inspections, which revealed that the bedroom window was not the correct window, it was a vinyl replacement window, and was dissimilar from all other windows in the home. (Ex: 1 Plaintiffs' Summons and Complaint). Plaintiffs' notified the builder, in writing, of the mold problem and the issue of the window not

being the correct fit, the builder responded on March 29, 2009, and the window was replaced on April 16, 2009. Due to ongoing medical problems, Plaintiffs' ordered another inspection, in August 2009, which found that there were numerous deficiencies, code violations, unsatisfactory work on the house, and interior areas of the home showing more than thirty (30%) percent moisture readings, and, as a result, the Inspector strongly suggested Plaintiffs' move out of the house for health reasons. (Ex: 1 Plaintiffs' Summons and Complaint). On September 1, 2009, Plaintiffs' followed the Inspector's advice and moved out of the house (which has been vacant since that time). Plaintiffs' then filed their Summons and Complaint on June 29, 2010.

On or about March 29, 2011 Willow Creek Construction, Inc. served its Third Party Complaint to the Defendant, and served a copy to the Plaintiff, as shown in the Certificate of Service. (Ex: 2 Willow Creek Construction, Inc.'s Third Party Complaint). On or about June 24, 2011, Defendant served a copy of its Answer to Willow Creek Construction, Inc. and Plaintiffs'. (Ex: 3 Answer to Third Party Complaint). Willow Creek Construction, Inc. Amended its Complaint and served it (to Defendant and Plaintiffs') on or about June 29, 2011, and Defendant Answered the Amended Complaint and served it, on or about, July 8, 2011. (Ex: 4 Willow Creek Construction Inc.'s Amended Third Party Complaint) (Ex: 5 Defendant's Answer to Amended Third Party Complaint). Plaintiffs' state that Defendant was an active participant in the lawsuit by doing the following:

(1) answering both Third Party Complaints,

(2) attending all Depositions conducted by Willow Creek Construction, Inc. and Plaintiffs',

(3) serving Plaintiffs' with Third Party Defendant's Requests for Production of Documents (Ex: 6 Defendant's Certificate of Service for the Defendant's Interrogatories Request to the Plaintiff),

(4) executing Authorization for Release of Medical Records (Ex: 7 Defendant's Request for Plaintiff Harold Alston's Medical Records,

(5) consenting to Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP (Ex: 8 Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP), and

(6) answering Plaintiffs' Amended Complaint (Ex:9 Defendant's Answer to Amended Complaint).

Plaintiffs' filed a Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) on November 1, 2011, which Defendant consented to when he signed the document. (Ex:8 Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP). On October 11, 2012 Plaintiffs' filed a motion to Restore the Case to the active trial roster, and the Court ordered that the case be restored to the roster on the same day. (Ex: 10 Plaintiffs' Motion to Restore Case to Active Trial Roster) (Ex:11 Order to Restore Case to Active Trial Roster). Plaintiffs', on May 22, 2014 filed a Motion for Leave to file an Amended Complaint adding parties. (Ex: 15 Plaintiffs' Motion for Leave to File Amended Complaint Adding Parties). On August 11, 2014 Plaintiffs' filed an Amended Complaint. (Ex: 12 Plaintiff's Amended Complaint). Plaintiffs' state that the Amended Complaint is not a new Complaint because the Amended Complaint arose under the same facts and controversy as the original Complaint, and the Defendant was properly placed on notice of the lawsuit, when it was served with the Third Party Complaint, therefore Defendant has had, and in fact was, participating in discovery concerning this case. (Ex: 2 Willow Creek Construction, Inc.'s Third Party Complaint). Defendant answered the Amended Complaint and served it to the Plaintiffs', on or about September 2, 2014. (Ex: 13 Defendant's Answer to Amended Complaint).

III. STANDARD OF REVIEW

"The circuit court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rwe Nukem Corporation v. Ensr Corporation*, 644 S.E.2d 730, 373 S.C. 190 (S.C. 2007) (quoting Rule 56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). If triable issues exist, those issues must go to the jury for consideration. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991); *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct.App.2000).

IV. LEGAL ARGUMENTS

a. The Statute of Limitations was Tolled, Under Rule 3(b), Once Plaintiffs' filed the Original Summons and Complaint, and the Defendant was Put On Notice When Willow Creek Construction, Inc. Served Defendant with its Third Party Complaint Within the Three Year Statute of Limitations; Further Under Rule 15(c) the Amended Complaint Relates Back to the Original Summons and Complaint

"Under Rule 3(b), the statute of limitations is tolled once the plaintiff files a summons and complaint..." *Hughes v. Water World Waterslide, Inc.*, 442 S.E.2d 584, 585 (S.C. 1994). Here, once the Plaintiffs' served their Summons and Complaint to Willow Creek Construction, on June 29, 2010, and a Third Party Complaint was filed against Defendant, the statute of limitations tolled on June 29, 2010. Further, it was clear, in the Complaint, that part of the issue with the construction of the house came about because of the window, which the Defendant

installed. The Defendant was placed on notice, not on August 18, 2014 when it was served with the Amended Complaint, but the Defendant was placed on notice, on or about March 29, 2011, when Willow Creek Construction Inc. served him with the Third Party Complaint. The chronological time line shows that CBS Builder's proposal of a window problem was identified, on or about December 5, 2008, which means the Plaintiffs' were not put on notice of a window issue until December 5, 2008, and the statute of limitations did not expire until December 5, 2011. (Ex: 14 Chronological Time Line). The Defendant's are attempting to argue that that the Plaintiffs' did not serve Defendant with a "direct action" against him until they were served with the Amended Complaint on August 18, 2014 and therefore the statue of limitations apply. Plaintiffs' disagree based on the above argument that the statute of limitations had not expired because the Defendant's were placed on notice, on or about March 29, 2011,when he was served with a Third Party Complaint, and also based on the fact that under SCRCP 15(c) the Amended Complaint relates back to the original Complaint, which was filed on June 29, 2010.

"Rule 15(c) of the SCRCP, provides as follows: Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." *Hughes*, 442 S.E.2d 584, 585 (S.C. 1994). "An amendment changing the party against whom a claim is asserted relates back if the foregoing provisions is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that she will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *Id.*

to Plaintiffs Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP. Therefore, the Defendant, by and through its actions, as mentioned above, will not be prejudiced in maintaining his defense.

Third, the Defendant knew, or should have known that, but for the Plaintiffs' not knowing that Defendant had installed the defective window, the original Complaint would have included him (Donald Richard Torres d/b/a DMT Construction Co, Inc.) as a Defendant. Plaintiffs' had no knowledge of the fact that Defendant installed the window as they had no direct contact with the Defendant, and Plaintiffs' only dealt with Willow Creek Construction, Inc. However, when the Defendant was served with the Third Party Complaint he was placed on notice that the window, being incorrectly installed, was the issue in the lawsuit, and because he installed the window, he should have known that the action could have directly been brought against him and his company.

Hughes, 442 S.E.2d 584; 586 (S.C. 1994), states that, "In 1991, Federal Rule of Civil Procedure 15(c) was amended to specifically allow amendments naming additional parties based upon federal procedure rather than state law statute of limitations. The committee note on the rule directly states that: this paragraph has been revised to change the result in *Schiavone v. Fortune*, 106 S.Ct. 2379 (1986) (case stated that when the amendment to the pleadings and service on the correct defendant occurred after the running of the statute of limitations, even though within the reasonable time allowed by the Rules for service of process, the amendment was untimely and the action was dismissed), with respect to the problem of the misnamed defendant. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8."

"Although South Carolina has not adopted the 1991 amendment to Fed.R.Civ.P 15(c), we read the original Rule 15(c), SCRCP consistent with the committee's note to amended Fed.R.Civ.P 15(c). Thus, the result in *Schiavone* is inconsistent with our rules. We therefore decline to follow *Schiavone*." *Id.* "Rule 8(f), SCRCP, requires that '[a]ll pleadings shall be so construed to do substantial justice to all parties.' We agree with the committee note on amended Fed.R.Civ.P 15(c) that Rule 8(f), SCRCP, is applicable and that the rules should be liberally construed." Here, the Defendant appears make an argument similar to the Defendant in the *Schiavone v. Fortune* case concerning the Amended Complaint. However, the South Carolina Supreme Court has clearly rejected the holding in the *Schiavone* case, as mentioned above, and cited that it went against the *Schiavone* case because it was inconsistent with the SCRCP. Just as the Court in the *Hughes* case held, the Plaintiffs' state that the Court should dismiss the Defendant's Motion for Summary Judgment because Plaintiffs' have met all of the requirements of Rules 3(b) and 15(c).

Similarly, in *Thomas v. Grayson*, 456 S.E.2d 377 (S.C. 1994), the South Carolina Supreme Court stated that, "Rule 15(c), SCRCP provides in pertinent part as follows: '[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Here, as mentioned above, the claim asserted in the Amended Complaint arose out of the conduct, transaction or occurrence set forth in the original pleadings, therefore the Amended Complaint relates back to the date of the original pleading.

"The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations." *Id.* See *Hiers v. Mullens*, 425 S.E.2d 57 (Ct.App.1992). "Rule 15(c) is based on

the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment or defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." *Id.* Here, based on the concept stated in the *Thomas* case, because the claims, from the Amended Complaint, made by Plaintiffs' arose out of the same conduct, transaction, or occurrence, from the original pleading, the Defendant is not entitled to the protection of the statute of limitations against the Amended Complaint. The Plaintiffs', therefore, respectfully request that the Court dismiss the Defendant's Motion for Summary Judgment based off of the fact that Plaintiffs' have met Rules 3(b) and 15(c), and further, the Amended Complaint relates back to the original Complaint, which was timely filed.

b. The Defendant, When He Intentionally Participated in the Discovery Process of the Lawsuit, Waived the Defense of the Statute of Limitations Because Had the Actual Knowledge of His Right to Argue That the Statute of Limitations Expired Before He Chose to Participate In The Discovery Process

The Plaintiffs' state that because the Amended Complaint relates back to the original Complaint under Rule 15(c), Defendant should have argued the Statute of Limitations defense before the discovery process began. Instead, Defendant participated in all stages of the discovery process (to include requesting Interrogatories and Production of Documents from Plaintiffs', participating in all depositions, attending mediation, attending the walk through of the Plaintiffs'. house to inspect it, and further Defendant failed to object to the Plaintiffs' Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP, filed on November 1, 2011, and Defendant failed to object when the Plaintiffs' filed a Motion to Restore the Case to the Active Trial Roster, on October 11, 2012). The Plaintiffs' contend that at any time, during the above mentioned stages of the discovery process, Defendant could have asserted his right to the Statute

of Limitations defense, and because he failed to do so, he waived his right to argue the Statute of Limitations defense.

"A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 415 S.E.2d 384, 387-388 (S.C. 1991). Here, the Defendant clearly had both actual and constructive knowledge of his right to argue the Statute of Limitations, before the discovery stage, and the fact that Defendant failed to argue the defense of Statute of Limitations, within a reasonable time frame, shows a voluntary and intentional abandonment or relinquishment of his right to argue the Statute of Limitations. In the alternative, Plaintiffs' filed on May 22, 2014, a Motion for Leave to file an Amended Complaint Adding parties, which placed the Defendant on notice that Plaintiffs' were Amending their Complaint, however, the Defendant did not object to the motion, and he failed to argue the statute of limitations defense at that time (it took approximately eight months before Defendant filed his Motion for Summary Judgment). (Ex: 15 Plaintiffs' Motion for Leave to File Amended Complaint Adding Parties). Further, Plaintiffs' state that the Defendant was served with the Amended Complaint, on or about August 11, 2014, and even using the Amended Complaint date, Defendant still waived his right to assert the Statute of Limitations because of his lack of arguing the defense in a timely manner. The Defendant's decision to consent to strike the case from the docket under Rule 40(J), and his failure to object when the Plaintiffs' filed a Motion to

Restore the Case to the Active Trial Roster, on October 11, 2012, proves that the Defendant waived his right to argue the Statute of Limitations as a defense.

In *Anonymous Taxpayer v. Dept. of Revenue*, 661 S.E.2d 73, 80 (S.C. 2008), the Court stated that, "a party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense." Here, the Defendant's actions, as mentioned above, are inconsistent with his intent to use the statute of limitations defense. Similar to the *Rwe Nukem Corporation v. Ensr Corporation*, 644 S.E.2d 730, 734 (S.C. 2007) case where the Appellant continued to comply with the Respondent's request, the Defendant, in this case, continued to comply with the Plaintiffs' request, and sent requests out to the Plaintiffs' to which the Plaintiffs' responded. The Defendant, in this case, went further than the Appellant in the *Rwe Nukem Corporation* case by actively participating in the discovery process, attending the walk through of Plaintiffs' house when it was inspected, and consenting to the Rule 40(J) motion, as well as answering the Plaintiffs' Amended Complaint, which Plaintiffs' received on or about September 2, 2014.

"Waiver is a question of fact for the finder of fact." *City of North Myrtle v. Lewis-Davis*, 599 S.E.2d 462 (S.C.App.2004). The Plaintiffs' have pled sufficient facts to argue that the Defendant's actions have been inconsistent with the intention to insist upon the statute of limitations. There is also a genuine issue as to whether or not the Defendant waived his right to argue the statute of limitations, and because waiver is a question of fact, the Court must deny the Defendant's Motion for Summary Judgment; as such, the case should be heard in front of a jury.

date the lawsuit was filed to the original Complaint and not the Amended Complaint), and in failing to make his argument in an earlier stage of the lawsuit, the Defendant should not be allowed to argue the defense, of statute of limitations, this late into the lawsuit.

The Defendant's delay in arguing the statute of limitations defense is unreasonable. The Plaintiffs' state that the Defendant only asserted this defense after Willow Creek Construction, Inc. was dropped from the lawsuit, and but for Willow Creek Construction, Inc. being dropped from the lawsuit, the Defendant would not have filed a Summary Judgment motion. The Defendant has had, in his possession, the same knowledge and material he had during, and after the discovery phase, to include the dates when the original lawsuit, Third Party lawsuit, and the Amended Third Party lawsuit were filed. The Defendant participated in all stages of discovery, attended depositions, a mediation, and a walk through of the Plaintiffs' house, and at no time, did the Defendant find it necessary to bring up the defense of the statute of limitations.

The SCRCP, under Rule 15(a) states that; "a party may amend his pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires and does not prejudice any other party." *Parker v. Spartanburg Sanitary Sewer Dist.*, 607 S.E.2d 711, 720 (S.C.App.2005). The Defendant had an opportunity to argue against the consent for removing the case from the roster under Rule 40(J) and he could have argued against having the case restored to the active trial roster, but he failed to make any objection. In fact, the Order to Restore the Case to Active Trial Roster states that, "all pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action and that all parties WILL NOT be required to refile pleadings or discovery in this matter." The Defendant knew, that under Rule 40(J) the Plaintiffs' would have the opportunity to place the case back on the active trial roster, and he failed to argue the statute

of limitations defense. The Defendant had another opportunity to argue the defense after he was placed on notice that the order to place the case back on the active trial roster was granted. Yet, Defendant continued to participate in the discovery process of the case, until Willow Creek Construction Inc. was dropped from the lawsuit.

The fact that the Defendant waited until Willow Creek Construction Inc. was dropped from the lawsuit is unreasonable delay because it is beyond what can be accepted, inappropriate, excessive, and harmful to the Plaintiffs' to a degree. Further, Plaintiffs' filed the Amended Complaint on August 11, 2014 and the Defendant did not file the Motion for Summary Judgment until January 2, 2015, approximately (5) five months after the Amended Complaint was filed with the Clerk of Court. Since that time, the Defendant filed an Answer to the Amended Complaint and served it on the Plaintiffs', on or about September 2, 2014. Plaintiffs' state that this timeframe is also unreasonable and the Defendant's Motion for Summary Judgment should be dismissed under the Doctrine of Laches.

Finally, the Plaintiffs' would be prejudiced, under the Doctrine of Laches, if the Defendant were granted the Motion for Summary Judgment based on the statute of limitations, because Plaintiffs' have engaged with the Defendant in the discovery process, they have incurred costs in preparation for trial, they hired expert witnesses to inspect the house in preparation for trial against the Defendant, and the Plaintiffs' have incurred attorney's fees in having to respond to the Defendant's discovery requests. Plaintiffs' state that allowing the Defendant to use the statute of limitations as a defense would be of a serious disadvantage to them based on the issues listed above and hereby request that the Court dismiss the motion for Summary Judgment based on the Doctrine of Laches.

V. CONCLUSION

The Plaintiffs' have presented genuine issues of fact that should be decided by a jury. The Plaintiffs' have also provided the Court with sufficient evidence to show that the statute of limitations did not expire because, under SCRCP 15(c), the Amended Complaint relates back to the original Complaint. The Doctrine of Laches prevents the Defendant from arguing the statute of limitations, because he failed to seasonably assert his defense, and Defendant's actions clearly waived their right to a defense of the statute of limitations, because he was an active participant throughout the lawsuit and discovery process. For the foregoing reasons, the Plaintiffs' claim should succeed as a matter of law, and the Court should deny the Defendant's motion for summary judgment. Plaintiffs' also reserve the right to supplement their Memorandum in Response to the Motion for Summary Judgment.

Respectfully Submitted:

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Candice Grant, Esquire (SC Bar # 101948)
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Attorneys for Plaintiffs

March 11, 2015
Columbia, South Carolina

Stipulation of Dismissal with Prejudice by Willow Creek Construction

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON Plaintiffs, vs. WILLOW CREEK CONSTRUCTION, INC. AND OSCAR TORRESS, Defendants, And WILLOW CREEK CONSTRUCTION, INC., Third-Party Plaintiff, Vs. DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Third-Party Defendants.	)	Civil Action No. 2012-CP-40-6895R **STIPULATION OF DISMISSAL WITH PREJUDICE BY WILLOW CREEK CONSTRUCTION, INC.**

RICHLAND COUNTY
FILED
2014 SEP 29 AM 11:06
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Pursuant to Rule 41(a) of the *South Carolina Rules of Civil Procedure*, Willow Creek Construction, Inc., Third-Party Plaintiff in the above-captioned case, by and through the undersigned counsel, hereby dismisses its case against DMT Construction Co., Inc., Third-Party Defendant, with prejudice. Third-Party Defendant DMT Construction Co., Inc., consents to this dismissal with prejudice. The parties agree to bear their own respective costs.

WE SO STIPULATE:

DOUGALL & COLLINS

Thomas F. Dougall, Esquire
1700 Woodcreek Farms Road
Elgin, South Carolina 29045
(803) 865-8858

ATTORNEYS FOR WILLOW CREEK CONSTRUCTION, INC.

Date: 8 Sept. 2014

WE CONSENT:

McANGUS, GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEY FOR THIRD-PARTY DEFENDANT DMT CONSTRUCTION CO. INC.

Date: 9/15/2014

Defendant DMT's Motion for Summary Judgment

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted]

Plaintiff(s)

vs.

Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction

Defendant(s)

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

C/A No: 2012-CP-40-6895R

Plaintiff's Attorney:	Defendant's Attorney:
Donald Gist, Esquire Bar No. Address: 4400 North Main Street Columbia, South Carolina 29203 phone: (803) 771-8007 fax: (803) 771-0063 e-mail: donaldgist.gistlawfirm@gmail.com other:	G. Thomas Chase, Bar No. 66452 Address: McAngus, Goudelock & Courie, LLC Post Office Box 2980 55 East Camperdown Way, Suite 300 (29601) Greenville, South Carolina 29602 (864) 239-4000 Direct number: (864) 239-4008 Fax: (864) 242-3199 e-mail: tchase@mgclaw.com other:

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

RICHLAND COUNTY FILED 2015 JAN -2 PM 4:07 JEANNETTE W. MCBRIDE C.C.P. & G.S.

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION

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

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: Metts

Date Filed: 1-2-15

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **DEFENDANT DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC.'S MOTION FOR SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
2015 JAN -2 PM 4:07
JEANNETTE W. McBRIDE
C.C.P. & G.S.

The Defendant, Donald Richard Torres d/b/a DMT Construction Co., Inc. ("Defendant"), hereby moves the Court for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting Defendant summary judgment in the above-captioned matter on the grounds that the statute of limitations expired on any potential cause of action against Defendant prior to the Complaint against Defendant being filed and, therefore, the Defendant is entitled to judgment as a matter of law. Plaintiffs claim they suffered from property damage and personal injury arising out of alleged negligent work performed by Defendants in the construction of a home. Under South Carolina law, Plaintiffs had three years within which to bring their claim against Defendant under the statute of limitations. S.C. Code §15-3-530 and §15-3-535 (1976, as amended). Plaintiffs failed to bring an action against Defendant within three years of the time they knew they had a cause of action against Defendant and, therefore, their claim against Defendant is barred as a matter of law.

ROA 367

Plaintiffs purchased a home located at [redacted] in Blythewood, South Carolina and moved in on or about April 3, 2007. Plaintiffs claim they began having problems with the construction of the home, including, but not limited to, water intrusion and physical health-related reactions, almost immediately. By March of 2009 Plaintiffs admittedly were aware of allegedly major problems with the construction of the home, including, but not limited to, alleged water intrusion issues, window issues and alleged related health issues. Willow Creek Construction, Inc. was the general contractor in the construction of the home. DMT Construction Co., Inc. was hired as a subcontractor by Willow Creek Construction, Inc. to perform framing in the construction of the home. Plaintiffs knew Defendant was a subcontractor in the construction of the home.

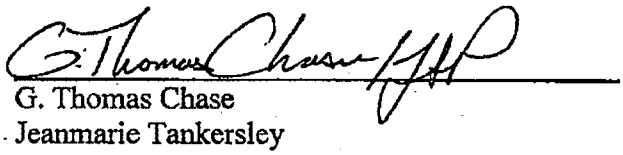
Plaintiffs filed a Complaint against Willow Creek Construction, Inc. and Oscar Torres on June 29, 2010. Willow Creek Construction filed an Answer to the Complaint. Willow Creek Construction, Inc. filed a third-party action against Donald Richard Torres d/b/a DMT Construction Co, Inc. on April 11, 2011, as a subcontractor in the construction of the home. Donald Richard Torres d/b/a DMT Construction Co., Inc. answered the Third-Party Complaint on June 24, 2011. An Amended Third-Party Complaint was filed by Willow Creek Construction, Inc. against Defendant on June 30, 2011. Defendant Answered on July 8, 2011. However, Plaintiffs did not file an action against Defendant Donald Richard Torres and/or DMT Construction Co, Inc. until August 11, 2014. The Amended Complaint with the direct action against Defendant was served on August 18, 2014. Defendant filed an Answer to the Amended Complaint, including the defense of the expiration of the statute of limitations.

Because Plaintiffs failed to initiate an action against Defendant within three years after they knew or by the exercise of reasonable diligence should have known that they had a cause of

action, the action by Plaintiffs against Defendant is barred by the statute of limitations. Therefore, the case against Defendant must be dismissed as a matter of law.

Defendant's Motion is based upon the pleadings, discovery, affidavits, exhibits, deposition transcripts, other admissible evidence as well as the applicable common law and statutory law, and a memorandum in support of this motion which will be submitted to the court. Defendant submits the following the Exhibits with this motion, but reserves the right to supplement with additional exhibits: (1) Deposition Excerpts Tymika Jones Alston; (2) Deposition Excerpts Harold Alston; (3) Report Pinpoint Home & Commercial Inspections, LLC 2/27/2009; (4) Title to Real Estate; (5) Report Classic Systems, LLC 11/21/2008; (6) Southeastern Inspection Services, Inc. report 8/11/2009; (7) Proposal CBS Builders; (8) Report Larry Harris 7/6/2009; (9) Notice of Complaint to South Carolina Labor, Licensing and Regulation 10/6/2010; (10) South Carolina Labor, Licensing and Regulation Inspection Report 1/21/2011; and (11) Chronological Time Line from Plaintiffs.

McANGUS GOUDELOCK & COURIE, L.L.C.



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January 2, 2015

ROA 369

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **CERTIFICATE OF SERVICE**

RICHLAND COUNTY
FILED
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C.C.P. & G.S.

I certify that on this date, I have served a copy of Motion for Summary Judgment in this action on counsel of record by

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed and via Facsimile, as follows:

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Attorney for Tymika Jones Alston

January 2, 2015
Date

Barbara B. Hanna for
Melinda B. Owens
Legal Assistant to G. Thomas Chase

EXHIBIT 1

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

2010-CP-40-04307

TYMIKA JONES ALSTON and HAROLD ALSTON,	WILLOW CREEK CONSTRUCTION, INC.; and OSCAR TORRES,
PLAINTIFFS,	THIRD-PARTY PLAINTIFFS,
VS.	VS.
WILLOW CREEK CONSTRUCTION, INC.; and OSCAR TORRES,	DONALD RICHARD TORRES, d/b/a DMT CONSTRUCTION, CO., INC.; L&L ELECTRIC, INC.; and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION,
DEFENDANT.	THIRD-PARTY DEFENDANTS.

DEPOSITION OF TYMIKA JONES ALSTON, TAKEN BEFORE DIANE GRUBOWSKI, A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 10:15 A.M., JULY 27th, 2011, AT THE LAW OFFICES OF THE GIST LAW FIRM, 4400 NORTH MAIN STREET, COLUMBIA, SOUTH CAROLINA.

COPY #071311

REPORTED BY DIANE GRUBOWSKI

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REPORTED BY: DIANE GRUBOWSKI

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EXHIBITS

DEFENDANT'S EXHIBIT #1, Copies of medical work-ups, various dates
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DEFENDANT'S EXHIBIT #2, Copy of a consultation note from Carolina Allergy and Asthma Consultants, dated 7/25/2008
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DEFENDANT'S EXHIBIT #3, Copy of a letter dated 4/30/2009 from Robert A. Vande Stouwe to Tymika Jones
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PLAINTIFF'S EXHIBIT #1, Copy of a letter dated 8/22/2008 from Robert A. Vande Stouwe to Sean D. Fuller
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PLAINTIFF'S EXHIBIT #2, Copy of a document entitled "Mold Screening Report" dated 11/30/2008 with attached document entitled "Acceptable Ranges Graph"
(3 PAGES) ---------- 144

PLAINTIFF'S EXHIBIT #3, Copy of a letter dated 8/11/2009 from G. Allen Moore to Mr. and Mrs. Harold Alston, with attached statement
(5 PAGES) ---------- 150

1 THE READING AND SIGNING OF THIS DEPOSITION IS
2 WAIVED BY THE DEPONENT AND COUNSEL FOR THE
3 RESPECTIVE PARTIES.
4 WHEREUPON,
5 TYMIKA JONES ALSTON, BEING DULY SWORN AND
6 CAUTIONED TO SPEAK THE TRUTH, THE WHOLE
7 TRUTH, AND NOTHING BUT THE TRUTH, TESTIFIED
8 AND DEPOSED AS FOLLOWS:
9 EXAMINATION
10 BY MS. KLINE:
11 Q Ms. Alston, I'm Adelaide Kline. We met --
12 A Yes.
13 Q -- before your deposition started.
14 A Yes.
15 Q I represent, in this lawsuit, defendants
16 Willow Creek Construction, Inc. and Oscar Torres.
17 Do you know Willow Creek Construction, Inc.?
18 A Yes.
19 Q Do you know Oscar Torres?
20 A Yes.
21 Q We'll talk about that in just a little bit.
22 The Rules of South Carolina Civil Procedure
23 require that I give you some ground rules --
24 A Okay.
25 Q -- and I would like to do that. The purpose

A Uh-huh.

Q And your Social Security number?

A It's [redacted]

Q And your present address?

A [redacted] and that's Columbia, South Carolina, 29229.

Q How long have you lived at [redacted]

A It's going up on almost two years.

Q Where were you born?

A I was born in Charlotte, North Carolina.

Q What is your date of birth?

A It's [redacted]

Q Prior to [redacted] where did you live?

A We resided at [redacted] that's Blythewood, 29016.

Q How long did you live at [redacted]?

A Approximately, around almost two years; almost two years.

Q Could you give me those dates?

A We moved in probably around the first week of April of '07, and we moved out -- I think it was around September of '09, I believe.

Q Did you own or rent the home on [redacted]

RDA 376

1 [redacted] in Blythewood?
2 A We were owning it; buying it.
3 Q Do you still own the property?
4 A Yes. Yes.
5 Q Are you still making mortgage payments?
6 A Yes.
7 Q Why did you leave [redacted]?
8 A After an inspection, we were advised by our
9 inspector to move out, due to the issues that we
10 were experiencing in the home.
11 Q And we're going to get into those --
12 A Okay.
13 Q -- more specifically, but could you just sort
14 of give me a general idea?
15 A As far as?
16 Q You said "issues" that you were having within
17 the home.
18 A Yeah. Yeah. We were experiencing a lot of
19 health issues. I was -- my son and I both were
20 having a lot of upper respiratory issues. I was
21 going back and forth to the doctor and had been
22 diagnosed with bronchitis. My son had pneumonia
23 and now he's -- long term, has asthma. We both
24 have -- have had ear infections, recurrent ear
25 infections, a lot of eye infections. They

1 diagnosed me with conjunctivitis, which is
2 inflammation of the eyes.
3 MR. GIST: (TO MS. ALSTON) Don't go so fast.
4 MS. ALSTON: Okay.
5 Q Okay. I have health issues, upper
6 respiratory, bronchitis; your son had pneumonia,
7 recurrent ear infections. Both, or just --
8 A Both of us had those.
9 Q Both, and eye infections. You?
10 A Both.
11 Q "Both." What was next?
12 A And that was the bulk of it. I mean, that's
13 what we've been experiencing from the time we
14 moved in the home until now.
15 Q The kind of -- what kind of cladding is on
16 your home in Blythewood? The cladding, what's --
17 is it brick?
18 A Oh, okay. I didn't understand. Okay. It's
19 vinyl, and --
20 Q Vinyl siding?
21 A -- some brick in the front, but it's mostly
22 vinyl.
23 Q Are you married, Ms. Alston?
24 A Yes.
25 Q To whom are you married?

1 drops. I take the [redacted]
2 Q Would you spell that for me?
3 A Yes. [redacted]
4 Q Okay.
5 A I take another one. I don't use them -- I
6 have to kind of use them not together, but the
7 next one is [redacted] and another
8 one is [redacted] and I have one
9 more, I think. It's -- actually, I have taken --
10 and I only take it as prescribed. It's
11 [redacted] excuse me. It's [redacted]
12 [redacted], I believe.
13 Q Okay.
14 A I think those are all the ones, I believe.
15 Q The four medications for eye drops -- what's
16 wrong with your eyes, Ms. Alston?
17 A They diagnosed me with conjunctivitis.
18 Q Who diagnosed you and when?
19 A I've been diagnosed by three doctors. My
20 first diagnosis was Columbia Eye Clinic.
21 Actually, Dr. Sean Fuller did, also -
22 Q When did you --
23 A -- my medical doctor.
24 Q -- get diagnosed at Columbia Eye Clinic with
25 conjunctivitis?

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A Maybe around '09. I'm not sure of the month. It was in '09, I believe, and actually, I think Dr. Sean Fuller may have diagnosed me earlier than that. I was thinking they did it, but I think he did maybe in '08. I'm not really sure. Maybe around '08, and my allergist, she diagnosed me, as well, Dr. Hutto.

Q Do you remember when she would have diagnosed you?

A I started going to her, I think, around in '09, so I would say maybe '09.

Q Okay.

A I'm trying to guess these dates.

Q Any other medications?

A I sometimes take [redacted], that's not -- I take it sometimes, but I was just letting you know all the ones I take.

Q Would you spell that, please?

A [redacted]

Q What do you take [redacted] for?

A It's supposed to control -- help with weight loss, if you want to lose weight, or -- that's it.

Q Anything else?

A I'm trying to think. I also have to do

1 respiratory problems?
2 A No, ma'am.
3 Q So you use your eye drops in his eyes when
4 they're red?
5 A Well, no. He got his own eye drops.
6 Q He has his own?
7 A Yes, ma'am.
8 Q When was [redacted] diagnosed with upper
9 respiratory issues?
10 A When we moved in our home in '07, around June
11 '07.
12 Q When was he diagnosed with walking pneumonia?
13 A All that was around June '07.
14 Q Had he ever been sick before then?
15 A No. He was healthy.
16 Q Ms. Alston, do you plan to call any doctors
17 as experts in this case, if it goes to trial?
18 A Yes.
19 Q Tell me who they would be, please.
20 A Dr. Hutto, my allergist.
21 Q What do you expect Dr. Hutto to say?
22 A I don't know what she would say. It depends
23 on what you guys ask, I assume. I mean, she
24 would give the information that she has on my
25 condition and my diagnosis. I guess it would be

ROA 381

1 who we have already mentioned, Dr. Vande Stouwe.
2 What does Dr. Vande Stouwe have -- what does he
3 treat you for?
4 A For allergy. Well, I went to him and found
5 out I had -- that it was allergies, but yeah.
6 That's it. He treated me for allergies.
7 Q When did you first start seeing Dr. Vande
8 Stouwe?
9 A I went to him, I believe, in '08, around '08.
10 Q Why did you go to Vande Stouwe in '08?
11 A Because after then, my doctor, Dr. Fuller, I
12 was having these issues recurrent and he made --
13 suggested for me to go see an allergist and that
14 was one of the ones that he had, that he used, he
15 referred.
16 Q You were having recurrent bronchitis?
17 A Was having issues like the eye infections
18 and, you know, upper -- ear infections and, yeah,
19 the same symptoms, bronchitis.
20 Q What did Dr. Vande Stouwe tell you?
21 A He did a testing and he said that I was -- I
22 didn't test -- have any positive reactions to
23 anything, but he said an irritant to mold.
24 Q So, as to the testing, you didn't have any
25 positive reactions, but he named --

1 sinusitis or something, and that's dealing with
2 your head, ear, nose and throat. That's what I'm
3 leaning towards because I know --
4 Q Do you have sinusitis often?
5 A Yes. That's -- yes. I didn't -- remember
6 that's -- it's like a combination of all those
7 things. Yeah, they do diagnose me with
8 sinusitis.
9 Q These are the medical records that came from
10 Doctor's Care, and [redacted] is your birthday?
11 A Yes, ma'am.
12 Q We'll ask Mr. Alston about that one.
13 A Okay.
14 Q Sandhills Pediatrics Northeast are listed as
15 witnesses on your witness list, Ms. Alston.
16 Would they have treated your son?
17 A Yes.
18 Q We are going to go through some of these
19 medical records in just a minute, but I want to
20 get through this witness list first.
21 A Okay.
22 Q Have they always been [redacted] doctors?
23 A Since he's been in Columbia, South Carolina.
24 Q How long has that been?
25 A April '07.

1 Q -- the pediatrician's name?
2 A Yeah.
3 Q Columbia Eye Clinic. I think you have
4 testified that they diagnosed conjunctivitis, and
5 that they -- are they still treating you?
6 A I go to them sometimes when -- yes, I do go.
7 Q Who do you see there?
8 A Whoever they have available. It's a group.
9 The last time, I saw Dr. Johnson, I believe.
10 Q Another person who is listed on your witness
11 list is Mr. Tim Jacobsen, Inspector, Pinpoint
12 Home and Commercial Inspections, from Lexington.
13 What did Mr. Jacobsen do?
14 A He came out to our home to do a home
15 inspection.
16 Q This was after you moved in or before you
17 moved in?
18 A After.
19 Q Why did you have a home inspection after you
20 moved in?
21 A Well, it was as a result of us getting sick
22 and I felt like something wasn't right in the
23 home, and I just suggested to have an inspection
24 because I felt something wasn't right in the
25 home. I just thought we needed to get -- just to

ROA 384

1 rectify that problem.
2 Q Mr. Harris is next. He is Classic Systems,
3 LLC?
4 A Yes.
5 MS. KLINE: Could you by any chance get your
6 hands on that one? You have less papers than
7 I do. I've got it, but I thought you could
8 pull it out faster.
9 MR. NEWELL: The Southeastern Services
10 inspection?
11 MS. KLINE: Classic Systems.
12 MR. GIST: It should be here. I have it
13 here.
14 THE EXAMINATION BY MS. KLINE CONTINUES.
15 Q I was really looking for the date. 11/21/08.
16 So 11/21/08 is when Mr. Harris came out. Would
17 that have been the same day that Mr. Torres came
18 and replaced the window?
19 A Mr. Harris came out on a couple of occasions.
20 Q Okay.
21 A So I'm -- I don't -- that may have been his
22 first time coming out. I'm not sure.
23 Q That's the date of his report, so that may
24 not be the day he came out. On 11/21/08, "we
25 performed an IAQ/Mold Inspection at 866 Forrest

ROA 385

1 check out everything.
2 Q How long after you lived there did you call
3 Pinpoint Home and Commercial Inspections?
4 A I'm trying to think was it -- I'm not sure.
5 I don't have -- '08, '09, something like that.
6 I'm not sure.
7 Q How long --
8 A It was '08 or '09, because my husband handled
9 that part of it, but yeah.
10 Q How did you choose Pinpoint Home and
11 Commercial Inspections?
12 A Just looked in the Yellow Pages.
13 Q What did Mr. Jacobsen tell you?
14 A He -- one thing that he told us, I know that
15 in my master bedroom there was a window that he
16 said that wasn't -- it looked like it shouldn't
17 have been installed in the home, and he found
18 some other citations. I believe it's in the
19 paperwork, but he -- he had gone through
20 different -- throughout the home and he told us
21 different things that he saw. There was a few
22 other things, like with our sinks and mold was
23 there. It was some malfunctions with the sink in
24 the kitchen. I think it also was some things
25 with the toilets. Around the toilets, something

1 Hill Road, Saluda, South Carolina," is what his
2 report says.
3 A It must be wrong. He must have put the wrong
4 information in there.
5 Q It was addressed to Harold and Tymika Alston,
6 [redacted] South
7 Carolina 29016, 11/21/08, but he references that
8 he performed this mold inspection at [redacted]
9 [redacted]
10 A Yeah. He -- I think -- I think -- I'm pretty
11 sure -- I remember -- recall telling him that he
12 had the wrong information. He said he was going
13 to send it. You don't see an updated one where
14 he put the right address because we had mentioned
15 it to him. I think he put the wrong information.
16 He says he had -- yeah.
17 Q I don't see another one. This is Mr. Gist's
18 copy.
19 A Yeah. He should have -- because he should
20 have sent another one with the correct address,
21 and what he told me was that he has a system that
22 he uses and he should have taken it out and put
23 our address.
24 MR. GIST: Do you have it?
25 MR. NEWELL: I do.

1 MS. KLINE: It has the correct --
2 MR. NEWELL: It does.
3 MS. KLINE: He did correct it?
4 MR. NEWELL: He even leaves a nice little gap
5 right there to --
6 MS. KLINE: Thank you.
7 A Yeah, we told him.
8 Q This is dated July 6th, 2009. He performed
9 this IAQ/Mold Inspection at the following
10 address, [redacted] Okay.
11 Well, let's work from the new one that is
12 correct, that has your correct address.
13 A Okay.
14 Q It talks about property history. We learned
15 the following. "Property had water intrusion
16 from master bedroom window and leak in attic HVAC
17 condensation pipe. Mold was present in master
18 bedroom main air return." We are going to talk
19 about that water intrusion in the master bedroom
20 window in just a minute. Tell me about a leak in
21 the attic HVAC condensation pipe.
22 A He actually talked to my husband about that.
23 Q Okay.
24 A He could probably tell you more about that.
25 I don't know.

1 Q Okay.
2 A They went up in the attic.
3 Q Were you aware that there was a leak?
4 A Well, I was aware. My husband had told me.
5 He told us at the end of the report that he had
6 found that up there and he was concerned about
7 mold.
8 Q What did you do about that?
9 A He actually recommended us to get -- I know
10 he told us about getting some type of system.
11 I'm not really sure. My husband talked. Because
12 he talked to him more. I just know that he
13 mentioned that to us and he may have said
14 something about getting some type of system that
15 he offered that would -- and then I think he also
16 said something about going back to the people
17 that installed it. I don't quite remember.
18 Q Where did Mr. Harris find mold in the master
19 bedroom?
20 A That was the window. It's going back to that
21 window because that was where he found the mold.
22 Well, he did several testing. Okay, the first
23 testing he did, he did -- I think he took two or
24 three samples. He took one on my master
25 headboard and that one came back with mold.

1 MR. GIST: You've got one for 11/21.
2 MS. KLINE: Right. That was -- yeah.
3 MR. GIST: Right. 11/21/08, he made the
4 mistake on that, but bottom line, that's the
5 first report. The second report is the July
6 the 6th, 2009.
7 MS. KLINE: Okay, right.
8 Q So he made two trips out and did two
9 inspections?
10 A Yes.
11 Q Did you pay him twice?
12 A Yes, ma'am.
13 Q How much did he charge you?
14 A My husband would have to -- have we -- I
15 don't have the information. He charged for each
16 sample. I think it was like $75.00 to $100.00
17 for each sample, approximately, $75.00 to
18 $100.00, and he charged for coming out, so --
19 which was like $100.00 just to come out.
20 Q Did you and your husband and Mr. Harris have
21 any conversations about the fact that he had sold
22 you a $1,000.00 piece of equipment that was
23 supposed to purify the air, and --
24 A And that's what we was a little confused on,
25 that we thought that maybe it was some other

ROA 390

1 issues in the home other than the window, at that
2 point, because --
3 Q What did he say?
4 A He don't do that; he just do the mold. We
5 got another inspection after that.
6 Q Who did that?
7 A He's out of -- it should be --
8 MS. ALSTON: Do you have it, Mr. Gist, the
9 second inspection?
10 A That was -- I know he's out of Hollywood,
11 South Carolina; he came.
12 MR. GIST: Yes; I've got it.
13 Q Southeastern Inspections?
14 A Yes.
15 Q G. Allen Moore?
16 A Yes.
17 Q How did you find Mr. Moore?
18 A I'm trying to remember. I can't remember, to
19 be honest. My husband might could tell you. I
20 don't remember. It was so much going on at the
21 -- I don't remember.
22 MS. KLINE: Does somebody have that one?
23 MR. NEWELL: Can we go off the record for a
24 second?
25 [OFF THE RECORD, VERY BRIEFLY.]

ROA 391

1 I don't know if it was in there, but I know he
2 had given us all the citations, and it was
3 discussed about still having mold in the home,
4 and we didn't know. We thought it was rectified,
5 and then all the citations, so he recommended us
6 to move out of the home.
7 Q And that's why you moved out?
8 A Yes, according to his recommendation and the
9 fact that because we didn't know where the mold
10 -- it was still in the air return throughout the
11 home.
12 Q Frank Sander is CBS Builders?
13 A Yes.
14 Q He gave you an estimate to replace the window
15 in the master bedroom?
16 A Uh-huh.
17 Q Correct?
18 A Yes.
19 Q But you did not have him do that; correct?
20 A Yes. No, we didn't.
21 Q At this point, you called Mr. Torres?
22 A Yes.
23 Q At Willow Creek Construction?
24 A Yes.
25 Q What did Mr. Torres do?

1 and what they did and put back in wood that had
2 below 17% moisture; correct?
3 A Yes.
4 Q How much longer did you live in the home
5 after that?
6 A I'm trying to think. After that, maybe a
7 year, almost a year, maybe, because we thought
8 that was the root of the problem. We thought
9 that was because of the water intrusion coming
10 in; we thought that was it.
11 Q What caused you to move out when you did?
12 A We were still getting sick, even after the
13 window was replaced, and we were still having
14 medical issues. I mean, we were still going
15 through the same symptoms that we were even when
16 we had -- they replaced the window, we had the
17 machine, we had done everything that was
18 recommended, and we still were getting sick and I
19 didn't understand. I said, "Well, if the problem
20 is rectified, why are we still getting sick?"
21 At that point, that last inspection report,
22 when he had the different citations -- Mr. Moore,
23 that you are speaking of -- and it was still mold
24 after -- this is the second time -- after they
25 replaced the window, it was still mold in the

1 home. At that point, he recommended us to move
2 out because, apparently, there was other issues.
3 Q So Mr. Harris is the mold expert and he
4 recommended that you move out?
5 A No. Mr. Moore, the inspector, that did the
6 inspection.
7 Q Okay. So Mr. Harris didn't suggest you move
8 out; it was Mr. Moore?
9 A Mr. Moore; right.
10 Q But you waited about a year after Mr. Moore's
11 suggestion?
12 MR. GIST: Object to the form.
13 A I'm not sure because, when we moved out, it
14 was -- like I said, I'm not sure. It was -- when
15 he told us, we moved out like a couple of months
16 later. When the inspector told us to move out,
17 we moved out. He told us in August. We moved
18 out, I think, in September. It was like a month
19 later. Yeah. I'm getting a little confused with
20 that.
21 Q August of 2009, Mr. Moore suggested you move
22 out and you moved out a couple of months later?
23 A Like we moved out in September. Yeah, it was
24 September. It was a month.
25 Q We need to talk about some construction

RDA 394

1 defects and we need to talk about what happened
2 when you first moved into the house. Tell me
3 when you moved in -- would you like to take a
4 break?
5 A Uh-uh. No. I'm okay. I'm fine.
6 Q When did you move into the house?
7 A Approximately the first week of April '07.
8 Q Who was your real estate agent?
9 A Tina Boggs.
10 Q Did Ms. Boggs live next-door?
11 A Yes, she did.
12 Q Ms. Boggs is not listed on your witness list,
13 but she would be a witness?
14 A I guess. I don't know.
15 Q Tell me about Ms. Boggs living next door and
16 about her boyfriend setting up a sprinkler to
17 water your grass when you first moved in.
18 A Okay. We moved in, like I say, around the
19 first week of April and, when we moved in, we
20 hadn't purchased a sprinkler system yet and,
21 actually, before we even had moved in the home,
22 they were watering, you know, like they were
23 doing it for us, you know.
24 Q With what kind of sprinkler?
25 A I don't know; just one that you buy, like a

ROA395

1 A I don't know. I don't know that.
2 Q But Mr. Torres, Willow Creek Construction,
3 came the second time and put -- I think you
4 called it "sealant" --
5 A That's what he told me.
6 Q -- and it didn't -- and rain didn't come in
7 anymore?
8 MR. GIST: Object to the form.
9 A It didn't come inside.
10 Q Okay. That's your testimony. I'm just
11 clarifying your testimony.
12 A It didn't come inside.
13 Q Ms. Alston, what construction defects -- I
14 think, in your Complaint -- let's look at a few
15 of your allegations in your Complaint. Willow
16 Creek completed the home in April 2007. You
17 moved in on April 3rd, 2007. Does that sound
18 right?
19 A Approximately around that date.
20 Q On April 5th, "Plaintiffs noticed bedroom
21 window wall was wet inside and out from the
22 neighbor's sprinkler." It was your neighbor's
23 sprinkler, but your neighbor had put it on your
24 house?
25 A Yes.

1 Q You contacted Mr. Torres and he came out,
2 observed the problem, had the wall sanded and
3 painted. Did he actually do the work himself or
4 did he have someone come do it?
5 A He did --
6 Q Okay.
7 A -- Mr. Torres.
8 Q Then, in July, which would have been April,
9 May, June -- three months later, according to
10 your Complaint, after a heavy rain and
11 thunderstorm, you once again noticed the master
12 bedroom wall was wet inside and out. You
13 contacted the builder, who came out and sanded
14 the wall, repaired it, resealed the window and
15 told you everything was fine. "At that time,
16 plaintiffs were told by the builder that the
17 problem was cured." Is that a correct statement?
18 A I'm sorry. Can you repeat the question?
19 Q "At that time, plaintiffs were told by the
20 builder that the problem was cured." Is that a
21 correct statement?
22 A Yes. He said it was corrected, "The problem
23 is corrected."
24 Q And then you started having -- you and your
25 son started having medical problems. You hired a

1 mold inspector in November 20008. The mold
2 specialist found the mold was airborne throughout
3 the house. Is that an accurate statement?
4 A Yes.
5 Q On December 5th, 2008, you received a quote
6 from CBS Builders to make repairs to the window
7 and the mold treatment. February 27th, 2009,
8 "Plaintiffs had home inspected by Pinpoint Home
9 and Commercial Inspections. Inspection revealed
10 bedroom window was not the correct window. It
11 was a vinyl replacement window and was dissimilar
12 from all the other windows in the home." At that
13 point, you notified the builder of the mold
14 problem and of the problem with the misfit
15 window. The builder responded on March 20th,
16 2009, and replaced the window on April 16th,
17 2009; is that correct?
18 A Yes.
19 Q Then, in August, you had another inspection
20 by Southeastern Inspection Services. "Numerous
21 deficiencies, code violations and unsatisfactory
22 work was noted." Do you know what those were?
23 A Repeat the question.
24 Q "Numerous deficiencies, code violations and
25 unsatisfactory work was noted."

1 A By whom? I don't -- I'm --
2 Q Southeastern Inspection Services.
3 A Is that Mr. Moore?
4 Q Mr. Moore.
5 A Oh.
6 Q The long list --
7 A I don't know -- I don't have all those
8 citations. He wrote them all. I don't know them
9 by heart. I'm sorry.
10 Q Are you alleging that those are construction
11 defects with your home?
12 A Yes, ma'am. I would say structural from the
13 beginning.
14 Q You would call them structural defects?
15 A I would say structural.
16 Q So you're alleging basically two basic
17 things, that the home has structural
18 deficiencies; correct?
19 A Yes.
20 Q And that mold in the home caused you to have
21 health problems, and your son?
22 A Yes.
23 Q And number 18, on page 5 of your Complaint,
24 alleges how the defendant's work was defective
25 but not in all, but not limited to the following

1 MR. NEWELL: I believe that's all I have.
2 Thank you.
3 MR. GIST: I have some follow-up.
4 MS. KLINE: Excuse me, Mr. Gist. I just have
5 one question following up on his questions.
6 Shall I wait until you're done?
7 MR. GIST: Yes, ma'am.
8 EXAMINATION
9 BY MR. GIST:
10 Q Ms. Alston, following up on Mr. Newell's last
11 question to you, are you convinced that Mr.
12 Torres' putting the sealant on that window
13 eradicated the mold problem in your home, ma'am?
14 A No.
15 Q Ms. Kline had asked you earlier in her
16 questioning about the actual mold report that was
17 done by Mr. Harris. I believe that the mold
18 report was done 11/30 or somewhere around 11/25
19 of 2008. Have you ever seen Mr. Harris's Mold
20 Screening Report, ma'am?
21 A Yes, I did.
22 Q Do you recall testifying to Ms. Kline that he
23 actually did sample two areas in your home with
24 one to include the headboard of your bed?
25 A Yes.

ROA 400

1 to remove the drywall to check the drywall out,"
2 because it had gotten wet, and that's when he had
3 replied to me that -- that the way they build
4 homes now, that he didn't need to remove it
5 because something about the wood wouldn't be
6 susceptible to mold.
7 Q The Mold Screening Report which was provided
8 by Larry Harris, do you ever recall, in the Mold
9 Screening Report, actually getting a -- what we
10 will call a colony count, a mold colony count,
11 that was lifted from your headboard, as well as
12 lifted from your main air return?
13 A Yes, I recall that.
14 MR. GIST: Mark this, please, which is the
15 Mold Screening Report. I'm going to just
16 mark these first pages right here.
17 MARKED AS PLAINTIFF'S EXHIBIT #2,
18 DEPOSITION OF TYMIKA JONES ALSTON, TAKEN
19 7/27/2011. Copy of a document entitled
20 "Mold Screening Report" dated 11/30/2008
21 with attached document entitled
22 "Acceptable Ranges Graph" (3 PAGES).
23 MR. GIST: Ms. Kline, I think you have a copy
24 of that?
25 MS. KLINE: Yes, I do. Thank you.

1 Q I'd like for you to take a look at the
2 Plaintiff's Exhibit #2. First of all, have you
3 ever seen this document before, ma'am?
4 A Yes. Yes.
5 Q What is this document, ma'am?
6 A It's a Mold Screening Report.
7 Q What's the date of that document, ma'am?
8 A November 30th, 2008.
9 Q On that, it looks like there has been several
10 samples taken. Do you see that?
11 A Yes, I do.
12 Q All right. Sample number one, what was it
13 taken of, ma'am?
14 A It was taken from the main air return.
15 Q What was the identification on the
16 Penicillium?
17 A It was they had Penicillium spores, 24 cfu.
18 Q And the Cladosporium?
19 A It was 9 cfu.
20 Q And the Aspergillusporum?
21 A Was 2 cfu.
22 Q So, from the main air return that was taken
23 on November the 30th of 2008, how many total
24 colonies of mold was lifted, ma'am?
25 A It was 35 cfu.

A Yes.

Q And his report of August 11th of 2009.

A Yes.

Q Okay.

MR. GIST: May as well mark that one, too, ma'am.

MARKED AS PLAINTIFF'S EXHIBIT #3, DEPOSITION OF TYMIKA JONES ALSTON, TAKEN 7/27/2011. Copy of a letter dated 8/11/2009 from G. Allen Moore to Mr. and Mrs. Harold Alston, with attached statement (5 PAGES).

Q Plaintiff's Exhibit #3, I'd like for you to look at the first -- to read for me the third paragraph from the Southeastern Inspection Report that was done, starting here.

A Okay. It says, "I reviewed the Mold Screening Report performed by Larry Harris of Enviro Screening and dated November 30th, 2008. This report confirms the type of mold problems which exist in the home. The main problem here is that there is excessive moisture throughout the home and this promotes mold growth."

Q Okay. Ma'am, Ms. Kline asked you and Mr. Newell asked you earlier about the window, and I

1 think the question was whether or not the outside
2 of the window, whether or not you had any
3 knowledge as to whether or not there was moisture
4 -- I think Mr. Newell asked -- moisture anywhere
5 else in the house. What does this report confirm
6 to you? Was there moisture --
7 A Yes.
8 Q -- throughout the house, ma'am?
9 A Yes. Yes, there was.
10 Q Where was the baby allowed to stay in the
11 house, ma'am?
12 A Because of the way my house was built, it has
13 the master bedroom downstairs and three bedrooms
14 upstairs. Being that my husband was in Virginia,
15 he slept in the master bedroom with me.
16 Q Did the baby experience -- by sleeping in the
17 master bedroom with you, did the baby experience
18 any kind of respiratory problems, ma'am?
19 A Yes, sir; he did.
20 Q You mentioned to Ms. Kline that all of your
21 records from 2004, I believe, up to 2007, would
22 be in Virginia. Was the baby born in Virginia?
23 A Yes, he was.
24 Q All of the pediatric records of the baby
25 would be kept in Virginia?

ROA 404

1 A No.
2 Q -- of the mold exposure?
3 A No.
4 Q Has anyone told you, up through until today,
5 which is today's date, okay --
6 A Yes.
7 Q -- of July the 27th, 2011, that you are mold
8 contaminated free?
9 A No, nobody has told me that, that I'm mold
10 free. No, sir; I'm not.
11 Q When you talked to Mr. Torres, did Mr. Torres
12 tell you, "Oh, well, the problem here is that my
13 subcontractors didn't do a good job"?
14 A Yes, he said that. He --
15 Q He told you that?
16 A Yes, he did.
17 Q Did he tell you that Donald Torres was one of
18 his subcontractors?
19 A He mentioned DMT, yeah. He mentioned that.
20 I had never met him, but he mentioned that -- I
21 think he might have mentioned to me and my
22 husband. I think, when he came out, he mentioned
23 to him.
24 Q Okay. Well, your husband can testify to
25 that.

1 Q Had you all consulted with an attorney in
2 April of 2009, ma'am?
3 A I can't remember talking to anyone during
4 that time.
5 Q Okay.
6 A I hadn't hired an attorney, not that I know
7 of.
8 Q I'd like for you to look at the date that
9 this lawsuit was filed, ma'am, with our office.
10 A Okay. Yes, sir, I was looking. You were
11 telling me to look, so...
12 Q What's the date that this lawsuit was filed?
13 A I see it was June 29th, 2010.
14 Q June 29th, 2010, is when you filed --
15 A Yes.
16 Q -- this lawsuit?
17 A That's correct.
18 Q And from April the 30th of 2009 to June 29th
19 of 2010, would that be more than 13 to 14 months
20 after you had this conversation?
21 A Yes, sir.
22 Q So, when you had this conversation with this
23 doctor, you weren't anticipating filing a
24 lawsuit, were you?
25 A No, sir. No, sir. I wasn't sure. I didn't

ROA 406

1 right?
2 A Yes, sir.
3 Q Even conceding that, if Mr. Torres' men had
4 done improper work, when you called Mr. Torres
5 and talked to him that day in 2007 and told him
6 what was going on with your home --
7 A Uh-huh.
8 Q -- did he try to take -- did he call the
9 subcontractors back out there and say, "You all
10 go fix their problems"?
11 A No. He -- no.
12 Q "Go fix the problem with the kitchen, go fix
13 the air leaks around the bottom or the overhead
14 door"?
15 A Uh-uh, no. He did it himself. He did it
16 with -- he never called anybody.
17 Q Did you all ever -- prior to filing a
18 lawsuit, did you all ever meet with Mr. Torres
19 and give him the Southeastern Inspection report
20 that was done August 11th, 2009?
21 A I believe he got some documents of everything
22 we had. I'm not sure if he got -- I'm thinking
23 he got everything.
24 Q So Mr. Torres had this somewhere in 2009,
25 between August and December 2009?

RA 407

1 A I'm thinking he did. If he didn't, I know he
2 got it at some point.
3 Q Did he ever make any efforts to fix these
4 problems?
5 A No, sir. No, he didn't.
6 Q So, long before you filed a lawsuit, Mr.
7 Torres was given these reports showing the
8 deficiencies to this house?
9 A I believe he has those. Yes, sir.
10 Q You say your husband tried to reach Mr.
11 Torres. Tell me about that again. You told Ms.
12 Kline something about that.
13 A He tried to reach him when -- about the
14 window -- after we found out, based on the
15 inspection reports, that there was a problem with
16 the window, and he didn't respond. My husband
17 saw him, because he was still building homes, and
18 I think he -- I think he went up and talked to
19 him. I think that's when he finally came over to
20 -- we had left several messages where he didn't
21 come, and my husband, I think, finally talked to
22 him, and that's when he decided to come out.
23 Q You and your husband did not move out of this
24 house until September; am I correct?
25 A That's correct.

ROA 408

1 reach Ms. Boggs to tell Ms. Boggs to get in touch
2 with Mr. Torres, that you all were having to
3 leave out of the house, you no longer lived
4 there?
5 A No, we didn't get in touch with Ms. Boggs.
6 Q Did you try to reach Mr. Torres?
7 A Not before we moved out. We -- at that
8 point, we just moved out. We didn't -- we had
9 tried previously and sent all this information.
10 Q You had tried previously to reach Mr. Torres
11 before you moved?
12 A I believe we sent all these documents to him.
13 Yes.
14 Q And what was the reason as to why you were
15 trying to reach him before you moved, ma'am?
16 A To correct all the problems that we still saw
17 that was existing.
18 Q So you got this report here on August 11th of
19 2009. You got Mr. Harris' report before that
20 time, okay.
21 A Yes.
22 Q And you made Mr. Torres aware of what was
23 going on with your home, ma'am?
24 A Yes. He --
25 Q Did you make him aware?

A Yes. We sent -- everything we had was sent to him. From my recollection, we sent him everything. He had the mold specialist reports.

Q Larry Harris's report was done on July 6th, 2009.

A Yes.

Q Did you give that to Mr. Torres?

A I believe we did. Yes, sir. I'm sure we did.

Q Was anything done, ma'am?

A No, nothing else, other than that window.

Q Ms. Kline asked you about what you expected from Willow Creek Construction Company and Oscar Torres. You said you expected another house?

A Well, I just don't know -- not from them. I don't know. We -- I don't really want them to build another house for me. I don't trust them and I don't think my husband trusts them, either. I was just saying that I would want them to take this house back or -- we just want to get rid of the house. We don't want it because it's still -- it's not liveable. I don't feel the house is --

Q Who paid for your medical expenses? Did Willow Creek Construction -- Ms. Kline showed you

ROA 410

1 the rights, members, whatever that is, and" --
2 "to premises belonging to" -- "incident or
3 pertaining to having and to hold all and singular
4 the premises before mentioned until the Grantee,
5 his heirs, successors and assignees forever."
6 Whew.
7 Q Since Willow Creek Construction Company is
8 the person who did the title to you, ma'am --
9 A Yes, sir.
10 Q -- did you all have every expectation that,
11 if you all had any problems, that you all would
12 have to communicate with Willow Creek
13 Construction Company?
14 A If we had any problems, yes, he -- yes.
15 Q Did you communicate with them?
16 A Yes, we did.
17 MR. GIST: Let's mark this as Plaintiff's #4.
18 MARKED AS PLAINTIFF'S EXHIBIT #4,
19 DEPOSITION OF TYMIKA JONES ALSTON, TAKEN
20 7/27/2011. Copy of a letter dated
21 3/5/2009 from Mr. and Mrs. Harold Alston
22 to Willow Creek Construction (2 PAGES).
23 Q Plaintiff's Exhibit #4, have you ever seen
24 that document there?
25 A Yes.

RA 411

Q What is that, ma'am?

A That's a letter that my husband and I had written to Willow Creek on -- well, to Willow Creek Construction, and we put "Oscar" and "Greg" because those are the two gentlemen that we --

Q When did you write that to them, ma'am?

A We wrote this -- it was written March 5th, 2009.

Q March 5th, 2009.

A Yes.

Q Are you telling them about the problems you're having with your house?

A Yes.

Q I want you to read the last sentence there.

A Yes. It says, "Being a first-time homeowner, we were a very" -- "we were exited about having our own home. We never imagined we would face something so disturbing."

MR. GIST: No further questions.

FURTHER DEPONENT SAITH NOT.

[SIGNING WAIVED.]

[WHEREUPON, THE DEPOSITION WAS CONCLUDED AT 3:05 P.M.]

ROA 412

EXHIBIT 2

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

2010-CP-40-04307

TYMIKA JONES ALSTON and HAROLD ASLTON,	WILLOW CREEK CONSTRUCTION, INC.; and OSCAR TORRES,
PLAINTIFFS,	THIRD-PARTY PLAINTIFFS,
VS.	VS.
WILLOW CREEK CONSTRUCTION, INC.; and OSCAR TORRES,	DONALD RICHARD TORRES, d/b/a DMT CONSTRUCTION, CO., INC.; L&L ELECTRIC, INC.; and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION,
DEFENDANT.	THIRD-PARTY DEFENDANTS.

DEPOSITION OF HAROLD LAWRENCE ALSTON, TAKEN BEFORE DIANE GRUBOWSKI, A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 3:00 P.M., JULY 27th, 2011, AT THE LAW OFFICES OF THE GIST LAW FIRM, 4400 NORTH MAIN STREET, COLUMBIA, SOUTH CAROLINA.

COPY #071311

REPORTED BY DIANE GRUBOWSKI

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REPORTED BY: DIANE GRUBOWSKI

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1 THE READING AND SIGNING OF THIS DEPOSITION IS
2 WAIVED BY THE DEPONENT AND COUNSEL FOR THE
3 RESPECTIVE PARTIES.
4 WHEREUPON,
5 HAROLD LAWRENCE ALSTON, BEING DULY SWORN AND
6 CAUTIONED TO SPEAK THE TRUTH, THE WHOLE
7 TRUTH, AND NOTHING BUT THE TRUTH, TESTIFIED
8 AND DEPOSED AS FOLLOWS:
9 EXAMINATION
10 BY MS. KLINE:
11 Q Mr. Alston, I'm Adelaide Kline. We met
12 earlier.
13 A Yes.
14 Q And you sat in the room during your wife,
15 Tymika's, deposition; correct?
16 A Correct.
17 Q I have a few questions similar, but I have
18 one big, overriding question. Did you take any
19 notes or is there anything you particularly need
20 to tell me that she didn't tell me, that you
21 thought of during her deposition?
22 A Well, based on the facts that were there, the
23 only other thing I wanted to point out was the
24 financial strain this has caused. It's been --
25 it's been tough just to try and make sure they

ROA 416

1 article.
2 Q Where did you read it?
3 A This was online.
4 Q Okay.
5 A It's an online site. I can't remember the
6 name of the site. I don't know whether it's
7 still out there, but this has been maybe two to
8 three years ago when I read this. Consumer
9 Complaints or consumerreports.com; I believe
10 that's what it is.
11 Q Consumer complaints?
12 A Consumerreports.com or -- if I was in front
13 of a PC, I could tell you right away. It's one
14 of those sites out there. So there's a ton of
15 them, but this was one of them that's -- rip-off
16 reports, that's it, rip-off reports, rip-off
17 reports.
18 Q Were these people in your neighborhood?
19 A Yes, they are -- oh, they mentioned Summer
20 Pines, and then there was also a rebuttal where
21 someone responded to these guys, so yep.
22 Q Did you ever go to the LLR?
23 A Yes, we did.
24 Q Tell me about that.
25 A The LLR experience was -- I knew something

ROA 417

1 was wrong based on her reports; but, based on the
2 laws of South Carolina and what she explained to
3 me was that it's now a civil matter and it's out
4 of their hands; but, when she did the walkthrough
5 and I was there and on site, watching, body
6 language was the thing for me. I saw body
7 language, and they were asking questions where I
8 just kind of sat back and did my observation of
9 body language that something was wrong, and she
10 gave me the notion that she was really helpful,
11 but her hands were tied, and if we had known
12 about the LLR -- the other thing is new home --
13 new home buyers. Very naive to not knowing.
14 The other part was the trust, but I thought
15 -- we trusted these guys. So, in my mind, if I
16 trust you, that's a lot. If I trust a friend,
17 that's a lot from me, so I kind of was naive to
18 -- well, we both were naive to putting the trust
19 as if you would trust a relative or a good
20 friend. I kind of gave them that notion,
21 especially Tina. I mean, I really -- and Mr.
22 John. I really trusted those folk. I would have
23 let them stay at my house, that type of trust.
24 So, at that point, those are the things that
25 resonate or, you know, I get -- I get -- I get

ROA 418

1 baffled on, trusting someone and then you find
2 out all of this stuff, and now, you know, it's
3 difficult to trust anyone.
4 Q Walk me through the LLR --
5 A Okay.
6 Q -- experience. You called over there and
7 complained or what happened?
8 A Yes. I called and went through the formal
9 complaint. They had a form that you fill out and
10 you go through this, and they required certain
11 documents. They responded by saying, "Hey, we
12 need these documentations, a Certificate of
13 Occupancy, the various forms, the permits and how
14 do" -- you know, "Who were the builders,"
15 basically.
16 So I responded to those guys, and then they
17 sent me a few correspondences about, you know,
18 what happens and how does it work. So, in fact,
19 I had -- when I did my taxes, I was talking to
20 the lady that was doing my taxes and she is the
21 one that told me about the LLR. I had no -- I
22 didn't even know what that was. I knew what the
23 labor board was, but I didn't know they did stuff
24 like that. I didn't know they, you know,
25 represented the various different functions. I

ROA 419

1 did not know that, and she's the one that told me
2 about that, the lady that did my taxes, whatever
3 year that was whenever I contacted them, and
4 that's how I found out.
5 Q So you got all the forms that they asked for,
6 the --
7 A Yes.
8 Q -- Certificate of Occupancy --
9 A Yes.
10 Q -- and the permits and whatever? Where did
11 you get those?
12 A I got them from Richland County, downtown.
13 Is it Harden or Taylor Street? One of those
14 streets. Yeah.
15 Q Did you have to get in touch with Mr. Torres
16 in Willow Creek to get any of those?
17 A No. Everything was there, but they were well
18 aware of it. In fact, once I started it, we both
19 were served copies, basically, with the
20 letterhead, was Oscar Torres, Willow Creek, and
21 then my name and my wife's.
22 Q So Mr. Torres was also served with --
23 A Yes. He knew about it from start to finish
24 --
25 Q Okay.

RA 420

1 A -- at that time because of the letterhead, so
2 I assume that he got a copy of what they sent.
3 Q And somebody came out to your house and did a
4 walkthrough?
5 A Yes.
6 Q Okay.
7 A Yes.
8 Q And what else? Who came to your house?
9 A It was their inspector or their -- their
10 inspector. She was from Greenville. I've got
11 her card. Here's a --
12 Q Do you have a copy of your report?
13 A I don't have it here.
14 Q Sharon Cook?
15 A Yes.
16 Q But you have it?
17 A Yes, I do have it.
18 Q Could you get that and give it to your
19 attorney?
20 A Yes.
21 [OFF THE RECORD, VERY BRIEFLY.]
22 THE EXAMINATION BY MS. KLINE CONTINUES.
23 Q What was the bottom line of what Sharon Cook
24 said?
25 A The bottom line was that it was a civil

RA 421

1 matter and, based on the laws of South Carolina
2 -- and I think, right at the time when I had the
3 inspection, this is when the laws were changing,
4 so we were right at the -- I remember watching
5 the news and I said, "Okay, this is probably
6 going to affect what happens here," and it turns
7 out that it did, based on what I saw on the
8 television and also heard conversations, the
9 conversation we had --
10 Q Okay.
11 A -- and then the final letter, I think we got
12 that in February, I believe.
13 Q And the final letter said --
14 A Yes.
15 Q -- this a civil matter?
16 A A civil matter, exactly, and it should be
17 handled there, basically. So, in a nutshell, I
18 tried to do everything in power from trusting,
19 contacting the builder to resolve the issue,
20 contacting experts, paying experts, exhausting
21 whatever I had to get to make sure my baby and my
22 wife were safe, whatever I had to do. That was
23 my main concern. I wasn't even worried about me.
24 I was more concerned with them. So I did
25 everything that I thought reasonable. I'm an IT

ROA 422

1 This is what -- I got an e-mail, actually, about
2 that in my phone right now. This was recently.
3 Q So --
4 A So I've had trouble before, since we moved
5 in, so I don't -- I don't get important mail all
6 the time, just every now and then, every now and
7 then, and then I don't like going to the office
8 sometimes, so it's just inconvenient for me to
9 run all the way over there.
10 Q I'm going to ask you the same question I
11 asked your wife. I went over the allegations
12 that are in your Complaint with her. Page 5,
13 there's a list of things that you are alleging
14 that are defective, that you said defendant's
15 work was defective, in all, but not limited to,
16 the following particulars. You're aware of those
17 allegations? You've seen the Complaint; right?
18 A Yes.
19 Q Tell me what it is that you want from this
20 lawsuit.
21 A Based on the sequence of events, this
22 timeline of stuff, I think we should be fully
23 compensated for everything I have experienced,
24 the headaches, the, you know, dealing with my
25 wife. Even, you know, our personal life. Our

RA423

1 Q Did you reach him by phone?
2 A No; voicemail all the time.
3 Q Did he return your phone calls?
4 A On the first time, yes.
5 Q How about the subsequent times, Mr. Alston?
6 A I think the second time, yes, but not
7 immediately.
8 Q On Defendant's #4, which is the March 31st,
9 2008, letter that you sent to Oscar, where did
10 you send this to?
11 A We sent it to the address that they have.
12 It's a P.O. box, a Blythewood, South Carolina,
13 address.
14 Q Okay.
15 A So the same one they had from day one pretty
16 much, or the one on record from their contract.
17 Q Now, from March the 31st, of 2008, until --
18 MR. GIST: May I see the Plaintiff's exhibits
19 from the prior deposition?
20 Q I want you to look at Plaintiff's Exhibit #4.
21 That will be Four on Four matching up to
22 Defendant's #4. The March 31st of 2008, what's
23 the date on this Plaintiff's exhibit, sir?
24 A March 5th, 2009.
25 Q Have you seen this document before?

ROA 424

1 A Yes.
2 Q Who wrote this document?
3 A Myself and my wife.
4 Q So, from March the 3rd of 2008 until March
5 the 5th of 2009, when you write Mr. Torres on
6 March the 5th of 2009, you are telling him along
7 the side of the house, the wall by that window,
8 needs to be removed and potentially treated for
9 mold, that the vinyl needs to be replaced, that
10 the inspector says that the window needs to be
11 replaced as soon as possible, the window is not
12 locked in the framework. There are a few major
13 concerns that were mentioned, such as a crack in
14 the foundation of the house that should not be
15 present for a home that is approximately two
16 years old or longer, things that should have been
17 provided on the home when it was originally
18 built. Okay. I mean, I guess what I'm trying to
19 say is that, on March the 31st of 2008 -- I'm
20 trying to understand from you, this was more of a
21 follow-up from the original punch list?
22 A Yes.
23 Q But, by March of 2009, would you say you had
24 come into or you were aware of the fact that
25 there were other major problems going on with the

ROA 425

1 house?
2 A Yes, and that's the reason for the March the
3 5th, the 2009, letter, because when --
4 Q Go ahead.
5 A -- we had the inspections, based on the
6 inspections, and the new findings.
7 Q Well, you keep saying you had trouble
8 reaching Mr. Torres. I'm just trying to figure
9 out -- I mean, was he that difficult to reach?
10 A On the last time.
11 Q The last time?
12 A The last time.
13 Q Basically, by the time you write him on March
14 the 5th of 2009, you now are realizing there are
15 major concerns and major problems?
16 A Exactly; yes.
17 Q Was that roof at that house still open?
18 A Yes.
19 MR. GIST: No further questions.
20 FURTHER DEPONENT SAITH NOT.
21 [SIGNING WAIVED.]
22 [WHEREUPON, THE DEPOSITION WAS
23 CONCLUDED AT 4:55 P.M.]
24
25

ROA 426

EXHIBIT 3

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC

148 WHITE ROCK LANE, LEXINGTON, SC 29072
803.917.1884

Summary for Harold & Tymika Alston

Tim Jacobson, License #877, your Home Inspector(s) started at 11:00am on Friday, February 27, 2009. The weather was cloudy and the temperature was in the mid 60's.

The structure at [redacted] is a two-story house with a two car garage. See Figures 1 & 2. The house faces east. It has 4 bedrooms and 2 full baths and a half bath. The areas of concern are broken down below as major and minor. Major concerns include items that are either costly to repair, costly or damaging if not repaired, or safety issues. Minor issues include items that require either some maintenance or have relatively small costs for repairs.

All directions are given facing the front door from the exterior.

Areas of Concern and Recommendations:

I. Major:

1. THE MASTER BEDROOM REAR WINDOW IS NOT THE CORRECT WINDOW. IT APPEARS TO BE A VINYL REPLACEMENT WINDOW AND IS DISSIMILAR FROM ALL THE OTHER WINDOWS. THIS SHOULD BE REPLACED WITH THE PROPER WINDOW AND THE VINYL SIDING WILL NEED TO BE REINSTALLED IN THIS AREA. IT HAS SIGNS OF REPAIRS AROUND THE EXTERIOR PANES THAT SHOULD NOT BE NEEDED FOR A 2 YEAR OLD WINDOW.
2. THERE IS A STRESS CRACK AT THE FRONT RIGHT CORNER OF THE GARAGE THAT SHOULD BE FURTHER EVALUATED.

II. Minor:

A. Exterior:

1. THE SHINGLES HAVE MINOR WEATHERING WITH NAIL POPS.
2. THE EXTERIOR CAULKING IS DETERIORATED OR MISSING BY THE 2 GARAGE FRONT AND 1 RIGHT SIDE EYEBROWS WHERE THE FASCIA MEETS THE SHINGLES. SEE FIGURE 3. THE GAP AT THE GARAGE FRONT RIGHT EYEBROW RIGHT CORNER HAS EXPOSED WOOD AND SHOULD ALSO BE SEALED. SEE FIGURE 4.

B. Plumbing:

1. IN THE KITCHEN, THE SINK FAUCET IS LOOSE, AND THE LEFT SINK DRAIN HAS A PIECE OF PAPER TO KEEP IT SEALED FROM FURTHER LEAKS. IT HAS ALREADY DAMAGED THE CABINET BASE.
2. IN THE 1/2 BATHROOM, THE COMMODE IS LOOSE.

C. Electrical:

D. Heating & Air Conditioning:

E. Interior:

F. Attic & Crawlspace:

III. Informational comments:

- SOME AREAS WERE NOT READILY ACCESSIBLE, VISIBLE OR WERE OBSTRUCTED AND COULD NOT BE PROPERLY INSPECTED.

Thank you for using PINPOINT Home & Commercial Inspections, LLC for your home inspection. Your business is appreciated.

For inspections after repairs are complete or any future needs, please call **PINPOINT**. 803.917.1884. I can also be reached by email @: PINPOINT721@gmail.com.

www.pinpointhomeinspections.com

— ROA 428

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC
148 WHITE ROCK LANE, LEXINGTON, SC 29072
803.917.1884

Figure 1

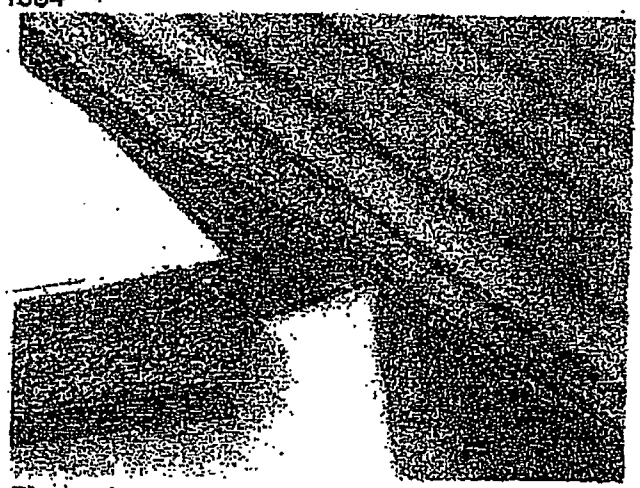

Figure 4

Figure 2

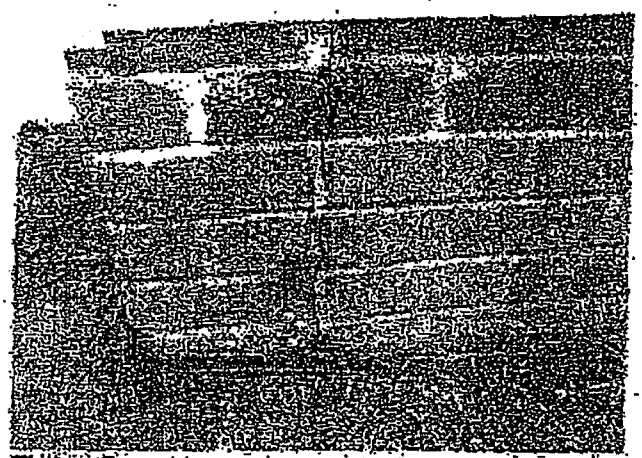

Figure 5

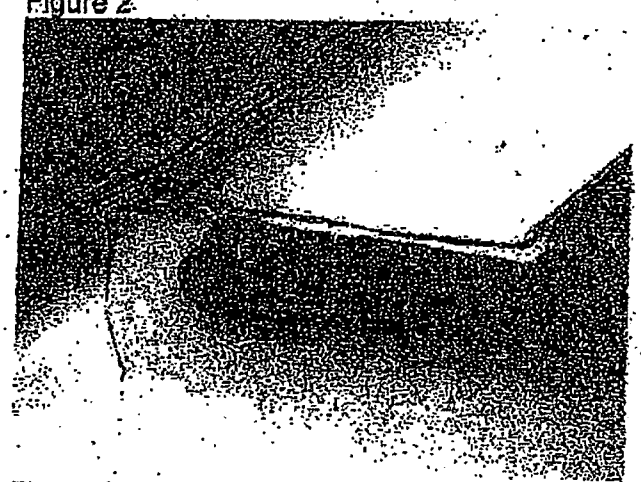

Figure 3

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC

148 WHITE ROCK LANE, LEXINGTON, SC 29072
803.917.1884

Real Estate Inspection Contract

Clients' Name(s): Harold & Tymika Alston
Inspection Address: [redacted]
Date: Friday, February 27, 2009
Time of Inspection: 11:00am

Home Phone: [redacted]
Cell Phone:
Work Phone:
Email:

PINPOINT Home and Commercial Inspections, LLC (PINPOINT) is hereby employed by Client to perform a limited visual inspection of apparent conditions in readily accessible areas existing at the time of inspection. Generally accepted professional inspection standards and methods shall be used. This home inspection is being performed in accordance with the standards of practice of the South Carolina Department of Labor, Licensing and Regulation - Residential Builders Commission. A copy of these guidelines is available from said Commission. Absolutely no warranties or guarantees are given or implied for any latent or concealed defects. Additionally, any repairs after the inspection may reveal defects that are not accessible at the time of inspection. PINPOINT is not liable for any defects or deficiencies that cannot be reasonably discovered during the limited visual inspection. As part of your home inspection the inspector will inspect and report on the following areas unless that area has been marked for exclusion from our services:

1. STRUCTURAL COMPONENTS - including foundation, floors, walls, columns, ceilings, and roofs.
2. EXTERIOR OF STRUCTURE - including wall claddings, entryway doors, decks, steps, eaves, driveways and a representative number of windows.
3. ROOFING - including roof coverings, roof drainage systems, flashing, skylights, and chimneys.
4. PLUMBING - including interior water supply and distribution system, interior drain waste and vent system, hot water system, fuel storage and distribution, and sump pump.
5. ELECTRICAL - including service entrance conductors, service equipment, main distribution panels, voltage ratings, a representative number of installed ceiling fans, lighting fixtures, switches and receptacles, ground fault circuit interrupters, and smoke detectors.
6. SYSTEM HEATING - including permanently installed heating system and its controls, chimneys, heat distribution system, including fans, pumps and ducts, and automatic safety controls.
7. CENTRAL AIR CONDITIONING - including normal operating control of the central air conditioning system and the distribution system.
8. INTERIOR - including walls, ceilings, floors, steps, a representative number of cabinets and a representative number of doors and windows.
9. INSULATION AND VENTILATION - including insulation vapor barriers, ventilation of attic and foundation, kitchen, bathroom and laundry venting systems, and the operation of any readily accessible attic ventilation fan when temperature permits.
10. BUILT-IN KITCHEN APPLIANCES - including the observation and operation of dishwasher, range, trash compactor, garbage disposal, ventilation equipment, permanently installed oven and microwave oven.

EXCLUSIONS OR SPECIAL CIRCUMSTANCES:
None

The price for this inspection with the exclusions identified shall be $225.00.
PAYMENT is due upon receipt of inspection report .

www.pinpointhomeinspections.com

ROA 430

PINPOINT HOME & COMMERCIAL INSPECTIONS, LLC

148 WHITE ROCK LANE, LEXINGTON, SC 29072
803.917.1884

Real Estate Inspection Contract

Clients' Name(s): Harold & Tymika Alston
Inspection Address: [redacted]

Date: Friday, February 27, 2009
Time of Inspection: 11:00am

Home Phone [redacted]
Cell Phone:
Work Phone:
Email: _____

PINPOINT Home and Commercial Inspections, LLC (PINPOINT) is hereby employed by Client to perform a limited visual inspection of apparent conditions in readily accessible areas existing at the time of inspection. *Generally accepted professional inspection standards and methods shall be used.* This home inspection is being performed in accordance with the standards of practice of the South Carolina Department of Labor, Licensing and Regulation - Residential Builders Commission. A copy of these guidelines is available from said Commission. Absolutely no warranties or guarantees are given or implied for any latent or concealed defects. Additionally, any repairs after the inspection may reveal defects that are not accessible at the time of inspection. PINPOINT is not liable for any defects or deficiencies that cannot be reasonably discovered during the limited visual inspection. As part of your home inspection the inspector will inspect and report on the following areas unless that area has been marked for exclusion from our services:

1. STRUCTURAL COMPONENTS - including foundation, floors, walls, columns, ceilings, and roofs.
2. EXTERIOR OF STRUCTURE - including wall claddings, entryway doors, decks, steps, eaves, driveways and a representative number of windows.
3. ROOFING - including roof coverings, roof drainage systems, flashing, skylights, and chimneys.
4. PLUMBING - including interior water supply and distribution system, interior drain waste and vent system, hot water system, fuel storage and distribution, and sump pump.
5. ELECTRICAL - including service entrance conductors, service equipment, main distribution panels, voltage ratings, a representative number of installed ceiling fans, lighting fixtures, switches and receptacles, ground fault circuit interrupters, and smoke detectors.
6. SYSTEM HEATING - including permanently installed heating system and its controls, chimneys, heat distribution system, including fans, pumps and ducts, and automatic safety controls.
7. CENTRAL AIR CONDITIONING - including normal operating control of the central air conditioning system and the distribution system.
8. INTERIOR - including walls, ceilings, floors, steps, a representative number of cabinets and a representative number of doors and windows.
9. INSULATION AND VENTILATION - including insulation vapor barriers, ventilation of attic and foundation, kitchen, bathroom and laundry venting systems, and the operation of any readily accessible attic ventilation fan when temperature permits.
10. BUILT-IN KITCHEN APPLIANCES - including the observation and operation of dishwasher, range, trash compactor, garbage disposal, ventilation equipment, permanently installed oven and microwave oven.

EXCLUSIONS OR SPECIAL CIRCUMSTANCES:
None.

The price for this inspection with the exclusions identified shall be **$225.00**.
PAYMENT is due upon receipt of inspection report.

www.pinpointhomeinspections.com

ROA 431

EXHIBIT 4

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, That Willow Creek Construction Co., Inc. (hereinafter called "Grantor"), for and in consideration of the sum of One Hundred Seventy-five Thousand Seven Hundred and No/100ths ($175,700.00) Dollars to the Grantor in hand paid at and before the sealing of these presents, by Harold L. Alston of [redacted] (hereinafter called "Grantee") (the receipt of which is hereby acknowledged) has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the Grantee, his heirs, successors and assigns:

ALL that certain piece, parcel, or lot of land, with the improvements thereon, situate, lying, and being in the County of Richland, State of South Carolina, shown and designated as Lot 35 as shown on a Plat of Summer Pines- Phase 3, dated July 21, 2005, last revised August 24, 2005, and recorded September 1, 2005 in the office of the Register of Deeds for Richland County in Record Book 1093 at Page 1200 and being further shown on a plat prepared for Harold Alston and Tymika Alston by CTH Surveyors, Inc. dated March 27, 2007, to be recorded, and having the metes and bounds as shown thereon.

This being a portion of the property conveyed to the Grantor by deed of RTL Grading, Inc., dated January 30, 2006 and recorded in the Office of the Register of Deeds for Richland County in Record Book 1148 at Page 2571.

TMS #: Portion of 14800-04-24

This conveyance is made subject to easements and restrictions of record and otherwise affecting the property.

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the premises before mentioned unto the Grantee, his Heirs, Successors and Assigns forever.

R0A 433

Book 1299-3625
2007026687 04/05/2007 11:45:58:770 Deed
Fee:$10.00 County Tax:$193.60 State Tax:$467.60

2007026687 Richard W. Rodden Richland County ROD

EXHIBIT 5

Classic Systems, LLC
Larry Harris
2610 Divinci Rd
West Columbia, SC 29170
803-755-6699

Harold & Tymika Alston
[redacted]

11/21/08

Dear Tymika & Harold:

I want to personally thank you for the time you have taken with me to help expedite this NORMI™ Certified IAQ/Mold Inspection. I am satisfied that we now have enough information to draw some important conclusions and make some specific recommendations to substantially improve the indoor air quality of your Home.

Enclosed you will find our report for your location. We are eager to solve the problems as we have found them and hope you will help us expedite a solution. To your improved health and the health of your family, we remain sincerely yours.

Respectfully yours,

Larry Harris
Environmental Consultant

NORMI™ Certified IAQ/Mold Inspector
Certified Mold Inspector
Certified Environmental Evaluator
Certified Indoor Environmental Advisor
Certified Bacteria-Microbial Tester
Certified Biocide Applicator
Certified Indoor Air Quality Specialist
Charter Member of National Institute Indoor Air Quality Washington, DC 1998
Member IAQA
NORMI Trained Professional

LOA 4/35

www.EnviroScreening.com
OFFICE: 22174 PRATS RD
ABITA SPRINGS, LA 70420
877-251-2296

DATE: 11/30/08
NAME: Larry Harris
Address: 2610 Divinci Rd
City/ST/Zip: West Columbia, SC 29170
Telephone: 803-755-6699

Mailing Address for samples:

The EnviroScreening Lab
3665 E. Bay Drive #204
PMB 428
Largo, Florida 33771

MOLD SCREENING REPORT

Client NAME: Harold & Tymika Alston
Address: [redacted]
City/ST/ZIP:
Telephone: 803-735-3283

DATE Sample #1: 11/21/08
DATE Sample #2: 11/21/08
DATE Sample #3:
DATE Sample #4:

	LOCATION/SOURCE	Identification	COUNT
Sample #1 swab	Main air return:	Penicillium sp.	24 cfu
		Cladosporium sp.	8 cfu
		Aspergillus sp.	2 cfu
		Total colonies:	35 cfu
Sample #2 swab	MBR head board:	Cladosporium sp.	21 cfu
		Penicillium sp.	6 cfu
		Bacteria	3 cfu
		Total colonies:	30 cfu

* cfu: colony forming units per square inch.
* TNTC: too numerous to count per square inch (>200cfu)
* for Hyphal Fragments, see following Page

Please see RANGE BROCHURE for General Organism Information and Disclaimers.
YOUR REPORT SHOULD INCLUDE THREE PAGES as follows:
1. Screening Report 2. Acceptable Ranges Graph 3. Reference/Disclaimer Sheet

For more information contact Info@EnviroScreening.com

www.EnviroScreening.com

ROA436

General Information

- On 11/21/08, we performed an IAQ/Mold *Inspection* at, (866 Forest Hills Rd, Saluda, SC), for the purpose of determining the quality of the indoor air. The collection of information is included herein along with our findings and recommendations. It is our determination that REMEDIATION is Not recommended to solve the current problems found in your indoor environment. When REMEDIATION is required, we recommend that you use the following criteria to select a REMEDIATOR:
  - ☑ Must be licensed and bonded in compliance with the municipality,
  - ☑ Must be fully insured (Worker's Compensation and General Liability)
  - ☑ Must be familiar with Mold-Free Construction™, and
  - ☑ Must have at least five (5) good references for your review,

Once the REMEDIATION process is completed, we request that you give us permission to come back to complete "clearance testing" and confirm that proper SANITIZATION solutions have been implemented. Those solutions are listed at the end of this report and will also include addressing the areas of specific IAQ/Mold concerns in your environment as well as recommendations for improving the quality of living indoors. By partnering with us, you will be able to create a healthier indoor environment for you and your family.

Our recommendations are in accordance with standards established by NORMI™(National Organization of Remediators and Mold Inspectors) and have proven to be successful in substantially improving indoor air quality throughout the United States. For more information on IAQ/Mold issues and their solutions, please reference the book entitled **Mold-Free Construction™** by D. Douglas Hoffman, available at www.MoldFreeConstruction.com. You will find this book insightful and easy-to-follow as you continue to improve the environment indoors.

Our IAQ/Mold Inspection references the following property:

Harold & Tymika Alston

[redacted]

Our reason for inspecting this property is: Home owner has tested positive to mold. Property had prior leaks in Bed room wall.

Property History

The property had prior water leaks Master bed room wall. Owner has concerns of air quality and mold issues.

Visual Inspection

Visible mold was found on in Kitchen near floor base board and under the sink. Main cold air return had signs of mold. Property had excessive dust in return and on ceiling fans.

Diagnostic Testing

Attached find copies of laboratory results from tests conducted by us on your indoor air quality. There are five different types of testing we could have performed and it is our responsibility to use our experience and expertise to assess which testing procedures will give us the best IAQ/Mold Profile of your indoor environment. Should additional testing be required, we may select one or more of these methods to enhance our understanding of your environment so we will have an objective overview of your indoor air quality. The five methods from which we choose are:

1) Air-O-Cell Sampling—in this process we collect particulate from the air to get a comparison count between the indoor air and the outdoor air. This method does not evaluate the viability of the spores collected.

2) Impaction Sampling—this process uses gravity or pressure to plate a petri dish with airborne particulate and then incubate for the laboratory to identify. This method only represents a small sample of the entire indoor air environment.

3) EnviroSWAB™ Sampling—this is an effective way of collecting "dust" which includes viable mold spores, plate them to a petri dish, and have the laboratory identify and count the number of live colony forming units (cfu). This method recognizes only the viable mold that has settled out in the location where it has been collected.

4) EnviroTAPE™ Sampling—where visible mold is present, this tape lift method allows the laboratory to identify and count the number of dead or live colony forming units (cfu). This method does not recognize viability of mold growth only the presence of mold.

5) Bulk Sampling—occasionally we determine that specific construction materials or other items require laboratory testing to identify and count the number of either dead or live colony forming units (cfu). This method does not recognize viability of mold growth only the presence of mold.

We are not attempting to make you a Certified IAQ/Mold Inspector but want you to understand the different methods of collection so you will better understand why we choose the following methods. The EviroSwabs reveal viable mold and the type with total colony forming units of mold.

Collection Samples

Sample One:	Main cold air return
Sample Two:	Master bed room head board

NORMI

ROA 438

Moisture Meter Readings

Moisture Meter readings can add to your understanding of the indoor environment. The moisture meter we use is a Wagner BI-2200 which is a non-penetrating meter designed to recognize moisture content of construction materials that have been tested. The general rule of thumb in our industry is that moisture content in construction materials in excess of 17% MAY indicate a moisture problem. Since we are often unable to test in wall cavities, attics, or other non-visible locations, we can only draw limited conclusions about the moisture of any area tested. These conclusions, however, are included in our over-all assessment and evaluation of the IAQ/Mold Profile in your environment.

Test Site ONE --- Wall in M/B room 16.2%
Test Site Two: --- Kitchen floor 22.9%

Inspection Summary

Inspection found visible mold on base board near refrigerator and under kitchen sink. We recommend the Ecoquest Fresh Air Purifier or the Ecobox Purifier to Kill Mold spores, sanitize and oxidize the dust in the home. Sani-Shield Organo Saline Solution with 3% Hydrogen Peroxide may be purchased to clean the base board and under kitchen sink. One gallon of Sani-Shield is concentrate at 4 parts of water to 1 part of Sani-Shield. $70.00 per gallon.

Larry Harris
Certified Mold Inspector
See Lab Report.

The SANITIZATION Protocol

It is our recommendation, based on all of the information we gathered, our expertise, experience, and the clear IAQ/Mold Profile we have developed from this inspection, that you SANITIZE the indoor air environment using the following protocol. By partnering with us in this process, you will be able to provide a clean air environment for years to come and create a healthier living space for you and your family.

The information contained herein comes from Chapter TEN of Mold-Free Construction™ and is copyrighted and should not, therefore, be reproduced without the express permission of the author, D. Douglas Hoffman, Environmental Consultant. The NORMI Certified IAQ/Mold Inspector has been trained to understand these techniques and has been granted permission to use this information to the betterment of your indoor environment.

* * * * * * *

"BEYOND"—This is taking the extra step of prevention. This list comprises suggestions for keeping your home clean so mold will not have a chance to get a foothold. Some of these may seem "extreme measures" but have proven to be invaluable in maintaining a mold-free environment. Use these, as you will...

1) Keep the premises clean and regularly dust, vacuum, and mop.
2) Install an air purification system in the home to maintain good indoor air quality and reduce dust.
3) Use hood vents when cooking, cleaning, and dishwashing.
4) Keep closet doors ajar, where possible, to increase airflow in the closets or install vented doors.
5) Avoid excessive amounts of indoor plants.
6) Use exhaust fans when bathing/showering.
7) Leave exhaust fans on long enough to remove moisture from the room.
8) Use ceiling fans.
9) Water all indoor plants outdoors, if possible.
10) Wipe down any moisture and/or spillage.
11) Wipe down bathroom walls and fixtures after bathing/showering. There are some good products out there for this very purpose.
12) Wipe down any vanities/sink tops.
13) Avoid drying clothes by hand drying indoors.
14) Avoid air-drying dishes.
15) Open blinds/curtains to allow light into premises.
16) Wipe down floors after any water spillage.
17) Hang shower curtains within the bath when showering.
18) Securely close shower doors, if present, when showering.
19) Leave bathroom and showers door open after use.
20) Use dryer if present for wet towels.
21) Use household cleaners (we prefer biodegradable enzyme cleaners) on any hard surfaces.
22) Remove any moldy or rotting food
23) Remove garbage regularly.
24) Wipe down any and all visible signs of moisture.
25) Regularly scan the ceiling for evidence of roof leaks.

ROA 440

26) Periodically check the air conditioning vents to be sure they are clean.
27) Change the air conditioning filter regularly.
28) Perform scheduled maintenance on your air conditioning system, including, but not limited to, cleaning the evaporator coil.
29) Wipe down windows and sills if moisture is present.
30) Regularly, inspect for leaks under the sinks and around the base of the water closets, around the washing machine and water heater.
31) Check all washer hoses and outside garden hose connections.
32) Regularly empty dehumidifier.
33) Clean behind the refrigerator and around the air conditioning air handler if possible.
34) Empty the refrigerator condensation pan where possible.
35) If possible, pour a small amount of bleach in the drip pan of the air conditioning air handler to decrease the potential for mold growth.
36) Answer this question regularly and check for the signs of mold: "If I were mold and liked moisture, where would I feel most comfortable to set up a home and build a family?"

It is our opinion that these recommendations will substantially improve the indoor air environment of your home and, as in addition, reduce the potential for mold or other IAQ problems in the future. There is no "over-night" solution but we believe the improvement will be significant and, over a relatively short period of time, the occupants and visitors in your home will feel better about their environment. If we may be of further service to you in the future, please do not hesitate to call. We appreciate your business and thank you for choosing a NORMI Certified IAQ/Mold Inspector.

NORMI

Larry Harris
NORMI™ Certified IAQ/Mold Inspector

Enclosures:

- Reports from Laboratory
- Photos
- Fresh Air Purifier Brochure
- Ecobox Air Purifier

NORMI

EXHIBIT 6

SOUTHEASTERN INSPECTION SERVICES, INC.
5455 CHAPLINS LANDING ROAD
HOLLYWOOD, SOUTH CAROLINA 29449
(843) 556-1867 / MOBILE: (843) 324-6803
FAX: (843) 556-1738

August 11, 2009

Mr. and Ms. Harold Alston
[redacted]

Subject: Inspection
2-Yr. Old Residence

Time: 10:00
Temp: 86
Weather/Ground Cond.:
clear/dry

Dear Mr. and Ms. Alston:

Thank you for giving me the opportunity to inspect your home for you today.

The home is a 2-story, slab-on-grade, with brick curtain wall, vinyl siding, and composition shingles--it has a 2-car garage. As reported, you closed and took possession of the home in October of 2007.

I reviewed the "Mold Screening Report" performed by Larry Harris of EnviroScreening, and dated 11/30/08. This report confirms the type of mold problems which exist in the home--the main problem here is that there is excessive moisture thruout the home and this promotes mold growth.

I also reviewed the inspection report of "Pinpoint Home & Commercial Inspections, LLC" dated 2/27/09, and the cost-proposal of "CBS Builders" dated 12/5/08 for performing window replacement and weather sealing and mold treatment

The following additional deficiencies, code violations, and unsatisfactory work was noted and I have provided a cost estimate for repairs/corrections as applicable:

1. Open joints where vinyl vertical and horizontal trim intersects brick veneer along front of house is not sealed--code violation. $ 350.00

PLAINTIFF'S EXHIBIT 3
Alston
7/27/11 DG

ROA 4441

2. No rain diverter was installed along the front roof above the entrance. 75.00

3. Mortar/concrete overrun needs to be removed from the brick sill along the front entrance door, from the brick pavers below the front porch entrance, and in several areas around the brick curtain wall. 350.00

4. At each of the pigeon roof sections above the overhead garage door, the roof sheathing and open joints are showing and need to be thoroughly sealed. 125.00

5. The flashing around the windows cannot be inspected without removing the windows and the siding in the affected areas--because several windows (especially the frosted glass master bath window) appear to be the source of water intrusion, this needs to be performed by a Contractor with experience. At a minimum, open joint between the vinyl siding and window trim needs to be sealed along the jambs and head. The large frosted glass window at the master bath has lost its thermal seal and is one source of the water entering to the interior of the home (you have photos of this showing water on the interior sill/stool). Allowance: 3,800.00

Note: Mold inside the home cannot be eradicated until the source of all water intrusion is identified and corrected--some interior areas are showing more than 30% moisture readings at this time--moisture is what promotes mold growth.

6. At the front windows in the brick veneer, the open joint between the steel lintel above the windows and the window trim/frame has not been sealed--code violation. Also, the steel lintels were primed but never painted. 70.00

7. Open joint around base of two surface-mounted light fixtures at garage and rear entrance are not sealed--code violation. 40.00

8. Roof: at the rightside rear rake, shingle overhang is insufficient--code violation. 225.00

9. At the rear entrance, open joint between threshold and sill is not sealed--code violation. 20.00

10. Open joint between bath exhaust fan/louver and vinyl on upper rear wall is not sealed--code violation. 25.00

11. Raw wood showing inside door strike plates at front entrance and other doors is not painted. 20.00

12. Although the paint finish on the sheetrock and trim areas is better than I normally see on new homes, it still needs a little refinishing to improve the appearance around the foyer area. 220.00

13. The open joint around the base of all three toilets has not been sealed--code violation. 75.00

14. There is a large air leak at the head of the front door, above the strike jamb--code violation. 40.00

15. Master Bath: the on/off mixing valve at the shower stall is not anchored tightly in the wall cavity--code violation. 125.00

16. In the rightside hallway downstairs, the 4-plex light switch is behind the powder room door when the door is opened--code violation. 545.00

17. Air leaks are present along the bottom of the overhead door in the garage--this is apparently where excessive dust/sand is blowing in from high winds. 175.00

18. Kitchen: a. hot/cold/integral sink spray unit is loose at the base--code violation--$45.; b. the GFI electrical receptacle to the right of the range must be wired incorrectly or has a short--blows fixtures when plugged in and turned on--$45. 90.00

19. Bath: toilet base is not anchored tightly to floor--code violation. 40.00

20. Room Over Garage: at both attic access doors, batt insulation is missing along the head of the doors on the attic side--code violation. 60.00

21. Main Attic: a. weatherstripping is missing around the top of the access panel--code violation--$25.; b. no cardboard or plywood baffles were installed at the ends of the floor joists to deter blown insulation from spilling over--code violation--$175.; c. a small section of Armaflex insulation is missing at the refrigerant line at the air handler and taped section is not fully taped/sealed--code violation--$25.; d. OSB roof sheathing has been butted-tight at the joints--Mfgr's. black stamp on each piece of sheathing requires a 1/8" space between the panels at the ends and along the sides--two methods to correct are very expensive--recommend that Contractor and Owner negotiate on amount for Contractor to pay. 225.00

Cost estimate sub-total =	$ 6,529.00
Add 15% for cost overruns/concealed deficiencies, etc. =	+ 979.00
TOTAL COST ESTIMATE =	$ 7,508.00 *

* includes permits/fees, insurance, materials, labor, supervision, and overhead and profit.

Southeastern Inspection Services, Inc., does not perform any construction/repairs on any buildings.

Note: Because of the extensive work required to perform the above and to eradicate the home of any moisture, a major concern for the mold problem and health of the home owners, I strongly recommend that they seek other living quarters.

Please call if you have any questions or if I can be of further service.

Sincerely,

G. Allen Moore
President

GAM/smm

xc: FAX'd to C. Darryl Caldwell, Atty. at Law

SOUTHEASTERN INSPECTION SERVICES, INC.
5455 CHAPLINS LANDING ROAD
HOLLYWOOD, SOUTH CAROLINA 29449
(843) 556-1867 / MOBILE: (843) 324-6803
FAX: (843) 556-1738

S T A T E M E N T

August 11, 2009

Mr. and Ms. Harold Alston
451 Apple Branch Court
Blythewood, South Carolina 20016

Subject: Inspection
2-Yr. Old Residence

8-11-09 Inspection & Report w/Estimate $ ~~650.00~~ BM
$ 525.00

DUB AS DISCUSSED

THANK YOU

RDA 448

G. Allen Moore
Pres./CEO

Licensed by State of SC
#G-10397

EXHIBIT 7

CBS Builders

FED. EMP. I.D. # 57-0840754

2821 Wales Rd.
Columbia, SC 29223

Phone: 803-736-9233
Fax: 803-699-5715
Pager: 803-414-2229

PROPOSAL

Proposal Submitted To:

Name Mr. & Mrs. Harold Alston
Street [redacted]
City
State
Phone

Work To Be Performed At:

Street [redacted]
City
Start Date
Completion Date 3 Working Days
Proposal Date 12-5-08

WE HEREBY PROPOSE TO FURNISH ALL THE MATERIALS AND PERFORM ALL THE LABOR NECESSARY FOR THE COMPLETION OF: Home Repair and Mold Treatment:

(1) To Remove Vinyl Siding From Rear Section of Home:
(2) To Reconstruct Present Rear Window, (1):
(3) To Weather Seal and Wrap Rear Window:
(4) To Weather Seal Rear Section of Base Brick:
(5) To Treat Rear Wall of Bedroom For Mold:
(6) To Treat Inside Bedroom For Mold:
(7) To Treat Kitchen Sink Area For Mold:
(8) To Replace Vinyl Siding To Rear of Home:
(9) Mold Growth Present in Bedroom & Kitchen:
(10) To Clean-up All Construction Waste:

All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial manner.
For the sum of: Twenty Three Hundred Eighty Dollars($) $2380.00 With payment as follows:
$1500.00 when accepted and $880.00 when finished:

Any alteration or deviation from above specifications involving extra cost, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner is to carry fire, tornado and other necessary insurance on/for above work.

Respectfully Submitted: Frank Sanders Jr.

Accepted Date: _____
(Client)

Signature: _____
(Client)

Accepted Date: 12-5-08
(Builder)

Signature: [signature]
(Frank Sanders, Jr.)

NOA 450

EXHIBIT 8

Larry Harris
2610 Divinci Rd
West Columbia, SC 29170
803-755-6699
larryharrisnap@sc.rr.com

Tymica & Harold Alston

July 6, 2009

[redacted]

Att:

Dear Tymica & Harold Alston

We want to personally thank you for the time you have taken with us to help expedite this NORMI™ Certified IAQ/Mold Inspection. I am satisfied that we now have enough information to draw some important conclusions and make some specific recommendations to substantially improve the indoor air quality of your indoor environment.

Enclosed find the report for your location. We are eager to solve the problems as we have found them and hope you will help us expedite a solution. To your improved health and the health of your family, we remain sincerely yours.

Respectfully yours,

Larry Harris

NORMI™ Certified IAQ/Mold Inspector
Some of our Credentials Include:

Certified Environmental Evaluator
Certified Indoor Air Quality Specialist
Certified Indoor Environmental Advisor
Certified Biocide Applicator
Charter Member National Institute Indoor Air Quality Washington, DC 1998

NORMI
Certified IAQ/Mold Inspector

ROA 452

General Information

On July 6 2009 we performed an IAQ/Mold Inspection on the following address:

[redacted]

Blythewood, SC 29016

for the purpose of determining the quality of the indoor air. The collection of information is included herein along with our findings and recommendations. Based on our evaluation and interpretation of the results, it is our determination that:

☑ SANITIZATION is recommended to resolve the current issues and improve the indoor air quality. The subsequent improvement will be experienced very quickly once Sanitization techniques are employed as outlined herein.

☐ REMEDIATION is recommended to solve the current problems found in your indoor environment. When REMEDIATION is required, we recommend that you use the following four criteria to select your REMEDIATOR:

1) Must be licensed and bonded in compliance with the municipality,
2) Must be fully insured (Worker's Compensation and General Liability)
3) Must be familiar with Mold-Free Construction™, and
4) Must have at least five (5) good references for your review,

Once the REMEDIATION process is completed, we request that you give us permission to come back to complete "clearance testing" and confirm that proper SANITIZATION solutions have been implemented. Those solutions are listed at the end of this report and will also include addressing the areas of specific IAQ/Mold concerns in your environment as well as recommendations for improving the quality of living indoors. By partnering with us, you will be able to create a healthier indoor environment.

Our recommendations are in accordance with standards established by NORMI™(National Organization of Remediators and Mold Inspectors) and these recommendations have proven to be very successful in substantially improving indoor air quality throughout the United States.

For more information on IAQ/Mold issues and their solutions, please reference the book entitled Mold-Free Construction™ by D. Douglas Hoffman, available at MoldFreeConstruction.com. We believe you will find this book insightful and easy-to-follow as you continue to improve the environment indoors.

NORMI The National Organization of Remediators and Mold Inspectors™

Certified IAQ/Mold Inspector

ROA 453

General Information

On July 6 2009 we performed an IAQ/Mold Inspection on the following address:

[redacted]

for the purpose of determining the quality of the indoor air. The collection of information is included herein along with our findings and recommendations. Based on our evaluation and interpretation of the results, it is our determination that:

☑ SANITIZATION is recommended to resolve the current issues and improve the indoor air quality. The subsequent improvement will be experienced very quickly once Sanitization techniques are employed as outlined herein.

☐ REMEDIATION is recommended to solve the current problems found in your in door environment. When REMEDIATION is required, we recommend that you use the following four criteria to select your REMEDIATOR:

1) Must be licensed and bonded in compliance with the municipality,
2) Must be fully insured (Worker's Compensation and General Liability)
3) Must be familiar with Mold-Free Construction™, and
4) Must have at least five (5) good references for your review,

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NORMI
Certified IAQ/Mold Inspector

ROA 454

Larry Harris
2610 Divinci Rd
West Columbia, SC 29170
803-755-6699
larryharrisnap@sc.rr.com

Tymica & Harold Alston

July 6, 2009

[redacted]

Att:

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Charter Member National Institute Indoor Air Quality Washington, DC 1998

NORMI
Certified IAQ/Mold Inspector

ROA 455

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[redacted]

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NORMI The National Organization of Remediators and Mold Inspectors™

Certified IAQ/Mold Inspector

NOA 456

General Information

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[redacted]

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ROA 457

Our reason for inspecting this property is:

Re-testing of Air to see if any mold was still present.

☐ We HAVE included an exterior photograph of the subject property to confirm that our inspection was completed at the proper location.

☑ We HAVE NOT included an exterior photograph of the subject property.

Property History

From our IAQ/Mold Assessment Interview, we learned the following things about the subject property:

Property had water intrusion from Master Bed room window, and leak in attic HVAC condensation pipe. Mold was present in master Bed room and main air return.

Visual Inspection

We collected information from the occupants, visually inspected the exterior and interior of the residence and report the following information we consider pertinent to developing a clear IAQ/ Mold Profile of your indoor environment. Conclusions from the factors listed here have already been drawn regarding SANITIZATION or REMEDIATION but it is important for you to understand our intention is to provide a holistic solution to whatever problems may exist in your indoor air quality.

We were ask to test air Quality Only

Diagnostic Testing

Mold Sampling and Lab Analysis

Attached find the laboratory results from tests conducted by us on your indoor air quality. There are five different types of testing we could have performed and it is our responsibility to use our experience and expertise to assess which testing procedures will give us the best IAQ/

Mold Profile of your indoor environment. Should additional testing be required, we may select one or more of these methods to enhance our understanding of your environment so we will have an objective overview of your indoor air quality. The five methods from which we choose are:

1) **Air-O-Cell Sampling**—in this process we collect particulate from the air to get a comparison count between the indoor air and the outdoor air. This method does not evaluate the viability of the spores collected.
2) **Impaction Sampling**—this process uses gravity or pressure to plate a petri dish with airborne particulate and then incubate for the laboratory to identify. This method only represents a small sample of the entire indoor air environment.
3) **EnviroSWAB™ Sampling**—this is an effective way of collecting "dust" which includes viable mold spores, plate them to a petri dish, and have the laboratory identify and count the number of live colony forming units (cfu). This method recognizes only the viable mold that has settled out in the location where it has been collected.
4) **EnviroTAPE™ Sampling**—where visible mold is present, this tape lift method allows the laboratory to identify and count the number of dead or live colony forming units (cfu). This method does not recognize viability of mold growth only the presence of mold.
5) **Bulk Sampling**—occasionally we determine that specific construction materials or other items require laboratory testing to identify and count the number of either dead or live colony forming units (cfu). This method does not recognize viability of mold growth only the presence of mold.

We are not attempting to make you a Certified IAQ/Mold Inspector but want you to understand the different methods of collection so you will better understand why we choose the following methods. We selected:

- [ ] Air-O-Cell
- [ ] Impaction
- [ ] Swab
- [x] Tape
- [ ] Bulk
- [ ] Other: _____

Number of Samples from Which Locations:

Sample #1 Main Air Return Tape Lift
Sample #2 Head Board Master Bed room

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ROA 459

Moisture Meter Readings

Moisture Meter readings can add to your understanding of the indoor environment. The moisture meter we use is a Wagner BI-2200 which is a non-penetrating meter designed to recognize moisture content of construction materials that have been tested. The general rule of thumb in our industry is that moisture content in construction materials in excess of 17% MAY indicate a moisture problem. Since we are often unable to test in wall cavities, attics, or other non-visible locations, we can only draw limited conclusions about the moisture of any area tested. These conclusions, however, are included in our over-all assessment and evaluation of the IAQ/Mold Profile in your environment.

☐ We **DID** take moisture readings of the following suspicious areas of concern:

Every Window in the Home had 32% Moisture in the Sheet Rock around the window. This could be water intrusion around the window.

☐ We **DID NOT** find the need to take any moisture readings.

Other Diagnostic Tools Used

☐ We **DID** take relative humidity and temperature readings and found the following::

☑ We **DID NOT** take relative humidity and/or temperature readings..

☐ We **DID** take additional readings that included:

☑ We **DID NOT** take additional readings.

☐ We **DID** observe the following as a result of subjective evaluation (our senses):

☑ We **DID NOT** observe anything other than those specifically listed above.

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Certified IAQ/Mold Inspector

ROA 460

Inspection Summary

Our second testing of the property and mold is Still Present in the HVAC Main Return and Master Bed room head board. It is apparent that mold is coming from the Heating and Air Condition duct work and attaching to the Airborne Dust particles. We have made recommendations of a Sanitization Protocol. 1: Air Purification System, Proper Instructions how to use & get maximum Benefits of Purifier, 2 Fogging with a Biocide that will bond with duct work surface & Inhibit re-Growth of Mold. Option 3, an Induct System to sanitize Duct work. These are options! Without the Sanitization steps, the Mold will still be present.

The SANITIZATION Protocol

It is our recommendation, based on all of the information we gathered, our expertise, experience, and the IAQ/Mold Profile we have developed from this inspection, that you should use our SANITIZATION Protocol either as a stand-alone solution or after the remediation process, whichever fits our recommendation on PAGE 3 of this report. By partnering with us in this process, you will be able to provide a clean air environment for years to come and create a healthier living space indoors.

The information contained herein comes from Chapter TEN of "Mold-Free Construction" and is copyrighted. It should not, therefore, be reproduced without the express permission of the author, D. Douglas Hoffman. The NORMI Certified IAQ/Mold Inspector has been trained to understand these techniques and has been granted specific permission to use this information to help you improve your environment.

****

"BEYOND"—This is taking the extra step of prevention. This list comprises suggestions for keeping your home clean so mold will not have a chance to get a foothold. Some of these may seem "extreme measures" but have proven to be invaluable in maintaining a mold-free environment. Use these, as you will...

1) Keep the premises clean and regularly dust, vacuum, and mop.
2) Install an air purifier in the home to maintain good indoor air quality and reduce dust. (It important that you consult with an IAQ Specialist so you can take a holistic approach to the myriad of indoor air contaminants that exist. A multi-strategic approach is the most effective way to reduce indoor air pollutants)
3) Use hood vents when cooking, cleaning, and dishwashing.
4) Keep closet doors ajar, where possible, to increase airflow in the closets or install vented doors.

NORMI The National Organization of Remediation and Mold Inspectors

Certified IAQ/Mold Inspector

ROA 461

5) Avoid excessive amounts of indoor plants.
6) Use exhaust fans when bathing/showering.
7) Leave exhaust fans on long enough to remove moisture from the room.
8) Use ceiling fans.
9) Water all indoor plants outdoors, if possible.
10) Wipe down any moisture and/or spillage.
11) Wipe down bathroom walls and fixtures after bathing/showering. There are some good products out there for this very purpose.
12) Wipe down any vanities/sink tops.
13) Avoid drying clothes by hand drying indoors.
14) Avoid air-drying dishes.
15) Open blinds/curtains to allow light into premises.
16) Wipe down floors after any water spillage.
17) Hang shower curtains within the bath when showering.
18) Securely close shower doors, if present, when showering.
19) Leave bathroom and showers door open after use.
20) Use dryer if present for wet towels.
21) Use household cleaners (we prefer biodegradable enzyme cleaners and other green technologies) on any hard surfaces.
22) Remove any moldy or rotting food
23) Remove garbage regularly.
24) Wipe down any and all visible signs of moisture.
25) Regularly scan the ceiling for evidence of roof leaks.
26) Periodically check the air conditioning vents to be sure they are clean.
27) Change the air conditioning filter regularly.
28) Perform scheduled maintenance on your air conditioning system, including, but not limited to, cleaning the evaporator coil.
29) Wipe down windows and sills if moisture is present.
30) Regularly, inspect for leaks under the sinks and around the base of the water closets, around the washing machine and water heater.
31) Check all washer hoses and outside garden hose connections.
32) Regularly empty dehumidifier.
33) Clean behind the refrigerator and around the air conditioning air handler if possible.
34) Empty the refrigerator condensation pan where possible.
35) If possible, pour a small amount of bleach in the drip pan of the air conditioning air handler to decrease the potential for mold growth.
36) Answer this question regularly and check for the signs of mold: "If I were mold and liked moisture, where would I feel most comfortable to set up a home and build a family?"

It is our opinion that these recommendations will substantially improve the indoor air environment of your home and, as in addition, reduce the potential for mold or other IAQ problems in

NORMI The National Organization of Remediators and Mold Inspectors

Certified IAQ/Mold Inspector

ROA 462

the future. There is no "over-night" solution but we believe the improvement will be significant and, over a relatively short period of time, the occupants and visitors in your home will feel better about their environment. If we may be of further service to you in the future, please do not hesitate to call. We appreciate your business and thank you for choosing a NORMI Certified IAQ/Mold Inspector.

Larry Harris

NORMI™ Certified IAQ/Mold Inspector

We have included the following enclosures in this report:

- ☐ NORMI™ HVAC Checklist
- ☐ Photographs
- ☑ All pages of the lab report
- ☑ Range Brochure from EnviroScreening Lab
- ☐ NORMI™ Certificate of Sanitization Brochure
- ☐ NORMI™ Healthier Home Warranty Brochure
- ☐ Technical Data Sheets on products

NORMI The National Organization of Normal Healthy Home and Mold Inspectors™

Certified IAQ/Mold Inspector

ROA 463

EXHIBIT 9

South Carolina
Department of Labor, Licensing and Regulation

Division of Professional and Occupational Licensing
Office of Investigations and Enforcement

Mark Sanford
Governor

Adrienne Riggins Youmans
Director

LLR

110 Centerview Drive
Post Office Box 11329
Columbia, SC 29211-1329
Phone: (803) 896-4470
FAX: Information
Office of Investigations, (803) 896-4656
Wages and Child Labor, (803) 896-7680
www.llr.state.sc.us

NOTICE OF COMPLAINT

October 6, 2010

Mr. Oscar Torres
P. O. Box 955
Blythewood, SC 29016

File #: [redacted]

Complaint Filed By:
Mr.&Ms. Harold Alston

Site Location:
[redacted]

The SC Residential Builders Commission recently received a complaint against you for work performed at the above address. Please submit a written response addressing each of the items in the complaint within ten (10) days from receipt of this letter. You may mail your response to the address on this letter or fax it to 803-896-4656. Please include the case number on any correspondence and address it to my attention.

Item #1: See Enclosed.

Please be advised that I will be conducting an inspection at the above address in the next 30 to 60 days at which time I will examine each item in the complaint to determine if it represents a violation of the applicable building codes or construction standards. If you desire to be present during the inspection, please contact me at [redacted]

The results of my investigation will be submitted to an Investigative Review Committee (IRC) for review to determine if you have violated any of the provisions of the license law with regard to building code or standards violations. If you have satisfactorily addressed and/or repaired the items that represent violations prior to my inspection or filing of the IRC report, that fact will be taken into consideration by the IRC as long as proper documentation is received by this office.

Your immediate cooperation in this matter is encouraged and will be appreciated.

Respectfully,

Sharon Cook
Investigator

Enclosure

ROA 465

EXHIBIT 10

South Carolina Department of Labor, Licensing and Regulation

Office of Investigation and Enforcement

Inspection Report

Case No: 2010-819

Complainant:
Mr.&Ms. Harold Alston
[redacted]

Respondent:
Mr. Oscar Torres
P. O. Box 955
Blythewood SC 29016

Date Received: 09/17/2010 Date of Report: 1/21/11

Investigator: Sharon Cook

Person(s) Interviewed:
Complainant: Mr.&Ms. Harold Alston
Licensee/Respondent: Mr. Oscar Torres

The South Carolina Office of Investigations and Enforcement conducted an interview for the S.C. Residential Builders Commission in reference to a complaint filed by the Complainant referenced above. The purpose of this interview was to determine if specific facts exist or conduct displayed should warrant recommendation of any sanction(s) against the Respondent based upon conduct or actions made by the Respondent.

Complaint Items:

Item # 1: Water intrusion around window in master bedroom. The moisture has caused mold to form and the Complainants have moved out of the home.
Investigator's Observation: At the time of inspection the window had already been replaced, the Complainants are still not living in their home.
Respondent's Responsibility: At this time due to the fact the window has been replaced and that the mold issue is outside the guidelines of our office to address this will now be a civil matter.

There were numerous issues discussed the day of the inspection that were listed on the August 11, 2009 Southeastern Inspection Service Report. However, due to the age of the home these will now be a civil issue and outside the guidelines of our office.

The initial complaint, your response, and the Investigator's findings are being forwarded to an Investigative Review Committee (IRC), which is appointed by the Commission. The IRC makes recommendations to the Commission as to the disposition of complaints and violations of the residential building statutes. The IRC will review the case at the next available monthly IRC meeting. The parties involved in this case will be notified by letter of the IRC's recommendation(s) after this meeting. The IRC's recommendation(s) for the disposition of this case will then be presented to South Carolina Residential Builders Commission members for their consideration at the next available Commission meeting. Should the matter be resolved prior to the IRC's review of the complaint, the IRC may take your actions into consideration as to possible sanction.

Sincerely,

Sharon Cook
Investigator

cc: Mr.&Ms. Harold Alston
OSCAR TORRES
File

ROA 468

EXHIBIT 11

Chronological Time Line

Event	Date
Closing on the Home	April 3, 2007
Water Damage found in Master Bedroom	April 5, 2007
Notified Builders of the Water Damage	April 5, 2007
Builders responded and made the repairs	April 6, 2007
Medical issues started to arise- Tymika, [redacted] and Harold	June 8, 2007
Notified Builders of additional findings	July 23, 2007
Builders responded and made the repairs	July 27, 2007
Notified Builders of additional findings	March 31, 2008
1st Mold Test by Larry Harris- Certified	November 21, 2008
CBS Builders proposal- Window Problem	December 5, 2008
PinPoint Home & Commercial Inspection	February 27, 2009
Notified builder of new findings (MOLD, Window, etc)	March 8, 2009
Builders responded finally	March 20, 2009
Builders 1st choice w/ Oscar onsite	March 25, 2009
Company Rep...window manufacturer onsite	April 8, 2009
Builders replaced the window/ Cert ified Mold Insp onsite	April 16, 2009
Southeastern Inspection Services, Inc onsite	August 11, 2009
Alston Family vacated the home- [redacted]	September 1, 2009

mgc | INSURANCE DEFENSE

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgclaw.com

January 2, 2015

VIA HAND DELIVERY
The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted] vs. Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Carrier Claim No.: [redacted]
MGC File No.: [redacted]

Dear Ms. McBride:

Please find enclosed for filing the original and one (1) copy of our Motion for Summary Judgment in the above-captioned case. I would appreciate your returning a clocked-in copy of the same to our courier. Our check in the amount of $25.00 is also enclosed.

By copy of this letter, I am serving counsel of record with the above-referenced Motion for Summary Judgment.

Thanking you in advance for your assistance, I am

Very truly yours,

G Thomas Chase

G. Thomas Chase

GTC/mbo
Enclosures
cc: Donald Gist, Esquire, Gist Law Firm (w/encl.)

ROA 471

Supplemental Memorandum in Support of DMT's Motion for Summary Judgment dated March 30, 2

mgc | INSURANCE DEFENSE

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgdaw.com

March 30, 2015

VIA E-MAIL AND FIRST CLASS MAIL
The Honorable W. Jeffrey Young
Third Circuit Court
141 North Main Street
Sumter, South Carolina 29150

RE: Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child [redacted] vs. Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Carrier Claim No.: [redacted]
MGC File No.:

Dear Judge Young:

Pursuant to the instruction of the Court provided in the motions hearing from Defendant, DMT's Motion for Summary Judgment in the above-captioned case, attached please find Defendant DMT's Supplemental Memorandum, including exhibits, in support of the Motion for Summary Judgment. It is by copy of this letter, the content is also being submitted over to counsel for Plaintiffs. In the event that additional materials or a hearing is necessary, we stand prepared to participate. Additionally, please note that we are sending a hard copy by mail but have sent an e-mail version in the event Your Honor desires to review it in PDF form. It is my understanding that no proposed orders were to be submitted, but we stand prepared to prepare the same if so requested. In advance, we appreciate your kind consideration of these issues.

With kind regards, I am

Very truly yours,

G. Thomas Chase

GTC/gvi

Enclosures

cc: Donald Gist, Esquire (via e-mail)

RA 472

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DONALD R. TORRES D/B/A DMT CONSTRUCTION CO., INC.'S MOTION FOR SUMMARY JUDGMENT**

The Defendant, Donald Richard Torres d/b/a DMT Construction Co., Inc. ("DMT"), by and through his counsel, has moved before this Court for an Order granting it summary judgment as to the claims of Harold Alston and Tymika Alston in the above-referenced case. This supplemental memorandum of law is filed in support of that motion, per request of the Court.

STATEMENT OF FACTS

Initially, DMT refers to the Statement of Facts associated with its original memorandum in support of summary judgment. Additionally, Defendant submits that Plaintiff's counsel filed a Motion for Leave to File an Amended Complaint on May 22, 2014 (Exhibit "A" to Supplemental Memorandum). That motion related solely to Plaintiffs seeking to amend their complaint to add Harold Alston and Tymika Alston as Parents and Guardians of the minor child, [redacted] as a party to the action. [redacted] was still a minor at the time of the motion and remains a minor as of the submission of this Memorandum. DMT was a third-party Defendant at the time the motion was filed. Mediation was held, as noted, on June 19, 2014. At that mediation, an agreement was reached between Plaintiffs and the primary Defendants at that time, Willow Creek Construction, Inc. and Oscar Torres. However, the mediation agreement

reached between Plaintiffs and Willow Creek Construction, Inc. and Oscar Torres was not published to DMT. Rather, counsel for DMT obtained a copy on March 17, 2015, from counsel for Willow Creek Construction, Inc. and Oscar Torres. (Exhibit "B" to Supplemental Memorandum). As of March 17, 2015, Plaintiffs' counsel objected to the production of the agreement by the mediator. (Exhibit "C" to Supplemental Memorandum). Therefore, DMT did not know the express content until March 17, 2015, immediately before the hearing on its motion for summary judgment. On July 15, 2014, Aaron Wallace sent an e-mail to counsel for DMT regarding the scheduling of the motion hearing on their pending motion to add Jaiden Alston to the caption. (Exhibit "D" to Supplemental Memorandum). The only motion pending at the time was to add Jaiden Alston as a party, as noted above, and that is the only amendment discussed in the correspondence from Mr. Wallace. The only consent by counsel for DMT is for the amendment to add the child as a party. (Exhibit "E" to Supplemental Memorandum).

On August 11, 2014, counsel for claimants informed counsel for DMT by e-mails that the Amended Complaint was filed on that date. He requests that counsel accept service on behalf of DMT. (Exhibit "F" to Supplemental Memorandum). By response e-mail, counsel for DMT agreed to accept service of the Amended Complaint. (Exhibit "G" to Supplemental Memorandum). On August 12th, 2014, counsel for claimants sent the Amended Complaint to counsel for DMT. (Exhibit "H" to Supplemental Memorandum). The only reference to an agreement related to the Amended Complaint is for acceptance of service. However, the Amended Complaint did not merely add the minor as a party. Rather, it added the minor as a party, did not include the primary Defendants from the original suit and moved the third-party Defendants into primary Defendant status. Counsel for DMT only accepted service of the Amended Complaint and expressly reserved <u>all</u> defenses. (Exhibit "I" to Supplemental Memorandum). DMT filed a timely response, including the defense of the Statute of Limitations and Laches as defenses. (See Court file)

ARGUMENT

A. Defendant properly and timely pled affirmative defenses

Defendant did not waive affirmative defenses to the Amended Complaint merely by agreeing to accept service of an Amended Complaint that related to the addition of the minor child as a party to the action. Rule 4(j) of the South Carolina Rule of Civil Procedure provides only that

"[n]o other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney . . ." Nowhere in the rule is there any provision that acceptance of service of a pleading amounts to a waiver of defenses to the pleading accepted other than related to the proof of service. In fact, to find such would eliminate the practical utility of the rule by having a chilling effect on any party ever accepting service, but also such an interpretation would contradict the rules of procedure for responsive pleadings, including, but not limited to, Rule 8 regarding when defenses are to be stated. *See* Rule 8(b) and (c) SCRCP ("A party shall states in short and plain terms the facts constituting his defenses to each cause of action asserted . . . ."; "In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: , . . . laches . . . statute of limitations . . . ." Rules 8 and 12 of the Rules of Procedure govern when a defense is waived, specifically if not timely pled in a responsive pleading. Rule 8(c) and Rule 12(a), (b) & (c).

In this case, the only agreement for acceptance of service before the Amended Complaint was actually sent related to a motion to add [redacted] as a party by and through his parents. As a minor, the statute of limitations was tolled, and conceivably remains tolled for any alleged personal injuries he sustained. Therefore, the acceptance of service of the proposed pleading to add the minor as a party was strategically prudent because no substantive defense to the amended pleading could be presented to the Court in the hearing. Therefore, counsel for DMT agreed to accept service of the Amended Complaint associated with this motion that had been pending since May of 2014. The Amended Complaint that was submitted to counsel for DMT was a hybrid of what was the subject of the motion from May of 2014. Therefore, pursuant to the previous agreement to accept the Amended Complaint regarding the addition of the minor as a party, but in absolute protection that the acceptance of service of this hybrid Amended Complaint did not affect any defenses, counsel for DMT provided an acknowledgement of acceptance of service clearly preserving all other defenses. This submission was timely and clear. The timely Answer to the Amended Complaint included the affirmative defenses of statute of limitations and laches, as required by Rule 8 of the SCRCP, and, therefore, the defenses are properly before the Court.

Plaintiffs' counsel seeks to assert that the mere acceptance of service of an Amended Complaint constitutes a waiver of defenses in the responsive pleading to the Amended Complaint. Such an argument contradicts the rules of procedure, both in content and practical

application, and the substantive law of South Carolina. Plaintiff's counsel's only expectation from the acceptance of service is that the pleading would not have to be served through more formal means allowed under the rules of civil procedure. This is evident based on the correspondence submitted to and from counsel for claimants. Specifically, the correspondence contains no evidence of any waiver regarding affirmative defenses or procedural defenses other than the sufficiency of service. In fact, the evidence reveals, as specifically noted, that all other defenses were expressly preserved. The insufficiency of service of process is a distinct defense under Rule 12(b). Therefore, the acceptance of service acts as a waiver only to that substantive defense under Rule 12(b) and not other defenses that are submitted only through the responsive pleading. *See, Earthscapes Unlimited, Inc. v. Ulbrich,* 390 S.C. 609 (2010)(affirmative defenses to a cause of action must generally be asserted in a party's responsive pleading).

B. Summary Judgment is appropriate for the individual claims of Harold and Tymika Alston

As noted in the hearing and in this Memorandum, DMT does not contend that the personal injury claim of Jaiden Alston is subject to summary judgment based on the statute of limitations. Jaiden Alston is a minor and, therefore, the statute of limitations has not expired as to his personal injury claim. However, the separate claims of Harold and Tymika Alston are subject to summary judgment under the statute of limitations and laches. The pleadings expressly include individual claims by them related to alleged personal injury and property damages, including associated damages claims. Plaintiffs Harold and Tymika Alston did not timely pursue their actions against DMT. Their claims are separate and distinct from the claim of [redacted] including those arising out of the ownership of the home at issue. Summary Judgment is also timely considering (1) counsel for claimants agrees the statute of limitations began as of December 2008; and (2) the direct pleading against DMT was filed in August of 2015. No additional discovery is necessary to establish the failure of the pleading to be made within the statute of limitations, which is three years. Judicial economy also supports the ruling at this time considering that the same evidence and arguments would be presented regarding the statute of limitations and laches if presented before the trial judge, whether at a pre-trial motion or directed verdict motion. Similar to a jury, this Court is in the best position, with the same evidence, to rule on this issue. Therefore, while the claim of [redacted] certainly may continue

considering the statute of limitations, the claims of Harold and Tymika Alston should not.

CONCLUSION

The statute of limitations has expired for any claims of Harold and Tymika Alston resulting from the alleged damage stemming from the construction of Plaintiffs' home. Plaintiffs had ample time and opportunity to bring a claim against DMT or to join it as a primary defendant. However, Plaintiffs slept on their rights and neglected to assert claims against DMT until after the statute of limitations had run. Allowing a claim now would result in undue hardship and prejudice for DMT. For the reasons set forth herein, at the hearing and the previous initial memorandum, Defendant DMT requests that its motion for summary judgment be granted as to the claims of Harold and Tymika Alston.

MCANGUS GOUDELOCK & COURIE, L.L.C.

G. Thomas Chase
Jeanmarie Tankersley
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

ATTORNEYS FOR DEFENDANTS, DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC.

March 30, 2015

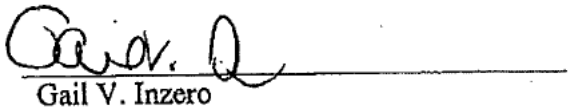
STATE OF SOUTH CA ROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
TYMIKA JONES ALSTON AND HAROLD ALSTON INDIVIDUALLY AND AS PARENTS AND GUARDIANS ON BEHALF OF THEIR MINOR CHILD [redacted] Plaintiffs, vs. DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION, CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, Defendants.	)	Civil Action No. 2012-CP-40-6895R **CERTIFICATE OF SERVICE**

I certify that on this date, I have served a copy of a Supplemental Memorandum in Support of Donald R. Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment in this action on counsel of record by

☒ Via e-mail as follows:

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203
Fax: (803) 771-0063
Attorney for Tymika Jones Alston

March 30, 2015
Date



Gail V. Inzero
Legal Assistant to G. Thomas Chase

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2010-CP-40-04307
TYMIKA JONES ALSTON AND HAROLD ALSTON Plaintiff,	)	MOTION AND ORDER INFORMATION FORM AND COVERSHEET
vs.	)	
WILLOW CREEK CONSTRUCTION, INC., OSCAR TORRES, et. al. Defendant.	)	

RICHLAND COUNTY
FILED
2014 MAY 22 PM 2:16
JEANNETTE W. McBRIDE
C.C.P. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Donald Gist, Bar No. 13098 Address: GIST LAW FIRM, PA, 4400 N. MAIN STREET COLUMBIA, SC 29203 Phone: 803-771-8007Fax 803-771-0063 E-mail: dtommygist@yahoo.comOther: _____	G. Thomas Chase and Thomas F. Dougall, Bar No. _____ Address: G. Thomas Chase - McAngus Goudelock & Courie, LLC, Post Office Box 2980, 75 Beattie Place, Suite 300 (29601), Greenville, South Carolina 29602 Thomas F. Dougall, Esquire, Dougall & Collins, Woodcreek Farms Road, Elgin, SC 29045 Phone: 864-239-4000 (Chase) and 803-865-8858 (Dougall) Fax803-865-8944 (Dougall) E-mail: tchase@mgclaw.com and, tdougall@dougallfirm.com Other: _____

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

ROA 480

SECTION I: Hearing Information

Nature of Motion: Motion to Add Parties

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

SECTION II: Motion/Order Type

☒Written motion attached

☐Form Motion/Order

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

Signature of Attorney for ☒ Plaintiff / ☐ Defendant 5/22/14 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00

☐ EXEMPT: (check reason)

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

JUDGE'S SECTION

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

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____

☐ MOTION FEE COLLECTED: $ _____

☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND TYMIKA JONES ALSTON and HAROLD ALSTON Plaintiffs, v. WILLOW CREEK CONSTRUCTION, INC., OSCAR TORRES, AND Defendants. WILLOW CREEK CONSTRUCTION, INC., Third Party Plaintiff, vs. DONALD RICHARD TORRES d/b/a DMT CONSTRUCTION CO., INC., L&L ELECTRIC INC. and EDUARDO MORENO d/b/a E.S. MORENO CONSTRUCTION Third Party Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 10-CP-40-04307 **PLAINTIFFS MOTION FOR LEAVE TO FILE AMENDED COMPLAINT ADDING PARTIES**

RICHLAND COUNTY
FILED
2014 MAY 22 PM 2:45
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO: Defendant Willow Creek Construction, Inc. and Thomas F. Dougall, Esquire Attorney for Defendant and Third Party Defendant DONALD RICHARD TORRES D/B/A DMT CONSTRUCTION CO., INC., L&L ELECTRIC INC. AND EDUARDO MORENO D/B/A E.S. MORENO CONSTRUCTION, and G. Thomas Chase, Esquire, Attorney for Third Party Defendants

COMES NOW Plaintiffs, by and through the undersigned counsel, and moves for an Order granting leave for Plaintiffs to amend their Complaint to add Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted] as a party Plaintiff to this action pursuant to South Carolina Rules of Civil Procedure 15(a), 19, 20 and 21 and shows grounds as follows:

1. This matter involves mold related injuries which occurred to Harold Alston, Tymika Alston, and their minor child, [redacted] based upon the negligent construction of the family home by Defendants.
2. The parties have displayed due diligence in the pursuit of discovery and have exchanged written discovery responses and documents and also taken the depositions of the Plaintiffs, Defendants, and treating physician in this case.
3. Through the course of the discovery exchange, the Plaintiff's learned of the serious long term injuries sustained by Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted] as a result of Defendant's negligence in this case. The injuries received by [redacted] as a result of Defendant's conduct are documented in the discovery documentation as well as the Deposition Testimony taken in this case. Therefore, Defendant's will suffer no prejudice as a result of this amendment to add [redacted] as a Plaintiff in this case.
4. There were no other means by which Plaintiffs could have gained knowledge of the extent of [redacted] long term medical injuries prior to discovery being taken in this case.
5. The absence of [redacted] as a Plaintiff in this case precludes complete relief from being accorded to the Plaintiffs. The Defendant would not be prejudiced in any way by adding said parties to this action.
6. A party may amend their pleading by leave of court or by written consent of the adverse party and leave shall be freely given when justice so requires and does not prejudice any other party. SCRCP 15(a).

Wherefore, Plaintiffs pray for leave to file an Amended Complaint to add Harold Alston and Tymika Alston as Parents and Guardians of their minor child, [redacted] as a Plaintiff in this action.

Respectfully submitted,

Donald Gist, Esquire
Gist Law Firm, PA
4400 N. Main Street
Columbia, SC 29203
Attorney for Plaintiff

May 22, 2014
Columbia, SC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Plaintiff's Motion for Leave to File Amended Complaint adding Parties has been served upon opposing counsel by U.S. Mail and by e-mail by mailing a copy properly addressed with sufficient postage affixed thereto this 23rd day of May, 2014 to the following:

G. Thomas Chase, Esquire
tchase@mgclaw.com
McAngus Goudelock & Courie, LLC
Post Office Box 2980
75 Beattie Place, Suite 300 (29601)
Greenville, South Carolina 29602
Attorney for Third-Party Defendant

Thomas F. Dougall, Esquire
tdougall@dougallfirm.com
Dougall & Collins
Woodcreek Farms Road
Elgin, SC 29045
Attorney for Defendant and Third-Party Plaintiff

Paralegal

EXHIBIT B

Tom Chase

From: Tom Dougall <tdougall@dougallfirm.com>
Sent: Tuesday, March 17, 2015 4:23 PM
To: Tom Chase
Subject: Re: Tymika Jones Alston and Harold Alston v. Willow Creek Settlement Documents
Attachments: Mediation Agreement.pdf

Tom:

Attached please find a copy of the mediation agreement. There is not a confession of judgment yet.

Thomas F. Dougall
Dougall & Collins
1700 Woodcreek Farms Road
Elgin, SC 29045
tdougall@dougallfirm.com
803.865.8858 (Office)
803.606.0901 (Cell)

****
This electronic transmission and any attached documents or other writings are intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. If you have received this communication in error, please immediately notify the sender by return email and destroy the communication. Any disclosure, copying, distribution, or the taking of any action concerning the contents of this communication or any attachments by anyone other than the intended recipient is strictly prohibited.

----- Original Message -----
From: Tom Chase
To: tdougall@dougallfirm.com
Sent: Tuesday, March 17, 2015 8:23 AM
Subject: Tymika Jones Alston and Harold Alston v. Willow Creek Settlement Documents

Tom,
Good morning.
I am writing to get a copy of the mediation agreement and confession of judgment for your client with Plaintiffs in the Alston case. Can you forward a copy of each? I need them for exhibits in a motion.
Thanks.

Tom

mgc | INSURANCE DEFENSE

Tom Chase, *Attorney*
tchase@mgclaw.com
55 E. Camperdown Way Suite 300
Greenville, SC 29601
Main:864-239-4000 | Direct:864-239-4008 | Fax:864-242-3199

ROA 484

VCARD | BIO

This electronic mail may contain information that is confidential, attorney/client and/or work product privileged, prepared in anticipation of litigation and/or exempt from disclosure under applicable law. This transmission is intended solely for the individual or entity designated above. If you are not the intended recipient, you should understand that any distribution, copying, or use of the information is unauthorized and strictly prohibited. If you have received this electronic mail in error, please immediately notify the sender and destroy all copies which you may have of this communication.

Please consider the environment before printing this email.

DOA 485

EXHIBIT C

Tom Chase

From: Macaulay, Angus H. <AMacaulay@nexsenpruet.com>
Sent: Tuesday, March 17, 2015 9:00 PM
To: tdougall@dougallfirm.com; Donald Gist (dtommygist@yahoo.com); aaronwallace.gistlawfirm@gmail.com; aaronvwallace@gmail.com
Cc: Hicks, Carolyn W.; Tom Chase; Angela Hope
Subject: Re: MEDIATION: Alston v. Willow Creek

Tom - a party objects to me providing you with a copy of the Agreement
Angus

Sent from my iPhone

On Mar 17, 2015, at 4:17 PM, Macaulay, Angus H. <AMacaulay@nexsenpruet.com> wrote:

> Gentlemen – I hope you are all doing well.
>
> As you may recall, I mediated the above-referenced case for you all in July of last year. Tom Chase (cc'd) is aware that a Mediation Agreement was entered into between your respective clients, and he has asked if I will provide him with a copy of that Agreement.
>
> As Tom and his client were not a party to the Agreement, please let me know if you consent to me providing Tom with a copy of the Agreement.
>
> Thank you, Angus

Angus H. Macaulay
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
PO Drawer 2426 (29202)
T: 803.253.8279, F: 8037271465
AMacaulay@nexsenpruet.com
www.nexsenpruet.com

<image001.png>

<image002.png><image003.png>

*** CONFIDENTIAL COMMUNICATION *** The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies. Nothing in this transmission is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly

ROA 487

indicated. Intentional interception or dissemination of electronic mail not belonging to you may violate federal or state law.

ROA 488

EXHIBIT D

Tom Chase

From: Work <aaronwallace.gistlawfirm@gmail.com>
Sent: Tuesday, July 15, 2014 11:50 AM
To: Tom Chase
Subject: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Tom,

As you may be aware we have a Motion Hearing on Monday regarding our Motion to Amend the Complaint to add Jayden Alston to the caption.

Tom Dougall indicated to me this morning that he has no problem consenting to our amendment, but that he has no intentions on appearing at the hearing as the case is settled with respect to his client.

What is your position on consenting to our Amending the Complaint in lieu of a hearing on the matter?

I think the law clearly allows for the amendment and with the statute of limitations being tolled due to [redacted] minority it would be in all parties best interest to resolve this matter during this case rather than with subsequent litigation.

Please let me hear from you sometime during this week.

If you are willing to consent to the Amendment, I will need to inform the Court in writing that the matter has been resolved.

Thanks.

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

ROA 489

EXHIBIT E

Tom Chase

From: Work <aaronwallace.gistlawfirm@gmail.com>
Sent: Friday, July 18, 2014 2:15 PM
To: Tom Chase
Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Dear Tom:

We have no objection to what you have proposed.

If we have your consent to the Amendment of the Complaint, we will inform the court the Matter has been resolved.

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

> On Jul 18, 2014, at 1:20 PM, Tom Chase <tchase@mgclaw.com> wrote:
>
> Aaron,
> We will consent to the amendment provided we are in agreement that the parents depositions may be reopened as to the minor's claim. Let me know.
>
> Thanks
>
> Tom Chase
>
>> On Jul 15, 2014, at 11:49 AM, "Work" <aaronwallace.gistlawfirm@gmail.com> wrote:
>>
>> Tom,
>>
>> As you may be aware we have a Motion Hearing on Monday regarding our Motion to Amend the Complaint to add [redacted] to the caption.
>>
>> Tom Dougall indicated to me this morning that he has no problem consenting to our amendment, but that he has no intentions on appearing at the hearing as the case is settled with respect to his client.
>>
>> What is your position on consenting to our Amending the Complaint in lieu of a hearing on the matter?
>>
>> I think the law clearly allows for the amendment and with the statute of limitations being tolled due to [redacted] minority it would be in all parties best interest to resolve this matter during this case rather than with subsequent litigation.
>>
>> Please let me hear from you sometime during this week.
>>

ROA 491

>> If you are willing to consent to the Amendment, I will need to inform the Court in writing that the matter has been resolved.
>>
>> Thanks.
>>
>> Sincerely,
>>
>> Aaron Wallace
>> Attorney at Law
>>
>>
>>
>>
>> Sent from my iPhone
>

ROA 492

EXHIBIT F

Tom Chase

From: Work <aaronwallace.gistlawfirm@gmail.com>
Sent: Monday, August 11, 2014 3:11 PM
To: Tom Chase
Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Tom,

Good afternoon. We filed the Amended Complaint on today in this case. Are you willing to accept service on behalf of your client?

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

> On Aug 11, 2014, at 10:46 AM, Tom Chase <tchase@mgclaw.com> wrote:
>
>
>
> Aaron,
> When can we expect a report that is to be used for the determination of the Confession of Judgment?
> Thanks.
>
> <http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
> [Tom Chase Attorney 864-239-4008
tchase@mgclaw.com]<http://mm1.lettermark.net/mgclaw/card/RWSF_13.map>
>
>
>
> -----Original Message-----
> From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
> Sent: Monday, August 11, 2014 10:26 AM
> To: Tom Chase
> Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)
>
> Tom,
>
> Good Morning. Our clients have indicated to is that the property has already been inspected by their expert.
>
> Sincerely,
>
> Aaron Wallace
> Attorney at Law
>
> Sent from my iPhone
>

ROA 494

EXHIBIT G

Tom Chase

From: Tom Chase
Sent: Monday, August 11, 2014 5:53 PM
To: 'Work'
Subject: RE: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Importance: High

Aaron,

I will accept service of the Amended Complaint.

Please note that I will need the names of any proposed experts and their reports pursuant to our discovery requests. We are quickly approaching the trial date and I will need this information to allow for discovery depositions if necessary. Please also supplement any discovery related to the minor's claim.

-----Original Message-----
From: Work [mailto:aaronwallace.gistlawfirm@gmail.com]
Sent: Monday, August 11, 2014 3:11 PM
To: Tom Chase
Subject: Re: Motion Hearing in Alston vs Willow Creek Construction (7/22/14)

Tom,

Good afternoon. We filed the Amended Complaint on today in this case. Are you willing to accept service on behalf of your client?

Sincerely,

Aaron Wallace
Attorney at Law

Sent from my iPhone

> On Aug 11, 2014, at 10:46 AM, Tom Chase <tchase@mgclaw.com> wrote:
>
>
>
> Aaron,

ROA 496

EXHIBIT H

mgc | INSURANCE DEFENSE

Reply To
G. THOMAS CHASE
Direct Dial: (864) 239-4008
tchase@mgclaw.com

August 18, 2014

Donald Gist, Esquire
Gist Law Firm
4400 North Main Street
Columbia, South Carolina 29203

RE: Tymika Jones Alston and Harold Alston v. Willow Creek Construction, Inc. and Oscar Torres and Willow Creek Construction, Inc., v. Donald Richard Torres d/b/a DMT Construction Co., Inc., L & L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-6895R (Richland)
Carrier Claim No.: [redacted]
MGC File No.: [redacted]

Dear Donald:

Enclosed please find the amended Acceptance of Service from the document that was submitted to me related to the Amended Summons and Complaint. The original document submitted over to me indicated that I would be accepting service on behalf of entities that I do not represent. The additional entities, assuming they are to continue to be in litigation, must be served through other means because I do not represent those entities. I have crossed through the language that is not acceptable and also clarified the proper names of the entities that I do represent. In the event that you have any questions regarding this document, please contact me at your convenience.

With kind regards, I am

Very truly yours,

G. Thomas Chase

GTC/gvl

Enclosure

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
Tymika Jones Alston and Harold Alston Individually and as Parents and Guardians On Behalf of Their Minor Child [redacted]	)	Civil Action No.: 2010-CP-40-04307
Plaintiffs,	)	Acceptance of Service
Vs.	)	
Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. And Eduardo Moreno d/b/a E.S. Moreno Construction,	)	
Defendant.	)	

I, G. Thomas Chase, of McAngus Goudelock & Courie, LLC, attorney for Defendant, ~~The~~ Donald Richard Torres ~~d/b/a DMT Construction, Co, Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction,~~ and DMT Co., Inc. in the above reference matter, hereby acknowledge receipt of the Amended Complaint in the above case and the Amended Summons issued by the Clerk.

On behalf of my client Donald Richard Torres and DMT ~~Construction~~ Co., Inc., I hereby waive any requirement for other service of the Amended Complaint in this action. ~~I agree to Answer or otherwise plead within twenty days pursuant to the Federal Rules of Civil Procedure. I understand that if I fail to file an Answer or other pleadings with the clerk of this court and serve the same upon the Plaintiff in accordance with the Rules of Civil Procedure within the time limits stated, I will be in default and Plaintiff may be afforded the relief demanded in the Amended Complaint without a trial or other hearing.~~ while preserving all other defenses.

Attorney

8/18/14

Date

ROA 499