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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2024-000772

Waterfall Investment and Construction Group, LLC, *Appellant,*

v.

A&E Construction & Maintenance, LLC, Jeronimo Ponce d/b/a JP & Sons Builders, Creative Drafting and Designs, Defendants,

of which Jeronimo Ponce d/b/a JP & Sons Builders is the *Respondent.*

RECORD ON APPEAL

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

JUDGMENT IN A CIVIL CASE
CASE NO. 2019CP2603604

Waterfall Investment And Construction Group LLC et al
PLAINTIFF(S)

James Daniel Smith, Sr 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

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

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

Third-Party Defendant Conquering Trades, Inc.'s Motion to Dismiss plaintiff/third-party plaintiff Waterfall Investment and Construction Group, LLC's cause of action for contribution is GRANTED. See First General Services of Charleston, Inc. v. Miller, Inc., 314 S.C. 439, 445 S.E.2d 446 (1994).

Third-Party Defendant Atlantic Electric Services' Motion to Issue Permanent Stay and to Dismiss and in the Alternative for Summary Judgment is PARTIALLY GRANTED and PARTIALLY DENIED. The request to permanently stay is denied as S.C. Code Ann. section 40-59-810, et seq., does not apply to claims by contractors against subcontractors. The motion to dismiss the plaintiff/third-party plaintiff's causes of action for negligence and contribution is granted. See First General Services of Charleston, Inc., id. See also Stoneledge at Lake Keowee Owners' Assn., Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 615, 776 S.E.2d 426 (S.C.App. 2015).

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 03/02/2021 .

Lynne M Brown
David A Brown
Frances Smith
James Daniel Smith, Sr
Creative Drafting and Designs

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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.



Horry Common Pleas

Case Caption: Waterfall Investment And Construction Group LLC , plaintiff, et al VS James Daniel Smith Sr , defendant, et al

Case Number: 2019CP2603604

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

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

JUDGMENT IN A CIVIL CASE
CASE NO. 2019CP2603604

Waterfall Investment And Construction Group LLC et al
PLAINTIFF(S)

James Daniel Smith, Sr 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

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

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

Motion to Reconsider 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 09/08/2021 .

Ramon Soto
Lynne M Brown
David A Brown
Frances Smith
James Daniel Smith, Sr
Creative Drafting and Designs

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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.



Horry Common Pleas

Case Caption: Waterfall Investment And Construction Group LLC , plaintiff, et al VS James Daniel Smith Sr , defendant, et al

Case Number: 2019CP2603604

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2019-CP-26-03604

Waterfall Investment and Construction)
Group, LLC)
)
Plaintiff,)

vs.)

James Daniel Smith, Sr. and Frances Smith,)
)
Defendants.)

**ORDER GRANTING PLAINTIFF’S
SUBSTITUTION OF COUNSEL AND
LEAVE TO AMEND COMPLAINT IN
ORDER TO REALIGN THE
REMAINING PARTIES & CLAIMS
AFTER A MEDIATED SETTLEMENT;
AND FOR A REVISED SCHEDULING
ORDER**

James Daniel Smith, Sr. and Frances Smith,)
)
Third-Party Plaintiffs,)

vs.)

David A. Brown and Lynne M. Brown,)
)
Third-Party Defendants.)

Waterfall Investment and Construction)
Group, LLC,)
)
Third-Party Plaintiff,)

vs.)

A&E Construction & Maintenance, LLC,)
Conquering Trades, Inc., Atlantic Electric)
Services, Jeronimo Ponce d/b/a JP & Sons)
Builders, Creative Drafting and Designs,)

Third-Party Defendants.)

This matter came before the Court on the Plaintiff’s Motion Seeking to Substitute Counsel,
for Leave to File an Amended Compliant in Order to Realign the Remaining Parties and Claims

after a Mediated Settlement; and for a Revised Scheduling Order be WebEx before the Honorable William H. Seals, Jr.

Present at the hearing was: Henrietta Golding representing the Defendants and Third-Party Plaintiffs Mr. James Daniel Smith Sr. and Mrs. Frances Smith; Kenneth R. Moss for the Third-Party Defendants David A. Brown and Lynne M. Brown; and Patrick McDonald and Fred Oliver for Plaintiff Waterfall Investment and Construction Group, LLC.

Based on the foregoing, it is ORDERED:

1. Attorney Kenneth R. Moss and his firm shall be substituted for Attorneys John Rogers, Fred Oliver and their respective firms as counsel for the Plaintiff;
2. Plaintiff and Third-Party Defendants are granted leave to amend the complaint as to better reflect and realign the remaining parties and claims after many parties to this action reached a settlement during mediation;
3. The caption of the case shall be amended as to realign the remaining parties and remove the parties that settled out of his case; and
4. The Parties and their respective attorneys shall submit an Amended Schedule Order to accommodate the remaining parties to have a trial of the remaining claims.

IT IS SO ORDERED.

_____, 2023

Honorable, William H. Seals, Jr., #2157
Presiding Judge of the 15th Judicial Circuit



Horry Common Pleas

Case Caption: Waterfall Investment And Construction Group LLC , plaintiff, et al VS James Daniel Smith Sr , defendant, et al

Case Number: 2019CP2603604

Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

contribution, and breach of warranty claims. This Motion followed.

LEGAL STANDARD

Under Rule 56 of the South Carolina Rules of Civil Procedure, the judgment sought by the moving party “shall be rendered forthwith if 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.” Rule 56(c), SCRPC. The rule further provides that “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC.

“In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party.” Gilmer v. Martin, 323 S.C. 154, 156, 473 S.E.2d 812, 813 (Ct. App. 1996). It is not sufficient, however, that a non-moving party creates an inference that is not reasonable or raises an issue of fact that is not genuine. Evans v. Stewart, 370 S.C. 522, 636 S.E.2d 632, 635 (Ct. App. 2006). “To justify departure from the course of the trial of an issue of fact and the award of summary judgment, the court must be convinced that the issue is not genuine but feigned and that there is in truth nothing to be tried. . . . The fact that there is a factual dispute is not enough to preclude a summary judgment.” Saluda Motor Lines, Inc. v. Crouch, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989) (quoting 73 Am. Jur. 2d Summary Judgment § 27). “The plain language of Rule 56(c), SCRPC, mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” Etheredge v. Richland School Dist. I, 330 S.C. 447, 453, 499 S.E.2d 238 (Ct. App. 1998).

ANALYSIS

Defendant contends that he is entitled to summary judgment as Defendant's claims are primarily barred by the three-year statute of limitations applicable to this case. S.C. Code Ann. § 15-3-520 et. seq. The Court agrees. Plaintiff initially brought negligence, equitable indemnity, and contribution claims against the Defendant on October 24, 2019. At that point, Defendant was identified as the framer for the residence in a case primarily defined by alleged framing deficiencies. Defendant appeared and defended this case for over three years before the Smiths settled their claims with Plaintiff on November 18, 2022. At that time, all damage claims arising from defective construction against the Defendant had expired under the three-year statute of limitations, and Plaintiff concedes that any claims asserted by any other party would have expired. Aff. of David A. Brown, p. 4. Additionally, Defendant purchased the home as part of its settlement with the Smiths with notice of the alleged defects it had been defending since 2019. Thus, when Plaintiff amended its pleadings on August 21, 2023, any claims that could have been assigned or arisen from Defendant's alleged construction work were extinguished.

With regard to Plaintiff's contractual indemnity claim, no contract has been produced in opposition to Defendant's Motion establishing an indemnity agreement between the parties. Additionally, Plaintiff's contribution claim is improper as the settlement agreement it reached with the Smiths specifically did not extinguish Defendant's liability, which, as discussed previously, had already expired under the statute of limitations. Def. Mot. for Summary Judgment – Exhibit A. Finally, Plaintiff concedes its role in constructing the subject residence and responsibility as a joint tortfeasor in its representative affidavit provided to the Court. Aff. of David A. Brown, pp. 1-4. Such explicitly bars any claim for equitable indemnity, which would require Plaintiff to be fault-free with regard to the Smiths' claims against it. Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983).

For the above-stated reasons, Defendant's liability for defective construction arising from work performed at the Smith residence expired prior to Plaintiff's settlement with the Smiths on November 22, 2022. As such, the Court **GRANTS** Defendant's Motion for Summary Judgment as to Plaintiff's negligence and breach of warranty claims. As Plaintiff has produced no contract in opposition to Defendant's Motion, the Court **GRANTS** such Motion as to Plaintiff's breach of contract and contractual indemnity claims. Finally, the Court finds that Plaintiff is not fault-free by admission in its representative affidavit, and the Court **GRANTS** Defendant's Motion as to Plaintiff's equitable indemnity claim.

As all other claims between the parties to this action have otherwise been dismissed or settled, this case is therefore ended.

IT IS SO ORDERED!

The Honorable William H. Seals, Jr.
Chief Administrative Judge
Fifteenth Judicial Circuit

Conway, South Carolina
March __, 2024



Horry Common Pleas

Case Caption: Waterfall Investment And Construction Group LLC , plaintiff, et al VS James Daniel Smith Sr , defendant, et al

Case Number: 2019CP2603604

Type: Order/Summary Judgment

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
)	
Waterfall Investment and Construction Group, LLC,	)	Civil Action No.: 2019-CP-26-_____
)	
Plaintiff,)	
)	
vs.	)	SUMMONS
)	
James Daniel Smith, Sr. and Frances Smith,)	
)	
Defendants.)	
)	

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

COLLINS & LACY, P.C.

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**ATTORNEYS FOR PLAINTIFF
WATERFALL INVESTMENT AND
CONSTRUCTION GROUP, LLC**

June 7, 2019
Murrells Inlet, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
)	
Waterfall Investment and Construction Group, LLC,	)	Civil Action No.: 2019-CP-26-_____
)	
Plaintiff,)	
)	
vs.	)	COMPLAINT
)	
James Daniel Smith, Sr. and Frances Smith,)	
)	
Defendants.)	
)	

NOW COMES the Plaintiff, complaining of the Defendants above named, and would show and allege that:

1. Plaintiff is a South Carolina limited liability company whose principal place of business is situated in Horry County, South Carolina.
2. Defendants own Lot #66 at 365 Waterfall Circle, Little River, within the community of Waterfall located in Horry County, South Carolina.
3. This parties to this action and the matters alleged herein are subject to the jurisdiction of this Court and venue for this action is proper in Horry County, South Carolina.

FIRST CAUSE OF ACTION
(Breach of Contract)

4. The above allegations are incorporated by reference as if re-alleged verbatim herein.
5. That heretofore the Defendants requested of Plaintiff and Plaintiff agreed to construct a home on Lot #66 in the Waterfall subdivision pursuant to contract entered into on March 3, 2017.
6. That pursuant to the contractual relationship, Plaintiff provided the labor, materials and equipment utilized in building the Defendants’ home, however, the Defendants have failed and refuse to fully pay Plaintiff and live up to their contractual obligations.
7. That in and by the express terms of the parties’ contract Plaintiff is entitled to seek the assistance of this Court in the collection of the sums owed to the Plaintiff and to an award of the costs and attorneys’ fees incurred by the Plaintiff in this action.

8. The Plaintiff is informed and believes it is entitled to an inquiry by the Court into the evidence of this case and an Order and Judgement finding that the Defendants have breached their contract with the Plaintiff, are indebted to Plaintiff in an amount that will be more specifically determined in the trial of this action and a judgment against the Defendants in such an amount and upon such terms deemed legal and equitable by the Court.
9. The Plaintiff is informed and believes that Plaintiff is entitled to an Order and Judgment requiring Defendants to pay pre-judgment and post-judgment interest and also the costs and attorneys' fees incurred by Plaintiff in this action.

SECOND CAUSE OF ACTION
(Unjust Enrichment)

10. The above allegations are incorporated by reference as if re-alleged verbatim herein.
11. That the Defendants, by and through their individual and concerted conduct, induced Plaintiff to provide labor, materials and equipment utilized in building a home on Defendants' property.
12. That the Defendants have failed and refused to pay Plaintiff for the labor, materials and equipment provided by Plaintiff.
13. That as a direct and proximate result of the Defendants' conduct, the Defendants have been unjustly enriched at the Plaintiff's expense in that the Plaintiff has provided labor, materials and equipment, however, has not been fully paid.
14. That all of the named Defendants would be unjustly enriched if the Plaintiff were not paid for the labor, materials and equipment as each Defendant's respective interest would be improved.
15. That Plaintiff's officers and agents are informed and believe that Plaintiff is entitled to judgment against the Defendants in a sum sufficient to compensate Plaintiff fully and fairly for the labor, materials and equipment provided to the Defendants, and also for Plaintiff's costs and attorneys' fees incurred in this action.

THIRD CAUSE OF ACTION
(Foreclosure of Mechanic's Lien)

16. The above allegations are incorporated by reference as if re-alleged verbatim herein.
17. That or about March 15, 2019, and pursuant to the contractual relationship, the parties' course of dealing and the Defendants express request and direction, Plaintiff provided materials utilized in the construction of improvements to the real property particularly described in the Lis Pendens filed in this action and more commonly described as Lot #66 365 Waterfall Circle, Little River, South Carolina.

18. That the Defendants are the owners of the real property and improvements particularly described in the Lis Pendens in this action and more commonly described as Lot #66 365 Waterfall Circle, Little River, South Carolina.
19. The Defendants, either by their express actions or implicitly because of their occupancy and use of the premises authorized and consented to Plaintiff providing materials, equipment and labor utilized on the premises.
20. The Defendants failed and refused to fully pay Plaintiff despite repeated demands to do so.
21. That in order to better secure the Defendants' indebtedness, the Plaintiff caused to be filed a Notice and Certificate of Mechanics Lien in the public records of Horry County and served the Defendants with a copy of the said lien. Plaintiff's Certificate of Mechanics Lien was duly filed in the records of Horry County, South Carolina in Lien Book 263 at Page 1611.
22. That despite notice of the lien the Defendants have failed and refused to fully pay Plaintiff for the materials, equipment and labor utilized in the installation of heating and air conditioning equipment in and on the premises.
23. Defendants owe to Plaintiff the principal sum of Fifty-Three Thousand Four Hundred Thirteen and 62/100 Dollars (\$53,413.62) together with interest and collection fees that will accrue through the trial of this action and the costs and attorney fees incurred by Plaintiff in this action.
24. The Plaintiff's officers and agents are informed and believe that Plaintiff is entitled to a judgment against the Defendants foreclosing Plaintiff's lien in and to the Defendants' property, that the property be sold by the Court at public sale with the proceeds of the sale being applied as further directed by this Court.
25. Plaintiff does not waive, but specifically demands judgment against the Defendants for the full amount found to be due Plaintiff, and for the right to enter personal judgment against the Defendants for any deficiency in this action remaining after the sale of the premises.

WHEREFORE, Plaintiff respectfully requests that the Court award it the following:

- a. Actual damages in an amount that will be proven in the trial of this action;
- b. Plaintiff's costs and attorney's fees incurred in this action;
- c. Foreclosure of the aforementioned property;

- d. Sale of the aforementioned property according to law, the equity of redemption barred, and that the proceeds of sale be applied first to the costs and expenses of this action and the sale, including attorney's fees due Plaintiff's attorney, second to discharge of amounts due Defendants with lien priority greater than the Plaintiff, third to the amounts due Plaintiff the surplus distributed according to law; and
- e. Such other and further relief as the Court deems proper.

Respectfully submitted,

COLLINS & LACY, P.C.

By: s/ Fred H. Oliver

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***ATTORNEYS FOR PLAINTIFF
WATERFALL INVESTMENT AND
CONSTRUCTION GROUP, LLC***

June 7, 2019
Murrells Inlet, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2019-CP-26-03604

Waterfall Investment and)
Construction Group, LLC)
)
Plaintiff,)

vs.)

James Daniel Smith, Sr. and,)
Frances Smith,)
)
Defendants.)

**ANSWER, COUNTERCLAIMS, AND
THIRD-PARTY COMPLAINT OF
DEFENDANTS JAMES DANIEL
SMITH, JR. AND FRANCES SMITH**

(Jury Trial Demanded)

James Daniel Smith, Sr. and)
Frances Smith,)
)
Third-Party Plaintiffs,)

vs.)

David A. Brown and Lynne M.)
Brown,)
)
Third-Party Defendants.)

The Defendants James Daniel Smith, Sr. and Frances Smith (collectively, "Defendants"), answering the Complaint, would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation set forth in the Complaint, which is not hereinafter admitted, modified, or qualified is denied and strict proof is demanded thereof.
2. The allegations of Paragraphs 1 and 2 are admitted.

3. The allegations of Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 are denied and strict proof demanded thereof.

SECOND DEFENSE

4. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

5. Plaintiff Waterfall Investment & Construction Group, LLC's ("Plaintiff") claims are barred, in whole or in part, by Plaintiff's unclean hands.

THIRD DEFENSE

6. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

7. Defendants assert the doctrine of waiver, estoppel, and laches as complete and affirmative defenses.

FIFTH DEFENSE

9. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

10. Plaintiff's claims are barred, in whole or in part, because at all times herein, Defendants acted fairly and in good faith with Plaintiff.

SIXTH DEFENSE

11. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

12. Plaintiff's claims are barred by its material breach of the contract.

SEVENTH DEFENSE

13. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

14. Plaintiff's claims are barred or otherwise affected by set-off and/or recoupment.

EIGHTH DEFENSE

15. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

16. Plaintiff's misrepresentations regarding the building code and hiring an architect act as a complete bar to the Plaintiff's claims.

NINTH DEFENSE

17. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

18. Plaintiff's breach of warranty acts as a bar to its claims.

TENTH DEFENSE

19. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

20. Plaintiff did not perfect its mechanic's lien in accordance with the South Carolina Mechanic's Lien Statute, S.C. Code Ann. § 29-5-10 *et seq.*

ELEVENTH DEFENSE AND FIRST COUNTERCLAIM
(Breach of Contract)

21. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

22. This case arises out of a contract (the "Contract") entered into on March 3, 2017 between Plaintiff and Defendants for the sale of a lot, located at Lot #66, 365 Waterfall Circle,

Little River, SC 29566 (the "Property"), and construction of a custom home (the "Custom Home"). A true and correct copy of the Contract is attached hereto as Exhibit A.

23. As set forth in the Contract, Plaintiff agreed to construct Defendants' Custom Home pursuant to the Smith's Custom Floor Plans, which included the Structural Engineering Plans, (the "Plans"), which were incorporated within the Contract by reference.

24. Before Defendants entered into the Contract, Plaintiff emailed the Defendants the Plans; Plaintiff provided Defendants their customizable Plans in a brochure; Plaintiff sent marketing photos and provided tours of a model home that was similar to Defendants' Plans; and, Plaintiff informed Defendants that it would hire an architect to assist in implementing and verifying the Plans (collectively, "Representations").

25. Defendants relied on Plaintiff's Representations when they entered into the Contract on March 3, 2017.

26. After entering into the Contract, Defendants wrote several emails to Plaintiff requesting that that Plaintiff's architect make changes to the Plans. The requested changes to the Plans included, but were not limited to, moving the windows one foot toward to the front of the house; enlarging the support wall and arch over the kitchen bar; and, providing updated dimensions for the kitchen island.

27. Plaintiff assured Defendants that its architect would make the changes to the Plans in accordance with state and local building code.

28. In fact, Plaintiff had not hired an architect and, Plaintiff opted to make changes without guidance from an architect or an engineer

29. Plaintiff is not a licensed architect or engineer.

30. Between October 13, 2018 and November 29, 2018, Defendants discovered several construction deficiencies (“Construction Defects”) existed within the Custom Home.

31. The Construction Defects include, but are not limited to, inadequate beams that support the bathroom, dormer, and bonus room; inadequate ceiling joists that support roof rafters and valley beams; missing frames; deviations from engineer’s intended design; improper design of electrical wires; and, walls built at the incorrect height.

32. On December 7, 2018, Defendants demanded that Plaintiff obtain approval from the Engineer of Record to correct the Construction Defects.

33. Plaintiff subsequently cancelled the construction permit and abandoned the construction of the Custom Home.

34. As a result of Plaintiff making the changes on its own volition, Construction Defects exist within the Custom Home.

35. As a result of the Construction Defects, Plaintiff breached the Contract with Defendants.

36. As a direct and proximate result of Plaintiff’s breach of the Contract, Defendants have been damaged.

37. Defendants are entitled to judgment against Plaintiff for actual damages, together with legal interest therein, and the legal costs of this action.

TWELFTH DEFENSE AND SECOND COUNTERCLAIM
(Negligence-Gross Negligence)

38. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

39. Plaintiff owed a duty to Defendants to exercise that degree of skill necessary to select an architect to oversee the construction of the Custom Home and otherwise deliver the

Custom Home free of Construction Defects and designed and built in conformity with the customary and ordinary standards of the building and construction industry pursuant to the Plans.

40. Plaintiff breached its duty to Defendants, and was negligent, when it failed to hire an architect and subsequently failed to properly construct the Custom Home pursuant to the Plans.

41. As a direct and proximate result of Plaintiff's negligence, gross negligence, willful, and wanton negligence and reckless disregard of the construction of Defendant's Custom Home, the Defendants have suffered damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, depreciation in value and such punitive damages as may be appropriate.

THIRTEENTH DEFENSE AND THIRD COUNTERCLAIM
(Breach of Express Warranty)

42. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

43. Plaintiff represented and warranted that the Custom Home was of the highest quality. Those representations and warranties were made in connection with the sale of the Custom Home.

44. Plaintiff breached its express warranty by producing, selling, and turning over to Defendants an inferior and rapidly deteriorating Custom Home plagued with extensive and severe construction defects and problems.

45. As a direct and proximate result and consequence of Plaintiff's breach of its express warranty, Defendants have suffered damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value.

FOURTEENTH DEFENSE AND FOURTH COUNTERCLAIM
(Breach of Implied Warranty)

46. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

47. Plaintiff, as developer, seller and grantor, made implied warranties of habitability and fitness for intended use.

48. Plaintiff breached its implied warranty by producing, selling, and turning over to Defendants an inferior and rapidly deteriorating Custom Home plagued with extensive and severe construction defects and problems.

49. As a direct and proximate result and consequence of Plaintiff's breach of implied warranties, Defendants have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value.

FIFTEENTH DEFENSE AND FIFTH COUNTERCLAIM
(Fraud)

50. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

51. Plaintiff represented to Defendants that it would hire an architect to assist in implementing and verifying the Plans and construct the Custom Home pursuant to the Plans.

52. Defendants relied on Plaintiff's Representations when it entered into the Contract with Plaintiff on March 3, 2017.

53. In fact, Plaintiff knew that its Representations to Defendants were false.

54. Plaintiff's Representations were material to the Contract and to the Defendants because Defendants believed that an architect would provide the proper drawings and instructions to construct the Custom Home and that the Custom Home would be built pursuant to the Plans.

55. Plaintiff intended for Defendants to rely on the Representations so that Defendants would enter into the Contract.

56. Defendants were not aware that Plaintiff's Representations were false.

57. Defendants relied on Plaintiff's Representations when it entered into the Contract believing that an architect would provide proper instructions and drawings to Plaintiff and the Custom Home would be built pursuant to the Plans.

58. As a direct and proximate cause of Plaintiff's reckless misrepresentation, Defendants have been damaged and are entitled to actual and punitive damages.

SIXTEENTH DEFENSE AND SIXTH COUNTERCLAIM
(Negligent Misrepresentation)

59. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

60. At the time of entering into the Contract with Defendants, Plaintiff represented that it would hire an architect and would construct the Custom Home pursuant to the Plans.

61. Plaintiff knowingly made false representations with reckless indifference to the rights of Defendants when it entered into this Contract knowing it was not going to hire an architect nor construct the Custom Home pursuant to the Plans.

62. Defendants relied on Plaintiff's false Representations when it purchased the Custom Home from Plaintiff.

63. The Representations of Plaintiff were made negligently for the Plaintiff either knew or should have known that it was not going to hire an architect nor construct the Custom Home pursuant to the Plans.

64. As a direct and proximate result of Plaintiff's misrepresentations, Defendants suffered a pecuniary loss in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value.

SEVENTEENTH DEFENSE AND SEVENTH COUNTERCLAIM
(Violation of South Carolina Unfair Trade Practices Act)

65. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

66. Plaintiff's acts, as described above, are unfair and deceptive acts which have an impact on the public interest. Furthermore, these unfair and deceptive acts are capable of repetition.

67. Plaintiff's acts deceive and falsely entice consumers to enter into contracts for the construction of custom homes which Plaintiff knows will not be built pursuant to the contract.

68. The actions of Plaintiff, as described herein, are in violation of S.C. Code Ann. § 39-5-20.

69. The actions of Plaintiff were committed with the intent, purpose and effect of procuring an unfair competitive advantage and such actions have the effect of harming the public.

70. The actions of Plaintiff have caused, and are continuing to cause, damages to Defendants.

71. Plaintiff's actions were, and are, a willful and knowing violation of S.C. Code Ann. § 39-5-20.

72. As a direct and proximate result of said unfair and deceptive acts, Defendants have been damaged.

73. Defendants are entitled to a judgment against the Plaintiff, jointly and severally, for damages set forth in the South Carolina Unfair Trade Practices Act, section 39-5-10 *et seq.* of the South Carolina Code of Laws, with legal interest thereon, as well as treble damages and attorneys' fees.

EIGHTEENTH DEFENSE AND EIGHTH COUNTERCLAIM
AND FIRST THIRD-PARTY COMPLAINT
(Violation of Statute of Elizabeth)

74. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

75. Upon information and belief, David A. Brown ("Mr. Brown") and Lynne M. Brown ("Mrs. Brown") (collectively, "Third-Party Defendants") are citizens and residents of, and/or transact business in Horry County, South Carolina.

76. This Court has jurisdiction over this matter pursuant to § 11 of Article 5 of the South Carolina Constitution, and venue is proper in Horry County, South Carolina pursuant to S.C. Code Ann. §§ 15-7-10 and 15-7-30. This Court has personal jurisdiction over the Third-Party Defendants.

77. On July 3, 2019, Defendants provided a notice of claim letter to Plaintiff regarding the Construction Defects.

78. On July 18, 2019, Plaintiff deeded, via warranty deed, a property located at 305 39th Ave. N., North Myrtle Beach, South Carolina 29582 ("Transferred Property") to the Third-Party Defendants. The Transferred Property is more particular described as follows:

ALL AND SINGULAR all that certain piece, parcel or lot of land, situate, lying and being in Little River Township, Horry County, South Carolina, known and

designated as LOT SIX (6) OF BLOCK "C-1" as appears on a map of subdivision in the Cherry Grove Beach Section, North Myrtle Beach, South Carolina as revised by C. B. Berry, R.L.S., dated July 30, 1974. A copy of said map is recorded in Plat Book 57 at Page 119, records of Horry County and is by reference incorporated herein as forming a part and parcel of this description.

This property is conveyed subject to restrictive covenants recorded in Deed Book 652 at Page 141, records of Horry County.

The Granter acquired the above described property by deed recorded January 6, 2016 in Deed Book 3883 at Page 2698, records of Horry County.

PIN: 35114030155

79. Upon information and belief, Third-Party Defendants are the sole members of Plaintiff.

80. Plaintiff deeded the Transferred Property to Third-Party Defendants for a total consideration of Ten and 00/100 Dollars (\$10.00). The current market value of the Transferred Property is approximately Five Hundred Thousand and 00/100 Dollars (\$500,000.00).

81. Plaintiff deeded the Transferred Property with the intent or purpose to delay, hinder, or defraud the Defendants in this action.

82. Plaintiff and Third-Party Defendants' actions are in violation of S.C. Code Ann. § 27-23-10(A).

83. Accordingly, Defendants request that this Court set aside Plaintiff's conveyance to the Third-Party Defendants as null and void under the Statute of Elizabeth.

WHEREFORE, the Defendants pray for judgment against Plaintiff and Third-Party Defendants as follows:

- A. Plaintiff's action be dismissed, with prejudice, with all costs assessed against the Plaintiff;
- B. Actual damages, together with legal interest, for the Breach of Contract as alleged in the First Counterclaim;

- C. Actual and punitive damages, together with legal interest, for Negligence as alleged in the Second Counterclaim;
 - D. Damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value for Breach of Express and Implied Warranty as alleged in the Third and Fourth Counterclaims;
 - E. Actual and punitive damages, together with legal interest, for Fraud as alleged in the Fifth Counterclaim;
 - F. Actual and punitive damages, together with legal interest, for Negligent Misrepresentation as alleged in the Sixth Counterclaim;
 - G. Actual damages, together with legal interest, as well as treble damages and attorneys' fees for Violation of the South Carolina Unfair Trade Practices Act as alleged in the Seventh Counterclaim,
 - H. An order from the Court setting aside the transfer of property between Plaintiff and Third-Party Defendants for a Violation of the Statute of Elizabeth as alleged in the Eighth Counterclaim and First Third-Party Complaint;
 - I. Costs of this litigation, including reasonable attorneys' fees; and,
 - J. For such other and further relief as this Court may deem just and proper.
- Respectfully submitted,

Burr & Forman LLP

s/Henrietta U. Golding

Henrietta U. Golding, SC Bar # 2173

John F. Connell, Jr. SC Bar # 101701

2411 N. Oak Street, Suite 206 (29577)

Post Office Box 336

Myrtle Beach, SC 29578-0336

Ph: (843) 444-1107; Fax: (843) 444-3964

Email: hgolding@burr.com

jconnell@burr.com

*Attorneys for the Defendants and Third-Party
Plaintiffs*

September 9, 2019

Purchaser: Jim and Frances Smith	Page 1 of 6
Date : 3/3/2017	Lot :66

CONTRACT FOR SALE OF CUSTOM HOME AND LOT

PURCHASER:

4/7/17
J.D. 4/7/17
JW 4/7/17
 James Daniel Smith, Sr.

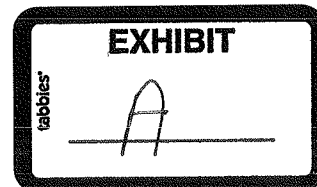
Name(s): James D. Smith & Frances Smith
 Address: 3948 Horseshoe Road North 2B
 City/St./Zip: Little River, SC 29566
 Phone (H): 805-295-1468
 Phone (2):
 Cell Phone: 805-295-1468 Jim
 Email: Jdsmith1723@gmail.com
 Email:

hereinafter called "Purchaser";

SELLER:

Waterfall Investment & Construction Group LLC
 288 Waterfall Circle
 Little River, SC 29566
 Phone: 843-399-4444

hereinafter called "Seller"



JW 3/3/17
 Initial Date

JAS 3/3/17
 Initial Date

 Initial Date

J 3/3/17
 Initial Date

Purchaser: Jim and Frances Smith	Page 2 of 6
Date : 3/3/2017	Lot :66

WITNESSETH:

WHEREAS, Purchaser desires to purchase Lot #66 , TMS # 130-33-01- 068, 365 Waterfall Circle (street address), within the community of Waterfall, Little River, South Carolina, (hereinafter called "the Property") under the terms and conditions of this contract and the Smith Custom Floor Plan, (hereinafter called "the Plans"), as more fully described in a supplemental agreement called the Builder/Owner Agreement and all related contract documents to that agreement including the plans and specifications between the Purchaser and Waterfall Investment & Construction Group , LLC, herein referred to as "The Builder".

WHEREAS, THEREFORE, for and in consideration of the mutual promises contained in this Contract, Purchaser agrees to purchase and Seller agrees to sell in fee simple, subject to the exceptions, terms and conditions set forth below. If any terms and conditions of this Agreement are conflicting with the Builder/Owner Agreement, the terms and conditions of this Agreement shall prevail.

1.0	\$ 60,000	Lot Price
	\$ 412,000	House Price
	\$ 472,000	Total Purchase Price (is to be paid as shown below)
	\$ 10,000	Deposit Due Upon execution of contract
	\$ 60,000	Due at Closing for lot
	\$ 31,200	Due at Closing for balance of construction start funds
	\$ 370,800	To be paid according to draw schedule

credited at Settlement

→ +10,000
380,800

<u>Jim</u>	<u>3/3/17</u>	<u>JLS</u>	<u>3/3/17</u>	<u>[Signature]</u>	<u>3/3/17</u>
Initial	Date	Initial	Date	Initial	Date

2.0 Purchaser shall be responsible for obtaining desired financing for the purchase and construction of the Property. By suggesting a source of financing and/or providing an application for such financing, Seller shall not be deemed to have Assumed any responsibility for obtaining such financing for the Purchaser or to represent or warrant that such financing will be available to the Purchaser. The lender chosen by the purchaser must agree to fund a minimum of 10% of the construction price of the Plans at closing before construction starts in addition to the purchase price of the Lot/Property. The purchaser shall be responsible for the difference in this amount, if their lender funds less than the amount specified.

3.0 This Contract is subject to the following arrangements:

3.1 It is mutually agreed by Seller and Purchaser that the Purchaser agrees to obtain a construction to permanent-type mortgage for the construction of the home or a conventional mortgage. Purchaser agrees to make diligent, truthful and proper application to lending institutions willing to provide the mortgage loan, and to furnish such information as may be required in the processing of Purchaser's application for a mortgage loan within Fifteen (15) days of the execution of this Contract. Purchaser further agrees that, once having obtained preliminary mortgage loan approval, Purchaser will take no deliberate action which would cause Purchaser's financial position to deteriorate to the extent that Purchaser's application for a mortgage loan would subsequently be denied. Purchaser will provide Seller the name and address of Purchaser's lender and the date of application and to keep Seller timely informed on acceptance or rejection of purchaser's financing application.

3.2 Purchaser shall pay those closing costs customarily paid by purchasers of real property in Horry County, South Carolina, including recording fees, Purchaser's attorney fees, survey costs and title costs, if applicable. Purchaser shall be responsible for recording the deed. Seller shall pay those closing costs customarily paid by Seller, including the documentary stamps for the deed.

3.3 I/We do not intend to apply for financing and I/We affirm that financing is not a contingency of the Contract and Purchaser's funds shall be used for construction of the home and purchase of the lot. The Construction Draw Schedule is included in this Contract and will be the basis for construction draws.

X *JM* X *ZJ*
Initials Initials

4.0 Seller agrees that it will obtain, at closing, appropriate releases releasing the Property described herein from the lien of any mortgage or other encumbrances, which may cover the Property.

 JM 3/3/17
Initial Date

Initial Date

 JM 3/3/17
Initial Date

 ZJ 3/3/17
Initial Date

Purchaser: Jim and Frances Smith	Page 4 of 6
Date : 3/3/2017	Lot :66

ELECTRONICALLY FILED - 2019 Sep 09 12:46 PM - HORRY - COMMON PLEAS - CASE#2019CP2603604

5.0 It is expressly understood and agreed by Purchaser that the Property shall be conveyed subject to matters of record: the zoning and subdivision ordinances of Horry County; any limitations on use imposed by state and federal law, regulations, or agreements; utility easements; all other easements shown on the recorded plat; the annual assessment contained herein; and the covenants and restrictions recorded by Seller in the Office of the Register of Mesne Conveyance for Horry County, South Carolina, hereinafter called the "Covenants". A COPY OF THE RECORDED COVENANTS IS AVAILABLE AND SHOULD BE READ BY PURCHASER PRIOR TO SIGNING THIS CONTRACT. BY SIGNING THIS CONTRACT, THE PURCHASER ACKNOWLEDGES HAVING RECEIVED A COPY OF SAID COVENANTS, RESTRICTIONS BY-LAWS AND ARB DOCUMENTS. IT IS STRONGLY RECOMMENDED THAT THE PURCHASER ORDERS A SURVEY BY A LICENSED SURVEYOR, AND IF SO, AGREES TO BE RESPONSIBLE FOR PAYING FOR, OBTAINING AND REVIEWING AN INDEPENDENT SURVEY OF THE PROPERTY BEFORE CLOSING FOR ANY ISSUES RELATING TO LOT BOUNDARIES, EASEMENTS, SUITABILITY FOR A SPECIFIC PLAN ON THE LOT, ENCROACHMENTS OR ANY OTHER ISSUE RELATED TO THE SPECIFICS OF THE LOT. THE PURCHASER AGREES TO HOLD THE SELLER HARMLESS FOR ANY ISSUES REGARDING THE ABOVE-MENTIONED SURVEY.

6.0 Purchaser acknowledges that Seller holds an exclusive option on the Property sold hereunder and that said option will be exercised by Seller simultaneously with the closing hereunder to provide the marketable title to Purchaser.

7.0 Annual assessments, including additional assessments and other maintenance costs are paid by each owner of a developed or undeveloped lot in order to provide for the maintenance and replacement of common areas, such as open spaces and streets in Waterfall as provided in the recorded covenants and Architectural Review Board documents.

8.0 The obligation to pay annual assessments shall be a covenant running with the land. Assessments are subject to increases as provided in Paragraph 8.2 below.


8.1 The annual assessments currently in effect are seven hundred dollars (\$750.00) for each lot. And, \$480.00 shall be paid at closing by the Purchaser as an initial capital contribution to the Waterfall POA Inc.


8.2 The Declaration of Covenants, Conditions, and Restrictions for Waterfall and the Bylaws for Waterfall Homeowners Association, Inc. outlines the manner by which the dues may be increased.

9.0 In order to help maintain the attractiveness of Waterfall residential areas for the good of the entire community, Purchaser irrevocably waives notice as provided in the covenants, and hereby irrevocably authorizes Seller and/or Declarant to enforce, correct and implement covenants and restrictions pertaining to the Property, including maintenance of landscaping and yards in a manner to be environmentally and aesthetically pleasing to the entire residential development at Waterfall. For the benefit of the entire residential community, such authorization shall be irrevocable. Entry on the Property for purposes outlined in this paragraph shall not be considered a trespass.

 3/3/17
Initial Date

Initial Date

 3/3/17
Initial Date

 3/3/17
Initial Date

Purchaser: Jim and Frances Smith	Page 5 of 6
Date : 3/3/2017	Lot :66

ELECTRONICALLY FILED - 2019 Sep 09 12:46 PM - Horry - COMMON PLEAS - CASE#2019CP2603604

10. The closing of this sale and purchase shall be held on or before March 31st, 2017 at the W.W.P.E.M. Law Firm located at 628 A Sea Mountain Hwy, N. Myrtle Beach SC 29582, telephone, 843-281-9901 or at such a time and place as Seller shall designate, or on such earlier date as is mutually agreed upon by both Purchaser and Seller. Seller has the sole discretion to extend this agreement for a period of time from the original closing date as he may deem appropriate.

11. In the event of a default in the performance of the purchase obligation of purchaser pursuant to this Contract, Seller shall have the right to either specifically enforce this Contract according to its terms; or Seller shall, at its sole election, be released from any further obligations to Purchaser pursuant to this Contract, and in such event, be entitled to retain the earnest monies deposited as agreed liquidated damages, it being the intention and agreement of both Purchaser and Seller hereto that upon Seller's so electing the amount of such earnest monies deposited shall act as fair measure of compensation for actual damages incurred by the Seller as a result of Purchaser's said default in purchasing the Property.


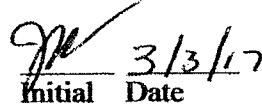
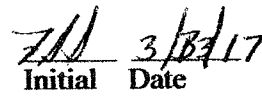
12. In the event of a default by Purchaser in the performance of any of the obligations imposed hereunder, Seller shall be entitled to all remedies allowed by law. Purchaser shall pay reasonable attorney's fees, expenses and costs of enforcement of such remedies.

13. In the event of default in performance of any other of the obligations of Seller pursuant to this Contract, Purchaser shall be entitled to terminate this Contract and receive a refund of Purchaser's earnest monies deposited; provided however, that no termination of this Contract by Purchaser shall be effective until written notice thereof has been delivered to Seller. Purchaser shall not be entitled to terminate this Contract on account of any default of Seller, which has been cured within a reasonable period of time of written notice thereof. The right of Purchaser to either terminate this Contract as herein provided, or specifically enforce this Contract according to its terms, shall be the sole remedy of Purchaser on account of any default in the performance of the obligations of Seller.

14. No employee or sales person or anyone may amend this Contract except as expressly authorized in writing by Seller. Purchaser acknowledges that Purchaser has read this Contract and understands and agrees to all of its terms and conditions and that no statements, pledges or commitments made by anyone including the Seller are a basis for any part of the Purchaser's decision to purchase including, any media, marketing materials, advertising or other materials or devices of any kind other than the terms contained within this agreement.

15. Purchaser agrees that Seller has made no pledges, covenants, or commitments in regard to the development of Waterfall, which have induced the purchaser of the property except as stated in this Contract.

16. It is acknowledged and agreed by the Purchaser that the Builder, not the Seller or its agents, is solely responsible for compliance with all state and county building codes, the plans and specifications, and including the Builder/Owner contract documents once acknowledged and dated by the Purchaser, with the most current revisions and agrees to hold the Seller harmless for any actions of the Builder, Designer, Engineer or Draftsman. At closing, all funds other than those related to the purchase of the lot shall be paid directly to the Builder's operating account and thereafter according to the construction draw schedule.

 3/3/17 _____ _____  3/3/17  3/3/17
Initial Date Initial Date Initial Date

Purchaser: Jim and Frances Smith	Page 6 of 6
Date : 3/3/2017	Lot :66

17. The Purchaser shall provide and pay for the following:
1. Landscape/Site plans/Home plans (only if custom or modified home plans) **INCLUDED**
 2. Surveys
 3. Builders Risk Insurance
 4. Design Review Board Fees (if using a plan other than the standard plans) **N/A**

18. Design Provision: In the event Purchaser has requested design changes or plan customization, any expenses for said changes including but not limited to design fees, surveys, or drafting fees shall be paid to Waterfall Investment & Construction Group LLC. Current fees are: \$2.40 per SF under roof for design fees and, \$.75 per SF under roof for drafting fees. If changes are requested after the customized plans have already been reviewed and accepted by Purchaser, then all changes will be made at a rate of \$75.00 per hour for design fees and \$45.00 per hour for drafting fees. Fees are due upon completion for drafting fees and must be paid before final plans will be released. Otherwise, the design fees are due upon completion. The Designer retains all copyright privileges for plans. The design may be used by the Purchaser one time only. If this agreement is cancelled for any reason, the design and drafting fees are due upon cancellation and Purchaser agrees to allow the escrow agent to release the escrow funds without exception to the Seller upon the Seller's request for payment of the design and drafting fees. Any amount above the deposit or escrow amount shall also be due. (**INITIAL DESIGN FEES INCLUDED IN HOUSE COST**)

Photo Provision: The Purchaser agrees that the Seller, two business days prior to final completion of the home be allowed to take photos of the interior of the home. Purchaser further agrees these photos may be used by Seller or their assigns for the purpose of sales and marketing and may be included in multiple forms of marketing media.

Additional Provisions: This agreement is subject to the following conditions: Purchaser acknowledges that the price herein quoted is based on estimated square footages on preliminary plans which are not complete as of 3/3/2017 . See Addendum #1

IN THE PRESENCE OF:

WITNESS: Ronna Williams PURCHASER: James D. Smith
DATE: 3/3/17 DATE: 3/3/17

WITNESS: Ronna Williams PURCHASER: Frances Sumner Smith
DATE: 3/3/17 DATE: 3/3/17

WITNESS: Ronna Williams SELLER: [Signature]
DATE: 3/3/17 DATE: 3/3/17
Waterfall Investment & Construction
Group LLC

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Waterfall Investment and Construction)
Group, LLC,)
)
Plaintiff,)

CIVIL ACTION NO: 2019-CP-26-03604

vs.)

James Daniel Smith, Sr. and Frances Smith,)
)
Defendants.)

_____)

James Daniel Smith, Sr. and Frances Smith,)
)
Third-Party Plaintiffs,)

**WATERFALL INVESTMENT AND
CONSTRUCTION GROUP, LLC'S
REPLY TO DEFENDANTS'
COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT
(Jury Trial Requested)**

vs.)

David A. Brown and Lynne M. Brown,)
)
Third-Party Defendants.)

_____)

Waterfall Investment and Construction)
Group, LLC,)
)
Third-Party Plaintiff,)

vs.)

A&E Construction & Maintenance, LLC,)
Conquering Trades, Inc., Atlantic Electric)
Services, Jeronimo Ponce d/b/a JP & Sons)
Builders, Creative Drafting and Designs,)

Third-Party Defendants.)

_____)

The Plaintiff, Waterfall Investment and Construction Group, LLC (hereinafter “Plaintiff,” “Third-Party Plaintiff,” or “Waterfall”), hereby submits this Reply and Third-Party Complaint and would respectfully show and allege unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation set forth in Defendants’ Counterclaims, which is not hereinafter, admitted, modified, or qualified is denied and strict proof is demanded thereof.

**FOR A SECOND DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS’ FIRST COUNTERCLAIM
(Breach of Contract)**

2. Answering Paragraph 21, Plaintiff realleges and reasserts all previous paragraphs as if set forth herein verbatim.

3. Admits Paragraph 22, upon information and belief.

4. Answering Paragraph 23, Plaintiff craves reference to the document referenced therein and denies any allegations inconsistent therewith and demand strict proof thereof.

5. Denies Paragraphs 24 – 37.

**FOR A THIRD DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS’ SECOND COUNTERCLAIM
(Negligence – Gross Negligence)**

6. Answering Paragraph 38, Plaintiff realleges and reasserts all previous paragraphs as if set forth herein verbatim.

7. Denies Paragraphs 39 – 41.

**FOR A FOURTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS’ THIRD COUNTERCLAIM
(Breach of Express Warranty)**

8. Answering Paragraph 42, Plaintiff realleges and reasserts all previous paragraphs as if set forth herein verbatim.

9. Denies Paragraphs 43 – 45.

**FOR A FIFTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' FOURTH COUNTERCLAIM
(Breach of Implied Warranty)**

10. Answering Paragraph 46, Plaintiff realleges and reasserts all previous paragraphs as if set forth herein verbatim.

11. Denies Paragraphs 47 – 49.

**FOR A SIXTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' FIFTH COUNTERCLAIM
(Fraud)**

12. Answering Paragraph 50, Plaintiff realleges and reasserts all previous paragraphs as if set forth herein verbatim.

13. Denies Paragraphs 51 – 58.

**FOR A SEVENTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' SIXTH COUNTERCLAIM
(Negligent Misrepresentation)**

14. Answering Paragraph 59, Plaintiff realleges and reasserts all previous paragraphs as if set forth herein verbatim.

15. Denies Paragraphs 60 – 64.

**FOR AN EIGHTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' SEVENTH COUNTERCLAIM
(Unfair Trade Practices)**

16. Answering Paragraph 65, Plaintiff realleges and reasserts all previous paragraphs as if set forth herein verbatim.

17. Denies Paragraphs 66 – 73.

FOR A NINTH DEFENSE

18. The Second Amended Complaint fails to set forth sufficient facts to constitute a cause of action, and, therefore, should be dismissed pursuant to Rule 12(b)(6), S.C.R.C.P.

FOR A TENTH DEFENSE

19. Defendants' claims are barred, in whole or in part, because at all times herein, Plaintiff acted fairly and in good faith with Defendants.

FOR AN ELEVENTH DEFENSE

20. Defendants' claims are barred by the doctrine of unclean hands.

FOR A TWELFTH DEFENSE

21. Defendants' claims may be barred by the doctrine of waiver, laches, and estoppel.

FOR AN THIRTEENTH DEFENSE

22. Defendants have failed to properly and timely maintain and preserve the property from damage and has failed to mitigate their damages.

FOR A FOURTEENTH DEFENSE

23. Even if Plaintiff was negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Defendants' injuries, if any, which is expressly denied, Plaintiff alleges the Defendants' negligent, grossly negligent, reckless, willful and wanton conduct contributed more than fifty percent (50%) to the cause of the accident, and therefore, Defendants' claims are barred.

FOR A FIFTEENTH DEFENSE

24. Any injuries sustained by the Defendants were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross negligence on the part of

third persons as a proximate cause of injuries as alleged, if any, and, therefore, this Plaintiff should not be liable to the Defendants in any sum whatsoever.

FOR A SIXTEENTH DEFENSE

25. Defendants claims are barred by their own material breach of the contract.

FOR A SEVENTEENTH DEFENSE

26. Defendants failed to give reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide these Plaintiff a reasonable opportunity to investigate or correct any such alleged defects.

FOR AN EIGHTEENTH DEFENSE

27. That Plaintiffs' failure to give these Defendants notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims and breach of warranty.

FOR A NINETEENTH DEFENSE

28. Plaintiffs' claim seeking punitive damages violates these Defendants' rights under Article I, §10 of the United States Constitution, as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the similar provisions of the Constitution of South Carolina, including, but not limited to, Article I, §3 and Article I, §15 of the Constitution of South Carolina for the following reasons:

- (a) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the Constitution of South Carolina are violated because the jury or fact finder has total discretionary power to award punitive damages, and adequate objective legal standards do not exist to guide and limit the jury's of fact finder's discretion, thus allowing an award of punitive damages to be irrational, arbitrary, capricious and based upon vague, unpredictable, conflicting and purely subjective standards;

- (b) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the vague and inconsistent legal standards for the imposition of punitive damages deprive these defendants of sufficient notice of the type of conduct and mental state upon which a punitive damage award could result from alleged misconduct;
- (c) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the guidelines, standards, procedures and instructions for the imposition of punitive damages are ambiguous, indefinite, vague, uncertain, conflicting, purely subjective, and fundamentally unfair;
- (d) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because no objective limitations are established concerning the amount or severity of punitive damages awards;
- (e) The Eighth Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution including but not limited to Article I, §15 of the South Carolina Constitution are violated because punitive damages constitute penal damages and amount to an unconstitutional criminal and excessive fine or punishment in a civil proceeding;
- (f) The Fifth and Sixth Amendments of the United States Constitution and the same or similar provisions of the Constitution of South Carolina including but not limited to Article I, §12, Article I, §14, and Article I, §23 of the South Carolina Constitution are violated because Defendants are not allowed to exercise in this case all the constitutional and statutory rights which must be accorded to a party which is subject to the imposition of a criminal penalty in the form of punitive damages;
- (g) The Equal Protection Clauses of the Fourth and Fifteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including but not limited to Article I, §3 of the South Carolina Constitution are violated because the imposition of punitive damages discriminates against defendants on the basis of wealth and greater amounts of punitive damages for the identical claims may be awarded against some defendants who have more economic wealth than other defendants;

- (h) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution, including but not limited to Article I, §3 of the South Carolina Constitution, are violated because the defendants in this case may be subjected to multiple exposure and multiple awards of punitive damages.
- (i) The First Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution, including but not limited to Article I, §2 of the South Carolina Constitution are violated because the imposition of punitive damages is based upon vague, conflicting, uncertain, and purely subjective standards, without adequate notice to defendant, and thereby create a chilling effect on speech and expression;
- (j) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including but not limited to Article I, §3 of the South Carolina Constitution are violated because the imposition of punitive damages impairs the Defendants' right of access to the courts to adjudicate civil disputes;
- (k) Article I, §10 of the United States Constitution and the same or similar provision of the South Carolina Constitution including but not limited to Article I, §4 of the South Carolina Constitution are violated because the imposition of punitive damages impairs the Defendants' rights to contract.
- (l) Pursuant to Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424, 121 S. Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages “[are] not really a fact tried by the jury” therefore Plaintiff’s request for punitive damages “to be determined by the jury” violates the United States Constitution.

FOR A TWENTIETH DEFENSE

29. Plaintiff would show that Defendants are barred from asserting any action in tort against Plaintiff and are limited to the remedies, if any, provided to Defendants under the law of contracts.

FOR A TWENTY-FIRST DEFENSE

30. Plaintiff would show that Defendants are barred from asserting any action because of the disclaimer of warranties.

FOR A TWENTY-SECOND DEFENSE

31. Plaintiff would show that Defendants limited and/or barred by the economic loss doctrine.

FOR A TWENTY-THIRD DEFENSE

32. Plaintiff has not had an opportunity to conduct sufficient investigation or engage in adequate discovery regarding the circumstances of Defendants claims; therefore, Plaintiff specifically reserves and does not waive its rights to assert any additional defenses as may be discovered through the course of written discovery, depositions, and further investigation.

**FOR A TWENTY-FOURTH DEFENSE AND BY WAY OF
THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY DEFENDANTS
(A&E Construction & Maintenance, LLC, Conquering Trades, Inc., Atlantic Electric
Services, Jeronimo Ponce d/b/a JP & Sons Builders, Creative Drafting and Designs)**

33. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

34. Waterfall/ Third-Party Plaintiff complaining of A&E Construction & Maintenance, LLC (“A&E”), Conquering Trades, Inc. (“Conquering Trades”), Atlantic Electric Services (“Atlantic Electric”), Jeronimo Ponce d/b/a JP & Sons Builders (“JP & Sons”), and Creative Drafting and Designs (“Creative Drafting”) all collectively referred to herein as “Third- Party Defendants” or “Subcontractors,” would respectfully show unto this Honorable Court the following:

35. Waterfall is a South Carolina limited liability company licensed in the State of South Carolina and engaged in doing business in South Carolina.

36. Upon information and belief, A&E is a South Carolina limited liability company licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at Lot #66, 265 Waterfall Circle, Little River, South Carolina 29566 (the "Property"), which is the subject of this matter.

37. Upon information and belief, Conquering Trades is a South Carolina corporation licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

38. Upon information and belief, Atlantic Electric is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

39. Upon information and belief, JP & Sons is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

40. Upon information and belief, Creative Drafting is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

41. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper in Horry County, South Carolina, which is the location of the Project.

42. Defendants have sued Waterfall claiming damages allegedly caused by defective or deficient construction at the Property.

43. Waterfall has denied the substantive allegations made against it by Defendants and is without fault in connection with said claims.

44. The Subcontractors performed various scopes of work at the Property.

45. Waterfall has been subjected to Defendants' suit and to the costs, expenses, attorneys' fees, and liabilities associated therewith.

46. Upon information and belief, the Defendants' claims against Waterfall are in whole or in part a result of the acts, omissions, various breaches of warranty, services and materials, and work of the Subcontractors.

47. The damages to Waterfall include the costs and fees, including attorneys' fees, associated with the investigation and defense of the Defendants' Counterclaims, as well as special and consequential damages, including injury and damage to Waterfall's business reputation and the liability for damage to the Property, which, according to Defendants' allegations, include failure of the building structure and systems due to acts or omissions of the Subcontractors, which combined to result in consequential damage to building components and other property.

**FOR A TWENTY-FIFTH DEFENSE AND BY WAY OF
FIRST CAUSE OF ACTION AGAINST SUBCONTRACTORS
(Equitable Indemnity)**

48. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

49. By virtue of the Subcontractors' work and services performed at the Property, a special relationship was created and exists between Waterfall and its Subcontractors.

50. Upon information and belief, Waterfall has been sued, and is exposed to liability upon Defendants' claims in this action, in whole or in part, because of the acts and omissions of Subcontractors, including all wrongful acts, omissions, negligence, breaches, and/or representations alleged by Defendants.

51. The Subcontractors recognized and understood they were being placed in positions and trust and expected by Waterfall to perform their work in accordance with workmanlike standards and the applicable building codes.

52. Waterfall's reliance on its Subcontractors was justified, as the Subcontractors undertook and owed a duty to construct and design the home and provide materials and services in accordance with applicable building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices throughout the construction of the Property.

53. Waterfall has incurred legal fees and retained attorneys to investigate and defend against Defendants' claims.

54. Waterfall is experiencing and will continue to experience damages as a consequence of the Subcontractors failure to perform their work as expected.

55. To the extent, if any, Waterfall is held liable to Defendants, such liability would be a direct and proximate result of the acts, omissions, negligence/gross negligence, contractors, and/or representations of the Subcontractors, which has damaged Waterfall as it has been subjected to liability and incurred consequential damages in having to expend attorneys' fees and costs defending Defendants' claims.

56. Waterfall is entitled to full indemnification from the Subcontractors for any liability Waterfall is found to have to the Defendants, and Waterfall is entitled to damages for the Subcontractors' acts, omissions, negligence, recklessness, and gross negligence, entitling Waterfall to recover from the Subcontractors its attorneys' fees, costs, and other expenses incurred in defending this action.

**FOR A TWENTY-SIXTH DEFENSE AND BY WAY OF
SECOND CAUSE OF ACTION AGAINST SUBCONTRACTORS
(Negligence)**

57. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

58. Subcontractors undertook and owed a duty to Waterfall to specify materials, construct various building components, oversee the project, and provide materials and services in accordance with the applicable plans and specifications, applicable building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

59. Defendants allege property damage resulting from alleged construction and design deficiencies that violate applicable plans and specifications, building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

60. Defendants' alleged damage, which is denied, is due to the carelessness, negligence, and gross negligence of the Subcontractors, which combined to result in consequential damage to non-defective building components and other property and constitutes an occurrence under applicable policies of insurance of the Subcontractors.

61. Waterfall has incurred actual, special, and consequential damages resulting from the carelessness, negligence, and gross negligence of the Subcontractors.

62. Based on the allegations of Defendants and the responsibilities undertaken by the Subcontractors on the project, the Subcontractors breached their duty of due care owed to Waterfall by recklessly performing their scope of work and recklessly failing to ensure proper levels of workmanship were achieved.

63. As a result of Subcontractors' negligence, Plaintiff has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling Defendants' claims, plus the costs associated with investigating Defendants' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

64. Waterfall is entitled to judgment against Subcontractors for its actual, special and consequential damages.

**FOR A TWENTY-SEVENTH DEFENSE AND BY WAY OF
THIRD CAUSE OF ACTION AGAINST SUBCONTRACTORS
(Contribution)**

65. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

66. If Waterfall becomes jointly and severally liable in tort to Defendants, which liability is herein denied, Waterfall is entitled to contribution from the Subcontractors who are also jointly and severally liable in tort to the Defendants, in accordance with the South Carolina Contribution Among Tort Feasors Act (S.C. Code Ann. § 15-38-10, *et seq.*).

67. Pursuant to its right to contribution, Waterfall is entitled to recover from the Subcontractors any and all amounts paid by Waterfall in excess of its pro rata share in any common liability.

WHEREFORE, Waterfall / Third-Party Plaintiff prays for Defendants' counterclaims be dismissed and judgment against Third-Party Defendants as follows:

- a. Award Waterfall its damages, including special and consequential damages, on its Third-Party claims, including but not limited to the amount of any settlement paid by

Waterfall to the Defendants or judgment rendered against Waterfall in favor of the counterclaims and all attorneys' fees and costs incurred as result of this action.

- b. Require Third-Party Defendants to fully indemnify Waterfall against all losses and expenses incurred as a result of Defendants' counterclaims, including but not limited to, the amount of any settlement or judgment paid to Defendants by Waterfall and all attorneys' fees and costs incurred by Waterfall as a result of this action; and
- c. Award Waterfall such other and further relief as may be just and proper.

Respectfully submitted,
COLLINS & LACY, P.C.

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***ATTORNEYS FOR PLAINTIFF
AND THIRD-PARTY PLAINTIFF
WATERFALL INVESTMENT AND
CONSTRUCTION GROUP, LLC***

October 24, 2019
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2019-CP-26-03604

Waterfall Investment and)
Construction Group, LLC)
)
Plaintiff,)

vs.)

James Daniel Smith, Sr. and,)
Frances Smith,)
)
Defendants.)

**AMENDED ANSWER,
COUNTERCLAIMS, AND AMENDED
THIRD-PARTY COMPLAINT OF
DEFENDANTS JAMES DANIEL
SMITH, SR. AND FRANCES SMITH**

(Jury Trial Demanded)

James Daniel Smith, Sr. and)
Frances Smith,)
)
Third-Party Plaintiffs,)

vs.)

David A. Brown and Lynne M.)
Brown,)
)
Third-Party Defendants.)

Waterfall Investment and)
Construction Group, LLC,)
)
Third-Party Plaintiff,)

vs.)

A&E Construction & Maintenance,)
LLC, Conquering Trades, Inc.,)
Atlantic Electric Services, Jeronimo)
Ponce d/b/a JP & Sons Builders,)
Creative Draftings and Designs,)
)
Third-Party Defendants,)

Conquering Trades Corporation,)
)
 Fourth-Party Plaintiff,)
)
 vs.)
)
 Ramon Soto,)
)
 Fourth-Party Defendant.)
 _____)

The Defendants James Daniel Smith, Sr. and Frances Smith (collectively, “Defendants”), answering the Complaint, would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation set forth in the Complaint, which is not hereinafter admitted, modified, or qualified is denied and strict proof is demanded thereof.
2. The allegations of Paragraphs 1 and 2 are admitted.
3. The allegations of Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 are denied and strict proof demanded thereof.

SECOND DEFENSE

4. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.
5. Plaintiff Waterfall Investment & Construction Group, LLC’s (“Plaintiff”) claims are barred, in whole or in part, by Plaintiff’s unclean hands.

THIRD DEFENSE

6. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

7. Defendants assert the doctrine of waiver, estoppel, and laches as complete and affirmative defenses.

FIFTH DEFENSE

9. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

10. Plaintiff's claims are barred, in whole or in part, because at all times herein, Defendants acted fairly and in good faith with Plaintiff.

SIXTH DEFENSE

11. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

12. Plaintiff's claims are barred by its material breach of the contract.

SEVENTH DEFENSE

13. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

14. Plaintiff's claims are barred or otherwise affected by set-off and/or recoupment.

EIGHTH DEFENSE

15. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

16. Plaintiff's misrepresentations regarding the building code, time to construct, and involvement of an architect and the Bluewater Plan act as a complete bar to the Plaintiff's claims. Plaintiff substituted an inferior plan which he had redrawn from the copyrighted Bluewater Plan and represented the inferior plan as the Bluewater Plan.

NINTH DEFENSE

17. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

18. Plaintiff's breach of warranty acts as a bar to its claims.

TENTH DEFENSE

19. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

20. Plaintiff did not perfect its mechanic's lien in accordance with the South Carolina Mechanic's Lien Statute, S.C. Code Ann. § 29-5-10 *et seq.*

ELEVENTH DEFENSE AND FIRST COUNTERCLAIM **(Breach of Contract)**

21. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

22. The Plaintiff and Defendants are Parties to a contract (the "Contract") entered into on March 3, 2017 for the sale of a lot, located at Lot #66, 365 Waterfall Circle, Little River, SC 29566 (the "Property"), and construction of a Bluewater custom home (the "Custom Home").

23. Plaintiff agreed to construct Defendants' Custom Home, being a Bluewater Home, in accordance with Architectural plans, which included structural engineering Plans, (the "Plans"), which were incorporated within the Contract by reference. Prior to the Contract, the Bluewater Plan, noted as being copyrighted, had been customized and built over 30 times in Waterfall. Plaintiff substituted an inferior plan which he redrew from the copyrighted Bluewater Plan and represented the inferior plan as the Bluewater Plan.

24. The Contract identified David A. Brown ("Brown") as the building contractor. Brown, being the majority owner of the Plaintiff, held himself out as a licensed home builder with many years of experience as a custom home builder.

25. Before Defendants entered into the Contract, Plaintiff provided the Defendants Bluewater Plans, provided the Waterfall Home/Lot Package Price List for the Bluewater Plan dated October 1, 2016, provided Defendants customizable designs in a brochure, sent marketing photos, and provided tours of a Bluewater model home. Plaintiff and Brown represented that David A. Brown was an experienced custom home builder with many years' experience as a licensed contractor, the Defendants' home would be constructed in eight (8) months, lead Defendants to believe that Brown had an architect involved in the preparation of the Plans, the home to be constructed would be a customized Bluewater home based on a Bluewater Plan, and Brown was a hands on contractor who would be very involved in construction of Defendants' new home (collectively "Representations"). Defendants relied on Plaintiff's Representations when they entered into the Contract on March 3, 2017.

26. After entering into the Contract, Defendants wrote several emails to Plaintiff requesting that that Plaintiff's architect make changes to the Plans. The requested changes to the Plans included, but were not limited to, moving the windows one foot toward to the front of the house, enlarging the support wall and arch over the kitchen bar, and, providing updated dimensions for the kitchen island.

27. Plaintiff and Brown lead the Defendants to believe that an architect would make the changes to the Plans in accordance with state and local building code.

28. In fact, neither Plaintiff nor Brown had not hired nor involved an architect rather, Plaintiff and Brown made changes without guidance from an architect or an engineer.

29. Subsequently it was discovered that neither Plaintiff nor Brown possess the rights to the Bluewater Plan, nor the files necessary to customize a Bluewater Home, but instead substituted an inferior plan.

30. After construction commenced, Defendants discovered many construction deficiencies (“Construction Defects”) during the construction of their home.

31. The Construction Defects include, but are not limited to, inadequate beams that support the bathroom, dormer, and bonus room, inadequate ceiling joists to support roof rafters and valley beams, missing frames; deviations from engineer’s intended design, improper design and installation of electrical wires, and, walls built at the incorrect height.

32. In addition to the Construction Defects, the Plaintiff and Brown presented pay requests for construction work not completed and for defective and deficient work, contrary to the Contract.

33. On December 7, 2018, Defendants requested that Plaintiff and David A. Brown obtain approval from the Engineer of Record to correct Construction Defects.

34. Without any notice, Plaintiff cancelled the construction permit and abandoned the construction of the Defendants’ home.

35. As a result of making the changes on its own volition, the Construction Defects, the fraudulent pay requests, the cancellation of the Building permit, and the abandonment of the construction of Defendants’ home, Plaintiff breached the Contract with Defendants.

36. As a direct and proximate result of Plaintiff’s breach of the Contract, Defendants have been damaged.

37. Defendants are entitled to judgment against Plaintiff for actual damages, together with legal interest therein, and the costs of this action, including reasonable attorney’s fees.

TWELFTH DEFENSE, SECOND COUNTERCLAIM
AND FIRST CAUSE OF ACTION AGAINST THE
THIRD-PARTY DEFENDANT DAVID A. BROWN
(Negligence-Gross Negligence)

38. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

39. Upon information and belief, David A. Brown (“Mr. Brown”) and Lynne M. Brown (“Mrs. Brown”) (collectively, “Third-Party Defendants”) are citizens and residents of, and/or transact business in Horry County, South Carolina.

40. This Court has jurisdiction over this matter pursuant to § 11 of Article 5 of the South Carolina Constitution, and venue is proper in Horry County, South Carolina pursuant to S.C. Code Ann. §§ 15-7-10 and 15-7-30. This Court has personal jurisdiction over the Third-Party Defendants.

41. Plaintiff and the Third-Party Defendant David A. Brown had a duty to the Defendants to exercise that degree of skill and care necessary to select and utilize an architect, and the Bluewater Architectural Plan construct, supervise, review the design and otherwise construct and deliver to the Defendants, a home free of construction defects, and to ensure that the Defendants’ Custom Home was designed and built in conformity with the customary and ordinary standards of the building and construction industry in the local community.

42. The deficiencies and defects with respect to the construction of the Defendants’ Custom Home are the proximate and direct result of the negligent and/or gross negligence of David A. Brown and the Plaintiff in one or more particulars:

- a. In failing to use an architect and use the Bluewater Architectural Plan and competent sub-contractors so that the Defendants’ residence would be designed and built by methods of construction and design conforming with accepted industry standards;
- b. In allowing and accepting non-conforming defective work;

- c. In not adhering to the engineered drawing but rather ignoring said drawing; including failing to submit the plans to a Truss Engineer to design the required Webbed Engineered Trusses;
- d. In failing to properly oversee and supervise the construction of the Defendants' Custom Home to insure that all work proceeded in conformity with the building code, proper plans and specifications; and the ordinary and customary standard of the construction area in this location;
- e. In failing to inform the Defendants that an architect had not drawn their house plans, an architect was not involved in the drawing of the Defendants' house plans and that the Bluewater Plan had not been used to customize the Defendants' Plans for their Custom Home;
- f. In failing to inform the Defendants that Brown would not utilize the engineered drawing, including not submitting the plans to a Truss Engineer to design the required Webbed Engineered Trusses or obtaining the Engineer's replacement design;
- g. In cancelling the construction permit for the Defendants' Custom Home without any prior notice to the Defendants;
- h. In seeking payment from the Defendants for work which had not been completed properly or not performed;
- i. In failing to adhere to the applicable building codes for the construction of Defendants' home;
- j. In failing to inform the Defendants that a Plan, which Brown redrew from the Bluewater Plan, noted as copyrighted, was being substituted for the copyrighted

Bluewater Architectural Plan which had been customized and built over 30 times in Waterfall prior to the Contract;

- k. In failing to inform the Structural Engineer of the discrepancies in the House Plans used for the Structural Engineering Plan, including reconciling the House Plans' dependence on Manufactured Roof Trusses, so that revised structurally sound plans would be developed;
 - l. In failing to inform the Structural Engineer that the Roof could not be built as drawn, that rear Roof Rafters and Beams would not be supported by Bearing Walls, that Roof Braces would not be supported by Bearing Walls including Braces used to support Electrical wiring and High-Voltage HVAC Electrical Wires, so that revised structurally sound plans would be developed;
 - m. In failing to inform the Structural Engineer that the Bonus Room design failed to create headroom clearance and needed to be changed so that revised structurally sound plans would be developed; and
 - n. In failing to inform the Structural Engineer that the Trusses the Engineer referenced in his March 7, 2018, Letter to Horry County Code Enforcement did not exist so that structurally sound plans would be developed.
43. Plaintiff and Brown owed a duty to Defendants to exercise that degree of skill necessary to present House Plans which were not defective, monitor and supervise the construction of the Custom Home, to follow the structural engineering plans, including submitting the plans to a Truss Engineer for the required Webbed Engineered Trusses, to inform the engineer that his plans were not being followed, to obtain engineering guidance when determining not to purchase trusses, to deliver the Custom Home free of Construction Defects, to design and build in

conformity with the customary and ordinary standards of the building and construction industry including the Horry County Building Code and to inform the Defendants that the building permit was to be cancelled.

44. As a direct and proximate result of the aforesaid negligence, gross negligence, willful, and wanton negligence and reckless disregard in the construction of Defendant's Custom Home, the Defendants have suffered damages due to the need of extraordinary repair and maintenance and reconstruction costs required, as well as personally experienced injuries including mental anguish, pain and suffering, loss of use of a home, depreciation in value of their home due to the faulty and defective construction, as well as punitive damages as may be awarded by the jury.

THIRTEENTH DEFENSE AND THIRD COUNTERCLAIM
(Breach of Express Warranty)

45. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

46. Plaintiff represented and warranted that the Custom Home of the Defendants would be of the highest quality, conform with all applicable building codes, and be constructed with regard to safety and wellbeing of all occupants for many years. Those representations and warranties were made in connection with the sale of the Custom Home.

47. Plaintiff breached its express warranty by producing, selling, and constructing for the Defendants an inferior and rapidly deteriorating Custom Home plagued with extensive and severe construction defects and problems.

48. As a direct and proximate result and consequence of Plaintiff's breach of its express warranty, Defendants have suffered damages in an amount equal to the extraordinary repair,

maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value.

FOURTEENTH DEFENSE AND FOURTH COUNTERCLAIM
(Breach of Implied Warranty)

49. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

50. Plaintiff, as developer, seller and grantor, made implied warranties of habitability and fitness for intended use.

51. Plaintiff breached its implied warranty by producing, selling, and turning over to Defendants an inferior and rapidly deteriorating Custom Home plagued with extensive and severe construction defects and problems.

52. As a direct and proximate result and consequence of Plaintiff's breach of implied warranties, Defendants have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value.

FIFTEENTH DEFENSE, FIFTH COUNTERCLAIM AND SECOND CAUSE
OF ACTION AGAINST THE THIRD PARTY DEFENDANT
DAVID A. BROWN
(Fraud)

53. The above allegations, defenses and claims are incorporated herein by reference and made a part and parcel hereof.

54. Plaintiff, and Brown represented to the Defendants that Brown, for many years, had been a licensed builder of custom homes, that the home contracted for by the Defendants would be completely constructed in eight (8) months, that Plaintiff and Brown were associated with an architect who was involved in the preparation of the Plans as well as the construction of a Custom

Home for the Defendants, that Brown possessed and would use the Bluewater Architectural Plan necessary to customize the Plans for the Custom Home for the Defendants, that the Defendants would receive a Custom Built Home of the highest quality, that all draws to the Defendants for the construction of the Defendants' home would be based upon draws for work completed at the Defendants' home, and that Brown would supervise and inspect construction of the Defendants' home.

55. In addition, the Plaintiff and Brown intentionally concealed that there was no architect involved in the preparation of the Defendants' Custom House Plans even though Plaintiff and Brown knew the Defendants believed an architect was involved. In addition, Plaintiff and Brown intentionally did not disclose that the engineer's drawings would not be used in the construction of the Defendants' Custom House.

56. Defendants relied on Plaintiff's and Brown's Representations, and intentional omissions, when they entered into the Contract with Plaintiff on March 3, 2017.

57. Plaintiff and Brown knew that the Representations to Defendants were false, or should have known of their falsity. Plaintiff and Brown knew he was presenting a plan that he had redrawn from a copyrighted Bluewater Plan which he did not disclose to the Defendants and Plaintiff and Brown knew that there was no architect involved in drawing the Custom House Plans for the Defendants.

58. The Representations, and concealments, were material to the Defendants in that the Defendants believed that an architect would be involved in the drawing of their Custom Home house Plans, the Custom Home of the Defendants would be a Bluewater Home customized from the Bluewater Architectural Plan, the Third-Party Defendant Brown was an accomplished home builder who for many years constructed Custom Homes in the area, the Custom Home of the

Defendants would be constructed and completed within eighth (8) months, all draws would be based upon work completed, the Defendant Brown would frequently inspect and supervise the construction of the Defendants' home, and the Defendants' Custom Home would be constructed in accordance with architectural plans, including engineering plans.

59. Plaintiff and Brown intended for Defendants to rely on the Representations so that Defendants would enter into the Contract.

60. Defendants were not aware that the Representations were false, in that the Plaintiff and Brown held themselves out as being reputable developers and their office was located in Waterfall and the Defendants were not aware of the omissions.

61. Defendants relied on the Representations when they entered into the Contract believing that an architect would customize the home using the Bluewater Architectural Plan, the Custom Home would be built pursuant to the Plans and in accordance with the applicable building codes, and their home would be constructed within eight (8) months. Plaintiff and Brown substituted an inferior plan which he redrew from the copyrighted Bluewater Plan and represented the inferior plan as the copyrighted Bluewater Plan which and been customized and built over 30 times in Waterfall prior to the Contract.

62. As a direct and proximate cause of the reckless and/or false Representations and omissions, Defendants have been damaged and suffered personal injury and harm. The Defendants are entitled to actual and punitive damages against the Plaintiff and the Third Party Defendant Brown.

**SIXTEENTH DEFENSE, SIXTH COUNTERCLAIM, AND THIRD
CAUSE OF ACTION AGAINST THE THIRD PARTY DEFENDANT
DAVID A. BROWN
(Negligent Misrepresentation)**

63. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

64. Plaintiff and Brown represented to the Defendants that Brown was a licensed builder of custom homes for many years, the home contracted for by the Defendants would be completely constructed in eight (8) months, Brown possessed and would use the Bluewater Architectural Plan necessary to customize the Plans for the Custom Home for the Defendants, the Defendants would receive a Custom Built Home of the highest quality, all draws for the construction of the Defendants' home would be based upon work completed at the Defendants' home site, and Brown supervised and inspected the construction. Plaintiff and Brown substituted an Inferior Plan which he redrew from the copyrighted Bluewater Plan and represented the Inferior Plan as the copyrighted Bluewater Plan which had been customized and built over 30 times in Waterfall prior to the Contract.

65. At the time of entering into the Contract with Defendants, Plaintiff and Brown lead the Defendants to believe that an architect was involved in drawing of the Defendants' home, and was customizing the Bluewater Plan.

66. Plaintiff and Brown knowingly made false representations with reckless indifference to the rights of Defendants, did not disclose that the engineering plan would not be followed, and did not disclose that no architect would be involved, and did not disclose that a plan, which Brown redrew from the copyrighted Bluewater Plan, would be substituted for the copyrighted Bluewater Architectural Plan which and been customized and built over 30 times in Waterfall prior to the Contract.

67. Defendants relied on the false Representations and the intentional omissions when they purchased the Custom Home from Plaintiff.

68. The Representations, and omissions, were made negligently for the Plaintiff and Brown either knew or should have known that they were not involving an architect, or the Bluewater Architectural Plan would not construct the Custom Home as a Bluewater home, would not provide supervision, and would not follow the engineering plans, including not submitting the plans to a Truss Engineer for the required Webbed Engineered Trusses. Plaintiff and Brown knew that he was substituting a Plan which he redrew from the copyrighted Bluewater Plan and representing the Plan he redrew from the copyrighted Bluewater Plan as the Bluewater Architectural Plan which had been customized and built over 30 times in Waterfall prior to the Contract.

69. As a direct and proximate result of the misrepresentations and omissions, Defendants suffered pecuniary loss in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value. In addition, the Defendants were personally injured and harmed for they suffered mental anguish, and pain and suffering. The Defendants are entitled to an award of actual and consequential damages as well as punitive damages against the Plaintiff and Brown.

**SEVENTEENTH DEFENSE, SEVENTH COUNTERCLAIM, AND FOURTH CAUSE
OF ACTION AGAINST THE PLAINTIFF AND THE THIRD PARTY
DEFENDANT DAVID A. BROWN
(Violation of South Carolina Unfair Trade Practices Act)**

70. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

71. Plaintiff and Brown's acts and omissions, as described above, are unfair and deceptive acts which have an impact on the public interest. Furthermore, these unfair and deceptive acts are capable of repetition.

72. Plaintiff and Brown's acts and omissions deceive and falsely entice consumers to enter into contracts for the construction of custom homes.

73. The actions of Plaintiff and Brown, as described herein, are in violation of S.C. Code Ann. § 39-5-20.

74. The actions of Plaintiff and Brown were committed with the intent, purpose and effect of procuring an unfair competitive advantage and such actions have the effect of harming the public.

75. The actions of Plaintiff and Brown have caused, and are continuing to cause, damages and injuries to Defendants.

76. Plaintiff and Brown's actions and omissions were, and are, a willful and knowing violation of S.C. Code Ann. § 39-5-20.

77. Defendants are entitled to a judgment against Plaintiff and Brown, jointly and severally, for damages set forth in the South Carolina Unfair Trade Practices Act, section 39-5-10 *et seq.* of the South Carolina Code of Laws, with legal interest thereon, as well as treble damages and attorneys' fees.

EIGHTEENTH DEFENSE, EIGHTH COUNTERCLAIM
AND FIFTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
DAVID A. BROWN AND LYNN M. BROWN
(Violation of Statute of Elizabeth)

78. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

79. Upon information and belief, David A. Brown ("Mr. Brown") and Lynne M. Brown ("Mrs. Brown") (collectively, "Third-Party Defendants") are citizens and residents of, and/or transact business in Horry County, South Carolina.

80. On July 3, 2019, Defendants provided a notice of claim letter to Plaintiff and Brown regarding the Construction Defects.

81. On July 18, 2019, Plaintiff deeded, via warranty deed, a property located at 305 39th Ave. N., North Myrtle Beach, South Carolina 29582 (“Transferred Property”) to the Third-Party Defendants. The Transferred Property is more particular described as follows:

ALL AND SINGULAR all that certain piece, parcel or lot of land, situate, lying and being in Little River Township, Horry County, South Carolina, known and designated as LOT SIX (6) OF BLOCK “C-1” as appears on a map of subdivision in the Cherry Grove Beach Section, North Myrtle Beach, South Carolina as revised by C. B. Berry, R.L.S., dated July 30, 1974. A copy of said map is recorded in Plat Book 57 at Page 119, records of Horry County and is by reference incorporated herein as forming a part and parcel of this description.

This property is conveyed subject to restrictive covenants recorded in Deed Book 652 at Page 141, records of Horry County.

The Granter acquired the above described property by deed recorded January 6, 2016 in Deed Book 3883 at Page 2698, records of Horry County.

PIN: 35114030155

82. Upon information and belief, Third-Party Defendants are the sole members of Plaintiff.

83. Plaintiff deeded the Transferred Property to Third-Party Defendants for a consideration of Ten and 00/100 Dollars (\$10.00). The current market value of the Transferred Property exceeds Five Hundred Thousand and 00/100 Dollars (\$500,000.00).

84. Plaintiff deeded the Transferred Property with the intent or purpose to delay, hinder, or defraud the Defendants in this action.

85. Plaintiff and Third-Party Defendants’ actions are in violation of S.C. Code Ann. § 27-23-10(A).

86. Accordingly, Defendants request that this Court set aside Plaintiff’s conveyance to the Third-Party Defendants as null and void under the Statute of Elizabeth.

NINETEENTH DEFENSE, NINTH COUNTERCLAIM
AND SIXTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANT
DAVID A. BROWN
(Breach of Contract Accompanied by Fraudulent Intent)

87. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

88. The Plaintiff and Brown engaged in actions following the execution of the Contract which actions were fraudulent breaches of the Contract.

89. Following the execution of the Contract, the Plaintiff and Brown presented pay requests for construction work not completed or was defective, engaged subcontractors that were not skilled, knowingly refused to construct a Bluewater Home, disregarded and refused to follow the engineer's plans, and did not correct the Defendants when the Defendants' referenced the involvement of an architect. In addition, the Plaintiff and the Defendant cancelled the construction permit and abandoned the construction of the Defendants' home.

90. As a result of the fraudulent acts accompanying the breach of the Contract, the Defendants have been harmed and damaged as set forth above and are entitled to actual and punitive damages.

WHEREFORE, the Defendants pray for judgment against Plaintiff and Third-Party Defendants as follows:

- A. Plaintiff's claims be dismissed, with prejudice, together with all costs, including attorney's fees, assessed against the Plaintiff;
- B. Actual damages, together with legal interest, for Breach of Contract;
- C. Actual damages, together with legal interest, and punitive damages for negligence;
- D. Damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Custom Home, loss of use, and depreciation in value for Breach of Express and Implied Warranty;

- E. Actual damages, together with legal interest, and punitive damages, for Fraud;
- F. Actual damages, together with legal interest, and punitive damages, for Negligent Misrepresentation;
- G. Actual damages, together with legal interest, as well as treble damages and attorneys' fees for Violation of the South Carolina Unfair Trade Practices Act;
- H. Actual damages, together with legal interest, and punitive damages, for the breach of contract accompanied by fraud;
- I. An order from the Court setting aside the transfer of property between Plaintiff and Third-Party Defendants for a Violation of the Statute of Elizabeth;
- J. Costs of this litigation, including reasonable attorneys' fees; and
- K. For such other and further relief as this Court may deem just and proper.

Burr & Forman LLP

s/Henrietta U. Golding

Henrietta U. Golding, SC Bar # 2173

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Attorney for the Defendants and Third-Party Plaintiffs

January 13, 2022

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Waterfall Investment and Construction)
 Group, LLC)
)
 Plaintiff,)
 vs.)
)
 James Daniel Smith, Sr. and Frances)
 Smith,)
)
 Defendants.)
 _____)
 James Daniel Smith, Sr. and Frances)
 Smith,)
)
 Third-Party Plaintiffs,)
 vs.)
)
 David A. Brown and Lynne M. Brown,)
)
 Third-Party Defendants.)
 _____)
 Waterfall Investment and Construction)
 Group, LLC,)
)
 Third-Party Plaintiff,)
 vs.)
)
 A&E Construction & Maintenance, LLC,)
 Conquering Trades, Inc., Atlantic Electric)
 Services, Jeronimo Ponce d/b/a JP & Sons)
 Builders, Creative Drafting and Designs,)
)
 Third-Party Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO: 2019-CP-26-03604

**WATERFALL INVESTMENT AND CONSTRUCTION GROUP, LLC'S
 REPLY TO
 DEFENDANTS JAMES DANIEL SMITH, SR. AND FRANCES SMITH'S
 COUNTERCLAIMS AND THIRD-PARTY COMPLAINT**

TO: HENRIETTA GOLDING, ESQ. COUNSEL FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS JAMES DANIEL SMITH, SR. AND FRANCES SMITH

COMES NOW Plaintiff Waterfall Investment and Construction Group, LLC (hereinafter referred to as "Plaintiff" or "Waterfall"), by and through their undersigned attorney, hereby submits this Reply and Third-Party Complaint asserting the following to answer James Daniel

Smith, Sr. and Frances Smith's Amended Answer, Counterclaims, and Third-Party Complaint ("Defendant Smiths Counterclaims"):

FOR A FIRST DEFENSE

1. The Defendant is not required to admit or deny the truth of the allegations contained in paragraphs 1- 20 of Defendant Smiths Counterclaims because such allegations are not intended to state a claim against Plaintiff Waterfall. To the extent that such allegations are held to state a claim against Plaintiff Waterfall, then such allegations together with all inferences are denied by the Plaintiff and strict proof is demanded.

**FOR A SECOND DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' FIRST COUNTERCLAIM
(Breach of Contract)**

2. In response to the allegations contained in Paragraph 21 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

3. The allegations of Paragraph 22 contain references to legal documents, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 22 as stated and craves reference to the language and provisions of the legal documents and contract, the terms and provisions of which speaks for themselves.

4. The allegations of Paragraph 23 contain references to legal documents, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 23 as stated and craves reference to the language and provisions of the legal documents and contracts, the terms and provisions of which speaks for themselves.

5. The allegations of Paragraph 24 contain legal conclusions, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 24, as stated and craves strict reference to the contract as written.

6. Plaintiff denies the allegations contained in Paragraphs 25 – 37 of Defendant Smiths Counterclaims and demands strict proof thereof.

FOR A THIRD DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' SECOND COUNTERCLAIM and FIRST
CAUSE OF ACTION AGAINST THE THIRD-PARTY
DEFENDANT DAVID A. BROWN
(Negligence – Gross Negligence)

7. In response to the allegations contained in Paragraph 38 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

8. The allegations of Paragraphs 39-41 contain legal conclusions, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraphs 39-41 and demands strict proof thereof.

9. Plaintiff denies the allegations contained in Paragraph 42 of Defendant Smiths Counterclaims, including all subparts a.) through n.) and demands strict proof thereof.

10. Plaintiff denies the allegations contained in Paragraphs 43 – 44 of Defendant Smiths Counterclaims and demands strict proof thereof.

FOR A FOURTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' THIRD COUNTERCLAIM
(Breach of Express Warranty)

11. In response to the allegations contained in Paragraph 45 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

12. The allegations of Paragraph 46 contain legal conclusions, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 46 and demands strict proof thereof.

13. Plaintiff denies the allegations contained in Paragraphs 47 – 48 of Defendant Smiths Counterclaims and demands strict proof thereof.

FOR A FIFTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' FOURTH COUNTERCLAIM
(Breach of Implied Warranty)

14. In response to the allegations contained in Paragraph 49 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

15. Plaintiff denies the allegations contained in Paragraphs 50 – 52 of Defendant Smiths Counterclaims and demands strict proof thereof.

**FOR A SIXTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' FIFTH COUNTERCLAIM and SECOND
CAUSE OF ACTION AGAINST THE THIRD-PARTY
DEFENDANT DAVID A. BROWN
(Fraud)**

16. In response to the allegations contained in Paragraph 53 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

17. Plaintiff denies the allegations contained in Paragraphs 54 – 62 of Defendant Smiths Counterclaims and demands strict proof thereof.

**FOR A SEVENTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' SIXTH COUNTERCLAIM and THIRD
CAUSE OF ACTION AGAINST THE THIRD-PARTY
DEFENDANT DAVID A. BROWN
(Negligent Misrepresentation)**

18. In response to the allegations contained in Paragraph 63 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

19. Plaintiff denies the allegations contained in Paragraphs 64 – 69 of Defendant Smiths Counterclaims and demands strict proof thereof.

**FOR AN EIGHTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' SEVENTH COUNTERCLAIM and
FOURTH CAUSE OF ACTION AGAINST THE
PLAINTIFF and THE THIRD-PARTY DEFENDANT
DAVID A. BROWN
(Unfair Trade Practices)**

20. In response to the allegations contained in Paragraph 70 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

21. The allegations of Paragraphs 71-72 contain legal conclusions, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraphs 71-72 and demands strict proof thereof.

22. Paragraph 73 of Defendant Smiths Counterclaims contains conclusions of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations and craves strict reference to South Carolina Code § 39-5-20 which speaks for itself.

23. Plaintiff denies the allegations contained in Paragraphs 74 – 75 of Defendant Smiths Counterclaims and demands strict proof thereof.

24. Paragraph 76 of Defendant Smiths Counterclaims contains conclusions of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations and craves strict reference to South Carolina Code § 39-5-20 which speaks for itself.

25. Paragraph 77 of Defendant Smiths Counterclaims contains conclusions of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations and craves strict reference to South Carolina Code § 39-5-10 which speaks for itself.

FOR A NINTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' EIGHT COUNTERCLAIM and FIFTH
CAUSE OF ACTION AGAINST THE THIRD-PARTY
DEFENDANTS DAVID A. BROWN AND LYNN M. BROWN
(Violation of Statute of Elizabeth)

26. In response to the allegations contained in Paragraph 78 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

27. The allegations of Paragraph 79 contain legal conclusions, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraphs 79 and demands strict proof thereof.

28. The allegations of Paragraphs 80-81 contain references to legal documents, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraphs 80-81 as stated and craves reference to the language and provisions of the legal documents, deeds, and contracts, the terms and provisions of which speaks for themselves.

29. The allegations of Paragraph 82 contain legal conclusions, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraphs 82 and demands strict proof thereof.

30. The allegations of Paragraph 83 contain references to legal documents, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 83 as stated and craves reference to the language and provisions of the legal documents, deeds, and contracts, the terms and provisions of which speaks for themselves.

31. Plaintiff denies the allegations contained in Paragraph 84 of Defendant Smiths Counterclaims and demands strict proof thereof.

32. Paragraph 85 of Defendant Smiths Counterclaims contains conclusions of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations and craves strict reference to South Carolina Code § 27-23-10(A) which speaks for itself.

33. The allegations of Paragraph 86 contain legal conclusions, to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraphs 86 and demands strict proof thereof.

FOR A TENTH DEFENSE AND BY WAY OF REPLY TO
DEFENDANTS' NINTH COUNTERCLAIM and SIXTH
CAUSE OF ACTION AGAINST THE THIRD-PARTY
DEFENDANT DAVID A. BROWN
(Breach of Contract Accompanied by Fraudulent Intent)

34. In response to the allegations contained in Paragraph 87 of Defendant Smiths Counterclaims, the Plaintiff reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

35. Plaintiff denies the allegations contained in Paragraphs 88 – 90 of Defendant Smiths Counterclaims and demands strict proof thereof.

36. Plaintiff denies the relief requested in the WHEREFORE Paragraph of Defendant Smiths Amended Answer, Counterclaims, and Third-Party Complaint, including any and all subparts a.) through k.).

37. Each and every allegation not specifically admitted or answered above is hereby denied.

FOR AN ELEVENTH DEFENSE
(Failure to Mitigate)

38. Plaintiff would respectfully show that Defendants have failed to take reasonable steps to mitigate damages.

FOR A TWELFTH DEFENSE
(Intervening Acts of a Third Party)

39. Plaintiff would respectfully show that any alleged injury the Smiths sustained may have been due to and proximately caused by the sole and intervening negligence, recklessness, willfulness and/or wantonness of some persons or entities other than Plaintiff, which occurred subsequent to any acts or omissions by Plaintiff, if any (which is expressly denied), and therefore,

the sole and intervening acts of third-parties may be the real and proximate causes of any alleged injuries to the Smiths, and therefore, the Defendant Smiths may not recover from the Plaintiff.

FOR A THIRTEENTH DEFENSE
(Failure to State a Claim)

40. Plaintiff would respectfully show that each and every cause of action set forth in Defendant Smiths Amended Answer, Counterclaims, and Third- Party Complaint fails to state a claim upon which relief can be granted and therefore, the counterclaims and Third-Party Complaint should be dismissed.

FOR A FOURTEENTH DEFENSE
(Punitive Damages Barred)

41. Plaintiff would respectfully show that to the extent the Defendant Smiths claim punitive damages, an award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I § 3 of the South Carolina Constitution in that:

- a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantee;
- b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. Any award of punitive damages based upon the wealth of Plaintiff violates due process guarantees;
- d. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and
- f. The Defendants' claim for punitive damages violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Plaintiff.

42. Further, the Defendants' claims for punitive damages violate the federal doctrine of separation of powers and Article I, § 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

43. To the extent applicable, the Plaintiff pleads the defenses and statutory caps set forth in S.C. Code Ann. §15-32-520 and S.C. Code Ann. §15-32-530.

FOR A FIFTEENTH DEFENSE
(Causation)

44. Plaintiff would respectfully show that no act or omission by the Plaintiff was the cause of any damages to the Smiths. Any damages alleged by the Smiths were not due to or caused by the Plaintiff but were due to and caused by the contributing, concurring, intervening or superseding fault, breach of warranty, and/or act or omission of one of more of the above listed Co-Defendants or Defendant, over which the Plaintiff had no control.

FOR A SIXTEENTH DEFENSE
(Waiver, Laches, Estoppel)

45. Plaintiff would respectfully show that some or all of the claims in Defendant Smiths Counterclaims and Third-Party Complaint are barred by the doctrines of waiver, estoppel and/or laches.

FOR A SEVENTEENTH DEFENSE
(Contribution or Indemnification)

46. Plaintiff would respectfully show that another party may be liable, in full or in part, for any damages suffered by the Smiths.

FOR AN EIGHTEENTH DEFENSE
(Incorporation by Reference)

47. Plaintiff incorporates by reference any and all affirmative defenses asserted or to be asserted by any other party(s) as if they are expressly stated herein.

FOR A NINETEENTH DEFENSE
(Statute of Limitations/Repose)

48. Plaintiff would respectfully show that all or part of Defendant Smiths' claims may be barred by the applicable statute of limitations and/or statute of repose.

FOR A TWENTIETH DEFENSE
(Unclean Hands)

49. Plaintiff would respectfully show that Defendant Smiths' claims are barred in whole, or in part, by the doctrine of unclean hands.

FOR A TWENTY-FIRST DEFENSE
(Standard of Care)

50. The Plaintiff complied with the applicable standards of care at all times relevant hereto and is thus not liable to the Smiths.

FOR A TWENTY-SECOND DEFENSE
(Comparative Negligence)

51. Plaintiff would respectfully show, upon information and belief, that any injuries or damages sustained by the Defendant Smiths were due to their own negligent, careless, reckless and/or grossly negligent acts or omissions, which combined and concurred with any negligence, carelessness, recklessness and gross negligence on the part of the Plaintiff, which are specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. Such negligent, careless, reckless and/or grossly negligent acts or omissions on the part of the Smiths were the direct and proximate cause of any injuries or damages sustained by the Smiths, and the Plaintiff pleads such negligence, carelessness, recklessness and gross negligence on the part of the Smiths and would ask that this court compare the negligence

or other conduct of Defendant Smiths and Plaintiff and if it is determined that the Smiths' negligence, carelessness, recklessness and gross negligence were greater than the negligence, carelessness, recklessness and gross negligence of the Plaintiff, which is specifically denied, then the Smiths should be totally barred from recovery and if it is determined that Smiths' negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of the Plaintiff, then the amount of recovery available to Defendant Smiths should be reduced by the percentage of their own negligence, carelessness, recklessness and gross negligence.

FOR A TWENTY-THIRD DEFENSE
(Betterment)

52. Plaintiff would respectfully show that Defendant Smiths are not entitled to recover for repairs which will put them in a better position than they would have been if all contracts/warranties had been properly performed and fulfilled, and their damages, if any, must be reduced by the amount of all betterments made or to be made to the property.

FOR A TWENTY-FOURTH DEFENSE
(Economic Loss Doctrine)

53. Plaintiff would respectfully show that Defendant Smiths' claims are barred by the Economic Loss Doctrine.

FOR A TWENTY-FIFTH DEFENSE
(Lack of Notice and Right to Cure)

54. Plaintiff would respectfully show that to the extent Plaintiff is liable to Defendant Smiths, which liability is denied, the Smiths' claims must fail in that they failed to give Defendant timely and reasonable notice of any alleged defects and/or timely and reasonable opportunity to correct any alleged defects as required by S.C. Code Ann. §40-59-810, et seq.

FOR A TWENTY-SIXTH DEFENSE
(Set Off)

55. Plaintiff would respectfully show that any recovery by the Defendant Smiths must be set off or reduced, abated, or apportioned to the extent that any other party's actions caused or contributed to damages, if any, or as otherwise provided pursuant to §15-38-50 of the South Carolina Code.

FOR A TWENTY-SEVENTH DEFENSE
(Limitation of Warranties)

56. Plaintiff would respectfully show that Defendant Smiths' claims are or may be barred by the limitation of express and implied warranties.

FOR A TWENTY-EIGHTH DEFENSE
(Disclaimer of Warranties)

57. Plaintiff would respectfully show that Defendant Smiths' claims are barred, in whole or in part, by the disclaimer of warranties.

FOR A TWENTY-NINTH DEFENSE
(Expiration of Warranties)

58. Plaintiff would respectfully show that Defendant Smiths' claims are barred, in whole or in part, because to the extent any warranties existed, all such warranties have expired.

FOR A THIRTIETH DEFENSE
(Applicable Warranty Period)

59. Plaintiff would respectfully show that Defendant Smiths' claims are barred, in whole or in part, because to the extent any warranties existed, the Smiths failed to file a claim within the applicable warranty period.

FOR A THIRTY-FIRST DEFENSE
(Failure to Join a Necessary Party)

60. Plaintiff would respectfully show that the Defendant Smiths may have failed to join a party(ies) necessary to this litigation as required by Rule 19, SCRCP, and the Smiths Counterclaims and Third-Party Complaint should be dismissed pursuant to Rule 12(b)(7), SCRCP.

FOR A THIRTY-SECOND DEFENSE
(Open and Obvious)

61. Plaintiff would respectfully show that the Defendant Smiths either knew or should have known of any alleged deficiencies in the work and accepted the same with such knowledge and as a result, the Smiths' recovery is barred.

FOR A THIRTY-THIRD DEFENSE
(Final Completion and Acceptance)

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

FOR A THIRTY-FOURTH DEFENSE
(Incorporation of Defenses Raised by Others)

63. Plaintiff hereby incorporates the defenses raised by any other parties to the extent said defenses might be applicable to it.

FOR A THIRTY-FIFTH DEFENSE
(Rule 8(c) SCRCP)

64. To the extent applicable, the Plaintiff raises all affirmative defenses required by Rule 8(c) SCRCP.

FOR A THIRTY-SIXTH DEFENSE
(Mental Anguish Damages Not Recoverable)

65. Plaintiff would respectfully show that damages for mental anguish are not recoverable when there is no physical injury.

FOR A THIRTY-SEVENTH DEFENSE
(S.C. Code Ann. § 33-44-303)

66. Plaintiff would respectfully plead the elements and any defenses set forth in S.C. Code Ann. §33-44-303.

FOR A THIRTY-EIGHTH DEFENSE
(Further Affirmative Defense)

67. Plaintiff has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of the Smiths' allegations. Plaintiff intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported injury or damage to the Smiths as alleged in their Counterclaims and Third-Party Complaint and gives notice of its intent to assert any further affirmative defense that its information-gathering process may indicate is supported by fact and law. Plaintiff thus reserves the right to amend this Reply and assert such defenses.

FOR A THIRTY-NINTH DEFENSE AND BY WAY OF
THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY
DEFENDANTS (A&E Construction & Maintenance, LLC, Conquering
Trades, Inc., Atlantic Electric Services, Jeronimo Ponce d/b/a JP & Sons
Builders, Creative Drafting and Designs)

68. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

69. Waterfall/ Third-Party Plaintiff complaining of A&E Construction & Maintenance, LLC ("A&E"), Conquering Trades, Inc. ("Conquering Trades"), Atlantic Electric Services ("Atlantic Electric"), Jeronimo Ponce d/b/a JP & Sons Builders ("JP & Sons"), and Creative

Drafting and Designs (“Creative Drafting”) all collectively referred to herein as “Third- Party Defendants” or “Subcontractors,” would respectfully show unto this Honorable Court the following:

70. Waterfall is a South Carolina limited liability company licensed in the State of South Carolina and engaged in doing business in South Carolina.

71. Upon information and belief, A&E is a South Carolina limited liability company licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at Lot #66, 265 Waterfall Circle, Little River, South Carolina 29566 (the “Property”), which is the subject of this matter.

72. Upon information and belief, Conquering Trades Corporation is a South Carolina corporation licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

73. Upon information and belief, Atlantic Electric is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

74. Upon information and belief, JP & Sons is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

75. Upon information and belief, Creative Drafting is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

76. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper in Horry County, South Carolina, which is the location of the Project.

77. Defendants have sued Waterfall claiming damages allegedly caused by defective or deficient construction at the Property.

78. Waterfall has denied the substantive allegations made against it by Defendants and is without fault in connection with said claims.

79. The Subcontractors performed various scopes of work at the Property.

80. Waterfall has been subjected to Defendants' suit and to the costs, expenses, attorneys' fees, and liabilities associated therewith.

81. Upon information and belief, the Defendants' claims against Waterfall are in whole or in part a result of the acts, omissions, various breaches of warranty, services and materials, and work of the Subcontractors.

82. The damages to Waterfall include the costs and fees, including attorneys' fees, associated with the investigation and defense of the Defendants' Counterclaims, as well as special and consequential damages, including injury and damage to Waterfall's business reputation and the liability for damage to the Property, which, according to Defendants' allegations, include failure of the building structure and systems due to acts or omissions of the Subcontractors, which combined to result in consequential damage to building components and other property.

**FOR A FORTIETH DEFENSE AND BY WAY OF FIRST
CAUSE OF ACTION AGAINST SUBCONTRACTORS**

(Equitable Indemnity)

83. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

84. By virtue of the Subcontractors' work and services performed at the Property, a special relationship was created and exists between Waterfall and its Subcontractors.

85. Upon information and belief, Waterfall has been sued, and is exposed to liability upon Defendants' claims in this action, in whole or in part, because of the acts and omissions of Subcontractors, including all wrongful acts, omissions, negligence, breaches, and/or representations alleged by Defendants.

86. The Subcontractors recognized and understood they were being placed in positions and trust and expected by Waterfall to perform their work in accordance with workmanlike standards and the applicable building codes.

87. Waterfall's reliance on its Subcontractors was justified, as the Subcontractors undertook and owed a duty to construct and design the home and provide materials and services in accordance with applicable building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices throughout the construction of the Property.

88. Waterfall has incurred legal fees and retained attorneys to investigate and defend against Defendants' claims.

89. Waterfall is experiencing and will continue to experience damages as a consequence of the Subcontractors failure to perform their work as expected.

90. To the extent, if any, Waterfall is held liable to Defendants, such liability would be a direct and proximate result of the acts, omissions, negligence/gross negligence, contractors, and/or representations of the Subcontractors, which has damaged Waterfall as it has been subjected to liability and incurred consequential damages in having to expend attorneys' fees and costs defending Defendants' claims.

91. Waterfall is entitled to full indemnification from the Subcontractors for any liability Waterfall is found to have to the Defendants, and Waterfall is entitled to damages for the

Subcontractors' acts, omissions, negligence, recklessness, and gross negligence, entitling Waterfall to recover from the Subcontractors its attorneys' fees, costs, and other expenses incurred in defending this action.

**FOR A FORTY-FIRST DEFENSE AND BY WAY OF
SECOND CAUSE OF ACTION AGAINST ALL
SUBCONTRACTORS EXCEPT ATLANTIC ELECTRIC¹**
(Negligence)

92. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

93. Subcontractors undertook and owed a duty to Waterfall to specify materials, construct various building components, oversee the project, and provide materials and services in accordance with the applicable plans and specifications, applicable building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

94. Defendants allege property damage resulting from alleged construction and design deficiencies that violate applicable plans and specifications, building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

95. Defendants' alleged damage, which is denied, is due to the carelessness, negligence, and gross negligence of the Subcontractors, which combined to result in consequential damage to non-defective building components and other property and constitutes an occurrence under applicable policies of insurance of the Subcontractors.

¹ Waterfall chose not to include a negligence action against Atlantic Electric in this Reply as it would be an exercise in futility due to the court previously dismissing the Negligence cause of action solely against Atlantic Electric by way of court order on March 3, 2021.

96. Waterfall has incurred actual, special, and consequential damages resulting from the carelessness, negligence, and gross negligence of the Subcontractors.

97. Based on the allegations of Defendants and the responsibilities undertaken by the Subcontractors on the project, the Subcontractors breached their duty of due care owed to Waterfall by recklessly performing their scope of work and recklessly failing to ensure proper levels of workmanship were achieved.

98. As a result of Subcontractors' negligence, Plaintiff has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling Defendants' claims, plus the costs associated with investigating Defendants' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

99. Waterfall is entitled to judgment against Subcontractors for its actual, special and consequential damages.

FOR A FORTY-SECOND DEFENSE AND BY WAY OF
THIRD CAUSE OF ACTION AGAINST
SUBCONTRACTORS EXCEPT CONQUERING TRADES
AND ATLANTIC ELECTRIC²
(Contribution)

100. Plaintiff incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

101. If Waterfall becomes jointly and severally liable in tort to Defendants, which liability is herein denied, Waterfall is entitled to contribution from the Subcontractors who are also

² Waterfall chose not to include a contribution action against Conquering Trades and Atlantic Electric in this Reply as it would be an exercise in futility due to the Court previously dismissing the Contribution cause of action against Conquering Trades and Atlantic Electric by way of court order on March 3, 2021.

jointly and severally liable in tort to the Defendants, in accordance with the South Carolina Contribution Among Tort Feasors Act (S.C. Code Ann. § 15-38-10, *et seq.*).

102. Pursuant to its right to contribution, Waterfall is entitled to recover from the Subcontractors any and all amounts paid by Waterfall in excess of its pro rata share in any common liability.

WHEREFORE, Waterfall / Third-Party Plaintiff prays for Defendants' counterclaims be dismissed and judgment against Third-Party Defendants as follows:

- A. Award Waterfall its damages, including special and consequential damages, on its Third-Party claims, including but not limited to the amount of any settlement paid by Waterfall to the Defendants or judgment rendered against Waterfall in favor of the counterclaims and all attorneys' fees and costs incurred as a result of this action.
- B. Require Third-Party Defendant to fully indemnify Waterfall against all losses and expenses incurred as a result of Defendants' counterclaims, including but not limited to, the amount of any settlement or judgment paid to Defendants by Waterfall and all attorneys' fees and costs incurred by Waterfall as a result of this action; and
- C. Award Waterfall such other and further relief as may be just and proper.

Signature Block on Following Page

Respectfully submitted,

RESNICK & LOUIS, P.C.

s/Patrick J. McDonald

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-and-

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*Attorneys for Plaintiff and Third-Party Plaintiff
Waterfall Investment and Construction Group,
LLC*

January 28, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COURT

WATERFALL INVESTMENT AND CONSTRUCTION GROUP, LLC. V. JAMES DANIEL SMITH,
SR. AND FRANCES SMITH, et al.

Docket No. 2019-CP-26-03604

PROOF OF ADR

Pursuant to the South Carolina Alternative Dispute Resolution Rules (SCADR):

1. Alternative Dispute Resolution (ADR) was conducted on November 18, 2022, in the form of:
Mediation.
2. The neutral was: **Karl A. Folkens**
3. Present at the ADR conference were:
 - Plaintiff (*through representatives*)
 - Defendants
 - Lawyers for Plaintiff: *John E. Rogers, II, Esq., Fred H. Oliver, Esq. & Kenneth R. Moss, Esq.*
 - Lawyers for Defendants and Third-Party Plaintiff/Defendants: *Henriette U. Golding, Esq., Taylor K. Voegel, Esq., William A. Collins, Jr., Esq., Brandon T. Reeser, Esq., Olivia A. Matte, Esq. & Glenn E. Elliott, Esq.*
 - Representatives for insurance carriers: *T. Romano, Kevin Walker*
 - Guardian ad Litem:
 - Expert:
 - Others: *Mary S. Willis, Esq. attorney for the plaintiff in a federal action, also participated*
4. As a result of ADR, this case should be considered (check one):
 - fully Settled by Consent Judgment to be filed by the parties' counsel.
 - fully settled by Voluntary Dismissal to be filed by the parties' counsel.
 - partially settled (*The Complaint and Answer are resolved; most of the third-party claims are resolved; the parties will be re-aligned going forward*)
 - at an impasse.
5. Further comments of the neutral: *None.*

Submitted: November 27, 2022

MA22-242
SCADR 104A (04/2021)



Karl A. Folkens, Mediator
karl@folkenslaw.com
601 W. Evans St., Florence, SC 29502-3409
(843) 665-0100; FAX (843) 665-0500

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Settlement Agreement”) is made by and among James Daniel Smith Sr. and Frances Smith (hereinafter collectively “the Smiths”); and Waterfall Investment and Construction Group, LLC (hereinafter Waterfall), Atlantic Electric Services, Conquering Trades, Corp., David A. Brown, Lynne M. Brown, and Ramon Soto (hereinafter collectively “Settling Defendants”). The Smiths and Settling Defendants are hereinafter collectively referred to as “the Parties” or the “Settling Parties”.

WHEREAS Waterfall initiated an action pending in Horry County in the Court of Common Pleas for the Fifteenth Circuit, styled *Waterfall Investment and Construction Group, LLC v. James Daniel Smith Sr. and Frances Smith*, Civil Action No.: 2019-CP-26-03604(hereinafter “the State Litigation”); and

WHEREAS, James Daniel Smith Sr. and Frances Smith asserted counterclaims against Waterfall and brought forward, as Third-Party Plaintiffs a complaint against David A. Brown and Lynne M. Brown; and

WHEREAS, Waterfall asserted third-party causes of action against Defendants, A&E Construction & Maintenance, LLC, Conquering Trades Inc., Atlantic Electric Services, Jeronimo Ponce d/b/a JP & Sons Builders, Creative Drafting and Designs; and,

10. All Settling Parties except Ramon Soto¹ are hereby releasing the other Settling Parties and their respective employees, former employees, agents, attorneys, insurers, and related

¹ Ramon Soto did not assert any claims against any other party to this lawsuit. For that reason, Ramon Soto is not a signatory to this document and does not give any release via this document. However, Ramon Soto is one of the "Settling Defendants" and one of the "Settling Parties" as those terms are defined in this document and he is fully released and protected as stated herein.

parties from all claims and damages arising from the State and Federal Litigation, yet specifically preserving any and all claims and potential claims that Waterfall , has or may have against Third-Party Defendants Jeronimo Ponce d/b/a JP & Sons Builders (“Ponce”), A&E Construction and Maintenance, LLC (“A&E”), and Creative Drafting & Designs (“Creative”). Ponce, A&E, and Creative will **NOT** be a party to any release relevant to this Settlement Agreement. The Smiths, as part of this Settlement, assign any and all claims and potential claims they have or may have against Ponce to Waterfall as part of this settlement. No Party to this Settlement Agreement is releasing Ponce, A&E, or Creative from any liability or potential liability related to the State Litigation.

4. Release by The Smiths: The Smiths hereby fully, finally, and forever release and discharge Settling Defendants, their insurers, from any and all claims for relief or obligations, causes of action, demands, damages, losses, occurrences, rights, costs, fees, expenses and any other compensation, and liabilities of any kind whatsoever, both known and unknown, at law or in equity, in contract or in tort, arising out of any matter, happening, or thing, from the beginning of time up to the date of final execution of the Settlement Agreement arising out of the transactions, actions, or omissions that occasioned the Litigation, and which were pled or could have been pled therein. This release constitutes full and final satisfaction of any and all claims of the Smiths against the Settling Defendants, their insurers which were pled or could have been pled in the State and Federal Litigation or otherwise arising out of these Parties' participation or involvement with the Residence.

² See footnote #1.

5. Release by Waterfall Investment and Construction Group, LLC: Waterfall hereby fully, finally, and forever releases and discharges the Smiths, Settling Defendants, their insurers from any and all claims for relief or obligations, causes of action, demands, damages, losses, occurrences, rights, costs, fees, expenses and any other compensation, and liabilities of any kind whatsoever, both known and unknown, at law or in equity, in contract or in tort, arising out of any matter, happening, or thing, from the beginning of time up to the date of final execution of the Settlement Agreement arising out of the transactions, actions, or omissions that occasioned the State and Federal Litigation, and which were pled or could have been pled therein. This release constitutes full and final satisfaction of any and all claims of Waterfall against the Smiths, Settling Defendants, their insurers which were pled or could have been pled in the State and Federal Litigation or otherwise arising out of these Parties' participation or involvement with the Residence.

Waterfall Investment & Construction Group, LLC by David B
Waterfall Investment and Construction Group, LLC

By: DAVID BROWN

Its: Managing Member

Date: 12/29/22

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRCP.

James Daniel Smith Sr
James Daniel Smith, Sr.

Date: 12-29-22

Frances Smith
Frances Smith

Date: 12-29-22

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRCP.

Seventy

David A. Brown
David A. Brown

Date: 12/29/22

Lynne M. Brown
Lynne M. Brown

Date: 12-29-22

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRPC.

Karen A. Moore
Karen A. Moore

Atlantic Electric Services

By: _____

Its: _____

Date: _____

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRPC.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR
	)	THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
	)	CASE NO: 2019-CP-26-03604
Waterfall Investment and Construction)	
Group, LLC	)	WATERFALL INVESTMENT AND
	)	CONSTRUCTION GROUP, LLC'S
Plaintiff,	)	AMENDED COMPLAINT TO
vs.	)	REALIGN THE PARTIES AND
	)	CLAIMS REMAINING
A&E Construction & Maintenance, LLC,	)	AFTER A MEDIATED SETTLEMENT
Jeronimo Ponce d/b/a JP & Sons Builders,)	
Creative Drafting and Designs,)	
)	
Defendants.)	

COMES NOW Plaintiff, Waterfall Investment and Construction Group, LLC (hereinafter referred to as "Plaintiff" or "Waterfall"), by and through its undersigned attorneys, hereby submits the within amended Pleading to realign the remaining parties and claims to this action pursuant to this Court's Order Granting Plaintiffs Substitution of Counsel and Leave to Amend Complaint.

1. Plaintiff, Waterfall Investment & Construction, LLC ("Waterfall") is a South Carolina limited liability company licensed in the State of South Carolina and engaged in doing business in South Carolina.

2. Defendant A&E Construction & Maintenance, LLC ("A&E") is a South Carolina limited liability company licensed in the State of South Carolina and, at times relevant hereto, was engaged in doing business in South Carolina including performing work at Lot #66, 265 Waterfall Circle, Little River, South Carolina 29566 (the "Property"), which is the subject of this matter.

3. Defendant Jeronimo Ponce d/b/a JP & Sons ("JP & Sons") is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

4. Upon information and belief, Creative Drafting and Designs (“Creative Drafting”) is a sole proprietorship licensed in the State of South Carolina and engaged in doing business in South Carolina including performing work at the Property, which is the subject of this matter.

5. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper in Horry County, South Carolina, which is the location of the Project.

6. Waterfall previously contracted to sell, and did sell the aforementioned Property to third parties, James Daniel Smith, Sr. and Frances Smith (collectively “the Smiths”), and contacted to construct on the Property a residential dwelling.

7. Defendants A&E, JP & Sons and Creative Drafting (“the Subcontractors”) were all contracted by Waterfall to provide and did provide professional services to the Waterfall’s construction of the residential dwelling.

8. Prior to completion of construction of the residential dwelling Waterfall experienced numerous difficulties with the Smiths about the status and quality of construction of their residential dwelling. Ultimately Waterfall withdrew from completion of construction of the residential dwelling due to the Smiths withholding of funding.

9. The Smiths and the parties hereto became involved in litigation over numerous construction related defects concerning the residential dwelling.

10. Waterfall initially denied the substantive allegations made against it by the Smiths and asserted that it was without fault in connection with the Smiths’ claims.

11. During the litigation discovery, Waterfall’s principal determined that there were substantive and substantial claims asserted by the Smiths as there were construction defects that existed in the residential dwelling, which defects are attributable to the work undertaken by the Subcontractors.

12. Waterfall has been subjected to the Smiths' suit and to the costs, expenses, attorneys' fees, and liabilities associated therewith.

13. Waterfall ultimately settled the litigation with the Smiths in such circumstances as required Waterfall to repurchase the Property.

14. The Subcontractors were offered the opportunity to but did not participate financially in a resolution of the Smiths' claims.

15. Upon information and belief, the Smiths' claims against Waterfall are a result of the acts, omissions, various breaches of warranty, services and materials, and work of the Subcontractors.

16. The damages to Waterfall include the costs and fees, including attorneys' fees, associated with the investigation and defense of the Defendants' Counterclaims, as well as special and consequential damages, including injury and damage to Waterfall's business reputation and the liability for damage to the Property, which included failure of the building structure and systems due to acts or omissions of the Subcontractors, combined to result in consequential damage to building components and other property.

**FOR A SECOND CAUSE OF ACTION
AGAINST THE SUBCONTRACTORS
(EQUITABLE INDEMNITY)**

17. Waterfall incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

18. By virtue of the work and services performed at the Property by Defendants A&E, JP & Sons and Creative Drafting, a special relationship was created and existed between Waterfall and each of the Subcontractors.

19. Upon information and belief, Waterfall and its principal Mr. David Brown, was sued, and was exposed to liability upon the Smiths' claims in this action, in whole or in part, because of the acts and omissions of the Subcontractors, including all wrongful acts, omissions, negligence, breaches, and/or representations alleged by the Smiths.

20. The Subcontractors recognized and understood they were being placed in positions and trust and expected by Waterfall to perform their work in accordance with workmanlike standards and the applicable building codes.

21. Waterfall's reliance on its Subcontractors was justified, as the Subcontractors undertook and owed a duty to construct and design the home and provide materials and services in accordance with applicable building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices throughout the construction of the Property.

22. Waterfall incurred legal fees and retained attorneys to investigate and defend against Defendants' claims.

23. Waterfall was required to repurchase the Property in order to resolve the claims asserted by the Smiths.

24. Waterfall is experiencing and will continue to experience damages as a consequence of the Subcontractors failure to perform their work as expected.

25. Waterfalls exposure to liability, economic and uneconomic damages, are a direct and proximate result of the acts, omissions, negligence/gross negligence, contractors, and/or representations of the Subcontractors, which damaged Waterfall as it was subjected to liability and incurred consequential damages in having to expend attorneys' fees, costs defending the Smiths' claims and ultimately had to repurchase the Property from the Smiths.

26. Waterfall is entitled to full indemnification from the Subcontractors and Waterfall is entitled to damages for the Subcontractors' acts, omissions, negligence, recklessness, and gross negligence, entitling Waterfall to recover from the Subcontractors its attorneys' fees, costs, and other expenses incurred in defending this action.

**FOR A SECOND CAUSE OF ACTION
AGAINST THE SUBCONTRACTORS
(NEGLIGENCE)**

27. Waterfall incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

28. The Subcontractors each undertook to provide their respective services in connection with the construction of a residential dwelling upon the Smiths' property.

29. The Subcontractors each undertook and owed a duty to Waterfall to specify materials, construct various building components, oversee the project, and provide materials and services in accordance with the applicable plans and specifications, applicable building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

30. The Subcontractors each breached undertaken duties in one or more of the following delicti:

- a. In negligently designing the residential dwelling so as to comply with applicable building codes and industry standards;
- b. In deviating from engineered and permitted construction plans when undertaking to frame the garage and kitchen portions of the residential dwelling, without seeking and obtaining authority from the project's contractor and engineer;
- c. In failing to adhere to span tables that were expressly set forth on the engineered

plans for the residential dwelling;

- d. In constructing housing that each of the Subcontractors knew or should know will pose serious risks of physical harm;
- e. In failing to properly fasten the floor system in the bonus room;
- f. In substituting framing materials from what was specified in the engineered and permitted construction plans without the authority of the contractor and engineer;
- g. In utilizing improper fasteners when installing windows and by shooting nails into the windows, as opposed to the nailing flanges;
- h. In failing to adhere to applicable building codes for the construction of the residential dwelling; and
- i. In such other and further deficiencies as will be proven during the trial of this action.

31. The Property was actually and proximately damaged resultant from construction and design deficiencies that violate applicable plans and specifications, building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

32. Property damages were due to the carelessness, negligence, and gross negligence of the Subcontractors, which combined to result in consequential damage to non-defective building components and other property and constitutes an occurrence under applicable policies of insurance of the Subcontractors.

33. Waterfall incurred actual, special, and consequential damages resulting from the carelessness, negligence, and gross negligence of the Subcontractors as will be more fully set forth during the trial of this action, but generally include costs of repairs, depreciation; inability to collect contract balance; incidental damages and consequential damages.

34. Based on the allegations of the Smiths and the responsibilities undertaken by the Subcontractors on the Property, the Subcontractors breached their duty of due care owed to Waterfall by recklessly performing their scope of work and recklessly failing to ensure proper levels of workmanship were achieved.

35. As a result of Subcontractors' negligence, Waterfall incurred, and will continue to incur actual damages in an amount to be determined by the court and did incur settlement costs in settling the Smiths' claims, plus the costs associated with investigating the Smiths' claims and defending the Smiths' action as well as special and consequential damages, including damage to Waterfall's business and business reputation, in an amount to be proven at trial.

36. Waterfall is entitled to judgment against Subcontractors for its actual, special and consequential damages.

**FOR A THIRD CAUSE OF ACTION
AGAINST THE SUBCONTRACTORS
(CONTRIBUTION)**

37. Waterfall incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

38. Having become exposed to liability in tort to the Smiths, and having had to settle the Smiths' claims, Waterfall paid substantially more than its pro rata share of the common liability.

39. Waterfall is entitled to contribution from each of the Subcontractors who are also jointly and severally liable in tort, in accordance with the South Carolina Contribution Among Tort Feasors Act (S.C. Code Ann. § 15-38-10, *et seq.*).

40. Pursuant to its right to contribution, Waterfall is entitled to recover from each of the Subcontractors any and all amounts paid by Waterfall in excess of its pro rata share in any common liability.

**FOR A FORTH CAUSE OF ACTION
AGAINST THE SUBCONTRACTORS
(BREACH OF CONTRACT)**

41. Waterfall incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

42. Each of the Subcontractors contracted with Waterfall to provide services to design and construction of the residential dwelling located upon the Property.

43. In contracting with Waterfall, each of the Subcontractors assumed a duty to undertake its work in a professional and workmanlike manner and in compliance with applicable plans and specifications, building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

44. Waterfall paid sufficient and valuable consideration to each of the Subcontractors by fully paying each for the services rendered by each.

45. Each of the Defendants breached its contract with Waterfall by failing to perform its work and services in accordance with applicable plans and specifications, building codes, applicable manufacturers' instructions, generally recognized and accepted construction industry standards, and good construction practices.

46. As a result of the breach by each of the Subcontractors, Waterfall incurred, and will continue to incur actual damages in an amount to be determined by the court and did incur settlement costs in settling the Smiths' claims, plus the costs associated with investigating the Smiths' claims

and defending the Smiths' action as well as special and consequential damages, including damage to Waterfall's business and business reputation, in an amount to be proven at trial.

47. Waterfall is entitled to judgment against each of the Subcontractors for its actual, special and consequential damages.

**FOR A FIFTH CAUSE OF ACTION
AGAINST THE SUBCONTRACTORS
(BREACH OF IMPLIED WARRANTIES)**

48. Waterfall incorporates all previous paragraphs as if realleged and reasserted herein verbatim.

49. Each of the Subcontractors contracted with Waterfall to provide services to design and construction of the residential dwelling located upon the Property.

50. Each of the Subcontractors impliedly warranted the work undertaken will be performed in a careful, diligent, workmanlike manner and that each would undertake its portion of the construction in a manner that is reasonably expected of living quarters of comparable kind and comparable quality.

51. Each of the Subcontractors breached its implied warranties, thereby actually and proximately causing Waterfall to sustain actual, special and consequential damages as will be more fully set forth during the trial of this action.

52. Waterfall is entitled to judgment against each of the Subcontractors for its actual, special and consequential damages.

WHEREFORE, Waterfall prays for and judgment against Defendants as follows:

- A. Award Waterfall its damages, including special and consequential damages, on its claims, including but not limited to the amount of any settlement paid by

Waterfall to the Smiths and all attorneys' fees and costs incurred as a result of this action.

- B. Require Defendants to fully indemnify Waterfall against all losses and expenses incurred, including but not limited to, the amount of any settlement or judgment paid to the Smiths by Waterfall and all attorneys' fees and costs incurred by Waterfall as a result of this action; and
- C. Award Waterfall such other and further relief as may be just and proper.

Respectfully submitted,

**WRIGHT WORLEY POPE
EKSTER & MOSS, PLLC**
*Attorneys for Waterfall Investment
and Construction Group, LLC*

s/ Kenneth R. Moss

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KennethMoss@wwpemplaw.com

August 19, 2023

North Myrtle Beach, South Carolina

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SC Court of Appeals

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2019-CP-26-03604

Waterfall Investment and Construction Group, LLC, Appellant,

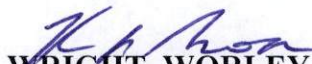
v.

Jeronimo Ponce d/b/a JP & Sons Builders, et al. Respondent.

NOTICE OF APPEAL

Waterfall Investment and Construction Group, LLC appeals the *Order Granting Defendant Jeronimo Ponce d/b/a JP & Sons Builders' Motion for Summary Judgment* of the Honorable William H. Seals, Jr. dated April 17, 2024. Appellant received electronic written notice of this order on April 17, 2024.

May 7, 2024.


**WRIGHT, WORLEY, POPE,
EKSTER & MOSS, PLLC**
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STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 WATERFALL INVESTMENT AND CONSTRUCTION)
 GROUP, LLC,)
)
 PLAINTIFF,)
)
 VS.)
)
 JERONIMO PONCE D/B/A JP & SONS BUILDERS,)
 ET AL.,)
)
 DEFENDANTS.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NUMBER: 2019-CP-26-3604

**ORDER GRANTING DEFENDANT
 JERONIMO PONCE D/B/A JP & SONS
 BUILDERS' MOTION FOR SUMMARY**

**JUDGMENT
 RECEIVED**

MAY 09 2024

SC Court of Appeals

THIS MATTER CAME BEFORE THE COURT on March 11, 2024 by Motion filed by Defendant Jeronimo Ponce on August 6, 2023. Present for Plaintiff in this action, Waterfall Investment and Construction Group, LLC, were Kenneth R. Moss, Esq. and Brittany C. Moore, Esq. Present for the Defendant was Brandon T. Reeser, Esq. For the reasons set forth below, the Court **GRANTS** Defendant's Motion for Summary Judgment.

BRIEF PROCEDURAL BACKGROUND

This case arises out of alleged damages sustained by James and Frances Smith regarding the construction of their home at 365 Waterfall Circle in Little River, South Carolina. See Pltf's Am. Compl. The Smiths entered into a contract with Plaintiff on March 7, 2017, and Waterfall left the job on December 8, 2018 before the certificate of occupancy was issued. See Aff. of David A. Brown. It is alleged Defendant was a framing subcontractor to Waterfall. Defendant was brought into the case via a third-party complaint filed by Plaintiff on October 24, 2019. The Smiths did not bring any direct claims against Defendant. All claims were settled at mediation on November 18, 2022 except those indemnity claims brought by Plaintiff against Defendant. Def. Mot. for Summary Judgment – Exhibit A. As part of the settlement, Plaintiff repurchased the Smith residence. Plaintiff then amended its pleadings on August 21, 2023 to assert equitable indemnity, negligence, breach of contract,

contribution, and breach of warranty claims. This Motion followed.

LEGAL STANDARD

Under Rule 56 of the South Carolina Rules of Civil Procedure, the judgment sought by the moving party “shall be rendered forthwith if 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.” Rule 56(c), SCRPC. The rule further provides that “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC.

“In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party.” Gilmer v. Martin, 323 S.C. 154, 156, 473 S.E.2d 812, 813 (Ct. App. 1996). It is not sufficient, however, that a non-moving party creates an inference that is not reasonable or raises an issue of fact that is not genuine. Evans v. Stewart, 370 S.C. 522, 636 S.E.2d 632, 635 (Ct. App. 2006). “To justify departure from the course of the trial of an issue of fact and the award of summary judgment, the court must be convinced that the issue is not genuine but feigned and that there is in truth nothing to be tried. . . . The fact that there is a factual dispute is not enough to preclude a summary judgment.” Saluda Motor Lines, Inc. v. Crouch, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989) (quoting 73 Am. Jur. 2d Summary Judgment § 27). “The plain language of Rule 56(c), SCRPC, mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” Etheredge v. Richland School Dist. I, 330 S.C. 447, 453, 499 S.E.2d 238 (Ct. App. 1998).

ANALYSIS

Defendant contends that he is entitled to summary judgment as Defendant's claims are primarily barred by the three-year statute of limitations applicable to this case. S.C. Code Ann. § 15-3-520 et. seq. The Court agrees. Plaintiff initially brought negligence, equitable indemnity, and contribution claims against the Defendant on October 24, 2019. At that point, Defendant was identified as the framer for the residence in a case primarily defined by alleged framing deficiencies. Defendant appeared and defended this case for over three years before the Smiths settled their claims with Plaintiff on November 18, 2022. At that time, all damage claims arising from defective construction against the Defendant had expired under the three-year statute of limitations, and Plaintiff concedes that any claims asserted by any other party would have expired. Aff. of David A. Brown, p. 4. Additionally, Defendant purchased the home as part of its settlement with the Smiths with notice of the alleged defects it had been defending since 2019. Thus, when Plaintiff amended its pleadings on August 21, 2023, any claims that could have been assigned or arisen from Defendant's alleged construction work were extinguished.

With regard to Plaintiff's contractual indemnity claim, no contract has been produced in opposition to Defendant's Motion establishing an indemnity agreement between the parties. Additionally, Plaintiff's contribution claim is improper as the settlement agreement it reached with the Smiths specifically did not extinguish Defendant's liability, which, as discussed previously, had already expired under the statute of limitations. Def. Mot. for Summary Judgment – Exhibit A. Finally, Plaintiff concedes its role in constructing the subject residence and responsibility as a joint tortfeasor in its representative affidavit provided to the Court. Aff. of David A. Brown, pp. 1-4. Such explicitly bars any claim for equitable indemnity, which would require Plaintiff to be fault-free with regard to the Smiths' claims against it. Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983).

For the above-stated reasons, Defendant's liability for defective construction arising from work performed at the Smith residence expired prior to Plaintiff's settlement with the Smiths on November 22, 2022. As such, the Court **GRANTS** Defendant's Motion for Summary Judgment as to Plaintiff's negligence and breach of warranty claims. As Plaintiff has produced no contract in opposition to Defendant's Motion, the Court **GRANTS** such Motion as to Plaintiff's breach of contract and contractual indemnity claims. Finally, the Court finds that Plaintiff is not fault-free by admission in its representative affidavit, and the Court **GRANTS** Defendant's Motion as to Plaintiff's equitable indemnity claim.

As all other claims between the parties to this action have otherwise been dismissed or settled, this case is therefore ended.

IT IS SO ORDERED!

The Honorable William H. Seals, Jr.
Chief Administrative Judge
Fifteenth Judicial Circuit

Conway, South Carolina
March __, 2024



Horry Common Pleas

Case Caption: Waterfall Investment And Construction Group LLC , plaintiff, et al VS James Daniel Smith Sr , defendant, et al
Case Number: 2019CP2603604
Type: Order/Summary Judgment

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED
MAY 09 2024
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2019-CP-26-03604

Waterfall Investment and Construction Group, LLC, Appellant,

v.

Jeronimo Ponce d/b/a JP & Sons Builders, et al. Respondent.

PROOF OF SERVICE

I certify that I have served copies of the *Notice of Appeal* with attached *Order Granting Defendant Jeronimo Ponce d/b/a JP & Sons Builders' Motion for Summary Judgment* and *Proof of Service* of same in the above-captioned matter on the following individuals by United States Mail with sufficient first-class postage affixed, and/or by electronic filing system, addressed as follows:

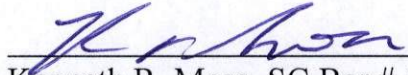
Brandon T. Reeser, Esq.
Wilson, Heyward & Reeser
924 Folly Road
P.O. Box 13177
Charleston, SC 29422

Clerk of Court
County of Horry
P.O. Box 677
Conway, SC 29526
(via electronic filing system)

[Remainder of page intentionally left blank; signature page follows]

Respectfully submitted,

**WRIGHT, WORLEY, POPE,
EKSTER & MOSS, PLLC**



Kenneth R. Moss, SC Bar # 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: (843) 281-9901 / Fax: (843) 281-9903
Email: kennethmoss@wwpemplaw.com
Attorneys for Appellant

North Myrtle Beach, SC

May 7, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
)	
Waterfall Investment and Construction Group, LLC,)	
)	
Plaintiff,	)	Civil Action No.: 2019-CP-26-03604
)	
v.)	
)	
James Daniel Smith, Sr. and Frances Smith,)	
)	
Defendants.)	
)	
James Daniel Smith, Sr. and Frances Smith,)	
)	
Third-Party Plaintiffs,)	
)	
vs.)	
)	
David A. Brown and Lynne M. Brown,)	
)	
Third-Party Defendants.)	
)	
Waterfall Investment and Construction Group, LLC,)	
)	
Third-Party Plaintiff,)	
)	
vs.)	
)	
A&E Construction & Maintenance, LLC,)	
Conquering Trades, Inc., Atlantic Electric Services, Jeronimo Ponce d/b/a JP & Sons Builders, Creative Drafting and Designs,)	
)	
Third-Party Defendants.)	
)	

THIRD-PARTY DEFENDANT ATLANTIC ELECTRIC SERVICES' MOTION TO ISSUE A PERMANENT STAY AND TO DISMISS AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

TO: PATRICK J. MCDONALD, ESQ. AND FRED H. OLIVER, ESQ., ATTORNEYS FOR PLAINTIFF/THIRD-PARTY PLAINTIFF WATERFALL INVESTMENT AND CONSTRUCTION GROUP, LLC:

YOU WILL PLEASE TAKE NOTICE THAT Third-Party Defendant, Atlantic Electric Services will appear before the presiding judge of the Horry County Court of Common Pleas on the tenth day following service hereof, or at such other place and time as may be designated by the Court, and then and there move for an Order granting a permanent stay and dismissal of the above matter or an Order granting summary judgment on the claims asserted by Waterfall. The within motion is made pursuant to the South Carolina Rules of Civil Procedure and is premised upon the grounds that:

- a. Waterfall failed to comply with the provisions of S.C. Code Ann. §§40-59-810 through -860, the South Carolina Notice and Opportunity to Cure Act, and
- b. Waterfall's claims for negligence are effectively nothing more than claims for equitable indemnity on the basis that there is no enforceable contract applicable to the work allegedly performed by Atlantic for Waterfall on the subject home. See *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct.App.2015). Further, Atlantic is entitled to summary judgment on Waterfall's claim for contribution which is not ripe because Waterfall has not paid more than its pro rata share of a common liability and the right to contribution does not arise prior to payment. *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994).

This motion will be based upon the pleadings, parties' written discovery responses and discovery undertaken thus far, documents produced, motion briefs and memoranda, and such evidence which may later be submitted.

(SIGNATURE PAGE TO FOLLOW)

Respectfully submitted,

DOUGALL & COLLINS

s/William A. Collins, Jr.

Thomas F. Dougall (S.C. Bar #1739)
William A. Collins, Jr. (S.C. Bar #8866)
Michal Kalwajtys (S.C. Bar #100950)
1700 Woodcreek Farms Road, Suite 100
Elgin, South Carolina 29045
(803) 865-8858 (TEL)
(803) 865-8944 (FAX)

Attorneys for Third-Party Defendant Atlantic Electric
Services

February 3, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Waterfall Investment and Construction Group,)
 LLC)
 Plaintiff)
 v.)
 James Daniel Smith, Sr. and Frances Smith,)
 Defendants.)
 _____)
 James Daniel Smith, Sr. and Frances Smith,)
 Third-Party Plaintiffs,)
 v.)
 David A. Brown and Lynn M. Brown,)
 Third-Party Defendants.)
 _____)
 Waterfall Investment and Construction Group,)
 LLC,)
 Third-Party Plaintiff,)
 v.)
 A&E Construction & Maintenance, LLC;)
 Conquering Trades, Inc.; Atlantic Electric)
 Services; Jeronimo Ponce D/B/A Jp & Sons)
 Builders; Creative Draftings and Designs,)
 Third-Party Defendants.)
 _____)
 Conquering Trades Corporation,)
 Fourth-Party Plaintiff,)
 v.)
 Ramon Soto,)
 Fourth-Party Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No.: 2019-CP-26-03604

**PLAINTIFF’S MOTION SEEKING TO
SUBSTITUTE COUNSEL, FOR LEAVE TO
FILE AN AMENDED COMPLAINT IN ORDER TO
REALIGN THE REMAINING PARTIES & CLAIMS
AFTER A MEDIATED SETTLEMENT; AND FOR
A REVISED SCHEDULING ORDER**

TO: ALL PARTIES TO THE ABOVE ACTION, BY AND THROUGH EACH'S RESPECTIVE ATTORNEYS

Plaintiff and Third-Party Defendants above named, by and through their respective attorneys hereby move for an Order or Orders of the Court to:

1. Substitute Attorney Kenneth R. Moss and his firm for Attorneys John Rogers, Fred Oliver and their respective firms as counsel for the Plaintiff;
2. Grant Leave to Plaintiff and Third-Party Defendants to file an amended complaint so as to better reflect and realign the remaining parties and claims after many parties to this action reached a settlement during mediation;
3. Amend the caption of the case so as to realign the remaining parties and remove the parties that settled out of this case; and
4. Issue an Amended Scheduling Order that will accommodate the remaining parties to have a trial of the remaining claims.

In support of this motion, the movants would show and alleged that the parties to this action engaged in a mediation conference, during which all parties that were not in default and other than Plaintiff and Third-Party Defendant Jeronimo Ponce D/B/A JP & Sons Builders resolved their claims in this action. Furthermore, the Plaintiff in this action obligated to and has repurchased the subject real property and residence in this action from the Defendants James Daniel Smith, Sr. and Frances Smith, and to thereafter pursue Plaintiff's remaining fourth party claims against Third Party Defendant Jeronimo Ponce D/B/A JP & Sons Builders.

Plaintiff, with the consent and joinder of Third-Party Defendants David A. Brown and Lynne M. Brown, so moves this 22nd day of January 2023.

Fred H. Oliver, Esquire
The Derrick Law Firm
fred@derricklawfirm.com

and

John E. Rogers, II, Esq.
Thomas J. Clark, Esq.
The Ward Law Firm
jrogers@wardfirm.com
jclark@wardfirm.com

Attorneys for Waterfall Investment and Construction Group, LLC

Kenneth Moss, Esq.
Wright, Worley, Pope, Ekster & Moss, PLLC
KennethMoss@wwpemlaw.com
Attorneys for David A. Brown and Lynne M. Brown

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS)
) FIFTEENTH JUDICIAL CIRCUIT)
COUNTY OF HORRY) CASE NUMBER: 2019-CP-26-3604)
)

WATERFALL INVESTMENT AND CONSTRUCTION)
GROUP, LLC,)

PLAINTIFF,)

vs.)

JAMES DANIEL SMITH, SR. AND FRANCES)
SMITH,)

DEFENDANTS.)

**DEFENDANT JERONIMO PONCE D/B/A)
JP & SONS BUILDERS' MOTION FOR)
SUMMARY JUDGMENT)**

JAMES DANIEL SMITH, SR. AND FRANCES)
SMITH,)

THIRD-PARTY PLAINTIFFS,)

vs.)

DAVID A. BROWN AND LYNNE M. BROWN,)

THIRD-PARTY DEFENDANTS.)

WATERFALL INVESTMENT AND CONSTRUCTION)
GROUP, LLC,)

THIRD-PARTY PLAINTIFF,)

vs.)

A&E CONSTRUCTION & MAINTENANCE, LLC,)
CONQUERING TRADES, INC., ATLANTIC)
ELECTRIC SERVICES, JERONIMO PONCE D/B/A JP)
& SONS BUILDERS, AND CREATIVE DRAFTING)
AND DESIGNS,)

THIRD-PARTY DEFENDANTS.)

**TO: KENNETH R. MOSS, ESQ., COUNSEL FOR WATERFALL INVESTMENT AND)
CONSTRUCTION GROUP, LLC:)**

COMES NOW Defendant Jeronimo Ponce d/b/a JP & Sons Builders (hereinafter
“Defendant”), who will move on the tenth day of service hereof, or at such other time as may be set by

the Court, at the Horry County Courthouse for an Order granting him summary judgment as to the Negligence and Contribution claims asserted by Waterfall Investment and Construction Group, LLC (hereinafter “Cross-Claimant) in its Third-Party Complaint. Defendant’s Motion is made pursuant to Rule 56, SCRCP as there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law as to Cross-Claimant’s Negligence and Contribution causes of action.

Defendant’s claim for negligence are nothing more than a disguised and repeated claim for equitable indemnity on the basis that there is no enforceable written contract applicable to the work allegedly performed by Defendant for Waterfall on the subject home. Defendant states that it denies liability for any damage to the Plaintiffs’ home, but that if there is any damage, it is due to the negligence of its subcontractors, including Defendant. See Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 615, 776 S.E.2d 426 (Ct.App.2015). Thus, its negligence claim is not independent from its equitable indemnity claim and should be dismissed. As Defendant has been a named party to the present action since October 24, 2019 and as the original Plaintiffs did not, at any point, assert any claims against Defendant within three years from the date of such naming and appearance, the statute of limitations has run as to any alleged negligence claim that Cross-Claimant asserts is either assigned, assumed, or has arisen through any other means. S.C. Code Ann. § 15-3-520 et. seq.

Defendant’s contribution claim is also improper as all claims in this matter other than the subject third-party claims have been settled, and by the terms of the settlement agreement itself, Defendant’s purported liability was not discharged by the settlement. See Exhibit A. Such failure to discharge Defendant’s purported liability extinguishes Cross-Claimant’s contribution claim as a matter of law. S.C. Code Ann. § 15-38-20.

Defendant's Motion will be further supported by the Pleadings in this case, deposition testimony, legal memoranda, and other documentary evidence as may be timely filed and served as well as record herein. This Motion is further based on the common and statutory law of the State of South Carolina and Rule 56, SCRPC.

Respectfully submitted,

WILSON HEYWARD & REESER, LLC

s/Brandon T. Reeser

Bonum S. Wilson, III

Brandon T. Reeser

P.O. Box 13177

Charleston, South Carolina 29422

(843) 762-4567

bwilson@wilsonheyward.com

breeser@wilsonheyward.com

ATTORNEYS FOR DEFENDANT JERONIMO PONCE

D/B/A JP & SONS BUILDERS

Charleston, South Carolina
August 4, 2023

EXHIBIT A

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Settlement Agreement”) is made by and among James Daniel Smith Sr. and Frances Smith (hereinafter collectively “the Smiths”); and Waterfall Investment and Construction Group, LLC (hereinafter Waterfall), Atlantic Electric Services, Conquering Trades, Corp., David A. Brown, Lynne M. Brown, and Ramon Soto (hereinafter collectively “Settling Defendants”). The Smiths and Settling Defendants are hereinafter collectively referred to as “the Parties” or the “Settling Parties”.

WHEREAS Waterfall initiated an action pending in Horry County in the Court of Common Pleas for the Fifteenth Circuit, styled *Waterfall Investment and Construction Group, LLC v. James Daniel Smith Sr. and Frances Smith*, Civil Action No.: 2019-CP-26-03604(hereinafter “the State Litigation”); and

WHEREAS, James Daniel Smith Sr. and Frances Smith asserted counterclaims against Waterfall and brought forward, as Third-Party Plaintiffs a complaint against David A. Brown and Lynne M. Brown; and

WHEREAS, Waterfall asserted third-party causes of action against Defendants, A&E Construction & Maintenance, LLC, Conquering Trades Inc., Atlantic Electric Services, Jeronimo Ponce d/b/a JP & Sons Builders, Creative Drafting and Designs; and,

10. All Settling Parties except Ramon Soto¹ are hereby releasing the other Settling Parties and their respective employees, former employees, agents, attorneys, insurers, and related

¹ Ramon Soto did not assert any claims against any other party to this lawsuit. For that reason, Ramon Soto is not a signatory to this document and does not give any release via this document. However, Ramon Soto is one of the "Settling Defendants" and one of the "Settling Parties" as those terms are defined in this document and he is fully released and protected as stated herein.

parties from all claims and damages arising from the State and Federal Litigation, yet specifically preserving any and all claims and potential claims that Waterfall , has or may have against Third-Party Defendants Jeronimo Ponce d/b/a JP & Sons Builders (“Ponce”), A&E Construction and Maintenance, LLC (“A&E”), and Creative Drafting & Designs (“Creative”). Ponce, A&E, and Creative will **NOT** be a party to any release relevant to this Settlement Agreement. The Smiths, as part of this Settlement, assign any and all claims and potential claims they have or may have against Ponce to Waterfall as part of this settlement. No Party to this Settlement Agreement is releasing Ponce, A&E, or Creative from any liability or potential liability related to the State Litigation.

4. Release by The Smiths: The Smiths hereby fully, finally, and forever release and discharge Settling Defendants, their insurers, from any and all claims for relief or obligations, causes of action, demands, damages, losses, occurrences, rights, costs, fees, expenses and any other compensation, and liabilities of any kind whatsoever, both known and unknown, at law or in equity, in contract or in tort, arising out of any matter, happening, or thing, from the beginning of time up to the date of final execution of the Settlement Agreement arising out of the transactions, actions, or omissions that occasioned the Litigation, and which were pled or could have been pled therein. This release constitutes full and final satisfaction of any and all claims of the Smiths against the Settling Defendants, their insurers which were pled or could have been pled in the State and Federal Litigation or otherwise arising out of these Parties' participation or involvement with the Residence.

² See footnote #1.

5. Release by Waterfall Investment and Construction Group, LLC: Waterfall hereby fully, finally, and forever releases and discharges the Smiths, Settling Defendants, their insurers from any and all claims for relief or obligations, causes of action, demands, damages, losses, occurrences, rights, costs, fees, expenses and any other compensation, and liabilities of any kind whatsoever, both known and unknown, at law or in equity, in contract or in tort, arising out of any matter, happening, or thing, from the beginning of time up to the date of final execution of the Settlement Agreement arising out of the transactions, actions, or omissions that occasioned the State and Federal Litigation, and which were pled or could have been pled therein. This release constitutes full and final satisfaction of any and all claims of Waterfall against the Smiths, Settling Defendants, their insurers which were pled or could have been pled in the State and Federal Litigation or otherwise arising out of these Parties' participation or involvement with the Residence.

Waterfall Investment & Construction Group, LLC by David B
Waterfall Investment and Construction Group, LLC

By: DAVID BROWN

Its: Managing Member

Date: 12/29/22

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRCP.

James Daniel Smith Sr
James Daniel Smith, Sr.

Date: 12-29-22

Frances Smith
Frances Smith

Date: 12-29-22

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRCP.

Seventy

David A. Brown
David A. Brown

Date: 12/29/22

Lynne M. Brown
Lynne M. Brown

Date: 12-29-22

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRCP.

Kevin A. Matis
Kevin A. Matis

Atlantic Electric Services

By: _____

Its: _____

Date: _____

As attorney for the above-referenced party, I hereby execute this agreement only for the purposes of Rule 43(k), SCRCP.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-03604
)	
Waterfall Investment and Construction)	
Group, LLC,)	
)	
Plaintiff,)	
	)	PLAINTIFF’S MEMORANDUM IN
vs.	)	OPPOSITION TO DEFENDANT
	)	JERONIMO PONCE D/B/A
A&E Construction & Maintenance, LLC,	)	JP & SONS BUILDERS’
Jeronimo Ponce d/b/a JP & Sons Builders,	)	MOTION FOR SUMMARY JUDGMENT
Creative Drafting and Designs,)	
)	
Defendants.)	
)	
)	

The Plaintiff respectfully submit this Memorandum in Opposition to the Motion for Summary Judgment filed by the Defendant, Jeronimo Ponce d/b/a JP & Sons Builders (hereinafter “Defendant”). Defendant filed the Motion for Summary Judgment (“Motion”) on August 6, 2023 pursuant to Rule 56, SCRPC. Plaintiff respectfully moves the Court to deny the Defendant’s Motion for the reasons set forth below.

STANDARD OF REVIEW

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment 'if 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.'" *Id.* (quoting Rule 56(c), SCRPC). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light

most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009); Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Tupper, supra. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. True v. Monteith, 327 S.C. 116, 489 S.E.2d 615(1997); Tupper, supra. The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

STATEMENT OF THE CASE

This case revolves around the construction of a residential dwelling located at 265 Waterfall Circle, Little River, SC 29566 (the "Property"). Plaintiff previously contracted to construct and sell the Property to third Parties, James and Frances Smith (collectively "the Smiths"). Amend. Compl. ¶ 6. Defendant along with the other named Defendants were all contracted by Plaintiff as subcontractors to provide professional services to the construction of the residential dwelling. Amend. Compl. ¶ 7. Plaintiff experienced numerous difficulties with the Smiths about the status and quality of construction and prior to completion, Plaintiff withdrew from the project due to the Smiths withholding of funding. Amend. Compl. ¶ 8. The Smiths and all the parties hereto became involved in litigation over numerous construction related defects concerning the Property. Amend. Compl. ¶ 9. During litigation discovery, Plaintiff's principle

determined there were substantial and substantive construction defects attributable to the work undertaken by the Defendant. Amend. Compl. ¶ 11. Plaintiff brought causes of action of negligence, equitable indemnity, and contribution against the subcontractors including, Defendant. Plaintiff ultimately settled litigation with the Smiths in such circumstances that required it to repurchase the Property. Amend. Compl. ¶ 13. Defendant was offered the opportunity but did not participate financially in the resolution of the Smiths' claims. Amend. Compl. ¶ 14.

Now Defendant moves for Summary Judgment arguing that Plaintiff's claim for negligence is nothing more than a repeated claim for equitable indemnity and that it is barred by the statute of limitations. Def's Motion ¶ 2. Defendant also argues that Plaintiff's claim for contribution is improper pursuant to S.C. Code Ann. § 15-38-20 seeing as "Defendant's purported liability was not discharged by the settlement." Def's Motion ¶ 3.

ARGUMENT

Defendant's Motion for Summary Judgment should be denied on the grounds that all three of Defendant's arguments fail. Plaintiff's negligence, breach of contract, and breach of implied warranties claims are independent of its equitable indemnity claim for which Plaintiff suffered distinct damages because of Defendant's conduct, the statute of limitations did not run on any of Plaintiff's claims, and the settlement agreement between Plaintiff and the prior parties did not render Plaintiff's contribution claim improper. Accordingly, Summary Judgment should be denied.

A. Plaintiff established enough facts and damages independent of having to defend itself under an indemnity claim to support Plaintiff's negligence claim and other causes of action against Defendant.

Defendant argues that Plaintiff's negligence, breach of contract, and breach of implied warranties claims should be dismissed because they are nothing more than "disguised and repeated

claim[s] for equitable indemnity”. Def’s Motion ¶ 2. Defendant relies on the ruling in Stoneledge at Lake Keowee Owners’ Ass’n, Inc., v. Builders First Source-Southeast Group, 413 S.C. 615 (Ct.App.2015) to support its argument however, Defendant fails to account for the distinguishing facts and circumstances in this case.

In Stoneledge, the court’s ruling that Marick’s negligence crossclaim was nothing more than a claim for equitable indemnity relied upon the fact that Marick “did not sustain its own damages as a result of negligence by the respondents.” Id. at 621. The court noted that Marick’s injuries arose exclusively from having to defend itself in Stoneledge’s lawsuit (i.e. attorney’s fees, costs, and any amount ordered to pay Stoneledge). Id. at 621 “The character of an action is primarily determined by the allegations contained in the complaint. Id. at 620 (quoting Seebaldt v. First Fed. Sav. & Loan Ass’n, 269 S.C. 691, 692 (1977)).

Plaintiff’s Amended Complaint lists damages as a result of Defendant’s negligence to include: “costs of repairs, depreciation, inability to collect contract balance (Amend. Compl. ¶ 33), incidental damages and consequential damages, and damage to Plaintiff’s business and business reputation” (Amend. Compl. ¶¶ 35 & 46), in addition to those listed that arose from having to defend itself from the Smith’s claims. Amend. Compl. ¶¶ 33 and 35. However, Plaintiff’s damages for its equitable indemnity claim were listed as: “attorneys’ fees, costs defending the Smiths’ claims and ultimately hav[ing] to repurchase the Property.” Amend. Compl. ¶ 25. The record reveals that *after settling* with the Smiths, Plaintiff learned the quantifiable extent of the damages concerning the defects in the kitchen attributable to Defendant. As a result, Plaintiff had to resell the house at a much lower price, offer a home warranty that is still in place, cover closing costs, and pay for repairs. *See* Plaintiff’s Affidavit. Additionally, Plaintiff was never able to recover its contract balance with the Smiths, a sum of between \$180,000.00 and \$211,000 depending on the

jury's determination. Also, Plaintiff had to pay a fee to the Department of Labor, Licensing, and Regulation as a result of Defendant's negligent work. *Id.* Accordingly, Plaintiff's negligence claim has distinct and separate facts and damages that did not arise exclusively from the claims made by the Smiths. In addition, Plaintiff's breach of contract and breach of implied warranties claims have independent damages than the indemnity claim. Plaintiff's payments to Defendants for work under the contract that Defendant failed to do or failed to do in a professional and workmanlike manner are separate damages from the other claims. Unlike Stoneledge, even if the Smiths had not sued the Plaintiff, the independent negligence, breach of contract, and breach of implied warranties claims and damages would still exist as they rise above and outside of litigation expenses.

B. None of Plaintiff's causes of action are barred by the statute of limitations.

Defendant argues that since "the original Plaintiffs [the Smiths] did not, at any point, assert any claims against Defendant within three years from the date of such naming and appearance [October 24, 2019], the statute of limitations has run as to any alleged negligence, [breach of contract, and breach of implied warranties] claims that Cross-Claimant asserts is either assigned, assumed, or has arisen through any other means." Def's Motion ¶ 2.

Plaintiff entered into a contract with the Smiths on March 3, 2017 for the sale of a lot and custom home. Plaintiff named and sued Defendant specifically for negligence, equitable indemnity, and contribution in its Reply to Counterclaims and Third-Party Complaint on October 24, 2019, roughly four months after receiving a professional report evidencing Defendants construction defects. *See* Waterfall Investment & Construction Group, LLC's Reply to Defendants' Counterclaims and Third-Party Complaint. According to S.C. Code Ann. §15-38-20 et. seq., the statute of limitations for the Plaintiff's claims is three years which Plaintiff satisfied by filing suit in October of 2019.

Plaintiff later received a second report dated February 2022 evidencing additional incidents of Defendant's negligence and deviation from the engineered construction plans. Thereafter in 2023, Plaintiff sued Defendant for breach of contract and breach of implied warranties based upon the contract by operation of law and the special relationship existing between Plaintiff and Defendant by virtue of Defendant's work and services performed at the Property. Despite Defendant's assertions, it is simply not relevant that the Smiths never filed suit against the Defendants. Plaintiff is not attempting to recover based upon any assigned or assumed claims of the Smiths against the Defendant and therefore Plaintiff's claims are not barred by the statute of limitations because all claims were filed within three years of learning of the defects.

Defendant may suggest that Plaintiff's breach of contract and breach of implied warranties claims are barred by the statute of limitations seeing as they were not filed until 2023, more than three years since Defendant left the jobsite on this Property. However, under Rule 15(c) SCRPC, these claims relate back to the original pleadings date of October 2019. Rule 15(c) reads, "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." Here, the two additional claims arise from the same exact conduct, transaction, and occurrence as the other claims, which is the framing work Plaintiff hired Defendant to do on the Smiths' house in 2017. "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 SOL against the latter assertion by amendment of defenses or claims that arise out of the same conduct... set forth in the original pleading." Thomas v. Grayson, 318 S.C. 82 (1995). Rule 15(c) was enacted to prevent the very protection and scenario that the Defendant is attempting to argue as a defense. All the facts and

damages are a result of Defendants negligent conduct in the framing of the Smiths' property. Defendant is not prejudiced in maintaining its defenses in any way by the additional two claims.

C. The settlement agreement between Plaintiff and the prior parties did not render Plaintiff's contribution claim against the Defendant improper because Defendant's liability was discharged as to the Smiths.

"A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable." S.C. Code Ann. § 15-38-20(D). Defendant asserts that Plaintiff's contribution claim is improper because the settlement agreement failed to discharge Defendant's liability as required by S.C. Code Ann. § 15-38-20.

The settlement agreement did extinguish Defendant's liability as to the Smiths seeing as they "assign[ed] any and all claims and potential claims they have or may have against Ponce to Waterfall as part of this settlement." *See* Settlement Agreement P. 4. And further, the statute of limitations barred any potential liability from any other parties at the time of the settlement agreement. As a matter of practicality, Defendant's liability was fully discharged with the exception of Plaintiff's claims. Accordingly, Plaintiff's contribution claim is proper because it accomplishes the intention of the statute to avoid double liability and Plaintiff can find no case or precedent with these particular facts that would warrant a bar.

D. Plaintiff's breach of contract claim is proper because South Carolina recognizes oral contracts so long as they are not barred by the statute of frauds.

South Carolina has long recognized oral contracts so long as they meet the contract essentials of offer, acceptance, and consideration. Here we have Defendant offering framework on this project, Plaintiff accepting said offer, and satisfying pay applications as consideration. As

to the detailed terms of the contract, the Parties relied upon their course of dealings in the past several years.

This subcontract agreement is not required to be in writing pursuant to the statute of frauds because the work to be performed was within one year from the making thereof and all of other subparts of the statute are not applicable. S.C. Code Ann. § 32-3-10.

The record of this case clearly evidences a breach of the contract by the Defendant deviating so far from the engineered plans as detailed in two expert reports. *See* Plaintiff's Affidavit. Plaintiff has suffered damages totaling over a million dollars not including the sums paid to Defendant under the contract.

E. There was an implied warranty of reasonable and professional care under the Parties' oral contract which was not barred by the statute of frauds.

It has long been established that a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. Hutson v. Cummins Carolina, Inc., 280 S.C. 552, 314 S.E.2d 19, (Ct. App. 1984). Said implied warranty exists as a matter of law. *Id.* This warranty requires the subcontractor to use skills customarily used in the industry therefore, the work rendered must meet the ordinary, reasonable, and normal standards in the industry. Where a builder holds himself out as a professional who is specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonably fitted for its intended purpose. *Id.*

Defendant's principal is a licensed contractor who held himself out to be "specially qualified" to perform framework on residential dwellings. Plaintiff contracted with Defendant to undertake the framework on the Smiths house with the understanding that Defendant's work would be performed in a careful, diligent, workmanlike manner to meet industry standards. Failing to

adhere to the engineered plans as Defendant did falls way below industry standards of proper workmanship. Following the construction plans is the bare minimum expectation from a builder. Because Defendant refused and failed to construct the home according to the plans, Plaintiff has suffered numerous damages over a million dollars as detailed in its Affidavit. *See* Plaintiff's Affidavit.

Conclusion

Therefore, the aforementioned Defendant's Motion for Summary Judgment must fail as Plaintiff has independent claims for negligence, breach of contract, and breach of implied warranties apart from indemnity, that are not barred by the statute of limitations, and Plaintiff's contribution claim is proper seeing as the settlement agreement successfully discharged Defendant's liability with the exception of Plaintiff's claims. Accordingly, Plaintiff respectfully requests that this Court deny Defendant's Motion for Summary Judgment.

**WRIGHT, WORLEY, POPE,
EKSTER & MOSS, PLLC**
Counsel for Plaintiff

s/ Kenneth R. Moss

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Email: KennethMoss@wvpemlaw.com

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Waterfall Investment and Construction)
 Group, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 A&E Construction & Maintenance, LLC,)
 Jeronimo Ponce d/b/a JP & Sons Builders,)
 Creative Drafting and Designs,)
)
 Defendants.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO.: 2019-CP-26-03604

**AFFIDAVIT OF DAVID A.
 BROWN IN OPPOSITION TO
 JERONIMO PONCE D/B/A
 JP & SONS BUILDERS' MOTION
 FOR SUMMARY JUDGMENT**

Personally appeared before me the undersigned, David A. Brown, and after first being duly sworn deposed and stated:

1. My name is David A. Brown. I am the principal of the Plaintiff, Waterfall Investment and Construction, LLC. I am over the age of eighteen (18) years and competent to make the within affidavit.
2. I have provided this affidavit in opposition to a motion by the Defendant Jeronimo Ponce d/b/a JP & Sons Builders (“the Defendant”), wherein summary judgment is sought.
3. My company, the Plaintiff, in March of 2017, contracted to construct a residential home James Daniel Smith, Sr. and Frances Smith (collectively “the Smiths”).
4. The Smiths and I worked together, and with other professionals, to design and have engineered the Smiths’ house plans. On behalf of Plaintiff, I obtained Building Permit and proceeded to construct the homes for the Smiths.

5. Pursuant to our contact, the Smiths were supposed to fund construction draws until the completion of their home.
6. On behalf of my company, the Plaintiff, I contracted with the Defendant to undertake the framing of the Smiths residential dwelling. In order that the Defendant could undertake its contracted obligations, I caused to be provided to the Defendant copies of both approved elevation plans and also engineered construction plans.
7. The Defendant did accept and undertake the frame construction of the Smiths' residential dwelling and my company fully paid the contracted price and also paid for several change orders / additions.
8. My company and I were not directly involved in the supervision of the construction of the Smiths' residential dwelling. Rather, my company contracted with a licensed residential home builder, Mr. Clodfelter, to supervise the construction and contracted with a licensed framing carpentry, the Defendant, to undertake the frame construction of the dwelling. Mr. Clodfelter arranged to have delivered to the jobsite all materials that were requested by the Defendant.
9. While my company and I were not negligent in the construction, as we had hired licensed professionals whom we had prior relationships and experience with, as the contractor pulling the permit and contracting with the Smiths my company was ultimately responsible for the defective work undertaken by the Defendant. Basically my company became liable due to the breaches of contract and duties by others.
10. During the course of this litigation, I learned that the Defendant breached its contracted obligations by failing to adhere to the engineered construction plans that were provided for the construction. I also learned that the Defendant breached its duties owed to my company

to undertake its construction activities in a good and workmanlike manner that adhered to applicable construction standards.

11. The relationship between the Smiths and me deteriorated over the course of the construction of their home and they refused to pay construction draws or to fully pay their contract.
12. I later learned that defective construction attributable to the Defendant became the primary source of the disputes that my company had with the Smiths.
13. On behalf of Plaintiff, I caused a third-party complaint to be filed against the Defendant on October 24, 2019. In that pleading, Plaintiff asserted claims against Defendant for negligence and gross negligence, equitable indemnity, contribution and breach of contract. When first asserting the claims, the extent of damages was not fully known. Those claims have remained pending since October 24, 2019.
14. Pursuant to a mediated settlement agreement, Plaintiff was obligated to: i) repurchase the subject home of this action from the Smiths; ii) pay the Smiths directly sums totaling \$222,500.00; and iii) to forgo contract damages in the amount of \$180,283.28. There are additional damages incurred for legal fees and associated closing costs.
15. After analyzing all of the damages sustained by my company, as a result of the litigation and settlement, I have determined that my company sustained \$1,074,635.71 in damages, exclusive of attorney fees payable as a result of this litigation.
16. In order to mitigate damages, I arranged to sell the home and lot that my company repurchased from the Smiths for a sum of \$640,000.00, resulting in net losses to the Plaintiff in the amount of \$434,635.70, exclusive of attorney fees payable as a result of this litigation.

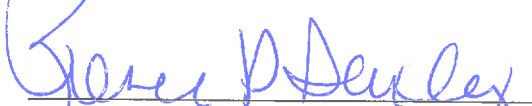
- 17. I prepared and have attached a summary of the damages sustained by my company as a result of the actions and inactions of Defendant.
- 18. While the Defendant did not participate in or contribute to the settlement, the Defendant was practically and legally absolved from any liability to any to any other party to this litigation because the applicable statute of limitations ran as to all other parties prior to the date that a settlement was reached in mediation.
- 19. I am informed and believe that my company, the Plaintiff, was forced to pay far more in damages than is equitable because the Defendant refused to contribute financially to any settlement.
- 20. I am informed and believe that the Defendant should be ordered by this Court to pay or at least contribute to the net damages sustained by my company as a direct and consequential result of the actions and inactions of the Defendant.
- 21. I respectfully request that the Court deny the Defendant's motion seeking summary judgment as to the claims asserted against the Defendant.

FURTHER DEPONENT SAYETH NOT.

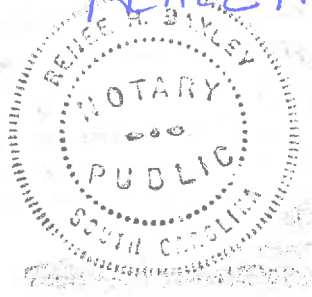


 David A. Brown

SWORN to before me this 7th day of March 2024.



 Notary Public for South Carolina
 My Commission Expires: 12-18-27
 Renee H Bailey



Legal fees Smith Lawsuit			
3/8/2019	Register of deeds	Lien	\$ 12.00
4/23/2019	MGC	Legal	\$ 1,025.68
3/12/2019	William Baily	Lien	\$ 60.00
6/6/2019	MGC	Legal	\$ 3,108.79
8/9/2019	Collins Lacy	Legal	\$ 2,395.32
9/10/2019	Collins Lacy	Legal	\$ 2,952.30
9/29/2019	MGC	Legal	\$ 2,278.72
10/4/2019	Collins Lacy	Legal	\$ 257.89
8/9/2019	Harry Bruton	Survey	\$ 250.00
11/5/2019	Collins Lacy	Legal	\$ 900.00
4/20/2020	Collins Lacy	Legal	\$ 1,020.40
22-Sep	LLR	Fine	\$ 500.00
3/12/2020	Collins Lacy	Legal	\$ 2,445.60
9/13/2022	WWPEM	Legal	\$ 2,000.00
12/7/2022	WWPEM	Legal	\$ 2,025.00
12/15/2022	Builders Ins	Deductable	\$ 1,000.00
1/21/2023	WWPEM	Legal	\$ 1,247.50
	WWPEM legal fees	Ken Moss	\$ 35,000.00
	Wingate	expert witness	\$ 4,500.00
12/15/2022	Smiths	Waterfall payment to settle	\$ 97,500.00
12/15/2022	CC Lot 66	Closing Cost for House	\$ 4,910.00
12/15/2022	Smiths	Waterfall payment to settle	\$ 125,000.00
	Waterfall	Contract Damages	\$ 180,283.28
1/9/2023	Waccamaw Ins	annual policy	\$ 1,614.00
	Cost to repair Kitchen	Infinity Homes Bid	\$ 72,410.00
4/10/2023	Closing cost to sell		\$ 2,827.75
3/10/2023	Interest for deal		\$ 15,111.48
4/10/2023	Commission		\$ 12,000.00
	Smith Settlement	Waterfall payment to settle	\$ 500,000.00
	Total		\$ 1,074,635.71
	<i>House purchase/Smith Settlement</i>	<i>Smith Settlement</i>	<i>\$ 500,000.00</i>
		<i>Payment to Smith</i>	<i>\$ 97,500.00</i>
		<i>Payment to Smith</i>	<i>\$ 125,000.00</i>
		<i>Closing Cost-Purchase</i>	<i>\$ 4,910.00</i>
		<i>Insurance</i>	<i>\$ 1,614.00</i>
		<i>Closing Cost - Sale</i>	<i>\$ 2,827.75</i>
		<i>Interest for carrying loan</i>	<i>\$ 15,111.48</i>
		<i>Real Estate Commission</i>	<i>\$ 12,000.00</i>
			<i>\$ 758,963.23</i>
	Total Invested		\$ 1,074,635.71
	House sale/Mitigation		\$ (640,000.00)
	Loss		\$ 434,635.70

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2019-CP-26-03604

WATERFALL INVESTMENT AND)
CONSTRUCTION GROUP, LLC,)

Plaintiff,)

Transcript of Record

(Motion Hearing)

vs.)

March 11, 2024

JERONIMO PONCE D/B/A)
JP & SONS BUILDERS,)
ET AL.)

Defendants.)

B E F O R E:

Honorable William H. Seals, Jr.
Horry County Courthouse
Conway, South Carolina

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

Kenneth Ray Moss, Esquire
Brittany C. Moore, Esquire
Attorneys for Plaintiff

Brandon Todd Reeser, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

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I N D E X

MARCH 11, 2024

Pg.

Motion	3
Ruling of the Court	20
Certificate of Court Reporter	23

E X H I B I T S

No.

ID

EV

(There were no exhibits marked or admitted.)

1 MARCH 11, 2024

2 ON THE RECORD - 11:43 A.M.

3 THE COURT: All right. I'm ready whenever you are.
4 It's your motion?

5 MR. REESER: Yes, Your Honor.

6 Good morning. Brandon Reeser on behalf of the defendant,
7 Jeronimo Ponce, d/b/a JP & Sons Builders. I believe Mr. Ponce
8 is the only defendant left in this case currently.

9 I'd like to start with a little bit of procedural history
10 because I think it would do a lot to kind of explain this
11 motion. This case started when the plaintiff currently filed
12 a mechanic's lien on a home in Waterfall Circle in Horry
13 County. The homeowners counterclaimed alleging significant
14 construction defects, framing, masonry, and other things. And
15 in response to those counterclaims, Waterfall asserted a
16 third-party complaint against its subs. And that was filed in
17 October of 2019. There are three causes of action in that
18 complaint: Equitable indemnity, negligence, and contribution.

19 We responded to that -- we responded to that pleading.
20 And then the next amendment -- I'm sorry, Your Honor -- not
21 amendment but next procedural issue at that point pleading-
22 wise -- or excuse me. There was an order -- there was a
23 similar motion filed by another one of Waterfall's subs,
24 actually three of them, the other three in this case. They
25 had a hearing before Judge -- I'm sorry -- yes, back in

WATERFALL V. PONCE, ET AL. - 2019-CP-26-03604
MOTION

4

1 January of 2022, there was an order granting a similar motion
2 based on -- of those three claims, equitable indemnity,
3 negligence, and contribution. Your Honor, I tried to pull the
4 date of that order, but for some reason the on-line wasn't let
5 me preview the image, but I'm happy to get that for you and
6 it's in the record of this case. From that prospective, at
7 least with regards to those three claims, we first argued that
8 that's the law of the case as to those claims against my
9 client. This is kind of a Rule 2 motion. Differently than
10 the subs, of course, this is -- one of the biggest issues in
11 this case is the mediation and settlement of the case with the
12 homeowners. There was a mediation in November of 2022. Keep
13 in mind the claims were filed against my client in October of
14 2019. The homeowners never filed direct claims against my
15 clients. They never filed direct claims against any of the
16 subs. The only claims against my client as of November of
17 2022 were equitable indemnity, negligence, and contribution.

18 And, Your Honor, I think -- I believe based on the
19 plaintiff's affidavit is in -- or in opposition of my motion.
20 It looks like Paragraph 18, I think we're all in agreement
21 that the statute of limitations for any claims for any other
22 party had expired by them. Of course, I've been a party for
23 over three years. If the homeowners thought they had an issue
24 with my work, I was involved in that case, I think that's
25 probably the latest any statute would run, even though they

1 could argue it was -- In August of 2023, there was an
2 amendment that Your Honor allowed in which Waterfall added two
3 additional claims, a breach of contract claim and a breach of
4 implied warranty.

5 Your Honor, I think those are pled, and this is something
6 I was taught early on as a clerk, don't look at the title of
7 the cause of the cause of action, look at the relief being
8 sought. And so, Your Honor, I think if you go through all
9 three of these, in every single one of them, Waterfall is
10 seeking to recover damages that only exist because the
11 homeowners had counterclaims against them. It all rises from
12 the defective construction allegations. There are no
13 independent damages because that is the case. That is the
14 entire matter.

15 As far as the settlement, Your Honor, there was a --
16 before the assignment of the homeowner's claims to Waterfall
17 -- I don't think there is any dispute that those are not
18 valid, because the statute has run. The negligence or the
19 contribution claim, I think is particularly important, because
20 the settlement agreement -- I included portions of it in my
21 motion because I didn't want to put the whole thing in the
22 record and public. I do have a full copy of it, if you'd like
23 it, Your Honor. There is essentially no elimination of my
24 client's liability in that case.

25 And, Your Honor, I don't think there could've been

1 because this was -- there was not a joint -- there's not a
2 joint wrong here. And I say that mainly because of the way
3 the homeowners presented their claims. If the homeowners
4 never sued -- there's no joint wrong for which we are both
5 responsible to another party. Because those were never served
6 on me, there is no liability for Waterfall to extinguish. And
7 Your Honor, if that's true then nothing that Waterfall paid to
8 settle this case was on behalf of my client's work.
9 Essentially, I didn't -- there were no claims against me at
10 that point. The only thing -- the only thing that could've
11 been alleged at that point, Your Honor, I think would've been
12 equitable indemnity.

13 And so, I believe that the -- with Mr. Brown's affidavit,
14 my primary purpose in filing this motion was to clear up the
15 claims that we would try. Your Honor, I think we've got
16 significant arguments as to equitable indemnity in that
17 Waterfall being the general contractor is at most a joint
18 tortfeasor, especially considering the amount paid. But, Your
19 Honor -- if Your Honor is inclined to allow the equitable
20 indemnity claim to proceed, I don't believe we need a jury for
21 that. We can have that before Your Honor fairly quickly.

22 THE COURT: Yes, sir.

23 MR. MOSS: Your Honor, Ms. Moore is prepared to argue the
24 case, but for the record I'd like to hand up the cases that
25 we'll rely on for the Court. There are four of them. First

1 being the *Addy* case. And there are two *Stoneledge Lake Keowee*
2 cases, and the Supreme Court was pretty busy in the *Hutson*
3 case.

4 MS. MOORE: Good morning, Your Honor. May it please the
5 Court.

6 My name is Brittany Moore. I am here on behalf of the
7 plaintiff, and we are opposing the defendant's motion for
8 summary judgment.

9 Your Honor, I will start with the defendant's claim that
10 our other causes of action are simply repeated causes of
11 action for indemnity. And my understanding is that the
12 defendant is relying on the *Stoneledge* case, and this case is
13 readily distinguishable from the *Stoneledge* case. The facts
14 are different. In that case, the plaintiff suffered only
15 damages regarding defending the lawsuit. So, attorney fees,
16 costs, that was it.

17 In our case, however, the plaintiff has sustained
18 substantial damages outside of having to defend itself. If
19 you look at our amended complaint, in Paragraph 33, they had
20 an inability to collect a contract balance of over 180,000, I
21 believe it was. We had damage to Waterfall's business and
22 their business reputation. They ended up -- in the settlement
23 agreement, the plaintiff ended up purchasing back the property
24 from the homeowners. And then after that, we discovered
25 substantial defects on the part of the defendant, and he had

1 to pay for costs of repairs, then we had a depreciation in
2 value. There were obviously closing costs associated with
3 repurchasing the house and then selling it again at a lower
4 price because of the defects. He has liability for a home
5 warranty that he had to offer on this home. There was also --
6 so, there are substantial damages that are outside of the
7 scope of just having to defend the claims of -- the original
8 home buyers claims were dismissed.

9 And so, we think this case is seriously different from
10 that. And, Your Honor, I will read from the *Stoneledge* case.
11 Just so we're all on the same page, if you'll go the top of
12 Page 3.

13 MR. MOSS: We've got two *Stoneledge* cases.

14 MS. MOORE: Oh, I'm sorry, Your Honor. *Stoneledge vs.*
15 *Builders First Source*, 630 -- I'm sorry -- 776 S.C. 434. And
16 we are at -- okay. I'm sorry; Your Honor. I'm on the wrong
17 page. So, on the righthand column, Marick's allegations
18 demonstrate it did not sustain its own damages as a result of
19 any breach of contract or breach of warranty by the
20 respondent. Rather, the allegation shows *Stoneledge* is the
21 party that suffered damages, and Marick's injuries arose
22 exclusively from having to defend itself in *Stoneledge's*
23 lawsuit. Consequently, the damages Marick seeks to recover
24 resulted only from its potential liability to *Stoneledge*, and
25 from the expenses Marick incurred defending itself. When

1 pressed at oral argument, Marick's counsel could not identify
2 any damages it claimed in its lawsuit that did not arise
3 exclusively from the claims made by Stoneledge. Here,
4 regardless of this -- the homeowners suing our client, we have
5 damages as we were contracted and had a contract, an oral
6 contract, with the subcontractor, they failed to perform in a
7 workman like manner, they have considerable construction
8 defects, and we have numerous damages that arose outside of
9 that authority whenever, and so we think that the causes of
10 action of negligence, breach of contract, and the breach of
11 warranties, seeing as the damages in our complaint are
12 different, they're listed differently. If you look at the
13 damages in our negligence claim, and our damages, and our
14 indemnity claim, they're different. They're separate. They
15 are not the same. So, we would think that the defendant's
16 motion for summary judgment on that issue should be denied.

17 And as to the indemnity claim itself, Your Honor, I think
18 the defendant asserted in his motion that there was -- because
19 there was no contract between the parties, the contractor and
20 the subcontractor, that there was no -- that we didn't have a
21 rightful claim as to the indemnity, but the -- this case has
22 an implied equitable indemnity agreement by just the nature of
23 the parties' relationship. And I think that that's
24 established case law. It's certainly the same scenario with
25 the general contractor and subs in the *Addy v. Bolten* case.

1 Did you hand that on up?

2 MR. MOSS: I did.

3 MS. MOORE: Okay. So, you have one in front of you as
4 well. It's the same type scenario. In that case, the Court
5 said that it's an implied agreement by the nature of the
6 relationship, and that recovery is allowed when a result of a
7 defendant's breach of contract or a tortious activity, the
8 plaintiff is required to either defend itself or bring an
9 action on another party, against a third party. In this case,
10 the plaintiff had to do both of those things. And the *Addy*
11 case also states that the plaintiff can recover if no personal
12 fault in causing the injury. Well, Your Honor, this is an
13 interesting case because the plaintiff is the general
14 contractor. However, he hired not only subs to do the work,
15 but also hired another licensed contractor to kind of oversee
16 the project beyond sight as the plaintiff was not doing that
17 role. And so, he hammered no nails on this site, and the
18 actual construction was happening with the defendant, and no
19 one has admitted -- the plaintiff has not admitted fault in
20 any of the construction defects. There's been no finding of
21 fault on the plaintiff as far as the construction defects.
22 And if you look at the *Stoneledge* case versus *Clearview*.

23 Was that one handed up as well?

24 MR. MOSS: That one was handed up.

25 MS. MOORE: The second *Stoneledge* case, it clearly states

1 in a situation similar to this that fault is a question of the
2 factfinder. So, I will read from that one as well. If you go
3 to Page 6, it says, We have carefully examined the record in
4 this case. We cannot say as a matter of law that Marick is at
5 fault. And, Your Honor, earlier in the case they talked that
6 the Trial Court had decided that Marick was involved as a
7 general contractor because he failed to discover code defects.
8 So, it says we cannot say as a matter of law that Marick is at
9 fault, rather we find the evidence is conflicting. In viewing
10 the evidence in light most favorable to Marick, the record
11 contains evidence a factfinder could reasonably find supports
12 the conclusion that Marick was not at fault. Because of this
13 conflicting evidence, the equitable indemnity cause of action
14 must be remanded for trial. So, this Appellate Court found --
15 and on Page -- the previous page, Page 5, we find the Circuit
16 Court erred in granting summary judgment on the merits of
17 Marick's equitable indemnity cross claim because Marick
18 presented a question of fact as to why they're at fault for
19 the alleged construction defects.

20 So, Your Honor, seeing as the plaintiff has not admitted
21 fault, there's been no one to determine that he was at fault.
22 He hired the subcontractor to do the work; they screwed up.
23 He hired a contractor to oversee it; he was not on-site. It
24 -- a jury could find that he was not at-fault. Now, we would
25 argue that he was responsible as the general contractor. You

1 know, he contracted with the homeowners, and he has stepped up
2 to that responsibility. He purchased the property back,
3 excuse me, and he has tried to remedy that situation with
4 them. And we think that there is a difference between
5 responsibility and fault. As did the Court in *Stoneledge*,
6 they at least said that fault was determined for the jury,
7 because in this case, he was the general contractor, and they
8 said that, you know, the Court -- the jury could decide that
9 he should've gotten the code defect, but that was a question
10 for the jury. So, respectfully, we think that -- that that's
11 a question for the jury and that no one has the authority to
12 determine at -- other than the factfinder, according to that
13 case.

14 As to the statute of limitations issues, that the
15 defendant has arised [sic], the plaintiff filed the negligent
16 indemnity claim and contribution claim in October of 2019,
17 which was well within the statute of limitation time period.
18 And at the time, Your Honor, I'm not sure if you're aware, but
19 the plaintiff had a different attorney at that time. After
20 settlement, our firm was then hired, and we filed the amended
21 complaint realigning the parties and added the two causes of
22 action for breach of contract and breach of the implied
23 warranties. We think that obviously that the ones that were
24 filed in '19 are clearly within the statute. I think the
25 contract with the Smiths was in 2017. So, we had met the

1 statute of limitations at least on those claims. As far as
2 the claims filed in 2023 for breach of contract and breach of
3 implied warranty, it is our assertion that Rule 15(c), the
4 relation back, the amendment, would relate back to the
5 original pleadings date. And we are relying on the rule
6 itself and the cases of *Thomas v. Grayson*, I assume he handed
7 that one up as well. And the cite is 456 S.E.2d 377. And it
8 -- the case says Rule 5(c) is based on the concept that once
9 litigation involving particular conduct or a given transaction
10 or occurrence has instituted, the parties are not entitled to
11 the protection of the statute of limitations against the later
12 assertion by amendment of defenses or claims that arise out of
13 the same conduct, transaction, or occurrence as set forth in
14 the original pleading.

15 Your Honor, in 2019, the defendant was sued for
16 negligence based on the constructual defects of the home. The
17 breach of contract and the breach of implied warranty are all
18 based on that same occurrence, that same conduct that happened
19 when they were hired to come onto this property and work on
20 this house. There's no separate transaction that we're
21 talking about. There's no separate occurrence, it's the same
22 time period. So, there's Rule 15(c), this case is literally
23 the scenario that Rule 15 was set forth to protect against,
24 that the defendant cannot come now and say that they -- that
25 they should have the protection of the statute of limitations

1 when they knew that they were being sued on their conduct from
2 working on that house for this man. And they're not
3 prejudiced in any way of maintaining their defense, seeing as
4 it's the same issue that we're talking about. So, we think
5 that the -- the two claims for breach of contract and breach
6 of implied warranty relate back to the original pleading, and
7 that would go back to 2019. And again, we're still within the
8 statute of limitations. We're not trying to -- and the fact
9 the dismissed have not filed any claims against the defendant
10 I think is irrelevant. We were in contract with the
11 defendant, were filing claims. We sued them in 2019. We have
12 standing to do that. That's what we're here to do. We're not
13 asserting any claims based on an assignment or assumption.

14 And the four-part test for -- in the *Thomas v. Grayson*
15 case is not applicable, because that's only when you're
16 changing a party. We haven't changed a party. We didn't add
17 a party. It's the same parties that have been involved since
18 the beginning of the case in 2019.

19 As to contribution, the plaintiff would argue that we're
20 not barred on that claim because the defendant's liability was
21 practically discharged, and was explicitly discharged as to
22 dismiss in the settlement agreement. And any other claims
23 that could've arose from a different party, which I'm not sure
24 who would've done that, would have been barred by the statute
25 of limitations at the time of this settlement. So, as a

1 matter of practicality, the settlement agreement did fully
2 discharge the defendant's liability, of course with the
3 exception of these claims from the plaintiff. And to my
4 knowledge, the defendant has not cited any caselaw or given
5 any precedent of facts with a case of these facts, in this
6 situation, that would warrant a bar to the -- to this claim,
7 nor can plaintiff find any caselaw or precedent that would
8 warrant such a bar to its contribution claim.

9 Your Honor, the purpose -- my understanding of the
10 purpose of that statute is that to prevent double liability,
11 to prevent a tory -- an alleged tortfeasor from paying more
12 than its fair share. And here we have a defendant who is
13 literally the most culpable party in the whole case, out of
14 all the parties, because he was the one doing the work, who
15 failed and refused to contribute anything financially to the
16 settlement to help these home buyers. And now, he's trying to
17 get away scot-free by filing this motion and not letting it go
18 to a jury, which I find incredible. So, Your Honor, we would
19 argue that the contribution claim is not barred because of
20 those reasons.

21 And of course, Your Honor, we know that the standard for
22 -- the standard for the summary judgment is that all
23 ambiguities, and conclusions, inferences arising from the
24 evidence must be construed most strongly against the movant
25 and in favor of the plaintiff. And so, we think that there is

1 definitely questions of fact that need to go to a jury on all
2 of these issues, and so we would move that the defendant's
3 motion be denied.

4 And, Your Honor, we did file a memorandum this morning.
5 I'm not sure if you have a copy. I'll give you a copy. And
6 the plaintiff's affidavit was filed previously on March 7th.
7 It should be in the record, but if you would like a copy of
8 the memorandum, I'll hand it up.

9 Thank you.

10 MS. MOORE: You already got a copy right?

11 MR. RESSER: Yes.

12 MS. MOORE: Your Honor, the defendant didn't argue the
13 claim particularly of breach of contract and breach of implied
14 warranty and negligence on their merit. So, I assume that I
15 don't need to address those, Your Honor.

16 THE COURT: Would you like a reply?

17 MR. REESER: Excuse me, Your Honor.

18 THE COURT: Your reply?

19 MR. REESER: Yes, Your Honor, just briefly. I'd just
20 like to read one paragraph from the most -- from the most
21 recent amendment. Paragraph 35. As a result of
22 subcontractor's negligence, Waterfall incurred and will
23 continue to incur actual damages in an amount to be determined
24 by the Court. We did incur settlement costs in settling the
25 Smiths' claims and costs associated with investigating the

1 Smiths' claims and defending the Smiths' claims in this
2 action. That's exactly what -- this is in -- there are no
3 independent -- and I know -- I know there's been a mention of
4 -- one of the things about this case that I'm not sure how we
5 go forward on, especially with regard to the contribution
6 action. Again, Your Honor, if the statute of limitations
7 expired before there was even a mediation, there was no claim
8 to be made. There was nothing to settle, there was nothing to
9 extinguish. But Waterfall is -- they're prosecuting an
10 equitable indemnity claim and a contribution claim. And if
11 you're bringing a contribution claim, you're conceding that
12 you're a joint tortfeasor. If you're a joint tortfeasor, you
13 don't get equitable indemnity. They're asking for everything,
14 when everything has been collapsed into one. You can't have
15 both. And, Your Honor, in this case, I think that's exactly
16 what they're trying to do. I have not seen any documentation
17 for Plaintiff's damages that are on the back of the
18 plaintiff's affidavit. With the home sale, I've never seen
19 any of the discovery. I don't know what any of that is. But,
20 if Your Honor wants -- if Your Honor looks, they're seeking to
21 recover amounts that the insurance company paid, waives up
22 their rights to, they're seeking to recover amounts that they
23 claim would breach their contract to the Smiths. It has
24 nothing to do with my client. They claim that they wrote
25 \$180,000 to the Smiths and then -- I don't -- I'm not sure if

1 it's breach of contract or their contract with the Smiths, or
2 breach of verbal contract here, but there's no dispute there's
3 no written contract. There's no written indemnity. So, there
4 are no pre-contractual claims.

5 And, Your Honor, with regards to the warranty claim in
6 particular, as a breach of implied warranty goes to the
7 homeowner. At the time this home was built, it had already
8 been sold to the Smiths. Waterfall has never been in a
9 position to bring a breach of implied warranty claim, because
10 they've never been entitled to warranty because it's not their
11 house. It was built for somebody else. And again, the Smiths
12 did bring their claim; they bought that home. And they have
13 an option to choose who they sue as the owners. Plaintiffs
14 always have an option, and they have an option not to sue.

15 Thank you, Your Honor.

16 And for the record, very briefly, I know it was mentioned
17 that we didn't -- that Mr. -- how is the best way to say this
18 for the record -- Mr. Ponce did not contribute financially to
19 the settlement that was entered into. That is not to say
20 there were not settlement discussions and offers and demands,
21 Your Honor. I just want to make that clear, Your Honor.

22 Thank you.

23 THE COURT: All right. I'll hear a reply.

24 MS. MOORE: Thank you, Your Honor.

25 Your Honor, as I stated before, I just want to reiterate

1 that our damages are listed in the amended complaint, our
2 separate damages are listed for our negligence claim versus
3 our indemnity claim and our breach of contract claims. Of
4 course, we listed the attorney fees and costs and things like
5 that. Those are listed in both. But there are separate
6 damages listed and, again, in Paragraph 33 it states the
7 inability to collect the contract balance; damage to --
8 consequential damages, which we allege were Waterfall's
9 business and business representation. And so, there are
10 separate -- we did not style this to repeat the same claim.

11 As far as the breach of implied warranty, the defendant's
12 assertion that the plaintiff is not entitled to a warranty,
13 I'm not sure where -- if he has any cite that -- I've never
14 heard anything like that. We -- the fact is that we were the
15 customer of the defendant. He owed the implied warranty to
16 us. He didn't have any relationship with the Smiths, and we
17 were the homeowner. We had to purchase that property back.
18 The plaintiff owned that home. That was his. The implied
19 warranty is owed to the plaintiff. And if you look at *Hutson*
20 *v. Cummins Carolinas, Inc.*, 314 S.E.2d 19, it says, and I
21 quote, It is settled law that where a person holds himself out
22 as specifically qualified to perform work of a particular
23 character, there is an implied warranty that the work which he
24 undertakes to do shall be of proper workmanship and reasonably
25 fitted for its intended purpose. Here we have a subcontractor

1 who is licensed, a professional who held himself out to be
2 specialized in frameworking, that's what he was hired to do.
3 And he failed to do that in conformity with the engineer
4 plans. The plaintiff was the homeowner, and the plaintiff was
5 his customer. So, he has standing, and he was owed the
6 implied warranty. And, Your Honor, frankly, we have a jury
7 qualified. We'll put up the evidence in a day and a half and
8 we'll see what the jury has to say about it.

9 And as to our damages whether we're claiming damages that
10 they don't think is relevant to them because of the settlement
11 or what have you, again, respectfully, that's up for the jury
12 to decide which damages they think that the plaintiff would be
13 entitled to or not.

14 So, Your Honor, again, we respectfully move that the
15 defendant's motion be denied.

16 THE COURT: One more time. You get the last word.

17 MR. REESER: Your Honor, one story from my clerking days,
18 if you will. I do have a copy, and I still have a copy of all
19 the bench books. And I did enjoy Mr. Moss's pretrial report,
20 because the idea of taking responsibility but not fault I
21 found interesting. So, when I looked through my old jury
22 charges, if you search for the word responsibility it shows up
23 52 times. If you search for the word fault, it shows up 12.
24 They are, in fact, the same, Your Honor.

25 RULING OF THE COURT:

1 THE COURT: I tell you what I'm gonna do. I'm gonna
2 continue the trial itself, but I want both sides to submit
3 proposed orders by next Wednesday at noon. And I'd like for
4 those proposed orders to be less than seven pages. And I'll
5 make a decision therefrom.

6 Just so y'all know, I have studied this all weekend or a
7 lot of the weekend. She studied it a lot over the weekend.
8 We do have some issues with it, but out of an abundance of
9 caution, I'd like to see it all in writing in proposed orders.

10 MR. REESER: Thank you, Your Honor.

11 MS. MOORE: Thank you, Your Honor.

12 MR. MOSS: Are we off the record?

13 THE COURT: And my instincts tell me that your client
14 probably should've hired you all to begin with.

15 MR. MOSS: Are we off the record?

16 THE COURT: Yes.

17 **RECESS - 12:20 P.M.**

18 *****OFF THE RECORD*****

19 **ON THE RECORD - 12:22 P.M.**

20 MR. MOSS: I did want to suggest, though, in proposed
21 orders for -- that we submit, I noticed that in Mr. Reeser's
22 proposed jury instructions and proposed verdict form, he did
23 continue the complete caption from the prior litigation. And
24 can -- in this particular order, there was an order of this
25 Court granting leave to realign the parties of the remaining

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RULING BY THE COURT

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1 claims. So, I think the caption we should go forward with is
2 the caption that we utilized, which was resulting of this
3 Court's order, not the complete caption from the original
4 complaint, but I'll leave it to the Court to decide.

5 MR. REESER: I'll be fine with using either caption, Your
6 Honor.

7 THE COURT: That's fine with me.

8 MR. MOSS: Okay. Thank you.

9 THE COURT: Thank you all. You all did a good job.

10 **ADJOURNED - 12:23 P.M.**

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Waterfall Investment and Construction Group, LLC v Jeronimo Ponce, d/b/a JP & Sons Builders, et al., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on March 11, 2024.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

May 24, 2024.

Oct 22 2024**SC Court of Appeals****CERTIFICATE OF COUNSEL**

The undersigned certifies this Record on Appeal contains all material proposed to be included by any parties and not any other material. The undersigned further certifies this Record on Appeal complies with the Supreme Court's Orders dated August 13, 2007 and April 15, 2014 regarding personal identifiers and sensitive information.

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October 22, 2024