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Business
Law

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen

Civil Action No. 06-CP-07-866

16 Jade Street, LLC,

Respondent/Appellant,

vs

R Design Construction Co., LLC and Carl R. Aten, Jr.
Individually and in his capacity as principal and agent of
R Design Construction Co., LLC, Catterson & Sons
Construction and Michael S. Catterson, Individually and
in his capacity as principal and agent of Catterson & Sons
Construction,

Defendants,

Of Whom, Carl R. Aten, Jr., is

Appellant,

and Michael S. Catterson, Individually and in
his capacity as principal and agent of
Catterson & Sons Construction, is

Respondent,

R Design Construction Co., LLC,

Third Party Plaintiffs,

vs

Kintz Electric

Third Party Defendant

RECORD ON APPEAL

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INDEX

Final Order and Judgment of the Honorable Carmen T Mullen, filed October 14, 2009	1
Notice of Intent to Appeal of Carl R Aten, Jr , dated November 19, 2009	18
Notice of Intent to Appeal of 16 Jade Street, LLC dated December 4, 2009	20
Trial Transcript of the bench October 13 2008 through October 16, 2008 Vol 1 pp 56-57, 61-62, 64 66-68, 70-71, 73-74, 76-77, 88, 98, 151, 153-160, 166-167	22
Trial Transcript of the bench October 13, 2008 through October 16 2008 Vol 2 pp 213-214, 216, 223, 234-235, 254-255, 291	49
Trial Transcript of the bench October 13, 2008 through October 16, 2008 Vol 3 pp 7, 10, 12, 14, 17, 22-23, 32, 52-53, 56, 58-59, 64-70, 77-78, 247-249	58
Contract between 16 Jade Street, LLC and R Design, dated July 27, 2004	83
Proposal of Catterson & Sons Construction, Inc , dated August 6, 2004	91
Certificate of Counsel	92
Certificate of Compliance	94

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO 06-CP-07-866

16 JADE STREET LLC

Plaintiff,

vs

R DESIGN CONSTRUCTION CO ,
LLC and CARL R ATEN JR
Individually and in his capacity as
principal and agent of R DESIGN
CONSTRUCTION CO , LLC,
CATTERSON & SONS
CONSTRUCTION and MICHAEL S
CATTERSON, Individually and in his
capacity as principal and agent of
CATTERSON & SONS
CONSTRUCTION,

Defendants

R DESIGN CONSTRUCTION CO
LLC and CARL R ATEN, JR ,

Third Party Plaintiffs

vs

KINTZ ELECTRIC,

Third Party Defendant

FINAL ORDER AND
JUDGMENT

2005 OCT 14 PM 3 18
CLERK OF COURT
SOUTH CAROLINA

PROCEDURAL FACTS

This case came before me for a trial on the merits on October 13-16,
2008 It is a construction defect action Plaintiff, 16 Jade Street, LLC ("Jade

Street"), brought this action against R Design Construction Co , LLC ("R Design"), Carl K Aten, Jr ("Aten'), individually and in his capacity as principal and agent of R Design, Catterson & Sons Construction, Inc ("Catterson & Sons'), and Michael S Catterson, individually and as principal and agent for Catterson & Sons, Defendant. This case arises out of the construction of a multi-family dwelling located in the Celadon development on Lady's Island, in Beaufort, South Carolina. The Complaint alleges claims for negligence and breach of implied warranties against R Design, Aten, Catterson & Sons, and Michael Catterson, as well as a claim for breach of contract against R Design and Aten. Cross-claims were instituted between R Design and the Catterson Defendants for equitable indemnity and breach of contract. Prior to trial, the court dismissed the Plaintiff's breach of contract claim asserted against Aten.

I find in favor of the Plaintiff against Defendants R Design, Aten, and Catterson & Sons, and in favor of R Design against Catterson & Sons.

FACTUAL BACKGROUND

Jade Street, through its managing partner, Dennis Green ("Green'), purchased several tracts of land on Lady's Island with the intent of developing a planned community called Celadon. The lot upon which the subject property was built was a part of this larger tract, and allowed for the construction of multi-family dwellings. Four (4) builders were approved to build within the Celadon development. One of these was R Design, owned and operated by the Defendant, Aten. Aten approached Green and requested to build the

condominium project for speculative purposes. When Aten was unable to obtain financing, 16 Jade Street, LLC was formed specifically for the purpose of developing the land, and constructing the project, and marketing the property for sale thereon.

On July 27, 2004, a contract was executed between the Plaintiff and R Design for the construction of the project, whereby the Plaintiff was to pay R Design \$150,000.00 for supervision of construction of a multi-family dwelling. The contract provided that the construction was to be "completed in conformity with the plans and specifications attached" to the contract (Exhibit #1). Additionally, the "Contract Responsibilities" were to "supervise and direct all construction work using its best skill and attention, and was solely responsible for all construction means, methods, techniques, consequences and procedures, and for coordinating all portions of the work required under this Contract" (Exhibit #1). Construction was to be based upon plans prepared by the Architect R. Stewart, and the engineer of record was Kern Coleman of Savannah. The Jade Street project was to be constructed of light gauge metal steel framing and aerated autoclave concrete block ("AAC Block"). AAC block is a specialty building product which is essentially a preformed concrete block with an internal channel cavity. These blocks, when stacked correctly, provide a continuous channel into which supporting rebar and grouting mortar is placed to give the wall structural support.

As the AAC block is a specialty building product, some concern was expressed by the Plaintiff that the subcontractor responsible for the installation of

the AAC block have some experience with the product and its application. Based on this concern, R Design contracted with Catterson & Sons on August 6, 2004, which had represented to Carl Aten that it had experience with the AAC product and its application on previous projects. The scope of Catterson & Sons' contract included framing, roof felt installation, Tyvek installation, setting the windows and doors, construction of the decking and stairs, exterior siding and trim and installation of the AAC block and floor panels.

On September 7, 2004, building permits were issued by the Beaufort County Building Department to R Design to begin construction. Construction began, and progress continued, until issues arose with construction between the Plaintiff and R Design. In March 2005, Green called on Kern Coleman, the structural engineer of record, to perform an inspection of the as-built condition of the project, to determine its compliance with the plans and specifications, as well as the overall quality of the building construction. Kern Coleman in its initial report dated April 1, 2005, indicated four (4) defects and/or deficiencies in the construction of the project, including improper span of the garage floor framing, improper substitution of steel beams for load bearing walls, lack of a continuous bond beam, and inadequate lintels over the shearwalls.

Following Kern Coleman's inspection, there continued to be problems onsite between both the owner and the contractor, and between the contractor and the subcontractors, particularly Catterson & Sons. Problems came to a head between Catterson & Sons and R Design in July 2005, specifically involving the application for work progress payments. It is unclear whether Catterson & Sons

quit or was terminated on July 22, 2005.¹ However, it is clear that after July 22nd Catterson & Sons did not return to the site. R Design did not subsequently retain any other subcontractor to complete the AAC block and framing work on the project. Disputes continued between the owner and R Design/Aten over the owner's concerns about the progress of construction, scheduling on the project, project costs and construction defects. Following a further deterioration of the relationship between owner and contractor, Aten and R Design either quit or were terminated on October 17, 2005.

The following day, Kern Coleman performed a second inspection on the project, and issued a report on November 16, 2005 that identified a total of thirty eight (38) defects with the construction of the project. These defects included the original four (4) from the first report, which had not yet been addressed, as well as an additional thirty-four (34) which included generally defects with the steel and structural framing, defects with the installation of the AAC block, defects with the installation garage truss system, defects with the balloon framing, defects with the attic and roof installations, and defects with the CMU block construction. The Owner then brought in a new contractor, Anchor Construction, to remedy the existing construction and complete the structures. Anchor, prior to agreeing to undertake the project, conducted its own inspection of the buildings, and identified some sixty (60) defects, some of which were not included in those listed in the Kern Coleman report, that would need to be addressed during

¹Deciding this issue of fact is nondeterminative of any substantive issue for purposes of disposition of the Plaintiff's claims against the defendants.

renovation and construction Jade Street signed a contract with Anchor on November 22, 2005, for repair and completion of the project on a cost plus basis. In addition, the owner retained an engineer, Randall Still with H2L Consulting Engineers, to address the structural issues identified by Kern Coleman and to assist with the remediation.

Mr. Still is a licensed professional engineer. Mr. Still was retained on November 28, 2005. He reviewed the reports of Kern Coleman and made several site visits to prepare repair documents for the Contractor, Anchor Construction Co. On March 30, 2006, Mr. Still issued repair documents for the Jade Street Project. Mr. Still centered his repairs on reinforcing the AAC Block, structural steel framing, and LVL lumber. The traditional wood framing and repairs were left to the Contractor Anchor for their means and methods of repairs.

Shortly after Anchor started work on the project, more construction defects were identified. Anchor, with guidance from H2L, repaired and completed the building. The Plaintiffs contend that the repairs were complete at or around Pay Application #18, for a total repair cost of approximately \$979,796.69. Another \$1.2M was spent completing the project, and making some interior design changes to improve the marketability of the project. The cost to complete and design change is not being sought by the Plaintiff as part of its damages in this case. The Plaintiff also introduced engineering expenses in the amount of approximately \$28,000 as well as interest on the repair costs through the time of

trial

The Defendants contend, alternatively, that the Plaintiff is not entitled to a recovery because the Defendants should have been allowed to complete the project, even though both abandoned the project. The Defendants argue the scope of repair was unnecessary and excessive in cost. The Defendants also characterize the repair work as actual finishing of incomplete work that was left by the original contractor when he was terminated from the project by the owner. The General Contractor, at the close of the evidence, conceded that there were defects at the Jade Street Project. He contends that the scope of repairs and cost of repairs was not necessary. Further, he claims that his subcontractor, Catterson & Sons Construction, Inc., should indemnify him for these claims.

R Design introduced evidence that the reasonable cost of repairs was One Hundred Sixty Five Thousand Six Hundred Thirteen and NO/100 (\$165,613.00) Dollars. R Design used Patterson Residential Builders to price a cost to repair. Mr. Patterson never saw the project until after it was completely repaired by Anchor Construction for the Plaintiff. Additionally, Mr. Patterson based his estimate on the Kern Coleman report. However, Mr. Patterson had discussions with the superintendent of Anchor Construction and based on those conversations believed that there were more problems at the project than listed in the Kern Coleman report. Instead of pricing all the repairs at the project, he was instructed to give a price based solely on the Kern Coleman report. Clearly, he had no motive to price the project competitively as the work had already been

completed

Also, Catterson & Sons presented an expert, Al Schweickardt, PE, to testify Mr Schweickardt, like Mr Patterson had not seen the project prior to the repairs being completed He did not see the damages to the project and apparently formed most of his opinions during the trial of this matter

FINDINGS OF FACT and CONCLUSIONS OF LAW

This case was heard non-jury upon consent of all parties The trial lasted three days Seven (7) witnesses were called by the parties, and hundreds of pages of documents and photographs were marked and entered as exhibits Based upon consideration of the entirety of the evidence presented, the Court reaches the following findings of fact and conclusions of law in this case

- 1 The Plaintiff entered into a valid and binding contract with R Design for the construction of the project, and specifically paid a \$105,096.07 fee to R Design for the supervision of the construction of the project, and \$107,122 of a \$122,838 contract to Catterson & Sons Construction, Inc for framing and AAC Block work,
- 2 Based upon the contract between the Plaintiff and R Design, the Plaintiff had the right to rely upon R Design and its subcontractors to construct the project in accordance with the plans and specifications, the applicable building code, manufacturers' specifications and industry standards,

- 3 Carl Aten was the residential homebuilder license holder for R Design. Because he was not a passive license holder, but was onsite daily and personally involved in construction process, he is individually liable for the negligence of his company.

The Defendant Carl Aten, argued that pursuant to S.C. Code §33-44-303(a) (2005), an LLC is solely responsible for the debts, obligations, or liabilities of that LLC, whether arising in tort, contract, or otherwise, and a member of that LLC is not personally liable for the debts, obligations, or liabilities of that LLC solely by being a member or manager of that LLC. Therefore, the Defendant Carl Aten claims he should not be held individually responsible for any alleged defects in the construction that was performed by the Defendant R Design Construction Co., LLC. However, pursuant to S.C. Code §40-59-400 et seq. (2005), the Defendant Carl Aten was the "resident licensee" for the company, as defined by the statute, not just a mere member. The Defendant Carl Aten was in "responsible charge" of the project, and the statute provides that the license holder in responsible charge "assumes professional responsibility for the building services" that the Defendant R Design Construction Co. provided to the Plaintiff. S.C. Code Ann. §40-50-400 (2005). With regards to the causes of action for negligence, breach of implied warranties, and damage to property, I find that the Defendant Aten was more than a mere member manager. He

was the "resident licensee," pursuant to S C Code §40 59-400 (2005) and as such he assumes professional responsibility for the project. Additionally, I find that the term "professional responsibility" is broad enough to include civil liability for negligently providing building services. Therefore, the Defendant Carl Aten is individually liable in this matter as the licensee under the theories of negligence, breach of implied warranty, for damage to the Plaintiff's property,

4 R Design and Catterson & Sons impliedly warranted that their work would be in accordance with the plans and specifications, applicable building codes, manufacturers' specifications, industry standards and good construction practices,

5 R Design and Catterson & Sons had a duty to the Plaintiff to build the project in accordance with the plans and specifications, applicable building codes, manufacturers' specifications, industry standards and good construction practices,

6 There were defects in the construction of the project prior to the termination and/or resignation of Catterson & Sons and R Design, including

1) Excessive cuts made in the bond beams throughout the project,

2) Inadequate wall reinforcement in the AAC

block walls throughout the project

3) Inadequate bearing of the lintels above window and door penetrations in the AAC block walls throughout the project,

4) Inadequate mortar beds in the AAC block walls throughout the project,

5) Improper installation of the garage floor trusses,

6) Improper installation of the Simpson foundations straps

7) Improper cutouts in the AAC block walls compromising their structural integrity,

8) Improper installation of the structural steel framing and supports throughout the project,

9) Improper installation of firewalls

10) Improper nailing and installation of the exterior siding,

11) Improper mechanical run cuts in the steel beams throughout the project,

12) Improper deletion and/or substitution of load bearing components in the project, reducing the

structural integrity and load capacity of the footings
and other load carrying components,

13) Improper construction and reinforcement of the
CMU block walls,

14) Improper installation of the AAC floor panel
system,

15) Improper installation of horizontal beam
headers at the front porches,

16) Improper balloon framing at gable end walls

17) Improper fastening of LVL beams,

18) Improper lapping of double top plates,

19) Omission of bird mouth cuts in the roof rafters,

20) Improper penetration of the fire-rated floor
system with plastic electrical conduit in violation of the
applicable building code,

21) Improper omission of collar ties in the roof
framing,

22) Improper use of OSB sheathing as filler
material for oversized window openings,

23) Improper omission of horizontal bridging or x-

bracing at the floor trusses,

24) Improper spacing of anchor bolts at the top of AAC walls,

25) Improper seating of floor trusses on bearing walls at the support ends of the trusses,

26) Improper substitution of LVL beams for steel support beams in violation of the plans and specifications,

27) Excessive cutting of LVL beams,

28) Improper omission of hurricane clips,

29) Improper omission of shear walls,

30) Improper omission of anchor bolts

31) Improper support of the ceiling system to meet seismic load requirements per the applicable building code

- 7 The aforementioned defects were directly due to the negligence of Catterson & Sons in failing to conform its work to the plans and specifications, applicable building codes, the Aerocon manufacturers specifications, industry standards and good construction practices. Additionally, there was damage to the Jade Street project that occurred after the contractor left the project. The

failure to follow the plans and engineering requirements caused the framing to begin to fail. Specifically, the LVL beams that had to be replaced had already started to fail and caused the floor to sag. The negligent construction compromised the structural integrity of the building framing system, resulting in deflection of various components of the building. Additionally, water intrusion and exposure to the elements resulted in deterioration of the sheathing and framing,

- 8 These defects were also directly due to the negligence of the general contractor, R Design and Mr. Aten, individually, in failing to supervise the work performed by its subcontractors and failing to conform its work and the work of its subcontractors to the plans and specifications, applicable building codes, manufacturers' specifications, industry standards and good construction practices,
- 9 R Design and Catterson & Sons breached their respective duties to the Plaintiff,
- 10 As active license holder, Mr. Aten is individually responsible for the negligence of his company, R Design, Aten oversaw the daily construction and he interacted with the building officials,
- 11 R Design breached its contract with the Plaintiff by failing to adequately supervise the work performed by its subcontractors and ensure its conformance with the plans and specifications,

applicable building codes, manufacturers' specifications, industry standards and good construction practices,

- 12 Catterson & Sons breached its contract with R Design by failing to conform its work to the plans and specifications, applicable building codes, manufacturers' specifications, industry standards and good construction practices,
- 13 As a result of the negligence of Defendants R Design Construction, Carl Aten individually, and Catterson & Sons, Inc and R Design's breach of its contract with the Plaintiff, the Plaintiff was required to expend significant monies to repair the project,
- 14 The scope, means and methods of repair undertaken on the project at the direction of H2L and Anchor Construction were reasonable,
- 15 Based upon the evidence presented, the reasonable amount attributable to the repair of the project is \$911 296 00 and
- 16 Based upon the evidence presented, the Plaintiff is also entitled to reasonable engineering costs and contract administration fees, in the amount of \$14,260 00 for repairs All other engineering fees were for litigation expense, and I conclude that is not recoverable

CONCLUSION

For the reasons set forth above, the Court finds

- 1) In favor of the Plaintiff against R Design Construction Co , LLC in

its claims for breach of contract, negligence and breach of implied warranties,

- 2) In favor of the Plaintiff against Catterson & Sons Inc for negligence and breach of implied warranty of workmanlike services,
- 3) In favor of the Plaintiff against Carl Aten individually, as license holder for R Design Construction for negligence,
- 4) In favor of Michael Catterson, individually, on the claims asserted by Plaintiff,
- 5) in favor of Catterson and Sons, Inc , and Michael Catterson individually on the claims asserted by R Design for equitable indemnity on the basis of the unclean hands doctrine,
- 6) In favor of R Design on its cross-claims against Catterson & Sons, Inc , for breach of contract

Based on the foregoing, the Court awards \$911,296 00 in repair costs to the Plaintiff to be assessed jointly and severally amongst Defendants R Design Construction, Carl Aten, individually, and Catterson & Sons, Inc In addition, the Court awards the Plaintiff \$14,260 00 in engineering costs and contract administration fees, also to be assessed jointly and severally against Defendants R Design Construction, Carl Aten, individually, and Catterson & Sons, Inc Further the Court awards R Design \$925,556 00 on its cross-claim against Catterson & Sons, Inc

Therefore, judgment is entered for the Plaintiff in the amount of Nine Hundred Twenty Five Thousand Five Hundred Fifty Six and NO/100 (\$ 925,556 00) Dollars jointly and severally against defendants R Design, Carl Aten, individually, and Catterson & Sons, Inc , and

For R Design on its cross-claims against Catterson & Sons, Inc in the amount of Nine Hundred Twenty Five Thousand Five Hundred Fifty Six and NO/100 (\$925,556 00) Dollars

AND IT IS SO ORDERED


Carmen T. Mullen,
Presiding Judge Fourteenth Circuit

Beaufort, South Carolina

October 14, 2009

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

RECEIVED
NOV 25 2009
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T Mullen

Civil Action No 06-CP-07-866

16 Jade Street, LLC

, Respondent,

vs

R Design Construction Co , LLC and Carl R Aten, Jr , Individually and in his capacity as principal and agent of R Design Construction Co , LLC, Catterson & Sons Construction and Michael S Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction

Of Whom,

Carl R Aten, Jr

, Appellant

NOTICE OF INTENT TO APPEAL

Carl R Aten, Jr appeals the Order of the Honorable Carmen T Mullen dated October 14 2009 Appellant received notice of the entry of the Order of October 14, 2009 on November 6, 2009

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HOWELL, GIBSON & HUGHES, P A

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November 19, 2009

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T Mullen

Civil Action No 06-CP-07-0866

16 Jade Street, LLC , Appellant,

vs

R Design Construction Co , LLC and Carl R Aten, Jr , Individually
and in his capacity as principal and agent of R Design
Construction Co , LLC, Catterson & Sons Construction and Michael S
Catterson, Individually and in his capacity as principal and agent
of Catterson & Sons Construction,

Of Whom

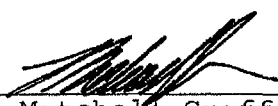
Michael S Catterson, Individually and
in his capacity as principal and
agent of Catterson & Sons Construction , Respondent

NOTICE OF INTENT TO APPEAL

16 Jade Street, LLC, appeals the Order of the Honorable Carmen
T Mullen, dated October 14, 2009 Appellant received notice of the
entry of the Order of October 14, 2009 on November 16, 2009

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GRIFFITH, SADLER & SHARP, P A



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December 4, 2009

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1 there? Was it originally going to be a spec project?

2 A It was I had been working with three builders,
3 and each of the builders had chosen lots that they would
4 build spec homes on R Design Construction had selected
5 lot nineteen to build the four-unit condominium, and lot
6 forty-five to build a courtyard home on R Design
7 attempted to get financing for the construction of the
8 condo and was unable to do so I wanted to have a small
9 condominium project there, to have a good mixture of
10 housing types in Celadon, and so I began to explore ways
11 to see how I could get
12 that -- get those condos built

13 Q Now, I want to go back to Randolph Stewart,
14 then So he was the designer, and he prepared the plans
15 for the condo unit?

16 A He did -- yes He did the -- he designed the
17 condominiums and working with Kern-Coleman and Company,
18 the construction drawings

19 Q All right And, ultimately, the construction
20 drawings were issued, is that correct?

21 A That's correct

22 Q Now, I believe these became part of the
23 contract, is that correct?

24 A Yes

25 [Whereupon, Plaintiff's Exhibit Number 2,

1 construction plans, is marked by the court reporter]

2 MR GRIFFITH Judge, I'm -- I'm sorry Try not
3 to talk while you're doing --

4 These have been marked as Exhibit Number 2

5 Q [Mr Griffith] And these are the plans for the
6 16 Jade Street Quarters or Jade Quarters, is that correct?

7 A That's Correct

8 Q All right

9 A Correct

10 Q We'll come back to those a little bit later In
11 that -- in your meetings with Mr Stewart, did you want to
12 use AAC block? Was that something that you --

13 A Yes

14 Q -- were interested in?

15 A Yes, we did We wanted to use AAC block, and
16 Impact windows And AAC block had been used in the
17 construction of our office there We have two shopfront
18 buildings, one occupied by Carol Waters, and one with the
19 Celadon office And those two buildings were built at the
20 same time using AAC block

21 Q And what was your understanding of the benefits
22 of AAC block? Was it insulation?

23 A Great sound attenuation, insulation, and each
24 inch gave you an hour's fire rating

25 Q You said sound attenuation, I believe --

1 A Yes, he did

2 Q -- before he did the Jade Quarters?

3 A He built a courtyard cottage, on lot forty-five
4 that was sold during construction

5 Q Now, ultimately, you ended up then going back --
6 and I'm summarizing Carl had come, he couldn't get the
7 financing, you ended up feeling that maybe you would go
8 with him to do the project then as the contractor,
9 correct?

10 A Yes Based on our experience with him

11 Q Did you ultimately negotiate a contract with Mr
12 Aten?

13 A Yes

14 Q And I will show you a copy of a document, and
15 ask you is this a copy of your contract with Mr Aten

16 A Yes

17 MR GRIFFITH Ask that that be marked as
18 Exhibit 3

19 [Whereupon, Plaintiff's Exhibit Number 3,
20 contract, is marked by the court reporter]

21 MR GRIFFITH Hand that up to the Judge

22 THE COURT Thank you

23 Q [Mr Griffith] Now, there were negotiations
24 leading up to this, but this was actually the contract
25 that was entered into between you and R Design, is that

1 correct?

2 A Correct

3 Q All right And it requested -- I believe just
4 looking through it, Mr Aten or R Design Construction LLC
5 was to get a 150,000-dollar fee, is that correct?

6 A Correct

7 Q And he was to act as the general contractor?

8 A Correct

9 Q And attached to that also is a schedule of
10 values that looks like for numbers that were for the
11 subcontractors, is that correct?

12 A Yes

13 Q Did you choose any of those subcontractors?

14 A No

15 Q Are you a contractor yourself?

16 A No

17 Q In the contract was it required that the subs be
18 licensed and qualified?

19 A Yes

20 Q All right In leading up to this contract, did
21 R Design and Carl Aten know the budget?

22 A Yes

23 Q And they originally actually developed the
24 budget?

25 A Yes

1 didn't work like that? A problem with Ray Construction

2 A Yeah, we did, where the contractor had subs and
3 the contractor -- the sub's parents were in bankruptcy and
4 didn't pass the cash on to the sub and the sub start --
5 didn't want to work, so we had to change the way we paid,
6 make sure the job continued

7 Q Now, under this contract, what was the time to
8 complete?

9 A It was about twelve to eighteen months

10 Q And with regards to the payments that were going
11 to be made to the subcontracts while you were writing
12 the checks directly, was R Design and Carl Aten, were
13 they required to approve payments before the checks were
14 written?

15 A Yes

16 Q When did work begin on the project?

17 A Right around September August, September of
18 2004

19 Q I was going to say '04 Is that correct?

20 A Yes

21 Q Now, are you familiar with Mike Catterson and
22 Mike -- are you familiar with Mike Catterson and Catterson
23 and Sons?

24 A Yes

25 Q All right Who are they?

1 A Well, in walking through the construction site,
2 I looked at the way the AAC block was being constructed,
3 and it didn't look as if it were done in the same kind of
4 manner as our shopfront buildings had been done, and it
5 looked a little sloppy And I looked at some of the
6 framing and I -- and it concerned me, and I asked about
7 it And Catterson and Carl did some things to clean it
8 up, but it didn't -- I just became concerned I was very
9 uneasy about it And so I called Kern-Coleman and asked
10 that they send their people out to take a look at it

11 Q All right Now, Kern-Coleman, let's make sure
12 that we understand Kern-Coleman was the engineer that
13 you had hired to work or that you paid to work with I
14 believe Randolph Stewart, correct?

15 A Yes Kern-Coleman are the architects of record
16 and the structural -- they did the structural engineering
17 work for Jade Quarters

18 Q And did -- when I ask you -- contract
19 administration were they supposed to come out and make
20 sure that -- do inspections on the job? Or did you have
21 to call them specifically because you thought you had a
22 problem?

23 A I had to call them specifically

24 Q So you didn't have a contract for what is called
25 contract administration, then?

1 A Correct

2 Q And did they come out?

3 A Yes They came out in March of 2005, and issued
4 a report on April 1st, 2005

5 Q Okay And without going into that report, were
6 there some problems there?

7 A Yes

8 Q They had identified some? Did you take those up
9 with Mr Aten?

10 A Yes, I did

11 Q All right And what was discussed about it?

12 A When are you going to fix them, how to fix them,
13 how are you going to do this

14 Q Did he assure you that they would get taken care
15 of?

16 A Yes

17 Q And then did you move forward with the project?

18 A We continued with the project, yes We never
19 stopped

20 Q Now, that was in probably April, you said, that
21 they came out Did there continue to be problems at the
22 project?

23 A Well, yes I mean, the project -- the problems
24 were not being corrected, and work was continuing, and it
25 was -- Catterson was complaining about Carl, and Carl

1 would complain about Catterson

2 Q Now, Catterson, Mr Catterson, would he complain
3 that he couldn't find Carl?

4 A Yes

5 Q Couldn't get instructions on how to go?

6 A Yes

7 Q Coordination of the project?

8 A Yes

9 Q And when you talked to Mr Aten, did he complain
10 about Mr Catterson?

11 A Yes

12 Q What did he tell you about Mr Catterson?

13 A He didn't like the way he worked and half of
14 what I was being told wasn't true

15 Q And, ultimately, did there -- when these
16 problems started to occur, was there an issue with Mr
17 Catterson in July?

18 A He had submitted a payment request

19 Q Did Mr Aten want you not to pay that request?

20 A He did And --

21 Q Tell the judge what happened there with that
22 particular request

23 A Well, I think the request was for about \$5,000
24 And we met in my office And between the two of them, it
25 was very difficult to tell who was being truthful And I

1 And I believe you said Carl approved \$2,000, is
2 that correct?

3 A That's correct

4 Q And how much did you pay Mr Catterson?

5 A \$2,000

6 Q All right After that, did Mr Catterson ever
7 return to the job site?

8 A That's correct

9 Q That's correct he did, or did not, return?

10 A He did not return

11 Q Okay What happened between July 22nd, 2005,
12 and October, 2005?

13 A Well, the job wasn't progressing The problems
14 were not being fixed Carl was -- did not find a
15 contractor to replace Catterson I think some siding work
16 was done, but not much I wrote Carl with my complaints
17 and met with him in August about the issues, met with him
18 and Rose, and it just got worse

19 Q Did it ultimately sort of grind to a halt there?
20 Progress was not being made?

21 A Yes I would say that

22 Q Okay Then in October of 2005, you and Carl
23 met, I believe, is that correct?

24 A Yes It was getting bad, and I decided that I
25 needed to get Kern-Coleman back out to take another look

1 at it And Carl and I met, and I said, I don't know if I
2 should fire you today or fire you tomorrow And he said,
3 well, why not now, or something like that, and that's when
4 he left

5 Q All right And then did he go to the Building
6 Department and pull his permit?

7 A He did

8 Q Okay And you were notified by that of Mr
9 Cummings, here from Beaufort County, is that correct?

10 A Correct

11 Q All right Then leading up to that, also
12 there was an issue mentioned about you making payments
13 You made payments directly to the subcontractors and the
14 material suppliers, is that correct?

15 A Correct

16 Q All right And was one of the reasons so that
17 they would be paid on time?

18 A That's correct

19 Q Were you getting a charge from Grayco for
20 finance charges and carrying charges?

21 A Grayco was one of the biggest of our material
22 costs, largest costs, for windows and doors and lumber
23 And every time Carl would bring the invoice, there would
24 be significant finance charges, and I would ask him why is
25 he waiting so long to bring me these invoices Because we

1 believe, on --

2 A Came in on the 18th Yes

3 Q 18th of October -- excuse me October 18th,
4 2005, Kern-Coleman came back, is that correct?

5 A Yes That's correct

6 Q And they did another inspection of the property,
7 is that correct?

8 A That's correct

9 Q Now, this was Mr Livingston, I believe, with
10 him, correct?

11 A Correct

12 Q And did he issue a report, then, later, I
13 believe, dated November 16th, 2005?

14 A Correct Yes

15 Q And did you receive a copy of that report that
16 listed the thirty-eight defects --

17 A I did

18 Q -- that he had concerns with?

19 Now, at that time were you now looking for
20 another contractor?

21 A Well, I had anticipated the need for another
22 contractor before that time and had asked Anchor if they
23 would be available to step in if I needed them, and they
24 said they would

25 Q Had Anchor worked with you in the past?

1 A Yes Anchor had first worked with me when
2 Lowcountry was considering buying the location on Lady's
3 Island And they met with me and the former bank
4 president at my home, going over construction costs, so I
5 got a sense of how they approached that They then were
6 the contractor for all the site development work at
7 Celadon

8 Q You worked with other contractors, too, such as
9 Heister Construction --

10 A That's correct

11 Q -- at Celadon?

12 A That's correct

13 Q Okay So they were not just the exclusive --

14 A That's correct

15 Q -- contractor that you had worked with up to
16 Mr Aten?

17 A That's correct But they were -- they had done
18 more commercial work

19 Q All right And you said they had done more
20 commercial --

21 A Anchor --

22 Q -- work for you?

23 A Anchor had done more commercial work Yes

24 Q And so when Kern-Coleman came out on October the
25 18th of 2005, did Steve Carpenter meet with them?

1 MR GRIFFITH I think the record -- the
2 testimony was that he had already called Kern-Coleman
3 Just ironically they ended up there the day after

4 THE COURT I just want to know the date that
5 Mr Aten --

6 THE WITNESS Contract --

7 THE COURT -- was off the project Okay

8 MR GRIFFITH And I believe we'll put in the
9 letter, where he went and pulled his license, a little
10 bit later I don't know that I can do it through this
11 witness

12 Q [Mr Griffith] In any event, did you then go
13 and get another engineer to come out and look at the whole
14 project? Being H2L

15 A Yes Upon your recommendation, we hired H2L and
16 Randy Still, and they performed an independent review of
17 the project

18 Q And did they assist you in developing a scope
19 for the remedial work?

20 A They did

21 Q All right And what areas did they work on?

22 A Well, identifying the issues, identifying the
23 design for the corrections, and observing the corrections
24 afterward to see -- conclude whether they were suitable

25 Q So they developed the scope of repairs --

1 A Yes

2 Q -- on the structural aspect, is that correct?

3 A Correct

4 Q Did you have conversations with H2L about
5 actually doing a full-blown new set of structural plans
6 and designs?

7 A We did And they advised that it would not be
8 cost effective to do that After they had worked with
9 Anchor Construction, they concluded that Anchor had
10 sufficient experience and knowledge to work up the plans
11 and so that H2L did not need to do that and we could save
12 money by avoiding that cost

13 Q And when you talk about they could save some
14 money about it was cost a factor to you at this point in
15 time?

16 A Cost was a factor from the very beginning
17 Absolutely

18 Q And their -- I heard in opening statement that
19 you used this in order to get a totally different project
20 Did you spend a million dollars repairing the project,
21 hoping that you would come to the courtroom and get lucky?

22 A No I mean, that's not a very good bet, you
23 know Not at all What we were trying to do is we had
24 investors who had put money in, we had the bank who had
25 put money in, and we had a project that we wanted to save

1 A No

2 Q And then -- so down at the bottom, then, what
3 you have basically, is listed in the engineering fees,
4 that you paid, \$38,295?

5 A To H2L Correct

6 Q To H2L

7 A Uh-huh

8 Q All right And then your construction repair
9 down at the bottom And then your interest expense Did
10 you calculate that interest expense?

11 A Yes

12 Q And I'm going to ask you this But being a CPA,
13 did you do that in accordance with generally-accepted
14 accounting principles?

15 A I sure hope so

16 Q Okay So is your claim, then, today for
17 \$1,232,698?

18 A Correct

19 [Whereupon, Plaintiff's Exhibit Number 8, Anchor
20 contract, is marked by the court reporter]

21 [Whereupon, Plaintiff's Exhibit Number 9,
22 Catterson contract, is marked by the court reporter]

23 THE COURT Mia, was this marked as something?
24 Was that 7? Do you know?

25 [Off the record momentarily]

1 this morning that -- I believe that the date that you
2 terminated Mr Aten or R Design was October 17, 2005, is
3 that correct?

-4 A Yes

5 Q And, in fact, you did terminate him from the
6 project, correct?

7 A I think it was kind of mutual

8 Q Have you not testified in the past that you
9 actually fired R Design from this job?

10 A Probably so

11 Q And, essentially, the problems between yourself
12 and R Design were over the progress of work and quality
13 of the work, is that correct? Is that fair?

14 A And the cost

15 Q Were there other subs that were working on the
16 project in October?

17 A There were a full range of subs working, yeah

18 Q At what point did those subs get called off the
19 job?

20 A Almost immediately after October 17th the subs
21 were terminated

22 Q And who terminated them?

23 A Anchor I guess I would say they suspended
24 work Okay?

25 Q Was it fair to say, then, that Anchor, when they

CARL ATEN,

Having Been First Duly Sworn,
was Examined and Testified as Follows

DIRECT EXAMINATION

BY MR GRIFFITH

Q As I understand, you are the owner or managing
partner of an LLC known as R Design, is that correct?

A Managing member

Q Managing member of R Design?

A Correct

Q That business was started in 1997, is that
correct?

A Yes, sir

Q Okay And just a little bit by way of
background, you live here in Beaufort, is that correct?

A Yes Well, I live in Okatie Beaufort County

Q Beaufort County And you've been here how long?

A Approximately fifteen years

Q And you came here, what, in the mid '90s?

A Yes

Q Now, when you started in 1997, R Design, you
were -- you did it in order to do speculative houses, is
that correct?

A That's correct

Q So you buy lots, and you build a house, is that

1 A That's correct

2 Q -- is that correct?

3 And when you started R Design, you had to go
4 take a test, is that correct?

5 A That is correct

6 Q And you had to get a license, correct?

7 A Yes, sir

8 Q You, Carl Aten, are the license holder for
9 R Design, is that correct?

10 A Carl Aten is the license holder

11 Q Okay Did I say that wrong?

12 A I guess -- if you think about it, my license is
13 hung, I guess, with R Design Construction

14 Q Okay But you took the test?

15 A Yes Me, personally

16 Q You paid for it?

17 A That's right

18 Q You made the application?

19 A Right

20 Q You took the test, you passed it, they issued a
21 license to Carl Aten?

22 A Correct

23 Q Carl Aten then took his license and put it with
24 R Design, LLC, is that correct?

25 A Correct

1 Q And as the license holder, you're responsible to
2 ensure that the buildings that you built were in
3 compliance with the code, is that correct?

4 A I think that, more or less, the license is a --
5 if you want to talk about the test specific, the license
6 is -- I guess would be ensuring a general knowledge of
7 residential construction That is my license, is a
8 residential homebuilder

9 Q Well, let's talk about that You went to
10 Columbia to take the test at the LLR, is that correct?

11 A Correct

12 Q And you got a test and passed the residential
13 homebuilders license, is that correct?

14 A Uh-huh [Indicates affirmatively]

15 Q That license allows you to build only homes that
16 are up to three stories high and single-family dwellings,
17 correct?

18 A And no more than four units in one building

19 Q Okay And it is your understanding -- jumping
20 ahead -- that you could do this job --

21 A Yes

22 Q -- is that correct?

23 Now, as the license holder, though, you said you
24 had to have general knowledge of the rules and regulations
25 in the code, is that correct?

1 A Yes, sir

2 Q And you have to build according to the code, is
3 that correct?

4 A Yes, sir

5 Q And that's why you take the test, so that the
6 Commission can control you, is that correct?

7 A Part of the test is code, part of the test is
8 general construction knowledge

9 Q Okay

10 A Part of the test is law, actually

11 Q All right And, as such, you would have been
12 the -- I believe the term they call it is -- resident
13 licensee is what it's called, is that correct?

14 A It sounds reasonable

15 Q All right And, as such, you would be the
16 responsible charge for R Design, LLC, is that correct?

17 A Could you rephrase that for me?

18 Q Well, responsible charge is defined in the code,
19 and the responsible charge means that if you are giving
20 building services, you're the person responsible because
21 you're the license holder, correct?

22 A I act for -- I acted for R Design Construction
23 That's what -- I'm the managing member That's what I
24 did

25 Q And without you being the license holder,

1 R Design couldn't have come out here and done this job,
2 is that correct?

3 A Someone else working for R Design could have
4 been there, I believe --

5 Q R Design had to --

6 A -- supervising the job

7 Q -- have a license holder, actually, to --

8 A Correct

9 Q -- do the job And your license is the one they
10 used?

11 A Correct

12 Q Now, in this -- you've never done a multi-family
13 before the Jade Street project, is that correct?

14 A Correct

15 Q And as I understand it, you and your wife
16 are the only shareholders or are the only officers in
17 R Design, is that correct?

18 A The only members Right

19 Q The only members She's never been licensed,
20 was she?

21 A No

22 Q And, therefore, as R Design, you, the license
23 holder, directed the building services, is that correct?

24 A On that particular job?

25 Q Yes, sir

1 A Yes

2 Q All right And you're responsible for the
3 supervision of the construction services that R Design
4 gave out, is that correct?

5 A Correct

6 Q And final decisions with regards to what was
7 going to be done by R Design were made by you, is that
8 correct?

9 A As far as R Design was concerned, yes

10 Q Now, on this job, you actually applied for the
11 permits, is that correct?

12 A Correct

13 Q And 16 Jade Street is in Celadon, is that
14 correct? The project?

15 A Yes

16 Q And Celadon is right over here on Sams Point
17 Road?

18 A Yes, sir

19 Q Correct? And you had actually built in there
20 before, correct?

21 A That is correct

22 Q Did a spec home there?

23 A Correct

24 Q In order to do that, you had to apply for work
25 in Celadon, become an approved builder, correct?

1 A Correct

2 Q And you understood these to be high-end condo
3 units, is that correct?

4 A Yes, sir

5 Q And you ended up with a contract with 16 Jade
6 Street, LLC, which has been marked as Plaintiff's Exhibit
7 That is the contract, is that correct?

8 A This is a contract between R Design
9 Construction and 16 Jade Street, if that's what you said

10 Q Yes, sir

11 A Okay

12 Q That contract was signed July 27, 2004, is that
13 correct?

14 A Yes, sir

15 Q And, as such, that contract makes certain -- on
16 the back of it --

17 Let me first ask you that's your signature
18 back there, is it not?

19 A Yes, sir

20 Q And that contract required you, or R Design, to
21 supervise the construction for the owner of a four-family
22 condominium unit on the owner's lot, is that correct?

23 A Yes

24 Q And you agreed to do that, is that correct?

25 A Yes, I did

1 Q The contract requires that it be completed in
2 a -- or that the buildings be completed in accordance with
3 the plans and specifications, is that correct?

4 A That's what the contract reads

5 Q Plaintiff's Exhibit Number 2 is a set of the
6 plans and specifications, is that correct?

7 A It looks familiar, yes

8 Q Okay It required that if you made any changes
9 to the plans and specifications, you would get a written
10 change order, is that correct?

11 A Without me going -- sitting here going through
12 it, if that's what you're telling me it reads, then I will
13 agree with you

14 Q On page 3, paragraph 7 deals with change orders
15 They were to be in writing, is that correct?

16 A Yes, sir, that's what it reads

17 Q Okay Time of completion was to be twenty
18 months, is that correct?

19 A Sounds familiar, yes

20 Q And you were to get \$150,000 to supervise this,
21 is that correct?

22 A R Design Construction was to get 150,000

23 Q All right And attached to the contract -- or
24 at least there was a schedule A, which was basically the
25 percentages of the subcontracts that you had lined up, is

1 that correct?

2 A That schedule shows that for example when the
3 clearing, foundation, and slab was complete, that 16 Jade
4 Street was to pay ten percent of the contract amount to
5 R Design Construction

6 Q Basically, that was showing how your draw
7 schedule was going to be?

8 A Correct

9 Q Okay Now, it was your job, under this, to
10 solicit bids from the subcontractors, is that correct?

11 A That's correct

12 Q And did you solicit bids?

13 A Yes, we did

14 Q And one of the bids that you solicited did you
15 solicit from Mike Catterson or Catterson and Sons?

16 A Yes, we did

17 Q And did you ultimately sign a contract with --
18 or did R Design ultimately sign a contract with Mike
19 Catterson or Michael Catterson and Sons?

20 A Yes

21 MR GRIFFITH One second

22 [Whereupon, Mr Griffith reviews documents]

23 Q [Mr Griffith] I'm going to show you a copy of
24 a document there and ask you if you can identify that

25 A That --

1 Q Paragraph 9

2 A Go ahead

3 Q It states that the contractor shall supervise
4 and direct all construction work, use his best judgment using
5 its best skills and attention, and shall be solely
6 responsible for all construction's means, methods,
7 techniques, consequences, and procedures, and for
8 coordinating all portions of the work required under this
9 contract

10 It was your job to ensure that the means and
11 methods and techniques were used -- proper means and
12 methods were used under this contract, is that correct?

13 A That's what the contract reads

14 Q And, also, if you were out on the job, you were
15 being paid supervisory's fee to make sure that everything
16 was coordinated If you were out there doing anything
17 else, you would be paid extra, correct?

18 A If I was -- say that again, please I'm sorry

19 Q Extra pay for non-supervisory work was
20 authorized under this contract --

21 A Correct

22 Q -- is that correct?

23 A Uh-huh

24 Q You could have gone out there and done the work
25 yourself and actually charged for it, is that correct?

1 A I could have, yes

2 Q After you signed the contract, you went down on
3 behalf of R Design and obtained the permits, is that
4 correct?

5 A Yes, sir

6 Q From the County?

7 A [No response]

8 Q From the County, correct?

9 A Yes

10 Q All right And I'm specifically just trying to
11 make sure that it was not in the City --

12 A Right

13 Q -- because a different --

14 A It was the County

15 Q -- code may apply

16 All right And under the County at that time,
17 the IRC-2000 would have applied to this construction, is
18 that correct?

19 A I would call it CAVO, I think or --

20 Q Well, I believe the County may have -- we had a
21 stipulation But in any event, these plans actually call
22 for it to be built in accordance with the IRC, is that
23 correct?

24 A Yes

25 Q And you understand that to be the International

1 A Yes, I am

2 Q Is it for residential construction?

3 A I'm a -- my license says residential
4 homebuilder

5 Q Okay And does that license qualify you to
6 build a four-unit condo that's the subject of this
7 litigation?

8 A Yes, it does

9 Q Okay Tell me how -- or, I'm sorry You owned
10 a company called R Design, correct?

11 A Correct

12 Q And R Design is the entity involved in this
13 lawsuit that's responsible for --

14 A Correct

15 Q -- the project?

16 Okay How was R Design organized? What type
17 of company is it?

18 A It was a -- it's an S Corp No It's a -- it's
19 an LLC I'm sorry

20 Q Okay And that company was formed by you and
21 your wife?

22 A Correct

23 Q Okay And that was for the purpose of building
24 residences, is that right?

25 A We started out building -- putting up homes,

1 build them, sell them That's, some would say,
2 speculation or spec homes

3 Q When was that LLC organized?

4 A I think '96, I think

5 Q Have you ever had any complaints against your
6 license?

7 A Never

8 Q Okay Approximately how many homes have you
9 built here in Beaufort?

10 A Now?

11 Q Yes, sir

12 A Probably up to about eighty now

13 Q Okay Tell me briefly, if you would, how you
14 came to be involved with the Jade Quarters project

15 A I had met --

16 THE COURT Actually, if you don't mind me
17 interrupting you

18 MR BENDLE Sure

19 THE COURT And I apologize, sir

20 You say you've built up to eighty homes now I
21 think you testified yesterday that -- have you built
22 eighty homes under R Design?

23 THE WITNESS No

24 THE COURT Okay So I'm assuming that some of
25 that is now with your experience?

1 we actually I think purchased another lot through him --
2 from him

3 I think it was somewhere in the time that we
4 were getting ready to build that second spec house that we
5 had talked to Dennis about this other piece of property,
6 which is where 16 Jade Street sits on He had already had
7 a set of drawings basically done -- not completed, but
8 semi-completed drawings for this particular building that
9 we've been talking about So we tried to get financing
10 for that, and we couldn't get financing Eventually went
11 back to Dennis, told him that we can't do the project

12 Dennis came back to us and said, how about if
13 I -- I meaning him or his partners, whatever, whoever was
14 going to put the building up -- and he wanted to know if
15 R Design wanted to supervise the project

16 Q Okay And eventually you agreed to do that,
17 correct?

18 A Yes, we did

19 Q And, in fact, a contract was entered into in or
20 about --

21 A Yes

22 Q -- July of '04?

23 Okay Did you have any involvement prior to
24 signing that contract, with regard to the plans or specs
25 or designs or anything of that nature, for this project?

1 THE COURT This is what?

2 MR BENDLE This is the proposal between
3 Catterson --

4 THE COURT Yes It's Plaintiff's Number 9

5 MR BENDLE Okay All right

6 Q [Mr Bendle] I'm going to hand you, Mr Aten,
7 what has been marked as Plaintiff's Number 9

8 A Uh-huh

9 Q Can you identify that document?

10 A It's the agreement between R Design -- or,
11 actually, it's between R Design and Catterson and Sons

12 Q Okay And does that accurately outline what the
13 scope of work was for Catterson on --

14 A Yes

15 Q -- this project?

16 A Yes

17 Q Okay And could you read briefly what that
18 scope of work entails?

19 A Frame according to plan, felt the roof, Tyvek,
20 sheet the exterior windows and doors, decking and stairs
21 Down near the bottom it also says basically framing,
22 exterior siding and trim, and the AAC block work along
23 with the ACC [phonetic] floor panels

24 Q And you've already indicated that that was one
25 of the lowest bids or the lowest bid that was --

1 to sign off on the work It's well-documented I told
2 him very, very specifically, heated exchange, myself,
3 Mike, Dennis, words flying around the room At that
4 particular point, Dennis basically shoved a piece of paper
5 in my hand and said, sign this thing so I can get this guy
6 out of here

7 Q So he was paid, at least in part, for what --

8 A What -- yes

9 Q -- for what he was claiming he was owed at that
10 point?

11 A That's correct

12 Q Okay And that following Monday, at least the
13 Monday following that meeting, did Mr Catterson return to
14 the project?

15 A No, he did not

16 Q Did anyone on his behalf return to finish the
17 job that he was responsible for?

18 A Not that I can remember, no

19 Q Tell me what measures were taken, on your own
20 behalf or R Design's behalf, to get someone to replace
21 Mr Catterson so that the framing and the work that he was
22 responsible for could be completed

23 A We had found -- there was actually a laborer on
24 the job who worked on and off from the beginning of the
25 job The laborer -- and his brother, who I would say --

1 call him more of a -- somewhere in between a rough and a
2 finish carpenter We hired him to start to try to
3 complete the work He worked on some of the railings on
4 the outside, whatever, just trying to get the job back on
5 So that's basically how we tried to keep it going, tried
6 to keep the job, keep going There was another person
7 hired -- I just almost forgot -- to start again working on
8 the siding on the exterior

9 Q Okay Other than the siding and the railing,
10 was there much work done with regards to the framing and
11 the block work from the time that Catterson left the job
12 and the time that you were terminated?

13 A Can't remember a whole lot Most of the work
14 was being done on the exterior

15 Q Okay You were terminated a few months shortly
16 thereafter when Catterson left, correct?

17 A Correct

18 Q Okay Would you tell me briefly kind of what
19 led to your termination

20 A Specifically, I can tell you -- the only thing
21 that I was told by Dennis that particular day -- well, let
22 me start over a little bit I was working on another spec
23 home in the neighborhood Dennis wanted to meet with me,
24 told me that morning, meet with me to go through that
25 house for basically the exterior, because he's in charge

1 A Yeah, but --

2 Q Number 7 is a crack by the doors that needs to
3 be repaired

4 A Correct Number 6, they weren't installed so
5 obviously they need to be installed So in my mind,
6 that's an incomplete part of the process

7 Q And the crack by the door, somebody just needs
8 to go back and repair that, right?

9 A That's correct

10 Q And the circle washers that were not installed,
11 someone needs to install them?

12 A That's correct

13 Q Okay You remember when the job was going on,
14 Catterson pointed out several places where the plans were
15 inadequate?

16 A We had many discussions about that

17 Q And Catterson had asked you to explain things on
18 the plans?

19 A We had -- we pulled the plans out, yes

20 Q Okay And you called either the engineer or
21 Mr Green to get clarification on things?

22 A I usually wouldn't call Mr Green, but I would I
23 think at the time -- especially on that wall, that front
24 wall -- or, actually, I would have called Mr Green on
25 that one because I would have had to pay Mike extra,

1 because the item that you were talking about were the
2 windows and it didn't match from top to bottom Mr Green
3 knew about that, because I had to verify from him that we
4 had to pay Mike extra because Mike had already built the
5 wall, he had to tear the wall back down, once we figured
6 out that the plans were not right So, yes, in some cases
7 I should say I did have to call Mr Green

8 Q And you remember there were problems with the
9 dormers? Mike made issue --

10 A Absolutely

11 Q -- Mike made an issue about the dormers?

12 A Yes That is another issue that we did have to
13 go through Mr Green because that wasn't really part of
14 Mike's scope of work Because they were designed
15 incorrectly, we had to pay Mike extra So I had to go
16 through Mr Green and let him know that

17 Q Do you remember what that was? Was it \$5500?
18 Do you remember?

19 A Somewhere between four and six As a matter of
20 fact, one of Mike's draws probably says for repair of the
21 dormers

22 Q All right Do you remember what the issue was
23 with the dormers?

24 A The way that they were -- if I remember
25 correctly, the way that they were drawn in the plans

1 Q He wasn't actually up on the roof banging nails
2 He was directing crews or he was -- there's a guy named
3 Got You, right? He was the foreman?

4 A Yes That's sounds familiar --

5 Q And Mr Catterson was the liaison between Got
6 You and you, correct?

7 A Correct Got You was there on it all the time
8 Mike was there most of the time How is that

9 Q And he would come out and he would talk with Got
10 You and he would go talk with you, and he would kind of be
11 a middle man?

12 A Correct

13 MR ROSS Okay Nothing else

14 THE COURT Mitch, anything further?

15 MR GRIFFITH No, ma'am

16 THE COURT Okay Anything else?

17 MR BENDLE No, Your Honor

18 THE COURT You can step down, Mr Aten Thank
19 you

20 THE WITNESS Do you want any of this paperwork?

21 THE COURT You need to leave everything that is
22 a -- got a little exhibit sticker right there

23 [Whereupon, Mr Aten is excused and exits the
24 witness stand]

25 THE COURT All right, y'all It is actually

1 MICHAEL S CATTERSON,

2 Having Been First Duly Sworn,

3 was Examined and Testified as Follows

4 CROSS-EXAMINATION

5 BY MR GRIFFITH

6 Q You are Michael Catterson, and you live at 48
7 Courtney Lane in Ridgeland, South Carolina, is that
8 correct?

9 A Correct

10 Q And I believe you're married, is that correct?

11 A Correct

12 Q You are the -- as I understand it, the sole
13 shareholder in Catterson and Sons Construction Company,
14 Inc, is that correct?

15 A Correct

16 Q And Catterson and Sons Construction Company is a
17 specialty subcontractor, is that correct?

18 A Correct

19 Q And you are the license holder for -- or the
20 certificate holder? You hold a --

21 A It's a specialty license

22 Q -- specialty license? And that is for -- I
23 believe you do framing?

24 A Uh-huh That's correct

25 Q All right And you actually -- you personally

MIA PERRON, CCR, CVR-CM

-7-

000058

1 been doing -- as part of the contract, you would have been
2 doing floor panels?

3 A Correct

4 Q Is that correct?

5 And also framing that would include setting the
6 interior windows -- I mean, excuse me -- setting the
7 windows, exterior windows?

8 A Exterior windows Correct

9 Q And you would have done -- would you have done
10 the exterior trim?

11 A Yes The exterior trim was in the siding
12 package

13 Q And that would have included the siding?

14 A The siding and the window trim on the outside

15 Q Okay Now, when you worked on this project, you
16 actually worked I believe, I understood, in a supervisory
17 capacity, is that correct?

18 A That is correct

19 Q And you also I believe testified earlier that
20 you worked with some subcontractors, is that correct? Or
21 you had subcontractors?

22 A Yes

23 Q All right And in doing this project over the
24 course of time, you signed the contract it looks like in
25 August of '04?

1 while your contract is in August of '04, when you got out
2 there, the slab had already been poured, is that correct?

3 A The contract -- the slabs were on hold for a
4 little bit I can't remember what the date we started
5 that project I know what day we signed the contract It
6 was in August

7 Q Well, when you arrived, the slabs had been
8 poured and the J-bars -- or the rebar was sticking out of
9 the slab?

10 A That's correct

11 Q It had to be done before --

12 A Absolutely

13 Q -- you could lay your block?

14 All right And as I understand, you were a
15 labor-only contractor, correct?

16 A That's correct

17 Q So materials would have been ordered by Carl, is
18 that correct?

19 A That is correct

20 Q ' If improper material showed up, he was
21 responsible, correct?

22 A That's correct

23 Q And if improper material showed up and you
24 noticed it, you would call him and say, got the wrong
25 stuff, right?

1 You followed those, correct?

2 A To my knowledge

3 Q Right Just like if you got laminated veneer
4 lumber, you've got to follow the specifications to make
5 sure that it meets when you cut it and --

6 A Glue it

7 Q -- glue it You've got to make sure that it's
8 right, correct?

9 A Correct

10 Q All right And you also felt that since you had
11 done it before, you were competent to supervise the
12 installation, is that correct?

13 A Correct

14 Q Was everything you did on the project at the
15 direction of Mr Aten?

16 A Yes He was the general contractor

17 Q And if any of the work that was performed on the
18 AAC block did not meet or was changed from what it was on
19 the plans, is it your position that he changed those?

20 A Correct

21 Q Now, you did get a set of plans? Is that
22 correct?

23 A Yes

24 Q And you followed the plans, with the exception
25 of the changes that Mr Aten made, is that correct?

1 construction site for you -- should not have happened to
2 your work, is that correct?

3 A That's correct

4 Q All right Also, there's been testimony about
5 when you got out there, the rebar that was in was forty-
6 eight inches on center Were you here for that testimony?

7 A I was not here for that, but I -- I don't
8 remember what the spacing was, out whatever the spacing
9 was is what I had to follow

10 Q Okay Did you look at the plans and understand
11 that those were wrong -- I mean, that the spacing was
12 wrong according to the plans?

13 A Yes I brought it to their attention, and I was
14 told to go ahead

15 Q Just go ahead and put it up, don't worry about
16 it?

17 A Correct

18 Q So at that point in time you went ahead and
19 started putting it up, and I guess maybe grouting at that
20 point in time, forty-eight inches on center, is that
21 correct?

22 A I believe the majority of the spaces were
23 tighter than forty-eight because we had cores coming up
24 alongside windows and door openings that I remember So
25 it would have made it tighter than forty-eight inch spaces

1 THE COURT Okay Okay Thanks

2 Q [Mr Griffith] Now, while we're looking at the
3 lintels, the lintels, according to the specifications,
4 also have to bear at least eight inches, is that correct?

5 A That's what I've heard here

6 Q Is that what the manufacturer's specifications
7 require?

8 A I don't know I wasn't provided with that
9 information

10 Q Is the -- in your contract you said that you
11 were going to install the block AAC -- it says AAC block
12 and floor panels You would not have familiarized
13 yourself with the specifications to ensure that you got
14 the proper bearing on all the block?

15 A Aercon sent the plan that came with this, and
16 they sent the parts, and if they sent an eight-foot header
17 to go over an area that was eight foot six or eight foot
18 seven, it was labeled on the plan

19 Q So it's your testimony, then, they sent you
20 basically a puzzle that you have to put the puzzle
21 together that this lintel goes over -- lintel A goes over
22 the head of window A on the plans, is that correct?

23 A For the most part

24 Q All right And if that lintel did not meet the
25 specifications that they had sent, did you bring it to the

1 attention of Mr Aten?

2 A I had no specifications that it said it had to
3 have an eight-inch bearing on there

4 Q You never read the specifications, then?

5 A In general, yes

6 Q Okay And when you read them, did you feel
7 confident then to go ahead and put them up without knowing
8 what all the specifications required?

9 A Yes, because I was told to follow the plan

10 Q Okay Now, let's go one step farther There's
11 been -- well, the block, when you lay the block, is it
12 supposed to be grouted? Or, excuse me Are you supposed
13 to put a mortar bed when you stack the block?

14 A The first course

15 Q The first course Not the second course?

16 A No

17 Q Are you supposed to put a mortar bed between the
18 heads when you -- once they butt up together?

19 A It's Thin Set

20 Q Thin Set?

21 A Yes

22 Q All right And with the Thin Set mortar, would
23 you be able to look through, or see light coming through,
24 if it were done properly?

25 A In occasional places

1 Q All right And it does not in that picture, is
2 that correct?

3 A That's correct

4 Q On the plans, it's supposed to, correct?

5 A That's correct

6 Q And as I understand, it's your position that it
7 did not extend through the roof line because you ran out
8 of block, is that correct?

9 A That is correct

10 Q And --

11 A And that section of -- that section of block
12 needed to be pumped before we went any further

13 Q Okay So you just went forward, at Mr Aten's
14 instruction, and put the roof on? You understand you're
15 going to have to cut -- now come back and cut through the
16 roof, correct?

17 A Yes That's correct

18 Q Okay And why did you do it that way?

19 A To protect the framing that was already in
20 place, because we had no block

21 Q Okay And had you told Mr Aten that you had
22 run out of block?

23 A Several times

24 Q And when you didn't get it, you had to go ahead
25 and do it in this fashion?

1 MR BENDLE Your Honor, I think I do have a few
2 questions

3 THE COURT Okay Go ahead, sir

4 CROSS-EXAMINATION

5 BY MR BENDLE

6 Q Mr Catterson, you testified a few minutes
7 ago that you had problems getting paid on this project by
8 R Design?

9 A I had problems getting paid, in general, at
10 times

11 Q Isn't it true that often you would request
12 payment for work that had not yet been completed?

13 A No

14 Q You also testified that you had problems getting
15 a hold of Carl Isn't it true that Carl was on this
16 project on a daily basis?

17 A Not on a daily basis And for an hour in the
18 morning, at times

19 Q Were you on this project on a daily basis?

20 A At least four days a week

21 Q And did you often try to reach him on his cell
22 phone?

23 A Yes

24 Q And it's your testimony that he just wouldn't
25 call you back?

1 A For the most part

2 Q You indicated that there was also some trouble
3 getting materials delivered to the site, isn't that
4 correct?

5 A That's correct

6 Q Were those problems addressed with Mr Aten or
7 Mr Green?

8 A They were

9 Q Would that often hold you up?

10 A For weeks

11 Q Did you have the capability of going to Mr
12 Green and asking to get those materials yourself?

13 A When he was available

14 Q Did you have any contact with the materials
15 suppliers yourself?

16 A Only just to find out information on product

17 Q If the wrong materials were delivered to the
18 project, would you use them?

19 A Not if they were so drastically wrong that they
20 were supposed to be red and they were purple But, I
21 mean, I was told to do what I was told to do

22 Q With regard to the scope of work that is
23 outlined in the proposal or the contract with R Design,
24 that Mr Griffith mentioned earlier, did R Design assist
25 you with regards to your scope of work? Physically, did

1 Q Okay Did you take responsibility to ensure
2 that that was done correctly?

3 A To the best of my ability

4 Q You would acknowledge that you have a contract
5 with R Design, correct?

6 A That's correct

7 Q And who drafted that contract?

8 A My wife

9 Q Okay You failed to complete the job that the
10 contract required you to perform, correct?

11 A Because I was terminated

12 Q You acknowledge that any of the deficiencies
13 that have been outlined throughout the course of this week
14 were your responsibility as the framing and the block
15 subcontractor?

16 A There was a lot of incomplete work

17 Q But no deficiencies on your part?

18 A I -- if there was a deficiency, you know, show
19 it to me in a picture and I would -- I can answer that

20 Q Okay It seems that you have been quick to
21 indicate that R Design was the reason for a lot of the
22 problems on this job that relate to your scope of work
23 Is that an accurate statement?

24 A There was a lot of -- for the most part, yes

25 Q Okay But you were actually hired to complete

1 MR BENDLE I'll ask the question again

2 THE COURT Go ahead

3 Q [Mr Bendle] Under your specialty contractor's
4 license, aren't you obligated to follow the building
5 codes --

6 A Correct

7 Q Industry standard? Okay

8 So when a directive, as you indicated earlier,
9 was issued by general -- the general contractor, R
10 Design, would you implement those changes if they were not
11 in accordance with industry standard, the specs, the
12 designs, or if they were in violation of any kind of code?

13 A No

14 MR BENDLE Okay That's all I have for now,
15 Your Honor Thank you

16 THE COURT Mitch?

17 MR GRIFFITH I just want to make sure -- clear
18 up one thing Or maybe two things

19 RECROSS-EXAMINATION

20 BY MR GRIFFITH

21 Q You talked about when you were fired You said,
22 he told me not to come back That was Carl that told you
23 not to come back, not Dennis, correct?

24 A That's correct

25 Q All right And, now, with regards to that

1 specialty contractor's license you hold a specialty
2 contractor's license, is that correct?

3 A Correct

4 Q As a framer, correct?

5 A Correct

6 Q As a specialty contractor you can't take a job,
7 if it exceeds \$5,000, without that specialty contractor's
8 license, can you?

9 A I have no earthly idea

10 Q You can't go out and actually do work as a
11 framer without that license --

12 A Okay

13 Q -- correct?

14 A Correct

15 Q And Catterson and Sons, your license hangs with
16 that business, is that correct?

17 A Correct

18 Q All right So without that license, Catterson
19 and Sons couldn't go do the work?

20 A Correct

21 Q And I believe -- I may not have asked you But
22 I understand you actually -- you do have a general
23 contractor's license, don't you?

24 A That's correct

25 Q And did you have that in 2004?

1 MOTION FOR A DIRECTED VERDICT

2 MR BENDLE Judge, I do have one motion It's
3 a motion for a directed verdict

4 The basis for the motion is that Carl Aten was
5 the managing member of R Design, who contracted with
6 the plaintiff in this case to supervise and act as the
7 general contractor over Jade Quarters There has been
8 no evidence entered into the record that would indicate
9 that at any time he acted outside of the course and
10 scope of his role as that managing member

11 If I may approach the bench, Your Honor, I do
12 have --

13 THE COURT Yes, sir

14 MR BENDLE -- a memorandum in support of this
15 motion, for your consideration

16 [Whereupon, Mr Bendle proffers documents to the
17 Court]

18 THE COURT Thank you

19 MR BENDLE Your Honor, if I may continue?

20 The basis of this motion lies within the Uniform
21 Limited Liability Company Act Specifically, Your
22 Honor, I'm relying on Section 33-44-201 of that code
23 that indicates that a limited liability company is a
24 legal entity distinct from its members The comment
25 section in that code, Judge, is that members are not

1 proper parties to suits against the company unless an
2 object of the proceeding is to enforce a member's
3 rights against the company or to enforce their
4 liability to the company

5 Further, Your Honor, I'm relying on the portion
6 of the code in Section 33-44-302 which indicates that
7 an LLC is liable for loss or injury caused to a person
8 or for a penalty incurred as a result of a wrongful act
9 or omission, or other actionable conduct of the member
10 or manager acting in the ordinary course of business of
11 the company or with authority of the company

12 This section, Your Honor, specifically protects
13 the individual so long as they act within that course
14 and scope of their role as a member or a managing
15 member

16 Further, Your Honor, I'm relying on another
17 portion of the same act, Section 33-44-303, which
18 indicates that a member or a manager is not personally
19 liable for a debt, obligation, or liability of the
20 company solely by reason of being or acting as a member
21 or a manager

22 Again, Your Honor, the plaintiff in their case
23 has failed to demonstrate that Mr Aten consented to
24 being held personally liable for the LLC or that he
25 acted outside the scope of the ordinary course of

1 business

2 This motion, Your Honor, has been brought before
3 in the form of a summary judgment Arguments that have
4 been made on the plaintiff's behalf basically reference
5 sections of the code of the Uniform Residential
6 Construction Code And in the past they have argued
7 that because Mr Aten individually had to pull the
8 license -- or had the license for the LLC, and that he
9 actually was the individual that pulled the permit,
10 that he has a certain professional responsibility owed
11 and that he could be held liable by virtue of having
12 held that license for the firm However, if you read
13 that portion of the code on which they rely, that act
14 clearly contemplates the fact that firms can engage in
15 the business of construction practices and it clearly
16 contemplates an individual, rather than a firm, having
17 to pull the permit and having to hold that license
18 Obviously, a firm can't go take the test to get the
19 license Obviously, a firm can't go to the County and
20 pull the necessary permits to begin the construction

21 The professional responsibility that this
22 qualified registrant has under that Residential
23 Construction Act is to the commission that issues the
24 license And it's also an obligation to the actual LLC
25 of which that individual is a member of

1 We certainly aren't arguing that that individual
2 license holder does not have a responsibility to
3 construct, in a workmanlike manner, that which they are
4 hired to construct We're just merely saying that so
5 long as that managing member does not act outside of
6 the course and scope of that role, that it's the firm
7 who assumes those debts and obligations, not that
8 individual member

9 So for that reason, along with the memo that
10 I've handed up to you, I would ask that Carl Aten be
11 dismissed as an individual for the remaining causes of
12 action against him, which would include the breach of
13 warranty action and the negligence action Thank you,
14 Your Honor

15 THE COURT Do you want to respond, Mr
16 Griffith?

17 MR GRIFFITH Yes, ma'am

18 I anticipate this argument also coming from
19 Catterson and Sons And I would take up this -- first
20 of all, the general law of agency is that when the
21 agent must answer not in contract, but in tort, an
22 agent's liability for his own tortuous acts and
23 unaffected by the fact that he acted in his
24 representative capacity As such, there is evidence
25 that Mr Aten acted on this property, that he was the

1 person in charge, and I believe even in admission he is
2 the responsible charge As such, what he is doing is
3 he is having to act in his own capacity

4 Further, by being the responsible charge, that
5 he is also the resident licensee Holding that
6 license, he has taken a test and gone to the Commission
7 and basically said, I will build in accordance with the
8 good building practices and the codes As such, as the
9 license holder, he is the person that is responsible to
10 ensure that this building is built in accordance with
11 the code and in accordance with good industry practice
12 And as such, we believe that that basically takes him
13 to the point where he has committed a tort, because he
14 has violated a duty of care to 16 Jade Street

15 And that would be my response to those
16 arguments

17 THE COURT Okay Respectfully -- and, Mr
18 Griffith, I would agree with you I think we can all
19 find that Carl Aten -- and I even believe it was by
20 stipulation from his counsel, Mr Bendle, that he, in
21 fact, did act as the general contractor and he used --
22 Mr Aten used his license to pull the building permits
23 I think he testified that he oversaw the daily
24 construction and was responsible, and ultimately
25 responsible for the subs, and that he interacted I

1 think he said with building officials

2 So, respectfully, I'm going to deny your motion
3 to dismiss him individually

4 MR BENDLE Your Honor, if I may just --

5 THE COURT Yes, sir

6 MR BENDLE -- for the record --

7 THE COURT Yes, sir

8 MR BENDLE -- respond to Mr Griffith

9 He indicates that the actions that were taken by
10 Mr Aten, I guess the implication being, again, that he
11 was acting individually and as the license holder for
12 the company I would just reassert that any actions,
13 whether dealing with other subs or engineers or anyone
14 that was involved in this project, was done on behalf
15 of the company, not himself, as evidenced in the
16 contract The contract, of course, was with R Design,
17 not with him personally And I believe that all the
18 actions of the plaintiff indicate that they had full
19 knowledge that they were dealing not with Aten as an
20 individual, or even as an agent, but certainly with
21 R Design

22 THE COURT But it's also correct that without
23 Mr Aten's license, R Design could not build this
24 project

25 MR BENDLE Correct

1 THE COURT Correct?

2 MR BENDLE I would agree with that However,
3 to that, Your Honor, I would say that the statutes that
4 we're arguing today clearly contemplate that an LLC,
5 being defined within -- being defined as a firm, can
6 engage in these types of construction practices

7 THE COURT Okay

8 MR BENDLE Thank you, Judge That's all I
9 have I appreciate it

10 THE COURT Thank you, Mr Bendle I appreciate
11 it

12 Mr Finn?

13 MR FINN Your Honor, could I request that we
14 take just a two-minute break? I have something to
15 discuss with Mitch that I need to do it now before --

16 THE COURT Absolutely We'll go ahead and take
17 about five minutes, y'all

18 Mitch, when y'all are -- Tom, either one of
19 y'all just come get me when y'all are finished and
20 you're ready to go Okay?

21 [Whereupon, a recess is taken from 12 31 p m to
22 12 40 p m]

23 THE COURT I don't need to hear from Mr Finn
24 I just need Mr Ross

25 MR FINN Not yet, Your Honor

1 should survive

2 THE COURT Okay

3 MR FINN Your Honor, I would make the same
4 argument on behalf of Catterson and Sons

5 THE COURT Okay And again, Mr Bendle, you
6 would agree and stipulate that as far as the company is
7 concerned, as well?

8 MR BENDLE I would, Your Honor

9 THE COURT Okay So, again, we'll just clean
10 up the pleadings just to only allow surviving under the
11 cross-claim, the equitable indemnity claim Okay?

12 - - - - -

13 MOTION

14 MR BENDLE Your Honor, if I may address one
15 more thing I would be remiss if I didn't join in in
16 Mr Ross's motion with regard to the warranty claim --
17 there's one still that exists, I believe, as to Mr
18 Aten, individually -- for the same reasons I believe
19 that the warranty cause of action against Aten
20 individually needs to dismiss The contract, again,
21 Judge, was between R Design --

22 THE COURT R Design and --

23 MR BENDLE -- and 16 Jade Street Yes, ma'am
24 And all of the warranties that -- or all the warranties
25 are included within that contract The warranties were

1 given by the LLC, not by Mr Aten individually, and
2 there's been no testimony offered that any implied
3 warranties or other warranties that were created
4 outside of that -- if any existed outside of that
5 contract

6 THE COURT You still have the same agency
7 argument as far as Mr Aten was concerned, because he
8 was privity of the contract with Mr Green, correct?

9 MR GRIFFITH Sure And, as well, I think that
10 definitely an implied warranty arises out of any
11 building, to the owner, even if I'm not the first
12 owner

13 THE COURT All right Respectfully --

14 MR FINN Your Honor, if I could just --

15 THE COURT Well, let me just for the record,
16 Mr Finn --

17 Respectfully, I deny your motion, Mr Bendle, as
18 to Mr Aten personally as to that claim

19 Yes?

20 MR FINN I'm sorry, Your Honor I just wanted
21 to clarify I think I just threw in with Jeff But I
22 believe that Mr Bendle would have -- his breach of
23 contract cross-claim would also survive I just -- I
24 didn't want to lump that in and have Tab not --

25 THE COURT The breach of contract claim?

1 through?

2 THE COURT For the record

3 MR ROSS No, we're not, Your Honor

4 THE COURT Obviously, we need some motions

5 MR ROSS Yes, Your Honor

6 MR GRIFFITH I didn't know if we had more
7 testimony That's fine

8 MR ROSS I rest, Your Honor

9 THE COURT Thank you, Mr Ross

10 - - - - -

11 RENEWED MOTIONS

12 THE COURT Any motions?

13 MR BENDLE Your Honor, I do have a couple just
14 very briefly, because they have been heard What I
15 would like for the Court --

16 THE COURT You don't even need to be brief, if
17 you want

18 MR BENDLE -- to consider is just to renew my
19 motions that I brought earlier at the end of
20 plaintiff's case, the first being the breach of
21 warranty claim as to my client individually

22 Again, I would submit to the Court that the
23 contract lays out what the scope of work was for
24 R Design, not Aten individually The contract was
25 created from that scope of work, from which the

1 warranties flowed Those warranties are created,
2 specifically in that contract Any implied warranties
3 outside of what's in the contract were warranties that
4 had to be honored by R Design, who was the entity that
5 contracted to do this work

6 So I would renew that -- along those lines, I
7 would renew that motion and ask that the Court dismiss
8 the breach of warranty claims as against my guy
9 individually I do concede that they would exist as to
10 R Design, LLC

11 THE COURT Mr Griffith?

12 MR GRIFFITH Judge, I made that argument just
13 a minute ago, a few hours ago I would stand by my
14 argument at that time, and I believe that Your Honor's
15 ruling was correct There has been no new evidence to
16 change your prior ruling

17 THE COURT Okay It stays the same My ruling
18 remains the same, based on the same grounds as
19 previous

20 MR BENDLE The second motion, and what I would
21 consider to be the most important, Your Honor, is with
22 regard to the individual liability of my client, Carl
23 Aten, as a member-manager of the LLC

24 Again, I would renew what I said earlier with
25 regard to my reliance on the Uniform Liability Company

1 Act and the sections of that that discuss protections
2 afforded to managing members so long as they don't act
3 outside of the scope of their role as a managing
4 member And I would conceded that any arguments that
5 are made under any separate code sections, inclusive of
6 the Residential Builders Act, would not necessarily
7 trump the statute, the Limited Liability Company Act
8 statute, with regard to those protections afforded to
9 the individuals within that

10 THE COURT Okay Respectfully, I deny that
11 motion, again, based on the same earlier grounds as
12 before

13 MR BENDLE Thank you, Your Honor

14 THE COURT Absolutely Mr Ross?

15 MR ROSS Your Honor, I would like to renew my
16 earlier motions for the same reasons I don't think I
17 need to go through the testimony again I just
18 reiterate what I've said earlier

19 THE COURT Okay

20 MR ROSS I also do have an additional motion,
21 Your Honor

22 THE COURT Okay Well, let's go ahead And,
23 obviously, I deny those based on --

24 Stay standing You're good

25 I deny those based, on my earlier rulings and on

THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE UNIFORM ARBITRATION ACT AS ADOPTED BY THE STATE OF SOUTH CAROLINA IN CODE OF LAWS Title 15, SECTIONS 48 ET SEQ.

STATE OF SOUTH CAROLINA) CONTRACT FOR THE SUPERVISION OF
COUNTY OF BEAUFORT) CONSTRUCTION
OF A MULTI-FAMILY DWELLING

THIS CONTRACT FOR SUPERVISION OF CONSTRUCTION OF A TWO (2) STORY FOUR (4) FAMILY, CONDOMINIUM RESIDENCE ("Contract") dated this 27 day of July 2004, by and between R DESIGN CONSTRUCTION COMPANY, L L C , a South Carolina Limited Liability Company ('Contractor) and 16 JADE STREET, LLC, a South Carolina Limited Liability Company ("Owner")

WHEREAS, Contractor is offering its construction supervision services to Owner with regard to the construction of a four (4) family condominium residence and Owner is desirous of employing Contractor to supervise the construction of such residence, and

WHEREAS, it is the mutual desire of the parties to enter into an agreement for the supervision of construction upon the terms and conditions as set forth herein

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy whereof is herewith acknowledged, the Parties agree to the following terms and conditions

1 **Incorporation of Clauses** The above "WHEREAS" clauses are incorporated herein and made an integral part hereof,

2 **Construction** Contractor herewith agrees to supervise the construction for Owner of a four (4) family Condominium residence on Owner's lot, said lot shown and described as Lot 19 Celadon 16 Jade Street, Lady s Island, Beaufort County South Carolina Such construction to be completed in conformity with the plans and specifications attached hereto as Exhibits 'A" and 'B' such Exhibits incorporated herein by this reference thereto All plans and specifications shall be approved by Owner and Contractor by having the Parties hereto sign and initial each page of such documentation

3 **Time of Commencement and Substantial Completion** The work to be performed under this Contract shall be commenced not later than the 27 day of July , 2004, and, subject to

written and authorized adjustments substantial completion of the work to be performed hereunder shall be completed on or about twenty (20) months from the start of land clearing

4 **Contract Sum** Owner herewith covenants and agrees to pay to Contractor for disbursement in current funds for the performance of the work subject to additions and deductions evidenced by written change orders signed by both parties, the total contract sum of One Hundred Fifty Thousand and No/100 Dollars (\$150,000 00), due and payable as follows

A deposit equal to five percent (5%) of the total contract price in the amount of Seventy-Five Hundred Dollars (\$7 500 00) shall be due and payable upon execution of this Contract All payments should be made payable to R Design Construction Company L L C

Draw Schedule The remaining 95% of the contract price One Hundred Forty-Two Thousand Five Hundred and No/100 Dollars (\$142,500 00) will due and payable on the following schedule

SEE SCHEDULE A

Payments shall be due and payable upon satisfactory completion of the prior building phase, unless funds are to be paid from Lender draws that specify differently Payments due and unpaid pursuant to the draw schedule as outlined above shall bear interest from the date payment is due at the rate of Six percent (6 %) per annum

Such payments are due after receipt of draw request, and upon approval by the Lender

5 **Selection / Recommendation of Subcontractors.** For major work items, Contractor shall when feasible solicit bids from three (3) licensed (if applicable) and reputable sub-contractors and shall make a recommendation to Owner Neither Contractor nor Owner shall be obligated to recommend or accept the lowest or other submitted bid(s) The bids of the selected subcontractor (through approved subcontractors or otherwise) shall be input into a draft budget by Contractor, which budget shall be approved and initialed by Owner Owner and Contractor agree and acknowledge that any said budget is an estimate or projection only and that Contractor shall not be held accountable in the event Owner- approved actual costs exceed budgeted costs

6 **Punch List.** Contractor does herewith covenant and agree to complete all punch list items within thirty (30) days from the issuance of a Certificate of Occupancy as referenced herein

7 **Change Orders** All additions or deletions for work to be performed hereunder shall be evidenced by written change orders, signed by both Contractor and Owner. All charges for work undertaken by such change orders shall be due and payable upon execution of the work called for by such change order in accordance with Lender's Draw Schedule. "Change Orders" do not include requirements imposed by the Celadon Design Code that were mistakenly not covered by the Contractor, and will be done during the construction for no additional compensation or reimbursement by the Owner. The compensation for a change order shall be based on the actual cost thereof, with specific overhead as agreed by the Contractor and the Owner.

8 **Contract Documents** The contract documents ("Documents") consist of this contract and plans and specifications and schedules.

9 **Contractor's Responsibilities** Contractor shall supervise and direct all construction work, using its best skill and attention, and shall be solely responsible for all construction means, methods, techniques, consequences and procedures and for coordinating all portions of the work required under this Contract. Contractor shall be paid for non-supervisory construction work performed at standard rates which payment shall be in addition to the supervision fee of \$150,000.00.

Unless otherwise specifically provided in the Documents, Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for the proper execution and completion of the work required hereunder, whether temporary or permanent, and whether or not otherwise incorporated or to be incorporated in the work required, but which is necessary for the Contractor to complete the work and which have been approved in advance by the Owner. **Owner shall reimburse Contractor for all such costs.** All draw requests for reimbursable costs will be made on the basis specified by the Bank as Lender. Contractor shall pay all proper sales, consumer, use and similar taxes and include them in invoices of costs presented to the Owner. Contractor shall secure and initially pay for the building permit, impact fees and for all other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the work, specifically including Celadon Design Review Board.

approvals permits and deposits, and include them in the invoices of costs presented to the Owner

Contractor shall give all notices and comply with all laws ordinances, rules, regulations and lawful orders of any public authority for the performance of the work to be performed hereunder and shall promptly notify Owner of any variance therewith Contractor shall be responsible to Owner and indemnify and hold the Owner harmless for the acts or omissions of its employees subcontractors and their agents and employees and other persons performing any of the work under a contract with Contractor

Contractor and his employees, will at all times conduct themselves in accordance with the Celadon Neighborhood Association, Inc rules and regulations Contractor at all times shall keep the premises free from accumulation of waste materials or rubbish caused by its operations At the completion of the work, Contractor shall remove all waste materials and rubbish from and about the project as well as its tools, construction equipment, machinery and surplus materials

10 Insurance. Contractor's liability insurance shall be purchased and maintained by Contractor to protect it from claims under worker's compensation acts or other employee benefit acts, claims for damages because of bodily injury including death and from claims for damages, other than to the residence itself to property which may arise out of or result from Contractor's operations under this Contract, whether such operations be by itself or any subcontractor or anyone directly or indirectly employed by any of them This insurance shall be written for not less than any limits of liability specified in the Documents or required by law, whichever is the greater, and shall include contractual liability insurance applicable to Contractor's obligations hereunder Contractor shall provide Owner with a copy of its liability insurance policy **BEFORE BEGINNING CONSTRUCTION**

11 Builder's Risk Insurance. Contractor shall be responsible for purchasing and maintaining Builders Risk insurance obtaining and maintaining, **with reimbursement from the Owner** This insurance shall include the interest of Owner, Contractor, subcontractors and shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss or damage including without duplication of coverage, theft, vandalism and malicious mischief, fire flood, wind and hail **ANY INSURED LOSS IS TO BE ADJUSTED WITH**

OWNER AND MADE PAYABLE TO OWNER AS TRUSTEE FOR THE INSURED AS THEIR INTERESTS MAY APPEAR THE COST OF THE PROPERTY INSURANCE SHALL BE SUBMITTED TO THE OWNER AS AN EXPENSE THE INSURANCE WILL BE BOUND AS TO COINCIDE WITH ALL CONSTRUCTION LOAN PROCEDURES Contractor shall provide Owner with a copy of the Builder's Risk insurance policy **BEFORE BEGINNING CONSTRUCTION** Owner at its option may maintain such additional insurance to protect Owner against claims which may arise from operations under the Contract

12 **Certificate of Occupancy.** Contractor, upon completion of the work as referenced herein and upon payment by Owner to Contractor of all sums due pursuant to Paragraph 4 hereof, including all change orders, shall deliver to Owner a Certificate of Occupancy issued by the Beaufort County, South Carolina, Department of Inspections

13 **Warranty** Contractor herewith warrants, for a period of one (1) year from the date of issuance of the Certificate of Occupancy for the residence referenced herein, to correct any and all defects occasioned by Contractor's work performed hereunder Such one (1) year warranty shall not extend and will not cover the separate warranties issued by the manufacturers of the heating and air conditioning system all appliances and any other systems or equipment that carry a separate manufacturer's warranty All such corrections made hereunder by Contractor pursuant to this warranty shall be undertaken at the sole cost and expense of Contractor Nothing in this Paragraph shall be construed to reduce or remove any liability of the Contractor under the applicable rights of an Owner for recovery for defects under the applicable statutes of limitations under South Carolina law

14 **Default.** Should either Party default under any of the terms or provisions hereunder the non-defaulting party, after seven (7) days written notice to the defaulting Party and without prejudice to any other remedy the non-defaulting Party may have, may then terminate this Contract and submit the matter to arbitration as provided in Paragraph 15 below

15 **Disputes and Arbitration** For any and all disputes (including unaccepted claims) and controversies that may arise under or regarding this Agreement, if the Parties cannot resolve it among themselves, they may agree to mediation, and in any event, all disputes and controversies under this Agreement are subject to and will be exclusively and irrevocably resolved by

arbitration under the Uniform Arbitration Act as adopted by the State of South Carolina

16 **Owner Responsibilities** Owner herewith covenants and agrees to submit all change orders color selections and other actions required by Owner hereunder in a timely and responsive manner

17. **Severability** If any part of this Agreement is found invalid or unenforceable for any reason, the remainder hereof will remain in full force and effect.

18 **Miscellaneous**

a This Contract shall be constructed and interpreted in conformity with the laws of the State of South Carolina.

b This Contract shall inure to the benefit of and be binding upon the respective Parties hereto, their heirs successors and assigns

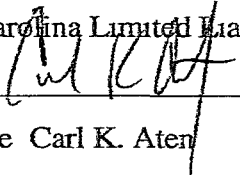
IN WITNESS WHEREOF, the respective Parties hereto have placed their hands and seals as of the day and year first above written

Signed, sealed and delivered in the presence of

CONTRACTOR

R. DESIGN CONSTRUCTION COMPANY, L L C ,

a South Carolina Limited Liability Company

By 

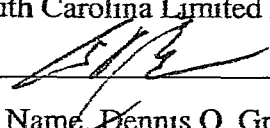
Print Name Carl K. Aten

Its Authorized Member

OWNER or Representative

16 JADE STREET, LLC,

a South Carolina Limited Liability Company

By 

Print Name, Dennis O Green

Its Manager

Owner s Address 14 Celadon Drive, Suite B, Beaufort, SC 29907 telephone number 525-9995

SCHEDULE A

DRAW SCHEDULE

CONTRACT SUM \$150,000 00

DEPOSIT	5%	\$7,500
CLEARING, FOUNDATION, SLAB	10%	\$15,000
EXTERIOR WALLS FRAMING ROOF FRAMING, EXTERIOR WINDOWS AND DOORS SET	22%	\$33 000
ROUGH MECHANICAL PLUMBING HVAC, ELECTRICAL	8%	\$12,000
ROOF	3%	\$4 500
EXTERIOR FINISH	6%	\$9 000
INSULATION	1%	\$1,500
DRYWALL	6%	\$9,000
BATH TILE	3%	\$4,500
INTERIOR TRIM	4%	\$6,000
INTERIOR PAINT	1%	\$1,500
EXTERIOR TRIM	3%	\$4,500
CABINETS VANITIES AND TOPS	6%	\$9,000

INTERIOR AND EXTERIOR PAINT FINISH	3%	\$4 500
HARDWARE	1%	\$1,500
PLUMBING FIXTURES SET	3%	\$4,500
HVAC TRIMMED AND SET	3%	\$4,500
DECORATIVE LIGHTING	2%	\$3,000
FINISH FLOORING	4%	\$6,000
APPLIANCES	2%	\$3,000
WALKS ANDS PADS	1%	\$1,500
SEWER WATER AND LANDSCAPING	2%	\$3,000
PUNCH COMPLETE	1%	<u>\$1,500</u>
TOTAL	100%	<u>\$150000</u>

**CATTERSON & SONS
CONSTRUCTION, INC**
48 COURTNEY LANE
RIDGELAND, SC 29936
368-6878 726-9592 368-6868

8/6/04

PROPOSAL SUBMITTED TO

WORK TO BE PERFORMED AT
LOT 19, CELADON
BEAUFORT, SC

WE HEREBY PROPOSE TO PERFORM THE LABOR NECESSARY FOR THE COMPLETION OF

- 1 FRAME ACCORDING TO PLAN
- 2 FELT ROOF
- 3 TYVEK
- 4 SET EXTERIOR WINDOWS & DOORS (NO SLIDERS & NO MULLING UNITS)
- 5 DECKING & STAIRS

*****JOB SITE WILL BE CLEANED OF THE DAY'S SCRAP WOOD
MON-THU AND THE JOB SITE WILL BE BROOM SWEEPED AND LUMBER
PILES COVERED ON FRIDAY *****
*****PLEASE PROVIDE SMALL TRASH CAN FOR LUNCH TRASH*****

ABOVE WORK TO BE PERFORMED IN ACCORDANCE WITH THE DRAWINGS AND SPECIFICATIONS
SUBMITTED FOR ABOVE WORK AND COMPLETED IN A SUBSTANTIAL WORKMANLIKE MANNER FOR

THE SUM OF \$65,000 00-framing
\$32,500 00 exterior siding & trim
\$36,000 00 acc block & floor panels

WITH PAYMENTS AS FOLLOWS
WEEKLY DRAWS TO BE SUBMITTED BY MIKE

RESPECTFULLY SUBMITTED
PER CATTERSON & SONS CONSTRUCTION, INC

NOTE - THIS PROPOSAL MAY BE WITHDRAWN BY US IF NOT ACCEPTED WITHIN 10 DAYS

ACCEPTANCE OF PROPOSAL

THE ABOVE PRICES SPECIFICATIONS AND CONDITIONS ARE SATISFACTORY
AND ARE HEREBY ACCEPTED YOU ARE AUTHORIZED TO DO THE WORK AS
SPECIFIED PAYMENTS WILL BE MADE AS OUTLINED ABOVE

DATE 8/6/04

SIGNATURE _____

SIGNATURE _____

000091

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen

Civil Action No. 06-CP-07-866

16 Jade Street, LLC

Respondent/Appellant,

vs

R Design Construction Co., LLC and Carl R. Aten, Jr., Individually and in his capacity as principal and agent of R Design Construction Co., LLC, Catterson & Sons Construction and Michael S. Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction,

Of Whom

Carl R. Aten, Jr. is

Appellant/Respondent,

And

Michael S. Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction is

Respondent

R Design Construction Co., LLC and Carl R. Aten, Jr.

Third Party Plaintiffs

Kintz Electric

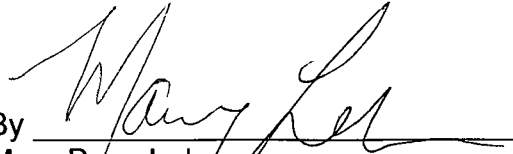
Third Party Defendant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal complies with Rule 211 (b), SCACR

000092

HOWELL GIBSON & HUGHES, P A

By 

Mary Bass Lohr
Thomas A Bendle, Jr
Williams T Young, III
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorney for Appellant/Respondent
Carl R Aten, Jr

October 19, 2010

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T Mullen

Civil Action No 06-CP-07-866

RECEIVED
NOV 05 2010
SC Court of Appeals

16 Jade Street, LLC

Respondent/Appellant,

vs

R Design Construction Co , LLC and Carl R Aten, Jr , Individually and in his capacity as principal and agent of R Design Construction Co , LLC, Catterson & Sons Construction and Michael S Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction,

Of Whom

Carl R Aten Jr is

Appellant/Respondent,

And

Michael S Catterson, Individually and in his capacity as principal and agent of
Catterson & Sons Construction is Respondent,

R Design Construction Co, LLC and Carl R Aten, Jr

Third Party Plaintiffs,

Kintz Electric

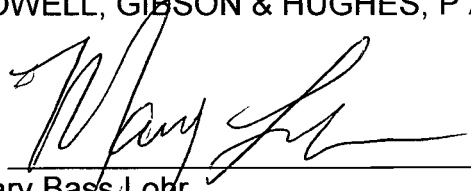
Third Party Defendant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Record on Appeal has been reviewed
and redacted (where necessary) and complies with the Supreme Court's
Order of August 13, 2007

000094

HOWELL, GIBSON & HUGHES, P A

By 

Mary Bass Lohr

Thomas A Bendle, Jr

William T Young, III

Post Office Box 40

Beaufort, SC 29901

(843) 522-2400

Attorney for Appellant/Respondent

Carl R Aten, Jr

October 19, 2010

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Of Whom

Carl R Aten Jr is

Appellant/Respondent,

And

Michael S Catterson, Individually and in his capacity as principal and agent of Catterson & Sons Construction is

Respondent,

R Design Construction Co LLC and Carl R Aten, Jr

Third Party Plaintiffs,

Kintz Electric

Third Party Defendant

CERTIFICATE OF MAILING

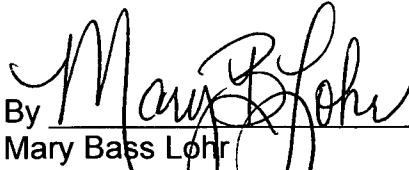
The undersigned counsel hereby certifies that she has served the foregoing Record on Appeal upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 4th day of November, 2010 addressed to the following

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HOWELL, GIBSON & HUGHES, P A

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Beaufort, South Carolina