

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

SC Court of Appeals

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No: 2013-001403

Stoneledge At Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessie B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, Individually and on Behalf of All others similarly situated, Plaintiffs

IMK Development, Co., LLC Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., Southern Basements, Inc., MJG Construction and Homebuilders, Inc., d/b/a MJG Construction, KMAC, Inc., d/b/a KMAC North Carolina, Eufacion Garcia, Everado jarmamillio, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, Miller/Pläyer & Associates, Defendants

Of whom Marick Home Builders, LLC, and Rick Thoennes are the Appellants,

And Clear View Construction, LLC, and Michael Franz are Respondents.

Bostic Construction, Inc., Third Party Plaintiffs,

v.

Southern Stone, Inc. and Buck Smith Construction, Third Party Defendants.

RECORD ON APPEAL
Volume II of II

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INDEX

Volume I

Order Granting Defendants Clear View Construction, LLC and Michael Franz's Motion for Summary Judgment as to The Cross-Claims of Marick Home Builders, LLC for Negligence and Equitable Indemnification.....	1
Order Granting Summary Judgment to Defendants Builders FirstSource—Southeast Group, LLC, Southern Concrete Specialties, Inc., ClearView Construction, LLC, and Michael Franz as to the Cross Claims of Marick Home Builders, LLC for Breach of Contract and Breach of Warranty..	11
Order Denying Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for Reconsideration and to Alter Judgment.....	22
Summons and Third Party Complaint of Stoneledge at Lake Keowee Owners' Association, Inc.....	27
Summons as to the Cross Claim and Marick Home Builders, LLC and Rick Thoennes' Answer to Plaintiffs' Third Amended Complaint and Cross-Claims against Defendants.....	55
Defendants Clear View Construction, LLC and Michael Franz's Answer to Plaintiffs' Third Amended Complaint.....	94
Transcript of Proceedings for Hearings for Motions for Summary Judgment dated September 5, 2012.....	108

Volume II

Transcript of Proceedings for Hearing dated April 10, 2013.....	325
Deposition Transcript of Frederick (Rick) R. Thoennes dated November 21, 2011 (pages 30-31, 36, 131-132, 176-177, 224-225, and 244).....	462
Deposition Transcript of Derek Hodgin (Day 2) dated January 24, 2012 (pages 81- 83, 87-89, 91-92, 96-97, 105-109, 123-124, 126-127, 133, 153, and 165-167).....	473
Deposition Transcript of Nathan Hornaday dated March 30, 2012 (pages18-20).....	498
Deposition Transcript of Randy Still dated August 15, 2012 (pages 84-85, 87, 89, 169-170, 172, and 174).....	502

Deposition Transcript of J. Drew Wilkie dated August 16, 2012 (pages 153, 165-168, and 205-206).....	511
Defendants Clear View Construction, LLC and Michael Franz’s Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....	519
Defendants Clear View Construction, LLC and Michael Franz’s Brief in Support of Motion for Summary Judgment as to the Cross Claims of Marick Home Builders, LLC and Rick Thoennes.....	527
Defendant Builders FirstSource—Southeast Group, LLC’s Memorandum of Law in Support of Its Motion for Judgment as a Matter of Law as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....	580
Marick Home Builders, LLC and Rick Thoennes’ Memorandum in Opposition to Upstate Utilities, Hutch N Son Construction, Miller/Player & Associates, Clearview Construction, Builders FirstSource—Southeast Group, Carl Catoe Construction, TG Construction, Alejandro Cruz, Heriberto Arcos Hernandez, Martin Hernandez-Aviles, Socorro Castillo Montel, KMAC, Inc., Jose Nino, and Vincent Morales d/b/a Morales Masonry’s Motion for Summary Judgment.....	592
Defendants Marick Home Builders, LLC and Rick Thoennes’ Motion for Reconsideration and to Alter Judgment.....	635
Marick Home Builders, LLC and Rick Thoennes’ Memorandum in Support of the S.C.R.C.P 59(e) Motion as to the Clear View Construction and Michael Franz.....	643
Defendants Clear View Construction, LLC and Michael Franz’s Brief in Opposition to Marick Home Builders and Rick Thoennes’ SCRC.P 59(e) Motion to Reconsider and Alter Judgment...	738
Memorandum in Opposition to Marick Home Builders, LLC’s Motion for Summary Judgment in Further Support of Builders First Source Southeast Group, Southern Concrete Specialties, Inc., and Clear View Construction, LLC’s Motion for Summary Judgment as to the Cross Claims of Marick Home Builders, LLC for Breach of Contract.....	747
Memorandum in Support of Carl Catoe Construction, Inc.’s Motion to Dismiss as to Marick Home Builders’ Claims.....	766
Contract between Marick Home Builders, LLC and Clear View Construction.....	803
Certificate of Counsel.....	805

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	2009-CP-37-00652
STONELEDGE AT LAKE KEOWEE	)	
OWNERS' ASSOCIATION, INC.,	)	
ET AL.	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
	)	(ORIGINAL)
IMK DEVELOPMENT CO., LLC,	)	
ET AL.,	)	
	)	
DEFENDANTS.	)	

APRIL 10, 2013
WALHALLA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.

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VIVIAN H. CROSS
OFFICIAL COURT REPORTER

APRIL 10, 2013
(STONELEDGE LITIGATION)
(MOTIONS HEARING)
(CASE NO. 2009-CP-37-00652)
(PAGE 1 OF 2)

PAGE
3

PRE-MOTIONS COLLOQUY

MR. LYLES
MR. DUNAWAY
MR. ALBERGOTTI
MR. TATE
MR. HARJEHAUSEN
MR. BUILDER
MR. IMHOFF

1ST, 3RD, AND 5TH MOTIONS:

MR. IMHOFF
MR. ROOT
MR. TATE
MR. SMITH
MR. WARD
MR. BUILDER
MR. MEBANE

4TH MOTION:

MS. MURPH
MR. IMHOFF
MR. LYLES

7TH, 8TH, 20TH, 22ND MOTIONS:

MR. BELCHER
MR. MARTIN
MR. WOODS
MR. YOKEL
MR. POTEAT
MR. RIVERA

10TH MOTION:

MR. IMHOFF
MR. LYLES
MR. BELCHER

13TH MOTION:

MR. HARJEHAUSEN

14TH MOTION:

MR. TATE

27

45

58

97

110

112

APRIL 10, 2013
(STONELEDGE LITIGATION)
(MOTIONS HEARING)
(CASE NO. 2009-CP-37-00652)
(PAGE 2 OF 2)

<u>15TH MOTION:</u>	113
MR. LYLES	
<u>16TH MOTION:</u>	116
MR. HEMPHILL	
MR. LYLES	
CERTIFICATE OF REPORTER	134

E X H I B I T S

IDENTIFICATION

ENTERED PG.

*****NO EXHIBITS OFFERED*****

P R O C E E D I N G S

(APRIL 10, 2013 - 10:22 A.M.)

(CASE NUMBER: 2009-CP-37-00652)

1
2
3
4 THE COURT: Good morning, ladies and gentlemen. We, uh,
5 have a lot to do today. Also, um, inasmuch as it's been some
6 time since we got together and we have a new court reporter,
7 uh, at least for today, uh, I would request that, uh, as
8 you're, uh, being heard if you would introduce yourself and
9 your, uh, party, uh, for the record so that, uh, it'd be
10 clear on that, um -- in that regard.

11 All right, um, as I understand it, Madam Clerk, we'll
12 follow the, um -- is it the motion roster that we have? Is
13 that the order?

14 THE CLERK: Yes, sir.

15 THE COURT: And it will be done as -- as far as---

16 THE CLERK: Yes, sir.

17 THE COURT: ---the various motions are concerned?

18 THE CLERK: Yes, sir. And I -- I -- I believe that
19 there are a couple of motions that, um, Mr. Lyles would like
20 to have, um, continued, but we thought we would do that on
21 the record. Um -- per your email?

22 MR. LYLES: Yes, ma'am.

23 THE CLERK: Okay. And we'll -- we'll do that when we
24 get to those.

25 THE COURT: We -- we'll take them up as we get to them?

1 THE CLERK: I -- I think, um -- do you think that that
2 would---

3 MR. LYLES: Well, we could -- I mean, we could do them
4 right now if you'd like.

5 THE COURT: Well let's go ahead and do it now so it'd
6 make it -- kind of lessens the, uh, panic.

7 MR. LYLES: The, uh, defendants in this case, Cox and
8 Lollis, represented by Cynthia Brown---

9 THE COURT: Uh-huh?

10 MR. LYLES: ---have a motion for summary judgment
11 pending. Uh -- I was scheduled to take the depositions --
12 I'm sorry, Madam Court Reporter. I've already broken the
13 rules.

14 THE COURT: There you go.

15 MR. LYLES: Robert Lyles for the plaintiffs. Um -- I
16 was scheduled to take the depositions of Mr. Cox and
17 Mr. Lollis yesterday and got detained in Charleston, um, in
18 trial and was not able to do that. So I -- I talked with
19 Cynthia and she agreed to carry those motions over beyond
20 today. And so I ask---

21 THE COURT: All right, would that be the one, um, motion
22 for summary judgment for Cox and Lollis?

23 MR. LYLES: Yes, sir; number six.

24 THE COURT: Number six -- six? Yeah.

25 MR. LYLES: Yes, sir.

1 THE COURT: All right, that will be continued then.

2 MR. LYLES: Yes, sir.

3 THE COURT: All right; next? There is a next, I trust.

4 MR. LYLES: Well, I -- there -- there is some confusion
5 about a motion that was filed by, uh, Mr. Dunaway on behalf
6 of Medallion, uh, a motion to quash a lis pendens, um, that
7 we filed in connection with a motion to amend our complaint.
8 Um -- I did not receive a copy of that motion when it was
9 filed and when I learned about the motion, um -- um, I was
10 unclear about whether or not Mr. Dunaway was making an
11 appearance for Medallion in the case or not.

12 THE COURT: Mr. Dunaway is here. Uh -- now, don't get
13 too close. I mean -- I mean, are -- are you gonna talk to
14 Mr. Lyles about your situation?

15 MR. DUNAWAY: I was just anticipating calling on 'em,
16 but I'll -- I'll be patient.

17 THE COURT: No, I -- I -- the thing is -- in other
18 words, you still have your, uh, motion -- or, to quash?

19 MR. DUNAWAY: Yes, sir; I was gonna explain the
20 confusion. I got the -- the notice from Mr. Lyles that he
21 did not receive notice from us even though I -- I -- my
22 computer says he did. I wrote him a letter as a courtesy and
23 said I didn't have a problem continuing that."

24 I'm Tom Dunaway; I'm sorry, young lady. Uh---

25 THE COURT: And your represent?

1 MR. DUNAWAY: ---uh, then I heard from The Clerk's
2 office who said that---

3 THE COURT: You represent?

4 MR. DUNAWAY: I represent Medallion regarding, uh, case
5 number 2013-CP-37-38.

6 The Clerk's office told me that -- that -- that the
7 Lyles firm had received notice and that therefore the
8 motion -- that there wasn't going to be a continuance. So
9 in -- in an abundance of caution I'm here. I'll -- I'll do
10 whatever The Court -- I don't want to make a hardship on
11 Mr. Lyles.

12 MR. LYLES: Well, I think -- I think we're prepared to
13 argue the motion even though -- and -- and, uh -- and we're
14 happy to do it. Sam Albergotti is -- is -- is assisting me
15 with this matter. He has been retained by my clients to
16 represent them in connection with some property-related
17 issues. Uh -- and we're prepared to go forward with the
18 motion, uh, but there is still some confusion about whether
19 or not Mr. Dunaway is making an appearance in this case for
20 Medallion, um, or not.

21 You may recall that you relieved Ms. Erin Culbertson of
22 the responsibilities of being Medallion's, um, attorney.

23 Um -- Mr. Dunaway filed a motion without making an
24 appearance. I sent him a letter and asked him, are you going
25 to make an appearance on behalf of Medallion because we would

1 like to know who Medallion's lawyer is. I didn't hear back
2 from him, uh, but today he's here apparently appearing for
3 Medallion.

4 THE COURT: Is that the case, Mr. Dunaway?

5 MR. DUNAWAY: I'm appearing for Medallion on the cases
6 filed by Mr. -- Mr. Albergotti only. The other matter, just
7 so that there's clarification---

8 THE COURT: No further -- it -- all right, this is the
9 case of Stoneledge, uh, Owners' Association, um, versus Bank
10 Greenville?

11 MR. ALBERGOTTI: Your Honor, we are actually involved
12 in -- my name is Sam Albergotti, A-L-B-E-R-G-O-T-T-I, uh,
13 representing Stoneledge at Lake -- at Keowee, uh,
14 Association, Inc.

15 Uh -- Your Honor, it's a little bit confused because of
16 the -- some procedural complexities but there are actually
17 three cases that my client is -- is the assoc -- the
18 property owners' association. And they're actually --
19 there's a motion to amend in the construction litigation that
20 Mr. Lyles filed on our behalf to assert equitable claims
21 against Medallion at Keowee. And those claims relate to
22 seventeen acres that's located across the street from the
23 development where the developers installed the septic tanks
24 that serve the association.

25 There's also a fore- -- there's a mortgage on that and

1 there's a foreclosure by Bank Greenville. And because of
2 some res judicata issues we had to do it this way. It is --
3 it is complicated, but they're -- actually, all three cases
4 is -- relate to what Mr. Dunaway's talking about.

5 So I -- I think, uh, The Court, if -- if Mr. Dunaway --
6 when he says he's only related to those two cases, or maybe
7 only one case, uh, there -- all three are related to the same
8 issues. And I can explain it all---

9 THE COURT: I---

10 MR. ALBERGOTTI: ---in whatever detail you want.

11 THE COURT: ---I don't think we have time to take that
12 up. Is there any objection to a continuance until you-all
13 can get, uh, get together on this? I mean this -- this is
14 not a part of the Stoneledge case, is it, that, uh, most of
15 us are here on?

16 MR. ALBERGOTTI: Well, it is, Your Honor. There's a
17 motion to amend in the -- in the one that most of you are
18 here on.

19 THE COURT: But it hasn't been heard or decided has it?

20 MR. ALBERGOTTI: It has not been decided. It's been
21 filed though.

22 THE COURT: Well then, therefore, it's not -- it -- the
23 motion to amend, which would bring all of this together is --
24 is not here.

25 MR. ALBERGOTTI: Well, it's before The Court today.

1 THE COURT: Well, it---

2 MR. ALBERGOTTI: It's one -- it's one of the motions in
3 this case that's in---

4 THE COURT: Is it your motion?

5 MR. ALBERGOTTI: It's Mr. Lyles' motion.

6 MR. LYLES: It's my motion; number sixteen I think.

7 THE COURT: (After pause) I -- perhaps you-all know or
8 have a different way of doing things, but usually it runs
9 that if a party's to be brought in or the, uh, action's
10 being -- being, uh -- uh -- affected in some fashion that
11 goes to the actual, uh, standing of, uh, representation or --
12 it's usually done before the hearings on the pending motions
13 are had.

14 Um -- I would consid- -- I'd -- I would suggest -- now,
15 of course, Mr. Albergotti and Mr. Dunaway are in this
16 circuit, so, I mean, I don't think it's a hardship. I
17 understand you are from Charleston, the others are from
18 other, um, venues. But, um -- uh, I would suggest go ahead
19 and let's -- we can reach the motion to amend and if it's
20 denied, then well, is it, uh -- apparently that makes this
21 other matter moot or at least not part of this action. Is
22 that correct, Mr. Lyles?

23 MR. LYLES: Um -- I -- I -- yes, sir. I -- I think that
24 that would be correct.

25 THE COURT: Well, why -- let's don't -- let's don't do

1 that. I -- you-all can stay with us; I mean, that's -- if
2 that's what you want to do.. But, uh---

3 MR. DUNAWAY: We don't object to a continuance.

4 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
5 CONFERENCE, OFF THE RECORD.)

6 (WHEREUPON, PROCEEDINGS CONTINUED.)

7 MR. ALBERGOTTI: I think, Your Honor, we -- we need to
8 have the motion to amend heard.

9 THE COURT: Well, it's gonna be heard; it's down. But
10 the thing is, we don't even have Mr. Dunaway, uh, noted in
11 the, uh, record as making an appearance. In fact, I don't
12 even find a -- a -- and if this is the case we're talking
13 about, uh, on 2013-CP-37-38?

14 MR. ALBERGOTTI: Uh -- yes, Your Honor.

15 THE COURT: I don't even find a motion to, what is it,
16 quash the, um, lis pendens filed.

17 MR. LYLES: That is, I think, number twelve, Judge.

18 THE COURT: Well, I mean, I'm talking about the files.

19 MR. ALBERGOTTI: I think his motion is actually in the
20 construction litigation, Your Honor.

21 MR. LYLES: He filed it in this case, a motion to quash
22 in this case, within the construction case, which is one of
23 the things that's lead to my confusion about whether or not
24 he's gonna appear for Medallion, okay?

25 MR. ALBERGOTTI: And, Judge, if -- if -- if it could be

1 helpful, we can certainly take -- I -- I think that we could
2 agree to move into the motion to amend and related motions
3 off of the motions docket at this moment if you could give us
4 some time over the next couple of days or weeks, just to
5 argue that discrete motion before The Court.

6 THE COURT: Well, of course you're gonna have some time
7 to do that. But, as I say, we're wasting time right now.

8 Uh -- I'll continue over your motion to amend and your
9 motion to quash, and if, uh, if it's filed somewhere, uh,
10 over today. And we'll -- subject to hopefully attorneys
11 being able to give -- work with The Court on a convenient
12 time to be heard.

13 MR. LYLES: Can I -- can we ask if there are any
14 objections to the motion to amend from those who are here?

15 THE COURT: We can. I don't know what sort of response
16 you're going to get.

17 MR. LYLES: I don't either. I -- I mean, if somebody
18 objects to it, then I'll have to include them in -- in -- in
19 our correspondence about the motion when it gets scheduled,
20 you know, if there's -- if there's an objection. I haven't
21 gotten any objection from anyone to the motion to amend.

22 THE COURT: Well, again, there are some people that are
23 not here today, uh, because they've already requested to be
24 excused.

25 Uh -- now -- yes, sir?

1 MR. TATE: Your Honor, I'm Ron Tate; I represent
2 Carl Catoe Construction. Uh -- I was anticipating that
3 Mr. Dunaway would ask to be excused for the rest of the day,
4 but I did want to point out to Your Honor that there is still
5 a matter involving Medallion. And I wanted to, uh, simply
6 ask The Court, uh, for some guidance on that point since
7 Mr. Dunaway is here now, uh, because we believe that, uh, and
8 apparently, according to what Mr. Dunaway just said, he is
9 not appearing for Medallion with respect to the cross-claims
10 that Medallion had filed in this case against this whole big
11 group of people, uh, who are here. Uh -- I think most---

12 THE COURT: Well, let me ask. Uh -- Mr. Dunaway, is
13 that correct? You are not on the cross-claim, but you---

14 MR. DUNAWAY: Yes, sir; but I could give some
15 clarification, I believe, for ev- -- everyone, including The
16 Court, if you'd bear with me -- if you would allow me.

17 THE COURT: All right.

18 MR. DUNAWAY: When Mr. Seckinger, uh, of -- of Medallion
19 contacted me and -- and Mrs. Culbertson was getting off the
20 case, he brought me a number of insurance policies that I
21 believe would provide him with a defense with his, um -- some
22 coverages that he had purchased.

23 I have now put Allstate on notice of their, uh,
24 requirement to provide him with a defense as well as an
25 attorney---

1 THE COURT: So we are talking about another attorney?

2 MR. DUNAWAY: Well, it's not -- but it wouldn't be me.
3 It would be somebody from Allstate.

4 THE COURT: We'll specify that, unless Allstate is going
5 to retain you.

6 MR. DUNAWAY: Uh -- uh, and we're waiting. Uh -- he's
7 had the requisite, uh, claims and telephone conferences with
8 Allstate. We're waiting for them to respond, hopefully by
9 the end of the week/middle of next week, about, um, their
10 requirement to provide a defense.

11 THE COURT: All right.

12 MR. DUNAWAY: That's why I -- I am not making an
13 appearance in this other litigation because I believe
14 that---

15 THE COURT: Well, you are not making an appearance.
16 That's what we need to know.

17 MR. TATE: Yes, sir. And, uh -- uh, that appearance of
18 defense counsel, hopefully on behalf of Medallion, would not
19 affect the cross-claim, the motion to dismiss of which was
20 already heard way back when, back in September.

21 And, Your Honor, uh -- uh, that motion was fully
22 briefed, was fully argued when Ms. Culbertson was in the
23 case. We were asked before October 1 to submit proposed
24 orders and additional briefing on that motion, which we did.

25 Uh -- Ms. Culbertson then moved to withdraw. And

1 Ms. Culbertson was allowed to withdraw by order dated, uh,
2 October the 11th of 2012, six months ago tomorrow. Uh -- and
3 the order stated, Your Honor, that Medallion shall obtain new
4 counsel as soon as possible and notify The Court of same.

5 It's been six months and there's been nobody appearing
6 and we've still got this motion out there. We had submitted
7 a proposed order. We'd simply, uh, respectfully submit that
8 the order has been -- it is ready to be signed as far as we
9 are concerned and we would appreciate The Court's
10 consideration of that today.

11 THE COURT: In other words, uh -- uh, Ms. Culbertson
12 did, or Mr. Culbertson did not, what is it, uh -- uh, provide
13 with, um -- uh -- uh, counsel for, uh -- notification as far
14 as who -- who would be representing him?

15 MR. TATE: Your Honor, we have not received an
16 appearance, uh, on behalf of any counsel for Medallion in the
17 case. Uh -- Mr. Dunaway, of course, is entering what I would
18 consider a limited appearance today. Uh -- but we believe
19 that this -- this order, uh -- uh -- uh, granting the
20 motions -- the -- this cross-claim---

21 THE COURT: In other words, you -- you're suggesting
22 that lines have been, uh -- not only did she, uh -- that, uh,
23 the attorney take -- with the -- with the, uh,
24 representation, she also took the, uh -- uh -- uh, brief or
25 the memorandum and the proposed order?

1 MR. TATE: Yes, Your Honor. Instead of -- of, uh,
2 submitting a proposed order to The Court by October 1 as you
3 directed, she filed a motion to be relieved.

4 THE COURT: Yeah; well, that's what I'm saying.

5 MR. TATE: Yes, sir.

6 THE COURT: You're saying it sort of just...

7 MR. TATE: And no counsel has appeared on this
8 cross-claim in six months. So we would respectfully
9 request---

10 THE COURT: Well, I -- I think that, whereas it, um -- I
11 usually do better when I've got two parties and I have two
12 sides to be heard. Uh -- not that I -- again, I'm not gonna
13 delay you any further. But whereas it -- I -- I -- I -- I
14 don't think -- if we don't have anybody representing them, I
15 think we'd be -- that needs to be addressed first. So, um --
16 uh---

17 MR. TATE: But, Your Honor, if I -- if I may---

18 THE COURT: Yes, sir? I mean -- and in fact, I would
19 suggest that there is a sort of a change of circumstances at
20 the time that the order was issued in October of, um -- uh --
21 uh, 2012. That apparently circumstances have changed such
22 that I think we require, uh -- uh, something for the record
23 to reflect that, what is it? You now wish to -- what is it,
24 uh -- uh, have it, uh -- the matter, uh, addressed on the
25 failure to prosecute. And I -- I don't see that in the file

1 either.

2 MR. TATE: It will be; yes, sir. There is no motion,
3 uh, to dismiss these claims---

4 THE COURT: Well, sir, I think that's -- that's the
5 proper procedure. If someone, uh -- uh, decides they're not
6 going to, or if parties decide they're not going to pursue
7 either a claim or a defense of their clients, it, uh -- uh,
8 then you, uh, dismiss it.

9 MR. HARJEHAUSEN: Your Honor, if I -- if I may, I---

10 THE COURT: I want just one at a time. So we'll finish
11 hearing from you.

12 MR. HARJEHAUSEN: Okay.

13 MR. TATE: And that -- that's fine. I've -- I've said
14 my piece. Uh -- we think that these motions were fully
15 briefed---

16 THE COURT: Well, I'm -- I'm -- let's just say this.
17 I'm here on the Stoneledge Construction case. Uh --
18 admitted, these things might be ancillary, uh, tangential or
19 whatever. But the point is, I don't have anything in the
20 file at this time reflecting just what you said.

21 MR. TATE: Yes, sir.

22 THE COURT: Now, I do have the order, of course,
23 relieving counseling. But I don't have anything in there
24 that says there's been a violation of that order and that it
25 should be, uh -- the party or the action as far as it a- --

1 it affects that particular party should be dismissed for
2 failure to prosecute.

3 MR. TATE: My -- my friend, Mr. Builder here, has a
4 motion to strike. And I'd, if -- if I may, ask you to --
5 right now it's on---

6 THE COURT: Well now, is this still on the, um -- uh --
7 uh -- uh, Mr. Dunaway's client's case?

8 MR. BUILDER: Your Honor, Lindsay Builder on---

9 THE COURT: Who's on the other side of your motion?

10 MR. BUILDER: Medallion and---

11 THE COURT: Well, he doesn't represent Medallion except
12 for this one thing so you are -- you're in the same situation
13 that he is. You don't have anybody on the other side.

14 MR. BUILDER: Well, Your Honor---

15 THE COURT: Are you gonna move for, what is it, um --
16 uh, default?

17 MR. BUILDER: Lindsay Builder on behalf---

18 THE COURT: I don't have a motion for a default either.
19 I have -- unless you've filed one.

20 MR. BUILDER: Lindsay Builder on behalf of Clear View
21 Construction. Your Honor, I originally filed a motion to
22 strike based on your order relieving Ms. Culbertson and the
23 fact that Medallion was an L-L-C unrepresented by counsel;
24 strike all their pleadings.

25 I contacted Mr. Dunaway, provided him with a copy of

1 that and our motion for summary judgment, which is the order
2 that Mr. Tate has been referencing.

3 Uh -- based on the fact that I'd seen Mr. Dunaway file
4 the motion to quash and saying that he represented Medallion,
5 I withdrew that motion to strike and resubmitted our
6 filings -- the motion for summary judgment against
7 Medallion -- on that basis thinking that Mr. Dunaway was
8 representing Medallion now.

9 THE COURT: Well, he's not.

10 MR. BUILDER: But I did have a motion to strike before
11 The Court.

12 THE COURT: He -- he -- he tells me he's not. So, I
13 mean, uh, if he's not then, uh, you should notice they're --
14 the Medallion, that they'll be in default.

15 MR. BUILDER: So I should---

16 THE COURT: I -- listen, I---

17 MR. BUILDER: ---would you like me to re-file my---

18 THE COURT: ---I -- I stopped practicing twenty years
19 ago.

20 MR. BUILDER: All right.

21 THE COURT: And, um, and in fact, what is it, even when
22 I was practicing all my, uh -- uh, opinions weren't all that
23 good. Just like you, I ended up in this courtroom and
24 sometimes in the appellate courtrooms.

25 But the point is, do what you think's best. Right now,

1 I have nothing. Uh, you -- you -- I -- The Court's been
2 advised that, what is it, a party is unrepresented.

3 MR. BUILDER: Yes, Your Honor.

4 THE COURT: And if a party's unrepresented, then the
5 party has not been, uh -- uh, on notice of, uh, any motions
6 to be heard today.

7 MR. BUILDER: Well, Your Honor, my motion was to strike
8 their pleadings based on the fact that they were an
9 unrepresented L-L-C. And in the alternative that you appoint
10 counsel within a reasonable time for Medallion to represent
11 them.

12 THE COURT: I appoint counsel?

13 MR. BUILDER: Or to direct them that they must---

14 THE COURT: I mean, I'm not sure that---

15 MR. BUILDER: Not to appoint but to---

16 THE COURT: ---I get -- I can do that in criminal
17 matters but I'm not sure we've gone so far as that The
18 Court's gonna take over the, um -- uh, Common Pleas practice
19 of it.

20 MR. BUILDER: Well, I misspoke, Your Honor; we're -- to
21 direct---

22 THE COURT: Please, let -- let's -- we're -- we're --
23 we're getting a little bit too deep in this; what I would say
24 morass. All right, what now---

25 MR. HARJEHAUSEN: Your Honor, I---

1 THE COURT: ---in other words, give me something to rule
2 on that would be, uh -- uh -- and it's not gonna be today
3 because it hasn't been filed. So, it would be the subsequent
4 day.

5 MR. HARJEHAUSEN: ---Your Honor, my name is John
6 Harjehausen. I represent Heyward Electrical Services. We
7 have a motion on the docket today, which is number twelve for
8 summary judgment on the cross-claims of Medallion at Keowee,
9 L-L-C and Bradford Seckinger.

10 Uh -- that motion was filed and served while
11 Ms. Culbertson was counsel for those folks. Uh -- we have
12 served that motion on Erin Culbertson, who is the registered
13 agent for Medallion, even if she is no longer, uh, counsel
14 designated or entering appearance in this case.

15 THE COURT: By order of default -- motion for default,
16 or a motion to uh -- uh, dismiss---

17 MR. HARJEHAUSEN: It -- it -- so we cannot---

18 THE COURT: ---for failure to -- to, uh---

19 MR. HARJEHAUSEN: ---Mr. -- Mr, Seckinger, though, is
20 here in an individual capacity. He doesn't require -- the --
21 the statute does not require that he have an attorney
22 representing him. Um -- he has been given notice and been
23 personally served with the motion and memorandum. And we
24 would request that at least that portion of our motion, um,
25 be heard today.

1 Uh -- I understand from Mr. Dunaway that he's here in a
2 limited capacity representing Medallion in a case that is --
3 has a 2013 case number or a 2012, not the Stoneledge case.

4 Um -- and -- and we'd move for summary judgment
5 against -- on all of the cross-claims by both Medallion, who
6 arguably may need an attorney since it's a corporate entity,
7 and Mr. Seckinger, in his individual capacity since he is an
8 individually-named, uh, cross-claimant. Um -- and this
9 motion was filed when counsel was present. They've had
10 six months to get counsel or to look at their insurance
11 policies to determine---

12 THE COURT: Yeah, that'd be -- that'd be a wonderful
13 grounds for your motion to dismiss for failure to prosecute.

14 MR. HARJEHAUSEN: Okay. Thank you, Your Honor.

15 THE COURT: Okay; thank you. Now, how long have you
16 known this, that they haven't had any response?

17 MR. HARJEHAUSEN: Well, we filed our motion when they
18 did have counsel, Your Honor.

19 THE COURT: Well, I did know that, but I -- obviously
20 you've known that they didn't have, uh -- that -- that she
21 was relieved as counsel.

22 MR. HARJEHAUSEN: Uh -- prob- -- probably from three
23 months, and we anticipated---

24 THE COURT: And you haven't filed anything to let The
25 Court know that that's what it was gonna be faced with this

1 morning? Thank you.

2 MR. HARJEHAUSEN: And we learned -- we learned yesterday
3 that Mr. Dunaway had filed a motion and were under the
4 impression that he was appearing in this case.

5 THE COURT: So, therefore, you did -- you knew until
6 yesterday that it was no one. Because the last action was to
7 relieve counsel and no one has made an appearance, uh, either
8 informally or formally.

9 I'm just asking though, you have to help The Court
10 sometime because I can't just sua -- sua sponte, uh, strike
11 actions and, uh, dismiss actions or grant even judgments. I
12 have to have something that runs -- that, um -- uh, relates
13 and, uh, reflects that all parties have -- are properly
14 noticed before The Court.

15 MR. HARJEHAUSEN: I understand.

16 THE COURT: All right; I don't know what that does to
17 this wonderful, um -- uh, roster we have, but we'll wait and
18 see as we come along. So now we get -- we're back -- all
19 right.

20 Your, uh -- uh, Medallion will be continued, uh, as far
21 as Dunaway -- Mr. Dunaway's representation until the time
22 that, um, -- uh, the principle -- I guess, Mr. Albergotti and
23 Mr. Dunaway can, what is it, uh, schedule a hearing. And
24 also, uh, it would be nice if you could, what is it, uh, to
25 join the issues as far as whatever motions are gonna be

1 pending.

2 MR. ALBERGOTTI: Your Honor, one of the -- one of the
3 problems on our motion to amend, it's -- technically it
4 involves -- it -- it involves all the lawyers that are here.
5 So it's -- and it will---

6 THE COURT: Well, if they do, I think you'd better get
7 their addresses and, um -- uh, so they can be served.

8 MR. ALBERGOTTI: Well, they've been served.

9 THE COURT: All right. Well then, what's the problem?

10 MR. ALBERGOTTI: Nothing, Your Honor. It's just -- I
11 just wanted to bring it to your attention that it's -- it
12 would be a big hearing, not just me and Mr. Dunaway.

13 THE COURT: Well, I'm not saying it's gonna -- uh, the
14 size of the hearing. The size of the hearing is gonna be the
15 size of the, um -- uh -- it, uh -- action. If it's got more
16 than one party involved, it's gonna obviously have all the
17 parties there.

18 MR. ALBERGOTTI: Yes, sir.

19 THE COURT: But my main thing is that you-all, uh -- you
20 need to, um -- uh, when you -- you as principals on that
21 particular motion, what is it, need to, uh, be sure that the
22 others who would have an interest in it are notified.

23 I'm letting you have the, uh, the choice of, uh, working
24 out when that motion will be heard, then I'll hear the others
25 if they want it to be continued.

1 MR. ALBERGOTTI: Yes, sir.

2 THE COURT: They -- I guess not. I just need to move
3 on---

4 MR. ALBERGOTTI: Yes, sir.

5 THE COURT: ---if you understand, Mr. Albergotti.

6 MR. ALBERGOTTI: Yes, sir.

7 THE COURT: All right. And so you are continued,
8 Mr. Dunaway.

9 MR. DUNAWAY: Thank you, Your Honor.

10 THE COURT: And---

11 MR. ALBERGOTTI: Your Honor, and our---

12 THE COURT: ---I guess you---

13 MR. ALBERGOTTI: ---and our---

14 THE COURT: ---are too.

15 MR. ALBERGOTTI: ---our motion to consolidate, and it
16 was the last motion in the other -- in the Bank Greenville
17 case and the foreclosure by Bank Greenville, those are
18 continued as well I take it?

19 THE COURT: Continued as well, right. And -- all of
20 those in the -- in -- in -- and I think you did it
21 appropriately, Bank, uh -- Bank Greenville case, are
22 continued.

23 MR. ALBERGOTTI: All right, sir.

24 THE COURT: (After pause.) But I do expect, what is it,
25 um -- uh, cooperation between parties in trying to get it

1 resolved. I mean, except for a time.

2 MR. ALBERGOTTI: Yes, sir.

3 THE COURT: Very good. In other words, please don't
4 let -- wait out there for me to call you. I think that's
5 impossible.

6 MR. ALBERGOTTI: No, sir. We'll be---

7 THE COURT: All right.

8 MR. ALBERGOTTI: ---contacting Ms. Burton.

9 THE COURT: Thank you. Plus, I think there is a, uh,
10 case, uh, that says that The Court has ultimate
11 responsibility for, uh, its, uh -- uh, conduct of, uh, cases
12 and trials of cases. So without, uh, Rule, what is it, 42 --
13 whichever is the one for failure to prosecute -- there's an
14 inherent authority for the crate (sic) -- The Court, uh, to
15 just dismiss actions. And then, of course, what is it, it's
16 usually -- I would imagine it's done without prejudice. If
17 I'm not mistaken, I think it's Crestwood Golf Club, uh, is
18 one of the parties.

19 MR. ALBERGOTTI: All right, sir; thank you.

20 THE COURT: But I don't want to get there. But the
21 thing is, I -- I -- at some point, um -- uh -- uh, at some,
22 uh -- pruning needs to be done if there's any dead wood on
23 the matter. All right, so much for my editorial comments.

24 Now, are we back on the, uh, regular roster?

25 MR. LYLES: As far as I know, Judge; yes, sir.

1 THE COURT: All right. Uh -- the -- and the first one
2 would be, um, defense motion for reconsideration? Do you-all
3 all have a copy of the roster?

4 MR. LYLES: I do, Judge. I don't know---

5 MR. IMHOFF: Yes, Judge.

6 THE CLERK: Um -- I -- I don't mean to interrupt; his
7 copy does not mirror ours and I don't mind making a copy for
8 them so they---

9 THE COURT: Let's do that if you would.

10 THE CLERK: ---can stay on the same page.

11 THE COURT: All right; all right, so we'll stand at ease
12 for a minute so we find out where we are.

13 (WHEREUPON, COURT STOOD AT EASE.)

14 MR. IMHOFF: Your Honor, if I may, just a little
15 housekeeping?

16 THE COURT: Certainly.

17 MR. IMHOFF: I have a stack of briefs which I've sent by
18 mail and by email to you. Do you have these briefs in your
19 office or should I hand -- hand them up to you?

20 THE COURT: If you've filed them with The Court, I'll
21 have them.

22 THE CLERK: Well, we've received a ton a briefs.

23 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
24 CONFERENCE, OFF THE RECORD.)

25 (WHEREUPON, PROCEEDINGS CONTINUED.)

1 THE COURT: All right, are we ready?

2 THE CLERK: Yes.

3 THE COURT: Ms. Cross, are you ready?

4 COURT REPORTER: Yes, sir.

5 THE COURT: All right, let's, um -- we're back on the
6 record then, uh, with the first, uh, motion for
7 reconsideration. (After pause.) Um -- and you have the, uh,
8 roster, so who is that?

9 (NO RESPONSE.)

10 THE COURT: Who's the, uh, moving party in the first,
11 uh---

12 THE CLERK: Um -- it is (after pause), well, it's the,
13 uh, defendant motion. Is this your, uh -- it's Mr. Imhoff's
14 motion.

15 MR. IMHOFF: That's me, yes.

16 THE COURT: All right. Mr. Imhoff?

17 MR. IMHOFF: Thank you, Your Honor. Um -- we're
18 gonna -- I'm gonna -- I'm gonna try to make this as short for
19 you as -- as possible, Your Honor. As you can see from the
20 roster, I've actually filed three motions for this---

21 THE COURT: All right. I was gonna ask you about that.
22 I think, um, I have one, three and five is your motions?

23 MR. IMHOFF: That's correct, Your Honor.

24 THE COURT: All right. Well, could you -- it would be
25 proper to, uh -- are there going to be the same grounds?

1 MR. IMHOFF: Yes and no, Your Honor. They're very, very
2 similar grounds. I have briefed them all. Um -- as I
3 understand it, your -- your office has received those briefs.
4 They're very, very similar. As you know, you've heard all
5 those motions for summary judgment from the subcontractors so
6 they're very similar.

7 THE COURT: Right.

8 MR. IMHOFF: You collapsed all of the causes of action
9 and the equitable indemnity and then found that my client,
10 Marick, had unclean hands, essentially, um, on all of them.

11 THE COURT: Right.

12 MR. IMHOFF: Um -- and so, we are here today for several
13 reasons to ask you to reconsider that. But, you have heard
14 on at least two, maybe three occasions the arguments on that.
15 And so we have put the arguments into these briefs. We have
16 also included, uh, the contracts that were discussed,
17 deposition testimony that was discussed, so that this Court,
18 any other Court that looks at it, has all of the information
19 before it.

20 Um -- so I don't think we need to argue each one of
21 those motions individually. I -- I think that it has been
22 done and is done again in the brief. If I---

23 THE COURT: All right, let's do this. Uh -- the
24 first -- the one that is, um, on the roster is the first
25 motion for reconsideration. Who is, um -- uh, the sub on

1 that one?

2 MR. IMHOFF: I can't tell from the roster, Your Honor.

3 THE COURT: Does somebody know?

4 MR. IMHOFF: I'm sorry, Your Honor?

5 THE COURT: I mean, is somebody here on the---

6 MR. ROOT: Your Honor, the roster doesn't say. I know
7 that there are several---

8 THE COURT: Your name?

9 MR. ROOT: I'm sorry -- so sorry; David Root. I
10 represent Builder's First Source, one of the parties who
11 prevailed -- here you go -- prevailed on the motion for
12 summary judgment.

13 THE COURT: All right; well, let's just take up that one
14 then. It's gonna be one of the three?

15 MR. ROOT: It is, Your Honor. I -- I'm on two orders
16 because they're broken up. Um -- but, yes, absolutely, we
17 can take up that one first.

18 THE COURT: Right; one is for Builder's Source. Is
19 there another?

20 MR. ROOT: Builder's First Source and there are two
21 orders that contain or address the dismissal on a summary
22 judgment of the cross-claims that Marick made against, uh,
23 Builder's First Source.

24 THE COURT: All right. And that -- uh, so you have
25 those two as being one through -- one of the -- one, three or

1 five?

2 MR. IMHOFF: That -- yes, Your Honor.

3 THE COURT: All right. Well, let's address the
4 Builder's First Source. Um -- uh, your motion to reconsider
5 the order of, uh -- in that case?

6 MR. IMHOFF: Yes, Your Honor, they're essentially --
7 they're essentially all -- all the same, except for maybe
8 some of the different testimony. Um -- if -- we would say
9 first that discovery wasn't complete. I think that was on
10 the record at one of the last hearings. But as it -- there
11 were so many hearings, I'm not sure that got said at each
12 individual, uh, motion for summary judgment. Uh -- but it is
13 correct that discovery was still ongoing.

14 Plaintiff's expert had not finished his testimony. More
15 importantly to me, my expert, Randy Steel, had not finished
16 his testimony. And I think I may have taken ten minutes at
17 the end of a very long day to try and ask him some questions
18 in the middle of his testimony, while there were other
19 defendants still able to take his testimony, to try to get at
20 least a little bit of information on the record for The
21 Court.

22 Um -- and so as to all of them -- I want to make it
23 clear for the record -- as to all of the motions for
24 reconsider -- to reconsider and all of the hearings on the
25 subcontractors' motion for summary judgment, we would state

1 that discovery was still on-going. And, that most
2 importantly, my expert never had a full chance to give his
3 opinion, uh, in response to my questions regarding
4 supervision of the subcontractors, which is essentially the
5 basis of all of the subcontractors' motions.

6 Um -- secondly, Your Honor, where there were contracts
7 with certain subcontractors, you'll remember that we brought
8 cross-claims not only for negligence and equitable indemnity,
9 but also for a breach of contract and for contractual
10 indemnity, which I -- I understand there's been some
11 confusion about that. But I have now attached those
12 contracts to, uh, the briefs for each of, uh -- each of the
13 parties.

14 So, if Your Honor would like to look at the contract --
15 and I understand that several of the parties will argue that
16 those contracts post-date the work. We -- we make an
17 argument that those contracts were for the work and,
18 therefore, there is equitable indemnity -- I'm sorry,
19 contractual indemnity or a breach of contract, uh, and the
20 indemnity agreement or clause in the contract.

21 And the third part, Your Honor, is the deposition
22 testimony. I think, as -- as best I could, I tried to inform
23 The Court where there had been evidence or deposition
24 testimony for each of the subcontractors, uh, that would give
25 rise to the -- some reasonable analysis that a jury could

1 find that my client, Marick, did, in fact, supervise, uh, or
2 did not have unclean hands.

3 And so, I've attached that deposition testimony, where I
4 could find it, to the appropriate briefs.

5 Again, I -- Your Honor, I was trying to, because we've
6 argued this so much, I'm trying to make it as short---

7 THE COURT: I understand.

8 MR. IMHOFF: ---today---

9 THE COURT: I understand.

10 MR. IMHOFF: ---as possible.

11 THE COURT: All right. But -- and, uh, for -- not only
12 for the record, but, uh, as you well know, that your filings
13 will be, uh, incorporated and used for a, uh -- uh, an
14 argument. That, uh, you don't have to, um -- um -- uh,
15 present oral argument on matters that have been briefed and
16 filed with The Court.

17 MR. IMHOFF: And I -- and we've -- and as I've said,
18 we've done that at length. Uh, I -- it -- the only thing --
19 the only new things that I think we've added is to make sure
20 that the -- the discovery that's still ongoing applies to
21 every one of the motions for summary judgment and then
22 briefed where I could to add evidence of the contract or
23 deposition testimony.

24 THE COURT: All right.

25 MR. IMHOFF: Thank you, Your Honor.

1 THE COURT: Mr. Root?

2 MR. ROOT: (NO VERBAL RESPONSE.)

3 THE COURT: Well, go ahead and consult with your
4 co-counsel.

5 MR. LYLES: Whoa.

6 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
7 CONFERENCE, OFF THE RECORD.)

8 (WHEREUPON, PROCEEDINGS CONTINUED.)

9 MR. ROOT: All right. If it please The Court, Your
10 Honor, David Root again for Builder's First Source. And I
11 agree, uh, with the primary point that Mr. Imhoff is making.

12 These issues -- these arguments have been made to Your
13 Honor twice, um, and essentially three times and they've
14 been briefed. Initially they've been briefed by way of
15 supplemental briefs and we have submitted proposed orders and
16 we eventually had the order signed.

17 And as I indicated initially too, the orders included
18 my client, Builder's First Source, and it disposed of the
19 cross-claims against Builder's First Source as to the counts,
20 um, that Marick alleged against it in its cross-claims being
21 for equitable indemnity, negligence, breach of contract, and
22 breach of warranty. I have copies of, um, Your Honor's
23 orders if it would help. I don't know if you have them right
24 in front of you. If it would help---

25 THE COURT: I have -- I have one.

1 MR. ROOT: Okay. The only reason I point to these is
2 because there are diff- -- there are -- one order has
3 Builder's First Source, B-F-S, as well as Catoe Construction
4 and all of Catoe's subcontractors on it. And another order
5 has Builder's First Source as well as -- as Southern
6 Concrete, uh, Clear View and Michael Franz on it.

7 Uh -- they deal with first -- the first one deals with
8 negligence, equitable indemnity. The second dealing with
9 breach of contract and breach of warranty. I was just
10 wanting to make that clear since we're on a motion to
11 reconsider.

12 I agree though that we don't need to parade all of these
13 arguments back in front of you. I think you got it right
14 when you signed these orders.

15 Uh -- just to address the points that I guess we haven't
16 addressed by way of the order, as far as the -- or, haven't
17 been addressed fully before.

18 As far as discovery goes in the 2009 cases, um,
19 Mr. Steel, the expert for Marick, testified that Marick did,
20 uh, violate the building code and that is a primary premise,
21 um, upon which we argued that Marick had fault.

22 Um -- inasmuch as -- as Marick needed to be re- -- or,
23 excuse me, Mr. Steel needed to be re-deposed, I guess it's
24 been since Sep- -- September, he could have been re-noticed
25 and re-deposed by, uh, Marick's counsel since it's been a

1 good length of time.

2 I think the only other issue that I need to address
3 would be about the timeliness of the filing. The initial
4 motions submitted by Marick, uh, for reconsideration of these
5 orders, that's all the parties just -- just say, um, that The
6 Court was wrong, 'cause the orders violate South Carolina
7 law. Essentially, that's the only basis they gave.

8 And then yesterday afternoon we all received packages of
9 about a hundred and fifteen pages on average that contained
10 more bases of -- for the motion. But as Mr. Imhoff said,
11 legally they're the same; but also, all of his deposition
12 testimony is in the record. So I would just object to that
13 for purposes of the record today so I have that on there.
14 But, otherwise---

15 THE COURT: All right. I'm gonna note your objection
16 that the filings were made, um -- uh -- um, not timely in the
17 sense -- in the sense that, uh -- uh, notice of the hearings.

18 But it -- I am going to included it in -- if, uh,
19 this matter's gonna be reviewed, I want, um, the Appellate
20 Court, uh, to have, what is it, the benefit of all of your
21 filings.. I might say, I looked at one; it was sixty-three
22 pages. And, um, then there's -- you say it's a hundred and
23 fifteen in the other side. Uh -- you'll have to give me,
24 um -- uh -- uh, I would have had a difficult time and my
25 family would -- probably would have complained if I'd spent

1 all that time between the time they were filed and this
2 morning with them.

3 So anyway, I -- I'll note that your timeliness is, um,
4 part of it, but I am going to, uh, be sure that whoever looks
5 at it can determine whether or not it, uh, was, uh---

6 MR. ROOT: I appreciate you hearing my objection and
7 making a ruling on it.

8 THE COURT: All right. Anything else? All right, uh,
9 Mr. Im- -- Imhoff?

10 MR. IMHOFF: Your Honor, just -- just two things in
11 regard, uh, to the continuing discovery and the deposition of
12 Raymond Steel. Uh -- Raymond Steel is my expert. I --
13 I'm -- I'm not gonna notice him for a deposition. He's --
14 he's my expert. If -- if anyone else wanted more testimony
15 from him, I would say that that is anyone else in the case.
16 I don't -- I've -- I've never noticed my own expert's
17 deposition before, maybe someone else has.

18 THE COURT: Well, sometimes you, uh -- it -- on a
19 summary judgment you will have, what is it, um -- uh -- uh --
20 uh, affidavits at least, or something that would suggest
21 that, what is it, there is a genuine issue. Not as a -- I
22 mean, I understand that, what is it, I don't want the
23 charge -- I don't want this case is -- is decided because the
24 dog didn't bark. But, it's more than, um -- uh, something
25 didn't happen than something that has a -- creates a genuine

1 issue.

2 MR. IMHOFF: The second issue as to that is we -- I'm
3 not sure The Court has ruled; maybe verbally you ruled.
4 Uh -- as you know, some of this case is up on appeal. Some
5 of it may be stayed, some of it may not be; we'll address
6 that later. But, that also comes into play.

7 THE COURT: Well, now, what -- now what haven't I ruled
8 on? Now, I'm limiting these motions to a motion to
9 reconsider my granting the summary judgment, uh, as to the,
10 um -- uh, the claims of Marick against, uh -- well, the --
11 the two that I have now is Builder's First Source, um -- uh,
12 Southern Concrete and what was the other one?

13 MR. ROOT: On these -- on these two orders are included
14 Builder's First Source, Carl Catoe Construction Company, um,
15 as well as Catoe's subcontractors, that's what we've been
16 calling them. That's for the most part what makes up the
17 rest of them.

18 THE COURT: All right, so it's Catoe, uh, and Builder's
19 First Source are the, uh, principals; all right.

20 MR. SMITH: And then on one of the other orders, as you
21 pointed out, Southern Concrete might be on---

22 THE COURT: Oh, Southern is the third one?

23 MR. SMITH: And Clear View.

24 THE COURT: Okay. Well, those are the -- the three
25 that, uh, that the orders really addressed. And, um, those

1 are the ones I'll be -- on these motions I'll be considering.

2 MR. ROOT: And -- and I'm sure counsel for those
3 entities will at least want to stand up and say we're here
4 about the arguments, what have you -- just so the record is
5 clear.

6 THE COURT: Well, let's do that so that we, what is it,
7 um -- uh, resolve the matters---

8 MR. TATE: Your Honor, if I may, I'm Ronald Tate
9 again---

10 THE COURT: ---at least for this -- this level. I mean,
11 it's either going -- I'm going to reverse it and we all go
12 to, uh, trial on the matter.

13 MR. TATE: Yes, sir. Uh -- Your Honor, I'm Ron Tate; I
14 represent Carl Catoe Construction along with Dana Lang who's
15 here today.

16 Uh -- we would also adopt, uh, Mr. Root's arguments.
17 Uh -- if I may list the names of who are identified as the
18 Catoe subcontractors? Their counsel are probably here. They
19 may want to chime in---

20 THE COURT: Is -- is this the gentleman, um, behind you?

21 MR. TATE: Uh -- the -- that would be the gentleman
22 behind me and probably some others. But if I may, for the
23 record, just list them?

24 THE COURT: All right.

25 MR. TATE: Uh -- they are identified as, uh, T-G

1 Construction, L-L-C.

2 THE COURT: All right; who is that attorney?

3 MR. SMITH: I'm Chris Smith, Your Honor, represent- ---

4 THE COURT: Pardon?

5 MR. SMITH: ---Chris Smith, representing T-G

6 Construction.

7 THE COURT: Smith? Mr. Smith---

8 MR. SMITH: Yes, sir.

9 THE COURT: ---uh-huh. All right.

10 MR. TATE: Alejandro Al- -- Avalos -- Avalos,

11 A-V-A-L-O-S, Cruz, C-R-U-Z; Herbert (sic) Acros Hernandez.

12 THE COURT: Now, is -- those -- those are two separate,
13 uh, subs?

14 MR. TATE: Those are separate subcon- ---

15 THE COURT: All right, who represents Alejandro?

16 (NO RESPONSE.)

17 THE COURT: He's not here?

18 MR. TATE: Their counsel may not be present.

19 THE COURT: Oh, okay.

20 MR. TATE: Uh -- Martin Hernandez-Aviles, A-V-I-L-E-S;

21 Ester Moran---

22 THE COURT: All right, is he, uh -- now, again, give me
23 parties' names.

24 MR. TATE: Yes, sir.

25 THE COURT: All right, uh, is Aviles, uh, one party?

1 MR. TATE: Aviles is one party.

2 THE COURT: All right, and who represents him (after
3 pause) or her?

4 MR. TATE: Their counsel's not present. I believe all
5 these people are represented.

6 THE COURT: Okay.

7 MR. TATE: Uh -- the next one is Ester, E-S-T-E-R, Moran
8 Mentado.

9 THE COURT: M-A-T-A-D-O?

10 MR. WARD: Yes, Your Honor. Jason Ward here---

11 THE COURT: Moore?

12 MR. WARD: ---for Ms. Moran. Jason Ward---

13 THE COURT: Ward---

14 MR. WARD: ---W-A-R-D---

15 THE COURT: ---Mr. Ward; all right.

16 MR. WARD: ---here for Ester Moran Mentado.

17 THE COURT: All right.

18 MR. TATE: All right, the next one is, uh, Socorro,
19 S-O-C-E-R-R-O (sic) Castillo Montel.

20 THE COURT: Let's go with Montel; is that the last name?

21 MR. TATE: Montel.

22 THE COURT: Yeah, okay. Who represents -- anybody -- is
23 he represented here?

24 (NO RESPONSE.)

25 THE COURT: All right.

1 MR. TATE: And the next one is -- and the last one is,
2 Zarate, Z-A-R-A-T-E Construction. And I don't believe his
3 counsel is---

4 THE COURT: Z-R-A?

5 MR. TATE: Z-A-R-A-T-E Construction.

6 THE COURT: All right; and who represents him -- or, it?

7 MR. TATE: Uh -- Finley Clarke in Florence; I don't
8 believe he's here.

9 THE COURT: All right. And, um, you represent, uh,
10 Catoe and the subs are represented -- they are all rep- --
11 are represented today are Mr. Smith on T-G, and Mr. Ward on
12 Mentado? All right.

13 MR. TATE: Thank you, Your Honor.

14 THE COURT: Now, Mr. Smith or, uh, Mr. Ward, do you
15 adopt, um -- uh, Mr. Root's, um -- uh, position?

16 MR. WARD: Yes, we do, Your Honor.

17 THE COURT: All right.

18 MR. SMITH: I do, Your Honor.

19 THE COURT: And Mr. Smith, very good. Thank you,
20 gentlemen. All right; anything else, Mr. Imhoff?

21 MR. IMHOFF: Uh -- nothing, Your Honor, just -- just
22 I'm---

23 THE COURT: Oh, wait a minute, got somebody else.

24 MR. BUILDER: Your Honor---

25 THE COURT: Yes, sir?

1 MR. BUILDER: ---Lindsey Builder on behalf of Clear View
2 Construction and Michael Franz. We are on one of Mr. Root's
3 orders, uh, regarding breach of contract and breach of
4 warranty and we have a separate order for Clear View on
5 equitable indemnity and negligence. I adopt Mr. Root's
6 arguments on both of those; they follow the same grounds,
7 um, your order is---

8 THE COURT: All right; and, again, your -- your name,
9 sir?

10 MR. BUILDER: Lindsay Builder.

11 THE COURT: Builder?

12 MR. BUILDER: Yes, sir; like house builder.

13 THE COURT: All right; that's interesting. All right.
14 And you represent?

15 MR. BUILDER: Clear View Construction---

16 THE COURT: Clear View.

17 MR. BUILDER: ---and Michael Franz.

18 THE COURT: Individually?

19 MR. BUILDER: Yes, sir -- yes, Your Honor.

20 THE COURT: All right. Um -- and your -- your -- the
21 order in your case, uh, was based pretty much on the same,
22 um -- uh -- uh, issues that, um, the -- all of the causes of
23 action were folded into the equitable indemnification and
24 that The Court in that order found that there was, um --
25 uh -- uh, unclean hands?

1 MR. BUILDER: Yes, Your Honor; that is correct.

2 THE COURT: All right. All right; yes, sir.

3 MR. MEBANE: Your Honor, Robert Mebane for Southern
4 Concrete. Um -- we also adopt the arguments of Mr. Root.
5 Um -- and we were on one of the orders as well. The same --
6 basically the same arguments that have prev- -- previously
7 been made, Your Honor.

8 THE COURT: All right; and that's Mevin?

9 MR. MEBANE: Uh -- yes, sir.

10 THE COURT: M-E-V-I-N?

11 MR. MEBANE: Uh -- M-E-B-A- ---

12 THE COURT: B; Mebin (sic).

13 MR. MEBANE: Yes, sir.

14 THE COURT: I'm sorry?

15 MR. MEBANE: M-E-B-A-N-E.

16 THE COURT: M-E-B-A-N (sic); all right. Thank you, sir.
17 All right.

18 MR. IMHOFF: Your Honor, I think we just did the
19 exercise, but just to make sure, there are three motions to
20 reconsider based on three orders from this Court, um, that --
21 that we're arguing today based on all of those people that
22 just stood up. Southern Concrete, Catoe, Builder's First
23 Source, Clear View, uh, their individuals and then all of the
24 subcontractors. And I just wanted to make sure that that was
25 on the record.

1 THE COURT: Very good. Now, that -- that is The Court's
2 understanding and I've had the -- and I appreciate your
3 cooperation in being able -- able to, uh, sort of
4 consolidate, um -- uh, the orders; or, the considerations of
5 the orders.

6 All right; if there's nothing else, um, (after pause) I
7 really do not find that there was any, uh -- and I'm doing
8 this from recall -- um -- uh, that there was any error of law
9 or misconstruction of, um -- uh, fact. And that, um, the
10 order in each of these cases, um -- uh, to include the ones
11 who are not subject to -- but -- but the orders that go to
12 Marick's, um -- uh, counterclaims, uh, their causes of
13 action, uh, -- negligence, breach of contract and equitable
14 indemnification were all folded into equitable
15 indemnification. I do find that, uh -- uh, that the -- the
16 conclusion of, um, Marick's unclean hands would be such it
17 would defeat those claims. And, uh, motion to reconsider is
18 denied. Very good.

19 MR. IMHOFF: Thank you, Your Honor. I think I can move
20 down.

21 THE COURT: All right; very good. All right, uh, what's
22 next?

23 THE CLERK: Um -- it deals with the number four, which
24 is M-H-C Contractors' motion for summary judgment.

25 MR. ROOT: I'm sorry, Your Honor, and I -- and I do want

1 to get back by -- behind the bar. In the review, do you want
2 us to prepare Court -- short orders or you just do a Form
3 four order for that?

4 THE COURT: Uh -- it would be -- it'd be good to prepare
5 an order for me.

6 MR. ROOT: Yes, sir.

7 THE COURT: Um....

8 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
9 CONFERENCE, OFF THE RECORD.)

10 (WHEREUPON, PROCEEDINGS CONTINUED.)

11 THE COURT: I tell you what, just it, uh -- inasmuch as,
12 um -- uh -- uh, you have all of the captions on your
13 machines, how about, what is it, you preparing it? I can
14 tell you what the language would be.

15 After careful consideration, uh, and review, uh, The
16 Court finds that there was no, uh, error of law or
17 misconstruction of facts and that the, uh, motion for, uh,
18 reconsideration should be denied. (After pause.) Very good.

19 MR. ROOT: Thank you, Your Honor.

20 THE COURT: Then -- and that -- and that's -- that's, I
21 think, sufficient. At least it has been up until now.

22 All right; so this is, um, motion for summary judgment;
23 is that correct?

24 MS. MURPH: Yes.

25 THE COURT: Yes, ma'am; all right.

1 MS. MURPH: Um -- my name is Megan Murph, and I
2 represent M-H-C Contractors and Miguel Porras Choncoas.

3 I -- we are, um, we're before The Court on our motion
4 for summary judgment; it's a cross-claim from Marick. We
5 were also a sub of Marick's to perform stone work in phase
6 two of Stoneledge. And as we just discussed, The Court
7 granted summary judgments of similarly situated defendants,
8 including Clear View, whose work -- scope of work was
9 identical to ours.

10 Um -- the cross-claims against M-H-C are the same ones;
11 negligence, breach of contract, breach of warranty and
12 ethical indemnification. And, like the other defendants, the
13 same arguments, uh, that the first three claims we fold into
14 ethical indemnification. And then, um---

15 THE COURT: Well, let me ask you, um, is the, uh --
16 Marick's position going to be that there was a contract or
17 something like that bound them or?

18 MS. MURPH: There was prior; it was -- but not with this
19 job. It was the same as, um -- as before their prior
20 contracts and prior jobs.

21 THE COURT: All right. So you're just saying that you,
22 uh, pretty much, uh, as in the other cases of, um -- uh,
23 Marick's cross-claim, uh, that, um -- uh, there's no, uh,
24 genuine issue as to their involvement and that involvement
25 was such that, what is it, that it would taint, uh, their

1 cause of actions?

2 MS. MURPH: Exactly. It's the -- it's the same thing
3 that you've ruled on and we're in the same place as the other
4 subcontractors.

5 THE COURT: All right; Mr. Imhoff?

6 MR. IMHOFF: Um---

7 THE COURT: Now, has this one been briefed?

8 MR. IMHOFF: No, Your Honor, I -- I -- frankly, I think
9 I just missed this one. I -- I mean, I didn't see it. But,
10 uh -- uh, be- -- because we've already discussed it many
11 times, I would say first the same thing, if discovery is---

12 THE COURT: Well, let me ask you this, uh, but do you
13 have any -- I -- I'm a little bit concerned that, what is it,
14 um, this is a summary judgment. In other words, it's not a
15 reconsideration and -- and so it'd be their, uh -- their
16 first, uh, instances of a Court, you know, considering the
17 judgment -- summary judgment. I understand that the, uh --
18 uh, the legal argument is going to be the same---

19 MS. MURPH: Right.

20 THE COURT: ---on both sides. Uh -- but the only thing
21 is, I'm a little bit concerned about the factual basis for
22 it, you know, because again, it's a summary judgment on this
23 continuing issue.

24 MR. IMHOFF: I -- and I would ask The Court to allow me
25 to brief it, uh, if I could, without maybe coming back up

1 here to The Court.

2 THE COURT: Well, let me ask you this. Um -- uh, would
3 you be, uh, willing to, uh, have it decided on, uh -- uh,
4 briefs, or/and affidavits? I mean, without further hearing?

5 MR. IMHOFF: I -- I would---

6 MS. MURPH: Yes.

7 MR. IMHOFF: ---I would be fine with that, Your Honor.
8 But if I may, um, and this is -- this is sort of a conundrum
9 that we're in. My client -- we, as you know, have taken the
10 position that because of the appeals, this case is stayed,
11 especially for, more importantly, as to phase two. M-H-C is
12 a phase two sub-contractor. You'll see, if you go down your
13 list of motions today, that I actually filed a motion to
14 quash, a motion for protective order, because depositions
15 were being scheduled. We have not taken M-H-C's deposition,
16 because I don't think M-H-C had counsel until---

17 MS. MURPH: We were late.

18 MR. IMHOFF: ---after the appeals were filed.

19 MS. MURPH: Hence, that's why we're filing now.

20 MR. IMHOFF: And so, I would -- I would like to take
21 their deposition.

22 THE COURT: So in other words, we don't even have a
23 factual basis yet?

24 MR. IMHOFF: And that's a problem because I think
25 that---

1 THE COURT: Well, that's -- that's one of the grounds
2 for not, um -- uh, granting or -- or considering summary
3 judgment if there is, um -- uh, a need for developing a
4 factual record.

5 And, again, it doesn't -- now, that doesn't mean that,
6 uh -- as we all know, a summary judgment is, uh, is not
7 conclusive, uh, unless it's granted.

8 And, uh -- but the -- the fact is that, um, it can be
9 renewed based on, you know, the development of the record.

10 MR. IMHOFF: I guess my position would be that the
11 summary judgment hearing or this summary judgment motion
12 should not be heard if the case is stayed.

13 THE COURT: Well, the only thing is, as -- as I say,
14 the -- the -- if I should deny the summary judgment, it does
15 not prejudice the, um -- uh, parties ability to renew it, you
16 know, based on a -- a -- a more -- I -- in other words, I
17 find at this time, my, uh -- obviously, uh, not -- not your
18 problem because you weren't retained or at least, um -- uh,
19 brought into that until later, uh, that the case does need to
20 be, as far as your particular client's concerned, uh, needs
21 to be developed. And, uh, at least the, uh -- uh, the
22 cross-claimant here, uh, have the opportunity to develop any,
23 uh, support for its claim. In other words, what you -- you
24 want to have denied.

25 MS. MURPH: Which -- well, we filed, Judge, like a few

1 months ago. So it's been -- he's had the motion.

2 MR. IMHOFF: But we're taking the position this case is
3 stayed. And if I take a deposition during a stay then I'm
4 under the -- I know it's not The Court's problem. But, uh --
5 but that's -- that's sort of where I sit. If I'm filing a
6 motion to quash then I---

7 THE COURT: Well, it -- has all of the -- the, um, cases
8 been appealed?

9 MR. IMHOFF: No, Your Honor, no.

10 THE COURT: But is this one that is under the appeal?

11 MR. IMHOFF: No, because you've never heard or granted
12 this particular motion.

13 THE COURT: Well, I mean, was the -- was this party,
14 though? Uh -- was this party a, um -- uh -- uh, considered
15 in the appeal? In other words---

16 MS. MURPH: Yes.

17 THE COURT: It was?

18 MS. MURPH: We -- we were part of the case when the
19 appeal was made.

20 THE COURT: Well, when the appeal went up, were you
21 noted in the, uh, caption?

22 MR. IMHOFF: Yes, but they weren't represented, I don't
23 believe.

24 THE COURT: All right; Mr. Lyles?

25 MR. LYLES: Your Honor, I don't -- I don't think that

1 M-H-C was -- was denoted at all in that appeal. They were
2 a -- a party in the case at the time that Jason appealed your
3 order granting summary judgment with respect to site
4 contractors.

5 So M-H-C -- their claim against M-H-C was not involved
6 in that appeal.

7 THE COURT: Well, let me -- and -- and, again, I'm --
8 obviously, what is it, um -- uh, Mr. Imhoff's, um, concern is
9 governed by, uh, the rules governing appeals that what, uh --
10 where they are stayed.

11 Um -- and if it -- you were not a part of the appeal, in
12 other words, you did not, um -- uh -- has it been briefed or
13 anything as yet?

14 MR. IMHOFF: The appeal?

15 THE COURT: Yeah.

16 MR. IMHOFF: Yes, Your Honor.

17 THE COURT: Well, did -- did you, uh, note an appearance
18 in the appeal?

19 MS. MURPH: No. We -- we weren't in the original---

20 THE COURT: Well, there -- that's what -- what I'm --
21 I'm saying, I think that these -- these, uh -- ones who were
22 not included in the appeal. In other words, the, uh -- uh --
23 uh, the subs and the, um -- uh -- uh -- uh, the defendants or
24 whatever or cross-claim defendants. Um -- and they were not
25 included in the appeal. I don't think that would interfere

1 with a -- a pursuit of the others. In other words, I'd go --
2 I think that you are entitled -- I'm -- in other words,
3 I'm not gonna grant your summary judgment. In fact, I think
4 the -- to clear the record, it'd probably be better to go
5 ahead and, uh, deny it without prejudice. In other words,
6 renew it upon the, um -- uh, cross-claimant, uh -- uh, having
7 the opportunity to develop his case.

8 MR. IMHOFF: Thank you, Your Honor.

9 MR. LYLES: Thank you.

10 THE COURT: Now -- but, again, I don't think that, um --
11 how much time? It -- it -- like, uh -- uh, as has been
12 noted, we've had these things. Of course, what, it's almost
13 impossible to get all of these cases together at one time.
14 So how much time do you need for development of, uh, whatever
15 your opposition to the, uh, motion for summary judgment is?

16 MR. IMHOFF: Um -- well, it's not -- it's not
17 necessarily a timing issue, Your -- Your Honor. I -- I -- I
18 thought, and I may have misunderstood you, I thought that the
19 last time that we argued the stay issue -- you know, the loss
20 of jurisdiction by this Court because of the appeals -- you
21 were inclined to stay phase two and you were thinking about
22 bifurcating the case to allow phase one to go forward.

23 THE COURT: I think, if I'm not mistaken, and this is
24 coming -- this is -- you -- you -- you're testing an old
25 person's recall -- that I've -- I've taken several positions

1 about bifurcation, you know, phase one and phase two. And I
2 don't know which one's my current one right now.

3 The only thing, I'm just trying to move this case along.
4 And I'd be honest with you, uh, I think it's like eating a
5 bear; you have to do it a piece at a time. You can't much
6 consume the whole case, what is it, at one time. We need to
7 whittle it down to something the jury can understand.

8 So, therefore, um, notwithstanding my, uh, ruling
9 before, my ruling in this particular -- on this summary
10 judgment -- the motion for summary judgment, is I'm going to
11 grant, uh, the, um -- uh, cross-claimant, uh, an opportunity
12 to develop, uh, any case that he would have.

13 And, again, as I said -- ma'am?

14 MS. MURPH: Never mind, go ahead.

15 THE COURT: No, I -- no please, I -- I don't want to
16 waste my -- I'm talking too much as it is.

17 MS. MURPH: No, no; I was -- I was just gonna reiterate
18 that we're very much the same -- like as all the other
19 subcontractors in this situation.

20 THE COURT: Well, then that means they won't -- they
21 won't be able to, uh, oppose your motion. I mean, I -- it's
22 a -- it's a cer- -- it -- let -- not to complicate anything
23 more than necessary, a summary judgment is usually done on
24 the record---

25 MS. MURPH: Right.

1 THE COURT: ---as it exists at the time. And it can be
2 done with affidavits or/and counter-affidavits. And that's
3 all I'm saying is, I think that the cross-claimant, inasmuch
4 as you are a different party, you're not a party to the
5 appeal, uh, that needs to have an opportunity to address
6 whether there -- there are genuine issues, unless you want to
7 move for summary judgment on your own.

8 MR. IMHOFF: Against myself, Your Honor?

9 THE COURT: No; against, what is it, uh, granting
10 non-summary judgment to you on your claim.

11 MR. IMHOFF: Okay; thank you.

12 THE COURT: If you think you've got that good a case.

13 MR. IMHOFF: All right.

14 THE COURT: All right, how much time do you need,
15 though, uh, Mr. Imhoff?

16 MR. IMHOFF: Um -- I'm -- I'm sure the next time this
17 Court is able to schedule a motion hearing.

18 THE COURT: No, let's do it -- I -- I don't, uh --
19 the -- the clerk doesn't need it, and my law clerk is the one
20 that's usually abused, uh, with all of these filings, uh --
21 uh, at the, uh -- and I don't want to be, what is it, too,
22 uh -- uh -- uh, concerned that -- for the eleventh hour --
23 and it pretty much was.

24 All right; so, uh -- well, let's just say, let's --
25 let's do thirty days. And -- and you can do it -- as I say,

1 if you've got a case, or -- and if it's gonna be something
2 different from the other cases, then, uh, let it be developed
3 here. You know, and you can do it on affidavits and, um --
4 uh -- uh, whatever. But I mean, uh -- uh, you're not --
5 you're not trying the case on a summary judgment unless you
6 don't have a case. That goes for, what is it, the, uh, mover
7 as well as the one in opposition.

8 MR. IMHOFF: All right, thirty days, Your Honor. Thank
9 you.

10 THE COURT: All right. And if you -- you might want --
11 I don't know what your -- what -- what sort of record are
12 you, uh, moving on in your summary judgment? You got an
13 affidavit or anything, or is it just based on the other
14 rulings?

15 MS. MURPH: I was basing it on -- I made the motion and
16 I've written a lot in my motion and then on your prior, uh --
17 whatever.

18 THE COURT: All right. Well and good; as it relates to
19 your particular client?

20 MS. MURPH: You want me to go through the whole---

21 THE COURT: Well, I want you -- I -- The Court needs
22 something in your case---

23 MS. MURPH: Okay.

24 THE COURT: ---to determine whether in your case it
25 falls in like all the other cases The Court's ruled on.

1 short order because just the -- the word, denied. Uh -- but
2 you can renew it, uh, when you feel, uh, appropriate -- I
3 mean, it's appropriate. But you do -- you just follow the
4 rules---

5 MS. MURPH: Okay.

6 THE COURT: ---with, uh, some sort of basis for it
7 re- -- uh, reflecting that is a genuinely issue of material
8 fact.

9 MS. MURPH: Thank you.

10 THE COURT: All right; thank you, ma'am. And, of
11 course -- and, Mr. Imhoff, you would respond.

12 MR. IMHOFF: Yes, Your Honor.

13 THE COURT: You can either throw up your hands and
14 concede or, what is it, maybe not. All right; next?

15 THE CLERK: Um -- next will be number, um, seven and it
16 is Jose Nino's motion for summary judgment as to cross-claim
17 of Bostic.

18 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
19 CONFERENCE, OFF THE RECORD.)

20 (WHEREUPON, PROCEEDINGS CONTINUED.)

21 THE COURT: I tell you what, let's take a short break.
22 Um -- then, uh, we'll come back in about ten minutes.

23 (WHEREUPON, HEARING RECESSED AT 11:34 A.M.)

24 (WHEREUPON, HEARING RESUMED AT 11:55 A.M.)

25 THE COURT: All right, next?

1 MS. MURPH: Um---

2 THE COURT: Well, I mean, not now. I mean I'm giving
3 you---

4 MS. MURPH: Okay.

5 THE COURT: ---time to develop it.

6 MS. MURPH: All right.

7 THE COURT: Yeah.

8 MS. MURPH: So just write a -- submit a brief then?

9 THE COURT: Well, I -- well, brief or -- I don't know,
10 briefs are not as controlling as affidavits or, you know...

11 MS. MURPH: Okay.

12 THE COURT: Well, I'm sorry, I -- I didn't write the
13 rules.

14 MS. MURPH: Thank you.

15 THE COURT: All right. I tell you what, in that case,
16 um, you're on, uh...

17 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
18 CONFERENCE, OFF THE RECORD.)

19 (WHEREUPON, PROCEEDINGS CONTINUED.)

20 THE COURT: Ms. Murph, um, inasmuch as you're gonna be
21 the moving party, you'll control when, um -- uh, it'll be
22 heard. In other words, you'll re- -- I -- because I'm
23 denying your motion for summary judgment.

24 MS. MURPH: Okay.

25 THE COURT: And the only thing I -- we can do that on a

1 short order because just the -- the word, denied. Uh -- but
2 you can renew it, uh, when you feel, uh, appropriate -- I
3 mean, it's appropriate. But you do -- you just follow the
4 rules---

5 MS. MURPH: Okay.

6 THE COURT: ---with, uh, some sort of basis for it
7 re- -- uh, reflecting that is a genuinely issue of material
8 fact.

9 MS. MURPH: Thank you.

10 THE COURT: All right; thank you, ma'am. And, of
11 course -- and, Mr. Imhoff, you would respond.

12 MR. IMHOFF: Yes, Your Honor.

13 THE COURT: You can either throw up your hands and
14 concede or, what is it, maybe not. All right; next?

15 THE CLERK: Um -- next will be number, um, seven and it
16 is Jose Nino's motion for summary judgment as to cross-claim
17 of Bostic.

18 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
19 CONFERENCE, OFF THE RECORD.)

20 (WHEREUPON, PROCEEDINGS CONTINUED.)

21 THE COURT: I tell you what, let's take a short break.
22 Um -- then, uh, we'll come back in about ten minutes.

23 (WHEREUPON, HEARING RECESSED AT 11:34 A.M.)

24 (WHEREUPON, HEARING RESUMED AT 11:55 A.M.)

25 THE COURT: All right, next?

1 THE CLERK: Um -- okay, we were at number seven; um,
2 Jose Nino's, um, motion for summary judgment as to
3 cross-claim. But, I've been informed that, um, KMAC has the
4 same motion, as well as Eason Con- -- Construction and---

5 MR. BELCHER: Jerry Miller.

6 THE CLERK: ---Jerry Miller. And so it's all basically
7 the same motion. So that would take care of number seven,
8 eight, um, twenty, and this one would have been twenty-two.
9 It was filed on April 4th, so I did not add it because of the
10 ten days. But because everything, um---

11 THE COURT: All right.

12 THE CLERK: ---his motion is a joint motion with the
13 others; they've waived the ten days' notice as long as you're
14 okay with that.

15 THE COURT: Oh, I'm fine with that. Uh -- 'cause I
16 do -- in -- in all seriousness, I do appreciate your patience
17 with The Court. But, we do need to get this -- this -- move
18 this matter, moving -- move it along.

19 Okay; all right, uh, your motion is for summary judgment
20 on the cross-claims?

21 MR. MARTIN: Uh -- yes, sir. Curt Martin for Jose Nino,
22 along with Bill Woods.

23 THE COURT: All right, Mr. Martin and Mr. Woods.

24 MR. MARTIN: Yes, sir; it's a motion for summary
25 judgment. It's, uh, Bostic's cross-claim.

1 THE COURT: And this is against Bostic?

2 MR. MARTIN: Yes, sir.

3 THE COURT: And you are for Jose Nino?

4 MR. MARTIN: Yes, sir.

5 THE COURT: And who represents Bostic?

6 MR. BELCHER: Alan Belcher, Your Honor, for Bostic
7 Construction Incorporated.

8 THE COURT: All right, uh---

9 MR. MARTIN: Uh -- Your Honor---

10 THE COURT: ---Mr. Martin.

11 MR. MARTIN: ---uh, Jose Nino was the framing
12 subcontractor on phase one; they were a subcontractor for
13 Bostic. Um -- this argument is gonna sound very familiar.
14 Um -- it's essentially the same argument made by all the
15 phase two subs as to their respective general contractor,
16 Marick, uh, which The Court heard back in the fall, uh, and
17 granted back in the fall, and essentially reaffirmed this
18 morning in the---

19 THE COURT: Is Bostic the general contractor in the,
20 um -- uh, phase two?

21 MR. BELCHER: They completed a couple of units in phase
22 one; I think up to eleven units in phase one.

23 THE COURT: Okay, but, uh, is this out of the phase one?

24 MR. BELCHER: Nothing in phase two, whatsoever.

25 THE COURT: All right; okay, very good.

1 MR. MARTIN: Yes, sir, it's -- yeah, the argument is the
2 same as it was for the phase two subs as to their contractor.

3 Um -- Bostic's cross-claims are for negligence, breach
4 of contract, breach of warranty, contractual and equitable
5 indemnity and contribution.

6 Um -- now, the actions for negligence and breach of
7 contract and breach of warranty, uh, we're arguing, of
8 course, that those are just disguised indemnity claims. They
9 are, uh -- they're styled as distinctive claims; however, uh,
10 the language in the actions make clear that they are
11 contingent upon plaintiff's success against Bostic. Uh -- so
12 we contend that those are disguised indemnity claims and they
13 be treated as such.

14 Uh -- as to the indemnity claims themselves, uh,
15 contractual indemnity, there is no contract. Without a
16 contract, there is no contractual indemnity.

17 Uh -- equitable indemnity, uh, South Carolina Courts
18 have been very clear that the most important element to find
19 for an equitable -- an equitable indemnity, is that the party
20 seeking equitable indemnity -- in this case, Bostic -- be
21 adjudged to be without fault. Bostic has not been adjudged
22 to be without fault and they cannot be adjudged to be without
23 fault.

24 Bostic's own expert, Rick Moore, has testified he
25 observed building code violations out at the project and also

1 testified that the general contractor is ultimately
2 responsible for the work of the subs. Therefore, best case
3 scenario, Bostic is a joint tortfeasor and there could be no
4 equitable indemnity amongst joint tortfeasors.

5 Uh -- the last cause of action from Bostic,
6 contribution, that's not ripe. Uh -- there can't be a -- a
7 cause of action for contribution until a payment has been
8 made. Uh -- Bostic has not made a payment, uh, certainly not
9 one that---

10 THE COURT: Well, that's not a jury issue anyway, is it?

11 MR. MARTIN: I don't believe so, Your Honor. So there
12 has been no payments so it not a ripe action. Uh -- for
13 those reasons we ask for, uh, summary judgments on all of
14 Bostic's cross-claims.

15 THE COURT: All right; Mr. Belcher?

16 MR. BELCHER: Thank you, Your Honor. And I think that
17 we do a little bit of disservice to -- to this motion for
18 summary judgment in our defense if we say that this is a
19 similar argument. Certainly if we say it's an identical
20 argument to the ones that you've heard last year on phase
21 two. We do have some distinctions here and I'd like to kind
22 of go through those with you.

23 First of all, I -- I do think that we do need to look at
24 it completely different from what -- what happened, because
25 the facts are different. There were a lot of distinctions.

1 But first of all, um, our claims should not be collapsed
2 into indemnity claims. They are not solely indemnity claims.
3 Um -- there is case law in The State of South Carolina --
4 just to set the backdrop for you, it's the case of *Addy v.*
5 *Bolton*; I'd be happy to cite that for you -- that says that
6 in the case of an individ- ---

7 THE COURT: All right; do you have the cite?

8 MR. BELCHER: Yes; the cite is, uh, 257 S.C. 28. Or --
9 yeah; 257 SC 28, a 1971 case.

10 Uh -- in that case The Court held that aside from an
11 equitable argument you are entitled to damages, special
12 damages, in the case of an indemnity thing (sic) -- in- --
13 indemnity claim for, uh, special damages at law. All right?
14 You're -- you're not just entitled to equitable relief,
15 you're also entitled to damages at law.

16 Now, in our cross-claims we pled negligence. And our
17 negligence complaint says -- or, our negligence cross-claim
18 says, to the extent we have to pay the plaintiffs, we're
19 looking to you for that.

20 But, that's not all we're demanding in our complaint --
21 in our cross-claims. We're demanding the costs and fees
22 and expenses associated with the -- the defense, the
23 investigation, and the settlement, if any, of these claims.
24 That is not an equitable indemnity claim. That is not a
25 claim that arises out of us having to pay something as in a

1 special relationship and all those other arguments.

2 THE COURT: Well, if it's attorney's fees, what does it
3 arise from?

4 MR. BELCHER: Well, it could arise from a contract. It
5 could arise from---

6 THE COURT: Well, that's what I'm asking. What --
7 what -- your claim, uh, for attorney's fees, what is it
8 based on?

9 MR. BELCHER: It -- well, costs could a- -- arise from
10 an offer of judgment. It could a- -- arise from a contract.
11 It could arise from anything. I mean, it could just be---

12 THE COURT: That's not for anything. That's just --
13 it -- it has to either be statutory or contract.

14 MR. BELCHER: Statute or contract; I agree, Your Honor.
15 Um -- and so we are asking for more in our complaint than
16 just---

17 THE COURT: Well I thought -- but, again, I'm asking,
18 what is the basis for your claim for comp- -- for attorney's
19 fees? I mean, it wouldn't -- would it -- is it a
20 statutorial, um -- uh -- uh, remedy?

21 MR. BELCHER: No, we don't think these are -- we have
22 not -- no, we haven't plead any statutes, Your Honor, but---

23 THE COURT: Well, is it -- you got a contract that says
24 that, um -- uh, you'd be entitled to attorney's fees?

25 MR. BELCHER: We don't think we do. I mean, there were

1 contracts between these parties before---

2 THE COURT: Well, if you don't have it, then that's not
3 a -- a cause of action.

4 MR. BELCHER: Well, we pled it and I think there is---

5 THE COURT: Well, I'm sorry; what is it -- you could
6 plead a lot of things. I, uh -- I had to, what is it, advise
7 a -- a solicitor not long ago that when I started practicing
8 law that the, um, indictment slated -- uh, stated that, um --
9 uh, the crime was committed with force of arms at the
10 courthouse door. And I -- in other words, allegations are
11 not evidence.

12 MR. BELCHER: Well, fair enough, Your Honor. But I
13 think we would be entitled to costs under Title Fifteen if we
14 ask for them at the end of trial. I think if---

15 THE COURT: Well I -- you'd have to give me some
16 authority for that. All right?

17 MR. BELCHER: Title Fifteen entitles a prevailing party
18 to petition The Court for costs within three days of the
19 trial.

20 THE COURT: Well, a cost is still statutory, uh, by
21 rule. There are certain statutory costs that you get, not,
22 what is it, uh -- not just any costs.

23 MR. BELCHER: Well, you can get the costs associated
24 with the -- the trial docket---

25 THE COURT: All right. Well, that -- that's your

1 argument, fine. All right.

2 MR. BELCHER: That's one of the arguments. I mean, the
3 other argument, too, is that there is case law that says
4 that, you know, when you're dealing with equitable indemnity,
5 and we cited a case of -- the case that I would cite is
6 Jourdan, G-O-U- -- J-O-U-R-D-A-N v. Boggs Vaughn
7 Construction. Um -- and it's cited at 324 South Carolina
8 309.

9 THE COURT: 324?

10 MR. BELCHER: 324 South Carolina 309, a 1996 case, which
11 basically says, under a similar analysis under the motion to
12 dismiss; that, uh, indemnity is something that, of course, is
13 an equitable remedy. But, with regard to finding whether or
14 not there are unclean hands or whether the, uh, general
15 contractor is at fault, uh, that is an issue to -- to be
16 determined by the finder of fact and not by The Court.

17 And I believe in this case you could have, especially
18 with some of these other subcontractors, if not all of
19 them -- there's testimony in the record by Bostic
20 Construction -- the only person that we've deposed from
21 Bostic Construction -- that says, we rely on our
22 subcontractors to know what they're doing.

23 These subcontractors cannot make a credible argument to
24 a jury that the general contractor didn't catch our
25 negligence; therefore, he's at fault for it. They can't --

1 that's not an argument that I think they can make to a jury
2 that's gonna pass muster with the jury. And that's the only
3 argument that they would have that would allow you to---

4 THE COURT: So you're saying there's a genuine issue as
5 to whether or not there was, um -- uh---

6 MR. BELCHER: Whether or not there was---

7 THE COURT: ---failure---

8 MR. BELCHER: ---I -- I apologize, Judge.

9 THE COURT: No, that's all right. Go ahead; you can
10 probably state it better than I can.

11 MR. BELCHER: Whether or not the general contractor has
12 a right to rely on the expertise of its subcontractors to do
13 the job that they are duly paid to do.

14 THE COURT: So you don't think the general contractor
15 has an overriding responsibility, uh, to, uh, supervise the,
16 um, actions of its subs?

17 MR. BELCHER: I don't think that supervision is at issue
18 here. I think that what the issue here is whether or not the
19 general contractor has a right to rely on the subcontractors
20 when he pays them twenty thousand dollars to frame a building
21 that they're gonna do it right.

22 And I think there's a genuine issue of material fact as
23 to one, whether that was the understanding; and, two, whether
24 they did do it right. And I think that that's a decision
25 that needs to be made by the twelve people in the box and not

1 The -- not The Court. I think that raises the scintilla of
2 evidence that our Supreme Court has said is required to pass
3 muster on a summary judgment standard.

4 THE COURT: Well, are they gonna award attorney's fees
5 too?

6 MR. BELCHER: Who's that; the jury?

7 THE COURT: The, uh, fact finders.

8 MR. BELCHER: Well, I'd love to ask them for them.

9 THE COURT: Okay; I'm just curious.

10 MR. BELCHER: I know a lot of people who would like to
11 ask them for it.

12 THE COURT: I didn't -- I -- I didn't know how much we
13 were gonna put on the, uh, juries to write law and rules and
14 stuff.

15 MR. BELCHER: Well, no -- no. And I wouldn't ask -- I
16 wouldn't ask them to do that. But, I think that there does
17 need to be a determination as to liability of the general
18 contractor.

19 THE COURT: All right; I understand that. All right.

20 MR. BELCHER: And -- and you've got other -- you've got
21 other issues here too as well, Your Honor, because in this
22 particular case you've got Bostic not completing many of
23 these units. But, the jury may very well hear Bostic
24 Construction, hear that they didn't complete some of the
25 units, hear that, uh, perhaps the warrant- -- there are no

1 war- -- I mean, it -- it could come to pass that The Court
2 could make a conclusion of law that when you do not complete
3 a building, you do not extend warranties of habitability and
4 fitness for a particular use. Preferably for, uh -- most --
5 most importantly the warranty of habitability which do not
6 require privity of contract. But they arguably -- or, we will
7 argue -- require completion of the project for those
8 warranties to begin, okay?

9 So, we may be in a place here where the subcontractors
10 cannot make that argument because their scope of work was
11 completed on the project, while Bostic's was not. They may
12 find that Bostic is not at fault, but the subcontractors, who
13 were paid to do the job they did, were required to do it
14 right and, therefore, their warranties do extend even though
15 the -- the unit itself did not receive a certificate of
16 occupancy under their general contractor.

17 So I think all those issues create issues of fact that
18 are still to be determined by a finder of fact and not this
19 Court, such that summary judgment is inappropriate in our
20 particular phase.

21 THE COURT: All right.

22 MR. MARTIN: Uh -- Judge, just responding to
23 Mr. Belcher, uh, his first contention that, uh, these are
24 separate and distinct causes of action, uh, as he admitted
25 in -- in their pleading, uh, breach of negligence, breach of

1 contract, breach -- breach of warranty, they ask to recover
2 from the subcontractors, including Jose Nino, any monies it
3 is adjudged to owe plaintiffs.

4 The character and the nature of the action is indemnity.
5 Uh -- and as far as the indemnity itself, uh, the facts may
6 be a little bit different in that Bostic Construction only
7 completed maybe a -- a dozen units before, uh, leaving the
8 property. It doesn't change the underlying principals. Its
9 own expert, uh, said that, uh, Bostic is ultimately
10 responsible to ensure that subs comply with the building code
11 and -- and plans.

12 Plus, it -- it doesn't matter what the jury's allocation
13 is as to fault as to the subs. If they find that there is a
14 violation of building code, their expert, Mr. Moore, who's
15 already said that the G-C is ultimately responsible for that,
16 which completely undercuts their claim for any kind of
17 equitable indemnity.

18 THE COURT: All right. Mr. Woods are you involved in
19 this?

20 MR. WOODS: No, Your Honor; I'll -- I'll, uh, stand with
21 Mr., uh -- Curt's, uh, statements on this. I believe that
22 several of the other subcontractors have additional arguments
23 or further arguments that, uh, they'd like to make on it,
24 though.

25 THE COURT: Yes, sir.

1 MR. BELCHER: And, Your Honor, I think I do need to
2 respond to what Mr. Martin said here.

3 That scenario where Bostic is adjudged in the jury --
4 which, again, it's gonna be a question of fact for a jury --
5 they'll have an expert testifying to whatever he's going to
6 testify to. The jury will weigh the credibility of that
7 evidence and make a determination.

8 If the jury -- if the jury determines that -- if the
9 jury determines that, uh, there is a violation of a building
10 code, then that's almost a clear-cut scenario wherein you
11 have a general contractor being charged with liability. That
12 general contractor did not violate a building code if he
13 didn't swing a hammer on that project. The violation of the
14 building code is by the subcontractor who failed to build
15 something to code. The architects are responsible for
16 telling you whether or not things are built to the code.

17 THE COURT: Well, let me ask you something. Does a
18 general contractor ever swing a hammer?

19 MR. BELCHER: Some of 'em self-perform.

20 THE COURT: Well, I'm serious.

21 MR. BELCHER: Yeah, there's a matter---

22 THE COURT: I mean, most of them -- that's why you have
23 project managers and all. They're -- they're -- they're not,
24 um -- uh, laborers.

25 MR. BELCHER: The old -- the old form that---

1 THE COURT: Oh, I -- listen, I know about, what is it,
2 the---

3 MR. BELCHER: ---you used to have master builders that
4 would have everything done in-house.

5 THE COURT: I understand.

6 MR. BELCHER: Now you got---

7 THE COURT: But I'm just curious. That's a proposition
8 of law that I didn't know existed that you had to swing a
9 hammer in order to be responsible for the product.

10 MR. BELCHER: Well, I think that that's a situation
11 where you're held responsible, but then you're entitled to
12 seek indemnity because you do have to swing a hammer. You
13 didn't create that code violation. Someone else---

14 THE COURT: Well, I think that's -- that's -- again,
15 I -- I'm not sure, uh -- I'll have to look at this. I -- I
16 trust you-all have briefed this question of whether or not,
17 uh, there's an ultimate responsibility to, uh -- uh,
18 supervise and to, uh -- to be sure that the people that you
19 bring onto a project does, um -- uh, or do, uh, what they're
20 supposed to---

21 MR. MARTIN: And, Your Honor---

22 THE COURT: ---and the way they're supposed to.

23 MR. MARTIN: ---Your Honor, forgive me; I -- I don't
24 think there's a need to brief that because their own expert
25 admitted that the G-C has that responsibility to supervise,

1 to make sure the subs comply with the code and the plans.
2 Moreover, the G-C pulled the permits. They need to ensure
3 that it complies with code.

4 THE COURT: Well, there's -- I'm just curious. All
5 right, you -- you say that -- that's what you're gonna rely
6 on, you don't need any law on it you just need the testimony.
7 I hope you don't find any other testimony out there that
8 contradicts that.

9 MR. BELCHER: Well, and -- and---

10 THE COURT: I mean, another opinion, not another expert.

11 MR. BELCHER: And you do; you have Joe Bostic on the
12 record saying, I rely on my subcontractors to do what they're
13 supposed to do to build to code and follow the code.

14 THE COURT: Well, what else would he say?

15 MR. BELCHER: Well, I'm just saying, there -- there --
16 there you have a genuine issue of material fact that meets
17 the scintilla of evidence requirement to make summary
18 judgment not appropriate in this case.

19 THE COURT: Well, uh---

20 MR. BELCHER: And---

21 THE COURT: ---well -- well, wait a minute. We've got
22 somebody else standing now.

23 MR. BELCHER: ---and the other issue that I need to---

24 THE COURT: Well wait a minute -- okay.

25 MR. BELCHER: ---I need to address the contribution

1 claims. The contribution in South Carolina, especially these
2 construction cases, has gotten really difficult because we
3 stand to be in a position potentially, given the age of this
4 case, where the statute of repose is -- we've hit the statute
5 of repose in this case, and I can't bring my contribution
6 claims. There's case law in The State of South Carolina that
7 says that we recognize it's a harsh situation, but if you try
8 to bring your contribution claim outside of the initial
9 statute of repose, it is time-barred.

10 So, The Court has to weigh the ripeness issue, uh,
11 between whether or not we are -- should be entitled to this
12 recovery. And we leave it in our pleadings, leave it as an
13 issue for The Court, and then it's gonna be something that's
14 addressed after the jury anyway, and after monies have been
15 paid out. But, we might get to a place where, after a trial
16 and an appeal and who knows what else, we don't have our
17 contribution claim to file after we've settled the -- the
18 debts of another, uh, joint non-settling tortfeasor.

19 So, that's why I plead contribution in my complaints or
20 in my cross-claims because I always fear that if I don't
21 plead it in the initial phase of a litigation, it's gonna be
22 time-barred by the statute of repose by the time everything
23 settles.

24 So I think The Court needs to weigh that in the -- in
25 the balance as to what the proper way to proceed, knowing

1 that it's not ripe yet but it will be as soon as we pay. And
2 that's -- that's -- that's just -- I hadn't responded to that
3 argument and now I'm done.

4 THE COURT: I understand.

5 MR. BELCHER: So, thank you, Your Honor.

6 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
7 CONFERENCE, OFF THE RECORD.)

8 (WHEREUPON, PROCEEDINGS CONTINUED.)

9 THE COURT: All right -- all right.

10 MR. YOKEL: Thank you, Your Honor; may it please The
11 Court. David Yokel, I'm the attorney for KMAC. Uh -- we
12 built, uh -- or, poured the elevated concrete decks. Um --
13 and we join in the arguments that Mr. Martin made on behalf
14 of, uh, Nino. Um -- I have for The Court the case of *Fields*
15 *versus, um, Haynes Water Builders.*

16 THE COURT: *Fields* versus what?

17 MR. YOKEL: Um -- Haynes Water Builders.

18 THE COURT: H-A-N or H-A-Y?

19 MR. YOKEL: H-A-Y-N-E-S, Your Honor. 376 South Carolina
20 545; 658 S.E.2d 80.

21 THE COURT: All right, 376 South Carolina?

22 MR. YOKEL: Five-forty-five.

23 THE COURT: Okay.

24 MR. YOKEL: 658 S.E.2d 80. Um -- this is where The
25 Court approved a jury charge in a construction case, where if

1 the builder undertakes construction of a building and quietly
2 represents that he possesses and will exercise a reasonable
3 degree of skill usually possessed by a member of the building
4 occupation, and that a builder who undertakes to supervise
5 the construction of a building is under a duty to exercise
6 reasonable care and sub-supervision to see that the work is
7 done in conformity with applicable building code.

8 If I may hand this case up, Your Honor?

9 THE COURT: Certainly.

10 MR. YOKEL: Your Honor, what I would like to add to what
11 Mr. Martin has stated to The Court is, not only did
12 Mr. Moore, um -- Mr. Moore, their expert, um, you know,
13 testify as to what he said, but he was specific, on
14 page one hundred and one -- and it's attached to the brief
15 that we provided to The Court -- where he says that it's the
16 general contractor's responsibility to ensure his subs build
17 according to the building code. Um -- he didn't use just to
18 supervise, he actually said to ensure; and that's coming from
19 his own expert.

20 And whether there may be some scintilla evidence of
21 other items out there, there is still uncontradicted evidence
22 that he was responsible for, um, the subcontractors and for
23 the fed- -- and that there was, uh -- found instances in
24 phase one where the contractor or subs failed to comply with
25 building code requirements with regard to the moisture

1 penetration.

2 Um -- not only did Mr. Moore, but, um, KMAC's expert,
3 Marshall Clark, was, um -- was, um, deposed by, uh, the
4 plaintiff, Mr. Lyles, and he found numerous times where he
5 testified throughout his deposition, um, where there were
6 deficiencies, which were violations of building code, and he
7 attributed it to the general contractor, Your Honor.

8 So, I believe that the evidence is completely
9 uncontradicted. The general contractor in this case is --
10 they're here without -- with unclean hands. And, therefore,
11 um -- his equitable indemnity and then the other cases, uh,
12 that fall within it, uh, merge into it, and this, um,
13 cross-claim should be dismissed, Your Honor.

14 THE COURT: All right. Now -- so that's KMAC as well
15 as, um -- (after pause) let's see, Nino and, um -- Mr. Wood
16 (sic), who were you again? Bostic or -- Mr. Wood (sic)?

17 MR. WOODS: Yes, sir?

18 THE COURT: Who---

19 MR. WOODS: I -- I'm -- I'm here on behalf of Nino
20 also---

21 THE COURT: Oh, all right.

22 MR. WOODS: ---and that's why---

23 THE COURT: You are Nino as well---

24 MR. WOODS: ---I didn't make---

25 THE COURT: ---okay; all right.

1 MR. WOODS: ---a separate argument, but would like to
2 point out at this time that Nino also adopts the arguments of
3 these other---

4 THE COURT: Right.

5 MR. WOODS: ---gentlemen because they are buttressing
6 what, uh---

7 THE COURT: All right.

8 MR. WOODS: ---what Mr. Martin's already said.

9 THE COURT: All right; let's see, we've got some other
10 people up. Uh -- you are?

11 MR. POTEAT: Your Honor, and I -- and I -- Chad Poteat
12 on behalf of Eason Construction.

13 THE COURT: Poteat?

14 MR. POTEAT: Yes, Your Honor.

15 THE COURT: Who is it?

16 MR. POTEAT: Uh -- Eason Construction.

17 THE COURT: Eason?

18 MR. POTEAT: E-A-S-O-N Construction.

19 THE COURT: Very good; thank you.

20 MR. POTEAT: And -- and, Your Honor, I'm gonna be
21 even -- I think, as you find that we get down to the -- the
22 last subcontractor of Bostic making the same argument, uh, we
23 have less to add that's not already been said.

24 Um -- I would simply point out that in addition -- of
25 course, we've got testimony from, um, Bostic's own expert

1 that keeps being cited by -- by both the, uh, defense
2 attorneys. And we would cite the same -- those -- those same
3 passages as well.

4 Uh -- but I also wanted to -- I wanted to point out an
5 issue with Bostic's defense that they may not have done the
6 work entirely to phase one; this idea that they might not be
7 the G-C for entire phase one.

8 With respect to the exteriors of the buildings, I think
9 it's all our understandings that the general contractor -- at
10 least who hired us to perform the work on these exteriors --
11 was Bostic. Now, whether or not their C-O's are there and
12 whether or not that changes the legality of the claims with
13 respect to the plaintiffs versus Bostic, I don't know. But
14 with respect to our -- the -- these cross-claims between the
15 G-C and these four subcontractors, um, for -- for the -- for
16 our purposes, Bostic is the general contractor; they are the
17 ones that hired us to do the work on the building.

18 So, I don't know if the legal distinction that -- that
19 Mr. Belcher came up with is, uh -- uh, persuasive in -- in
20 trying to get out from underneath the, uh -- the arguments
21 that have been brought forth by the defendants, uh, in their
22 motion for summary judgment.

23 And I'd also point out, Your Honor, if, uh -- at least
24 with respect to the phase two motions that were argued last
25 fall with respect to the various subcontractors against

1 Marick, uh, the exact same argument as far as the duty to
2 supervise, the duty to, uh -- to not bring forth a building
3 that has, uh -- that has, uh, building code violations, that
4 was the exact basis of the arguments of those subcontractors.
5 And that is why I think Mr. Martin appointed -- or -- or,
6 pointed out to The -- The Court that this is simply phase one
7 subs' arguments that mirror that of the phase two, uh, subs,
8 uh, made several months ago. And, as far as I can tell,
9 there's actually no legal distinction between the basis of
10 the arguments on either phase one or phase two with respect
11 to the -- the cross-claims from those general contractors.

12 Thank you.

13 MR. RIVERA: Your Honor, Nick Rivera; R-I-V---

14 THE COURT: Has -- I beg your pardon?

15 MR. RIVERA: Nick Rivera, R-I-V-E-R-A---

16 THE COURT: Very good.

17 MR. RIVERA: ---for Everado Jaramillo. And I'm, uh,
18 here to adopt the arguments made before me. And I have
19 nothing else to add, Your Honor.

20 THE COURT: And who is your client, Mr. Rivera?

21 MR. RIVERA: Everado Jaramillo.

22 THE COURT: Spell the last---

23 MR. RIVERA: Jaramillo. All right, J-A-R-A-M-I-L-L-O.

24 THE COURT: Jaramillo; all right, very good.

25 MR. RIVERA: Thank you, Your Honor.

1 THE COURT: All right. Mr. -- Mr. Belcher?

2 MR. BELCHER: If I may make one last closing comment
3 here? The KMAC issue is something that is also distinct.
4 KMAC makes it's even clearer the situation where a general
5 contractor has completely relied on a sub-contractor to do
6 the work that it did..

7 These plans originally were specified to have open
8 decking and a cha- -- and an opp- -- and an opportunity or
9 a -- an attempt to make these things -- these units nicer.
10 They poured light-weight concrete on them; it was not part of
11 the plans. They hired KMAC. KMAC is a waterproofing and
12 light-weight concrete contractor. They hired them to come in
13 there, make the decks waterproof, pour their concrete over
14 it, and do it so that they don't leak and don't cause damage.

15 Joe Bostic, in his deposition, pages eighty-five through
16 eighty-eight, says, KMAC sure knows a heck of a lot more than
17 I do about how to waterproof a building. They're a
18 waterproofing and light-weight concrete contractor. We
19 didn't ask them how to do it. We didn't tell them how to do
20 it. We said, get there and do it. You do -- you de- -- you
21 design it the way you design all these things, 'cause you do
22 it all the time and you put it out there.

23 That's another situation where Bostic had no control
24 over the design, hired a contractor that it believed knew
25 what they doing, that does this work all over the State of

1 North -- States of North and South Carolina, and left it to
2 them to do it and do it right. So that -- that buttresses my
3 argument.

4 Also, I would like The Court to pay particular attention
5 to the *Fields* case and the jury charge in that case because
6 it's -- it discusses the duty of reasonable care that a
7 contractor has in ensuring the viola- -- the vio- -- the
8 building codes are not violated.

9 The duty of reasonable care. That is a jury charge
10 because a jury should hear whether or not a contractor --
11 there may well be building code violations out there and
12 Bostic's expert may well say that there are, but to determine
13 whether or not Bostic acted reasonably in its duties to
14 ensure that there weren't -- that doesn't mean necessarily
15 that there weren't, it just means that Bostic acted
16 reasonably in addressing those issues and trying to avoid
17 those issues. That is a jury charge because a jury should be
18 able to determine that issue, which means that it's not ripe
19 for summary judgment.

20 And that's all I have. Thank you, Your Honor.

21 MR. YOKEL: Your Honor, if I may just---

22 THE COURT: Yes, sir, Mr. Yokel?

23 MR. YOKEL: Yes; uh, David Yokel for KMAC. Um -- the
24 only -- Mr. Moore, their expert, would not give an opinion
25 that any of the subcontractors did anything, um, negligent --

1 negligently or incorrectly. The, um, only evidence with
2 regard to KMAC, Your Honor, is that when Marshall Clark
3 testified that KMAC did everything it was supposed to and did
4 it in accordance, uh, with, um, the proposal. Um -- so there
5 is no evidence that KMAC did anything wrong for which he can
6 even be here today to add -- to answer that they relied on
7 him.

8 Um -- Mr. Morris, um, indicated -- he is the, uh, the
9 30(b)(6), uh -- um, witness who testified on behalf of Bostic
10 who indicated that, um -- he, first of all, didn't know
11 anything so he couldn't testify about what they did or didn't
12 do. But he testified that there was a superintendent, there
13 was an assistant superintendent and there were, um, you know,
14 other people. I think two people underneath him, that he was
15 sure that was there and those people would know anything.

16 They've not brought these people in -- uh, in two, three
17 years to come, um, as to where they can be identified -- or,
18 where we identified them or when we can get ahold of them or
19 the access to them. Nor has he brought affidavits to show
20 anything about reasonable supervision.

21 So, the only evidence that we have is that they share in
22 any type of liability or responsibility and they're here with
23 clean hands. It doesn't make a difference.

24 THE COURT: Well, do you take the position that they're
25 automatically responsible without, uh, any sort of, um -- uh,

1 violations of the reasonable care?

2 MR. YOKEL: Uh -- well, the -- in that case The Court's
3 real clear that there's not a strict liability. So, I
4 wouldn't take that position, Your Honor. But, I believe
5 there is an absence of evidence, and we're here on a motion
6 for summary judgment that's been filed for months and they
7 have every opportunity to bring affidavits.

8 THE COURT: So you're saying all right, so there is no
9 counter, uh, affidavit or anything else that -- that he
10 suggests?

11 MR. YOKEL: There's nothing, Your Honor.

12 THE COURT: And the only thing that you do have in the
13 record at -- at this point, what they're -- your motion to,
14 um -- uh, as to the, uh, cross-claim is that, uh, there were
15 defects and violations of the code?

16 MR. YOKEL: That is correct. And that the testimony is
17 that the general contractor, um, is responsible for that.

18 THE COURT: All right; uh... (After pause.) What do you
19 have, uh, Mr. Belcher, that says that the, uh, general
20 contractor is not responsible for the, uh -- uh, the conduct
21 of its subs or it's, uh -- the performance of the subs?

22 MR. BELCHER: Well, Your Honor, uh---

23 THE COURT: And particularly when we're talking about,
24 uh -- uh, code violations.

25 MR. BELCHER: ---well, Your Honor, I -- the -- the

1 issue -- we're back to the -- if we're back to that issue,
2 it -- we have the testimony of one the former principals of
3 Bostic Construction saying, I relied on my subcontractors to
4 do their duties and do them correctly. That -- I'm not a guy
5 who knows how to waterproof a building.

6 THE COURT: In other words he did know what their duties
7 were and how they were to be done correctly?

8 MR. BELCHER: No; he says, I don't know how to
9 waterproof a building. I relied on subcontractors who hold
10 themselves out as waterproofing---

11 THE COURT: I thought a general contractor had to have
12 a -- a more, uh -- uh -- uh -- I guess, uh, intelligent
13 license, uh, and -- than---

14 MR. BELCHER: Well---

15 THE COURT: ---what is it, a sub -- I mean, a specialty
16 contractor.

17 MR. BELCHER: ---and -- and even then, the---

18 THE COURT: I mean, don't they have to, uh, under our
19 licensing law have to have, uh -- uh, some acquaintance with,
20 uh, what's required of the code?

21 MR. BELCHER: Well, they have to take a test on it;
22 yeah, they do. So, I mean, that gives 'em---

23 THE COURT: Well, I mean, so doesn't that sort of
24 educate the general contractor that, um, he's -- uh, he can't
25 just go out and, uh -- uh, absolve himself of any

1 responsibility---

2 MR. BELCHER: Well---

3 THE COURT: ---by hiring a sub?

4 MR. BELCHER: ---and on the same vein, a subcontractor
5 cannot absolve itself from liability by saying, I -- you
6 didn't catch my mistake. I'm in a better position to catch
7 my own mistake, but you didn't catch my mistake. Therefore,
8 you have unclean hands.

9 THE COURT: Well, unless that was an equitable sort of
10 argument, though, what is it, you should -- if you're gonna
11 try and get the equitable contribution, you -- you'd better
12 be sure that what you do is, um -- uh -- uh, what you were
13 supposed to do.

14 MR. BELCHER: Right. And -- and then why would---

15 THE COURT: In other words, you -- if you got two, um --
16 uh, hands that are not entirely clean, that's usually where
17 the, you know, uh, contribution falls or lays.

18 MR. BELCHER: Right, which is to be determined by a
19 trier of fact as to whether or not Bostic---

20 THE COURT: Well how about there's no -- how about
21 if there's no, um -- uh, contradiction? I mean, I didn't
22 know, what -- what do you -- where -- where do you find
23 something that says that a -- a builder who undertakes
24 construction of a building, uh, with a subcontractor has no
25 responsibility?

1 MR. BELCHER: I don't say that they have no
2 responsibility, what I said---

3 THE COURT: Well how about you, uh, have, uh, anything
4 but a -- a reasonable resonsi- -- uh---

5 MR. BELCHER: They have a reasonable duty to ensure --
6 to a- -- en- -- a duty to actually---

7 THE COURT: And -- and if they don't -- if they don't do
8 it?

9 MR. BELCHER: Well, it's not a -- it's not a res ipsa
10 situation where just because there's bile (sic) -- building
11 codes, a general contractor didn't act reasonably in trying
12 to avoid building codes. If you're gonna determine whether
13 or not a general contractor acted reasonable (sic) in trying
14 to avoid the violation of building codes, then you have to --
15 that's -- that's an issue for a jury. That's a -- even if
16 it's a negligence per se issue. It's a negligence issue that
17 has to be addressed by a jury.

18 And if I put Joe Bostic up there on the stand or Jeff
19 Bostic or whoever they want up there---

20 THE COURT: Do -- do -- do you have an affidavit or a
21 deposition from Mr. Bostic?

22 MR. BELCHER: We have a deposition from Mr. Bostic; we
23 have---

24 THE COURT: And does he say in that deposition that he
25 had no responsibility?

1 MR. BELCHER: He says I---

2 THE COURT: Or that he did everything reasonably?

3 MR. BELCHER: He says, I -- he says I -- I don't know
4 anyone who said that Bostic did something unreasonable. I
5 haven't -- I haven't seen that on -- attached to this motion
6 either, Your Honor.

7 I mean, I have Joe Bostic saying I rely on my
8 subcontractors to do what they're supposed to do in their
9 depositions. I'm aware---

10 THE COURT: In other words, he -- as I say, he just
11 absolves himself of responsibility. And I don't think that's
12 the law. I -- I don't think that a sub -- a general
13 contractor who has a -- a broader license -- in other words,
14 he is there to be sure that what is done is in, uh -- feels,
15 uh -- uh, is in accordance with the building codes.

16 MR. BELCHER: I -- I---

17 THE COURT: And that he has to have some knowledge of
18 building codes. He just can't say that, what is it, uh --
19 um, my -- my subs are the only ones that are responsible for,
20 uh, following the codes.

21 MR. BELCHER: Right -- right; but, there could be a
22 scenario where this jury hears testimony from Joe Bostic
23 saying I relied on my subcontractors.

24 THE COURT: And that's not the law.

25 MR. BELCHER: But -- but then the jury gets to decide

1 whether the---

2 THE COURT: The law isn't that he can rely on his subs.

3 MR. BELCHER: But the -- the jury gets---

4 THE COURT: Unless you find the law. Tell me where the
5 law is says that you can rely on your subs.

6 MR. BELCHER: Well, I'm sorry; I'll -- I don't have a
7 case right here with me. But if that's---

8 THE COURT: All right.

9 MR. BELCHER: ---that's the way I've always operated.
10 It's a---

11 THE COURT: Well, the only thing is that -- I'm just --
12 I'm reading what, uh, the Chief Justice says---

13 MR. BELCHER: Right.

14 THE COURT: ---she says, a builder who undertakes to
15 supervise the construction of a building is under a duty to
16 exercise reasonable care.

17 MR. BELCHER: Right. And reasonable care is what I am
18 focusing on here, Your Honor. That whether there are vio- --
19 violations of the building code or not, nobody -- I mean, I
20 don't know that there's a failure to exercise reasonable
21 care. I think that's something that the jury has to
22 determine. That's why you have a jury charge on reasonable
23 care for a building contractor---

24 THE COURT: Okay.

25 MR. BELCHER: ---instead of a Judge -- instead of an

1 appeal from a grant of a motion for summary judgment against
2 a general contractor.

3 THE COURT: Well, again---

4 MR. BELCHER: It's a jury charge.

5 THE COURT: ---the -- well, the jury has to have
6 something to -- to consider. And I haven't heard anything
7 that says that what those -- your general contractor did was
8 reasonable. I mean, I haven't heard any -- except to say
9 that, uh, as long as I got a sub, then I can rely on what
10 that, you know, that fellow on the street does.

11 MR. BELCHER: Right, but---

12 THE COURT: All right, he -- I mean, he doesn't have a
13 general contractor's license, but I -- I can rely on him---

14 MR. BELCHER: ---but taking---

15 THE COURT: ---to a- -- to absolve me. And that's not
16 reasonable.

17 MR. BELCHER: ---but taking the evidence in the light
18 most favorable to the non-moving party, they haven't put
19 forth any ev- -- evidence that suggests that I was -- that
20 Bostic was unreasonable.

21 THE COURT: But I thought I heard, what is it, somebody
22 said that there were violations of a building code---

23 MR. BELCHER: That there weren't---

24 THE COURT: ---and I would think that a general
25 contractor, uh, would know what the build code requires.

1 MR. BELCHER: Right; they -- but---

2 THE COURT: He takes a test.

3 MR. BELCHER: ---the testimony that The -- The Court has
4 before it, that I've heard here, is that there has been an
5 identification of a building code. That does not mean that
6 the general contractor did not exercise reasonable care in
7 addressing the building code.

8 THE COURT: And I have -- the only thing I've heard from
9 you, sir, is that, uh, that as long as you got subs then you
10 don't have any responsibility.

11 MR. BELCHER: All right; well---

12 THE COURT: And I -- and I -- I don't think that's the
13 law. I think that, what is it, uh -- uh, and, of course, we,
14 uh -- the whole -- the whole idea of, uh, of building codes
15 and their, uh, requirements and, uh -- go to different --
16 talking about reasonable. You -- you do have certain, uh --
17 uh, questions there that if -- if they had been adopted that,
18 what is it, they are required -- it's much like a -- a
19 traffic violation. You can't say whether it's reasonable to
20 violate a traffic law. Uh -- it's, uh, negligence per se.

21 Now, I don't know. The -- the thing is, I just haven't
22 heard anything and I'm advised that there isn't anything in
23 there that says that either law or facts that, what is it, a
24 contractor can, what is it, uh -- uh, rely on his subs to do
25 what, um, he, uh -- uh, is hired to do.

1 MR. BELCHER: All right.

2 THE COURT: Okay? All right; anything else?

3 MR. POTEAT: Your Honor, and I -- and I---

4 THE COURT: Now, be careful about, um -- uh, victory.

5 MR. POTEAT: No, no, no. This is -- this is short.

6 THE COURT: All right.

7 MR. POTEAT: I just wanted to point out and make sure
8 The Court understands that, um -- and I -- and I understand
9 the tenor of your discussion just now and it's not lost on me
10 or anybody else the way -- what The Court has -- your, um --
11 your thought process.

12 But, the expert testimony that we've mentioned here
13 today, I just want to make sure The Court understands that we
14 are citing Bostic's experts for that -- for this testimony
15 regarding the building code violations and the responsibility
16 of the G-C for that. It would be very difficult, if almost
17 impossible, for Bostic to get around their own experts'
18 testimony at trial unless they intend to withdraw that
19 expert, which we've not seen nor have -- or have another
20 expert in its place.

21 THE COURT: Be careful; there is a case -- no---

22 MR. POTEAT: So, that's all I have to say, Your Honor.

23 THE COURT: ---there's a case *Hucks versus Michelin*,
24 admittedly it's a, um -- uh, a workers' comp. case, but there
25 the expert testified both ways. Uh -- uh, The, um -- uh --

1 uh, Court of Appeals, I think it was, it might have been the
2 Supreme Court---

3 MR. POTEAT: No, that's it; thank you, Your Honor, I
4 appreciate it.

5 THE COURT: ---in other words, uh, said that, uh, any
6 evidence will support a, uh, finding, even though it's
7 contradicted. In fact, I think, you know, if you listen to
8 most Judge's charges they'll tell you that expert testimony
9 is, um -- uh, to be given the same weight as any other and
10 even if it's uncontradicted.

11 MR. POTEAT: And can be ignored if -- if -- if -- if --
12 if, uh---

13 THE COURT: Exactly.

14 MR. POTEAT: ---I think that's what the charge was.

15 THE COURT: Thank you. I'll have to remember that.

16 MR. POTEAT: That -- that's how it's been said by other
17 judges before, Your Honor, so...

18 THE COURT: All right; anything else?

19 (NO RESPONSE.)

20 THE COURT: All right, as to the matter of the summary
21 judgments as to the cross-claims against Bostic's, um -- uh,
22 subcontractors which have, um, been heard today, um, the
23 motions are granted.

24 Um -- I do find that there is, uh -- uh -- they --
25 the -- the record is insufficient to create a -- a genuine

1 issue as to whether or not, um -- uh, the contractor did not
2 have a duty to, um -- uh, exercise the -- the degree of care
3 or supervision to see that the work was done in conformity
4 with the applicable building code. In other words, there was
5 nothing in the -- nothing that The Court has been made aware
6 of, other than he can rely on what his subs know, uh -- uh,
7 that would say that's reasonable. All right.

8 MR. BELCHER: Does that address the contribu- --
9 contribution claim as well, Your Honor?

10 THE COURT: Well, contribution, as far as I can tell,
11 is, um -- uh -- uh -- uh, not a matter of law. I mean, it's
12 equitable. Uh -- and that would only be if, um -- uh,
13 there's some finding that, um -- uh -- uh, the negligence
14 that the, um -- uh -- uh, well, in other -- in other words,
15 it's not a jury question.

16 Now, you did, uh, put up a case, um -- uh, *Addy versus*
17 *Bolton*, but I notice that was, uh, the land's law --
18 landlords were entitled to recover, uh, costs and attorneys'
19 fees in a successful defense by their tenants. Uh -- so,
20 uh -- so I -- I -- I don't think this -- that would be
21 applicable here. I think that, what is it, you'd have to
22 establish that, um -- uh, there was a -- a duty, uh, where
23 either, um -- uh -- well, in other words, it wouldn't be a
24 part of the -- you can bring a -- a -- your claim for
25 contribution if you're successful, but I don't think that you

1 could find that, um -- here that, uh, you'd be entitled to
2 attorney's fees. Unless you can give me some, what is it,
3 um -- uh, statutory or a rule.

4 MR. BELCHER: Okay; thank you, Your Honor.

5 THE COURT: Very Good. Or a contract. You did --
6 you -- you have contracts with these, um, contractors --
7 subs?

8 MR. BELCHER: Had one; I don't know where they are. At
9 one time we did.

10 THE COURT: Okay. All right.

11 MR. MARTIN: Your Honor, uh, would you like us to submit
12 a written order?

13 THE COURT: I think you should. Now, how -- as far
14 as, uh -- can we consolidate these motions for summary
15 judgment so that whatever action is done in regard to the --
16 the judgment doesn't have to be, uh, duplicated?

17 MR. YOKEL: You might have to -- I would think
18 Mr. Martin would prepare the order and then---

19 MR. MARTIN: I think we can consolidate.

20 THE COURT: Well, I mean -- but I'm, uh -- for
21 Mr. Belcher, I don't want to prejudice his client by having,
22 you know, if he wants, what is it, how many different, um,
23 orders?

24 MR. MARTIN: Four subs I think moving.

25 THE COURT: Just four?

1 MR. POTEAT: Four subs, one -- and -- but one order. I
2 mean---

3 THE COURT: Whatever. I'm trying to do one order that
4 will cover---

5 MR. POTEAT: Agreed.

6 THE COURT: ---four subs', you know, uh---

7 MR. POTEAT: I think we're in agreement on that.

8 THE COURT: ---summary judgment. Would that be, uh---

9 MR. POTEAT: That's fine.

10 THE COURT: ---do you have any objection to that,
11 Mr. Belcher?

12 MR. BELCHER: I don't; but, I'll probably have to make
13 a -- the proffer that I made today in that order, uh, with
14 regard to the specifics of KMAC as opposed to Jose Nine's and
15 the other defendants.

16 THE COURT: Well, I think the record here will---

17 MR. BELCHER: Okay.

18 THE COURT: ---be the basis for that.

19 MR. BELCHER: Well, if -- that's fine. Let the
20 record -- the record will---

21 THE COURT: Yeah -- no, I don't -- what -- now, the
22 thing -- and, again, on a summary judgment, I do not find
23 that there is a genuine issue of a material fact that it --
24 was it reasonable or unreasonable to rely on the, uh, subs
25 for, um -- uh, their doing their work properly. Uh -- and if

1 they're entitled as a matter of law, uh, that, um, it --
2 there being no basis for a reasonable, um -- uh -- uh -- uh,
3 supervision, uh, or a finding of supervision. That, uh,
4 they're entitled to it as a matter of law.

5 Now, the -- the record, um -- uh, I think, uh, since it
6 is as a matter of law and I find no, uh -- the -- I think you
7 all used, um, whatever the general contractor's, um -- what
8 is it, uh---

9 MR. MARTIN: Mr. Moore's testimony.

10 THE COURT: ---it'd be -- be the same in all the cases?

11 MR. MARTIN: I believe so, sir. And I understand it,
12 and I---

13 THE COURT: Well, then set it out because that's the
14 only thing that I have. I mean, not the only thing I have,
15 but I mean, the one thing that, um -- uh, says that, uh -- it
16 follows the law. All right, sir.

17 MR. MARTIN: Thank you, Judge.

18 MR. BELCHER: Thank you, Your Honor.

19 THE COURT: And if you -- if you have an objection to
20 the -- you know, of course, he can do it. But the motion to
21 reconsider there, it should be each -- that they stand
22 separately on, um -- after looking at the orders.

23 MR. BELCHER: Okay.

24 THE COURT: All right?

25 MR. BELCHER: Yes -- Yes, Your Honor.

1 MR. MARTIN: Thank you, Judge.

2 THE COURT: Very good; all right. So that's what?
3 Seven and...

4 THE CLERK: That would have been, um, seven, eight and
5 twenty.

6 COURT REPORTER: And twenty-two.

7 THE COURT: And twenty-two---

8 THE CLERK: And twenty-two, yes.

9 THE COURT: ---that we got to. (After pause.) All
10 right, um, the next one is number ten?

11 THE CLERK: Um -- that is correct; yes, sir.

12 THE COURT: A motion to quash?

13 THE CLERK: Yes, and that is Marick.

14 THE COURT: Or in the alternative for a protective
15 order?

16 THE CLERK: Yes, sir; and that is -- was made by Marick.

17 MR. IMHOFF: Your Honor, you've already heard this.
18 Uh -- again, it's -- it's Marick's motion to -- to stay to
19 prevent continuing discovery, depositions. You -- it's been
20 in front of you last fall. Uh -- we discussed it a little
21 bit this morning. I can certainly -- we can cut -- we
22 certainly came to argue it more. Uh -- I mean---

23 THE COURT: Well, again, I -- inasmuch as there are some
24 cases that are not subject to the appeal, I think that those
25 cases need to be developed. While -- I mean, again, because

1 we all know that, um, over time you'll lose, um -- uh, access
2 to information.

3 MR. IMHOFF: I -- I -- I agree with that, Your Honor. I
4 don't -- I don't know what we're gonna do with your rulings
5 today. And that -- I think we go to phase one general
6 contractor and myself -- but that's something I have to go
7 back and talk to my client about.

8 But you know the argument -- heard the argument today
9 that the issues of not bringing the subcontractors to the
10 trial now, because they've all gotten out, um, is -- is sort
11 of now a universal issue for phase one and phase two.

12 MR. LYLES: Your Honor, that's a misrepresentation of
13 the lay of the land. The only issues that have been
14 determined by The Court are the validity of the claims of the
15 general contractors against the subcontractors. Those
16 matters would be stayed while they are appealed, whether it's
17 Jason's appeal, or yours today, or Allen's appeal.

18 I have claims pending against the subcontractors. There
19 is nothing that prevents those claims from going forward and
20 being tried. So if there is a trial in this case, those
21 subcontractors will be here, those who haven't settled,
22 defending my claims against them.

23 So, this notion that the subcontractors can't be brought
24 to Court because they've had a motion granted in their favor
25 is just not accurate.

1 THE COURT: Well, and -- and again, um -- uh, The
2 Court's concern if a -- if the -- from whatever rulings, uh,
3 have been made in their particular, um -- uh, cases haven't
4 been appealed, then they're not subject to a stay.

5 MR. LYLES: That's right.

6 THE COURT: And if you need an order to that, I think
7 that, um -- uh, somebody can draw me an order. And then I
8 would suggest that you do, uh, have some sort of scheduling
9 order that you can -- because as I say, this -- this whole
10 matter needs to be resolved at some point. And we've got to
11 have a sort of a closing of the record.

12 But, uh, -- who -- Mr. Imhoff, Mr. Lyles, are you the two
13 that, what is it, can put together something like that? I
14 mean, you don't have to -- I'm not doing -- you're not
15 consenting to it. But me, I'm asking you to put together
16 something that you can live with, you know. And -- and even
17 in appeal, you can go ahead and serve -- and serve it to your
18 objection if you want to.

19 Uh -- but, again, I would like the -- the two of you to
20 contribute to it. Um -- uh, one will be the principal author
21 and the other be the -- the, you know, the editor -- the
22 editor of it.

23 MR. LYLES: This is for a -- a scheduling order?

24 THE COURT: Right. As to what -- now, as far as those
25 cases that are under appeal---

1 MR. LYLES: Yes, sir?

2 THE COURT: ---I don't think I have -- I think I --
3 they're out of my jurisdiction.

4 MR. LYLES: Yes, sir.

5 THE COURT: I mean, they -- they've been removed.

6 MR. LYLES: Those are.

7 THE COURT: But the ones that are not directly under
8 appeal, I think that The Court has a duty to be sure that
9 they move along. So that, what is it, uh, all the cases can
10 be developed, um -- uh, that are still out there.

11 MR. LYLES: Well, what will happen as a result of today
12 is that, I guess, Jason will have to decide if he's gonna
13 appeal, uh, the rulings with respect to B-F-S, Catoe and
14 Southern Concrete and that crowd. I suspect that he will
15 since he's already got one such ruling on appeal.

16 The next question will be whether or not Allan decides
17 to appeal the ruling with respect to his subcontractors.
18 Um -- at that point, if that occurs -- and I suspect it will
19 occur in the next thirty days if it occurs -- then what I
20 will move for is a trial of my case against everybody and ask
21 that The Court sever those downstream claims. Because, my
22 clients, there -- there is nothing about those appeals,
23 the -- nobody's made a summary judgment motion with respect
24 to my claims against them.

25 Mr. -- Mr. Hemphill's gonna do that in a minute, but

1 none of the subcontractors. So there's nothing that would --
2 that -- that should prohibit my claims from going forward.
3 These, -- these downstream indemnity claims are things that
4 can be dealt with two years from now when the appeals are
5 decided. But there's nothing that should prohibit my clients
6 from going forward with their claims.

7 And so that -- that is just sort of how I see, um, the
8 procedural jockeying in this case going forward. So---

9 THE COURT: Well, uh, let me do this then. Um --
10 inasmuch as -- the only thing I know how to do is to split
11 the baby and that's not a good, uh, resolution for the child.
12 Um -- what would you suggest, Mr. Lyles? Your client, uh, as
13 far as this motion to, um -- uh, quash, stay or, uh, in the
14 alternative for a protective order?

15 MR. LYLES: Yes, sir. Well I, as you recall, back in
16 October I submitted, I think, about a twenty-page brief on
17 the issue. Clearly---

18 THE COURT: I'm not needing a brief right now---

19 MR. LYLES: Yes, sir---

20 THE COURT: ---I need a proposal.

21 MR. LYLES: ---but -- but I'm gonna reiterate what I
22 said, which is, there -- there's no automatic stay, except as
23 it relates to those discrete issues that have been appealed,
24 which are Marick's claims against the subcontractors who got
25 summary judgment.

1 Um -- then the question becomes, under Rule 205, does
2 The Court elect to stay matters that The Court believes are
3 affected by the appeal? And, um, my position with regard to
4 any motion to stay is, none of these appeals affect my
5 clients' claims against these parties -- none of them.

6 Now, whether The Court, um, elects to try to do this,
7 um, you know, try portions of the case or not try portions of
8 the case, trying to maximize---

9 THE COURT: You mean phase one and phase two?

10 MR. LYLES: ---judicial economy, which is what I tried
11 to address in my brief in October, trying my best to figure
12 out the most economical way to try the case.

13 Uh -- but the fact of the matter is, these are
14 downstream claims that are unrelated to my claims. And --
15 and my clients should not be required to wait until the
16 exhaustion of a bunch of potential downstream claims are
17 decided in The Court of Appeals.

18 In the meantime, my buildings are falling down; my
19 clients' are going bankrupt. And, you know, I mentioned in
20 October, I said, you know, we're not only going -- we --
21 we've lost insurance money for Bostic, because they had a
22 case that settled a month ago in Myrtle Beach. And I
23 mentioned in my brief in October, I said, we're losing
24 witnesses or we have the potential.

25 Well, the key defense expert on the issue of pricing

1 died in January. So it is a reality that it is affecting --
2 we mentioned it earlier today -- and reality is that this
3 case is degrading as it continues to grind through the
4 process simply because of the loss of witnesses, the loss of
5 money, and people dying.

6 And so I think The Court's gonna be in a position to
7 have to sort of balance out judicial economy versus my
8 client's rights.

9 THE COURT: All right. What do you say, Mr. Imhoff?

10 MR. IMHOFF: Your Honor, again, I don't want to be here
11 all day. I think we've -- we've talked about it before. But
12 let me -- let me point one central issue, uh, that Mr. Lyles
13 didn't.

14 Your rulings that -- in regard to general contractor
15 Marick, and the general contractor Bostic, are that Bostic
16 and Marick are at fault as a matter of law.

17 And that, I am certain, will be something that Mr. Lyles
18 will point out to the trial judge, if it is not you, that
19 there are already standing orders that our two clients are at
20 fault. You had to find -- you had to rule that way to decide
21 that they had unclean hands. And so that---

22 THE COURT: Well, the -- the thing is, you have to also
23 understand, um -- uh, Mr. Imhoff, that those were done on
24 motions to dismiss and summary judgment, which had to be
25 decided on the record at the time.

1 MR. IMHOFF: Right.

2 THE COURT: And the record can always change if
3 something's -- if something's found and added to it.

4 Now, to be honest with you, that's just the point I'm
5 trying to get to right now is let's exhaust what the evidence
6 is going to be out there. You know, find out what it -- what
7 is there if there's any -- anything.

8 MR. IMHOFF: Uh -- I -- I---

9 THE COURT: I mean, and -- and to those cases, uh, that
10 were not decided.

11 MR. IMHOFF: ---uh -- but, well that -- well, that's my
12 point, that -- that at the trial of this case, I'm -- I'm
13 certain that those orders will at least be attempted to be
14 used to -- to forestall any effort that the two general
15 connor (sic) -- contractors make, uh, to prove innocence in
16 regard to what their subcontractors did.

17 And so that is a central issue to the case. I don't
18 know what the trial judge will do in this case.

19 THE COURT: Well, I don't know either and, uh, the way
20 everybody's already talking about it, you know, things -- uh,
21 uncertainty. Uh -- on January -- or, no, December the 31st
22 19- -- or, 2014, I'm going to be put down.

23 MR. LYLES: 2014?

24 THE COURT: 2014. A year and a few months. So, what is
25 it, you're gonna be looking at a -- another Judge if this

1 thing isn't resolved by that time. So -- and, uh, I could --
2 I might even decide to go earlier.

3 MR. IMHOFF: Yes, sir.

4 MR. LYLES: Your Honor, this is -- you know, we're
5 reaching the fourth anniversary of the case.

6 THE COURT: Well, the thing is, let -- well, I know all
7 of this. I -- what I'm trying to do is just to tell you,
8 let's -- let's move it. And then we'll find out, you know,
9 um -- uh, what happens.

10 Um -- you do this; you draw an order, uh, setting forth
11 all of your -- your -- what you have there. Um, also -- but
12 be sure that you understand that, um, anything that's on
13 appeal is gonna be stayed.

14 MR. LYLES: Yes, Your Honor.

15 THE COURT: Uh -- but, uh, there are certain things
16 that, uh, are not necessarily, uh, limited to just those
17 cases on appeal.

18 MR. LYLES: Yes, sir.

19 THE COURT: There are certain witnesses that would be,
20 um -- uh -- uh, still, um -- uh, available as well as, um --
21 uh -- uh, contributing to, um, the -- the preparation and
22 the -- and ultimate trial of the cases. That can be deposed
23 now so their testimony and, uh, evidence can be captured.

24 MR. LYLES: The -- the -- the -- the appeal in --
25 involves claims and issues. It -- it doesn't necessarily

1 preclude action against parties.

2 THE COURT: Well, that's what I'm saying.

3 MR. LYLES: Yes, sir.

4 THE COURT: So all right; so you draw your order that
5 way and we'll see -- and, of course, what is it, allowed it
6 to be circulated. But particularly between, uh, you and
7 Mr. Imhoff and, uh, Mr. Belcher. Is that right, Mr. Belcher?
8 Is he still here?

9 MR. BELCHER: Yes, sir.

10 THE COURT: All right.

11 MR. BELCHER: I haven't decided to appeal anything yet.

12 THE COURT: Well I know, but I'm---

13 MR. BELCHER: That's---

14 THE COURT: ---you -- you two are the ones that have,
15 um, what is at stake here---

16 MR. BELCHER: Right.

17 THE COURT: ---um, these rulings that I made in the past
18 and, what is it, today. And that's -- I just want to be sure
19 that you circulate, even before, um -- uh, it's submitted to
20 me to see if they have any, uh, thing -- to make any
21 contribution.

22 If not, then -- or if they do, um -- uh, see if you can
23 incorporate it or, what is it, submit the whole thing to me.
24 And then, of course, anybody else, you know, affected, will
25 be able to, uh, review it too 'cause Rule 5 says you have to

1 circulate it.

2 MR. LYLES: You know, when we were here in October
3 everybody in this courtroom agreed that the case could be
4 tried on January the 22nd. And so I'm gonna be just trying
5 to give The Court some perspective on where I'm coming from.

6 THE COURT: January the 22nd 2014?

7 MR. LYLES: 2013.

8 THE COURT: '13?

9 MR. LYLES: And everybody in the courtroom agreed the
10 case was ready for trial---

11 THE COURT: Yeah, but there are a lot of people who got
12 sick or something; I don't remember. Anyway...

13 MR. LYLES: Well, it just, you know, I know The Court---

14 THE COURT: Wait a minute. No, there wasn't. Um -- no,
15 no, all right, not sick---

16 MR. LYLES: I know that---

17 THE COURT: ---what was it? Huh?

18 MR. LYLES: ---I know that to get a multi-week term
19 you need to work with Court Administration. And so, and I
20 will -- I will tell you, um, that since December, I don't
21 know that any party in this case has noticed a deposition,
22 except for me. So, you know, this -- this case has been
23 sitting here and the lawyers, I think candidly, have been
24 wondering when the case is going to be tried.

25 THE COURT: Well, let's do this. Why don't you do a

1 night before; (after pause) not a day certain but a night
2 before? I mean, just put it out there and then I'll -- I'll
3 deal with, uh, Court Administration.

4 MR. LYLES: Okay.

5 THE COURT: I mean, -- it -- it -- it's -- it's the
6 dickens to set a date because that's always something that's
7 gonna -- it's almost -- sometimes you'll have to get it, but
8 I guess I'm a little cynical. It's almost like a target
9 that nobody takes a vacation until they have a day certain.
10 Nobody learns that it has a -- a witness that's out-of-pocket
11 until they have a day certain.

12 I would suggest that you, you know, uh, attorneys would
13 be better served if they -- and their clients particularly --
14 if they, uh -- if they get a day certain they let the
15 vacations and they also put their witnesses on notice that
16 they are gonna be there that day, uh, when the case is going
17 to trial.

18 MR. LYLES: That's why I was hoping we could get -- work
19 with The Court to try to get a date certain from Court
20 Administration so that everybody can be---

21 THE COURT: Well -- well -- well, what we do first,
22 though, Mr. Lyles, is that we establish a limit. And that's
23 why I say that -- how -- you talk about, uh, discovery. How
24 much more time do you need in discovery in a four-year-old
25 case?

1 MR. LYLES: None -- none. I -- that---

2 THE COURT: All right, then set a day certain -- not --
3 or, not -- not a day certain, but, uh, not before July, if
4 you want to.

5 MR. LYLES: Okay.

6 THE COURT: I don't know, what is it, uh, I'll be out in
7 July. I mean, I've got four weeks of vacation; you ain't
8 gonna get my vacation.

9 MR. LYLES: And I don't want it, Your Honor, I---

10 THE COURT: I get my vacation; you don't, though. All
11 right; so I think the point is that -- go ahead and put it --
12 and try to work together because all of you, you've got a --
13 an interest in it. This case is gonna be tried when? So try
14 to get a date, uh, a closing date, in other words, as far as
15 discovery and everything so they can, uh -- the trial can be,
16 uh, after that time. And then I'll try to work with you as
17 best I can, uh, as far as, uh, get -- getting you a day
18 certain. All right?

19 MR. LYLES: Yes, sir.

20 THE COURT: And Mr. Imhoff and Mr. Belcher and everyone,
21 I hope you-all understand that I'd like to move this, uh,
22 better than you would. And I think we'll run out -- running
23 out of, uh, what is it, room now in the, uh, brand new
24 courthouse with, uh, this file. Is that right, Madam Clerk?

25 THE CLERK: That is correct; yes, sir.

1 THE COURT: All right. Next? Now, you will do that,
2 uh, Mr. Lyles?

3 MR. LYLES: Yes, sir; I'll be glad to do it.

4 THE COURT: All right.

5 MR. LYLES: I'll try to get it done by Friday and get it
6 around to everybody.

7 THE COURT: Well, start -- get it out there. And---

8 MR. LYLES: Yes, sir.

9 THE COURT: ---and, uh -- that's the only way that
10 the -- this thing's gonna be, uh---

11 MR. LYLES: This has been a -- a -- a good group to work
12 with. Everybody has generally cooperated with regard to
13 this -- all matters in this case. I -- I do anticipate this
14 issue about a potential appeal is gonna require another
15 ruling from The Court about severance just because I know
16 appeals take two to three years.

17 THE COURT: Well, let's just -- let's -- let's not
18 anticipate---

19 MR. LYLES: Yes, sir.

20 THE COURT: ---what is it, uh, bad things. All right;
21 anything, uh -- what's the next?

22 THE CLERK: Um -- the next one will be, um, number
23 thirteen; and it is Heyward Electrical Services' motion for
24 summary judgment as to cross-claims of Marick.

25 THE COURT: All right, uh, who do we have?

1 MR. HARJEHAUSEN: Uh -- John Harjehausen, Your Honor,
2 for Heyward Electrical Services.

3 Um -- Your Honor, we'd like to request that this be --
4 this motion be continued. Um -- Heyward has essentially
5 negotiated a settlement with the plaintiff and with Marick
6 and Rick Thoennes. The only thing left is unresolved
7 cross-claims with Medallion and Bradford Seckinger.

8 THE COURT: All right. Is Medallion involved?

9 MR. HARJEHAUSEN: Medallion, uh---

10 THE COURT: All right, so let's -- I've continued those,
11 so, uh---

12 MR. HARJEHAUSEN: Right.

13 THE COURT: ---let -- let it fall under that umbrella.

14 MR. HARJEHAUSEN: So, we'll just continue this one as
15 well?

16 THE COURT: Right.

17 MR. HARJEHAUSEN: Great; thank you, Your Honor.

18 THE COURT: (After pause.) But do, um -- uh, consult
19 with, um, the ones who are involved in the Medallion. I
20 guess, Mr., uh -- well, of course, that's not a part of this
21 action. Uh -- that isn't consolidated but, uh -- well you --
22 in other words, you just want a continuance to see if you
23 can't -- your -- your -- your, uh, matter could be resolved?

24 MR. HARJEHAUSEN: Yeah; I mean, that -- that's exactly
25 it.

1 THE COURT: All right, it---

2 MR. HARJEHAUSEN: We anticipate filing additional
3 motions in regard to Medallion. And, uh, we would just ask
4 that this motion against Marick---

5 THE COURT: It'll be continued.

6 MR. HARJEHAUSEN: ---go on that roster once those are
7 filed. Thank you, Your Honor.

8 THE COURT: Yes, sir. All right; next?

9 THE CLERK: Um -- the next one will be, um, number
10 fourteen, Carl Catoe Construction motion to dismiss and
11 summary judgment.

12 MR. TATE: Uh -- Your Honor, this is Ron Tate for Carl
13 Catoe. I believe, if I may ask, is that as to Medallion?

14 THE CLERK: Um -- I'd have to be honest and tell you
15 that I am unsure.

16 MR. TATE: Okay. Your Honor, I would just, uh, carry
17 the motion over. If I may suggest -- I don't know what that
18 motion is; it may, in fact, be the motion that we filed many
19 months ago relating to the, uh -- the claims of the
20 plaintiff. We had cross-motions with the plaintiff at some
21 point and I would ask for a continuance.

22 THE COURT: Mr. Lyles?

23 MR. LYLES: I'm told it's Medallion so that would be, I
24 think that---

25 THE COURT: All right, so that's to come under the

1 Medallion umbrella. Next?

2 THE CLERK: Um -- and the next one would be, um, number
3 fifteen, plaintiff's motion for judgment against defendants
4 Keowee Townhouses and others.

5 MR. LYLES: Your Honor, we have a number of defendants
6 originally served, named defendants in the case who are in
7 default and I have filed a motion, um, for a hearing for
8 damages in relation to those defendants. Um -- as I read the
9 rules, I'm required to get a date for a damages hearing,
10 um---

11 THE COURT: Put them on notice, yeah.

12 MR. LYLES: ---I'm to notify them of that date. Um -- I
13 only hope---

14 THE COURT: How long do you think it'll take?

15 MR. LYLES: A day.

16 THE COURT: Is that a full day?

17 MR. LYLES: I think a day would be plenty.

18 THE COURT: All right, um, how far out do you want it?

19 MR. LYLES: As soon as you can give it to me.

20 THE COURT: Well, I know, but how much time do you need
21 for your -- how many you got and how many---

22 MR. LYLES: How many defendants are there?

23 THE COURT: Right.

24 MR. LYLES: Probably six or eight. And I'm sorry
25 that I---

1 THE COURT: Well, I'm -- I'm just asking you---

2 MR. LYLES: There's probably six or eight.

3 THE COURT: ---because in other words, um -- uh, what's
4 the next term of, um, non-jury?

5 THE CLERK: Um -- it's going to be the week -- the week
6 of May, um, 28th.

7 THE COURT: Am I here?

8 THE CLERK: You are; yes, sir.

9 THE COURT: You want to do it then? That's a month.

10 MR. LYLES: Yes, sir. That'll be great.

11 THE COURT: All right, uh, set one day for a -- a
12 damages hearing in defaults. And has---

13 MR. LYLES: Preferably not the 28th because that's my
14 wife's birthday. The 29th?

15 THE CLERK: Yeah; normally, on the 28th we would do, um,
16 motions, so we'll keep you in the clear for that.

17 MR. LYLES: Okay; thank you.

18 THE COURT: All right, um---

19 THE CLERK: And, um, we'll probably -- what about
20 Thursday of that week? That would give us -- I mean, it's a
21 short week anyway because Monday is a holiday. We'll be
22 doing motions on, um, Tuesday. I think we already have a
23 full-day case on Wednesday that's already scheduled.

24 MR. LYLES: Thursday's great.

25 THE CLERK: So Thursday the 30th?

1 MR. LYLES: Thursday the 30th.

2 THE CLERK: Okay.

3 THE COURT: Now, you, uh -- have defaults, uh, been
4 entered on them?

5 MR. LYLES: Yes, sir.

6 THE COURT: All right; so on a default, uh, order?

7 MR. LYLES: Yes, sir.

8 THE COURT: Okay. Now we're looking for the damages
9 hearing. All right. All right; does that do it?

10 THE CLERK: Um -- I -- I have one more, um, and it is
11 M Group Construction. It's number sixteen, motion for
12 summary judgment.

13 THE COURT: All right; yes, sir?

14 MR. HEMPHILL: May it please the Court, Your Honor. Roy
15 Hemphill on behalf of, uh, M Group Construction and
16 Development.

17 COURT REPORTER: I'm sorry; your name again?

18 MR. HEMPHILL: Roy Hemphill. Uh -- Your Honor, uh,
19 defendant, M Group, has filed for summary judgment in this
20 case. Um -- uh, I would point out to The Court that, uh, I'm
21 not a cross-claim defendant. I've become a main defendant --
22 or, my client is a main defendant by virtue of an amended
23 complaint that Robert filed about fifteen months or so ago.

24 Uh -- my client, Your Honor, was an L-L-C that was not
25 formed until after all of this. M Group, uh, was an L-L-C

1 that was formed by two of the members of Marick. Uh -- Rick
2 Thoennes, Junior -- who I -- I refer to in my brief, which I
3 hope The Court, uh, received a copy of a couple of days ago,
4 or, my memo -- and Rick Thoennes, the third, who was the son.
5 Those were principals in Marick, and in March of 2009, uh,
6 formed a new company. We would contend formed a new company
7 to do something completely different, uh, than what they'd
8 been doing.

9 Marick was a corporation that was built -- that was
10 formed in 1998 to, um, to build custom homes anywhere from
11 half-a-million dollars to several million dollars. Uh -- I
12 think The Court is cognizant of what happened to the market
13 for the -- that type of housing. And what happened in March
14 of 2009 was two of the principals from Marick formed a new
15 company to build a -- a completely different product. And
16 that product was, um, a hundred to two-hundred-thousand-
17 dollar spec. houses in -- in -- in neighborhoods in the
18 Upstate.

19 Uh it -- when it formed in March of 2009, it picked up
20 two -- two -- two new owners. That was a Mark Thoennes, who
21 was a -- the other -- another son of one of the owners -- and
22 I also need to reference that I do represent Mr. Thoennes as
23 it relates to M Group as in -- in terms of his being a member
24 of that and him having any potential individual liability on
25 behalf of M Group in this litigation.

1 But, Your Honor, they also picked up a fourth principal
2 owner, that being a Mark Hutcherson. Mr. Hutcherson had been
3 an original, uh, member of Marick back in the '90's, but had
4 dissolved his membership after about a year, and had not had
5 any involvement in Marick in about, uh, '90.

6 Each of these owners, uh, put up additional capital
7 and -- and created their -- their own, uh, new company.
8 Uh -- Your Honor, there were no -- there were no -- what -- I
9 think what's key is when these principal owners were -- had
10 formed M Group, there's no evidence that they appeared at
11 Stoneledge, did any work. You raised -- may have raised
12 reference to a general contractor never driving a nail or --
13 or turning a screw. They didn't do that. Not because that's
14 not what a G-C does, they didn't do that because the work was
15 done at Stoneledge. They were on to other things. So this
16 is a totally separate, quote, company that plaintiffs have
17 sued.

18 Your Honor, um, this -- this action has been brought on
19 this notion of successor liability. And as His Honor knows,
20 that's a very limited right of recovery in South Carolina.
21 Uh -- it's based on a 1923 case, uh, known as, uh, *Brown*
22 *versus American Railway Express*, 1924. It set forth four --
23 four very narrow exceptions and, um, that was affirmed in the
24 *Simmons* case, which is cited in my memo, which is a 2005
25 Supreme Court case where there was a lengthy dissent, uh,

1 where some of the Justices were advocating ex- -- expounding
2 upon and allowing greater latitude. But the majority of The
3 Court said that these -- there were -- these four exceptions
4 were narrow and very limited.

5 Uh -- the first one is that there was an agreement to
6 assume the debts. Your Honor, I would contend that most
7 people would -- would know that would be sort of like a stock
8 sale versus an asset sale. Um -- the fact of the matter is,
9 there's -- there's no evidence in this case that there was
10 any kind of a formal sale. In fact, uh, I have included in
11 my material, uh, printouts from the Secretary of State's
12 Office that would -- that would show The Court that both
13 entities still exist. The market's dried up for both
14 entities, but the entities still exist. Neither one --
15 neither one was dissolved. Marick was not dissolved to allow
16 M -- M Group to go forward; they still exist. Uh -- M Group,
17 uh, in fact, Your Honor, um, there -- there's no merger.
18 Um -- there -- there's no -- there's no written document or
19 anything that the plaintiffs can point to to indicate that
20 there was any transfer of assets. My memorandum, um, I -- I
21 cited a North Carolina case that goes into a good bit of
22 detail.

23 And -- and it -- that North Carolina Court said that
24 North and South Carolina have very similar laws as relates
25 to, uh, the elements of -- of successor liability. And the

1 North Carolina court felt like there had to be, uh, some
2 agreement, some -- to -- to -- to allow the -- the liability
3 to flow through.

4 Uh -- going further, Your Honor, the, uh,
5 circumstances -- the second, uh, exception is the
6 circumstances surrounding the transactions warrants a
7 find- -- finding of a consolidation or a merger of the
8 two corporations.

9 As I argue in my brief, there -- there's absolutely --
10 as -- as His Honor is aware -- mergers of corporations are,
11 uh, dictated -- statutory mergers are dictated by what the
12 General Assembly has passed. And -- and there was no
13 paperwork filed or anything to indicate that, uh, one -- one
14 corporation -- the prior corporation -- was merged into the
15 second. As I said, uh, a merger would indicate that -- that
16 the new corporation assumes the -- the prior corporation.
17 Uh -- both corporations still exist, but there's not a --
18 certainly not a statutory, uh -- uh, merger. We would also
19 indicate, even though South Carolina's law in this area is
20 silent as to what a de facto or implied merger might would
21 be, uh, we would contend that that is not the case here
22 because this situation lacks common flow-through alone.

23 THE COURT: Let me ask you something, Mr. Hemphill. Now
24 it, uh -- you say Marick is still, um -- uh, in existence?

25 MR. HEMPHILL: Yes, Your Honor; it has not been

1 dissolved.

2 THE COURT: And, um -- but then the -- this -- you
3 contend that this is a separate, um -- uh, M Group is a
4 separate, um -- uh, entity it -- itself?

5 MR. HEMPHILL: Yes, Your Honor.

6 THE COURT: And are both, uh, in the action? Are they
7 both, uh, defendants?

8 MR. HEMPHILL: Yes, Your Honor. Uh -- the -- the
9 plaintiff amended to add M Group about -- a little better
10 than a year ago.

11 Uh -- the -- the third element set forth in that case,
12 Your Honor, is that there's -- that the -- the successor or
13 the second entity is a mere continuation of the -- of the
14 first. Uh -- there's not a great deal of elaboration in
15 either of those cases that I referenced about what a mere
16 continuation is.

17 But, whether you look at it from a merger standpoint or
18 a mere continuation argument, the owners are not the same.
19 Uh -- Mr. Lyles, uh, took -- Mr. Lyles took the deposition
20 of -- of the -- the principal owner, Mr. Rick Thoennes,
21 Junior, who I refer to as the father in my, uh, complaint.
22 He was the one that held the general contractor and he
23 indicated -- he was the 30(b)(6) witness for M Group and he
24 testified to, uh, basically a new operation.

25 If you looked at it, uh, there was -- the -- the

1 accounts receivables were not moved over. There wasn't a
2 great deal of assets. He's a general contractor; he's not a
3 sub-contractor. There wasn't a great deal of assets, but
4 what asset that -- what assets there were, they weren't moved
5 over. There was not a -- a physical location to speak of.
6 This was being operated out of a home. Well, one of them was
7 being operated out of a home and the other one had an
8 address. I get them mixed up as to which. But, uh, as it
9 relates to assets, you know, we produced as part of the
10 deposition a list of -- of vendors that they transacted with,
11 a list of subcontractors. And at one point during the
12 deposition -- I've cited it in my memo --- uh, he went down a
13 lengthy list of new subcontractors they were dealing with.
14 Why? Because it was a new product that they were -- they
15 were producing. It was -- it was something totally
16 different. It was a different market and it was something
17 that they were doing. Yes, it was a home building, but it
18 was spec. houses in a much, much lower-end market. And they
19 were trying to -- they created a company to produce a
20 different product. That would be our contention in this,
21 Your Honor.

22 Further, the fourth element is that it was done --
23 that -- that the new corporation was formed, or, the new
24 entity was formed to fraudulently dodge creditors. Um --
25 there just is no clear and convincing evidence that's been

1 produced that was -- that's been produced by the plaintiff,
2 or otherwise came out in the one deposition that was taken to
3 look into the inner workings of the M Group, that would rise
4 to the level that this -- this corporation was created to
5 fraudulently, um -- uh, escape any kind of creditor claims.

6 Your Honor, based upon that -- upon that, and in the
7 interest of trying to pear this case down for -- for the fact
8 finder, uh, we would, uh -- we would, uh, request that our
9 motion for summary be granted, uh, upon -- upon those---

10 THE COURT: All right. Mr. Lyles?

11 MR. HEMPHILL: ---grounds.

12 MR. LYLES: Yes, sir; thank you, Judge. Um -- first of
13 all, Judge, in our memorandum...

14 And did -- did you -- were you able to print a copy of
15 the memo so I've got a copy I can hand up to The Court? I
16 don't -- I know you've got a lot of memos. (After pause,
17 memo handed to The Court.) There you go.

18 First of all, Judge, in our memo, we, uh, oppose the
19 motion for summary judgment in part on something that is not
20 accurate. And that was, um, this morning, um, Mr. Hemphill
21 advised me that they did, in fact, respond to our discovery.
22 Uh -- we were not able to find that in our file, but that
23 doesn't mean anything. So, I'll withdraw that portion of our
24 objection to their motion for summary judgment.

25 But factually, I think that we have presented in our

1 memorandum more than the scintilla of evidence that is
2 required to support our successor liability claim with
3 respect to M Group.

4 Um -- everything that Mr. Hemphill said, for the most
5 part, um, at least in general terms, um, is accurate. Um --
6 but in our memorandum, starting on page four, I list a number
7 of facts that he didn't mention to you, which I think support
8 our successor liability claim.

9 The start-up capital for the M Group, which he mentioned
10 earlier, fourteen thousand dollars of that start-up capital
11 came from Rick, Junior, who he refers to as father, and Rick,
12 the third, who he refers to as son. They were the only
13 members of Marick at the time M Group was formed and they are
14 defendants in this lawsuit. So you have cash from Marick
15 principals who are defendants personally in this lawsuit that
16 was injected into the M Group.

17 Mr. Thoennes, the father, testified in the M Group
18 deposition that the reason M Group was formed, Your Honor, is
19 because Marick was insolvent. That will become important
20 later on. As noted by Mr. Hemphill, I think, um, M Group
21 utilized a number of the same vendors as Marick. M Group
22 utilized the same project manager and superintendent as
23 Marick. Mr. Thoennes, the father, was the license holder for
24 both Marick and the M Group.

25 THE COURT: Did they use the same license?

1 MR. LYLES: Yeah. The general contractor license?

2 THE COURT: That's what I'm saying.

3 MR. LYLES: Yes, sir; yes, sir. Importantly, at the
4 time M Group was formed, Marick was insured under a general
5 liability insurance policy listed, uh -- um, issued by
6 Simpson Addy Insurance. And I give you the policy
7 information.

8 When they formed M Group, they simply added M Group as
9 an insured on the Marick policy, which meant that Marick was
10 paying M Group's insurance. The document that we've
11 submitted to you indicates that that addition was done at no
12 additional premium. That insurance, by the way, continued in
13 effect through, I think, 2012, where they were jointly
14 insured on that policy.

15 As late as November the 12th of 2009, a proposal for work
16 at Stoneledge was submitted to M Group by Builder's First
17 Source. As of October the 5th 2011---

18 THE COURT: Well, let's see; what was the date on
19 M Group's, um -- uh, incorporation?

20 MR. LYLES: It was in the spring of 2009. And the
21 testimony was that Marick began its last construction project
22 in 2008 and finished it in 2009, and then M Group was formed
23 because Marick was insolvent.

24 As of October the 5th 2011 -- that's a significant (sic)
25 because it's a -- it's an exhibit in a deposition -- if you

1 went to Google or went to the internet and you typed in
2 Marick-dot-net, up popped the M Group website. So, there's a
3 direct marketing connection between Marick and the M Group.
4 We have attached copies of pages from the M Group website.
5 If you look at those pages from the M Group website, the
6 M Group markets itself as being a company with four years of
7 experience in the Upstate, building quality construction --
8 excuse me, quality custom homes. They actually list
9 Stoneledge as a project for reference on the M Group website.

10 And even though Mr. Thoennes did, in fact, testify in
11 his deposition that the M Group, um, home was gonna be, you
12 know, as -- as Mr. Hemphill said, a spec. home and whatnot,
13 if you look at those web pages on the main M Group website,
14 they have a fine homes division. And, again, market projects
15 such as Stoneledge as being qualifications of the M Group,
16 um, company itself.

17 Um -- just -- and -- and one last point. Again, if you
18 go through those website pages, they talk about -- the
19 M Group talks about different categories of classes of homes,
20 ranging from two-ninety-five, six hundred, nine-hundred
21 thousand, and even over a million dollars. Um -- but all of
22 that is included in my materials.

23 As Mr. Hemphill correctly points out, when you look at a
24 successor liability issue, you have to go back to this 1924
25 case of *Brown versus American Railway Express*, and it lists

1 the four exceptions to the general rule that a successor is
2 not liable for the debts and liabilities of the predecessor.

3 I agree with Roy that there was no agreement to assume
4 liability because the evidence in this case is very clear.
5 What the Thoenneses were trying to do is insulate themselves
6 from Marick liability. He testified that Marick was -- was
7 insolvent, so we opened up a new company. And that's what
8 they---

9 THE COURT: Now that's, um, Rick Marick -- um---

10 MR. LYLES: That's---

11 THE COURT: ---I mean, Rick Thoennes---

12 MR. LYLES: ---that's the father.

13 THE COURT: ---Junior?

14 MR. LYLES: That's the father. Now, what he said in his
15 deposition is, we were insolvent and we were trying to
16 attract new investors and so we needed to open up a new
17 company. That's what he said. But the critical thing is, he
18 opened it up because it was insolvent.

19 And what they did is, um -- they knew they couldn't
20 continue doing business as Marick because they were
21 insolvent. And so they had to have this new entity and this
22 new name.

23 And the new investors he was talking about, don't
24 forget, were his son, another son, and a former partner in
25 Marick itself.

1 I do think that if you look at the *Brown versus American*
2 *Railway* case, that the last three exceptions to the general
3 rule about successor liability do apply.

4 One is consolidation or merger. And there is case law
5 in our -- in our memorandum, which talks about merger. And
6 the factors that are looked at are the continuity of
7 management and personnel. Here we have that. Roy's right,
8 we do have two new owners -- minority owners -- of M Group,
9 but we have the two majority owners are the same guys that
10 were operating Marick. We have a continuity of personnel
11 through the Thoenneses and Mr. Gouch, their superintendent.
12 Continuity of ownership, which I just spoke to.

13 Cessation of the seller, um, activities. The testimony
14 here is that after the forming -- excuse me, formation of
15 M Group, Marick did no further work. They have not been
16 dissolved, but they don't do anything else either.

17 And then, assumption of liabilities. The most important
18 of those factors is continuity of ownership per the case law.
19 We think that we have produced evidence in response to this
20 motion for summary judgment that is at least a scintilla of
21 evidence supporting our claim, um, that that exception
22 applies.

23 The second one is mere continuation. And I think that
24 that is dead-on with regard to this case. I mean, what
25 happened here is the Thoenneses knew they couldn't continue

1 doing business as Marick because they were insolvent. And so
2 they simply put a new name on the company, used the same
3 marketing literature, the same construction license, so on
4 and so forth.

5 THE COURT: Did they use the same, uh, what is it,
6 they were operating as general contractors, so they operated
7 with the same, uh, general contractor's license? In other
8 words---

9 MR. LYLES: Mr.---

10 THE COURT: ---one of the principals was a, uh, licensed
11 general contractor?

12 MR. LYLES: ---Thoennes, Junior; yes, sir.

13 THE COURT: The same one?

14 MR. LYLES: Yes, sir. And then finally, interestingly
15 enough on this fraudulent transfer issue, I think -- I think
16 that the evidence in this case actually supports the
17 application of that exception to the general rule too.
18 And -- and the reason is, it -- it's very simple.
19 Mr. Thoennes testified that the reason they started a new
20 company was because the old one was insolvent. Obviously, a
21 company that's insolvent, once it stops doing operations, is
22 not gonna be able to repay all of those creditors. Simple as
23 that. They minimize the opportunity to repay those creditors
24 and instead decided to operate in a new company to try to
25 shield that new income from the former creditors.

1 THE COURT: All right, just a -- a little query here.

2 MR. LYLES: Yes, sir?

3 THE COURT: Um -- I notice this is a 2009 case.

4 MR. LYLES: Yes, sir.

5 THE COURT: When was it filed?

6 MR. LYLES: When was what filed?

7 THE COURT: The case.

8 MR. LYLES: This case?

9 THE COURT: Right.

10 MR. LYLES: Uh -- May of 2009.

11 THE COURT: And they incorporated when?

12 MR. LYLES: Um -- right about that time.

13 MR. HEMPHILL: March.

14 MR. LYLES: March? March, 2009. They had received
15 letters -- it isn't in the record -- but, they had received
16 letters and demands from the association and others about the
17 Stoneledge case prior to that incorporation. But, they had
18 other debts and obligations. I think the testimony in this
19 case would be that they were several million dollars in debt.

20 Um -- in any event, we think that the fact that they
21 admit that they created the M Group because of the insolvency
22 of Marick would support a claim of a fraudulent transfer as
23 well.

24 Um -- and for those reasons, we respectfully request
25 that this motion be denied.

1 THE COURT: Mr. Hemphill?

2 MR. HEMPHILL: May it please the Court. Your -- Your
3 Honor, uh, as it relates to, uh, the -- the more serious
4 allegation against my client, that being, uh, the allegation
5 of fraud, uh, I would contend that the -- that the -- the --
6 the burden of proof and the standard, even at this juncture,
7 would be, uh, clear and convincing evidence.

8 And as -- as Robert indicated, um, you know, my
9 client, in the deposition excerpts that are attached to my --
10 to my brief, said that yes, it was insolvent. Uh -- but, we
11 were very clear, when you read those excerpts, that they were
12 creating a new entity and they needed additional capital to
13 go after a different -- to -- to work on a different product.

14 And so it's -- it's as if -- the reason why they -- they
15 created this new organization was to create a new product,
16 just as if they were making widgets I would contend. And
17 it's just a -- it had a different character; it was not a --
18 a continuation of the old corporation. The common
19 denominator might well be that one of the principals who held
20 the G-C license from the predecessor became -- who held the
21 license for the successor. That's some commonality. But,
22 Your Honor---

23 THE COURT: Well, isn't that almost an asset for a
24 corporation? I mean for a general contractor?

25 MR. HEMPHILL: I -- I would -- I would agree that it is.

1 THE COURT: I mean, that's, uh -- uh, that's why we
2 permit, uh, corporations to, um -- uh, use a license of one
3 of their other, uh -- uh, either employees or incorporated.

4 MR. HEMPHILL: But -- but, Your Honor, the accounts
5 receivables didn't -- didn't transfer or---

6 THE COURT: Well, were there any accounts receivable?

7 MR. HEMPHILL: The question was asked, uh, were there?
8 That was not delved into in the deposition.

9 THE COURT: Well, I didn't ask that, I just -- all
10 right. And again now, please understand I, you know, I'm the
11 last one, and -- and it sort of concerned me earlier that,
12 what is it, uh, Mr. Imhoff I think said that, what is it,
13 that my, uh, rulings in some of these, um -- uh, summary
14 judgments are going to be, um -- uh, res judicata or
15 something like that, admissible as, uh -- as to the other
16 claims.

17 I, um -- uh, I -- I'm not sure about that and I don't
18 intend to. I'm just talking about the record that I have
19 before me at the time of the -- the cross-claims, uh, that,
20 uh, it was such that, uh, the record at that time reflected
21 that there was no, uh, sufficient evidence to grant the, uh,
22 summary judgments.

23 But, uh, here the same thing. I'm not questioning
24 anybody's motives as much as I think that there is sufficient
25 evidence to create a genuine issue as to a material fact of

1 whether or not it was to someone's advantage to, uh, maybe,
2 uh, change hats. And, uh, so I -- I'm going to leave that up
3 to the trier, uh, the trier of fact.

4 MR. HEMPHILL: Thank you, Your Honor.

5 MR. LYLES: Thank you, Your Honor.

6 THE COURT: All right. Uh -- and by the way, um -- uh,
7 since the, uh, motion is -- is, um -- uh, denied that's the
8 only thing that needs to be said.

9 MR. LYLES: Okay.

10 THE COURT: It will be a very short order. All right;
11 anything else?

12 MR. HEMPHILL: No, Your Honor.

13 THE COURT: All right, ladies and gentlemen, I do want
14 to thank you for your patience, as I said earlier, with The
15 Court. But also, um, your concentration on today. Um -- I
16 was not looking forward to it and, uh, particularly when, uh,
17 my, um -- uh, emails and attachments began to pile up.

18 I mean -- I mean, I -- I was gonna tell somebody
19 earlier -- you-all -- as you-all have found out, the ones
20 that have been here, uh, more than once, um, I am want to,
21 what is it, uh, bore people with my little, uh, observations.

22 But, a long time ago, uh, I was appointed to The State
23 Board of Education and I don't know why. My father said if
24 in the Parole and Pardon Board I might have known something
25 about it. But, uh, education never took with me, so

1 anyway...

2 But the point was, I learned how bureaucracies ran at
3 that time. Um -- the week before our monthly meeting they
4 would send me a package of what the agenda was going to be
5 and the supporting materials. I finally got to the point of
6 asking them did they want me to read it or weigh it? And,
7 um -- uh, a lot of times -- and the summary judgments is the
8 one I use -- is that if the memorandum is more than two
9 pages, it must be a genuine issue of material fact somewhere
10 in all of that. So anyway...

11 All right, gentlemen and ladies, I do appreciate your
12 patience, as I say. And those who I've asked to do
13 something, Mr. Lyles, and I -- and again, Mr., uh, Belcher
14 and, um, Mr. Imhoff, uh, you-all do try to work together so
15 we can -- see if we can't move this along.

16 MR. LYLES: Yes, Your Honor.

17 THE COURT: All right. Thank you.

18 JOINTLY FROM ALL: Thank you, Your Honor.

19 (WHEREUPON, HEARING ENDED AT 1:35 P.M.)

20 *****END OF REQUESTED TRANSCRIPT*****

21

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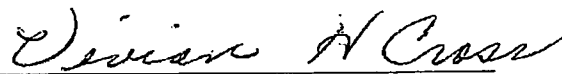
STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED VIVIAN H. CROSS, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THOSE PROCEEDINGS AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR OCONEE COUNTY, SOUTH CAROLINA, ON THE 10TH DAY OF APRIL 2013.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

SEPTEMBER 27, 2013


VIVIAN H. CROSS
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

SDI Funding, LLC, Ludwig
Corporation, LLC, et.al.,
_____ Defendants, _____

Marick Home Builders, LLC,
Third-Party Plaintiff,

vs.

Michael Franz, Clearview
Construction, et. al.
_____ Third-Party Defendants,

Builders FirstSource-SE Group,
Fourth-Party Plaintiff,

vs.

Carl Catoe Construction, Inc.,
Fourth-Party Defendant. _____

DEPOSITION of FREDERICK (RICK) R. THOENNES

Pursuant to notice, a deposition was taken in the
above case on the November 21, 2011, commencing at
approximately 10:10 a.m. attended by counsel as follows:

1 A. I don't know.

2 Q. How about this, at the height of Marick's existence
3 when it was at its busiest, how many employees did
4 it have?

5 A. Probably three or four.

6 Q. Describe the job duties or titles of those
7 employees.

8 A. Administrative Assistant in the office. Would have
9 had a superintendent, assistant superintendent and
10 probably a laborer.

11 Q. So when Marick was doing its construction it
12 subcontracted out its work?

13 A. Correct.

14 Q. And who at Marick was responsible for selecting and
15 contacting with subcontractors?

16 A. Me.

17 Q. And who at Marick was responsible for observing and
18 supervising the work of subcontractors?

19 A. Our superintendents.

20 Q. Can you name your superintendents at Marick, and
21 tell me the years that they were with Marick?

22 A. I don't know about that, but I can tell you some of
23 the superintendents.

24 Q. Okay.

25 A. Matthew Gooch ---

1 Q. Can you spell that last name?

2 A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday,
3 just like it sounds. There's a couple I can picture
4 but I can't name. There are probably two, maybe
5 three others.

6 Q. Who was the superintendent who was responsible for
7 observation and supervision of the subcontractors in
8 connection with what Marick did at the Stoneledge
9 project?

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

13 Q. Did Mr. Hornaday hold any sort of license,
14 contractor's license?

15 A. I don't know. Not that I know of.

16 Q. Who hired Mr. Hornaday?

17 A. I did.

18 Q. Are you the one that assigned him to the -- his
19 responsibilities in connection with the Stoneledge
20 project?

21 A. Yes.

22 Q. What were his qualifications such that you felt
23 comfortable he could supervise subcontractors' work
24 at the Stoneledge project?

25 A. He had worked as a subcontractor for us for years

1 A. There were one or two laborers down there and an
2 on-site administrative assistant.

3 Q. What would you have expected the role of the
4 laborers of Marick to be at the Stoneledge project?

5 A. Well, Nathan hired them and supervised them so he
6 would have told them what their responsibilities
7 would have been.

8 Q. What was your expectation of what work they would
9 have been performing for Marick?

10 A. Whatever Nathan needed.

11 Q. Okay. Do you know as you're testifying today what
12 work was, at Stoneledge, was actually done by
13 laborers employed by Marick?

14 A. I know some. They would clean up, keep the streets
15 clean, keep the units clean. Those are things I
16 observed when I went down there.

17 Q. Is there any aspect of the construction of the
18 Stoneledge units that was done by Marick that you
19 believe was self-performed by Marick or was it all
20 done by subcontractors?

21 A. I think it was all subcontracted other than the
22 cleanup like they -- like I mentioned.

23 Q. Okay. Did Mr. Hornaday ever express to you any
24 concern about the quality of the work at Stoneledge
25 that was being performed by the subcontractors?

1 Q. Had you had any experience with Carl Catoe before?

2 A. No.

3 Q. Did you have occasion to talk with or observe the
4 work being done by Carl Catoe or his crews?

5 A. Some.

6 Q. Did you have any questions about the work they were
7 doing?

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

25 Larry, I'm sorry, I couldn't. Was that once a week

1 he was on site?

2 WITNESS ANSWERS:

3 A. A week to a week and a half.

4 Q. He was on site once a week or once every week and a
5 half. During the time that the framing work was
6 being done, did Nathan ever indicate to you that he
7 had any problems or had corrected any of the work
8 that Carl Catoe was doing?

9 A. I don't recall any workman type problems except for
10 one. We had a floor truss that was put in wrong and
11 we had to support it. That's the only thing that
12 jumps out at me. Of course, we always looked at
13 scheduling, and for the most part he manned the job
14 the way he was supposed to.

15 Q. Any problems associated with the installation of the
16 building wrap or the flashing?

17 A. Not that I know of. Nathan would've seen that.

18 Q. Pardon?

19 A. Nathan would've seen that and he didn't mention it
20 to me.

21 Q. If there had been a problem, would he have mentioned
22 it to you?

23 A. You have to ask him.

24 Q. Would you, I mean, based upon you working with him
25 over the time, would you have expected him to ---

1 A. No.

2 Q. You were on site approximately once a week?

3 A. Once to once, every week and a half.

4 Q. And your communications, though, with Nathan were
5 how consistent?

6 A. Daily.

7 Q. What kind of ---

8 A. Well, I say "daily," there may have been a day he
9 was gone or I was gone, but for the most part daily.

10 Q. As far as a quantity of time, how much time during a
11 typical week would you spend talking to Nathan?

12 A. No idea.

13 Q. Couldn't say?

14 A. Wouldn't even venture to guess. One week it could
15 be, you know, an hour, next week it could be five
16 minutes, next week it could be two hours.

17 Q. I understand. Was there any particular stage of
18 construction during which you were on the site more
19 frequently than another stage?

20 A. Probably during the layout, like when they were
21 staking or that kind of thing. If they were doing
22 any work on the lake itself, then I was there.

23 Q. As to Nathan's onsite time, you said essentially for
24 a vacation or something where you would expect
25 someone to be absent from the site, he was generally

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

5 Q. Ten to twelve. Did you have any, during the course
6 of the construction of Phase II, any interactions
7 with any employees or representatives of Builders
8 First Source, BFS?

9 A. Yes.

10 Q. Who?

11 A. Lots of people. Mike Green, Brock Bauknight,
12 Elaine, can't remember her last name, for the
13 windows ---

14 Q. And that's what I was going to get to next if you
15 want to say that while you go through their names,
16 you can tell me what you dealt with them about. You
17 said Elaine you dealt with windows?

18 A. Right. I think windows and doors.

19 Q. Mike Green?

20 A. Mike Green, I dealt with materials and labor.

21 Q. All right, go ahead.

22 A. And Brock Bauknight was my outside representative
23 that I dealt with on all of those things.

24 Q. General outside sales?

25 A. That's right. He handled my account.

1 Catoe? That is, who did monthly inspections for
2 subcontractor payment?

3 A. Nathan would inspect -- well, there was a draw
4 schedule that Mike Green and I worked out ---

5 Q. Okay.

6 A. --- for all aspects when we did the contract and
7 then all Nathan had to do was look and see what
8 portion of that schedule was done and then he'd sign
9 off on it and then we'd pay it. Not Carl, BFS.

10 Q. Yeah, right, because Carl was -- Carl Catoe was not
11 your subcontractor, correct?

12 A. That's correct.

13 Q. Only Builders First Source was?

14 A. Correct.

15 Q. But nonetheless you got to occasionally communicate
16 with Carl Catoe by virtue of being on the site?

17 A. Sure.

18 Q. Did anyone at Marick ever call or otherwise contact
19 Carl Catoe Construction regarding any warranty
20 issues?

21 A. I'm sure Nathan did.

22 Q. You say that you're sure he did. What do you know
23 that he did?

24 A. Siding that had warped and popped, a truss, the
25 truss that was over-spanned.

1 Q. Was Nathan calling Carl Catoe or Builders First
2 Source with these issues?

3 A. Both. I mean it would start with Carl to see if it
4 could be worked out in the field, I'm sure, but then
5 it would go -- if it couldn't be worked out in the
6 field with Carl then it would go to Builders First
7 Source.

8 Q. I had asked you about warranty issues, and to me
9 typically that means issues once you've left a
10 site ---

11 A. Oh, oh, I don't know of -- I don't know of any.

12 Q. But you were starting to tell me about some issues
13 while construction was ongoing ---

14 A. Right.

15 Q. --- and you mentioned some siding that was warping
16 and popping and then you mentioned the over-spanned
17 truss issue that you already talked about with
18 David. On the siding that was warping or popping,
19 was it an isolated board, was it widespread or was
20 it somewhere in between those two?

21 A. No, I mean, it was an isolated board according to
22 Nathan. He called and asked Carl to fix it.
23 Normally they were on site, but after they had left
24 site then he'd have to call Builders First Source.

25 Q. And was Builders First Source generally responsive?

1 A. Would ---

2 Q. I'm sorry, the finished floor, not the finished
3 grade.

4 A. No.

5 Q. Would you expect it to show the grade at the
6 building?

7 A. Yes, within plus or minus.

8 Q. Would you expect it to show the slope away from the
9 building?

10 A. Yes.

11 Q. If the Freeland drawings don't show or did not show
12 the grade at the building, how would the -- to your
13 knowledge, how would the grading subcontractor know
14 where to set the grade?

15 A. You're asking a hypothetical question there. It
16 should show it, period.

17 Q. I think you said that you assumed that Nathan
18 contacted Hutch N Son regarding some issues with the
19 grade, do you know that for sure or do you just
20 assume that?

21 A. No, I know that for sure.

22 Q. Okay. And that was relating to this standing water?

23 A. Standing water and the slope.

24 Q. And the slope?

25 A. Yes.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,

Plaintiffs,

vs.

IMK Development Company, Inc.

Keowee Townhouses, LLC,

Ludwig Corporation, LLC,

SDI Funding, LLC, Medallion

At Keowee, LLC, Integrays

Keowee Development, LLC,

Marick Home Builders, LLC,

Bostic Brothers Construction,

Miller/Player & Associates,

et. al.

Defendants.

DEPOSITION of DEREK HODGIN (DAY 2)

Pursuant to notice, a deposition was taken in the
above case on the January 24, 2012, commencing at
approximately 9:15 a.m. attended by counsel as follows:

1 believe the document that I looked at was Phase II,
2 based on a 2003 date. I can't be sure. I can't be
3 certain without looking at it closer. The exterior
4 wall details really don't have much of any flashing
5 details. The only place that I saw flashing would
6 be at a roof/wall intersection. And all it does is
7 point to the intersection and say "flashing."

8 There's no blow up of how the flashing would be
9 installed or integrated. I don't recall seeing any
10 flashing detail at this location.

11 Q. Let's look so that we can put our eyes on it. Are
12 you going to start with 55?

13 A. Sure.

14 Q. Phase II, 55?

15 A. Sure.

16 Q. Since we're there already.

17 A. I believe the photographs that depict this
18 condition would be best reflected in Images 4646
19 through, I guess 4648. There's some additional
20 photos after that, but they're a little bit below
21 the water table.

22 Q. Let's go back.

23 A. Okay.

24 Q. A couple -- or a page to 4636.

25 A. Okay.

1 Q. And the reason I want to do that is I want to see
2 it before you tore it apart.

3 A. Okay.

4 Q. Or 4635.

5 A. Yes, sir.

6 Q. It appears to me that the siding actually
7 terminates, I don't know, inches above the water --
8 the stone water table. And there is a piece of
9 trim installed there with a piece of flashing over
10 it.

11 A. Yes, sir.

12 Q. Matter of fact, I think that may have been one of
13 the pieces we were just talking about.

14 A. Yes, sir.

15 Q. That has the caulk joint. Okay. Is this -- does
16 this installation still require yet another piece
17 of flashing between the trim and the stone water
18 table? Is that what you call a water table?

19 A. Yes.

20 Q. Okay.

21 A. I believe it's the manufacturer's requirements that
22 have the flashing above the water table. I would
23 think that it would be important to segregate the
24 two sections of cladding with flashing. And just
25 for clarification, the trim flashing is required by

1 the code. But I think toward the end of 703.8 it
2 says flashing shall be installed over projected
3 wood trim. Something like that, that you can't
4 have flat pieces of wood coming out of the wall
5 that aren't flashed. So the trim is really a
6 separate building code requirement that it be
7 flashed, which they did. There's some minor issues
8 with how that was done. But this is a separate
9 issue down at the stone water table level.

10 Q. So in your opinion this needs to be double flashed?

11 A. Correct.

12 Q. Let's go ahead and look at the Code Section 703.8,
13 I guess, is what you ---

14 A. Okay.

15 Q. --- cited.

16 A. It'd probably just be easier for me to ---

17 Q. You haven't looked at the code?

18 A. It should be in the report. But I was going to
19 look at it.

20 Q. Are you looking at 2003 or 2000?

21 A. I'm looking at the 2000 IRC and the commentary.
22 Also I don't know if you have the commentary. Do
23 you want to look at it at my copy and then let me
24 know if there's something you want me to read into
25 the record?

1 top of the stone water table. But we will need to
2 look at the manufacturer's instructions. I have
3 had some repairs where I violate the manufacturer's
4 instructions because I don't agree with them. And
5 I don't know if this is that case or not.

6 Q. But the issue we're talking about right now is the
7 flashing at the top of the stone water table which
8 you're not sure that it would be necessary or
9 appropriate anyway?

10 A. I think the manufacturer requires it. I think
11 that's why it's included in our matrix -- or the
12 table as an identified deviation from what was
13 required of the contractor when he constructed the
14 buildings at Stoneledge.

15 Q. Do you have those manufacturer installation
16 instructions close by?

17 A. I think they should be in the reference binder.

18 Q. Would they be attached to the back of your report?

19 A. I think so.

20 Q. Owens Corning Cultured Stone?

21 A. Yes, sir. I don't know if there's one specific to
22 cedar siding. I'm looking at a page of details
23 from Owens Corning Cultured Stone, Best Practices
24 for Flashing Details.

25 Q. Yes. Do you have a page?

1 A. I think it's Page 4. And at the bottom left it
2 looks like 1-B. I believe it's stucco above the
3 water table. But the detail is generically
4 identified as "sheathing and wood studs, water
5 table or wainscot." So basically this is when your
6 entire wall is not covered with stone, you've got
7 to interrupt and you've got this water table
8 feature. There is a GSM flashing identified. It
9 says, "See note A2." It extends, in this case,
10 from behind the stucco out onto the stone sill. I
11 think GSM is metal flashing.

12 Q. Will you flip to page 8 for me, please?

13 A. Sure.

14 Q. And this may not be right, but it seems closer.
15 Where you have at 1B, "Sheathing/wood studs,
16 horizontal trim, recessed base flashing." Is
17 this -- and there's another one right next to it
18 also that has wood, the horizontal trim piece, and
19 then the stone below.

20 A. I don't think any of them have exactly what we
21 have. I mean, the reason I picked the -- that
22 first one was because it has the sill component.
23 And it was identified as water table -- as the
24 water table detail. But it doesn't matter which
25 one you look at. All three of them, that one on

1 page 4, and then two of them on page 8, both the
2 1.14A and 1.14B also call out that same GSM
3 flashing. See note A2.

4 Q. So I don't know that that helped or not. Were you
5 actually able to get your hands on the Owens
6 Corning instructions that were provided with the
7 stones installed at the project?

8 A. I don't know that -- we have various dates, I think
9 from late nineties or early 2000s to 2009 maybe.
10 This one looks like 2006 is this date. All the
11 versions I've seen include I believe those same set
12 of details.

13 Q. Is this condition causing damage?

14 A. Well, I know that we've seen -- I believe there's
15 been some damage below the water table feature in
16 the areas of the stone. But I don't know that I
17 could directly correlate it to that one particular
18 detail. Again, I would say one set of flashing,
19 either above or below that sill, would be
20 sufficient to keep water from migrating behind the
21 stone.

22 Q. Have you composed a remedy for this issue?

23 A. Well, I think generically it's to remove the stone
24 and install it in accordance with the
25 manufacturer's instructions.

1 A. You'll have to look at the photographs to see the
2 extent of destructive testing in the area with the
3 stone.

4 Q. Well, let's look at -- well, we're at 55. Aren't
5 we? 55 in D6 and 81 in D5, let's look at those.

6 A. Okay.

7 Q. Let's do 55 first.

8 A. Were you asking about damages at 55?

9 Q. Right.

10 A. There's no stone removed below this improper
11 detail.

12 Q. Oh. What's 4649 and 4650?

13 A. That's, I think probably a bigger problem than the
14 flashing, is that -- I mean, I think I talked about
15 it briefly earlier is that, I think properly
16 they've installed an additional layer of weather-
17 resistant barrier. I believe in most cases it was
18 identified to be felt. Asphalt-saturated building
19 felt.

20 Q. Is that the Grace Vycor Plus?

21 A. No. That would be self adhered flashing. Do you
22 see in 4649 and 4650 where there's -- somebody's
23 finger is pinching the felt in 49. And then a
24 knife being placed behind the felt in 50?

25 Q. Yes.

1 A. That means that any water that comes down the face
2 of the weather-resistant barrier from above is
3 going to go directly behind that felt and be in
4 intimate contact with the one layer of weather-
5 resistant barrier behind it. That's a significant
6 problem particularly in brick veneer and any kind
7 of intimate masonry exterior wall assembly.

8 Q. Back to the damage, do you see -- so no stone was
9 taken off of this one. So as to Unit 55 we can't
10 say whether or not this condition caused the
11 damage?

12 A. Not directly, no. I would have to -- and I would
13 probably take off stone toward the base of the wall
14 just from a gravity standpoint, that water would
15 migrate to the base of the wall and collect at that
16 location.

17 Q. Let's look at Unit 73. Are we back to Dr. Hund's
18 unit, I guess?

19 A. I believe so, yes. I've seen photographs of the
20 specific issue that we're discussing. But again,
21 no stone removed from below that detail.

22 Q. So as to Unit 73, we cannot say whether or not that
23 condition is causing damage?

24 A. I think I agree with that.

25 Q. Let's go to 81.

1 weather-resistant barriers.

2 Q. Well, that's what I'm asking you. I mean,
3 obviously, you know, hindsight is 20/20. But at
4 the time that the contractors built this building
5 were they -- did they deviate from a code
6 requirement or an industry standard in regard to
7 the way they constructed it and the barriers that
8 they used?

9 A. I would say from a code standpoint, only -- the
10 other thing we saw in 703.8 was that flashing
11 should have been installed below the water table.
12 The above the water table came from the
13 manufacturer. And the double layer of weather-
14 resistant barrier came from the manufacturer. So
15 the only violations you would have would be 703.8
16 for the under the water table. And the
17 manufacturer for the over the water table and
18 possibly if there is a mixture of weather barriers
19 that are used that are not approved by the
20 manufacturer. I haven't researched that. You
21 know, I guess one thing that would violate the code
22 is that when you do put a weather-resistant barrier
23 on it has to be installed in a weather lapped
24 fashion. So I would say that's a code violation,
25 that they put that second layer behind the stone on

1 top of the first layer.

2 Q. But anyway, it shouldn't have lapped behind the
3 weather-resistant barrier above it?

4 A. Right. So from water migrating from above, you
5 totally lost the benefit of that second layer. And
6 now you've got water trapped between the two layers
7 of the weather-resistant barrier.

8 Q. I don't want to get into a philosophical argument
9 about how this should be done or not. But it seems
10 to me that the manufacturer's instructions and the
11 code and what you're saying are all inconsistent
12 with each other. In other words, it could be read
13 to require three sets of flashing, one above the
14 trim, one above the water table, one below the
15 water table?

16 A. I think that is what's required, yes.

17 Q. Which would make it impossible to incorporate the
18 water -- or the weather-resistant barrier into all
19 three of those effectively unless you were cutting
20 out strips of weather-resistant barrier at each one
21 of those locations?

22 A. Right. It would be interlaced, kind of like you do
23 cedar shakes. You would have layers of weather-
24 resistant barrier between those three sets of
25 flashing.

1 code allow an on-site builder to use alternate and
2 adequate means of construction?

3 A. You'll have to be more specific than that. There's
4 a section in the code that talks about alternate
5 products that can be used. And if they're not
6 specifically addressed by the code, the building
7 official can ask for code evaluation reports or
8 some evidence of code compliance.

9 Q. Can I see your ---

10 A. Yeah.

11 Q. --- code there a minute, please? And this is the
12 only one you have? This is 2000?

13 A. Correct.

14 Q. Well, we'll have to come back to that. I can't
15 find it in my notes.

16 A. Is that what you were talking about though? The
17 alternate materials?

18 Q. No. We'll just have to come back to that.

19 BY MR. IMHOFF:

20 All right. What time is it?

21 (OFF THE RECORD).

22 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

23 Q. Does your repair scope include removing all of the
24 stone on all of the Stoneledge units?

25 A. I can't think of any place that we are able to

1 salvage it, no. I'm sorry. I think the answer is
2 yes.

3 Q. And you have provided that repair scope despite the
4 fact that your testimony is today that you don't
5 know whether or not there's any damage behind the
6 stone?

7 A. Not on Phase II. That's correct. I just know the
8 details are the same between the two phases. And
9 we've found extensive damage behind the stone in
10 Phase I.

11 Q. I'm going to hand you Exhibit Number 72 again. It
12 looks like 7 and 8 may need a line between them?

13 A. I need to borrow Randy's version, I think.

14 Q. When you do it, will you state if for the record
15 for the table, please?

16 A. There's a couple pages.

17 Q. Go ahead and tell us what you did, please.

18 A. The first line that I drew between Issues 7 and 8
19 are between Unit Number 73 and 15. If you go to
20 the next page, I added three lines. Between Issues
21 10 and 11, the line goes between Unit 66 and Unit
22 8. Between 11 and 12 between Unit 66 and 25 and
23 between 12 and 13 between Units 91 and 33.

24 Q. Let's move on to D7.

25 A. Okay.

1 Q. And just in general describe what that defect is,
2 please.

3 A. I think this reverse lap is what we got sidetracked
4 onto in our previous discussion that in addition to
5 not having the proper flashing at the intersection
6 of the stone and the cedar that the second layer of
7 weather-resistant barrier installed behind the
8 stone was simply put on top of the first layer,
9 allowing any water migrating from up above to go
10 directly behind that second layer.

11 Q. Your consequence damage there says, "Damage
12 observed to sheathing and wall framing, interior
13 gypsum wall and floor damage observed." Is that
14 from the emergency repair that you did in Phase I?

15 A. I believe so. Are 55 and 73 the ones we've
16 previously looked at?

17 Q. Yeah. Well, 55 is directly above in 6, and 73 is
18 directly above in 5. So it was one of the four
19 that we -- the -- two of the four that we just
20 looked at.

21 A. Okay. So the damage that we observed is definitely
22 the emergency repair on 32.

23 Q. And not the issue at 55 and 73?

24 A. Correct. Would you like to look at the pictures of
25 32?

1 Q. I'll let somebody else do that, because we're
2 moving pretty slow.

3 A. All right.

4 Q. Let's move on to 8, and I guess 9 at the same time.
5 It looks like they're both talking about windows?

6 A. Yes.

7 Q. Well, back to Unit 55, I guess, since we're here.

8 A. 55 is not part of Issue Number 8.

9 Q. No, but it's part of Issue Number 9.

10 A. Okay.

11 Q. It looks like for both 8 and 9, again, you've cited
12 the general provision of 703.8. Well, no, you cite
13 Note 3 and Note 4 about "Under and at the ends of
14 masonry wood or metal copings and sills," and Note
15 4, continuously above all projecting wood trim,"
16 corrosion-resistant flashing needs to be installed.
17 All right. Let's look at that, and identify a
18 picture, if you would. Or a photo, I should say.

19 A. I don't know that that's an issue a whole lot
20 different than Number 6. I mean, I know it's in
21 that same area. So what this is saying is that
22 there should be flashing not only at the cedar to
23 stone intersection, but also the window stone
24 intersection. There should be flashing below
25 the -- between the window and that stone sill, I

1 guess it would be called at this location.

2 Q. Let me make sure that I understand. What is the
3 trim material?

4 A. Around the window?

5 Q. Well, around the window and above the stone water
6 table?

7 A. Cedar.

8 Q. That's a piece of cedar trim?

9 A. Yes, sir.

10 Q. So if we look at, I guess Photograph 4636 where you
11 can see the bottom of the trim piece around the
12 window right above the water table feature, the
13 stone water table feature?

14 A. Yes, sir.

15 Q. That's where you say a piece of flashing needs to
16 be put?

17 A. I believe it would be below the sill. Below the
18 window sill, which we have been calling a water
19 table at -- running away from the window we call it
20 a water table. Here it's a sill. And there should
21 be flashing that extends out below that location
22 based on that section of the code.

23 Q. Below the piece of stone?

24 A. Right.

25 Q. That creates the sill?

1 hard time. I'm giving you a hard time -- I'm just
2 asking you questions to try to identify what you've
3 done, and what your opinions are, and why you have
4 come to those opinions. And then what your scope
5 of repair is going to be.

6 A. Right. And my only point was this is not such a
7 different repair scope than it would be if I was
8 working for you on the defense.

9 BY MR. IMHOFF:

10 What time is it? It's 12:40.

11 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

12 Q. I think we're done with 9.

13 A. Okay.

14 Q. Let's do 10 real quick and then we'll stop.

15 A. Okay.

16 Q. All right. Essentially -- well, tell us in general
17 what this is -- what this condition is?

18 A. I believe in our observations -- and it has several
19 units listed. But again, this is one of those
20 issues that you can walk around the project and see
21 repeatedly on, I believe all the buildings. Is
22 that the stone continues in an uninterrupted manner
23 down to grade -- and actually, the next issue is
24 below grade, without any base of wall flashing or
25 weep provision.

1 Q. Let's go ahead and look at 59, if we could?

2 A. Okay.

3 Q. This looks to be the new one. The one we talked
4 about before.

5 A. I seem to have two sets of the same photographs.
6 I'm not sure. Yeah, there's a tag that says
7 "duplicate photos." There's some field notes from
8 Mr. Metcalf on July 1st, 2010. And then some
9 photographs at the base of one of the stone clad
10 walls.

11 Q. And this just evidences the lack of the -- what do
12 you call it, through flashing at the base of the
13 wall?

14 A. You might be referring to through wall flashing,
15 which is flashing that would extend from behind the
16 weather-resistant barrier, through the outer
17 masonry veneer to daylight. That's what we -- what
18 would be missing.

19 Q. Is that what this issue is?

20 A. Yes.

21 Q. I think you've told me previously that you have not
22 actually taken any stone off to see if there's
23 damage to this wall. I don't see that you've done
24 that here, and I don't see any photographs on
25 damage to the wall. Am I wrong about that?

1 Q. Let's go to 66, which I think is the next one.

2 A. All right.

3 Q. This looks to be a fairly large file.

4 A. All right. I found some exterior wall photos, but
5 the stone goes below grade, and there is no
6 excavation to see where the stone actually
7 terminates. But my earlier point was that the
8 entire purpose of the base of the wall flashing
9 would be to exit water in front of the wood framed
10 wall areas. And so you would see this flashing
11 extending through a linear, horizontal joint at the
12 base of the wall between the concrete foundation
13 and the wood framing, which you don't see in
14 Photographs 0595 through 0603. So they're kind of
15 overview pictures. But what's being shown is the
16 absence of any flashing that would extend through
17 the stone.

18 Q. And you haven't done any investigation or
19 destructive testing to determine if there's any
20 damage between or behind the stone on any of the
21 units that you looked at in Phase II?

22 A. The only thing -- and I didn't think about it a
23 minute ago when you asked me the question. We were
24 looking at these photographs -- and maybe that's
25 the reason we were taking pictures of this outside

1 wall. Because there seems to be extensive flooding
2 of the basement of this particular unit where he
3 has wet carpet and stains coming down the inside of
4 the concrete wall and damages to the base of the
5 wall in the finished basement. It's hard to say.
6 Certainly this detail, even though it's intended to
7 protect the wood framing, would contribute to the
8 amount of water that the concrete wall below sees
9 or is exposed to. So you can't really separate
10 those. I mean, it's got to be a contributing
11 factor. But I wouldn't be able to say to what
12 extent it contributes to his flooding.

13 Q. It looks like we've knocked Number 11 out too,
14 because it is the same units in Phase I, 59, 65,
15 and 66, and is -- the fact that you've pointed out
16 that the stone veneer is installed below grade?

17 A. Yes, sir.

18 BY MR. IMHOFF:

19 Lunch?

20 BY WITNESS:

21 Sure.

22 BY MR. IMHOFF:

23 Okay, let's just stop here for lunch?

24 (OFF THE RECORD).

25 EXAMINATION RESUMED BY MS. MONTAGUE:

1 regarding the stone veneer, its termination,
2 presence or absence of any weep system and the
3 extent that it extended below grade.

4 Q. So what is your opinion as to why the stone veneer
5 being installed below grade is incorrect?

6 A. Well, if there was a proper weep hole and flashing
7 system, I don't think all by itself it would
8 necessarily be a significant issue. What makes it
9 more important on these buildings is that there's a
10 totally uninterrupted path for termites to get
11 behind the stone and travel up to the OSB wall
12 sheathing and wood framing.

13 Q. Have you seen any evidence of live termites or
14 termite damage?

15 A. The only place that I recall stone being removed
16 near the base of the wall was the emergency repair
17 on 32.

18 Q. So this is Unit Number 32?

19 A. Right, Unit Number 32. And I don't recall, we'll
20 have to look at those photographs to see the extent
21 of any termites that may have been present. So we
22 haven't explored the extent of any termite damage
23 at the base of the wall.

24 Q. Do you mind pulling up 32? Do you have that in
25 front of you, so we can see those photos? Is 32 in

1 drawings that show wood framed balconies. I think
2 I've only seen the CMU and concrete. But somebody
3 made a switch to have the wood trusses and the
4 pressure treated framing.

5 Q. All right, let's pick back up where we left off on
6 your on Exhibit Number 72.

7 A. Okay.

8 Q. I think we're at 12; is that ---

9 A. I think that's right.

10 Q. Seem about right?

11 A. Yeah.

12 Q. This seems fairly obvious. Some of the stone
13 wasn't adhered properly and may fall off?

14 A. Yes.

15 Q. It looks like you've identified three units where
16 that has happened. Let's go ahead to 73.

17 A. Okay.

18 Q. I guess this is Dr. Hund's unit again?

19 A. I believe so, yes. It looks like stone that's
20 popped off here is right below the ceiling in
21 Photos -- well, you can see it kind of in the
22 background, 2141.

23 Q. I got to get there. Just a minute, please. Okay.

24 A. And then the other one, it cuts off the image
25 number on the bottom. So if you just go from 2141

1 Q. Oh, yeah. 19. I think it was 19. Well, no, I
2 skipped 19, because that's just in Phase I; is that
3 right?

4 A. It looks like it, yeah.

5 Q. "Inadequate wall sheathing attachment," you're
6 talking about the OSB or the plywood or whatever
7 exterior sheathing?

8 A. Yes.

9 Q. Didn't have enough nails or something like that?

10 A. Correct.

11 Q. And you found that in one place in Phase I?

12 A. It looks like it was just found during exterior
13 wall emergency repair.

14 Q. And you didn't find that anywhere in Phase II?

15 A. No. I don't think we were looking for it in Phase
16 I, it just happened to be observed during an
17 emergency repair. And I wouldn't propose that
18 that's some kind of widespread issue. To the
19 extent that OSB is exposed during a repair process
20 and nails are found to be inadequate, then you
21 would just add some nails.

22 Q. Let's talk about 20. "Cultured stone veneer is
23 installed in contact with the concrete path/stoop."
24 Let's go ahead and look at 76.

25 A. Okay.

1 Q. So we can get an idea of what ---

2 A. It says, "7/1/2010" at the set of notes. It looks
3 like the photographs -- there's a series of
4 photographs, but in terms of regarding this
5 particular condition it would be images 7241
6 through 7246 prior to removing the stone, seeing
7 how it terminates against the top of a concrete
8 balcony.

9 Q. And maybe I misunderstood that. This is talking
10 about on top of the balcony or on the balcony?

11 A. Well, it could be at other locations. Like it
12 could be below the balcony, where that same column
13 would hit the slab on grade foundation. Or it
14 could be -- we don't show it, but there would be at
15 the front entrance in that 7240, those stone clad
16 base of columns would come down against a concrete
17 entry porch.

18 Q. And that is, according to your chart here, a
19 manufacturer's installation instruction violation?

20 A. Yes, sir.

21 Q. What is the violation, exactly?

22 A. Well, they were supposed to be held up off of these
23 surfaces. I can think of a couple of reasons why
24 that would be important. I don't know exactly what
25 the manufacturer details, without looking at it,

1 but I know that there's a flashing detail or a
2 termination detail a certain height above concrete
3 surfaces.

4 Q. To allow it to drain?

5 A. To allow it to drain. And to the extent that you
6 have flashing that's coming up from below, you
7 don't want to have say your weep screed or some
8 other accessory penetrate the flashing too low on
9 the column. That would cause a water penetration
10 point. Weep screed is W-E-E-P S-C-R-E-E-D.

11 Q. Can we go to the Owens Corning ---

12 A. Yes.

13 Q. --- installation instructions? I'm not sure I'm
14 following it. And while you're looking, this is
15 purely an installation instruction issue? It's not
16 a code issue, other than the code requires you to
17 follow a manufacturer's instructions?

18 A. I mean, I guess you could throw in the 703.1 or
19 maybe 703.8. We could look at it to see, but I
20 would say primarily it would be a manufacturer-
21 related issue. I don't see any detail that shows
22 exactly what we have. I do see like a paving
23 surface, like paver block surfaces on Page 3 of the
24 instructions that are including in our report,
25 which is "Owens Corning Cultured Stone Best

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
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vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
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At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.
Defendants.

Deposition of NATHAN HORNADAY

Pursuant to notice, a deposition was taken in the
above case on the March 30, 2012 commencing at
approximately 10:15 a.m. attended by counsel as follows:

DEPOSITIONS AND __, INC.
(864) 585-0642

000498

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

4 Q. Had you ever -- when you went to Stoneledge, had
5 you ever been a supervisor or superintendent on a
6 job?

7 A. No.

8 Q. When you went over there, did you think that you
9 had the skills to be -- did you call yourself
10 supervisor or superintendent first of all. Let me
11 ask you that. Or what title did you use, if you
12 used one?

13 A. Supervisor. I mean, I was mostly just supervising
14 everything that was being done.

15 Q. Were you supervising subcontractors?

16 A. Yes.

17 Q. Or did Marick have any other employees doing such
18 things as framing or other work of that type?

19 A. No.

20 Q. So it was all -- all the work was being done by
21 subcontractors?

22 A. Yes.

23 Q. Prior to the time you went to Stoneledge, had you
24 ever supervised subcontractors?

25 A. No.

1 Q. When you arrived at Stoneledge, did you feel like
2 you were up to that job?

3 A. Yes.

4 Q. In other words, you felt like you had enough
5 general experience to be able to monitor what the
6 different subs were doing and to determine whether
7 they were doing it correctly or not?

8 A. Yes.

9 Q. And were there times when you thought they were not
10 doing something correctly?

11 A. No.

12 Q. So basically the subs you felt like were proceeding
13 correctly?

14 A. I believe each sub, depending on what he did, I
15 mean, obviously knew more than I did about it.
16 That's why we hired them. And each sub, you know,
17 was an expert in their field. So I was basically
18 there to make sure -- schedule them to do their
19 work, when to come in, and make sure they got it
20 done.

21 Q. I understand that. Did you ever see something that
22 caused you to say to a sub, "Wait a minute, I don't
23 like the way you're doing that"?

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

2 Q. Do you remember specific instances, or are you just
3 saying that from time to time ---

4 A. From time to time I would see something that they
5 would cut a corner on, but I would talk to them and
6 they would fix it. But it was nothing major. It
7 was like nail guards on pipes, painting, you know,
8 caulking, stuff like that, on the inside -- the
9 interior unit.

10 Q. Did you do any work on Phase I?

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

14 Q. And what -- I'm sorry.

15 A. --- supervised a lot of repair work.

16 Q. By the way, if I start to ask you a question before
17 you finish -- I'll try not to do that, but
18 sometimes you can't help it.

19 A. Okay.

20 Q. Just let me know there's more in your answer.

21 A. Okay.

22 Q. Did this supervising of repair work in Phase I, was
23 that going on while ---

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,

Plaintiffs,

vs.

IMK Development Company, Inc.

Keowee Townhouses, LLC,

Ludwig Corporation, LLC,

SDI Funding, LLC, Medallion

At Keowee, LLC, Integrays

Keowee Development, LLC,

Marick Home Builders, LLC,

Bostic Brothers Construction,

Miller/Player & Associates,

et. al.

Defendants.

Deposition of RANDY STILL

Pursuant to notice, a deposition was taken in the
above case on the August 15, 2012 commencing at
approximately 10:20 a.m. attended by counsel as follows:

DEPOSITIONS AND _____, INC.
(864) 585-0642

000502

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You
4 would expect they would but I don't know
5 contractually. I think it becomes a legal question
6 of duty.

7 Q. It is a duty, is it not, of the general contractor
8 to comply with the applicable building codes in the
9 performance of a project?

10 A. I would think so.

11 Q. Is it the duty of a general contractor to coordinate
12 the work of subcontractors?

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

16 A. I would think so to the extent he understands that
17 coordination effort.

18 Q. And if he doesn't understand the coordination effort
19 what should the general contractor do?

20 A. Ask questions.

21 Q. Of whom?

22 A. Subcontractors, make sure they're putting them
23 together correctly.

24 Q. Is it a duty of the general contractor on a project
25 like the Stoneledge Project to supervise the work of

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 Object to the form.

4 WITNESS ANSWERS:

5 A. I'm thinking about the word "supervise." You would
6 think that he would make sure they were doing what
7 entity they were supposed to be doing. In other
8 words, you would want a framing contractor doing
9 framing and you would rely upon them to perform
10 their craft appropriately. And the supervisory
11 condition would be, I would think, contractual.

12 Q. Between the general contractor and the
13 subcontractors?

14 A. I would think so.

15 Q. Do you think a general contractor has any obligation
16 to insure that his subcontractors(phone ringing) ---
17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

19 Q. Is it an obligation of a general contractor to
20 insure his subcontractor's in compliance with the
21 contract documents?

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I'm not sure I'd use the word "insure." I would

1 A. I think it would be advisable for him to do that,
2 yes.

3 Q. Would you agree with me that the general
4 contractor's role on a construction project like
5 Stoneledge is the overall responsibility for the
6 construction of the entire project?

7 A. Yes.

8 Q. Since your last deposition have you reviewed or have
9 you developed any opinions about sufficiency of the
10 plans and specifications that were provided to
11 Marick Home Builders by Miller/Player?

12 A. I have looked at the plans. I haven't spent a lot
13 of time looking at them. They don't have an
14 enormous amount of detail to them.

15 Q. But do you have an opinion as to whether or not the
16 plans as provided by Miller/Player were sufficient?

17 BY MR. ORR:

18 Object to the form.

19 WITNESS ANSWERS:

20 A. I hesitate on that because you're asking me to opine
21 on the duty of an architect to prepare plans. As an
22 engineer I'm not sure I can do that. I can tell you
23 that there are details that I would've liked to have
24 seen in those plans that would've clarified areas.

25 Q. But you don't have any opinions about whether or not

1 conditions that you observed in Phase II among the
2 Marick Home Builders' subcontractors?

3 A. No.

4 Q. Do you acknowledge that at least in some respects
5 that we have discussed today as the general
6 contractor on the project, Marick Home Builders
7 violated the applicable building code?

8 A. I would agree with you that there are components
9 that have sustained damage at those isolated areas
10 we've talked about that now appear to be a code
11 violation because of failure.

12 Q. In other words, the fact that damage has occurred
13 indicates that the code has been violated?

14 A. At least in part. Some of it may be -- like we
15 talked about that stone that rolled out. You can't
16 isolate on the edge of the deck between the lack of
17 sealing that joint or maintaining that joint to the
18 contribution of what that would cause versus what
19 would come across the membrane, for example. We
20 haven't talked about those type issues. You can't
21 segregate that.

22 Q. What type issues haven't we talked about?

23 A. Maintenance. I mean, if the homeowner -- there is
24 some maintenance that's required and I have not
25 tried to go into that, but the issue we just talked

1 obligation in the construction or installation of
2 the low slope roofs, whether it be code violation,
3 violation of the design documents or non-compliance
4 with the design documents or violation of
5 manufacturers' installation instructions or any
6 other obligation on the installation of the low
7 slope roofs?

8 A. I think the only place in the low slope roofs that
9 there is question is there's some very limited areas
10 where felts are missing, and that is an omission of
11 felts, a single layer of felts.

12 Q. Let's talk about that for just a minute. In your
13 experience and education and in your work, do you
14 hold the opinion that a general contractor is always
15 liable for all defects in construction which were
16 performed by subcontractors?

17 A. I think what I have found is the term "liable" is a
18 legal term and my belief is that the general
19 contractor can rely on the subcontractors who have
20 the specialty crafts and knowledge to perform their
21 work correctly.

22 Q. Is it fair to say that in many cases a subcontractor
23 is in fact more experienced and better qualified to
24 perform their particular trade than a general
25 contractor?

1 A. Yes.

2 Q. Is that because they have specialized over the years
3 in that particular area and have focused their
4 education and experience in that area?

5 A. Yes, and they've performed the work and they know
6 what works and what doesn't work.

7 Q. In your opinion is it fair -- is it acceptable for a
8 general contractor to rely on that experience and
9 education of a subcontractor in a particular trade?

10 A. I think in many cases he has to.

11 Q. Would you agree that obviously a general contractor
12 cannot see every nail which is driven or every board
13 which is installed?

14 A. Yes.

15 Q. Would you agree that he must, out of necessity, rely
16 on a subcontractor's experience and knowledge and
17 compliance with good building practice and the code?

18 A. Yes.

19 Q. Let me go back to my question then again. If based
20 upon that, if there are violations of code such as a
21 completely missing felt under a roof, do you hold
22 the opinion that the general contractor has violated
23 the code or some other obligation if the work was
24 done by a subcontractor?

25 A. No, but clearly when something like felt is missing

1 or a prototypical installation and that will serve
2 as the standard by which an installation is
3 accepted. For example, if you put a window in and
4 you've got a mock-up wall and you put in the rough
5 opening flashing and you put in the -- all the
6 flashings that would be there, all the peel-and-
7 stick and you've got all of the entities, for
8 example, the window manufacturer and the wrap
9 manufacturer and the peel-and-stick manufacturer and
10 the exterior cladding person there. And if they're
11 all there and they say, "Yeah, this is the way it
12 needs to be done." And your subcontractor who's
13 doing all those different components install it that
14 way, says he's going to install it that way, that's
15 how it should be installed. I'm not sure that
16 answers your question but ---

17 Q. Okay. Let me try to get to it a little bit
18 different way. Are you familiar with the term
19 "paper contractor"?

20 A. I'm not sure.

21 Q. Do you know if Marick actually drove any nails or
22 constructed any part of Stoneledge?

23 A. I think my understanding is he did not self-perform
24 any work.

25 Q. What in your opinion is the role of a general

1 Q. Do you believe or do you have an opinion that Marick
2 violated any code, manufacturers' instructions,
3 design drawings in the installation of the cedar
4 shake and plank siding in Phase II?

5 A. No.

6 Q. Do you have any opinion that Marick violated any
7 code, manufacturers' installation instructions,
8 design drawings or any other obligation in the
9 installation of the doors and windows in Phase II?

10 A. I am not aware that he installed any of those
11 components.

12 Q. Is that a "no"?

13 A. No.

14 Q. Do you believe Marick violated any code,
15 manufacturers' installation instructions, design
16 drawings or any other obligation in the stone
17 installation in Phase II?

18 A. No.

19 Q. Do you believe Marick violated any code,
20 manufacturers' installation instructions, design
21 drawings or any other obligation in the installation
22 of any of the waterproofing, framing, grading or
23 other construction components in Phase II?

24 A. No.

25 Q. I don't think I have any more questions for you

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

Deposition of J. DREW WILKIE

Pursuant to notice, a deposition was taken in the
above case on the August 16, 2012 commencing at
approximately 10:12 a.m. attended by counsel as follows:

DEPOSITIONS AND , INC.
(864) 585-0642

000511

1 Q. Do you have any idea what amount of supervision and
2 direction was given to Clear View?

3 A. Based on some of the testimony I've read by, I
4 believe Mr. Hornaday, there was some supervision
5 provided and I think he was -- Mr. Hornaday was in a
6 role of providing for that supervision. Aside from
7 what Mr. Hornaday said in his deposition I'm not
8 aware of what other supervision there was.

9 Q. Do you know what supervision of its employees was
10 provided by Clear View?

11 A. I do not.

12 Q. Do you know what direction was provided by Clear
13 View?

14 A. I do not.

15 Q. Do you know if Clear View had the Owens Corning
16 manufacturer's installation instructions?

17 A. I do not.

18 Q. Where could a subcontractor obtain installation
19 instructions for this type of stone; do they come
20 with the box of stone or on the side or is it
21 something you need to go and search out on the web
22 or how does that -- how do you get those
23 instructions?

24 A. In 2006 I don't know whether the instructions
25 would've been adhered to the packaging of the

1 outboard of the weather-resistant barrier that's on
2 the wall sheathing underneath it. So it's -- this
3 is all occurring outboard so I don't think that
4 that -- that the presence of that gap or crack is a
5 condition that by itself is a violation of the
6 building code. Is that what you were asking?

7 Q. Right.

8 A. Okay.

9 Q. Do you know or do you have an opinion why that
10 mortar has cracked or shrunk or gapped at that area?

11 A. There are several reasons that that crack or gap
12 could form. Do you want me to ---

13 Q. Yes.

14 A. --- give you examples of what some of them could be?

15 Q. Sure.

16 A. I don't know what the major reason is or what all of
17 the reasons are but there are several that could be
18 occurring there. One is simply that the mortar
19 joint between the edge of the slab and the nosing
20 stone can become wet and be subjected to changes in
21 temperature, freeze/thaw and could just become
22 loose, some of those stones could become loose due
23 to freeze/thaw action, that's one possibility.
24 Another force that could be applied to that stone is
25 from the bottom rail of the guard assembly. The

1 bottom rail of the guard assembly is comprised of
2 wood and in some places the guard assembly is
3 sitting so close and actually in contact with what
4 amounts to be the back of the mortar joint for the
5 nosing stone, that if and when that wood expands and
6 contracts due to wetting and drying cycles, it can
7 exert force onto that nosing stone and cause it to
8 de-bond from its substrate. Another possible force
9 that could be applied to that stone to cause it to
10 de-bond is that the wood materials that are directly
11 underneath the outboard edge of the balcony slab, in
12 places where destructive testing was performed, they
13 were damp. The increase in moisture content of
14 those wooden materials can expand the wood and exert
15 force on the back of that nosing stone and cause it
16 to dislodge. Another possibility is that the
17 waterproofing membrane itself is terminated right
18 behind the nosing stone and the buildup of water
19 and -- can create in cold situations, possibly ice,
20 behind that as a result of there being a waterproof
21 membrane layer that terminates there could exert
22 force on the back of that stone. Those are several
23 reasons or possible forces that could be applied to
24 that stone to cause it to become dislodged, but I've
25 not determined what exactly caused it to become

1 dislodged.

2 Q. Two further reasons that that mortar would crack or
3 gap or shrink there would be that the mortar was
4 improperly mixed; is that a possible reason why the
5 mortar has failed and cracked?

6 A. That's a possibility, yes.

7 Q. Is another possibility that the mortar was
8 improperly installed, too thick, too thin, not
9 enough in those areas?

10 A. Yes, those are all things that ought to be
11 considered.

12 Q. Would any of those items that we just went through
13 be immediately obvious at the time of construction
14 to anyone that was inspecting that installation?

15 A. In the case of your mortar mixing example there are
16 instances where the mortar could be of such a low
17 quality that it would be observable at the time of
18 installation.

19 Q. Do you have any evidence to support that the mortar
20 was so poorly mixed that it was observable at the
21 time it was installed?

22 A. I do not.

23 Q. What about any other ones, would they be immediately
24 observable at the time that the mortar was installed
25 or the stone was installed?

1 A. I believe the other examples I gave would take time.

2 You wouldn't be able to see those right away.

3 Q. Do you have any opinion as to the overall quality of
4 the stone installation done by Clear View at the
5 project?

6 A. I have not made an assessment of any and all areas
7 that Clear View may have installed stone, but I have
8 surveyed areas where it's apparent to me that, by
9 the documents I have available, that they did
10 perform work that in the areas where I've observed
11 the stonework looks normal. I wouldn't say that
12 it's the best work I've ever seen and it's certainly
13 not the worst. It looks like a normal type of
14 installation of cultured stone veneer to me.

15 Q. My photographs may be numbered differently than
16 yours, but mine is Wilkie 479. Would you look at
17 that photograph, please?

18 A. Okay. (Witness complies).

19 Q. And I'll try to read the same thing.

20 BY MS. NICHOLS:

21 You're reading a Bates number, aren't you?

22 BY MR. IMHOFF:

23 Wilkie ---

24 BY MS. NICHOLS:

25 Do you have a Bates number?

1 A. That's my opinion, yes.

2 Q. And in that situation where the general contractor
3 has pulled the permit for the project, hired all the
4 subs, the general contractor has the ultimate
5 responsibility for the project; correct?

6 A. That's my opinion.

7 Q. Within that framework would the general contractor
8 have ultimate responsibility for the selection of
9 materials?

10 A. No, because the selection of materials would be
11 guided in part by the contents of the plan.

12 Q. Right.

13 A. So if the plans call out enough detail about what
14 materials it takes to build that project the general
15 contractor would at least need to follow that. If
16 they deviate from that then that's another area
17 where they're on their own.

18 Q. Right. Would the general contractor under that
19 framework have ultimate responsibility for
20 coordinating the work of the subcontractors?

21 BY MR. IMHOFF:

22 Object to form.

23 WITNESS ANSWERS:

24 A. I think that the general contractor who hires
25 subcontractors is responsible for coordinating their

1 work.

2 Q. I don't think I have any other questions for you. I
3 appreciate it.

4 EXAMINATION BY MR. ORR:

5 Q. Mr. Wilkie, my name is Larry Orr. I represent
6 Miller/Player & Associates in this case. I
7 understand you are not going to offer any opinions
8 on the standard of care of an architect or deviation
9 from the standard of care on the part of the
10 architect in this case?

11 A. That's correct.

12 Q. Thank you, sir. That's all I have.

13 EXAMINATION BY MR. GRAYSON SMITH (via telephone):

14 Q. This is Grayson Smith with Hutch N Son. Just
15 briefly -- can y'all hear me okay?

16 BY MR. IMHOFF:

17 Yes.

18 EXAMINATION RESUMED BY MR. SMITH:

19 Q. Is there a requirement that the stone must not
20 extend below grade?

21 BY MS. NICHOLS:

22 Did you hear that?

23 BY THE WITNESS:

24 I did hear the question.

25 WITNESS ANSWERS:

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., et al

☐ Plaintiff

v.

Imk Development Co., LLC, et al

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

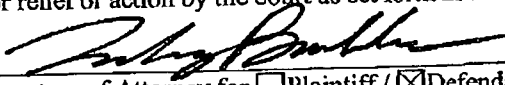
2009-CP-37-0652

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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

SECTION I: Hearing Information	
Nature of Motion: Motion for Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes	
Estimated Time Needed: 15 min Court Reporter Needed: ☒ YES / ☒ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant	August 24, 2012 Date submitted
SECTION III: Motion Fee	
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

**DEFENDANTS CLEAR VIEW
CONSTRUCTION LLC AND MICHAEL
FRANZ'S MOTION FOR SUMMARY
JUDGMENT AS TO THE CROSS-
CLAIMS OF MARICK HOME
BUILDERS, LLC AND RICK THOENNES**

August 24, 2012

By:



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Attorneys for Defendant Clear View Construction,
LLC and Michael Franz.

CERTIFICATE OF SERVICE

I hereby certify that I have this date, electronically mailed a true and correct copy of Clear View Construction, LLC and Michael Franz's Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Tick Thoennes to the following counsel of record:

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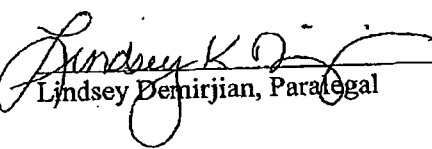
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This 24th day of August, 2012
Spartanburg, SC

By:


Lindsey Demirjian, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

**DEFENDANTS CLEAR VIEW
CONSTRUCTION LLC AND MICHAEL
FRANZ'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
AS TO THE CROSS-CLAIMS OF
MARICK HOME BUILDERS, LLC AND
RICK THOENNES**

AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,)
 MARTIN HERNANDEZ-AVILES, FRANCISCO)
 VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-)
 RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
 CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
 SOUTHERN BASEMENTS, INC., MJG)
 CONSTRUCTION AND HOMEBUILDERS, INC.)
 D/B/A MJG CONSTRUCTION, KMAC, INC.,)
 D/B/A KMAC NORTH CAROLINA, EUFACIO)
 GARCIA, EVERADO JARMAMILLO, GARCIA)
 PARRA INSULATION, INC., J&J CONSTRUCTION,)
 JOSE NINO, JOSE MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT MORALES)
 D/B/A MORALES MASONRY, MILLER/PLAYER &)
 ASSOCIATES,)
 Defendants,)

Defendants Clear View Construction, LLC ("Clear View") and Michael Franz (collectively "CVC Defendants") submit the following brief in support of their motion for summary judgment, in part or in total; as to the cross-claims of Defendants Marick Home Builders, LLC ("Marick") and Rick Thoennes (collectively "Marick Defendants"). Regardless of the manner in which Marick Defendants' cross-claims against CVC Defendants are styled, they are claims for indemnity. There is no genuine issue as to any material fact with respect to Marick Defendants' cross-claims against CVC Defendants, and CVC Defendants are entitled to summary judgment.

RELEVANT BACKGROUND FACTS

A. Stoneledge Background

The present action concerns the Stoneledge at Lake Keowee townhome community located on Lake Keowee in Oconee County, South Carolina ("Stoneledge"). Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Phase I of Stoneledge consists of townhomes numbered 1 through 37 and was constructed by general contractor

defendant Bostic Brothers Construction. Phase II of Stoneledge consists of units numbered 41-43 and 55-94 and was constructed by general contractor defendant Marick, which is the subject of this motion.

B. CVC Defendants Background

Clear View was a limited liability company dissolved on March 10, 2009, as recorded in the South Carolina Secretary of State's Business Filings database. Michael Franz was a member of Clear View prior to dissolution and termination. Clear View provided services related to the stonework for certain townhomes located in Phase II of Stoneledge. (See CVC Defendants Answer to Medallion Cross-Claims ¶ 105.) Clear View performed no work on the construction of Phase I of Stoneledge. (See Marick's Responses to CVC Defendants' Requests for Admission) (Attached hereto as Exhibit 1.) Clear View acted as a stone mason subcontractor for Marick on the project during the general time period of July 2006 through August 2007, as evidenced by the copies of Clear View Invoices. (Invoices from Marick's Project File are attached hereto as Exhibit 2.) No evidence has been produced to date that Michael Franz performed any stone installation at Stoneledge, either in his individual capacity or in furtherance of Clear View's services on the project.

C. Plaintiffs' Claims Against CVC Defendants and Marick Defendants

Plaintiffs are the Stoneledge at Lake Keowee Owners' Association, Inc., ("Stoneledge HOA") and individual owners of townhomes located at Stoneledge. (See Plaintiffs' Third Am. Compl. ¶ 1-3.) Plaintiffs originally brought suit on May 29, 2009, and through subsequent amendments have added alleged developers, design professionals, contractors, and subcontractors and other entities that played a part in the development and construction of Stoneledge, including Marick Defendants and CVC Defendants, the parties to the present motion

before the Court. (*See Id* at ¶ 18-19, 25-26.) Plaintiffs allege that the townhomes at Stoneledge have construction and design defects leading to water intrusion which has damaged and deteriorated the building components of the units (*See* Plaintiffs' Third Am. Compl ¶ 62.)

UNDISPUTED MATERIAL FACTS

D. Marick Defendants' Cross-Claims against CVC Defendants

Marick Defendants assert claims for styled equitable indemnity, breach of contract, negligence, and breach of warranty against CVC Defendants. (*See* Marick Defendants' Answer to the Third Amended Complaint ¶¶ 134-174.) Despite the individual styling of these four defenses as separate cross-claims, the only damages Marick Defendants seek arise from their involvement in this litigation. (*See* Marick Defendants' Answer to the Third Amended Complaint ¶¶ 158, 162, 169-170, and 174.)

E. Marick Defendants' Fault

Marick Defendants engaged professional engineer Randy Still to assess construction issues at Stoneledge. In his capacity as Marick's retained expert, Still admitted that Marick, as the general contractor, bears the overall responsibility for the construction of Stoneledge.¹ (*See* R. Still Dep. pp. 87:3-7.) (Pertinent pages of R. Still's depositions are attached hereto as Exhibit 3.) Still further admitted that in least in some areas of construction, as the general contractor on the project, Marick violated the applicable building code. (*See* R. Still Dep. pp. 89:4-11.) Moreover Rick Thoennes, Marick's corporate designee, testified that Marick was the permit holder for Phase II of Stoneledge, and therefore is the party responsible for compliance with the building code. (*See* R. Thoennes Dep. pp. 81:2-4.) (Pertinent pages of R. Thoennes' deposition are attached hereto as Exhibit 4.)

CVC Defendants' retained professional engineer J. Drew Wilkie also testified to the general contractor's overall responsibility for the project and for coordinating the work of subcontractors. (*See* D. Wilkie Dep. pp. 205:2-206:1.) (Pertinent pages of D. Wilkie's deposition are attached hereto as Exhibit 6.)

Lastly, the nature of alleged construction defects in this matter show that Marick cannot be without fault given the general contractor's duty to coordinate the work of subcontractors and ensure at least to the extent construction defects are visible or obvious during construction that they are repaired. There are allegations of missing flashing, weep screeds, and visible framing underlying veneer material that a general contractor would be responsible for remedying or at least bringing to the attention of the appropriate subcontractor.

STANDARD OF REVIEW

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. In deciding a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party; however, a court "cannot ignore facts unfavorable to that party and [it] must determine whether a ruling for the party opposing the motion would be reasonable under the facts of the case." *Bloom v. Ravoria*, 399 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by "pointing out to the court that there is an absence of evidence to support the nonmoving party's case." *Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

A party opposing a Motion for Summary Judgment "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing there is a genuine issue for trial." Rule 56(e), SCRCF. "The purpose of summary judgment is to expedite the resolution of cases that do not require a fact finder." *Shirley's Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 5 (Ct. App. 2010).

LEGAL ANALYSIS AND ARGUMENT

I. THE CROSS CLAIMS ASSERTED BY MARICK DEFENDANTS ARE ALL CLAIMS FOR INDEMNITY

The Court should not regard Marick Defendants' cross-claims against CVC Defendants for breach of contract, breach of warranty, and negligence as separate claims, but as claims for equitable indemnity. All of Marick Defendants' cross-claims are claims equitable indemnity because of potential damages claims, regardless of how they are styled. "Indemnity is that form of compensation in which a first party [CVC Defendants] is liable to pay a second party [Marick Defendants] for a loss or damage the second party [Marick] incurs to a third party [Plaintiffs]." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)).

Although Marick Defendants have styled their cross-claims as four separate causes of action, it is the allegations and remedies sought that determines the character of the action. See *State v. Yelsen Land Co.*, 257 S.C. 401, 403 (1972). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." *Winn v. Grantham*, 263 S.C. 368, 372, 210 S.E.2d 602, 604 (quoting *210 Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919)). As

noted above, Marick Defendants' cross-claims claim damages stemming directly from the potential damages they could face if found liable for Plaintiffs' allegations against them. This is the precise nature of a claim for indemnification, thus all of Marick Defendants' cross-claims are for equitable indemnity.

II. CVC DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON MARICK DEFENDANTS CROSS-CLAIMS FOR EQUITABLE INDEMNITY

A. Marick is Not Without Fault

CVC Defendants are entitled to summary judgment on Marick Defendants' equitable indemnity claims because Marick cannot be adjudged without fault. The most important element of an equitable indemnity action is that the party seeking indemnification must be without fault. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992); *Stuck v. Pioneer Loggins Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Marick was the general contractor and permit holder for Phase II construction at Stoneledge. The party pulling a permit is ultimately responsible for compliance with the building code. Marick's own expert Randy Still confirmed both that in some areas of construction Marick violated the building code and that Marick has responsibility for construction of the project. Because Marick was the permit holder for Phase II construction, it violated the building code, and is ultimately responsible for construction, it cannot be adjudged without fault, and thus its claims for equitable indemnity must fail.

B. No Special Relationship

The lack of special relationship acts as a further bar to Rick Thoennes' claim against both Clear View and Michael Franz. Likewise, there is no special relationship to support Marick's claim against Michael Franz. "Equitable indemnity is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (internal citations omitted). For there to be an equitable indemnification between two parties, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." See *Id* at 390, 237.

There has been no evidence produced that Michael Franz performed any stonework or other construction related activities at Stoneledge, therefore there is no subcontractor relationship or otherwise with Marick or Rick Thoennes. Likewise Clear View did not act as a subcontractor for Rick Thoennes, but for Marick. Clear View's subcontractor relationship with Marick is the only relationship between the parties to this motion that can sustain a claim of equitable indemnity, and Marick's claim fails because Marick cannot be adjudged to be without fault.

III. POTENTIAL CLAIMS BY MARICK DEFENDANTS FOR CONTRACTUAL INDEMNITY

Although not plead, should Marick argue that it is entitled to contractual indemnity from CVC Defendants, this claim must also fail. Clear View's subcontractor agreement with Marick is not specific and does not reference Stoneledge. The subcontractor agreement also postdates all work performed by Clear View at Stoneledge.

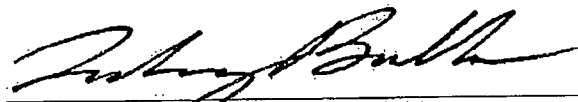
CVC Defendants also specifically adopt the arguments of defendants Carl Catoe Construction, Inc., and Builders FirstSource Southeast Group, LLC in regard to potential claims for contractual indemnity.

CONCLUSION

Based on the foregoing undisputed facts, legal authority and arguments, CVC Defendants respectfully request that this Court grant their motion for summary judgment.

August 31, 2012

By:



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EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.-

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

DEFENDANT MARICK HOME
BUILDERS, LLC'S RESPONSES TO
DEFENDANTS CLEAR VIEW
CONSTRUCTION LLC AND MICHAEL
FRANZ'S REQUESTS FOR ADMISSION

AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,)
 MARTIN HERNANDEZ-AVILES, FRANCISCO)
 VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-)
 RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
 CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
 SOUTHERN BASEMENTS, INC., MJG)
 CONSTRUCTION AND HOMEBUILDERS, INC.)
 D/B/A MJG CONSTRUCTION, KMAC, INC.,)
 D/B/A KMAC NORTH CAROLINA, EUFACIO)
 GARCIA, EVERADO JARMAMILLO, GARCIA)
 PARRA INSULATION, INC., J&J CONSTRUCTION,)
 JOSE NINO, JOSE MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT MORALES)
 D/B/A MORALES MASONRY, MILLER/PLAYER &)
 ASSOCIATES,)

Defendants,

COMES NOW the Defendant Marick Home Builders, LLC, by and through its undersigned counsel, who responds to the Defendants Clear View Construction, LLC and Michael Franz's First Requests to Admit to Defendant Marick Home Builders, LLC (hereinafter "Marick") as follows:

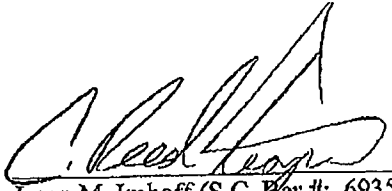
REQUESTS FOR ADMISSION

1. Admit that Clear View Defendants performed no construction related services on any townhome during Phase I of the Stoneledge at Lake Keowee project.

RESPONSE: Upon information and belief, it is admitted that Clear View Defendants did not perform construction related services during original construction for Marick on phase I at the Stoneledge at Lake Keowee project. However, Marick can neither admit nor deny whether Clear View Defendants performed repair work on phase I or original construction at phase I for entities other than Marick.

2. If you deny this request to admit, identify the factual basis for your denial and any documents, witnesses, or statements supporting your denial.

RESPONSE: N/A.



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rteague@wardfirm.com

June 28, 2012
Spartanburg, South Carolina

EXHIBIT 2

INVOICE

Vendor: Clearview
Address: _____
Phone(s): _____
Federal ID## SSN: _____

INVOICE#:

Billing Information

Subdivision: Stoneledge	Name: Marick Home Builders
Lot:	Address: 501 Brixton Circle
Name: Bldg 20	Simpsonville, SC 29681
	Phone: 864.232.5555
	Fax: 864.232.5504

[illegible]

Previously paid:	\$ 26,600
Payment requested today:	\$ 13,300
Total of today & previous:	\$ 39,900
Balance remaining	\$ 0

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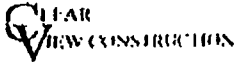
8/15/2008

Marick 010662

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08-27-2006 06:38

PAGE1



121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

INVOICE STONE WORK SERVICES

INVOICE #101
DATE: AUG 21, 2006
FOR: STONELEDGE AT KEOWEE BUILDING # 20

(DRAW #2)

Draw	DESCRIPTION	PAY	AMOUNT
12	INSTALL STONE ON EXTERIOR OF BUILDING	\$4.75 SQFT * 8400sqft	\$39,900.00
	PAID -- DRAW # 1		\$13,300.00
	Requested amount to be drawn every 2 weeks broken into 3 equal payments or six weeks to complete, per rick and mikes agreement.		\$13,300.00
	Balance Due		\$13,300.00
	DRAW # 2	TOTAL	\$13,300.00

Make all checks payable to Clear-View Construction

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Thank you for your business!

SENT

8-21-06

APPROVED

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DUE - 10/10/06

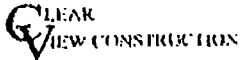
Marick 010663

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10-16-2006 04:16

PH622



121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135

TO:
Marick Home Builders
501 Brickton Circle
Simpsonville, SC 29601
(864) 232-5555

INVOICE STONE WORK SERVICES

INVOICE # 100
DATE: OCT 16, 2006
FOR: STONELEDGE AT KEOWEE BUILDING #23

(DRAW#1)

Draw	DESCRIPTION	PAY	AMOUNT
#1	INSTALL STONE ON EXTERIOR OF BUILDING	\$4.75 SQFT * 1372 sqft =	\$6517.00
	Requested amount to be drawn every 2 weeks broken into 3 equal payments or six weeks to complete, per Rick and Mike's agreement.		\$6517.00
	Balance Due AFTER FINAL MEASUREMENT STEPS, GARAGE ECT.		
TOTAL			\$6517.00

Make all checks payable to Clear-View Construction

Thank you for your business!

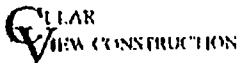
1- STONE Labor
2- Stoneledge units 92
93
94
due - 10/27/06

Marick 010852

000548

11-27-2006 06:15

PAGE 1



**121 Clearview Drive
Greer, SC 29615
Phone (864) 920-4135**

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

INVOICE
STONE WORK SERVICES

INVOICE #200
DATE: NOV 15, 2006
FOR: STONELEDGE AT KEOWEE BUILDING #18,19,20
FINAL SQ FT ADJUSTMENTS AFTER NATHAN MEASURED

[illegible]

Make all checks payable to Clear-View Construction

PROVED

Thank you for your business!

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Marick 011895

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PHASE 2

RECEIVED
JAN 24 2007

INVOICE
STONE WORK SERVICES

INVOICE #105
DATE: JAN 24, 2007

(DRAW #5)

Draw	DESCRIPTION	PAY	AMOUNT
	FRAMING /FOOTERS/STEPS/BEAMS/ETC...		\$2680.00
	C/L V B N O 226		
	FRAME		
		TOTAL	\$2680.00

Make all checks payable to Clear-View Construction

Year-View Construction

Thank you for your business!

APPROVED

000551

PAGE 2

INVOICE #106
DATE: FEB17, 2007

(DRAW #6)

Make all checks payable to Clear-View Construction

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INVOICE
STONE WORK SERVICES

INVOICE #107
DATE: FEB19, 2007

FOR: STONELEDGE

(DRAW #7)

DRAW	DESCRIPTION	PAY	AMOUNT
	ROCKWORK	1,491 SQ FT @ \$4.50/SQ FT	\$6,709.50
TOTAL			\$6,709.50

Make all checks payable to Clear-View Construction

Thank you for your business!

43 unit

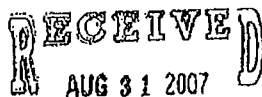
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Marick 013318

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**121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135**

INVOICE #112
DATE: AUG 30, 2007

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

FOR: STONEEDGE

(DRAW #12)

DRAW	DESCRIPTION	PAY	AMOUNT
12	Finish screened porch , punch ,plumbing and screened doors		\$1635.00
		TOTAL	\$1635.00

Make all checks payable to Clear-View Construction

APPROVED

Thank you for your business!

CLARK HOUZEL
FRANK

Insurance. GLC. 670. 981

FRANKER

Marick 015015

000557

TO:
Marick Home Builders
501 Briston Circle
Simpsonville, SC 29601
(864) 232-5555

INVOICE
STONE WORK SERVICES

INVOICE #1
DATE: NOV 1, 2006
FOR: STONELEDGE AT KEOWEE UPPER PORCH REPAIR BLD
10

Wm 15-80

DRAW	DESCRIPTION	PAY	AMOUNT
	TEAR OUT AND CLEAN UP UPPER PORCH	\$1.75 SQFT * 232 SQFT	\$1102.00
	REPAIR ROCK ON UPPER PORCH	\$1.75 SQFT * 232 SQFT	\$1102.00
	Balance Due AFTER FINAL MEASUREMENT STEPS,GARAGE ECT.	TOTAL	\$2204.00

Make all checks payable to Clear-View Construction

SENT

NATHAN
Thank y

Thank you for your business!

RECEIVED
MAR 22 2007

Southern Concrete -
Refund of credit previously
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EXHIBIT 3

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.
Defendants.

Deposition of RANDY STILL

Pursuant to notice, a deposition was taken in the
above case on the August 15, 2012 commencing at
approximately 10:20 a.m. attended by counsel as follows:

DEPOSITIONS AND INC.
(864) 585-0642

000560

1 A. I think it would be advisable for him to do that,
2 yes.

3 Q. Would you agree with me that the general
4 contractor's role on a construction project like
5 Stoneledge is the overall responsibility for the
6 construction of the entire project?

7 A. Yes.

8 Q. Since your last deposition have you reviewed or have
9 you developed any opinions about sufficiency of the
10 plans and specifications that were provided to
11 Marick Home Builders by Miller/Player?

12 A. I have looked at the plans. I haven't spent a lot
13 of time looking at them. They don't have an
14 enormous amount of detail to them.

15 Q. But do you have an opinion as to whether or not the
16 plans as provided by Miller/Player were sufficient?

17 BY MR. ORR:

18 Object to the form.

19 WITNESS ANSWERS:

20 A. I hesitate on that because you're asking me to opine
21 on the duty of an architect to prepare plans. As an
22 engineer I'm not sure I can do that. I can tell you
23 that there are details that I would've liked to have
24 seen in those plans that would've clarified areas.

25 Q. But you don't have any opinions about whether or not

1 conditions that you observed in Phase II among the
2 Marick Home Builders' subcontractors?

3 A. No.

4 Q. Do you acknowledge that at least in some respects
5 that we have discussed today as the general
6 contractor on the project, Marick Home Builders
7 violated the applicable building code?

8 A. I would agree with you that there are components
9 that have sustained damage at those isolated areas
10 we've talked about that now appear to be a code
11 violation because of failure.

12 Q. In other words, the fact that damage has occurred
13 indicates that the code has been violated?

14 A. At least in part. Some of it may be -- like we
15 talked about that stone that rolled out. You can't
16 isolate on the edge of the deck between the lack of
17 sealing that joint or maintaining that joint to the
18 contribution of what that would cause versus what
19 would come across the membrane, for example. We
20 haven't talked about those type issues. You can't
21 segregate that.

22 Q. What type issues haven't we talked about?

23 A. Maintenance. I mean, if the homeowner -- there is
24 some maintenance that's required and I have not
25 tried to go into that, but the issue we just talked

1 construction, the contractor and subcontractors to,
2 in broad scope do their job. But one of the
3 problems is nobody can certify that.

4 Q. Absent a ---

5 A. Tear it down and start over.

6 Q. Do you know of any reason why the owners of these
7 Stoneledge units should assume risk of code
8 non-compliance in their property?

9 A. I think they did the day they bought it. I think
10 you do in everything you do.

11 Q. So the risk was the assumption of that the -- as you
12 say the code officials, the design professionals,
13 the contractors and subcontractors, were going to in
14 broad strokes do what they were supposed to do?

15 A. Absolutely.

16 Q. And we know that not to be the case?

17 BY MS. LANG:

18 Object to the form.

19 BY MR. IMHOFF:

20 Object to form.

21 BY MR. ROOT:

22 Object to form.

23 WITNESS ANSWERS:

24 A. At least in isolated areas that's true.

25 Q. And the areas that we don't know about are areas

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrays
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19

20 Certificate

21 This is to certify that the foregoing deposition of
22 RANDY STILL was taken by the within court reporter, a
23 notary public for the state of South Carolina, duly
24 commissioned and qualified as such, on August 15, 2012
25 at Womble, Carlyle, Sandridge & Rice, 550 South Main

1 Street, Suite 400, Greenville, South Carolina.

2 That the deponent was duly placed under oath and
3 admonished to speak the whole truth; that the oral
4 deposition was duly taken and transcribed as to the
5 questions propounded and the answers given; that the
6 foregoing 190 pages is a true, accurate, and correct
7 record of the testimony given by the deponent; together
8 with such changes as said deponent may have made, if
9 any, during the reading over and signing procedure.

10 That the court reporter has retained the original
11 deposition in its possession for the purpose of sealing
12 and filing same with the proper official.

13 That all offered exhibits, stipulations and
14 objections, if any, involved in this cause are duly
15 attached or included herein.

16 In witness whereof, I have set my hand and official
17 seal.

18

19 Date: 8-18-12

20

21 _____
Joanne S. Quebe, Court Reporter
22 Notary Public for South Carolina
23 My Commission Expires 12-7-21
24
25

EXHIBIT 4

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

SDI Funding, LLC, Ludwig
Corporation, LLC, et.al.,
_____ Defendants, _____

Marick Home Builders, LLC,
Third-Party Plaintiff,

vs.

Michael Franz, Clearview
Construction, et. al.

_____ Third-Party Defendants,
Builders FirstSource-SE Group,
Fourth-Party Plaintiff,

vs.

Carl Catoe Construction, Inc.,
Fourth-Party Defendant. _____

DEPOSITION of FREDERICK (RICK) R. THOENNES

Pursuant to notice, a deposition was taken in the
above case on the November 21, 2011, commencing at
approximately 10:10 a.m. attended by counsel as follows:

1 A. The one-year warranty.

2 Q. Did Marick pull the building permits for all of the
3 Phase II units?

4 A. Yes.

5 Q. And did Marick complete the construction of all of
6 the Phase II units?

7 A. No.

8 Q. What units did Marick not complete?

9 A. I couldn't tell you the specific units.

10 Q. Do you know how many of the Phase II units?

11 A. I don't. I would -- no, I don't.

12 Q. Did Marick apply the siding and stone to all of the
13 Phase II units?

14 A. Yes. Well, our subcontractors did.

15 Q. Subcontractors did. And set the windows and doors
16 for the Phase II units?

17 A. Correct.

18 Q. And put the roof on and the shingles in Phase II
19 units?

20 A. We did all of the construction on Phase II up until
21 the time we sold them to SDI.

22 Q. But the exterior of the units, the building
23 envelopes were completed by Marick or its
24 subcontractors, or were there units that SDI had to
25 complete?

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3 Stoneledge at Lake Keowee
4 Owners' Association, et.al.,

5 Plaintiffs,

6 vs.

7 SDI Funding, LLC, Ludwig
8 Corporation, LLC, et.al.,

9 Defendants,

10 Marick Home Builders, LLC,
11 Third-Party Plaintiff,

12 vs.

13 Michael Franz, Clearview
14 Construction, et. al.

15 Third-Party Defendants,
16 Builders FirstSource-SE Group,
17 Fourth-Party Plaintiff,

18 vs.

19 Carl Catoe Construction, Inc.,
20 Fourth-Party Defendant.

21

22 Certificate

23 This is to certify that the foregoing deposition of
24 FREDERICK (RICK) THOENNES was taken by the within court
25 reporter, a notary public for the state of South

1 Carolina, duly commissioned and qualified as such, on
2 November 21, 2011 at Womble, Carlyle, Standbridge &
3 Rice, 550 South Main Street, Suite 400, Greenville,
4 South Carolina.

5 That the deponent was duly placed under oath and
6 admonished to speak the whole truth; that the oral
7 deposition was duly taken and transcribed as to the
8 questions propounded and the answers given; that the
9 foregoing 245 pages is a true, accurate, and correct
10 record of the testimony given by the deponent; together
11 with such changes as said deponent may have made, if
12 any, during the reading over and signing procedure.

13 That the court reporter has retained the original
14 deposition in its possession for the purpose of sealing
15 and filing same with the proper official.

16 That all offered exhibits, stipulations and
17 objections, if any, involved in this cause are duly
18 attached or included herein.

19 In witness whereof, I have set my hand and official
20 seal.

21
22 Date: 11-30-11

23
24 _____
25 Joanne S. Quebe, Court Reporter
Notary Public for South Carolina

EXHIBIT 5

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.
Defendants.

Deposition of J. DREW WILKIE

Pursuant to notice, a deposition was taken in the
above case on the August 16, 2012 commencing at
approximately 10:12 a.m. attended by counsel as follows:

DEPOSITIONS AND _____, INC.
(864) 585-0642

000572

1 A. That's my opinion, yes.

2 Q. And in that situation where the general contractor
3 has pulled the permit for the project, hired all the
4 subs, the general contractor has the ultimate
5 responsibility for the project; correct?

6 A. That's my opinion.

7 Q. Within that framework would the general contractor
8 have ultimate responsibility for the selection of
9 materials?

10 A. No, because the selection of materials would be
11 guided in part by the contents of the plan.

12 Q. Right.

13 A. So if the plans call out enough detail about what
14 materials it takes to build that project the general
15 contractor would at least need to follow that. If
16 they deviate from that then that's another area
17 where they're on their own.

18 Q. Right. Would the general contractor under that
19 framework have ultimate responsibility for
20 coordinating the work of the subcontractors?

21 BY MR. IMHOFF:

22 Object to form.

23 WITNESS ANSWERS:

24 A. I think that the general contractor who hires
25 subcontractors is responsible for coordinating their

1 work.

2 Q. I don't think I have any other questions for you. I
3 appreciate it.

4 EXAMINATION BY MR. ORR:

5 Q. Mr. Wilkie, my name is Larry Orr. I represent
6 Miller/Player & Associates in this case. I
7 understand you are not going to offer any opinions
8 on the standard of care of an architect or deviation
9 from the standard of care on the part of the
10 architect in this case?

11 A. That's correct.

12 Q. Thank you, sir. That's all I have.

13 EXAMINATION BY MR. GRAYSON SMITH (via telephone):

14 Q. This is Grayson Smith with Hutch N Son. Just
15 briefly -- can y'all hear me okay?

16 BY MR. IMHOFF:

17 Yes.

18 EXAMINATION RESUMED BY MR. SMITH:

19 Q. Is there a requirement that the stone must not
20 extend below grade?

21 BY MS. NICHOLS:

22 Did you hear that?

23 BY THE WITNESS:

24 I did hear the question.

25 WITNESS ANSWERS:

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrays
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.

18 Defendants.

19

20 Certificate

21 This is to certify that the foregoing deposition of
22 J. DREW WILKIE was taken by the within court reporter, a
23 notary public for the state of South Carolina, duly
24 commissioned and qualified as such, on August 16, 2012
25 at Womble, Carlyle, Sandridge & Rice, 550 South Main

1 Street, Suite 400, Greenville, South Carolina.

2 That the deponent was duly placed under oath and
3 admonished to speak the whole truth; that the oral
4 deposition was duly taken and transcribed as to the
5 questions propounded and the answers given; that the
6 foregoing 213 pages is a true, accurate, and correct
7 record of the testimony given by the deponent; together
8 with such changes as said deponent may have made, if
9 any, during the reading over and signing procedure.

10 That the court reporter has retained the original
11 deposition in its possession for the purpose of sealing
12 and filing same with the proper official.

13 That all offered exhibits, stipulations and
14 objections, if any, involved in this cause are duly
15 attached or included herein.

16 In witness whereof, I have set my hand and official
17 seal.

18

19 Date: 8-19-12

20

21

Joanne S. Quebe, Court Reporter
Notary Public for South Carolina
My Commission Expires 12-7-21

22

23

24

25

CERTIFICATE OF SERVICE

I hereby certify that I have this date, electronically mailed a true and correct copy of *Clear View Construction, LLC and Michael Franz's Brief in Support of Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes* to the following counsel of record:

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This 31 day of August, 2012
Spartanburg, SC

By:

A handwritten signature in cursive script, appearing to read "Lindsay Builder", written over a horizontal line.

Lindsay Builder, Esq.

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

CASE NO. 09-CP-37-652

Stoneledge at Lake Keowee Owners' Association,)
Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W.)
Davenport, Michael Furnari, Donna Furnari, Jessy)
B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy)
H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund,)
III, Ruth E. Isaac, Michael D. Plourde, Mary Lou)
Plourde, Carol C. Pope, Steven B. Taylor, Bette J.)
Taylor, and Robert White, individually, and on)
behalf of all other similarly situated,)

Plaintiffs,

v.

IMK Development Co., LLC, Keowee Townhouses,)
LLC, Ludwig Corporation, LLC, SDI Funding,)
LLC, Medallion at Keowee, LLC, Integrys Keowee)
Development, LLC, Marick Home Builders, LLC,)
Bostic Brothers Construction, Inc., Miller/Player &)
Associates, John Ludwig, William Cox, Larry D.)
Lollis, Rick Thoennes, M Group Construction and)
Development, LLC, Mel Morris, Joe Bostic, Jeff)
Bostic, Clear View Construction, LLC, Michael)
Franz, MHC Contractors, Miguel Porras Choncoas,)
Builders FirstSource Southeast Group, Mike Green,)
Southern Concrete Specialities, Carl Compton d/b/a)
Compton Enterprize a/k/a Compton Enterprises,)
Gunter Heating & Air, All Pro Heating, A/C &)
Refrigeration, LLC, Coleman Waterproofing,)
Heyward Electrical Services, Inc., Tinsley)
Electrical, LLC, Hutch N Son Construction, Inc.,)
Upstate Utilities, Inc., Southern Basements, Inc.,)
Carl Catoe Construction, Inc., T.G. Construction,)
LLC, Delfino Construction, Francisco Javier Zarate)
d/b/a Zarate Construction, Alejandro Avalos Cruz,)
Herberto Acros Hernandez, Martin Hernandez-)
Aviles, Francisco Villalobos Lopez, Ambrosio)
Martinez-Ramirez, Ester Moran Mentado, Socorro)
Castillo Montel, MJG Construction and)
Homebuilders, Inc. d/b/a MJG Construction,)
KMAC of the Carolinas, Inc., Eufacio Garcia,)
Everado Jaramillo, Garcia Parra Insulation, Inc.,)

**Defendant Builders FirstSource –
Southeast Group, LLC's
Memorandum of Law in
Support of its Motion for
Judgment as a Matter of Law
as to the Cross-Claims of Marick
Home Builders, LLC and Rick
Thoennes**

J&J Construction, Jose Nino, Jose Manuel Garcia,)
Eason Construction, Inc., Vincent Morales)
Masonry, and Miller/Player & Associates,)
Defendants.)

Defendant Builders FirstSource – Southeast Group, LLC¹ ("BFS") submits this memorandum of law in support of its Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes (collectively referred to as "Marick").

Background

This case arises out of the construction of the Stoneledge at Lake Keowee townhouse complex, located in West Union, South Carolina (the "Project"). The Project includes 80 townhouse units. There are three (3) to seven (7) individual townhouse units per building. The Project was constructed in two phases. Phase 1 consists of thirty-seven townhouse units. Phase 2 consists of forty-three townhouse units.

The Complaint was originally filed by Paul W. Hund, III, M.D. as an owner of one of the townhouse units. The Stoneledge at Lake Keowee Owners' Association, Inc. (the "HOA") joined as a Plaintiff. The HOA was allegedly created pursuant to the South Carolina Horizontal Property Regime Act, and it is asserting claims related to its purported obligations to maintain, repair, and replace components of the townhouses. (Third Amended Complaint ¶ 2.) In addition to Dr. Hund, the other named individual owners are allegedly bringing this action individually and on behalf of a class of individuals pursuant to Rule 23, SCRCP.

¹ Defendant, Mike Greene, is only an employee of BFS and is not a proper party to this action. Nonetheless, to the extent it is necessary, this memorandum shall be deemed a memorandum for Mr. Greene, as well.

Plaintiffs have named BFS to the suit, alleging that BFS "provided materials and labor for the Project, included but not limited to, framing work." (Third Amended Complaint ¶¶ 29, 30.) Plaintiffs have alleged causes of action against BFS for Breach of Warranty and Negligence. (Third Amended Complaint ¶¶ 87 - 97.) BFS has denied all allegations of fault or liability as to it. In its Answer to Plaintiffs' Third Amended Complaint, Marick has asserted cross-claims against BFS for Equitable Indemnity, Breach of Contract, Negligence, and Breach of Warranties.

Marick served as general contractor for Phase 2 of the Project. Marick contracted with BFS to provide materials and labor for framing, siding and related construction components. BFS, in turn, contracted with Carl Catoe Construction, Inc. ("Catoe") to perform the labor associated with those tasks.

Argument

Marick's claims against BFS for breach of contract, negligence and breach of warranty should be dismissed because they are disguised indemnity claims. The equitable indemnity claim should be dismissed because Marick is not without fault. Further, to the extent Marick alleges any contractual indemnity claims against BFS, which it expressly does not, those should be dismissed because Marick had no contract with BFS that applied to this work and that carried any indemnification language, or that was otherwise enforceable.

1. As to Marick's disguised indemnity claims

Marick's breach of contract, breach of warranty, and negligence claims against BFS should be dismissed because these claims are merely disguised claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party [here allegedly BFS] is liable to pay a second party [here Marick] for a loss or damage the second

party incurs to a third party [Plaintiffs].” Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff’d*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005).

The character of an action is determined by the allegations contained in the complaint, specifically “the nature of the issues and the remedies which are sought.” State v. Yelsen Land Co., 257 S.C. 401, 403 (1972); Seebaldt v. First Fed. Sav. & Loan Ass’n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). “The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited.” Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 (“The character of an action is primarily determined by the allegations contained in the complaint.”).

Marick’s cross-claims in this case are all claims for indemnity. As clearly delineated in each of Marick’s cross-claims, Marick’s claimed damages are comprised of those sums it may have to pay Plaintiffs because of the allegations against it. (Marick’s Answer to the Third Amended Complaint ¶¶ 162, 170, and 174.) These cross-claims are thus clearly claims for indemnity. See Vermeer Carolina’s, Inc., 336 S.C. at 60, 518 S.E.2d at 305. Therefore, the Court can and should characterize the breach of contract, breach of warranty, and negligence claims as equitable indemnity claims.

As noted by South Carolina’s federal district court, “a rose by any other name is still a rose,” and legal claims, whether denominated as negligence or breach of warranty, which assert damages

arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

2. As to Marick's claims for equitable indemnity

Because Marick cannot be adjudged without fault, summary judgment on Marick's equitable indemnity claims is proper. Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Loggins Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Here, Marick's own expert admits that Marick is not without fault. Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." Still Dep. 87:3-7 (Aug. 15, 2012). Still further acknowledged that, in some instances, Marick violated the building code.^{1 2}

Because Marick is the permit holder for Stoneledge Phase 2, it cannot be adjudged without fault. The party pulling a permit is ultimately responsible for compliance with the building code. Marick, not BFS, was the entity that obtained the permits for construction of Phase 2 of the Project. Because Marick was the permit holder for Phase 2 and violated the building code according to its own expert, it cannot be adjudged without fault, and thus its claims for equitable indemnity fail.

¹
Q. Do you acknowledge that at least in some respects that we have discussed today as the general contractor on the project, Marick Home Builders violated the applicable building code?

A. I would agree with you that there are components we've talked about that now appear to be a code violation because of failure. Still 89:

²

Q. So you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?

A. At the time that we looked at it, yes. Still Dep. 92:25-93:5.

3. **As to any claims by Marick for contractual indemnity**

To the extent Marick argues that it is entitled to contractual indemnity (though it did not plead this) its claims fail, for it entered into no contract with BFS which applied to the Project and which carried indemnification language. Additionally, BFS is informed and believes that Marick had no contractor's license, and is thus prohibited from enforcing any contract as a matter of law. South Carolina Code § 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, it "may not bring an action either at law or in equity to enforce the provisions of a contract." South Carolina Code § 40-11-370(C). The same prohibition exists as to residential home builders. S.C. Code Ann. §40-59-30. The plainly worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

Conclusion

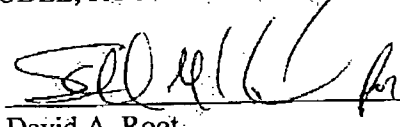
For the foregoing reasons, as well as any others as may be argued or presented at the hearing on the subject motion, BFS's Motion for Summary Judgment against Marick should be granted.

SIGNATURE ON FOLLOWING PAGE

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August 30, 2012

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The undersigned hereby certifies that on this date, the attached *Builders FirstSource - Southeast Group, LLC's Memorandum of Law in Support of its Motion for Judgment as a Matter of Law as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class, to:

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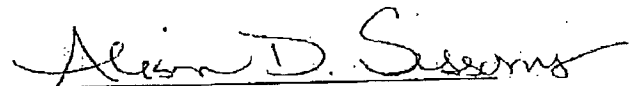
August 30, 2012

Attorney for Eason Construction, Inc.

**Attorney for Vincent Morales d/b/a
Morales Masonry**

**Attorney for Vincent Morales d/b/a
Morales Masonry**

**Attorney for Rick Thoennes, Rick
Thoennes, III and M Group
Construction and Development,
LLC**


Alison D. Sessoms

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT Co., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME BUILDERS,
LLC, BOSTIC BROTHERS CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES, JOHN
LUDWIG, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO
AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,
MARTIN HERNANDEZ-AVILES, FRANCISCO
VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-

MARICK HOME BUILDERS, LLC AND
RICK THOENNES' MEMORANDUM IN
OPPOSITION TO UPSTATE UTILITIES,
HUTCH N SON CONSTRUCTION,
MILLER/PLAYER & ASSOCIATES,
CLEARVIEW CONSTRUCTION,
BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, CARL CATOE CONSTRUCTION,
TG CONSTRUCTION, ALEJANDRO CRUZ,
HERBERTO ARCOS HERNANDEZ,
MARTIN HERNANDEZ-AVILES,
SOCORRO CASTILLO MONTEL, KMAC,
INC. JOSE NINO, AND VINCENT
MORALES D/B/A MORALES MASONRY'S
MOTION FOR SUMMARY JUDGMENT

Defendants, Marick Home Builders, LLC (hereinafter "Marick") and Rick Thoennes (hereinafter "Thoennes") (hereinafter both Defendants collectively referred to as "Defendants" "Marick") hereby submit this Memorandum in Opposition to Upstate Utilities, Hutch N Son Construction, Miller/Player & Associates, Clearview Construction, Builders FirstSource-Southeast Group, Carl Catoe Construction, T.G. Construction, Alejandro Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Socorro Castillo Montel, KMAC, Inc., Jose Nino, and Vincent Morales d/b/a Morales Masonry's Motions for Summary Judgment and/or Motions to Dismiss concerning Marick and Rick Thoennes Cross-claims (hereinafter collectively "subcontractors.")

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter "Hund"). (See Plaintiff's Complaint). Hund's complaint alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the project.

Upon information and belief, Stoneledge Owners Association (hereinafter "SOA") took the position that Dr. Hund's Complaint was improper as the SOA was responsible for the exterior of the units and it retained Jim Logan to review its options. In November of 2009, the owners voted to retain Mr. Lyles to represent the SOA and amend the lawsuit to include the SOA and both Phase I and Phase II of the project.

Dr. Hund amended the complaint to add the SOA and additional individual homeowners as Plaintiffs and included new allegations concerning Phase I of the project. Plaintiffs again alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, inadequate installation of building components, improper site work, and undisclosed latent defects.

Stoneledge at Lake Keowee (hereinafter "Stoneledge") is an 80 unit lakefront townhome development located in West Union, South Carolina along the shores of Lake Keowee. Stoneledge was constructed in two separate phases. The general contractor for phase I construction was Bostic Brothers Construction, Inc. (hereinafter "Bostic Brothers"). Following completion of the exterior of all phase I units and completion of a majority of the interiors of all phase I units, Bostic Brothers terminated construction at Stoneledge. A majority of the subcontractors and suppliers used by Bostic for phase I construction are different from the subcontractors and suppliers used during phase II construction.

After Bostic Brothers exit, the remaining unsold units and vacant land was purchased by IMK Development Co., LLC (hereinafter "IMK"). Once purchased, Marick Home Builders, LLC (hereinafter "Marick") was retained as the general contractor to construct phase II at Stoneledge. While preparing to begin phase II

construction, Marick also contracted to assist phase I homeowners with repairs and internal construction which was not performed by Bostic Brothers prior to Bostic Brothers departure from the development. Therefore, in reference to phase I, Marick made repairs to units sold by Bostic Brothers and completed some interior construction to phase I units.

Additionally, Marick was the general contractor in charge of phase II construction which began in January 2006. Upon information and belief, most of the subcontractors and suppliers that provided services and supplies to phase II construction were not involved with the construction of phase I.

Prior to completion of phase II, on or about June 13, 2008, Ludwig Corporation, LLC (hereinafter "Ludwig") purchased/acquired all unsold units from IMK Development and Integrys. At that point, Ludwig took over construction and finished phase II. Ludwig also acquired finished units located in phase I. Ludwig took over all general contracting roles previously performed by Marick. Further, after conducting an auction and selling some of the units acquired from IMK/Integrys, Ludwig sold/transferred the remaining unsold units to Medallion at Lake Keowee (hereinafter "Medallion").

Therefore, Phase II involved different subcontractors from phase I, different general contractors (Marick, Ludwig and Medallion rather than Bostic Brothers), different developers, the addition of amenities which were not built during phase I construction, in addition to numerous other differences between the two phases of construction.

STANDARD OF REVIEW

1. Motion to Dismiss

When reviewing a motion to dismiss, the Court must accept all well-pled facts in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *Nemet Chevrolet, LTD. V. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Trulock v. Freech*, 275 F.3d 302, 307 (4th Cir. 2001) and *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). To avoid dismissal, the “complaint must contain sufficient factual matter...[that when]...accepted as true...state[s] a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1958 (2007)). To be facially plausible, a complaint must contain factual content that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Nemet Chevrolet, LTD.*, 591 F.3d at 256 (citing *Iqbal*, 129 S.Ct. at 1952). However, this plausibility standard does not necessitate the plaintiff make a showing of the probability of success on the claim asserted. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965). The question to be answered is whether in a light most favorable to the plaintiff, and with every doubt resolved in plaintiff’s behalf, the Complaint states any valid claim for relief. *Washington v. Lexington County Jail*, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct.App. 1999).

2. Motion for Summary Judgment

“Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Thomas Sand Co. v. Colonial Pipeline Co.*, 563 S.E.2d 109, 112 (S.C. Ct. App. 2002). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston*

Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefore must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997).

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, **the non-moving party is only required to submit a mere scintilla of evidence** in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009); *See: Thomas Sand, Co.*, 563 S.E.2d at 112 (on negligence cause of action, "[a]t the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.")

LAW & ANALYSIS

In Defendants Third Amended Answer, Defendants asserted cross-claims for (1) Equitable Indemnification; (2) Breach of Contract; (3) Negligence; and (4) Breach of Warranties. A number of the parties have filed Motions for Summary Judgment and/or to Dismiss Defendants' cross-claims.

THE LAW

1. EQUITABLE INDEMNIFICATION

Subcontractors' Motions to Dismiss and for Summary Judgment of equitable indemnity causes of action should be denied because, at worst, genuine issues of material fact exist regarding Defendants' wrongdoing and subcontractors' contractual obligations. The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor. The Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight.

All of the subcontractors prosecuting motions allege that Marick cannot recover under Equitable Indemnity as Marick is not without fault. Specifically, they allege that defense expert Randy Still has admitted fault on behalf of Marick. This is an incorrect twisting of Mr. Still's words. Mr. Still specifically testified that Marick was not at fault and did not breach its obligation of supervision and oversight.

Deposition of Randy Still

Q: ... For clarification, just because there is an item on your scope of repair which you believe needs some modification or repair, does that, in your opinion, mean that Marick, my client, your client, breached any duty or obligation?

A: I don't think so, no.

Q: And, in fact, there are items on your scope of repair for Phase I which Marick did not build?

A: That is correct.

Q: And do you believe that Marick breached any obligation in its—or construction obligations in Phase I?

A: No.

(Still Dep. 163:19 – 164:6.)

Q: And additionally there have been repairs and modifications to Phase II which are now no longer original construction but you've included those in your repair scope as well?

A: That is correct.

Q: But that does not mean, and it is not your opinion that inclusion in your repair scope means or should imply that you believe Marick did something wrong; correct?

A: That is correct.

(Still Dep. 164:9-18.)

Q: Do you believe that Marick violated any obligation, whether it be through a contract document, manufacturer's installation instructions, code or any other obligation regarding the installation of the low slope roofs in Phase I?

A: No.

(Still Dep. 165:2-7.)

Q: In your opinion is it fair—is it acceptable for a general contractor to rely on that experience and education of a subcontractor in a particular trade?

A: I think in many cases he has to.

(Still Dep. 170:7-10.)

Q: I may have asked this but let me ask it another way: If Marick did no do any exterior construction in Phase I, do you have an opinion based on the inspections, investigation and your knowledge of the facts and allegations in this case whether Marick violated any code section?

A: I don't see how he could have, because the conditions we found only occurred after extensive destructive testing occurred.

Q: Do you believe that Marick violated any code in the installation of the weather-resistant barrier in Phase II? And I'm specifying Marick. Did

Marick violate any code in the installation of the weather-resistant barrier in Phase II?

A: No, I'm not aware he installed any WRB.

(Still Dep. 173:11-25.)

Q: Do you believe or do you have an opinion that Marick violated any code, manufacturers' instructions, design drawings in the installation of the cedar shake and plank siding in Phase II?

A: No.

Q: Do you have any opinion that Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of the doors and windows in Phase II?

A: I am not aware that he installed any of those components.

Q: Is that a "no"?

A: No.

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the stone installation in Phase II?

A: No.

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of any of the waterproofing, framing, grading, or other construction components in Phase II?

A: No.

(Still Dep. 174:1:24.)

While he admitted that Marick as the general contractor has overall responsibility for the construction of the entire project, he did not state that Marick Home Builders was at fault for the failures and code violations at the project for work performed by subcontractors. Instead, he admitted issues at the project, but not that Marick was

responsible. In this case, there is a factual issue as to whether or not Marick breached its obligations of supervision and oversight, as Mr. Still testified that Marick had not breached its standard of supervision and oversight.

Further, as an example of the testimony and as an example of evidence in the case, Southern Concrete's superintendent Jason Carlan admitted that Southern Concrete selected the products for waterproofing, familiarized itself with the manufacturer's installation instructions, installed the waterproofing per manufacturer's installation instructions, showed Nathan Hornaday, Marick's Superintendent, that it was installed in compliance with the manufacturer's installation instructions and Nathan Hornaday inspected Southern Concrete's work to ensure that the waterproofing was installed per manufactures installation instructions:

Deposition of Jason Carlan

A: This was the best product out there for what we were doing.

Q: What were you doing?

A: Waterproofing a deck to pour concrete on top of it.

Q: And when you said it met or exceeded what you needed, how was what you need defined?

A: By what details we had on the plans.

Q: And where did those details come from?

A: From the plans.

Q: The Miller/Player plans?

A: The Miller/Player plans.

Q: Did you discuss the product that you were going to use with anyone from Marick?

A: No. Other than what we priced. Our pricing, Polyguard membrane was on there.

(Carlan Dep. 40:1-20.)

Q: And how about any representative of Marick Home Builders? Did they inspect?

A: Yes.

Q: They came and looked at your installation?

A: On more than one occasion, yes.

(Carlan Dep. 46:22 - 47:1.)

Q: So did he ask you questions.

A: Yes.

Q: --- about how it was installed?

A: Oh, yeah.

(Carlan Dep. 47:15-18.)

Q: And is that how you told Nathan it should be done?

A: Yes.

Q: And is that how you told Nathan it was being done?

A: That's how I told Nathan we were doing it and how it needed to be done.

Q: And that Southern Concrete believed it was sufficient?

A: Yes.

(Carlan Dep. 79:25 - 80:5.)

Q: And did you show Nathan that you were putting the slope in by sloping the concrete?

A: Yes.

Q: And told him that's what you were doing?

A: Yes.

(Carlan Dep. 84:1-5.)

Based upon the above testimony and evidence, it is clear that there is a factual issue concerning whether or not Marick appropriately supervised and oversaw this project. Marick did not perform any of its own construction on the project, and therefore relied on the subcontractors for their knowledge, expertise, experience, and installation. Clearly, there is testimony and evidence that Marick did not breach its standard of supervision and oversight. Based upon the above, there is a question of fact concerning whether or not Marick had fault; thus, the subcontractors' motions for summary judgment as to equitable indemnity and unclean hands should be denied.

a. Indirect subcontractors

The motions of subcontractors without direct contracts with Marick should be dismissed under rules of equity and fairness. Although Marick did not specifically contract with many of its subcontractor's subcontractors, it still allegedly had obligations to supervise and oversee that work. It would be inequitable to allow the subcontractors which were supervised and overseen by Marick, and for which Marick is being sued, to escape liability to Marick while Marick suffers liability at the hands of those subcontractors.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994). "The right is created by operation of law 'in cases of imputed fault or where some special

relationship exists between the first and second parties.” *Id.* (Internal citation omitted)

“Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury.” *Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (Internal citation omitted).

With equitable indemnification, it does not matter that there is no contractual provision for indemnity. “The very nature of equitable indemnification is that a contract for indemnity is unnecessary.” *Winnsboro II*, 307 S.C. at 132, 414 S.E.2d at 121. It is true if a jury finds a party negligent, then as an adjudicated tortfeasor equitable indemnity would not be available. See South Carolina Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to -70 (Supp.1995). However, if the jury were to find a party not negligent, then the party would be entitled to equitable indemnification. *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct.App.1990).

We note that the modern trend concerning the right to indemnity is to look to principles of equity. According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 312-13, 476 S.E.2d 708, 710 (Ct. App. 1996)(emphasis added).

The cases relied upon by the indirect subcontractors establish that our courts do not find a special relationship between remote or independent contractors and general contractors. However, these subcontractors have not produced a case where a general contractor does not have a special relationship with a subcontractor’s subcontractor who he supervises and oversaw on a daily basis. Therefore, this Court should hold that a

subcontractor who is overseen and supervised on a daily basis, has a special relationship with the general contractor; thus, the motions for summary judgment should be denied.

b. Phase I subcontractors

The Phase I subcontractors' motions to dismiss should be denied because the allegations set a scenario under which Marick would have a special relationship or cognizable causes of actions against Phase I subcontractors. Specifically, Plaintiff has alleged that Marick was responsible for the exterior construction in Phase I, although Marick denies that or that it is responsible for all of the construction in Phase I, because it pulled permits and requested Certificates of Occupancy. If Plaintiff is successful in proving that Marick performed general contracting work in Phase I, oversaw the construction of Phase I units or is otherwise liable for Phase I subcontractor work, it would have a special relationship as the general contractor with subcontractors who constructed the exteriors.

Alternatively, Plaintiff has alleged that Marick is in either in a joint venture or is the alter ego of the developer, IMK. If proven at trial, Marick could be liable to Plaintiffs as a developer. Under this scenario, if Marick is found to be the developer, Marick would have viable causes of action against the Phase I subcontractors.

2. CONTRACTUAL INDEMNIFICATION

Marick's cross claims for contractual indemnity and breach of contract should not be dismissed. Marick and Clearview Construction, Southern Concrete, and Builders FirstSource entered into contracts which required these subcontractors to defend, indemnify, and reimburse Marick for damages caused by their individual work. (See attached exhibits). Marick has alleged and prosecuted these claims for contractual

indemnity, and, to date, no party or insurance carrier has agreed to defend or indemnify Marick. The causes of action for breach of contract and contractual indemnity are not disguised as indemnity claims, rather they arise from legitimate negotiation and executed contracts.

The Subcontractors have alleged that the contracts referenced herein do not apply to the project at issue in this case. That allegation is a factual issue which needs to be resolved at the trial of this case by the jury. Marick has alleged and stands by its assertion that the contracts with Builders FirstSource, Clearview Construction and Southern Concrete (many others) for this project are enforceable and apply to the Stoneledge Project. This is true even if they were executed after or during the work. Specifically, Marick alleges that the contracts were executed ex post facto, and executed after work the work was performed. As an example of evidence supporting an ex post facto contract, Southern Concrete's principal testified:

Deposition of Jeffrey Gowder

Q: Do you know if Southern Concrete had any other projects that it was intending to work on for Marick after October of 2007?

A: I do not.

Q: Did Shannon Gowder have full authority to sign contracts on behalf of Southern Concrete?

A: Yes.

(J. Gowder Dep. 55:10-16.)

Based upon that testimony, there was no reason for Southern Concrete to execute an indemnity contract with Marick for any other project, thus creating an issue of fact for the jury to determine whether that indemnity contract applied to Stoneledge.

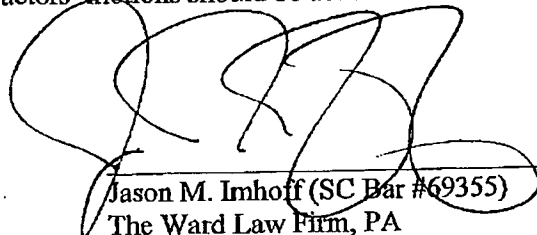
Based upon the above, the breach of contract and contractual indemnity causes of action should not be dismissed as there are issues of material fact to determine the timing and intent of the indemnity contract, which should be left for a jury.

Marick's licensure

As with the contractual indemnity claims, there is an issue of fact regarding the execution and applicability of the contracts. Marick should not be denied the ability to enforce its contract due to South Carolina Section 40-1137(c), which requires a general contractor to be licensed. Marick, like many other contractors, is licensed through its individuals and/or principals. This is clearly allowed, expected and is not a bar to contractual obligations of the contractor. (See: SC. ST §40-11-230)

Conclusion

For the foregoing reasons, Subcontractors' motions should be denied.



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*Attorney for Marick Home Builders,
LLC and Rick Thoennes*

September 4th, 2012

A



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First Source (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$2,000,000
 - Personal & Advertising Injury: \$1,000,000
 - Each Occurrence: \$1,000,000
 - Damage to Rented Premises: \$100,000
 - Medical Payments: \$5,000
 - With "Marick Home Builders" as Additional Insured. - per endorsement form LA-2002-0003.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

10/26/2007 10:11 FAX

01103/003



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and
job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general
liability insurance (see item 2 for details) - due in office before first
payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor
shall indemnify the Contractor, owner and their agent(s) from and against
claims, damages, losses, expenses and fees arising out of or resulting from
performance of the Subcontractors, but only to the extent of Subcontractor's
negligence or willful misconduct.

BY:

BY:

DATE:

10/26/07

DATE:

10/26/07

Rick Thoennes

NAME and TITLE

Deryl Ward

Senior Attorney

Marick Home Builder, LLC.

COMPANY NAME

Builder's First Source - Southeast Group, LLC

COMPANY NAME

SE Brider

WITNESSED BY

Subject To Written Changes

B



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: _____

DATE: _____

10/1/07

BY: _____

DATE: _____

10-30-07

Rick Thoennes

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Kim Weaver
WITNESSED BY

Mike Owens
NAME and TITLE

Clearview Const.
COMPANY NAME

9

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12/30/2007 11:00 FAX

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AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

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0003



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: _____

DATE: _____

BY: Shannon Gauder *

DATE: 10/11/07 *

Rick Thoennes

NAME and TITLE

Shannon Gauder *

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Southern Concrete Spec. Inc. *

COMPANY NAME

Kim W. Leathers
WITNESSED BY

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000616

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

THE TENTH JUDICIAL CIRCUIT

Stoneledge at Lake Keowee Owners')
Association, Inc., C. Dan Carson, Jeffrey J.)
Dauler, Joan W. Davenport, Michael Furnari,)
Donna Furnari, Jessy B. Grasso, Nancy B.)
Grasso, Robert P. Hayes, Lucy H. Hayes, Ty)
Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth)
E. Isaac, Michael D. Plourde, Mary Lou)
Plourde, Carol C. Pope, Steven B. Taylor,)
Bette J. Taylor, and Robert White, individually)
and on behalf of all others similarly situated,)

Plaintiffs,)

vs.)

IMK Development Co., LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee,)
LLC, Integrys Keowee Development, LLC,)
Marick Home Builders, LLC, Bostic Brothers)
Construction, Inc., Miller/Player & Associates,)
Bradford D. Seckinger, John Ludwig, William)
Cox, Larry D. Lollis, Rick Thoennes, M)
Group Construction and Development, LLC,)
Mel Morris, Joe Bostic, Jeff Bostic, Clear)
View Construction, LLC, Michael Franz,)
MHC Contractors, Miguel Porras Choncoas,)
Builders FirstSource Southeast Group, Mike)
Green, Southern Concrete Specialties, Carl)
Compton d/b/a Compton Enterprize a/k/a)
Compton Enterprises, Gunter Heating & Air,)
All Pro Heating, A/C & Refrigeration, LLC,)
Coleman Waterproofing, Heyward Electrical)
Services, Inc., Tinsley Electrical, LLC, Hutch)
N Son Construction, Inc., Upstate Utilities,)
Inc., Southern Basements, Inc., Carl Catoe)
Construction, Inc., T.G. Construction, LLC,)
Delfino Construction, Francisco Javier Zarate)
d/b/a Zarate Construction, Alejandro Avalos)
Cruz, Herberto Acros Hernandez, Martin)
Hernandez-Aviles, Francisco Villalobos)

CASE NUMBER: 2009-CP-37-0652

**Supplemental Memorandum in
Opposition to Defendants, Builders First
Source, Southern Concrete Specialties,
Clear View Construction, LLC and
Michael Franz's Motion for Summary
Judgment**

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 OCT 2 AM 11 25

entitled to judgment as a matter of law. *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefore must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997). If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

DISCUSSION

Marick entered into separate contracts with Defendants BFS, Southern Concrete and Clear View (see: Exhibits "A", "B" and "C"). In the contracts, BFS, Southern Concrete and Clear View each agreed to indemnify Marick for liability attributed to Marick as a result of those Defendants' work. By failing to indemnify Marick for the faulty work that each performed at the Stoneledge project, BFS, Southern Concrete and Clear View are breaching the terms of the contracts.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 451, 453-54, 438 S.E.2d 271, 272 (Ct.

App. 1993) (internal citations omitted). "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." *Rock Hill Tel. Co., Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)

The Court, at the hearing on September 5, 2012, found that Marick's cross-claims for negligence and breach of warranties merged into its equitable indemnification claim. BFS, Southern Concrete and Clear View errantly assert that Marick's cross-claim for breach of contract should also be merged into the equitable indemnity claim.

BFS, Southern Concrete and Clear View each entered into a contract with Marick (see: Exhibits "A", "B" and "C"). Set forth in each contract is a "Hold Harmless" provision. Due to the contracts entered into between Marick and BFS, Southern Concrete and Clear View, Marick's cross-claim for breach of contract is a separate and distinct cause of action different from equitable indemnification. BFS cited *S. Carolina Nat. Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990), "that a rose by any other name is still a rose" for the proposition that Marick's cross-claim for breach of contract is nothing more than an equitable indemnity claim. However, as is evident from the attached contracts, the "Hold Harmless" provision set forth in each contract establishes a separate and distinct claim, and thus should be viewed separately from the equitable indemnity claim. Although the Federal District Court in *S. Carolina Nat. Bank v. Stone* held that "a rose by any other name is still a rose", it in no way found that a tulip is another name for a rose. Thus, a party's breach of a specific contractual provision should be

determined based upon the terms of the contract and not subsumed by equitable indemnity. *Rock Hill Tel. Co.*, 363 S.C. 385, 611 S.E.2d 235 (2005).

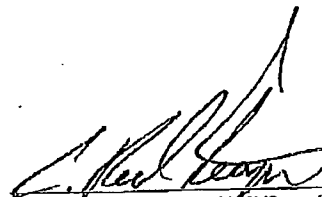
Since Marick's cross-claim for breach of contract is not an equitable claim, whether or not Marick has unclean hands is not a determinative factor; rather, the contracts set forth a completely separate contractual indemnity claim. Thus, the contracts should be construed in accordance with the terms. Therefore, due to the legal costs and expenses incurred by Marick as a result of this litigation and the continued potential liability for which Marick has been subjected, the jury should decide if BFS, Southern Concrete and Clear View breached the "Hold Harmless" provision of the contracts.

Further, at the hearings on September 5, 2012, BFS, along with other parties, handed forth to the Court two non-binding South Carolina Circuit Court Orders discussing similar issues to those currently before the Court: *Nelson v. John Wieland Homes*, 2009-CP-10-6573 (Order of Young, J.) and *Kirkland v. Cambridge Building Corp.*, 2005-CP-07-1312 (Order of Coltrane, J.). Neither of those Orders discusses a separate and distinct contractual "Hold Harmless" provision entered into between the parties. The South Carolina circuit court holdings do not discuss whether or not a separate and distinct contractual claim would be subsumed by an associated equitable indemnity claim. Had these courts addressed the issue before this Court, Marick asserts that they would have concluded that a party's claim pursuant to a mutually binding contract shall be determined separately, and not merged with an equitable cause of action.

CONCLUSION

As set forth in the attached contracts, BSF, Southern Concrete and Clear View each entered into separate contracts with Marick which contained specific "Hold Harmless" provisions for which Marick bases its cross-claims for breach of contract/contractual indemnity.

Thus, BFS, Southern Concrete and Clear View's Motions for Summary Judgment should be denied.



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(864) 585-3075
jimhoff@wardfirm.com

*Attorney for Defendants Marick Home
Builders, LLC and Rick Thoennes*

September 28, 2012

EXHIBIT "A"



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders FirstSource (Subcontractor).

Project on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$2,000,000
 - Personal & Advertising Injury: \$1,000,000
 - Bath Occurrence: \$1,000,000
 - Damage to Rented Premises: \$100,000
 - Medical Payments: \$5,000
 - With "Marick Home Builders" as Additional Insured. per endorsement form LA-2002-0005
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
5. Licenses, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

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8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and
job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general
liability insurance (see item 2 for details) - due in office before final
payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor
shall indemnify the Contractor, owner and their agent(s) from and against
claims, damages, losses, expenses and fees arising out of or resulting from
performance of the Subcontractors, but only to the extent of subcontractor's
negligence or willful misconduct.

BY:

BY:

DATE:

10/24/07

DATE:

10/24/07

Rick Thoenes

NAME and TITLE

Deryl Ward

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Builder First Source Southeast Group, LLC

COMPANY NAME

SE Binder

WITNESSED BY

Subject To Written Changes

EXHIBIT "B"



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractor's pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature] BY: Mike [Signature] *

DATE: 10/1/07 DATE: 10-30-07 *

Rick Thoennes Mike Owner *

NAME and TITLE NAME and TITLE

Marick Home Builder, LLC. Clermont Coast. *

COMPANY NAME COMPANY NAME

Kim [Signature]

WITNESSED BY

EXHIBIT “C”

10/31/2007 08:28 FAX
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AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

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marickhomebuilders.com

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8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY:

BY:

DATE:

DATE:

Rick Thoennes
NAME and TITLE

Sharon Gowler *
NAME and TITLE

Marick Home Builder, LLC
COMPANY NAME

Southern Concrete Spec. Inc *
COMPANY NAME

Wm Weather
WITNESSED BY

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, ET AL. V. IMKO DEVELOPMENT, LLC
CASE NO.: 2009-CP-37-0652

FILED O'CONNOR, SC
BEVERLY H. WHITEHEAD
CLERK OF COURT
2012 OCT 2 AM 11 25

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRCF and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the Defendant Marick Home Builders, LLC and Rick Thoennes' Supplemental Memorandum in Opposition to Defendants, Builders First Source, Southern Concrete Specialties, Clear View Construction, LLC and Michael Franz to the following counsel of record:

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223 W. Stone Avenue, Suite 100
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phammack@clawsonandstaubes.com
Attorney for Alejandro Avalos Cruz

This 1 day of October, 2012
Spartanburg, SC

By:


Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners'
Association, Inc., et al

Plaintiff,

vs.

Marick Home Builders, LLC et al

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-37-652

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

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

SECTION I: Hearing Information

Nature of Motion: Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for
Reconsideration and at Alter Judgment

Estimated Time Needed: 30 mins Court Reporter Needed: ☒ YES/ ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

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

Jason M. Imhoff
Signature of Attorney for ☐ Plaintiff/ ☒ Defendant

January 23, 2013
Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION

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

JUDGE CODE _____

Date: _____

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BEVERLY H. WHITFIELD
CLERK OF COURT
2013 JAN 24 PM 2 40
000635

CLERK'S VERIFICATION

Collected by: 18 Date Filed: _____
☒ MOTION FEE COLLECTED: \$ 25.00
☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO
AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,
MARTIN HERNANDEZ-AVILES, FRANCISCO
VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-

DEFENDANTS MARICK HOME
BUILDERS, LLC AND RICK THOENNES'
MOTION FOR RECONSIDERATION AND
TO ALTER JUDGMENT

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 JUN 24 PM 2 40

RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
SOUTHERN BASEMENTS, INC., MJG)
CONSTRUCTION AND HOMEBUILDERS, INC.)
D/B/A MJG CONSTRUCTION, KMAC, INC.,)
D/B/A KMAC NORTH CAROLINA, EUFACIO)
GARCIA, EVERADO JARMAMILLO, GARCIA)
PARRA INSULATION, INC., J&J CONSTRUCTION,)
JOSE NINO, JOSE MANUEL GARCIA, EASON)
CONSTRUCTION, INC., AND VINCENT MORALES)
D/B/A MORALES MASONRY, MILLER/PLAYER &)
ASSOCIATES,)

Defendants,)

BOSTIC CONSTRUCTION, INC.)

Third-Party Plaintiffs,)

vs.)

SOUTHERN STONE, INC. AND BUCK SMITH)
CONSTRUCTION,)

Third-Party Defendants.)

COME NOW, Defendants Marick Home Builders, LLC and Rick Thoennes (collectively "Marick"), pursuant to Rule 59, S.C. R. Civ. P. through its undersigned attorney and respectfully request that this Honorable Court vacate and/or reconsider the Order dated January 11, 2013 granting Defendants Clear View Construction, LLC and Michael Franz's Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC for Negligence and Equitable Indemnification. The grounds for this Motion are that the Court's ruling is inconsistent with South Carolina law.

THE WARD LAW FIRM, PA

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*Attorneys for Marick Home Builders, LLC
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Janaury 23, 2013
Spartanburg, South Carolina

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, ET AL. V. MK DEVELOPMENT, ET AL.
CASE NO.: 2009-CP-37-0652

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BEVERLY H. WHITFIELD BEVERLY H. WHITFIELD
CLERK OF COURT

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CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for Reconsideration and to Alter Judgment** to the following counsel of record:

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Attorney for Alejandro Amalos Cruz

This 23 day of January, 2013
Spartanburg, SC

By:

Amanda Steward
Amanda D. Steward, Paralegal

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-37-0652

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BEVERLY H. WHITFIELD
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CATOE CONSTRUCTION, INC.,	T.G.)
CONSTRUCTION, LLC,	DELFINO)
CONSTRUCTION, FRANCISCO JAVIER ZARATE	)
D/B/A ZARATE CONSTRUCTION, ALBJANDRO	)
AVALOS CRUZ, HERBERTO ACROS	)
HERNANDEZ, MARTIN HERNANDEZ-AVILES,	)
FRANCISCO VILLALOBOS LOPEZ, AMBROSIO	)
MARTINEZ-RAMIREZ, ESTER MORAN	)
MENTADO, SOCORRO CASTILLO MONTEL,	)
UPSTATE UTILITIES, INC., SOUTHERN	)
BASEMENTS, INC., MJG CONSTRUCTION AND	)
HOMEBUILDERS, INC. D/B/A MJG	)
CONSTRUCTION, KMAC, INC., D/B/A KMAC	)
NORTH CAROLINA, EUFACIO GARCIA,	)
EVERADO JARMAMILLO, GARCIA PARRA	)
INSULATION, INC., J&J CONSTRUCTION, JOSE	)
NINO, JOSE MANUEL GARCIA, EASON	)
CONSTRUCTION, INC., AND VINCENT MORALES	)
D/B/A MORALES MASONRY, MILLER/PLAYER &	)
ASSOCIATES,	)
	)
Defendants,	)

Defendants, Marick Home Builders, LLC and Rick Thoennes' (hereinafter collectively referred to as "Marick") filed cross-claims alleging negligence, breach of contract, breach of warranty and indemnification against a stonemason associated with phase II construction, Clear View Construction, LLC and its owner, Michael Franz (hereinafter collectively referred to as "Clear View"). In an order dated January 11, 2013, the Court granted summary judgment in favor of Clear View as to Marick's cross-claims for equitable indemnification and negligence (see: Exhibit "1"). In a separate order dated January 11, 2013, the Court granted summary judgment in favor of Clear View as to Marick's cross-claims for breach of contract and breach of warranty (see: Exhibit "2").

Marick timely filed a Motion to Alter and/or Amend the Orders pursuant to S.C.R.C.P.

59(e). Marick submits this Memorandum to the Court in support of its Motion.

FACTS

The Stoneledge Owners Association (hereinafter "SOA") filed suit against the architect, general contractors, subcontractors, developers and some of the individuals associated with the defendant entities in relation to both phases of construction at Stoneledge.

The Court is fully aware of the allegations at issue in this lawsuit. Clear View is a direct subcontractor of Marick, as Clear view and Marick entered into a contract wherein Clear View agreed to perform all "brick and stone labor" at Phase II of the project (see: Exhibit "3", Contract). Thus, Marick performed none of the actual labor associated with the stone installed at the project. Marick subcontracted that labor to Clear View. Marick paid Clear View to perform the stone labor and installation and Marick supervised the project.

STANDARD OF REVIEW

"Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes. See *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). We explained in *Elam* that 'there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.' *Id.* at 22, 602 S.E.2d at 779. Indeed, 'it is inherently unfair to disallow such an opportunity.'" *Home Med. Sys., Inc. v. S. Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

I. SUMMARY JUDGMENT WAS IMPROPER

Marick's Third Amended Answer asserted cross-claims for (1) Equitable Indemnification; (2) Negligence; (3) Breach of Warranties; and (4) Breach of Contract. The Court summarily dismissed all claims against Clear View (See: Orders attached hereto as Exhibit "1" and "2").

First and foremost, discovery is not complete in this case. Plaintiffs' expert's, Derrick Hodgin, deposition is still open and has not been completed and Marick's expert's, Randy Still, deposition is still open and has not been completed. Thus, since discovery is not complete in this matter, the Court's Orders awarding summary judgment were premature in this matter. *Bayle v. S. Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

This Memorandum will first address the Court's determination that Marick cannot be found to have no fault and thus is not entitled to indemnity. The second section of this Memorandum will discuss the errant determination that all pled causes of action collapse into one action for equitable indemnification.

(1) INDEMNITY

The Court's Order held that Marick's equitable indemnity claims failed because Marick cannot be adjudged without fault (see: Exhibit "1", Order). Based on the testimony presented in

this case, Marick has presented evidence that it was not at fault for the alleged defective stone installation at the project.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994).

The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor. The Court imposed a duty on a general contractor to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub-contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight. *Id.*

Plaintiffs' expert, Derrick Hodgin, testified that there are defects associated with the stone application at Phase II of the project (see: Hodgin's Dep. (Day 2) at 87:15 – 88:11, 89:22-25, 127:13-17, 133:4-12, 153:12-22, and 165:22 – 167:3). In Hodgin's opinion, the stone was not applied in accordance with the manufacturer's instructions, the stone was improperly installed below grade, the stone was improperly installed in contact with abutting concrete and the stone was not adhered to the base properly. *Id.* Further, Hodgin testified that the flashing and weather resistant barrier applied in connection with the stone was installed improperly or inadequately (see: Hodgin's Dep. (Day 2) at 81:14 – 83:11, 87:15 – 88:11, 91:12 – 92:7, 96:20 – 97:7, 107:3-10, 108:11 – 109:1, 123:18 -124:20, and 126:4-17). As a result of the alleged improper stonework, Hodgin opines that it is necessary to remove all stone in Phase II to remediate the problems (see: Hodgin Dep. (Day 2) at 105:23 – 106:2).

As stated earlier, Marick was the general contractor and provided no construction related labor associated with actual construction of the project at Stoneledge; Marick only provided supervision (see: Rick Thoennes Dep. at 36:17-22 and Randy Still Dep. at 172:21-24). Thus, the only function that Marick served (as the general contractor) was to hire subcontractors, schedule construction and provide supervision.

Rick Thoennes, one of the owners of Marick Home Builders, testified that Marick had a superintendent at the project supervising the subcontractors and scheduling construction (see: Thoennes Dep. at 30:17-19). Thoennes testified that Nathan Hornaday was employed by Marick to serve as the superintendent responsible for providing supervision of the project (see: Thoennes Dep. at 31:6-12). In addition to Hornaday's supervision and oversight, Thoennes visited the project weekly to oversee construction (see: Thoennes Dep. at 131:8-132:3). Further, Thoennes had daily communications with Hornaday concerning construction of the project (see: Thoennes Dep. at 176:4-6). According to Thoennes, during construction, Nathan Hornaday provided supervision on site at Stoneledge 10-12 hours per day. (Thoennes Dep. at 176:23 -177:4). According to Thoennes, on several occasions, Hornaday contacted separate subcontractors to discuss construction related issues noticed during Hornaday's inspections of work performed by subcontractors (Thoennes Dep. at 224:18 - 225:7, 244).

Hornaday also testified that he provided supervision at the project (Hornaday Dep. at 18:15-16).

Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I don't like the way you're doing that'?

A: I did.

Q: And was it corrected to your satisfaction?

A: Yes.

(Hornaday Dep. at 19:21 – 20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision was provided at the project. In addition to Marick's representatives' testimony,

Clear View's own expert, Drew Wilkie, admits that Hornaday provided supervision at the project:

Q: Do you have any idea what amount of supervision and direction was given to Clear View?

A: Based on some of the testimony I've read, I believe Mr. Hornaday, there was some supervision provided and I think he was - - Mr. Hornaday was in a role of providing for that supervision.

(Drew Wilkie Dep. at 153:1-6.)

Mr. Wilkie further admits that some of the alleged defects associated with the stone may not have been noticeable to the general contractor at the time of construction (see: Wilkie Dep. at 165:9 – 168:2). Thus, if the alleged defects to the stone were not noticeable during construction, but only became noticeable over time, there is no way the general contractor could have prevented the alleged damage/defects to the stone.

Additionally, Marick's expert, Randy Still, testified that a general contractor relies on the subcontractors that they will perform their craft appropriately (Still Dep. at 84 – 85). Mr. Still stated further:

Q: In your experience and education and in your work, do you hold the opinion that a general contractor is always liable for all defects in construction which were performed by subcontractors?

A: I think what I have found is the term "liable" is a legal term and my belief is that the general contractor can rely on the subcontractors who have the specialty crafts and knowledge to perform their work correctly.

Q: Is it fair to say that in many cases a subcontractor is in fact more experienced and better qualified to perform their particular trade than a general contractor?

A: Yes.

Q: Is that because they have specialized over the years in that particular area and have focused their education and experience in that area?

A: Yes, and they've performed the work and they know what works and what doesn't work.

Q: In your opinion is it fair – is it acceptable for a general contractor to rely on that experience and education of a subcontractor in a particular trade?

A: I think in many cases he has to.

Q: Would you agree that obviously a general contractor cannot see every nail which is driven or every board which is installed?

A: Yes.

Q: Would you agree that he must, out of necessity, rely on a subcontractor's experience and knowledge and compliance with good building practices and the code?

A: Yes.

(Still Dep. at 169:12 – 170: 18.)

Mr. Still further testified:

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of any of the waterproofing, framing, grading, or other construction components in Phase II?

A: No.

(Still Dep. 174:18:24.)

Thus, in South Carolina, the non-moving party is merely required to present a mere scintilla of evidence to survive summary judgment, and certainly, the fact that Marick's representatives testified that supervision was provided at the project, that Clear View's expert testified that "some supervision" was provided and that Marick's expert, Randy Still, testified

that Marick had a right to rely on the expertise of the subcontractors, presents more than a scintilla of evidence that Marick supervised and was not at fault for the alleged damages associated with the stone application at Stoneledge. Based upon these facts, a jury is required to determine fault.

In addition to equitable indemnification which Marick is entitled to if a jury finds Clear View solely at fault for the alleged defects to the stone, attached as exhibit "3" is a contract entered into between Marick and Clear View which includes an indemnification provision. Thus, contractually, Clear View is obligated to indemnify Marick for liability associated with the stonework it contracted to perform.

(2) The Court Erred in Collapsing all of Marick's Cross-Claims Into One Claim for Equitable Indemnification.

The Court erred in collapsing Marick' cross-claims for breach of warranty, breach of contract, and negligence into one claim for equitable indemnification. The Court cited no binding case law in support of its holding. In support of its holding, the Court cited two non-binding federal district court cases (*U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)) and two non-binding unpublished South Carolina circuit court orders (*Nelson v. John Weiland Home*, 2009-CP-10-6573 (Order by Judge Roger M. Young, October 26, 2011) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006)).

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Marick asserts cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants

which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n.

3. However, in this case, Plaintiffs continue to allege defective stonework against Marick. Thus, Marick is required to continue litigating claims associated with Clear View's defective work.

Marick continues to incur attorney fees and costs associated with Clear View's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Marick asserts that the federal court holdings should not be persuasive in this matter. Marick further asserts that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Marick may recover special damages at law under theories of negligence, breach of warranty, and breach of contract as to Clear View. Marick's claims for breach of warranty, negligence and breach of contract are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1990) citing *Addy v. Bolton*, 257, S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was

upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

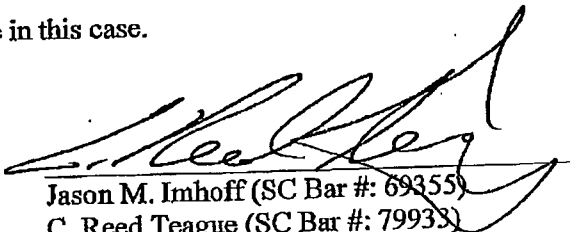
The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs' claims arising from the Defendant Subcontractor's tortious conduct (negligent performance of work), breach of warranty (failure to perform work in a workmanlike manner) and breach of contract (which includes an indemnification clause); thus, Marick properly filed claims for negligence, breach of warranty and breach of contract against Clear View seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including special damages claims against subcontractors as Clear View was sued directly by Plaintiffs for their defective work. Thus, the *Addy* rule, followed in *Griffin and Town of Winnsboro*, allows Marick to recover special damages at law under negligence, breach of contract and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by Clear View to Marick constitute separate causes of action which did not arise through Plaintiffs' relationship to the parties. The

Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, separate causes of action for negligence and breach of contract do not collapse into a single indemnity claim. Marick had a contractual relationship and was owed separate duties by Clear View, which it was overseeing to perform the work at issue in this action; if Clear View failed to perform the work it was hired to perform properly, it breached duties and contractual obligations owed to Marick and thus should be liable to Marick.

CONCLUSION

For the reasons stated hereinabove, Marick respectfully requests that this Court alter and/or amend its January 11, 2013 Orders and deny summary judgment to Clear View as clearly there are questions of fact for a jury to determine in this case.


Jason M. Imhoff (SC Bar #: 69355)

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*Attorney for Marick Home Builders,
LLC and Rick Thoennes*

April 9, 2013

EXHIBIT 1

FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

2063

01/11/2013

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (12/2011)

Page 1

000657

For Clerk of Court Office Use Only

This judgment was entered on the 14th day of January, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of January, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER 2009-CP-37-0652

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MBDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOB BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

ORDER GRANTING DEFENDANTS
CLEAR VIEW CONSTRUCTION, LLC
AND MICHAEL FRANZ'S MOTION
FOR SUMMARY JUDGMENT AS TO
THE CROSS-CLAIMS OF MARICK
HOME BUILDERS, LLC FOR
NEGLIGENCE AND EQUITABLE
INDEMNIFICATION

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 JAN 14 PM 3 42

000659

AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,)
MARTIN HERNANDEZ-AVILES, FRANCISCO)
VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-)
RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)

SOUTHERN BASEMENTS, INC., MJG)
CONSTRUCTION AND HOMEBUILDERS, INC.)
D/B/A MJG CONSTRUCTION, KMAC, INC.,)
D/B/A KMAC NORTH CAROLINA, EUFACIO)
GARCIA, EVERADO JARMAMILLO, GARCIA)
PARRA INSULATION, INC., J&J CONSTRUCTION,)
JOSE NINO, JOSE MANUEL GARCIA, EASON)
CONSTRUCTION, INC., AND VINCENT MORALES)
D/B/A MORALES MASONRY, MILLER/PLAYER &)
ASSOCIATES,)

Defendants,)

This matter came before the Court on the Motion of Defendants Clear View Construction, LLC ("Clear View") and Michael Franz's (collectively hereinafter "Clear View Defendants") for Summary Judgment. Clear View Defendants seek summary judgment as to the cross-claims of Marick Home Builders, LLC ("Marick")¹ against Clear View Defendants. The Court conducted a hearing on this Motion on September 5, 2012. Attorney Melissa M. Nichols appeared on behalf of Clear View Defendants and Attorney Jason M. Imhoff appeared on behalf of Marick.

The present action concerns the Stoneledge at Lake Keowee townhome community located on Lake Keowee in Oconee County, South Carolina ("Stoneledge"). Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Phase II of Stoneledge is the subject of this motion. Phase II of Stoneledge consists of units numbered 41-43 and 55- 94

¹ The caption of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross Claims against Clear View Defendants appears to indicate that the cross claims were being asserted by both Marick and Rick Thoennes. In the body of the cross claims, however, only Marick asserted claims. Thus, there is not a cross claim by Defendant Rick Thoennes against Clear View Defendants. To the extent Rick Thoennes claims he has submitted claims against Clear View Defendants, this order shall also apply in full to those claims.

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and was constructed by general contractor defendant Marick. Marick subcontracted with Clear View to provide stonework on Phase II townhomes. Plaintiff has alleged deficiencies in Clear View's work such as the installation of stone below grade and complete lack of flashing at the water table at intersections of differing building components.

Clear View Defendants moved for summary judgment on Marick's cross-claims for equitable indemnity, breach of contract, negligence, and breach of warranty against Clear View Defendants. Clear View Defendants' Motion for Summary Judgment on Marick's cross-claims for breach of contract and breach of warranty against Clear View Defendants will be addressed in a separate order. For the reasons set forth below, Clear View Defendants' Motion for Summary Judgment as to Marick's equitable indemnity and negligence claims is hereby GRANTED.

STANDARD OF REVIEW

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by "pointing out to the court that there is an absence of evidence to support the nonmoving party's case." *Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

DISCUSSION

A. Marick's Negligence Claim is a Claim for Equitable Indemnification

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Marick's cross-claims for negligence and equitable indemnity against Clear View Defendants stem from the potential liability Marick faces from the claims brought against it by the Plaintiffs in this matter, the Stoneledge at Lake Keowee Owners' Association and individual

townhome owners (hereinafter collectively "Plaintiffs"). Plaintiffs allege that the townhomes at Stoneledge have construction and design defects leading to water intrusion which has damaged and deteriorated the building components of the townhomes.

Marick's negligence claims are subsumed by its equitable indemnification claims because the allegations and remedies sought by both actions stem directly from the potential liability they could face for the damages claimed by Plaintiffs.² "Indemnity is that form of compensation in which a first party [here allegedly Clear View] is liable to pay a second party [here Marick] for a loss or damage the second party incurs to a third party [Plaintiffs]." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005); *U.S. Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) (stating that the non-settling defendants did not have independent claims apart from indemnification and contribution because the claims were nothing more than claims for indemnity and because they would not exist without plaintiff suing the non-settling defendants); and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990) (holding that the cross-claims against the settling

² Marick's cross-claim labeled as a claim for negligence states:

Should Plaintiff's prevail on their claims, Marick will be damaged as a direct and proximate result of [Clear View's] negligence; as a result, Marick is informed and believes that it is entitled to recover from [Clear View] such as it may incur legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick's Answer to Plaintiffs' Third Amended Complaint & Cross-claims, ¶ 169.)

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defendants for breach of contract, negligence, and fraud were nothing more than claims for contribution or indemnification with a slight change in wording). The circuit courts in South Carolina have likewise found that claims for negligence, breach of warranty, and breach of

contract are absorbed by the equitable indemnification claim. See *Nelson v. John Welland Homes*, 2009-CP-10-6573 (unpublished order); *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (unpublished order).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." *State v. Yelsen Land Co.*, 257 S.C. 401, 403 (1972); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Further, courts may use the allegations in the complaint to determine the correct character of an action. See *Seebaldt*, 269 S.C. at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

After reviewing Marick's cross-claim for negligence cited above, this Court finds that Marick's negligence claim is a claim for equitable indemnification.

B. Marick's Equitable Indemnity Claims Fail because Marick is Not without Fault

Clear View Defendants are entitled to summary judgment on Marick's equitable indemnity claims because Marick cannot be adjudged without fault. Marick Defendants engaged Randall Still, P.E. ("Still") to assess construction issues at Stoneledge. Still was deposed August 15, 2012. Still testified about Marick's responsibility for Phase II construction as follows:

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Q: Would you agree with me that the general contractor's role on a construction project like Stoneledge is the overall responsibility for the construction of the entire project?

A: Yes.

(Deposition of Randall Still, page 87.) Still went on to testify about Marick's violation of the building code during construction of Stoneledge:

Q: Do you acknowledge that at least in some respects that we have discussed today as the general contractor on the project [Stoneledge], Marick Home Builders violated the applicable building code?

A: I would agree that there are [building] components [of the townhomes] that have sustained damage at those isolated areas we've talked about that now appear to be a [building] code violation because of failure.

(Deposition of Randall Still, page 89.) Marick's corporate designee, Defendant Rick Thoennes ("Thoennes"), was also deposed in this matter on November 21, 2011. Thoennes echoed Still's opinions regarding Marick's responsibility for building code violations when asked about the Marick's position as the permit holder for Phase II construction:

Q: Did Marick pull the building permits for all of the Phase II units?

A: Yes.

(Deposition of Frederick (Rick) Thoennes, page 81.) Clear View Defendants' retained expert J. Drew Wilkie, P.E. ("Wilkie"), was also deposed in this matter on August 16, 2012. Wilkie testified that about the general contractor's responsibility for the construction:

Q: And in a situation where the general contractor has pulled the permit for the project, hired all the subs, the general contractor has the ultimate responsibility for the project; correct?

A: That's my opinion.

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(Deposition of J. Drew Wilkie, page 205.) Based on the deposition testimony in the record and Plaintiffs' allegations in this matter, it is clear that should Plaintiffs' allegations be proven, ~~Marick would be partially at fault for the damages due to its role as the general contractor for~~ Phase II construction.

According to well established South Carolina case law, a party can only recover under equitable indemnity if the party is without fault, which is also known as the doctrine of unclean hands. The most important element of an equitable indemnity action is that the party seeking indemnification must be without fault. See *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *Town of Winnsboro v. Wiedeman-Stingleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992); *Stuck v. Pioneer Loggins Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (stating that right to equitable indemnification do not exist between joint tortfeasors). Marick was the general contractor and permit holder for Phase II construction at Stoneledge. The party pulling a permit is ultimately responsible for compliance with the building code. Marick's own expert Randy Still confirmed both that in some areas of construction Marick violated the building code and that Marick was responsible for Phase II construction. Because Marick was the permit holder for Phase II construction, it violated the building code, and is ultimately responsible for construction, it cannot be adjudged without fault, and thus its claims for equitable indemnity must fail.

C. No Special Relationship between the Individual Defendants

Michael Franz is also entitled to summary judgment because there is no special relationship between Marick and Michael Franz. "Equitable indemnity is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party." *Rock Hill Tel.*

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Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). For there to be an equitable indemnification between two parties, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." *Rock Hill*, 363 S.C. at 390, 611 S.E.2d at 237.

There is no evidence in the record that Michael Franz performed any stonework or other construction related activities at Stoneledge, therefore there is no subcontractor relationship with Marick to support claims for equitable indemnification against Michael Franz.

CONCLUSION

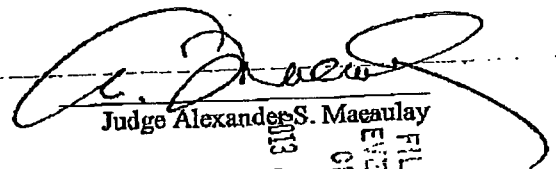
Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds there is no genuine issue of material fact that Marick's negligence cross-claim is subsumed by its equitable indemnification claim. This Court finds that Marick has at least some fault for the construction defects alleged and therefore cannot recover against Clear View Defendants under equitable indemnity because it is a joint tortfeasor. As an additional basis, this Court finds that there is no special relationship between Michael Franz and Marick to support claims for equitable indemnity.

The Court hereby GRANTS Defendants Clear View and Michael Franz's Motions for Summary Judgment as to Marick's cross-claims for negligence and equitable indemnity.

IT IS SO ORDERED.

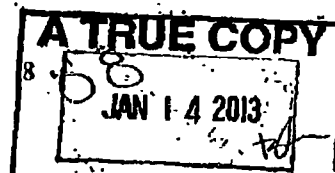
Walhalla, South Carolina

October 11, 2013



Judge Alexander S. Macaulay

FILED OCTOBER 30
EVERLY N. WHITEFIELD
CLERK OF COURT
JAN 14 PM 3 42



000666

EXHIBIT 2

FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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S/ALEXANDER S. MACAULAY

Circuit Court Judge

2063
Judge Code

01/11/2013
Date

SCRPC Form 4C (12/2011)

Page 1

000668

For Clerk of Court Office Use Only

This judgment was entered on the 14th day of January, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of January, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. W. Shufeldt
CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON
PLEAS

THE TENTH JUDICIAL CIRCUIT

Stoneledge at Lake Keowee Owners' Association,)
Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W.)
Davenport, Michael Furnari, Donna Furnari, Jessy)
B. Grasso, Nancy E. Grasso, Robert P. Hayes,)
Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W.)
Hund, III, Ruth B. Isaac, Michael D. Plourde,)
Mary Lou Plourde, Carol C. Pope, Steven B.)
Taylor, Bette J. Taylor, and Robert White,)
individually and on behalf of all others similarly)
situated,)

Plaintiffs,

vs.

IMK Development Co., LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee, LLC,)
Integrays Keowee Development, LLC, Marick)
Home Builders, LLC, Bostic Brothers)
Construction, Inc., Miller/Player & Associates,)
John Ludwig, William Cox, Larry D. Lollis, Rick)
Thoennes, M Group Construction and)
Development, LLC, Mel Morris, Joe Bostic, Jeff)
Bostic, Clear View Construction, LLC, Michael)
Franz, MHC Contractors, Miguel Porras)
Choncoas, Builders FirstSource Southeast Group,)
Mike Green, Southern Concrete Specialties, Carl)
Compton d/b/a Compton Enterprize a/k/a)
Compton Enterprises, Gunter Heating & Air, All)
Pro Heating, A/C & Refrigeration, LLC, Coleman)
Waterproofing, Heyward Electrical Services, Inc.,)
Tinsley Electrical, LLC, Hutch N Son)
Construction, Inc., Upstate Utilities, Inc., Southern)
Basements, Inc., Carl Catoe Construction, Inc.,)
T.G. Construction, LLC, Delfino Construction,)
Francisco Javier Zarate d/b/a Zarate Construction,)
Alejandro Avalos Cruz, Herberto Acros)

CASE NUMBER: 2009-CP-37-0652

ORDER GRANTING SUMMARY
JUDGMENT TO DEFENDANTS
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC,
SOUTHERN CONCRETE
SPECIALTIES, INC., CLEAR VIEW
CONSTRUCTION, LLC, AND
MICHAEL FRANZ AS TO THE
CROSS-CLAIMS OF MARICK
HOMEBUILDERS, LLC FOR
BREACH OF CONTRACT AND
BREACH OF WARRANTY

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BEVERLY H. WHITEFIELD
CLERK OF COURT
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Hernandez, Martin Hernandez-Aviles, Francisco)
Villalobos Lopez, Ambrosio Martinez-Ramirez,)
Ester Moran Mentado, Socorro Castillo Montel,)
Upstate Utilities, Inc., MJG Construction and)
~~Homebuilders, Inc. d/b/a MJG Construction.~~)
KMAC of the Carolinas, Inc., Eufacio Garcia,)
Everado Jaramillo, Garcia Parra Insulation, Inc.,)
J&J Construction, Jose Nino, Jose Manuel Garcia,)
Eason Construction, Inc., and Vincent Morales)
d/b/a Morales Masonry, and Miller/Player &)
Associates,)
Defendants.)

This matter came before the Court on September 5, 2012 for hearing on dispositive motions filed by Defendants Builders FirstSource – Southeast Group, LLC (“BFS”), Southern Concrete Specialities, Inc. (“Southern Concrete”), Clear View Construction, LLC, and Michael Franz (collectively “Clear View”)¹ as to the cross-claims of Defendant Marick Home Builders, LLC (“Marick”).² Appearing were David A. Root on behalf of BFS, Mason A. Goldsmith on behalf of Southern Concrete, Melissa M. Nichols on behalf of Clear View, and Jason M. Imhoff on behalf of Marick.

Procedural Posture

In its answer to Plaintiffs’ Third Amended Complaint, Marick asserted cross-claims against Defendants BFS, Southern Concrete, and Clear View alleging causes of action for Equitable Indemnity, Breach of Contract, Negligence, and Breach of Warranties. This Court has,

¹ Michael Franz was a member of Clear View Construction, LLC during the construction of Stoneledge. No evidence has been produced that Franz performed any construction related services on the project.

2109
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by separate orders, determined that BFS, Southern Concrete, and Clear View are entitled to judgment as a matter of law as to Marick's causes of action for negligence and equitable indemnity. ~~Thus, this order addresses the remaining causes of action asserted by Marick in its~~

Cross-Claims, which are styled "Breach of Contract" and "Breach of Warranty." As Marick's claims for Breach of Contract and Breach of Warranty are merely reworded equitable indemnity claims, which are barred by Marick's unclean hands, and in that Marick has no viable claims for contractual indemnity, this Court finds that Defendants BFS, Southern Concrete, and Clear View are entitled to summary judgment on Marick's causes of action for Breach of Contract and Breach of Warranty.

Standard

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC. The movant must first demonstrate that there is no genuine dispute of material fact. See Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. See Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him, thereby

²While these defendants filed separate motions for summary judgment, they are being treated together in this order as they are similarly postured in relation to the claims of Marick.

showing that there is a genuine issue for trial. See Miller, 365 S.C. at 220, 225, 616 S.E.2d at 730, 732.

~~When only one reasonable inference can be deduced from the evidence, it becomes a~~
question of law for the court, and not a question of fact for a jury. See National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581 (1934). Moreover, "a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be *reasonably* possible under the facts.'" Bloom v. Rayoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)) (emphasis added). Based on the aforementioned considerations, summary judgment is appropriate in this case.

Discussion

This case arises out of the construction of the Stoneledge at Lake Keowee townhouse complex located in West Union, South Carolina (the "Project"). The Project includes 80 townhouse units. There are three (3) to seven (7) individual townhouse units per building. The Project was constructed in two phases. Phase 1 consists of thirty-seven townhouse units. Phase 2 consists of forty-three townhouse units.

Marick was the general contractor during original construction of Phase 2 of the Project. BFS, Southern Concrete, and Clear View served as subcontractors for construction of Phase 2. BFS provided materials and labor for framing, siding, and related construction components.

Southern Concrete provided flat work and basement work. Clear View provided stone work.

**Marick's claims for Breach of Contract and Breach of Warranty
are claims for Equitable Indemnity and thus fail.**

BFS, Southern Concrete, and Clear View are entitled to summary judgment as to Marick's Breach of Contract and Breach of Warranty causes of action because these claims by Marick are merely disguised, or reworded, claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party [here allegedly BFS, Southern Concrete, or Clear View] is liable to pay a second party [here Marick] for a loss or damage the second party incurs to a third party [Plaintiffs]." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005); U.S. Fidelity & Guaranty Co. v. Patriot's Point Development Authority, 788 F. Supp. 880, 881 (D.S.C. 1992) (stating that the non-settling defendants did not have independent claims apart from indemnification and contribution because the claims were nothing more than claims for indemnity and because they would not exist without plaintiff suing the non-settling defendants); and S.C. National Bank v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990) (holding that the cross-claims against the settling defendants for breach of contract, negligence, and fraud were nothing more than claims for contribution or indemnification with a slight change in wording). The circuit courts in South Carolina have likewise found that claims for negligence, breach of warranty, and breach of contract are absorbed by the equitable indemnification claim. See Nelson v. John Weiland Homes, 2009-CP-10-6573 (unpublished order); Kirkland v. Cambridge Building Corp., 2006-CP-07-1312 (unpublished order).

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The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." State v. Yelsen Land Co., 257 S.C. 401, 403 (1972), Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239

S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Further, courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

After thoroughly reviewing the allegations contained in Marick's cross-claims for Breach of Contract and Breach of Warranty, the Court finds that they are claims for indemnity, regardless of the phraseology employed by Marick. In Marick's cross-claim for Equitable Indemnity³ it alleges that if Plaintiffs are entitled to judgment against it, then it is entitled to recovery from BFS, Southern Concrete, and Clear View, among others. This is a typical indemnification framework. Vermeer Carolina's, Inc., *supra*. Likewise, Marick's claims for Breach of Contract and Breach of Warranty set forth the same indemnity framework. (Marick's Answer to the Third Amended Complaint ¶¶ 162 and 174.) Though Marick uses different wording, the gravamen of its claims are the same; i.e., if Plaintiffs are entitled to judgment against Marick, then it is entitled to corresponding recovery from BFS, Southern Concrete, and Clear View; Marick is not alleging personal injury or property damage as to it. As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal

claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

As established by this Court's orders granting these Defendants summary judgment as to Marick's causes of action labelled Equitable Indemnity and Negligence, Marick is not without fault as to Plaintiffs' claimed damages, and thus, summary judgment on Marick's claims for equitable indemnity, termed "Breach of Contract" and "Breach of Warranty," is proper.⁴

Marick has no viable claims for contractual indemnity

To the extent Marick has argued that it is entitled to contractual indemnity, such claims also fail. As a preliminary matter, nowhere in its Answer and Cross-Claims does Marick allege an entitlement to contractual indemnity. Rather, Marick's Breach of Contract cause of action is premised on the notion that if Plaintiffs' allegations are proven true, then BFS, Southern Concrete, and Clear View provided defective materials or services in breach of their contract with Marick (Marick's Answer to the Third Amended Complaint ¶161), and such actions have

³As noted above, Marick's claim for Equitable Indemnity was disposed of by separate order, based primarily on Marick's inability to show that it was without fault as to the relevant construction deficiencies at the Project.

⁴Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Loggins Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Among other basis for ascribing fault to Marick is that Marick's own expert testified that Marick is not without fault; Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." Still Dep. 87:3-7 (Aug. 15, 2012). Still acknowledged that, in certain instances, Marick violated the building code.

Because Marick is the permit holder for Stoneledge Phase 2, it cannot be adjudged without fault. The party pulling a permit is ultimately responsible for compliance with the building code. Because Marick was the permit holder for Phase 2 and violated the building code according to its own expert, it cannot be adjudged without fault, and thus its claims for equitable indemnity fail.

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"resulted or could result in damage to Plaintiff, which could or will be assessed against Marick."

(Id. ¶ 162.) Marick's Breach of Contract causes of action makes no mention of a contract

~~between it and BFS, Clear View, or Southern Concrete which contains contractual~~

indemnification provisions which it is attempting to enforce. Further, to the extent Marick argues that it does have contracts with these parties that contain indemnification provisions, it has offered no evidence that the contracts applied to the Project or would otherwise be enforceable in this matter.⁵ Finally, Marick has presented no evidence to rebut evidence demonstrating that such contracts were not supported by consideration. The documents in question were signed after the subcontractors completed their work and Marick appears to have paid the subcontractors only for the work performed.⁶

Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds that no genuine issue of material fact exists and that BFS, Southern

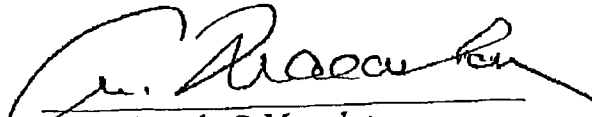
⁵The Court also takes notice that evidence was presented during its hearing on the various motions for summary judgment as to Marick's cross-claims that Marick had no contractor's license, and would thus be prohibited from enforcing a contract as a matter of law. (See Memorandum in Support of Carl Catoe Construction, Inc.'s Motion to Dismiss as to Marick Home Builders' Claims, dated August 30, 2012.) South Carolina Code § 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, it "may not bring an action either at law or in equity to enforce the provisions of a contract." South Carolina Code § 40-11-370(C). The same prohibition exists as to residential home builders. S.C. Code Ann. § 40-59-30. The plainly worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

⁶ Marick submitted a Supplemental Memorandum in Opposition to this motion, which included BFS, Southern Concrete and Clear View's "contracts" with Marick. While Marick argued a "hold harmless" provision in these contracts should apply, the Court notes that Marick provided no supporting evidence for the application of these documents to the Stoneledge Project and that they do not postdate the work performed by BFS, Southern Concrete and Clear View.

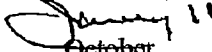
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Concrete, and Clear View are entitled to judgment as a matter of law as to the Cross-Claims of
Marick for Breach of Contract and Breach of Warranty.

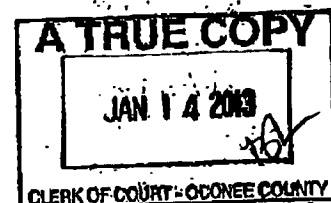
IT IS SO ORDERED.


Judge Alexander S. Macaulay

Walhalla, South Carolina


October __, 2013

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EXHIBIT 3



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY:

DATE:

10/1/07

BY:

DATE:

10-30-07

Rick Thoennes

NAME and TITLE

NAME and TITLE

Marick Home Bullder, LLC.

COMPANY NAME

COMPANY NAME

WITNESSED BY

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19

20 DEPOSITION of **DEREK HODGIN (DAY 2)**
21
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the January 24, 2012, commencing at
25 approximately 9:15 a.m. attended by counsel as follows:

1 believe the document that I looked at was Phase II,
2 based on a 2003 date. I can't be sure. I can't be
3 certain without looking at it closer. The exterior
4 ~~wall details really don't have much of any flashing~~
5 details. The only place that I saw flashing would
6 be at a roof/wall intersection. And all it does is
7 point to the intersection and say "flashing."
8 There's no blow up of how the flashing would be
9 installed or integrated. I don't recall seeing any
10 flashing detail at this location.

11 Q. Let's look so that we can put our eyes on it. Are
12 you going to start with 55?

13 A. Sure.

14 Q. Phase II, 55?

15 A. Sure.

16 Q. Since we're there already.

17 A. I believe the photographs that depict this
18 condition would be best reflected in Images 4646
19 through, I guess 4648. There's some additional
20 photos after that, but they're a little bit below
21 the water table.

22 Q. Let's go back.

23 A. Okay.

24 Q. A couple -- or a page to 4636.

25 A. Okay.

1 Q. And the reason I want to do that is I want to see

2 it before you tore it apart.

3 A. Okay.

4 Q. Or 4635.

5 A. Yes, sir.

6 Q. It appears to me that the siding actually
7 terminates, I don't know, inches above the water --
8 the stone water table. And there is a piece of
9 trim installed there with a piece of flashing over
10 it.

11 A. Yes, sir.

12 Q. Matter of fact, I think that may have been one of
13 the pieces we were just talking about.

14 A. Yes, sir.

15 Q. That has the caulk joint. Okay. Is this -- does
16 this installation still require yet another piece
17 of flashing between the trim and the stone water
18 table? Is that what you call a water table?

19 A. Yes.

20 Q. Okay.

21 A. I believe it's the manufacturer's requirements that
22 have the flashing above the water table. I would
23 think that it would be important to segregate the
24 two sections of cladding with flashing. And just
25 for clarification, the trim flashing is required by

- 1 the code. But I think toward the end of 703.8 it
2 says flashing shall be installed over projected
3 wood trim. Something like that, that you can't
4 have flat pieces of wood coming out of the wall
5 that aren't flashed. So the trim is really a
6 separate building code requirement that it be
7 flashed, which they did. There's some minor issues
8 with how that was done. But this is a separate
9 issue down at the stone water table level.
10 Q. So in your opinion this needs to be double flashed?
11 A. Correct.
12 Q. Let's go ahead and look at the Code Section 703.8,
13 I guess, is what you ---
14 A. Okay.
15 Q. --- cited.
16 A. It'd probably just be easier for me to ---
17 Q. You haven't looked at the code?
18 A. It should be in the report. But I was going to
19 look at it.
20 Q. Are you looking at 2003 or 2000?
21 A. I'm looking at the 2000 IRC and the commentary.
22 Also I don't know if you have the commentary. Do
23 you want to look at it at my copy and then let me
24 know if there's something you want me to read into
25 the record?

1 top of the stone water table. But we will need to
2 look at the manufacturer's instructions. I have
3 had some repairs where I violate the manufacturer's
4 instructions because I don't agree with them. And
5 I don't know if this is that case or not.

6 Q. But the issue we're talking about right now is the
7 flashing at the top of the stone water table which
8 you're not sure that it would be necessary or
9 appropriate anyway?

10 A. I think the manufacturer requires it. I think
11 that's why it's included in our matrix -- or the
12 table as an identified deviation from what was
13 required of the contractor when he constructed the
14 buildings at Stoneledge.

15 Q. Do you have those manufacturer installation
16 instructions close by?

17 A. I think they should be in the reference binder.

18 Q. Would they be attached to the back of your report?

19 A. I think so.

20 Q. Owens Corning Cultured Stone?

21 A. Yes, sir. I don't know if there's one specific to
22 cedar siding. I'm looking at a page of details
23 from Owens Corning Cultured Stone, Best Practices
24 for Flashing Details.

25 Q. Yes. Do you have a page?

- 1 A. I think it's Page 4. And at the bottom left it
2 looks like 1-B. I believe it's stucco above the
3 water table. But the detail is generically
4 identified as "sheathing and wood studs, water
5 table or wainscot." So basically this is when your
6 entire wall is not covered with stone, you've got
7 to interrupt and you've got this water table
8 feature. There is a GSM flashing identified. It
9 says, "See note A2." It extends, in this case,
10 from behind the stucco out onto the stone sill. I
11 think GSM is metal flashing.
- 12 Q. Will you flip to page 8 for me, please?
- 13 A. Sure.
- 14 Q. And this may not be right, but it seems closer.
15 Where you have at 1B, "Sheathing/wood studs,
16 horizontal trim, recessed base flashing." Is
17 this -- and there's another one right next to it
18 also that has wood, the horizontal trim piece, and
19 then the stone below.
- 20 A. I don't think any of them have exactly what we
21 have. I mean, the reason I picked the -- that
22 first one was because it has the sill component.
23 And it was identified as water table -- as the
24 water table detail. But it doesn't matter which
25 one you look at. All three of them, that one on

1 page 4, and then two of them on page 8, both the
2 1.14A and 1.14B also call out that same GSM
3 flashing. See note A2.

4 Q. So I don't know that that helped or not. Were you
5 actually able to get your hands on the Owens
6 Corning instructions that were provided with the
7 stones installed at the project?

8 A. I don't know that -- we have various dates, I think
9 from late nineties or early 2000s to 2009 maybe.
10 This one looks like 2006 is this date. All the
11 versions I've seen include I believe those same set
12 of details.

13 Q. Is this condition causing damage?

14 A. Well, I know that we've seen -- I believe there's
15 been some damage below the water table feature in
16 the areas of the stone. But I don't know that I
17 could directly correlate it to that one particular
18 detail. Again, I would say one set of flashing,
19 either above or below that sill, would be
20 sufficient to keep water from migrating behind the
21 stone.

22 Q. Have you composed a remedy for this issue?

23 A. Well, I think generically it's to remove the stone
24 and install it in accordance with the
25 manufacturer's instructions.

1 A. You'll have to look at the photographs to see the
2 extent of destructive testing in the area with the
3 stone.

4 Q. ~~Well, let's look at -- well, we're at 55. Aren't~~

5 we? 55 in D6 and 81 in D5, let's look at those.

6 A. Okay.

7 Q. Let's do 55 first.

8 A. Were you asking about damages at 55?

9 Q. Right.

10 A. There's no stone removed below this improper
11 detail.

12 Q. Oh. What's 4649 and 4650?

13 A. That's, I think probably a bigger problem than the
14 flashing, is that -- I mean, I think I talked about
15 it briefly earlier is that, I think properly
16 they've installed an additional layer of weather-
17 resistant barrier. I believe in most cases it was
18 identified to be felt. Asphalt-saturated building
19 felt.

20 Q. Is that the Grace Vycor Plus?

21 A. No. That would be self adhered flashing. Do you
22 see in 4649 and 4650 where there's -- somebody's
23 finger is pinching the felt in 49. And then a
24 knife being placed behind the felt in 50?

25 Q. Yes.

1 A. That means that any water that comes down the face
2 of the weather-resistant barrier from above is
3 going to go directly behind that felt and be in
4 intimate contact with the one layer of weather-

5 resistant barrier behind it. That's a significant
6 problem particularly in brick veneer and any kind
7 of intimate masonry exterior wall assembly.

8 Q. Back to the damage, do you see -- so no stone was
9 taken off of this one. So as to Unit 55 we can't
10 say whether or not this condition caused the
11 damage?

12 A. Not directly, no. I would have to -- and I would
13 probably take off stone toward the base of the wall
14 just from a gravity standpoint, that water would
15 migrate to the base of the wall and collect at that
16 location.

17 Q. Let's look at Unit 73. Are we back to Dr. Hund's
18 unit, I guess?

19 A. I believe so, yes. I've seen photographs of the
20 specific issue that we're discussing. But again,
21 no stone removed from below that detail.

22 Q. So as to Unit 73, we cannot say whether or not that
23 condition is causing damage?

24 A. I think I agree with that.

25 Q. Let's go to 81.

1 ~~weather-resistant barriers.~~

2 Q. Well, that's what I'm asking you. I mean,
3 obviously, you know, hindsight is 20/20. But at

4 the time that the contractors built this building
5 were they -- did they deviate from a code
6 requirement or an industry standard in regard to
7 the way they constructed it and the barriers that
8 they used?

9 A. I would say from a code standpoint, only -- the
10 other thing we saw in 703.8 was that flashing
11 should have been installed below the water table.
12 The above the water table came from the
13 manufacturer. And the double layer of weather-
14 resistant barrier came from the manufacturer. So
15 the only violations you would have would be 703.8
16 for the under the water table. And the
17 manufacturer for the over the water table and
18 possibly if there is a mixture of weather barriers
19 that are used that are not approved by the
20 manufacturer. I haven't researched that. You
21 know, I guess one thing that would violate the code
22 is that when you do put a weather-resistant barrier
23 on it has to be installed in a weather lapped
24 fashion. So I would say that's a code violation,
25 that they put that second layer behind the stone on

1 top of the first layer.

2 Q. But anyway, it shouldn't have lapped behind the
3 weather-resistant barrier above it?

4 A. Right. So from water migrating from above, you
5 totally lost the benefit of that second layer. And
6 now you've got water trapped between the two layers
7 of the weather-resistant barrier.

8 Q. I don't want to get into a philosophical argument
9 about how this should be done or not. But it seems
10 to me that the manufacturer's instructions and the
11 code and what you're saying are all inconsistent
12 with each other. In other words, it could be read
13 to require three sets of flashing, one above the
14 trim, one above the water table, one below the
15 water table?

16 A. I think that is what's required, yes.

17 Q. Which would make it impossible to incorporate the
18 water -- or the weather-resistant barrier into all
19 three of those effectively unless you were cutting
20 out strips of weather-resistant barrier at each one
21 of those locations?

22 A. Right. It would be interlaced, kind of like you do
23 cedar shakes. You would have layers of weather-
24 resistant barrier between those three sets of
25 flashing.

1 ~~code allow an on-site builder to use alternate and~~
2 adequate means of construction?

3 A. You'll have to be more specific than that. There's

4 a section in the code that talks about alternate
5 products that can be used. And if they're not
6 specifically addressed by the code, the building
7 official can ask for code evaluation reports or
8 some evidence of code compliance.

9 Q. Can I see your ---

10 A. Yeah.

11 Q. --- code there a minute, please? And this is the
12 only one you have? This is 2000?

13 A. Correct.

14 Q. Well, we'll have to come back to that. I can't
15 find it in my notes.

16 A. Is that what you were talking about though? The
17 alternate materials?

18 Q. No. We'll just have to come back to that.

19 BY MR. IMHOFF:

20 All right. What time is it?

21 (OFF THE RECORD).

22 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

23 Q. Does your repair scope include removing all of the
24 stone on all of the Stoneledge units?

25 A. I can't think of any place that we are able to

1 ~~salvage it, no. I'm sorry. I think the answer is~~

2 yes.

3 Q. And you have provided that repair scope despite the

4 fact that your testimony is today that you don't

5 know whether or not there's any damage behind the

6 stone?

7 A. Not on Phase II. That's correct. I just know the
8 details are the same between the two phases. And
9 we've found extensive damage behind the stone in
10 Phase I.

11 Q. I'm going to hand you Exhibit Number 72 again. It
12 looks like 7 and 8 may need a line between them?

13 A. I need to borrow Randy's version, I think.

14 Q. When you do it, will you state if for the record
15 for the table, please?

16 A. There's a couple pages.

17 Q. Go ahead and tell us what you did, please.

18 A. The first line that I drew between Issues 7 and 8
19 are between Unit Number 73 and 15. If you go to
20 the next page, I added three lines. Between Issues
21 10 and 11, the line goes between Unit 66 and Unit
22 8. Between 11 and 12 between Unit 66 and 25 and
23 between 12 and 13 between Units 91 and 33.

24 Q. Let's move on to D7.

25 A. Okay.

1 Q. And just in general describe what that defect is,
2 please.

3 A. I think this reverse lap is what we got sidetracked
4 onto in our previous discussion that in addition to
5 not having the proper flashing at the intersection
6 of the stone and the cedar that the second layer of
7 weather-resistant barrier installed behind the
8 stone was simply put on top of the first layer,
9 allowing any water migrating from up above to go
10 directly behind that second layer.

11 Q. Your consequence damage there says, "Damage
12 observed to sheathing and wall framing, interior
13 gypsum wall and floor damage observed." Is that
14 from the emergency repair that you did in Phase I?

15 A. I believe so. Are 55 and 73 the ones we've
16 previously looked at?

17 Q. Yeah. Well, 55 is directly above in 6, and 73 is
18 directly above in 5. So it was one of the four
19 that we -- the -- two of the four that we just
20 looked at.

21 A. Okay. So the damage that we observed is definitely
22 the emergency repair on 32.

23 Q. And not the issue at 55 and 73?

24 A. Correct. Would you like to look at the pictures of
25 32?

1 Q. I'll let somebody else do that, because we're
2 moving pretty slow.

3 A. All right.

4 Q. Let's move on to 8, and I guess 9 at the same time.
5 It looks like they're both talking about windows?

6 A. Yes.

7 Q. Well, back to Unit 55, I guess, since we're here.

8 A. 55 is not part of Issue Number 8.

9 Q. No, but it's part of Issue Number 9.

10 A. Okay.

11 Q. It looks like for both 8 and 9, again, you've cited
12 the general provision of 703.8. -- Well, no, you cite
13 Note 3 and Note 4 about "Under and at the ends of
14 masonry wood or metal copings and sills," and Note
15 4, continuously above all projecting wood trim,"
16 corrosion-resistant flashing needs to be installed.
17 All right. Let's look at that, and identify a
18 picture, if you would. Or a photo, I should say.

19 A. I don't know that that's an issue a whole lot
20 different than Number 6. I mean, I know it's in
21 that same area. So what this is saying is that
22 there should be flashing not only at the cedar to
23 stone intersection, but also the window stone
24 intersection. There should be flashing below
25 the -- between the window and that stone sill, I

1 ~~guess it would be called at this location.~~

2 Q. Let me make sure that I understand. What is the
3 trim material?

4 A. Around the window?

5 Q. Well, around the window and above the stone water
6 table?

7 A. Cedar.

8 Q. That's a piece of cedar trim?

9 A. Yes, sir.

10 Q. So if we look at, I guess Photograph 4636 where you
11 can see the bottom of the trim piece around the
12 window right above the water table feature, the
13 stone water table feature?

14 A. Yes, sir.

15 Q. That's where you say a piece of flashing needs to
16 be put?

17 A. I believe it would be below the sill. Below the
18 window sill, which we have been calling a water
19 table at -- running away from the window we call it
20 a water table. Here it's a sill. And there should
21 be flashing that extends out below that location
22 based on that section of the code.

23 Q. Below the piece of stone?

24 A. Right.

25 Q. That creates the sill?

1 hard time. I'm giving you a hard time -- I'm just
2 asking you questions to try to identify what you've
3 done, and what your opinions are, and why you have
4 come to those opinions. And then what your scope
5 of repair is going to be.

6 A. Right. And my only point was this is not such a
7 different repair scope than it would be if I was
8 working for you on the defense.

9 BY MR. IMHOFF:

10 What time is it? It's 12:40.

11 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

12 Q. I think we're done with 9.

13 A. Okay.

14 Q. Let's do 10 real quick and then we'll stop.

15 A. Okay.

16 Q. All right. Essentially -- well, tell us in general
17 what this is -- what this condition is?

18 A. I believe in our observations -- and it has several
19 units listed. But again, this is one of those
20 issues that you can walk around the project and see
21 repeatedly on, I believe all the buildings. Is
22 that the stone continues in an uninterrupted manner
23 down to grade -- and actually, the next issue is
24 below grade, without any base of wall flashing or
25 weep provision.

1 Q. ~~Let's go ahead and look at 59, if we could?~~

2 A. Okay.

3 Q. This looks to be the new one. The one we talked
4 about before.

5 A. I seem to have two sets of the same photographs.
6 I'm not sure. Yeah, there's a tag that says
7 "duplicate photos." There's some field notes from
8 Mr. Metcalf on July 1st, 2010. And then some
9 photographs at the base of one of the stone clad
10 walls.

11 Q. And this just evidences the lack of the -- what do
12 you call it, through flashing at the base of the
13 wall?

14 A. You might be referring to through wall flashing,
15 which is flashing that would extend from behind the
16 weather-resistant barrier, through the outer
17 masonry veneer to daylight. That's what we -- what
18 would be missing.

19 Q. Is that what this issue is?

20 A. Yes.

21 Q. I think you've told me previously that you have not
22 actually taken any stone off to see if there's
23 damage to this wall. I don't see that you've done
24 that here, and I don't see any photographs on
25 damage to the wall. Am I wrong about that?

1 Q. Let's go to 66, which I think is the next one.

2 A. All right.

3 Q. This looks to be a fairly large file.

4 A. ~~All right. I found some exterior wall photos, but~~
5 the stone goes below grade, and there is no
6 excavation to see where the stone actually
7 terminates. But my earlier point was that the
8 entire purpose of the base of the wall flashing
9 would be to exit water in front of the wood framed
10 wall areas. And so you would see this flashing
11 extending through a linear, horizontal joint at the
12 base of the wall between the concrete foundation
13 and the wood framing, which you don't see in
14 Photographs 0595 through 0603. So they're kind of
15 overview pictures. But what's being shown is the
16 absence of any flashing that would extend through
17 the stone.

18 Q. And you haven't done any investigation or
19 destructive testing to determine if there's any
20 damage between or behind the stone on any of the
21 units that you looked at in Phase II?

22 A. The only thing -- and I didn't think about it a
23 minute ago when you asked me the question. We were
24 looking at these photographs -- and maybe that's
25 the reason we were taking pictures of this outside

1 wall. Because there seems to be extensive flooding
2 of the basement of this particular unit where he
3 has wet carpet and stains coming down the inside of
4 the concrete wall and damages to the base of the
5 wall in the finished basement. It's hard to say.
6 Certainly this detail, even though it's intended to
7 protect the wood framing, would contribute to the
8 amount of water that the concrete wall below sees
9 or is exposed to. So you can't really separate
10 those. I mean, it's got to be a contributing
11 factor. But I wouldn't be able to say to what
12 extent it contributes to his flooding.

13 Q. It looks like we've knocked Number 11 out too,
14 because it is the same units in Phase I, 59, 65,
15 and 66, and is -- the fact that you've pointed out
16 that the stone veneer is installed below grade?

17 A. Yes, sir.

18 BY MR. IMHOFF:

19 Lunch?

20 BY WITNESS:

21 Sure.

22 BY MR. IMHOFF:

23 Okay, let's just stop here for lunch?

24 (OFF THE RECORD).

25 EXAMINATION RESUMED BY MS. MONTAGUE:

1 ~~regarding the stone veneer, its termination,~~
2 presence or absence of any weep system and the
3 extent that it extended below grade.

4 Q. So what is your opinion as to why the stone veneer
5 being installed below grade is incorrect?

6 A. Well, if there was a proper weep hole and flashing
7 system, I don't think all by itself it would
8 necessarily be a significant issue. What makes it
9 more important on these buildings is that there's a
10 totally uninterrupted path for termites to get
11 behind the stone and travel up to the OSB wall
12 sheathing and wood framing.

13 Q. Have you seen any evidence of live termites or
14 termite damage?

15 A. The only place that I recall stone being removed
16 near the base of the wall was the emergency repair
17 on 32.

18 Q. So this is Unit Number 32?

19 A. Right, Unit Number 32. And I don't recall, we'll
20 have to look at those photographs to see the extent
21 of any termites that may have been present. So we
22 haven't explored the extent of any termite damage
23 at the base of the wall.

24 Q. Do you mind pulling up 32? Do you have that in
25 front of you, so we can see those photos? Is 32 in

1 drawings that show wood framed balconies. I think
2 I've only seen the CMU and concrete. But somebody
3 made a switch to have the wood trusses and the
4 ~~pressure treated framing.~~

5 Q. All right, let's pick back up where we left off on
6 your on Exhibit Number 72.

7 A. Okay.

8 Q. I think we're at 12; is that ---

9 A. I think that's right.

10 Q. Seem about right?

11 A. Yeah.

12 Q. This seems fairly obvious. Some of the stone
13 wasn't adhered properly and may fall off?

14 A. Yes.

15 Q. It looks like you've identified three units where
16 that has happened. Let's go ahead to 73.

17 A. Okay.

18 Q. I guess this is Dr. Hund's unit again?

19 A. I believe so, yes. It looks like stone that's
20 popped off here is right below the ceiling in
21 Photos -- well, you can see it kind of in the
22 background, 2141.

23 Q. I got to get there. Just a minute, please. Okay.

24 A. And then the other one, it cuts off the image
25 number on the bottom. So if you just go from 2141

1 Q. ~~Oh, yeah. 19. I think it was 19. Well, no, I~~
2 skipped 19, because that's just in Phase I; is that
3 right?

4 A. It looks like it, yeah.

5 Q. "Inadequate wall sheathing attachment," you're
6 talking about the OSB or the plywood or whatever
7 exterior sheathing?

8 A. Yes.

9 Q. Didn't have enough nails or something like that?

10 A. Correct.

11 Q. And you found that in one place in Phase I?

12 A. It looks like it was just found during exterior
13 wall emergency repair.

14 Q. And you didn't find that anywhere in Phase II?

15 A. No. I don't think we were looking for it in Phase
16 I, it just happened to be observed during an
17 emergency repair. And I wouldn't propose that
18 that's some kind of widespread issue. To the
19 extent that OSB is exposed during a repair process
20 and nails are found to be inadequate, then you
21 would just add some nails.

22 Q. Let's talk about 20. "Cultured stone veneer is
23 installed in contact with the concrete path/stoop."
24 Let's go ahead and look at 76.

25 A. Okay.

1 Q. so we can get an idea of what ---

2 A. It says, "7/1/2010" at the set of notes. It looks
3 like the photographs -- there's a series of

4 photographs, but in terms of regarding this
5 particular condition it would be images 7241
6 through 7246 prior to removing the stone, seeing
7 how it terminates against the top of a concrete
8 balcony.

9 Q. And maybe I misunderstood that. This is talking
10 about on top of the balcony or on the balcony?

11 A. Well, it could be at other locations. Like it
12 could be below the balcony, where that same column
13 would hit the slab on grade foundation. Or it
14 could be -- we don't show it, but there would be at
15 the front entrance in that 7240, those stone clad
16 base of columns would come down against a concrete
17 entry porch.

18 Q. And that is, according to your chart here, a
19 manufacturer's installation instruction violation?

20 A. Yes, sir.

21 Q. What is the violation, exactly?

22 A. Well, they were supposed to be held up off of these
23 surfaces. I can think of a couple of reasons why
24 that would be important. I don't know exactly what
25 the manufacturer details, without looking at it,

1 but I know that there's a flashing detail or a
2 termination detail a certain height above concrete
3 surfaces.

4 Q. To allow it to drain?

5 A. To allow it to drain. And to the extent that you
6 have flashing that's coming up from below, you
7 don't want to have say your weep screed or some
8 other accessory penetrate the flashing too low on
9 the column. That would cause a water penetration
10 point. Weep screed is W-E-E-P S-C-R-E-E-D.

11 Q. Can we go to the Owens Corning ---

12 A. Yes.

13 Q. --- installation instructions? I'm not sure I'm
14 following it. And while you're looking, this is
15 purely an installation instruction issue? It's not
16 a code issue, other than the code requires you to
17 follow a manufacturer's instructions?

18 A. I mean, I guess you could throw in the 703.1 or
19 maybe 703.8. We could look at it to see, but I
20 would say primarily it would be a manufacturer-
21 related issue. I don't see any detail that shows
22 exactly what we have. I do see like a paving
23 surface, like paver block surfaces on Page 3 of the
24 instructions that are including in our report,
25 which is "Owens Corning Cultured Stone Best

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3 Stoneledge at Lake Keowee

4 Owners' Association, et.al.,

5 Plaintiffs,

6 vs.

7 SDI Funding, LLC, Ludwig

8 Corporation, LLC, et.al.,

9 Defendants,

10 Marick Home Builders, LLC,

11 Third-Party Plaintiff,

12 vs.

13 Michael Franz, Clearview

14 Construction, et. al.

15 Third-Party Defendants,

16 Builders FirstSource-SE Group,

17 Fourth-Party Plaintiff,

18 vs.

19 Carl Catoe Construction, Inc.,

20 Fourth-Party Defendant.

21 DEPOSITION of **FREDERICK (RICK) R. THOENNES**

22

23 Pursuant to notice, a deposition was taken in the
24 above case on the November 21, 2011, commencing at
25 approximately 10:10 a.m. attended by counsel as follows:

1 A. I don't know.

2 Q. How about this, at the height of Marick's existence
3 when it was at its busiest, how many employees did

4 it have?

5 A. Probably three or four.

6 Q. Describe the job duties or titles of those
7 employees.

8 A. Administrative Assistant in the office. Would have
9 had a superintendent, assistant superintendent and
10 probably a laborer.

11 Q. So when Marick was doing its construction it
12 subcontracted out its work?

13 A. Correct.

14 Q. And who at Marick was responsible for selecting and
15 contacting with subcontractors?

16 A. Me.

17 Q. And who at Marick was responsible for observing and
18 supervising the work of subcontractors?

19 A. Our superintendents.

20 Q. Can you name your superintendents at Marick, and
21 tell me the years that they were with Marick?

22 A. I don't know about that, but I can tell you some of
23 the superintendents.

24 Q. Okay.

25 A. Matthew Gooch ---

1 Q. Can you spell that last name?

2 A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday,
3 just like it sounds. There's a couple I can picture

4 but I can't name. There are probably two, maybe
5 three others.

6 Q. Who was the superintendent who was responsible for
7 observation and supervision of the subcontractors in
8 connection with what Marick did at the Stoneledge
9 project?

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

13 Q. Did Mr. Hornaday hold any sort of license,
14 contractor's license?

15 A. I don't know. Not that I know of.

16 Q. Who hired Mr. Hornaday?

17 A. I did.

18 Q. Are you the one that assigned him to the -- his
19 responsibilities in connection with the Stoneledge
20 project?

21 A. Yes.

22 Q. What were his qualifications such that you felt
23 comfortable he could supervise subcontractors' work
24 at the Stoneledge project?

25 A. He had worked as a subcontractor for us for years

1 A. There were one or two laborers down there and an
2 on-site administrative assistant.

3 Q. What would you have expected the role of the
4 laborers of Marick to be at the Stoneledge project?

5 A. Well, Nathan hired them and supervised them so he
6 would have told them what their responsibilities
7 would have been.

8 Q. What was your expectation of what work they would
9 have been performing for Marick?

10 A. Whatever Nathan needed.

11 Q. Okay. Do you know as you're testifying today what
12 work was, at Stoneledge, was actually done by
13 laborers employed by Marick?

14 A. I know some. They would clean up, keep the streets
15 clean, keep the units clean. Those are things I
16 observed when I went down there.

17 Q. Is there any aspect of the construction of the
18 Stoneledge units that was done by Marick that you
19 believe was self-performed by Marick or was it all
20 done by subcontractors?

21 A. I think it was all subcontracted other than the
22 cleanup like they -- like I mentioned.

23 Q. Okay. Did Mr. Hornaday ever express to you any
24 concern about the quality of the work at Stoneledge
25 that was being performed by the subcontractors?

1 ~~Q. Had you had any experience with Carl Catoe before?~~

2 A. No.

3 Q. Did you have occasion to talk with or observe the

4 work being done by Carl Catoe or his crews?

5 A. Some.

6 Q. Did you have any questions about the work they were
7 doing?

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

25 Larry, I'm sorry, I couldn't. Was that once a week

1 ~~he was on site?~~

2 WITNESS ANSWERS:

3 A. A week to a week and a half.

4 Q. He was on site once a week or once every week and a
5 half. During the time that the framing work was
6 being done, did Nathan ever indicate to you that he
7 had any problems or had corrected any of the work
8 that Carl Catoe was doing?

9 A. I don't recall any workman type problems except for
10 one. We had a floor truss that was put in wrong and
11 we had to support it. That's the only thing that
12 jumps out at me. Of course, we always looked at
13 scheduling, and for the most part he manned the job
14 the way he was supposed to.

15 Q. Any problems associated with the installation of the
16 building wrap or the flashing?

17 A. Not that I know of. Nathan would've seen that.

18 Q. Pardon?

19 A. Nathan would've seen that and he didn't mention it
20 to me.

21 Q. If there had been a problem, would he have mentioned
22 it to you?

23 A. You have to ask him.

24 Q. Would you, I mean, based upon you working with him
25 over the time, would you have expected him to ---

1 A. No.

2 Q. You were on site approximately once a week?

3 A. Once to once, every week and a half.

4 Q. And your communications, though, with Nathan were
5 how consistent?

6 A. Daily.

7 Q. What kind of ---

8 A. Well, I say "daily," there may have been a day he
9 was gone or I was gone, but for the most part daily.

10 Q. As far as a quantity of time, how much time during a
11 typical week would you spend talking to Nathan?

12 A. No idea.

13 Q. Couldn't say?

14 A. Wouldn't even venture to guess. One week it could
15 be, you know, an hour, next week it could be five
16 minutes, next week it could be two hours.

17 Q. I understand. Was there any particular stage of
18 construction during which you were on the site more
19 frequently than another stage?

20 A. Probably during the layout, like when they were
21 staking or that kind of thing. If they were doing
22 any work on the lake itself, then I was there.

23 Q. As to Nathan's onsite time, you said essentially for
24 a vacation or something where you would expect
25 someone to be absent from the site, he was generally

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

5 Q. Ten to twelve. Did you have any, during the course
6 of the construction of Phase II, any interactions
7 with any employees or representatives of Builders
8 First Source, BFS?

9 A. Yes.

10 Q. Who?

11 A. Lots of people. Mike Green, Brock Bauknight,
12 Elaine, can't remember her last name, for the
13 windows ---

14 Q. And that's what I was going to get to next if you
15 want to say that while you go through their names,
16 you can tell me what you dealt with them about. You
17 said Elaine you dealt with windows?

18 A. Right. I think windows and doors.

19 Q. Mike Green?

20 A. Mike Green, I dealt with materials and labor.

21 Q. All right, go ahead.

22 A. And Brock Bauknight was my outside representative
23 that I dealt with on all of those things.

24 Q. General outside sales?

25 A. That's right. He handled my account.

1 Catoe? That is, who did monthly inspections for
2 subcontractor payment?

3 A. Nathan would inspect -- well, there was a draw

4 schedule that Mike Green and I worked out --

5 Q. Okay.

6 A. --- for all aspects when we did the contract and
7 then all Nathan had to do was look and see what
8 portion of that schedule was done and then he'd sign
9 off on it and then we'd pay it. Not Carl, BFS.

10 Q. Yeah, right, because Carl was -- Carl Catoe was not
11 your subcontractor, correct?

12 A. That's correct.

13 Q. Only Builders First Source was?

14 A. Correct.

15 Q. But nonetheless you got to occasionally communicate
16 with Carl Catoe by virtue of being on the site?

17 A. Sure.

18 Q. Did anyone at Marick ever call or otherwise contact
19 Carl Catoe Construction regarding any warranty
20 issues?

21 A. I'm sure Nathan did.

22 Q. You say that you're sure he did. What do you know
23 that he did?

24 A. Siding that had warped and popped, a truss, the
25 truss that was over-spanned.

- 1 Q. Was Nathan calling Carl Catoe or Builders First
2 Source with these issues?
3 A. Both. I mean it would start with Carl to see if it
4 could be worked out in the field, I'm sure, but then
5 it would go -- if it couldn't be worked out in the
6 field with Carl then it would go to Builders First
7 Source.
8 Q. I had asked you about warranty issues, and to me
9 typically that means issues once you've left a
10 site ---
11 A. Oh, oh, I don't know of -- I don't know of any.
12 Q. But you were starting to tell me about some issues
13 while construction was ongoing ---
14 A. Right.
15 Q. --- and you mentioned some siding that was warping
16 and popping and then you mentioned the over-spanned
17 truss issue that you already talked about with
18 David. On the siding that was warping or popping,
19 was it an isolated board, was it widespread or was
20 it somewhere in between those two?
21 A. No, I mean, it was an isolated board according to
22 Nathan. He called and asked Carl to fix it.
23 Normally they were on site, but after they had left
24 site then he'd have to call Builders First Source.
25 Q. And was Builders First Source generally responsive?

1 A. Would ---

2 Q. I'm sorry, the finished floor, not the finished
3 grade.

4 A. No.

5 Q. Would you expect it to show the grade at the
6 building?

7 A. Yes, within plus or minus.

8 Q. Would you expect it to show the slope away from the
9 building?

10 A. Yes.

11 Q. If the Freeland drawings don't show or did not show
12 the grade at the building, how would the -- to your
13 knowledge, how would the grading subcontractor know
14 where to set the grade?

15 A. You're asking a hypothetical question there.. It
16 should show it, period.

17 Q. I think you said that you assumed that Nathan
18 contacted Hutch N Son regarding some issues with the
19 grade, do you know that for sure or do you just
20 assume that?

21 A. No, I know that for sure.

22 Q. Okay. And that was relating to this standing water?

23 A. Standing water and the slope.

24 Q. And the slope?

25 A. Yes.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **NATHAN HORNADAY**
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the March 30, 2012 commencing at
25 approximately 10:15 a.m. attended by counsel as follows:

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

4 Q. Had you ever -- when you went to Stoneledge, had
5 you ever been a supervisor or superintendent on a
6 job?

7 A. No.

8 Q. When you went over there, did you think that you
9 had the skills to be -- did you call yourself
10 supervisor or superintendent first of all. Let me
11 ask you that. Or what title did you use, if you
12 used one?

13 A. Supervisor. I mean, I was mostly just supervising
14 everything that was being done.

15 Q. Were you supervising subcontractors?

16 A. Yes.

17 Q. Or did Marick have any other employees doing such
18 things as framing or other work of that type?

19 A. No.

20 Q. So it was all -- all the work was being done by
21 subcontractors?

22 A. Yes.

23 Q. Prior to the time you went to Stoneledge, had you
24 ever supervised subcontractors?

25 A. No.

1 Q. ~~When you arrived at Stoneledge, did you feel like~~
2 you were up to that job?

3 A. Yes.

4 Q. In other words, you felt like you had enough
5 general experience to be able to monitor what the
6 different subs were doing and to determine whether
7 they were doing it correctly or not?

8 A. Yes.

9 Q. And were there times when you thought they were not
10 doing something correctly?

11 A. No.

12 Q. So basically the subs you felt like were proceeding
13 correctly?

14 A. I believe each sub, depending on what he did, I
15 mean, obviously knew more than I did about it.
16 That's why we hired them. And each sub, you know,
17 was an expert in their field. So I was basically
18 there to make sure -- schedule them to do their
19 work, when to come in, and make sure they got it
20 done.

21 Q. I understand that. Did you ever see something that
22 caused you to say to a sub, "Wait a minute, I don't
23 like the way you're doing that"?

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

2 Q. Do you remember specific instances, or are you just
3 saying that from time to time ---

4 A. From time to time I would see something that they
5 would cut a corner on, but I would talk to them and
6 they would fix it. But it was nothing major. It
7 was like nail guards on pipes, painting, you know,
8 caulking, stuff like that, on the inside -- the
9 interior unit.

10 Q. Did you do any work on Phase I?

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

14 Q. And what -- I'm sorry.

15 A. --- supervised a lot of repair work.

16 Q. By the way, if I start to ask you a question before
17 you finish -- I'll try not to do that, but
18 sometimes you can't help it.

19 A. Okay.

20 Q. Just let me know there's more in your answer.

21 A. Okay.

22 Q. Did this supervising of repair work in Phase I, was
23 that going on while ---

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

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14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **J. DREW WILKIE**
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the August 16, 2012 commencing at
25 approximately 10:12 a.m. attended by counsel as follows:

1 Q. Do you have any idea what amount of supervision and
2 direction was given to Clear View?

3 A. Based on some of the testimony I've read by, I
4 ~~believe Mr. Hornaday, there was some supervision~~
5 provided and I think he was -- Mr. Hornaday was in a
6 role of providing for that supervision. Aside from
7 what Mr. Hornaday said in his deposition I'm not
8 aware of what other supervision there was.

9 Q. Do you know what supervision of its employees was
10 provided by Clear View?

11 A. I do not.

12 Q. Do you know what direction was provided by Clear
13 View?

14 A. I do not.

15 Q. Do you know if Clear View had the Owens Corning
16 manufacturer's installation instructions?

17 A. I do not.

18 Q. Where could a subcontractor obtain installation
19 instructions for this type of stone; do they come
20 with the box of stone or on the side or is it
21 something you need to go and search out on the web
22 or how does that -- how do you get those
23 instructions?

24 A. In 2006 I don't know whether the instructions
25 would've been adhered to the packaging of the

1 ~~outboard of the weather-resistant barrier that's on~~
2 the wall sheathing underneath it. So it's -- this
3 is all occurring outboard so I don't think that

4 that -- that the presence of that gap or crack is a
5 condition that by itself is a violation of the
6 building code. Is that what you were asking?

7 Q. Right.

8 A. Okay.

9 Q. Do you know or do you have an opinion why that
10 mortar has cracked or shrunk or gapped at that area?

11 A. There are several reasons that that crack or gap
12 could form. Do you want me to ---

13 Q. Yes.

14 A. --- give you examples of what some of them could be?

15 Q. Sure.

16 A. I don't know what the major reason is or what all of
17 the reasons are but there are several that could be
18 occurring there. One is simply that the mortar
19 joint between the edge of the slab and the nosing
20 stone can become wet and be subjected to changes in
21 temperature, freeze/thaw and could just become
22 loose, some of those stones could become loose due
23 to freeze/thaw action, that's one possibility.
24 Another force that could be applied to that stone is
25 from the bottom rail of the guard assembly. The

1 ~~bottom rail of the guard assembly is comprised of~~
2 wood and in some places the guard assembly is
3 sitting so close and actually in contact with what
4 amounts to be the back of the mortar joint for the
5 nosing stone, that if and when that wood expands and
6 contracts due to wetting and drying cycles, it can
7 exert force onto that nosing stone and cause it to
8 de-bond from its substrate. Another possible force
9 that could be applied to that stone to cause it to
10 de-bond is that the wood materials that are directly
11 underneath the outboard edge of the balcony slab, in
12 places where destructive testing was performed, they
13 were damp. The increase in moisture content of
14 those wooden materials can expand the wood and exert
15 force on the back of that nosing stone and cause it
16 to dislodge. Another possibility is that the
17 waterproofing membrane itself is terminated right
18 behind the nosing stone and the buildup of water
19 and -- can create in cold situations, possibly ice,
20 behind that as a result of there being a waterproof
21 membrane layer that terminates there could exert
22 force on the back of that stone. Those are several
23 reasons or possible forces that could be applied to
24 that stone to cause it to become dislodged, but I've
25 not determined what exactly caused it to become

1 dislodged.

2 Q. Two further reasons that that mortar would crack or
3 gap or shrink there would be that the mortar was

4 improperly mixed; is that a possible reason why the
5 mortar has failed and cracked?

6 A. That's a possibility, yes.

7 Q. Is another possibility that the mortar was
8 improperly installed, too thick, too thin, not
9 enough in those areas?

10 A. Yes, those are all things that ought to be
11 considered.

12 Q. Would any of those items that we just went through
13 be immediately obvious at the time of construction
14 to anyone that was inspecting that installation?

15 A. In the case of your mortar mixing example there are
16 instances where the mortar could be of such a low
17 quality that it would be observable at the time of
18 installation.

19 Q. Do you have any evidence to support that the mortar
20 was so poorly mixed that it was observable at the
21 time it was installed?

22 A. I do not.

23 Q. What about any other ones, would they be immediately
24 observable at the time that the mortar was installed
25 or the stone was installed?

1 ~~A. I believe the other examples I gave would take time.~~

2 You wouldn't be able to see those right away.

3 Q. Do you have any opinion as to the overall quality of

4 the stone installation done by Clear View at the

5 project?

6 A. I have not made an assessment of any and all areas
7 that Clear View may have installed stone, but I have
8 surveyed areas where it's apparent to me that, by
9 the documents I have available, that they did
10 perform work that in the areas where I've observed
11 the stonework looks normal. I wouldn't say that
12 it's the best work I've ever seen and it's certainly
13 not the worst. It looks like a normal type of
14 installation of cultured stone veneer to me.

15 Q. My photographs may be numbered differently than
16 yours, but mine is Wilkie 479. Would you look at
17 that photograph, please?

18 A. Okay. (Witness complies).

19 Q. And I'll try to read the same thing.

20 BY MS. NICHOLS:

21 You're reading a Bates number, aren't you?

22 BY MR. IMHOFF:

23 Wilkie ---

24 BY MS. NICHOLS:

25 Do you have a Bates number?

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
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15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **RANDY STILL**
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the August 15, 2012 commencing at
25 approximately 10:20 a.m. attended by counsel as follows:

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You

4 would expect they would but I don't know ...
5 contractually. I think it becomes a legal question
6 of duty.

7 Q. It is a duty, is it not, of the general contractor
8 to comply with the applicable building codes in the
9 performance of a project?

10 A. I would think so.

11 Q. Is it the duty of a general contractor to coordinate
12 the work of subcontractors?

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

16 A. I would think so to the extent he understands that
17 coordination effort.

18 Q. And if he doesn't understand the coordination effort
19 what should the general contractor do?

20 A. Ask questions.

21 Q. Of whom?

22 A. Subcontractors, make sure they're putting them
23 together correctly.

24 Q. Is it a duty of the general contractor on a project
25 like the Stoneledge Project to supervise the work of

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 ~~Object to the form.~~

4 WITNESS ANSWERS:

5 A. I'm thinking about the word "supervise." You would
6 think that he would make sure they were doing what
7 entity they were supposed to be doing. In other
8 words, you would want a framing contractor doing
9 framing and you would rely upon them to perform
10 their craft appropriately. And the supervisory
11 condition would be, I would think, contractual.

12 Q. Between the general contractor and the
13 subcontractors?

14 A. I would think so.

15 Q. Do you think a general contractor has any obligation
16 to insure that his subcontractors(phone ringing) ---

17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

19 Q. Is it an obligation of a general contractor to
20 insure his subcontractor's in compliance with the
21 contract documents?

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I'm not sure I'd use the word "insure." I would

1 ~~obligation in the construction or installation of~~
2 the low slope roofs, whether it be code violation,
3 violation of the design documents or non-compliance
4 with the design documents or violation of
5 manufacturers' installation instructions or any
6 other obligation on the installation of the low
7 slope roofs?

8 A. I think the only place in the low slope roofs that
9 there is question is there's some very limited areas
10 where felts are missing, and that is an omission of
11 felts, a single layer of felts.

12 Q. Let's talk about that for just a minute. In your
13 experience and education and in your work, do you
14 hold the opinion that a general contractor is always
15 liable for all defects in construction which were
16 performed by subcontractors?

17 A. I think what I have found is the term "liable" is a
18 legal term and my belief is that the general
19 contractor can rely on the subcontractors who have
20 the specialty crafts and knowledge to perform their
21 work correctly.

22 Q. Is it fair to say that in many cases a subcontractor
23 is in fact more experienced and better qualified to
24 perform their particular trade than a general
25 contractor?

1 A. Yes.

2 Q. Is that because they have specialized over the years
3 in that particular area and have focused their

4 education and experience in that area?

5 A. Yes, and they've performed the work and they know
6 what works and what doesn't work.

7 Q. In your opinion is it fair -- is it acceptable for a
8 general contractor to rely on that experience and
9 education of a subcontractor in a particular trade?

10 A. I think in many cases he has to.

11 Q. Would you agree that obviously a general contractor
12 cannot see every nail which is driven or every board
13 which is installed?

14 A. Yes.

15 Q. Would you agree that he must, out of necessity, rely
16 on a subcontractor's experience and knowledge and
17 compliance with good building practice and the code?

18 A. Yes.

19 Q. Let me go back to my question then again. If based
20 upon that, if there are violations of code such as a
21 completely missing felt under a roof, do you hold
22 the opinion that the general contractor has violated
23 the code or some other obligation if the work was
24 done by a subcontractor?

25 A. No, but clearly when something like felt is missing

1 or a prototypical installation and that will serve
2 as the standard by which an installation is
3 accepted. For example, if you put a window in and

4 you've got a mock-up wall and you put in the rough
5 opening flashing and you put in the -- all the
6 flashings that would be there, all the peel-and-
7 stick and you've got all of the entities, for
8 example, the window manufacturer and the wrap
9 manufacturer and the peel-and-stick manufacturer and
10 the exterior cladding person there. And if they're
11 all there and they say, "Yeah, this is the way it
12 needs to be done." And your subcontractor who's
13 doing all those different components install it that
14 way, says he's going to install it that way, that's
15 how it should be installed. I'm not sure that
16 answers your question but ---

17 Q. Okay. Let me try to get to it a little bit
18 different way. Are you familiar with the term
19 "paper contractor"?

20 A. I'm not sure.

21 Q. Do you know if Marick actually drove any nails or
22 constructed any part of Stoneledge?

23 A. I think my understanding is he did not self-perform
24 any work.

25 Q. What in your opinion is the role of a general

~~Q. Do you believe or do you have an opinion that Marick~~
violated any code, manufacturers' instructions,
design drawings in the installation of the cedar
shake and plank siding in Phase II?

A. No.

Q. Do you have any opinion that Marick violated any
code, manufacturers' installation instructions,
design drawings or any other obligation in the
installation of the doors and windows in Phase II?

A. I am not aware that he installed any of those
components.

Q. Is that a "no"?

A. No.

Q. Do you believe Marick violated any code,
manufacturers' installation instructions, design
drawings or any other obligation in the stone
installation in Phase II?

A. No.

Q. Do you believe Marick violated any code,
manufacturers' installation instructions, design
drawings or any other obligation in the installation
of any of the waterproofing, framing, grading or
other construction components in Phase II?

A. No.

Q. I don't think I have any more questions for you

CERTIFICATE OF SERVICE

2013 APR 10 AM 11 01

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1),
SCRCP and counsel's regular business practices, do hereby certify that I have this date, electronically

mailed a true and correct copy of the Defendants Marick Home Builders, LLC and Rick Thoennes'

Memorandum in Support of the SCRCP 59(e) Motion as to Clearview Construction and Michael

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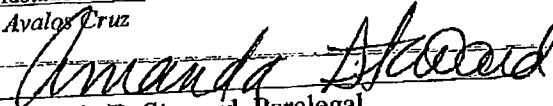
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This 9 day of April, 2014
Spartanburg, SC

By:


Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
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PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

**DEFENDANTS CLEAR VIEW
CONSTRUCTION, LLC AND MICHAEL
FRANZ'S BRIEF IN OPPOSITION TO
MARICK HOME BUILDERS AND RICK
THOENNES' S.C.R.C.P 59(e) MOTION
TO RECONSIDER AND ALTER
JUDGMENT**

AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,)
 MARTIN HERNANDEZ-AVILES, FRANCISCO)
 VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-)
 RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
 CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
 SOUTHERN BASEMENTS, INC., MJG)
 CONSTRUCTION AND HOMEBUILDERS, INC.)
 D/B/A MJG CONSTRUCTION, KMAC, INC.,)
 D/B/A KMAC NORTH CAROLINA, EUFACIO)
 GARCIA, EVERADO JARMAMILLO, GARCIA)
 PARRA INSULATION, INC., J&J CONSTRUCTION,)
 JOSE NINO, JOSE MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT MORALES)
 D/B/A MORALES MASONRY, MILLER/PLAYER &)
 ASSOCIATES,)
 Defendants,)

Defendants Clear View Construction, LLC ("Clear View") and Michael Franz (collectively "Clear View Defendants") submit this Brief in Opposition to the Motion to Reconsider of Marick Homebuilders, LLC and Rick Thoennes (collectively hereinafter "Marick"). For the reasons set forth below, Marick's Motion to Reconsider and Alter Judgment should be denied in its entirety.

PROCEDURAL BACKGROUND

On August 24, 2012, Clear View Defendants moved for summary judgment on Marick's claims. Clear View Defendants filed a Brief in support of its Motion on August 31, 2012. Marick filed a Memorandum in Opposition to Clear View's Motion, as well as numerous other parties motions, on September 4, 2012. The Court conducted a hearing on Clear View Defendants and the other parties' Motions on September 5, 2012. The Court requested that Clear View Defendants submit a proposed Order on Marick's Negligence and Equitable Indemnification claims and that Clear View Defendants, Builders FirstSource Southeast Group, LLC ("BFS"), and Southern Concrete Specialties, Inc. ("Southern Concrete") submit a proposed

Order on Marick's Breach of Contract and Breach of Warranty claims (collectively "Orders"). In Orders dated January 11, 2013, the Court granted summary judgment in favor of Clear View Defendants as to all of Marick's cross-claims.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). When an argument is presented before the trial judge but is not addressed in the judge's final order, a Rule 59(e), SCRPC, motion is proper to preserve the issue for appellate review. *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003).

"A party cannot raise an issue for the first time in a Rule 59(e), SCRPC, motion which could have been at trial [or at the substantive hearing.]" *MailSource, LLC v. M.A. Bailey & Assocs, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). "Post-trial motions [and post-hearing motions] are not necessary to preserve issues that have been ruled upon at trial [hearing]; they are used to preserve those that have been raised to the trial court but not ruled upon. *Bailey v. Segards*, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001).

"Under Rule 59 (f), SCRPC, a Rule 59 (e) motion may in the discretion of the court be determined on the briefs filed by the parties without oral argument." *Pollard v. City of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). The decision to grant or deny such motions will be reviewed for an abuse of discretion. *See id.*

ARGUMENT

I. The Court Has Fully Ruled on the Pending Motions; Therefore, the Motions to Reconsider Are Unnecessary and Without Merit.

Marick's Rule 59(e) Motion should be denied because the Court properly found in the Orders that Marick's equitable indemnity claims must fail and that all of Marick's claims were claims for equitable indemnification. As noted above, Rule 59(e) Motions are intended to address situations when a trial judge has not addressed in a final order arguments raised before him. Each argument presented in Marick's Rule 59(e) Motion was properly decided and addressed after careful consideration of the arguments from both parties in the Court's January 11, 2013 Orders; therefore, there is no need to reconsider and alter judgment, and Marick's Motion should be denied in full.

A. The Court Properly Found that Marick Cannot be Adjudged Without Fault

In the Orders, the Court expressly found that Clear View Defendants are entitled to summary judgment on Marick's equitable indemnity claims because Marick cannot be adjudged without fault. Marick's argument that this finding was improper because discovery is not complete does not change the fact that summary judgment was properly granted based on the testimony in the record of Marick's own witnesses regarding Marick's ultimate responsibility for construction and compliance with the building code. The Court properly found that testimony in the record established that if Plaintiffs' allegations regarding defective construction are proven, Marick cannot be found without fault due to its role as the permit holder for Phase II construction and party ultimately responsible for construction and compliance with the building code. Marick's reliance on *Field v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), for the its proposition that a general contractor is not automatically responsible for the work of its

subcontractors is misplaced and is not a proper basis for altering the Court's judgment. The basis for Court's finding that Marick cannot be adjudged without fault is not premised on the general contractor being automatically responsible for the alleged negligence of its subcontractors. The Court's Orders were properly decided on the finding that to the extent Plaintiffs' allegations of defective construction in violation of the building code are proven, Marick as the general contractor, cannot be adjudged without fault.

B. The Court Properly Found that Marick's Argument for Contractual Indemnification Must Fail

The Court's Orders correctly found that Marick has presented no evidence to support a potential claim for contractual indemnification. Marick's failures to allege an entitlement to contractual indemnification in its Cross-Claims and then to offer any evidence supporting the enforcement of a contract in this matter was specifically addressed in the Court's Orders. As this matter was specifically addressed in the Court's Orders and Marick presents no authority supporting reconsideration or alteration of the Court's finding, this matter is not the appropriate subject of a Rule 59(e) Motion.

C. The Court Properly Determined that Marick's Negligence, Breach of Warranty, and Breach of Contract Claims were Claims for Equitable Indemnification

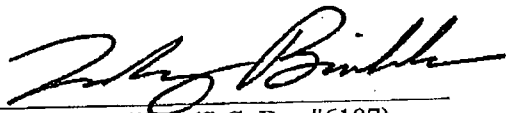
Marick erroneously contends that the Court cited no proper authority in support of finding that Marick's cross-claims were claims for indemnity. Contrary to Marick's contention, the Court relied on well-established authority in specifically holding that each of Marick's claims were based on the same issues and sought the same relief as its equitable indemnification claim. This matter was specifically addressed in the Court's Orders and the findings were based on

proper authority; therefore, this matter merits no reconsideration or alteration under a Rule 59(e) Motion.

CONCLUSION

The Court's decisions granting Clear View Defendants summary judgment were complete and proper, and Marick's Motion to Reconsider and Alter Judgment should therefore be denied. In further opposition to Marick's arguments, Clear View Defendants incorporate their Brief in Support of Motion for Summary Judgment and the arguments of Builders FirstSource-Southeast Group, LLC ("BFS"), Carl Catoe Construction, Inc., and Southern Concrete Specialties, Inc., contained in briefs and memoranda previously filed with Court.

April 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I have this date, electronically mailed a true and correct copy of *Defendants Clear View Construction LLC and Michael Franz's Brief in Opposition to Marick Home Builders and Rick Thoennes' Motion to Reconsider and Alter Judgment* to the following counsel of record:

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April 9, 2013

Spartanburg, South Carolina

By:



Lindsay L. Builder

STATE OF SOUTH CAROLINA

COMMON PLEAS
COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders FirstSource Southeast Group; Mike Green; Southern Concrete Specialties, Inc.; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating and Air; All Pro Heating, A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.;

IN THE COURT OF

C.A. NO: 2009-CP-37-00652

MEMORANDUM IN OPPOSITION TO
MARICK HOME BUILDERS, LLC'S
MOTION FOR SUMMARY
JUDGMENT AND IN FURTHER
SUPPORT OF BUILDERS FIRST
SOURCE SOUTHEAST GROUP,
SOUTHERN CONCRETE
SPECIALTIES, INC., AND CLEAR
VIEW CONSTRUCTION, LLC'S
MOTION FOR SUMMARY
JUDGEMENT AS TO THE CROSS
CLAIMS OF MARICK HOME
BUILDERS, LLC FOR BREACH OF
CONTRACT

Southern Basements, Inc.; Carl Catoe	)
Construction, Inc.; T. G. Construction, LLC;	)
Delfino Construction; Francisco Javier Zarate	)
d/b/a Zarate Construction; Alejandro Avalos	)
Cruz; Herberto Acros Hernandez; Martin	)
Hernandez-Aviles; Francisco Villalobos Lopez;	)
Ambrosio Martinez-Ramirez; Ester Moran	)
Mentado; Socorro Castillo Montel; MJG	)
Construction and Homebuilders, Inc. d/b/a MJG	)
Construction; KMAC Inc. d/b/a KMAC North	)
Carolina; Everado Jarmamillo; J&J Construction;	)
Jose Nino; Jose Manuel Garcia; Eason	)
Construction, Inc.; and Vincent Morales d/b/a	)
Morales Masonry; Southern Stone, Inc. and Buck	)
Smith Construction,	)
Defendants.	)

MEMORANDUM OF LAW

At the motions hearing held on September 5, 2012, Marick Home Builders, LLC (hereinafter "Marick") sought summary judgment against various parties including Builders First Source Southeast Group (hereinafter "Builders First Source"), Southern Concrete Specialties, Inc. (hereinafter "Southern Concrete"), and Clear View Construction, LLC (hereinafter "Clear View Construction") (hereinafter collectively "Defendants"). Marick's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims listed four cross-claims against all defendants: (1) Negligence, (2) Breach of Contract, (3) Breach of Warranties, and (4) Equitable Indemnity. Defendants were therefore surprised to find a claim for Contractual Indemnification listed in Marick's Motion for Summary Judgment.¹ As set forth more fully below, the Defendants submit

¹ Marick attempted to merge a claim for Contractual Indemnification with its cause of action for Breach of Contract, styling the claim as "Breach of Contract/Contractual Indemnification."

that Marick's claims for contractual indemnity must be dismissed or barred as a matter of law because (1) the claims were not properly pled; (2) to the extent Marick argues, outside of the pleadings, that it has contracts that contain indemnification provisions, it has offered no evidence that the contracts applied to the Stoneledge project or would be enforceable in this matter; and (3) such contracts were signed after work was completed and are not supported by consideration.

BACKGROUND

Stoneledge at Lake Keowee (hereinafter "the Project") is a community of townhomes located on Lake Keowee in Oconee County, South Carolina. The development was built in two phases. Phase I, which lies along the west bank of Lake Keowee, was built by Bostic Brothers Construction. Phase II was built on an adjacent peninsula and was constructed by Marick Home Builders in 2006 and 2007.

Marick hired a number of subcontractors to perform the work on Phase II, and among them Builders First Source, Southern Concrete, and Clear View Construction. The involvement of these Defendants was as follows:

- Builders First Source's scope of work was to perform framing work. Builders First Source completed its work by June 10, 2007.
- Southern Concrete's scope of work was to waterproof the foundation walls and pour and waterproof the elevated decks, as well as other flatwork. Southern Concrete performed its work on the foundation walls in May of 2006 through June of 2007.
- Clear View Construction's scope of work was to perform stonework on the Project. Clear View completed its stonework on Phase II townhomes no later than February of 2007. Invoices indicate Clear View performed some punch list work and provided

miscellaneous labor for work on the Clubhouse, but this work was completed no later than August 30, 2007.

In making its claim for contractual indemnity, Marick is presumably referencing a one-page document entitled "Agreement" and signed by representatives for each of the Defendants. These documents, attached as Exhibits A – C, provide in part "Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, and expenses and fees arising out of or resulting from performance of the Subcontractors." The "Agreements," which do not reference the Stoneledge Project, were each signed in October of 2007.

As noted, Marick's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims listed only four cross-claims against all defendants: (1) Negligence, (2) Breach of Contract, (3) Breach of Warranties, and (4) Equitable Indemnity. Marick asserted a claim for Contractual Indemnification listed in its Motion for Summary Judgment, attempting to fold a claim for Contractual Indemnity into the cause of action for Breach of Contract.

LAW

To obtain summary judgment, the moving party must demonstrate there is "no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. A trial court should grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

DISCUSSION

As shown below, Marick's claims for contractual indemnity must be dismissed or barred by summary judgment for the following reasons: (1) Marick failed to plead Contractual Indemnity, (2) Marick has failed to demonstrate that the Agreement relates to the Stoneledge Project, and (3) the Agreements are not supported by consideration.

I. Claim for Contractual Indemnity was not pled in Marick's Cross-Claims

Rule 8, SCRCP, provides that "[a] pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends . . . (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled."

Marick's Cross-Claims, as set forth in its Answer to the Plaintiffs' Third Amended Complaint:

- make no mention of Contractual Indemnity;
- make no mention of the Agreement; and
- make no allegation that any of the Defendants agreed to indemnify or hold harmless Marick.

The cause of action for Breach of Contract, into which Marick seeks to fold its claim for Contractual Indemnity, provides in pertinent part:

160. [Defendants] entered into a legally binding contract whereby Marick agreed to pay each contractor and subcontractor for furnishing appropriate and non-defective materials and work in each contractor's and subcontractor's specialty for Plaintiffs.

161. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for purpose of this defense and Cross Claim, contractors and subcontractors have provided defective materials or services in breach of their contracts with Marick.

162. If the Plaintiffs allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, said breach of contract has resulted or could result in damage to Plaintiff, which could or will be assessed against Marick.
163. If the Plaintiffs allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, each contractor or subcontractor breached the terms of its contract with Marick and Marick is informed and believes it is entitled to judgment against each contractor or subcontractor for actual damages, together with attorney's fees, and interest thereon.

Marick's Answer to Plaintiffs' Third Amended Answer, p. 25-26. These allegations provide no suggestion that they contain claims for Contractual Indemnity.

It is established in considering summary judgment, "the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." See Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). However, in the instant case, the facts supporting a claim for contractual indemnity are simply not alleged, and therefore no inferences can be drawn. In considering a motion to dismiss, the court must base its ruling solely on the allegations set forth in the complaint. See Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (S.C. 2007). Marick's Cross-Claims fail to comply with Rule 8, SCRCP, and fail to set forth even the most basic allegations which would suggest a claim for contractual indemnity. Consequently, any attempt by Marick to make such a claim must be barred.

II. Marick has not demonstrated that any written agreement relates to Stoneledge

As noted, Marick makes no mention of the "Agreement" with the various Defendants in its Cross-Claims. However, even if the Court finds that Marick sufficiently pleaded Contractual Indemnity, Marick has failed to show that the Agreement relates to the Stoneledge Project.

"It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms. See Edens v. Laurel

Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). Furthermore, the assent must be as to all of the terms of the contract. Id.

In the instant case, the Agreements each were signed after the Defendants completed their work on the Project. Moreover, the Agreement provides as a definition for "Project" "on all projects for this subcontractor." (emphasis in original). Nowhere in the Agreement is the Stoneledge Project referenced. Given these facts, even if we were to assume arguendo that the Agreement was referenced in the Cross-Claims, the document itself does not specify its application to the Stoneledge Project and, in fact, the timing of the execution of the Agreement suggests that it does not apply. Finally, Marick has failed to present any evidence demonstrating to this Court that the Agreement applies to the Stoneledge Project. Consequently, the terms of the alleged contract are not sufficiently definite to be enforced as Marick wishes.

III. The Agreement is not supported by consideration

As demonstrated above, Marick's claim for Contractual Indemnity must fail as the claim was not properly alleged in the Cross-Claims and it has not been shown that the Agreement applies to the Stoneledge project. Yet even assuming that Marick did comply with the rules of pleading and assuming the Agreement applies to Stoneledge, summary judgment for the Defendants remains appropriate, as the Agreement is not supported by consideration.

"In South Carolina, the formation of a contract is governed by well-settled principles. Quite simply, '[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.' See Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993), citing Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984). "In general, valuable consideration to support a contract may consist of some right, interest, profit or benefit

accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." See 30 S.C. Jur. Contracts § 13, citing J.C. White Lumber Co., Inc. v. Allen, 306 S.C. 183, 410 S.E.2d 588 (Ct. App. 1991); Sanchez v. Tilley, 285 S.C. 449, 330 S.E.2d 319 (Ct. App. 1985). A promise by a party to do that which it has already legally obligated itself to do is not a valid consideration. See City of Spartanburg v. Spartan Villa, 273 S.C. 1, 5, 253 S.E.2d 501, 503 (1978). "Consideration that is wholly past is not valuable consideration." Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996).

As noted, the Agreements that may form the basis for Marick's claim for Contractual Indemnity were signed after all work was completed by the Defendants. See Deposition of Green, p.44, lines 1-21 (attached as Exhibit D). Consequently, any other agreement under which the work was performed does not encompass the Agreement. The past work of the parties similarly cannot constitute consideration for the Agreement. Moreover, when asked in his deposition, Rick Thoennes, III, owner and principal of Marick, listed no consideration supporting the Agreement. See Deposition of Thoennes, p. 152, ll. 1-23, a copy of which is attached hereto as Exhibit E. As the Agreement is not supported by consideration, it is not a valid and binding contract.

CONCLUSION

For the reasons stated above, Defendants submit that Marick's motion for summary judgment for contractual indemnity must be denied as (1) the claims were not properly pled; (2) to the extent Marick argues, outside of the pleadings, that it has contracts that contain indemnification provisions, it has offered no evidence that the contracts applied to the Stoneledge project or would be enforceable in this matter; and (3) such contracts were signed after work was completed and are not supported by consideration. For these same reasons,

Defendants' motion for summary judgment as to Marick's cross claims for breach of contract should be granted.

Respectfully submitted,

ELMORE GOLDSMITH

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Attorneys for Defendant Builders First Source

October 4, 2012

10/31/2007 08:28 FAX
10/30/2007 11:00 FAX

2002
08/001/000



COPY

AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

Fri Jul 31 12:13:50 2009



000757

10/31/2007 08:28 FAX

10/30/2007 11:00 FAX

0003



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature]

BY: Shannon Barker *

DATE: 10/1/07

DATE: 10/1/07 *

Rick Thoennes
NAME and TITLE

Shannon Barker *
NAME and TITLE

Marick Home Builder, LLC.
COMPANY NAME

Southern Concrete Spec. Inc. *
COMPANY NAME

[Signature]
WITNESSED BY

Office (864) 232-5595 ~ Fax (864) 232-8804 ~ 501 Brixton Circle - Simpsonville, SC 29681
marickhomebuilders.com

Fri Jul 31 12:13:51 2009

000758

MARICK COPY HOME BUILDERS

AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

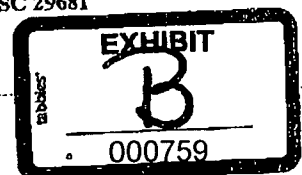
This agreement is between Marick Home Builders (Contractor) and
Clear-View-Construction (Subcontractor).

Project: [REDACTED]
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. [REDACTED]
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Block and Stone Labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

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marickhomebuilders.com

07/31/2009 10:56 AM





8. Payment schedule:

~~Bills received by the 1st of the month will be paid on the 15th~~

Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

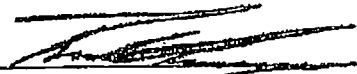
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: 

BY: 

DATE: 10/1/07

DATE: 10/1/07

Rick Thoennes

NAME and TITLE

Mike

Owner

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Clearview Const.

COMPANY NAME

Kim Woates

WITNESSED BY



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First Source (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured. *pay endorsement from LA 2002 0015.*
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (Description of Subcontract work):
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 - Fax (864) 232-5504 - 501 Briston Circle - Simpsonville, SC 29681
marickhomebuilders.com



BFS 3366

000761



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
 Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
 Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors, but only to the extent of Subcontractor's negligence or willful misconduct.

BY: _____ BY: Deryl Ward *

DATE: 10/1/07 DATE: 10/1/07 *

Rick Thoennes Deryl Ward *
 NAME and TITLE NAME and TITLE

Marick Home Builders, LLC Marick Home Builders, LLC
 COMPANY NAME COMPANY NAME

WITNESSED BY _____ Subject To Written Changes



Dear Vendor:

We are currently in the process of updating our files and verifying our contract and insurance compliance criteria.

Please fill out the following documents and fax them back to us as soon as possible. We will need to have these documents in receipt before your next payment can be issued.

Agreement Between Contractor & Subcontractor - areas marked with a star

W9 - If you have not provided one to us previously, please do so now; please make sure you enter your company name exactly as it was recorded when you received your tax ID number from the IRS.

Also, please see item 2 on the Agreement and ask your insurance agent to send us an updated certificate of insurance with the criteria listed.

Thank you!

Suzanne Blinder
Office Manager

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

BFS 3368

000763

1 Q. Let me show you what I marked as Exhibit 105, which
2 for you guys down the table is a contract -- what
3 appears to be a contract between Marick Home
4 Builders and Builders First Source. And it's got
5 Bates number BFS 3366 on it. Do you recognize
6 that?

7 A. I do.

8 Q. And is that a copy of the contract between Builders
9 First Source and Marick?

10 BY MR. ROOT:

11 Object to form.

12 DIRECT EXAMINATION RESUMED BY MR. LYLES:

13 Q. A contract between Builders First Source and
14 Marick?

15 A. It is a contract between Builders First Source and
16 Marick.

17 Q. Is this the contract that governed the work that
18 was performed by Builders First Source for Marick
19 on the Stoneledge project?

20 A. I wouldn't believe so, because it was signed after
21 we were complete at Stoneledge, I believe.

22 Q. The signature date on that is 10/1/07?

23 A. Yes, sir.

24 Q. Would your contract -- do you remember doing
25 another job with Marick after Stoneledge?

1 Q. Let me show you a document and I'll ask that we mark
2 that as an exhibit, wherever we are in the
3 numbering.

4 (COURT REPORTER MARKS TWO-PAGE DOCUMENT AS EXHIBIT NO.
5 69; ATTACHED TO DEPOSITION)

6 EXAMINATION RESUMED BY MR. ANTHONY:

7 Q. Does this look like, and you can take a moment to
8 review that, but does this look like the contract
9 that you asked the subcontractors to sign?

10 A. Yes.

11 Q. And what is the agreement date listed on that
12 contract?

13 A. (Reviews document). October 1st, '07.

14 Q. Do you believe that was before or after the
15 subcontractors performed their work?

16 A. I don't know.

17 Q. Well, what would you say you gave as consideration
18 for this contract?

19 A. Gave? Money. Is that what you mean?

20 Q. Well, however you want to answer it.

21 A. Money.

22 Q. Okay.

23 A. We didn't barter.

24 Q. Fair enough. I will -- I should have a copy of
25 this, but in your Answer and cross claims against

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners'
Association, Inc. *et al.*,

Plaintiffs,

IMK Development Co., LLC *et al.*,

Defendants.

)
) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT

) Civil Action No.: 2009-CP-37-0652

)
) MEMORANDUM IN SUPPORT OF CARL CATOE
) CONSTRUCTION, INC.'S MOTION TO DISMISS
) AS TO MARICK HOME
) BUILDERS' CLAIMS

TO: JASON IMHOFF, ATTORNEY FOR MARICK HOME BUILDERS, LLC

Defendant Carl Catoe Construction, Inc., ("Catoe"), by and through its undersigned attorneys and pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, has moved before this Court for dismissal of all causes of action asserted against it by Marick Home Builders, LLC and Rick Thoennes, Jr. (collectively, "Marick"). This memorandum of law is filed in support of that motion.

RELEVANT FACTS

Marick Home Builders, LLC served as General Contractor for Phase II of the townhome development known as Stoneledge. Marick entered into a subcontract with Builders First Source -Southeast, LLC ("BFS") to provide materials and labor to perform certain construction tasks, including framing, cladding, installation of windows and doors. BFS, in turn, contracted with Catoe to perform the labor associated with those tasks. Catoe has no contract, written or oral, with either Marick Home Builders or Rick Thoennes, Jr.

Stoneledge homeowners and Homeowners Association ("Plaintiffs") filed suit against a host of parties, including Marick and Catoe, for certain construction defects. Marick has filed cross-claims against Catoe for (1) negligence, (2) breach of warranty and (3) equitable indemnity.

ARGUMENT

Marick's claims against Catoe for negligence and breach of warranty should be dismissed because they are merely disguised indemnity claims. Other South Carolina circuit courts have so ruled in similar cases. (Orders attached as Exhibits A and B.) The indemnity claim should be dismissed because Marick and Catoe have no special relationship, and because Marick is not without fault. Finally, to the extent Marick alleges contractual claims against Catoe, those should be dismissed because no contract exists between Catoe and Marick, and because Marick is an unlicensed contractor, prohibited by law from access to the Courts in order to enforce contract claims.

I. Disguised indemnity claims should be dismissed.

Marick's breach of warranty and negligence claims against Catoe should be dismissed because these claims are merely disguised claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party [Catoe] is liable to pay a second party [Marick] for a loss or damage the second party [Marick] incurs to a third party [Plaintiffs]." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." State v. Yelsen Land Co., 257 S.C. 401, 403 (1972); Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the

pleaders have recited.” Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 (“The character of an action is primarily determined by the allegations contained in the complaint.”).

Marick’s claims in this case are all disguised indemnity claims. The cross-claim for breach of warranty against Catoe states:

Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of the above named parties breach of their express and/or implied warranties; as a result, Marick is informed and believes that it is entitled to recover from [Catoe] such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick’s Answer to Plaintiffs’ Third Amended Complaint & Cross-claims, ¶ 174.)

Similarly, Marick’s cross-claim for negligence states:

Should Plaintiff’s prevail on their claims, Marick will be damages as a direct and proximate result of [Catoe’s] negligence; as a result, Marick is informed and believe that it is entitled to recover from [Catoe] such as it may incur legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick’s Answer to Plaintiffs’ Third Amended Complaint & Cross-claims, ¶ 169.)

Marick’s cross-claims seek to recover the amount Marick will owe the Plaintiff after trial due ostensibly to the acts or omissions of others, plus attorney fees. The “damages” are contingent on the outcome of the trial. Marick does not seek damages from Catoe for personal injury, property damages, or other damages actually incurred by Marick. These cross-claims are textbook claims for indemnity. See Vermeer Carolina’s, Inc., 336 S.C. at 60, 518 S.E.2d at 305. Therefore, the Court can and should characterize the breach of warranty and negligence claims as equitable indemnity claims.

As noted by South Carolina’s federal district court, “a rose by any other name is still a rose,” and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one’s liability to a third party are “nothing more than claims for ...

indemnification with a slight change in wording.” SCNB v. Stone, 749 F.Supp. 1419, 1433 (D.S.C. 1990).

Trial courts in South Carolina have granted summary judgment in similar cases, concluding that claims couched in terms of indemnity fold into and are absorbed by overarching causes of action for indemnification. For example, in Nelson v. John Wieland Homes, 2009-CP-10-6573, the plaintiff homeowner sued her homebuilder, alleging construction defects. The homebuilder in turn filed third-party claims against its subcontractors for negligence, breach of warranty, breach of contract, and indemnity, alleging that if the homebuilder was liable to the plaintiff, it was due to the actions or omissions of the third-party subcontractors. Judge Roger M. Young granted summary judgment on claims of negligence, breach of warranty, and breach of contract, finding that these claims were disguised indemnity claims. (Order of Young, J., Exhibit A.)

Similarly, in Kirkland v. Cambridge Building Corp., 2005-CP-07-1312, plaintiffs brought an action alleging construction defects, and a defendant brought a third-party action against the manufacturers of the synthetic stucco applied to the residence, alleging negligence and breach of warranty. Judge Curtis L. Coltrane stated: “The Court concludes as a matter of law that [defendant’s] claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action.” Order of Coltrane, J., Exhibit B.

Appellate courts in other states, in similar cases, have also concluded that a cross-claim or third-party claim couched in terms of indemnity folds into and is absorbed by an overarching cause of action for indemnification. Dodge Trucks, Inc. v. Wilson, 231 S.E.2d 818, 821 (Ga. Ct. App. 1976) (stating “regardless of what [Plaintiff] may name [his claim], it is an action for contribution and indemnity”), aff’d, 235 S.E.2d 142, 144 (Ga. 1977); Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1258-59 (Ill. 1983) (observing that, although the claims

were "stated as counts for breach of implied warranty," they could be regarded as claims for indemnity); Warner v. Reagan Buick, Inc., 483 N.W.2d 764, 770 (Neb. 1992) (noting that, although the third-party plaintiff made claims for breach of contract, "[t]he gravamen of the [buyer's] third party petition is indemnification, and we shall treat it as such"); Adkinson v. Int'l Harvester Co., 975 F.2d 208, 216 (5th Cir. 1992) (treating third-party plaintiff's claim for breach of warranty as one for indemnity) (internal citations omitted).

II. The claims for equitable indemnity should be dismissed.

1. No special relationship exists between Marick and Catoe.

Marick's claims for equitable indemnity fail because Marick had no contractual or special relationship with Catoe, and, in fact, no such relationship has been alleged. (See Third-party Compl. ¶¶ 187-193.) "A right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). In order to maintain a claim for equitable indemnity, Marick must demonstrate that a special relationship existed between it and Catoe, Toomer v. Norfolk Southern Railway Company, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637 (Ct. App. 2001); Scott v. Fruehauf Corp., 302 S.C. 364, 368, 396 S.E.2d 354, 358 (1990) ("[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them").

The South Carolina Supreme Court's most recent comprehensive analysis of equitable indemnity held that an attenuated relationship will not support an equitable indemnity claim. Rock Hill Tel. Co. v. Globe Comm'n, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005)(certified question). There, a utility company hired a contractor to perform certain construction work.

That contractor, in turn, hired a subcontractor. A third party was injured at the site. After settlement, the utility brought suit against the second-tier subcontractor for equitable indemnity. The court, answering a certified question, held that the "subcontractor is merely a remote or distant independent contractor, and therefore does not have a special relationship" with the utility, and an equitable indemnity claim is inappropriate. Id. at 390, 611 S.E.2d at 237.

Catoe and Marick, like the utility and the subcontractor in Rock Hill, have no contractual relationship between them. Thus, the relationship will not support an indemnity obligation. Id. Marick alleges that BFS directly hired Catoe to perform work at Stoneledge. South Carolina case law is devoid of any suggestion that a downstream contractor or supplier has any special relationship with the prime contractor. The lack of a special relationship between Marick and Catoe is fatal to Marick's equitable indemnity claims as a matter of law.

2. *Marick cannot be adjudged without fault.*

Alternatively, because Marick cannot be adjudged without fault, summary judgment on Marick's equitable indemnity claims is proper. Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck, 279 S.C. at 24, 301 S.E.2d at 553. Here, Marick's own corporate witnesses and experts admit that Marick is not without fault.

Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." Still Dep. 87:3-7 (Aug. 15, 2012).

Because Marick is the permit holder for Stoneledge Phase II, it cannot be adjudged without fault. The party pulling a permit is "solely responsible" for compliance with the building code. (Ex. C, Representative Building Permit and Application from Oconee County.) Marick—not Catoe—was the entity that obtained the permits for construction of Phase II of Stoneledge.

Marick's own expert Still further acknowledged that, in some instances, Marick violated the building code.^{1 2} Because Marick was the permit holder for Phase II and violated code according to its own expert, it cannot be adjudged without fault for building code violations.

III. Marick Has No Right to Enforce Contractual Claims in Law or Equity.

Marick alleges that "Catoe...expressly and/or impliedly warranted to Marick..." certain guarantees. (Marick's Answer and Crossclaim against Catoe). Express warranty claims are contractual. Marick had no contract with Catoe, so these claims should be dismissed as a matter of law.³

Even if some implied contract terms exist (which is denied), Marick had no contractor's license during construction and is therefore prohibited from enforcing any contract terms as a matter of law. South Carolina Code Section 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, South Carolina Code Section 40-11-370(C) it "may not bring an action either at law or in equity to enforce the provisions of a contract." The same prohibition exists as to residential home builders. S.C. Code Ann. §40-59-30. The plainly

1

Q. Do you acknowledge that at least in some respects that we have discussed today as the general contractor on the project, Marick Home Builders violated the applicable building code?

A. I would agree with you that there are components we've talked about that now appear to be a code violation because of failure. Still 89: 4:11.

2

Q. So you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?

A. At the time that we looked at it, yes. Still Dep. 92:25-93:5.

3

Q. Carl Catoe was not your subcontractor, correct?

A. That's correct.

Marick 30(b)(6) Dep 224:10-12.

worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

Marick is not a licensed contractor. Although Mr. Thoennes, Marick's 30(b)(6) designee, testified he was personally licensed⁴ at the time Stoneledge was constructed, no public records for the State of South Carolina reflect that Marick Home Builders has ever had a contracting license. The attached exhibits are the results of searches performed on South Carolina's Labor, Licensing, and Regulation website. (Ex. D, Information from SC LLR). Those searches reflect that no commercial or residential builder's license has ever been issued to Marick at any time. *Id.* Because Marick was unlicensed, it cannot enforce any contractual obligations, including warranty claims.

CONCLUSION

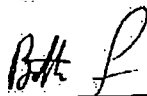
Marick's Cross-claims against Catoe consist solely of a single equitable indemnity claim. Marick improperly seeks recovery under tort, contract and warranty theories not for its own independent injury or property damage, but merely for the liability it might incur to Plaintiffs. Moreover, each of the claims explicitly seeks indemnification for any losses Marick might sustain regarding the Stoneledge development. Accordingly, each claim fails to state facts sufficient to constitute independent causes of action for negligence, breach of warranties or breach of contract. Marick's sole claim against Catoe is one for equitable indemnity.

That equitable indemnity claim must fail. No special relationship exists between Marick and Catoe. Further, Marick has not been—and, according to its own expert's testimony, cannot

⁴ Mr. Thoennes is reflected as the qualifying party for a commercial contractors' license issued to "Rick Thoennes Builders." Rick Thoennes Builders, Inc., which is registered with the South Carolina Secretary of State, is (presumably) a separate entity from Marick Home Builders, LLC. Pursuant to statute, a person may serve as the qualifying party for only one entity, subject to certain exceptions. S.C. Code Ann. §40-11-230. Thus, Mr. Thoennes is not the license holder for Marick Home Builders, LLC.

be—adjudged without fault in this matter. Therefore, Marick and Catoe are, at best, joint tortfeasors, with no right of indemnity between them.

Finally, to the extent Marick alleges contractual claims against Catoe, those claims are unenforceable, because Marick has no contract with Catoe and it is an unlicensed contractor. Marick is thus precluded from bringing these claims even if they were properly pled.



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Additional Cross-Claimant Carl Catoe
Construction, Inc.*

August 30, 2012

EXHIBIT A

(mcm)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CASE NO. 05-CP-07-1312

Carl T. Kirkland, Mary Alice Kirkland,)
Carl T. Kirkland Qualified Personal)
Residence Trust and Mary Alice Kirkland)
Qualified Residence Trust,)

Plaintiffs,)

v.)

Cambridge Building Corporation, MAJ)
Enterprises, Southern Roof and Wood Care)
Corp., T.R. Johnson Builders, Inc.,)
Figueroa's Exterior Trim & Woodwork,)
William Vitto, Susanne T. Sheik,)
Lang's Heating & Air Conditioning,)
Andersen Windows, Inc., and)
Clarence R. Floyd d/b/a Wiggins Iron)
and Fence,)

Defendants.)

Cambridge Building Corp.)

Third-Party Plaintiff,)

v.)

Sto Corp. and Acrocrete, Inc.,)

Third-Party Defendants.)

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT
OF STO CORP. AND
ACROCRETE, INC.**



This matter is before the Court on the motion of Third-Party Defendants Sto Corp. ("Sto") and Acrocrete, Inc. ("Acrocrete") for summary judgment as to the claims asserted by the Third-Party Plaintiff, Cambridge Building Corporation ("Cambridge"). The case involves the construction of a house on Hilton Head Island, South Carolina, now owned by the Plaintiffs, who bought it in 1997. Cambridge served as general contractor for the house, which was built in 1993 for a previous owner. As originally constructed, the exterior siding of the house was an Exterior Insulation and

cu # 1019

000776

Finish System ("EIFS"), sometimes referred to as synthetic stucco. It is undisputed that Cambridge's EIFS subcontractor mixed materials sold by two different manufacturers, Acrocrete and Sto, when installing the EIFS on this house.

Plaintiffs, in their Fourth Amended Complaint, assert claims against Cambridge for faulty construction resulting in water damage to the structure.¹ Cambridge's Third-Party Complaint against Sto and Acrocrete contains causes of action for indemnity, negligence and breach of warranty. For the reasons stated below, the Court concludes that summary judgment should be granted.

I. Summary judgment standard.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment **shall** be rendered forthwith when depositions and other evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a summary judgment motion, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. The non-moving party, however, can not rest on the mere allegations of its pleadings but must present specific, admissible facts which reasonably create a genuine issue for trial, and the Court need not consider unreasonable inferences from the proffered evidence. *Main v. Corley*, 281 S.C. 525, 526-527, 316 S.E.2d 406, 407 (1984); *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991); *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1992).

¹ As part of a settlement with Sto and Acrocrete, the Plaintiffs amended their Complaint to clarify that they do not allege the remaining defendants, including Cambridge, are liable in any way for supplying a defective product. It is clear that the Plaintiffs' claims against Cambridge relate solely to construction defects, including but not limited to the failure to properly supervise the installation of EIFS.

2. *The negligence and breach of warranty claims.*

The Court concludes as a matter of law that Cambridge's claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

Although Cambridge contends otherwise, a fair reading of the language of its third-party complaint reveals that the first and second causes of action for negligence and breach of warranty are, in reality, claims for indemnity. In stating both claims, Cambridge seeks recovery, not for its own independent personal injury or property damage, but merely for the liability it might incur to the Plaintiffs. In stating the negligence cause of action, paragraph 89 of the Third-Party Complaint reads as follows:

If Cambridge is liable to the Plaintiffs in any respect, which is denied, then such liability arose from [Sto and Acrocrete's] breach of the duties described above. Such breaches constitute negligence, and [Sto and Acrocrete] should indemnify Cambridge, in whole or in part, for any liability that may be adjudged against it in the Plaintiffs' favour. (emphasis added).

Likewise, the cause of action for breach of warranty contains virtually identical language seeking reimbursement of any amounts which Cambridge is found to owe to Plaintiffs. The causes of action for negligence and breach of warranty mimic that for

indemnity. These claims not only seek a form of relief that could only be defined as indemnity but also actually use the word "indemnify." Therefore, there can be no doubt that Cambridge's negligence and warranty claims are, essentially, indemnity claims in disguise.

Proof of a breach of warranty or negligence may be relevant for an indemnitee to establish the indemnitor's fault in causing a plaintiff's damages, which is an essential element of a claim for equitable indemnity. Such proof does not support stand-alone claims, however. Thus, to recover against Sto or Acrocrete, Cambridge must still establish the other elements of equitable indemnity. The Supreme Court of South Carolina recognized as much when it observed the following:

The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.

Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992). As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." *SCNB v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

The highest courts in other states have also concluded that a third-party plaintiff's claims for breach of warranty necessarily fold into and are absorbed by an overarching cause of action for indemnification. See *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 820 (Ga. Ct. App. 1976); *aff'd*, 235 S.E.2d 142, 144 (Ga. 1977) (claim couched as

breach of warranty was really one for indemnity); *Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (claims "stated as counts for breach of implied warranty" should be regarded as claims for indemnity); *Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) ("[t]he gravamen of the third party petition is indemnification, and we shall treat [claims titled breach of warranty] as such"); *Adkinson v. International Harvester Co.*, 975 F.2d 208 (5th Cir. 1992) (interpreting third-party claim for breach of warranty as one for indemnity).

Since Cambridge has not alleged or submitted evidence of any damages other than Plaintiffs' potential judgment against it and the costs incurred in defending Plaintiffs' claims, the only viable cause of action against Sto or Acrocrete is one for indemnity.² Therefore, the Court grants summary judgment on the causes of action for negligence and breach of warranty

3. *Equitable indemnity - lack of a special relationship.*

The Court also concludes as a matter of law that there is no special relationship between Cambridge and Sto or Acrocrete on which to base Cambridge's right to equitable indemnity.³ Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). In order to maintain a claim for equitable indemnity, Cambridge must demonstrate that a special relationship existed between it and Sto or Acrocrete. See *Toomer v. Norfolk Southern Railway Company*, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637, (Ct. App. 2001); see also, *Scott v. Fruehauf Corp.*, 302 S.C. 364, 368, 396 S.E.2d

² To the extent that Cambridge's request to be indemnified "in part" for any liability it incurs to Plaintiffs can be construed as a request for contribution, such request is meritless since any contribution claim was extinguished by Sto and Acrocrete's good faith settlements with the Plaintiffs. S.C. Code § 15-38-50.

³ There was no contract between Cambridge and Sto or Acrocrete so there can be no claim for contractual indemnity; the only applicable legal concept is that of equitable indemnity.

354, 358 (1990) (“[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them”).

The South Carolina Supreme Court recently clarified that this special relationship “must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another’s wrongdoing.” *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, fn. 3 (2005). The Court believes that *Rock Hill* is controlling precedent. Applying its principles to the instant case, it is clear that there is no special relationship between Cambridge and Sto or Acrocrete to support a claim for equitable indemnity. First, in its Third-Party Complaint, Cambridge fails to even allege that any such special relationship exists. Second, any relationship that did exist was even more attenuated than the relationship between the utility and subcontractor in *Rock Hill*, who were separated by just one level - the contractor. Here, Cambridge is separated from any dealings with Sto or Acrocrete by at least two levels - the EIFS subcontractor and the respective distributors of Sto and Acrocrete materials.

Furthermore, the undisputed facts of the case reveal that there was no relationship of any kind between Cambridge and Sto or Acrocrete at the time the house in question was built. The contract between Cambridge and the original owner of the house did not specify any particular manufacturer’s products or system and simply called for the use of synthetic stucco or “EIFS” generically. Sto and Acrocrete submitted uncontradicted testimony from Cambridge’s construction supervisor that Cambridge was not in the practice of specifying which manufacturer’s system to use and generally left it to the

discretion of the EIFS subcontractor. This was confirmed by the uncontradicted testimony of Cambridge's EIFS subcontractor that he had "free reign" to decide which manufacturer's EIFS materials to use on the job. Furthermore, there is no evidence in the record that Cambridge possessed or relied on any Sto or Acrocrete product literature at the time the house was built.

The EIFS subcontractor freely admitted in deposition testimony that he commonly mixed materials from various manufacturers on jobs and did just that in this case with Acrocrete and Sto materials. As pointed out by Sto and Acrocrete, no party or expert witness in the case has been able to determine where Acrocrete materials stop and Sto materials begin. The only evidence in the record on the issue is the uncontradicted testimony of Plaintiffs' expert that the EIFS materials were "hopelessly mixed" and that the EIFS system on the house was a "home-made" system and could not be said to be either an Acrocrete or a Sto system.

There is simply no evidence in the record that Cambridge had any sort of relationship with Sto or Acrocrete on which to base a right of indemnity. As such, Cambridge's claim fails to meet the standard set forth in the *Rock Hill* case, and the Court grants summary judgment on the cause of action for equitable indemnity.

4. *Equitable indemnity - alternative grounds.*

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second is not. [cites omitted]. If the second party is also at fault, he comes to court without equity and has no right to indemnity. [cites omitted]. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."

Vermeer v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). See *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). It is not enough for Cambridge to prove that the alleged defective design of EIFS contributed, in part, to the moisture damage on the house at issue. Under the established law of equitable indemnity, Cambridge must prove that it was **wholly** without fault in causing Plaintiffs' damages. See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, 237 fn. 2 (2005).

There is no evidence in the record that Cambridge was wholly without fault. In fact, the only evidence in the record is that Cambridge was at least partly at fault for the water intrusion damage to Plaintiffs' house. Sto and Acrocrete submitted the uncontradicted testimony of Plaintiffs' expert that many of the problems causing the water intrusion were the result of Cambridge's negligence in failing to properly sequence the work of its subcontractors on the project. The expert testified, without rebuttal, that there was no damage on the house caused solely by the alleged defective design of EIFS and that any damage to the house was caused, at least in part, by the improper workmanship of Cambridge and its subcontractors. Cambridge's inability to establish its own lack of fault bars any claim for equitable indemnity. Therefore, Acrocrete and Sto would be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

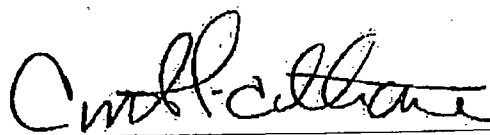
The Court concludes that there is yet another reason summary judgment is proper on the equitable indemnity claim. It is axiomatic that there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). The claims against Cambridge in the Fourth Amended

Complaint all relate to defective construction work, including but not limited to faulty EIFS installation. Plaintiffs do not allege in any way that Cambridge is responsible for supplying a defective product. As a result of the settlement with Acrocrete and Sto, Plaintiffs have removed the EIFS design issue from the case. Therefore, Cambridge can never be held liable to Plaintiffs for something Sto or Acrocrete did. As such, Cambridge is a mere joint tortfeasor with no right to indemnity.

The Court agrees with Sto and Acrocrete's argument that, while Cambridge may defend itself on the grounds that Plaintiffs' damages were caused by the alleged defective design of the EIFS product and not by improper construction work, the right to defend itself and establish its lack of liability does not establish a right to indemnity in favor of Cambridge. Therefore, Acrocrete and Sto would also be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

NOW, THEREFORE, IT IS ORDERED that summary judgment is granted to Sto Corp. and Acrocrete, Inc. on all causes of action in Cambridge's Third-Party Complaint, which is hereby dismissed with prejudice.

AND IT IS SO ORDERED.



Curtis L. Coltrane, Master-in-Equity
and Special Circuit Judge for Beaufort County,
South Carolina

BEAUFORT, SC
MAY 30, 2006

EXHIBIT B

000785

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-6573

CHERYL H. NELSON

JOHN WIELAND HOMES AND
NEIGHBORHOODS OF SOUTH CAROLINA

PLAINTIFF(S)

ET AL

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 40, SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICATION): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Order Granting In Part and Denying in Part Third-Party Defendant
ARS's Motion for Summary Judgment.

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

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

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

Circuit Court Judge

EXHIBIT

B

2134
Judge Code

Date

SCRPC Form 4C (10/2011)

Page 1 of 2

000786

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Cheryl H. Nelson,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods)
of South Carolina, f/k/a John Wieland)
Homes of South Carolina, Inc. and McGee)
Brothers Co., Inc.)

Defendants.)

John Wieland Homes and Neighborhoods)
of South Carolina, f/k/a John Wieland)
Homes of South Carolina, Inc.,)

Third-Party Plaintiff,)

vs.)

Benjamin Mora d/b/a Mora Construction,)
Sondles Builders, LLC, Carolina Custom)
Security & Sound, Inc., Barr Construction,)
Inc., Brancifort Concrete Industries, Inc.)
American Residential Services, LLC d/b/a)
American Residential Services of South)
Carolina, Inc. f/k/a Atlas Services, Inc. and)
Coastline Construction, Inc. f/k/a Coastline)
Construction,)

Third-Party Defendants)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2009-CP-10-6573

2011 OCT 26 PM 12:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

**ORDER GRANTING IN PART AND
DENYING IN PART THIRD-PARTY
DEFENDANT AMERICAN
RESIDENTIAL SERVICES OF SOUTH
CAROLINA, INC.'S MOTION FOR
SUMMARY JUDGMENT**

This matter came before the Court for a hearing on July 25, 2011, for consideration of Third-Party Defendant American Residential Services of South Carolina Inc's ("ARS") Motion for Summary Judgment. Counsel for the parties were present, and this Court entertained and

considered oral arguments as well as memorandums of law and affidavits submitted by the parties.

Facts

Plaintiff homeowner brings this suit, filed on October 19, 2009, to recover damages resulting from alleged faulty construction or repair of her home. Defendant Wieland Homes filed a third-party complaint against Third-Party Defendant ARS on December 2, 2010, alleging the work ARS did in installing the HVAC system in 1996 cause or contributed to the Plaintiff's damages. Defendant Wieland Homes brings four causes of action against ARS including 1) indemnity, 2) negligence, 3) breach of warranty, and 4) breach of contract.

ARS contends it is entitled to summary judgment as a matter of law to the claims of negligence, breach of warranty, and breach of contract, because these claims are disguised indemnity claims. It also argues that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes owes no liability to the Plaintiff as a result of ARS's work.

Standard of Review

Summary judgment is only appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 627, 541 S.E.2d 831, 833 (2001). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id.

Discussion

I. ARS's Motion for Summary Judgment as to the Claims of Negligence, Breach of Warranty and Breach of Contract.

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." Seebalt v. First Fed.

Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Courts may use the allegations in the complaint to determine the correct character of an action. Id. "Indemnity is that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (citations omitted).

In this case, Defendant Wieland Homes' Complaint requests the remedy of "any monies [Wieland Homes] is adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claims." Third-Party Complaint ¶ 160, 170, 164. Because these claims seek to recover the amount Wieland Homes paid to Plaintiffs, rather than personal injury or property damages, the claims are claims for indemnity. Vermeer Carolina's Inc., 336 S.C. at 60, 518 S.E.2d at 305.

This court finds that the causes of action for negligence, breach of warranty, and breach of contract are all disguised indemnity claims and Wieland Homes has failed to state facts sufficient to constitute independent causes of action and therefore Third-Party Defendant ARS is entitled to Summary Judgment as a matter of law.

II. ARS's Motion for Summary Judgment as to the Claim of Indemnity.

Third-Party Defendant ARS contends that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes has failed to present evidence that it is liable to the Plaintiff as a result of ARS's work and because all claims arising out of ARS's work are barred by the applicable three-year statute of limitations.

After thorough review, this Court finds that there is evidence in the record that Plaintiff has been damaged by excessive water and moisture damage in her home and there is a genuine issue of material fact regarding whether ARS's HVAC work contributed to Plaintiff's damage.



Additionally, the Plaintiff's Complaint alleges that the applicable statute of repose does not apply because the conduct is subject to the statutory exception for reckless conduct. S.C. Code Ann. §15-3-670. If the statutory exception applies, then the exception could apply to the work ARS did in installing the HVAC system in 1996.

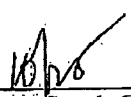
For these reasons, the Third-Party Defendant ARS's Motion for Summary Judgment as to the claim of indemnity is denied.

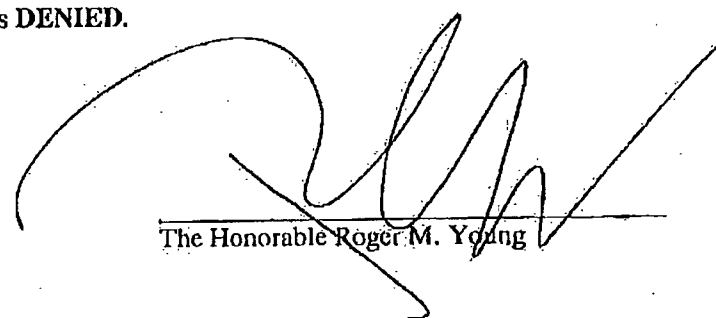
Conclusion

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

- 1) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Negligence, Breach of Warranty, and Breach of Contract is **GRANTED**.
- 2) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Indemnity is **DENIED**.

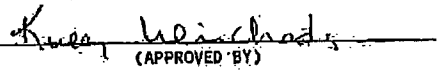
AND IT IS SO ORDERED.


_____, 2011
Charleston, South Carolina.



The Honorable Roger M. Young

EXHIBIT C

BUILDING PERMITS	
PERMIT #: 06-00466	MASTER PERMIT #: 06-00466
DATE ISSUED 03/08/06	
PROJECT #: 06- QV	REF #: _____
OCONEE COUNTY	
PROJECT ADDRESS: SUNSET POINT DR 542 WEST UNION SC 29696	
SUBDIVISION: STONELEDGE LOT 71	LOT #: _____ BLK #: _____
OWNER NAME: IMK DEV CO LLC	PHONE: (864)-232-5555
ADDRESS: 501 BRIXTON CIR	
CITY: SIMPSONVILLE	STATE: SC ZIP: 29681
CONTRACTOR: MARICK HOME BUILDERS	PHONE: () - _____
ADDRESS: 6 MILAN DR	
CITY: GREENVILLE	STATE: SC ZIP: 29609
ENGINEER: DESIGNER:	
PROP. USE: 501 BRIXTON CIR SIMPSONVILLE SC 29681	
WORK: NEW CONST OF TOWNHOME	
DESC:	
VALUATION: 263,785.32	FEES DUE: 952.00 FEES PAID: 952.00
SPECIAL CONDITIONS: _____	WORK CLASS: S2H SQ. FTG: 3,830 FIRE ZONE: Y OCCUP TYPE: R3 USE ZONE: CONST TYPE: VU
APPLICATION ACCEPTED BY	PLANS CHECKED BY APPROVED FOR ISSUANCE BY
***** NOTICE *****	
THIS PERMIT BECOMES NULL AND VOID IF WORK OR CONSTRUCTION AUTHORIZED IS NOT COMMENCED WITHIN 6 MONTHS, OR IF CONSTRUCTION OR WORK IS SUSPENDED, OR ABANDONED FOR A PERIOD OF 6 MONTHS AT ANY TIME AFTER WORK IS STARTED.	
I HEREBY CERTIFY THAT I HAVE READ AND EXAMINED THIS DOCUMENT AND KNOW THE SAME TO BE TRUE AND CORRECT. ALL PROVISIONS OF LAWS AND ORDINANCES GOVERNING THIS TYPE OF WORK WILL BE COMPLIED WITH WHETHER SPECIFIED HEREIN OR NOT. GRANTING OF A PERMIT DOES NOT PRESUME TO GIVE AUTHORITY TO VIOLATE OR CANCEL THE PROVISIONS OF ANY OTHER STATE OR LOCAL LAW REGULATING CONSTRUCTION OR THE PERFORMANCE OF CONSTRUCTION.	
 (SIGNATURE OF CONTRACTOR OR AUTHORIZED AGENT)	3/8/06 DATE
 (APPROVED BY)	3/8/06 DATE



OCONEE COUNTY BUILDING PERMIT APPLICATION

OWNER & PROPERTY INFORMATION

CONTRACTOR INFORMATION

PROJECT INFORMATION

[illegible]

01.05.06

EXHIBIT D

Professional Licensing Boards | Board Member Lookup

Main Menu : **Residential Builders** Note: All fields are not required for searching

Last Name:	First name:
License number:	City:
Company name: marick	
License Type: All	
To perform a lookup retype the characters in the box to the right	
  	
Find	

Your search returned: 0 record(s).

Search Tip:

- IF YOUR SEARCH RETURNED 0 RECORDS, YOU MAY WANT TO TRY SEARCHING UNDER "CONTRACTORS - COMMERCIAL" LICENSING BOARD.
- When searching for a specific licensee, search the INDIVIDUALS NAME. Enter just a few letters to do a multiple search listing if you don't know the exact way a person or company is licensed.
- When SEARCHING by license number, ENTER NUMBERS ONLY.
- IF YOU ARE AN APPLICANT CHECKING THE STATUS OF YOUR APPLICATION AND THE SEARCH RETURNS "0 RECORDS", CHECK HERE FIRST TO SEE IF YOUR APPLICATION IS PENDING BEFORE CONTACTING THE LICENSING BOARD: PENDING APPLICATION CHECK. IF YOU ARE SHOWN TO BE PENDING, YOUR APPLICATION HAS BEEN RECEIVED AND IS BEING PROCESSED. YOU WILL BE CONTACTED BY MAIL OR FAX IF ITEMS ARE MISSING OR INCOMPLETE.

Status Clarification:

- **ACTIVE:** Licensee is current and properly licensed to work and pull permits in the state of SC.
- **APPROVED:** Applicant/Licensee is in final stages of becoming ACTIVE.
- **PENDING:** License has not been issued, cannot do work over \$200.00.
- **INACTIVE:** Licensee cannot work until license is in an active status.
- **LAPSED:** This license is lapsed/cancelled; the licensee cannot perform any work over \$200.00
- **SUSPENDED:** The license has been suspended by the board until further notice. No work or permits can be pulled during this time.

Notes:

The information on this page is a secure, primary source for license verification provided by South Carolina Department Labor, Licensing and Regulation. This website is maintained by LLR staff and is updated nightly reflecting changes to our licensing and enforcement database.

Janet Baumberger
Administrator

Phone: (803) 896-4696
Fax: (803) 896-4814
PO Box 11329
Columbia, S.C. 29211-1329

South Carolina Department of Labor, Licensing & Regulation



Professional Licensing Boards | Board Member Lookup

Main Menu : **Commercial Contractors** Note: All fields are not required for searching

Last Name:	First name:
License number:	City:
	Company name: marick
	Classification: All

To perform a lookup retype the characters in the box to the right

PNK

Find

Your search returned: 0 record(s).

Search Tip:

- IF YOUR SEARCH RETURNED 0 RECORDS, YOU MAY WANT TO TRY SEARCHING UNDER "RESIDENTIAL BUILDERS" LICENSING BOARD.
- When searching for a specific licensee, search either the COMPANY NAME or the INDIVIDUALS NAME; you CANNOT search both together. Enter just a few letters to do a multiple search listing if you don't know the exact way a person or company is licensed.
- When SEARCHING by license number, ENTER NUMBERS ONLY. do not enter G or M.
- Do not use any punctuation marks when searching a "Company name"
- IF YOU ARE AN APPLICANT CHECKING THE STATUS OF YOUR APPLICATION AND THE SEARCH RETURNS "0 RECORDS", CHECK HERE FIRST TO SEE IF YOUR APPLICATION IS PENDING BEFORE CONTACTING THE LICENSING BOARD: PENDING APPLICATION CHECK. IF YOU ARE SHOWN TO BE PENDING, YOUR APPLICATION HAS BEEN RECEIVED AND IS BEING PROCESSED. YOU WILL BE CONTACTED BY MAIL OR FAX IF ITEMS ARE MISSING OR INCOMPLETE.

Status Clarification:

- **ACTIVE:** Licensee is current and properly licensed to work and pull permits in the state of SC.
- **APPROVED:** Applicant/Licensee is in final stages of becoming ACTIVE.
- **PENDING:** before accepting any jobs FROM THIS ENTITY, you must first contact this board at (803) 896-4686 to see if the contractor is within a 90-day grace period and can still work; otherwise, they can only do work that is unregulated UNTIL THEY BECOME "ACTIVE": No License Required by SC Contractor's Licensing Board (pdf)
- **INACTIVE:** Contractor cannot bid, pull permits, or do any regulated contracting work above the \$5,000 contract limit. See work/jobs that are unregulated here: No License Required by SC Contractor's Licensing Board (pdf)
- **LAPSED:** This license is lapsed/cancelled; the contractor cannot bid, pull permits, or do any regulated contracting work above the \$5,000 contract limit. See work/jobs that are unregulated here: No License Required by SC Contractor's Licensing Board (pdf)
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PO Box 11329

Columbia, S.C. 29211-1329

South Carolina Department of Labor, Licensing & Regulation

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., et al,
v. IMK DEVELOPMENT CO., LLC, et al.
Case No.: 2009-CP-37-0652

CERTIFICATE OF SERVICE

I do hereby certify that on the 30th day of August, 2012, I served a copy of the foregoing *Memorandum in Support of Carl Catoe Construction, Inc.'s Motion to Dismiss as to Marick Home Builders' Claims* in the above-entitled matter by sending a copy via electronic mail and regular mail to counsel for Marick Home Builders; all other counsel were served via electronic mail only.

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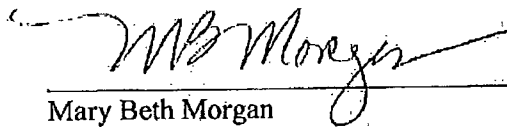
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Attorney for Vincent Morales d/b/a Morales Masonry



Mary Beth Morgan



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor**
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature]
DATE: 10/1/07

BY: [Signature] ★
DATE: 10-30-07 ★

Rick Thoennes
NAME and TITLE

Mike Owner ★
NAME and TITLE

Marick Home Builder, LLC.
COMPANY NAME

Clearview Const. ★
COMPANY NAME

[Signature]
WITNESSED BY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No: 2013-001403

Stoneledge At Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, Individually and on Behalf of All others similarly situated, Plaintiffs

IMK Development, Co., LLC Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Heriberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., Southern Basements, Inc., MJG Construction and Homebuilders, Inc., d/b/a MJG Construction, KMAC, Inc., d/b/a KMAC North Carolina, Eufacion Garcia, Everado jarmamillio, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, Miller/Player & Associates, Defendants

Of whom Marick Home Builders, LLC, and Rick Thoennes are the Appellants,

And Clear View Construction, LLC, and Michael Franz are Respondents.

Bostic Construction, Inc., Third Party Plaintiffs,

v.

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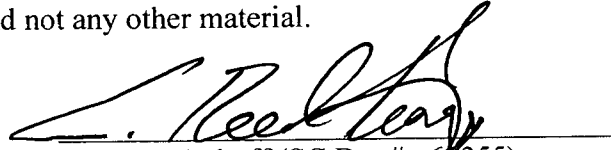
APR 17 2014

SC Court of Appeals

Southern Stone, Inc. and Buck Smith Construction, Third Party Defendants.

CERTIFICATE OF COUNSEL

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



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C. Reed Teague (SC Bar #: 79933)

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*Attorneys for Appellants Marick Home
Builders, LLC and Rick Thoennes*

April 14, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No: 2013-001403

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IMK Development, Co., LLC Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., Southern Basements, Inc., MJG Construction and Homebuilders, Inc., d/b/a MJG Construction, KMAC, Inc., d/b/a KMAC North Carolina, Eufacion Garcia, Everado jarmamillio, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, Miller/Player & Associates, Defendants

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Bostic Construction, Inc., Third Party Plaintiffs,

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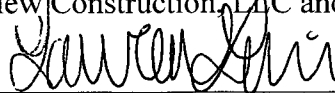
APR 17 2014

SC Court of Appeals

Southern Stone, Inc. and Buck Smith Construction, Third Party Defendants.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Respondents' counsel by hand delivering a copy of it on April 17, 2014, addressed to Respondents' attorneys of record, Michael B.T. Wilkes, Esquire and Lindsay L. Builder, Esquire, 127 Dunbar Street, Suite 200 Spartanburg, SC 29306 (attorney for Clear View Construction, LLC and Michael Franz.



Lauren Lavin
Courier at The Ward Law Firm, PA

April 17, 2014

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APR 17 2014

SC Court of Appeals