

STATE OF SOUTH CAROLINA
In the Supreme Court

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APR 23 2014

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

S.C. Supreme Court

Alexander J. Macaulay, Circuit Court Judge
Circuit Court Case No. 2009-CP-37-0652

Appellate Case No. 2012-21283

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.....PETITIONERS,

V.

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 ENTERPRISE 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, 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,

OF WHOM, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC ARE.....RESPONDENTS.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent Gunter Heating & Air

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APPEAL FROM OCONEE COUNTY
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Alexander J. Macaulay, Circuit Court Judge
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Appellate Case No. 2012-212830

Stoneledge at Lake Keowee Owners' Association, Inc., et al., ... Petitioners,

v.

Gunter Heating & Air & All Pro Heating, A/C & Renovations, LLC, . . . Respondents

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI
(Volume 1)**

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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 K. Plourde, Carol C.
Pope, Steven B. Taylor, Bette J. Taylor, Robert White,
Individually, and on behalf of all others similarly
situated, Appellants,

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, M Group Construction and Development,
LLC, Clearview Construction, Michael Franz, MHC
Contractors, Miguel Porras Choncoas, Builders First
Source Southeast Group, Mike Green, Southern Concrete
Specialties, Carl Compton d/b/a Compton Enterprise
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,
Defino 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. d/b/a MJF Construction, KMAC of the Carolinas, Inc., 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, Defendants,

Of Whom Gunter Heating & Air, and All Pro Heating, A/C & Refrigeration, LLC are Respondents.

Appellate Case No. 2012-212830

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Unpublished Opinion No. 2014-UP-062
Heard December 11, 2013 – Filed February 12, 2014

AFFIRMED

Robert T. Lyles, Jr., of Lyles & Lyles, LLC, of Charleston, for Appellants.

Anne Ross Culbreath and Charles Franklin Turner, Jr., both of Turner Padget Graham & Laney, PA, of Greenville, for Respondent All Pro Heating A/C & Refrigeration, LLC; and James Victor McDade, of Doyle Tate & McDade, PA, of Anderson, and Bradford William Cranshaw and Danielle F. Payne, both of Grier, Cox, & Cranshaw, LLC, both of Columbia, for Respondent Gunter Heating & Air.

PER CURIAM: The circuit court granted summary judgment against all plaintiffs in favor of defendants All Pro Heating, A/C & Refrigeration and Gunter Heating & Air. We affirm.

The circuit court excluded the affidavit of the plaintiffs' expert, Derek Hodgin, after determining it was a sham affidavit. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (explaining the difference "between a sham affidavit and a correcting or clarifying affidavit"). The court ruled that without Hodgin's affidavit, the plaintiffs presented no issue of material fact, and thus All Pro and Gunter were entitled to judgment as a matter of law. *See* Rule 56, SCRPC. However, the circuit court also ruled that even considering the affidavit, the plaintiffs' evidence "does not create an issue of fact to withstand summary judgment." We do not address whether Hodgin's affidavit was a sham because we agree with the circuit court that, even considering the affidavit, the plaintiffs submitted only speculation, and no evidence, as to who cut the truss. Therefore, there is no issue of material fact, and All Pro and Gunter were entitled to judgment as a matter of law. *See Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 315, 751 S.E.2d 256, 259 (2013) ("Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.").

For the reasons stated above, the circuit court's granting of summary judgment is

AFFIRMED.

FEW, C.J., and PIEPER and KONDUROS, JJ., concur.

Tab B

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No. 2009-CP-37-0652
Appellate Case No. 2012-212830

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.....Appellants,

v.

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, 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,

OF WHOM, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC, ... Respondents

APPELLANT'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

The Appellants, by and through their undersigned counsel, hereby petition this Honorable Court for a rehearing of the above referenced appeal, pursuant to Rule 221, SCACR. Said petition for rehearing is in regard to the Court's February 12, 2014 Opinion which affirmed the instant appeal.

The grounds for Appellants' petition for rehearing are as follows:

GROUND FOR REHEARING

- I. THE COURT OF APPEALS SHOULD HAVE RULED ON THE ISSUE OF WHETHER HODGINS AFFIDAVIT IS A SHAM AFFIDAVIT.
- II. THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANTING OF SUMMARY JUDGMENT
 - A. The testimony of Hodgin was not speculation.
 - B. The testimony of Hodgin, while based on circumstantial evidence, presented more than the required scintilla of evidence to overcome summary judgment.

I. THE COURT DECLINED TO ADDRESS A CRITICAL ISSUE IN THE CASE, THAT BEING WHETHER THE HODGIN AFFIDAVIT WAS A SHAM. THAT ISSUE WAS PRESERVED AS WAS THE PRIMARY ISSUE NOTED BY APPELLANTS IN THEIR APPEAL. IN ORDER TO PRESERVE THE ISSUE FOR FURTHER REVIEW, APPELLANTS RESPECTFULLY REQUEST THAT THAT ISSUE BE DECIDED.

The trial court's erroneous finding that Hodgin submitted a "sham" affidavit was the central issue on appeal. In order to preserve that issue for further review, the Court of Appeals should have considered and ruled upon that issue and reversed the trial court.

Under Rule 242(d)(2), SCACR, only those questions raised in the Court of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari....” (emphasis added)); *See also Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the Court of Appeals and not raised in petition for rehearing); *Holly Hill Lumber Co. v. McCoy*, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case).

As noted in Appellant’s brief, the affidavit of Hodgin was not a sham affidavit. In fact, it completely consistent with his earlier deposition testimony. Additionally, Hodgin's deposition was not complete when the hearing was held, leaving the record open to further inquiry and explanation by Hodgin. His affidavit was in no way a sham affidavit and the trial court’s finding in that regard was clearly erroneous and an abuse of discretion in light of the trial court’s failure to properly apply the law and its disregard of the facts.

For the forgoing reasons the Appellants’ respectfully request that the Court of Appeals rule upon the issue of Hodgin’s affidavit and reverse the trial court on this issue.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANTING OF SUMMARY JUDGMENT

The court erroneously concluded that the evidence presented by Plaintiffs was "speculative." In fact, the circumstantial evidence submitted by Plaintiffs, supported by the Hodgin testimony, was not speculation, and was more than the scintilla of evidence needed to overcome summary judgment.

It is not disputed that the cutting of a roof truss, and creating a life-safety issue, is negligence. The question is, which contractor cut the truss? Plaintiffs submitted proof in the form of Hodgin's testimony and photographs establishing that, in his opinion, the HVAC subcontractor is the "most likely" subcontractor to have cut the truss (Hodgin depo 66:16-19). That was based on several pieces of evidence, notably, 1) the proximity of the cut truss to the HVAC duct (Hodgin depo 60:25-61:12 and 162:8-11); 2) conversations with Channon Chambers (the building inspector) (Hodgin depo 162:19-24); and, 3) his experience with cut trusses on other projects (Hodgin depo 166:15-19 and 166:23-25). Further, in his affidavit, Hodgin definitively opined about that and articulated not one but two alternative opinions of fault on the part of the HVAC sub (negligently cutting the truss, or alternatively, failing to report it) Hodgin's opinion presented the trial court with more than the required scintilla of evidence ended to overcome summary judgment. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Without explanation, the Court ruled that such evidence was "speculation." While Hodgin admittedly does not know, by admission or direct evidence, who cut the truss, his testimony was not speculation at all. Rather, it was an opinion based upon the three things noted above (comprised of facts and experience), namely, the proximity of the duct to the truss, his conversations with the building inspector and his experience with cut trusses on other projects.

Plaintiffs' burden is merely a preponderance of the evidence and, as noted by the Supreme Court in *Mahaffey v. Ahl*, 264 S.C. 241, 214 S.E.2d 119, "It is axiomatic in this State that issue of negligence and proximate cause may be resolved by direct or circumstantial evidence." Circumstantial evidence is defined as,

Testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. *People v. Yokum*, 145 C.A.2d 245, 302 P.2d 406, 410.

Black's Law Dictionary (5th ed. 1979). Hodgin, an expert in the area of forensic building investigation, with extensive experience, considered the facts before him and deduced that it was the subcontractor who installed the duct work, *which was right next to and installed through the cut in the cut truss*, by who cut the truss. This is the essence of circumstantial evidence.

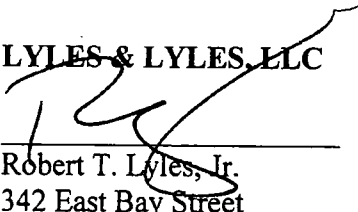
While the proof, at the time of the hearing on the motion for summary judgment may not have been persuasive to the trial judge, it was certainly more than scintilla of evidence necessary to overcome summary judgment.

CONCLUSION

Based on the foregoing, the Court's Opinion filed February 12, 2014, is in error and therefore, Appellant's Petition for Rehearing must be granted.

Respectfully submitted:

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February 26, 2014

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Tab C

The South Carolina Court of Appeals

Stoneledge at Lake Keowee Owners' Association, Inc.,
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Individually, and on behalf of all others similarly
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Development, LLC, Marick Home Builders, LLC, Bostic
Brothers Construction, Inc. and Miller/Player &
Associates, John Ludwig, M Group Construction and
Development, LLC, Clearview Construction, Michael
Franz, MHC Constructors, Miguel Porras Choncoas,
Builders First Source Southeast Group, Mike Green,
Southern Concrete Specialties, Carl Compton d/b/a
Compton Enterprise a/k/a Compton Enterprises, Gunter
Heating and Air, A/C & All Pro Heating, Refrigeration,
LLC, Coleman Waterproofing, Heyward Electrical
Services, Inc., Tinsley Electrical, LLC, Hutch N Son
Construction, Inc., Carl Catoe Construction, Inc., T.G.
Construction, LLC, Defino 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. d/b/a
MJF Construction, KMAC of the Carolinas, Inc., Eufacio
Garcia, Everado Jarmamillo, Garcia Parra Insulation,
Inc., J&J Construction, Jose Nino, Jose Manuel Garcia,

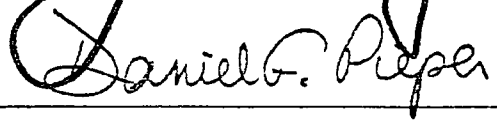
Eason Construction, Inc., and Vincent Morales d/b/a
Morales Masonry, Defendants,

Of Whom Gunter Heating & Air and All Pro Heating,
A/C & Refrigeration, LLC, are Respondents.

Appellate Case No. 2012-212830

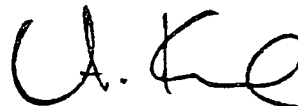
ORDER

After careful consideration of the Appellants' petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the Appellants' petition for rehearing is denied.

C.J.

J.

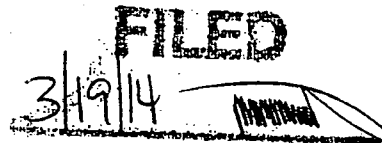


J.

Columbia, South Carolina

cc:

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Bradford William Cranshaw, Esquire
James Victor McDade, Esquire
Charles Franklin Turner, Jr., Esquire
Danielle F. Payne, Esquire
Anne Ross Culbreath, Esquire
The Honorable Alexander S. Macaulay



Tab D

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Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

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ARGUMENTS

I. THE AFFIDAVIT OF DEREK HODGIN CREATES AN ISSUE OF FACT.

a. Respondents fail to establish that Mr. Hodgin's affidavit is a "sham affidavit."

The initial briefs of the Respondents fail to establish that Mr. Hodgin's affidavit contradicts his previous deposition testimony, which is the required first factor to establish that an affidavit is a sham affidavit. See, *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). Respondents do not point to any contradictions between the affidavit and the prior deposition testimony. Rather, they point to deposition testimony where Mr. Hodgin acknowledged that he does not conclusively know who cut the attic truss observed by CSE. (R. 150.) Critically, Mr. Hodgin's affidavit does not contradict that testimony. His affidavit merely states that (in part):

- The cut truss in question is adjacent to HVAC duct work.
- Due to the proximity of the duct work to the location of the cut truss, it is likely that the truss was cut to accommodate the duct work.
- Due to the proximity of the cut truss to the HVAC duct work, the cut truss was either caused by the HVAC contractor *or* was open and obvious to the HVAC installer.
- The HVAC installer has a duty and obligation to report open and obvious cut trusses to their supervisor or to the upstream contractor at the time of discovery and installation

(R. 78, emphasis added)

Both his prior testimony and his affidavit acknowledge that it may have been a party other than the HVAC installer that cut the truss. In fact, the parties acknowledge that the

affidavit merely sets forth a "new" (not contradictory) basis for liability, which is perfectly permissible prior to the close of discovery (and even prior to the completion of Mr. Hodgins deposition).

Respondents cite the deposition testimony of various witnesses including the project's manager and the framer. None conclusively establish that any party did or did not cut the truss. Who cut the truss is an issue of fact for a jury to decide. Furthermore, as the Respondents acknowledge, the deposition of Mr. Hodgins was not complete at the time of the hearing and both the affidavit and portions of the transcript cited by the Respondents indicate that more research, investigation, etc., may be required or forthcoming.

Because Mr. Hodgins affidavit did not contradict his incomplete deposition, his affidavit was not a sham, as a matter of law, and that ruling should be reversed.

b. Mr. Hodgins affidavit does not contain improper conclusions of law or fact.

Respondents assert that even if Mr. Hodgins affidavit is not a "sham affidavit", it does not meet requirements for an expert affidavit to defeat summary judgment. As set for in Appellant's initial brief, the trial court's finding that Mr. Hodgins affidavit contained improper conclusions of law and fact was in error and Respondents cite no valid authority to dispute this point.

Respondent Gunter asserts the cases of *Yarborough & Co. v. Schoolfiend Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980) and *Charles R. Allen, Inc., v., Island Cooperative Service Coop. Ass'n., Ltd.*, 234 S.C. 537, 109 S.E.2d 446 (1959) in support of the position that Mr. Hodgins affidavit is "conclusory" and cannot defeat summary judgment. Neither of these cases address the applicability of the rules of

evidence and civil procedure to an affidavit prepared by an expert. Both involve affidavits of fact witnesses and are therefore inapplicable.

Additionally, cases cited by Respondents regarding standards for testimony regarding causation are not applicable. *E.g. Baughman v. American Tel. & Tel. Co.*, 306, S.C. 101, 111, 410 S.E.2d 2d 537, 543 (S.Ct. 1991). These cases address the sufficiency of medical testimony to establish causation of injury or illness. This matter involved an attic truss which was unquestionably cut. Plaintiff's expert has opined that based on the conditions of the location of the cut, the truss was either cut by the HVAC installer or it would have been open and obvious to him and therefore he should have reported it. (R. 76.) That testimony illustrates that a genuine issue of material fact exists and summary judgment should therefore have been denied.

II. THE TRIAL COURT DID NOT REJECT THE AFFIDAVIT OF MR. HODGIN BASED ON THE TIMING OF ITS SERVICE.

Both All Pro and Gunter assert that the trial court rejected the affidavit of Mr. Hodgin because it was not served within the time required by Rules 56(c) and 6(a), *SCRCP*. This misconstrues the order of the court. The two orders granting summary judgment to these parties do not state that the affidavit was rejected on timeliness. (See R.1 and R. 9.) In fact, the Court expressly considered the affidavit in determining whether Respondents were entitled to summary judgment. *Id.* The court merely considered the timing of the filing of the motion when evaluating the validity of affidavit for purposes of defeating summary judgment under the factors set forth in *Cothran*, 357 S.C. 210, at 218, one of which being when the affidavit was filed in relation to summary judgment. Therefore, the court did not reject the affidavit on the basis of when it was served.

Second, as acknowledged by All Pro, the affidavit was served on April 13, 2012, three days before the April 16, 2012 hearing. Rule 56(c) requires the following with regard to an affidavit in opposition to summary judgment “The adverse party may serve opposing affidavits not later than two days before the hearing”. Rule 56(c), *SCRCP*. Therefore, the affidavit was timely served.

Finally, the court was within its discretion in considering the affidavit. Absence a showing of prejudice, a trial court may consider even a late-served affidavit. *Smith v. Hastie*, 367 S.C. 410, 626 S.7.2d 13, (2005), cert. dismissed 379 SC 563, 666 S.E.2d 892 (2008). “Given the recognition that the trial court has the discretion to reject an untimely affidavit in a summary judgment motion, it follows that acceptance of a late affidavit would also be within its discretion.” *Id.* at 418, n 10. All Pro and Gunter make no argument that the court abused its discretion in considering the affidavit. In its brief All Pro acknowledges that it received the affidavit on the Friday afternoon of April 13, 2012, and neither party makes any argument that it was prejudiced by the service date of the affidavit. Both parties were clearly prepared to address the affidavit in their argument. Therefore the court was proper in considering the affidavit.

III. MR. HODGIN’S AFFIDAVIT CREATES AN ISSUE OF FACT AS TO ALL PARTIES AND THE TRIAL COURT WAS PREMATURE IN GRANTING SUMMARY JUDGMENT.

The court’s granting of summary judgment in this matter will prevent a jury from not only determining which party cut the truss that was discovered during emergency repairs at Stoneledge, but will also prevent recovery against parties who may be culpable should future destructive testing or emergency repairs reveal the same conditions in similar locations. This case illustrates the policy behind South Carolina law regarding summary

judgment. *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 346 (2003), cert. denied. (Summary judgment is a “drastic remedy” which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. (citations omitted)).

In *Baughman v. American Tel. & Tel. Co.*, 305 S.C. 101, 410 S.E.2d 2d 537 (1991), the Plaintiffs brought a personal injury claim based on pollution emissions from a refinery. The Supreme Court found that the granting of partial summary judgment was premature based on an opinion letter from an expert that found that the injuries were consistent with toxic exposure and because further testing was needed. Likewise, in this matter Mr. Hodgin sets forth that his opinion that based on the location of the cut truss, the cut likely was related to HVAC duct work installation. (R. 78.) Additionally, he states that based on his experience trusses may have been cut in areas with similar framing configurations and HVAC layouts, but that his firm has not done any destructive testing to verify other conditions at similar locations. *Id.* Importantly, this motion was granted during active discovery and the case still, as of today, has not been scheduled for trial. Therefore it is highly likely that additional evidence relevant to this issue will still come to light. (R. 78).

The various portions of depositions transcripts from multiple witnesses cited by the Respondents do nothing but establish the question of who cut the truss is an issue of fact to be tried by a jury. The trial court’s grant of summary judgment deprives a jury of consideration of one of the potentially culpable parties and also deprives them of considering the factual issue of whether the condition should have been reported to the general contractor. Additionally, the court’s ruling has deprived the Plaintiffs of recovery

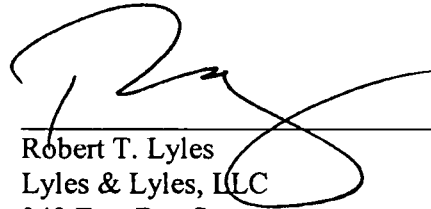
should additional emergency repairs or destructive testing reveal similar problems at other locations where both Respondents admit to performing work. For this reason, the trial court's summary judgment motion was premature and must be reversed.

CONCLUSION

For the foregoing reasons, Respondents' Briefs do not establish that Hodgin's affidavit was a sham affidavit, or that it was untimely and, furthermore, do not refute that a genuine issue of material fact exists with regard to the Respondents' liability for the cut truss and summary judgment was therefore improper.

January 9, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'R. Lyles', written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 2009-CP-37-0652

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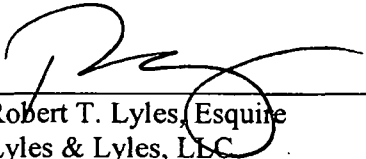
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Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellants on Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on January 9, 2013, addressed to Respondent's attorneys of record, Charles F. Turner, Jr., Esquire, 200 East Broad Street, Suite 250, Greenville, S.C. 29601, Bradford W. Cranshaw, Esquire and Danielle F. Payne, Esquire, Post Office Box 2823, Columbia, S.C. 29202, and J. Victor McDade, Esquire, Post Office Box 2125, Anderson, S.C. 29622.

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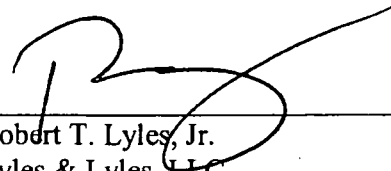
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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STATEMENT OF ISSUE ON APPEAL

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2. DID THE LOWER COURT ERR IN FINDING THAT THE AFFIDAVIT OF DEREK HODGIN DID NOT CREATE A QUESTION OF FACT?
3. DID THE LOWER COURT ERR IN GRANTING THE MOTIONS FOR SUMMARY JUDGMENT FILED BY GUNTER HEATING & AIR AND ALL PRO HEATING, A/C & REFRIGERATION, LLC?

STATEMENT OF THE CASE

This matter was filed by the Plaintiffs, in a individual and representative capacities, as well as by the POA, alleging claims for damages arising from pervasive construction defects at a townhome project in Oconee County known as Stoneledge. Included in that claim were claims against the Appellees, Gunter Heating & Air ("Gunter") and All Pro Heating A/C & Refrigeration, LLC ("All Pro"). The basis of the allegations against Gunter and All Pro arose from observations of a cut roofing truss at the project.

Gunter and All Pro filed essentially identical motions for summary judgment on February 22, 2012 and February 29, 2012 respectively. Appellant opposed those motions with the hearing in the lower court on April 16, 2012.

Notwithstanding Appellant's opposition, the lower court issued two orders dated July 27, 2012, on identical grounds, granting the motions for summary judgment of Gunter and All Pro. Those orders were received by Appellant on August 1, 2012 and the Notice of Appeal was served by Appellant on August 23, 2012.

FACTS

Plaintiff Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge HOA") is generally responsible for maintaining, repairing and replacing certain components of the townhomes located in the townhome community known as Stoneledge at Lake Keowee ("Stoneledge"), which is comprised of 80 townhomes. All other Plaintiffs named above are individual owners of the individual townhomes at Stoneledge ("Individual Owners"). The Individual Owners seek to represent the remaining townhome owners in this action.

The Stoneledge HOA has brought suit to recover damages relating to the cost to repair the common elements [and limited common elements], and the Individual Owners have brought suit to recover damages related to these components of the Project that are not the responsibility of the HOA and other claims of the Individual Owners, including loss of use, and the cost to repair the non-common elements [and the limited common elements]. Accordingly, this action by the Stoneledge HOA and the putative class represents all claims, rights and damages pertaining to improper development and construction of Stoneledge. Gunter and served as mechanical/HVAC contractor on Phase II of Stoneledge and All Pro served as mechanical/HVAC contractors on Phases I and II of Stoneledge. Gunter and All Pro were sued by Marick Home Builders, LLC (a general contractor at the Project) and Plaintiffs directly.

Plaintiffs hired Construction Science and Engineering ("CSE") to investigate the conditions at Stoneledge and develop a scope of repair. During work at the Project, CSE observed a cut roof truss. That condition was photographed by CSE and that finding was included in the CSE report.

ARGUMENTS

I. BECAUSE THE AFFIDAVIT OF DEREK HODGIN WAS NOT A SHAM AFFIDAVIT, AND CREATED QUESTION OF FACT, THE LOWER COURT'S FINDINGS TO THE CONTRARY WAS AN ABUSE OF DISCRETION

In response to the motions for summary judgment filed by Gunter and All Pro (R. 64 and R. 66.), and affidavits filed in support (R. 71 and R. 73.), Appellants submitted to the lower court an affidavit of their expert, Derek Hodgin (R. 76.) together with a deposition excerpt from the not yet completed deposition of Derek Hodgin. (R. 159)¹ In granting the motions for summary judgment, the lower court concluded that "the affidavit of Derek Hodgin, submitted by Plaintiffs' counsel, is a sham affidavit." (R. 13.) The lower court also held that, "...the affidavit of Derek Hodgin improperly makes conclusions of fact that are not supported by admissible evidence in violation of Rule 56, *SCRCP*. This affidavit, without sufficient supporting documentation, does not create an issue of fact to withstand summary judgment." (R. 15.) These conclusions are in error and are an abuse of discretion as the trial judge improperly applied to the law relative to a sham affidavit and Rule 703, *SCRE*.

The admission of evidence is left to the sound discretion of the trial court who will only be reversed if it constitutes an abuse of discretion amounting to an error of law. *Proctor v. DHEC*, 368 SC279, 628 S.E. 2d 496 (S.C. Ct. App 2006).

a. THE AFFIDAVIT OF DEREK HODGIN IS NOT A "SHAM AFFIDAVIT."

The sham or competing affidavit rule is an exception to the general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. *Cothran v. Brown*,

¹ Mr. Hodgin's deposition is currently scheduled to resume on November 27, 2012

357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). As noted in the lower court's order, the factors to consider in determining whether an affidavit is a sham are:

1. Whether an explanation is offered for the statements that contradict prior sworn statements;
2. The importance to the litigation of the fact about which there is a contradiction;
3. Whether the non-movant had access to this fact prior to the previous sworn testimony;
4. The frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
5. Whether the previous sworn testimony indicates the witness was confused at the time; and,
6. When, in relation to summary judgment, the second affidavit is submitted.

Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004).

Applying these factors to the instant situation, it is clear that the trial judge incorrectly and inappropriately applied the sham affidavit rule to the affidavit of Mr. Hodgin.

As in initial matter, in order for the "statements" (here, the affidavit) to contradict "previous sworn statements" (here, Hodgin's deposition), the deposition must at least be complete. As explained to the lower court, Mr. Hodgin's deposition is *still*, as of today, unfinished and ongoing. As a matter of law, his affidavit cannot be said to contradict his deposition testimony when his deposition testimony is not yet complete.

Further, Mr. Hodgin's affidavit is consistent with his deposition testimony (at least that taken to-date), which was submitted to the Court at the hearing by counsel for Plaintiffs and counsel for defendants (R. 159). While three or four lines of Mr. Hodgin's

deposition testimony, taken out of context, and read in isolation from the remainder of his testimony, may appear to be contrary to a statement in the affidavit, the deposition testimony as a whole is consistent with the affidavit.

Additionally, the affidavit was not provided to create an issue of fact where none existed previously. Mr. Hodgin's deposition testimony, standing alone, demonstrates a question of fact. The affidavit merely restates certain testimony and provides the court with additional testimony on matters about which Mr. Hodgin has not yet been thoroughly questioned during his deposition. Mr. Hodgin's affidavit is not contradictory, as the defendants suggest, merely because it restates, and adds to, previous, and still incomplete, deposition testimony.

Also, an overview of sham affidavit cases illustrate that application of that rule is not appropriate under the circumstances. In *Cothran*, relied upon by the lower Court, the Supreme Court actually reversed the trial court's decision to exclude the affidavit and determined that the competing affidavit rule did not apply. Mr. Hodgin's affidavit in this case is also clearly distinguishable from affidavits in cases where the sham affidavit rule has been applied. For example, the federal cases cited in *Cothran* as illustrative of the sham affidavit rule, are inapposite to this situation. In a decision from the Second Circuit, plaintiff submitted affidavits characterized by the court as "false", delayed errata sheets, and supplemental answers to interrogatories attempting to recant prior deposition testimony, which the district court found so egregious it imposed Rule 11 sanctions on the plaintiff and its counsel. *Margo v. Weiss*, 213 F.3d 55 (2nd Cir. 2000). The errata sheets, supplemental discovery responses and affidavits in *Margo*, under no uncertain terms, attempted to *change* and *recant* the testimony given during the deposition and

information given in prior discovery responses. *Id.* In fact, the court found the conduct so appalling that, in addition to affirming the award of attorney's fees and costs below, the court awarded double costs on appeal. *Id.*

In *Martin v. Merrell Dow Pharmaceuticals, Inc.*, the court found the plaintiff's affidavit "flatly contradicted" no less than 8 of her prior sworn statements. 851 F.2d 703, 705 (3rd Cir. 1988). Some explanation of the prior testimony and subsequent affidavit is necessary to an understanding of the court's exclusion of the affidavit and to understand how very different the instant case is from those where the sham affidavit rule has been applied. The Plaintiff mother sued the manufacturer of a drug called Bendectin, used to alleviate morning sickness, that allegedly caused birth defects in her child. During Mother's deposition, she testified that she began taking Bendectin on May 19, around the second month of her pregnancy, that she did not have any pills leftover from a prior pregnancy, that the May 19 prescription she obtained was her only source of Bendectin, that she first took Bendectin during her second month of pregnancy, and she did not do anything at home, prior to May 19, to try to alleviate her nausea. Her answers to interrogatories were consistent with this testimony. Then, after the drug company moved for summary judgment based on its expert's opinion that the birth defects could not have been caused by ingesting the drug after the first month of pregnancy, the mother submitted an affidavit stating that she did have pills left from a previous pregnancy and that she did take them before May 19, probably around one month into her pregnancy, in order to alleviate her morning sickness. Not all have been listed here, but the court remarked the affidavit, submitted after the motion for summary judgment was filed, "flatly contradicted no less than eight of [Mother's] prior sworn statements."

Finally, in *Barwick v. Celotex*, 736 F.2d 946 (4th Cir. 1984), the court determined that an asbestosis Plaintiff's affidavit was properly excluded from consideration by the district court under similar circumstances. In *Barwick*, during the plaintiff's lengthy deposition, he testified he could not identify the manufacturer of any asbestosis-containing product that he had ripped out of any installation during his employment at a particular facility. However, after motions for summary judgment were filed, Plaintiff submitted an affidavit stating that while he was employed at the facility, he was exposed to products manufactured by Keene Corporation, and went on to identify several products by name, including Thermoseal Pipe Covering and Eighty-Five Percent Magnesia Pipe Cover and Block. Importantly, during his deposition, he testified he had *no personal knowledge* of being exposed to Thermoseal or Eighty-Five Percent Magnesia block and pipe covering material. Also, importantly, a very specific pretrial order required Plaintiff to name every product (by name and manufacturer) that he was exposed to. None of the products named in his affidavit had been identified in the disclosure required by the pretrial order. Under these circumstances, the Court of Appeals for the Fourth Circuit found the affidavit should not be considered.

In each of these cases where sham affidavit rule has been applied, the subsequent affidavit was very clearly and squarely contradictory, if not opposite, to the prior testimony or discovery responses. In this case, defendants have attempted to demonstrate that Mr. Hodgin's affidavit is contradictory to his prior testimony by taking select lines of testimony out of context and ignoring other testimony of Mr. Hodgin. As reflected in the deposition excerpts which were submitted to the lower Court, Mr. Hodgin's affidavit is consistent with the testimony given by him, so far, at his deposition.

The sham affidavit rule is not applicable to the affidavit of Mr. Hodgin which should have been properly considered by the Court for the purposes of summary judgment.

b. THE AFFIDAVIT OF HODGIN CREATES AN ISSUE OF FACT.

Rule 703, *SCRE* states as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The lower court held that “the affidavit of Derek Hodgin improperly makes conclusions of fact that are not supported by admissible evidence in violation of Rule 56, *SCRPC*. (R. 15.) This affidavit without sufficient supporting documentation does not create an issue of fact to withstand summary judgment” (R. 76). For authority, the lower court cites *Robinson v. S. Fin. of S. Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005) though that case does not seem relevant to the issue.

To the extent the lower court disregarded Hodgin’s affidavit, the lower court’s findings about its lack of sufficiency is an abuse of discretion as it fails to properly apply Rule 703, *SCRE*, which allows an expert such as Mr. Hodgin to render opinions based upon evidence that is inadmissible.²

Similarly, the lower court found “Derek Hodgin’s affidavit references photographs and observations that were not observed or taken by him and are not admissible supporting evidence.” (R. 16.) Again, this is an error of law as nothing in

² There has been no contention, in the lower court or in the judge’s order, that the photographs were not taken by employees of Mr. Hodgin during emergency repairs at the Stoneledge facility. Thus, the authenticity and accuracy of the photographs are not in dispute.

Rule 703, or any other rule of evidence, requires that photographs relied upon by an expert be taken personally by the expert or that the expert personally make all observations which form the basis of his opinion.

II. BECAUSE PLAINTIFFS SUBMITTED ADMISSIBLE EVIDENCE WHICH CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO THE LIABILITY OF GUNTER AND ALL PRO, THE LOWER COURTS GRANTING OF SUMMARY JUDGMENT WAS IN ERROR

The evidence submitted to the trial court, in the form of both the affidavit and the deposition testimony of Derek Hodgins, established more than the required scintilla of evidence creating a genuine issue of material fact, sufficient to overcome the motions for summary judgment by Gunter and All Pro.

"When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." In order to withstand a motion for summary judgment ' in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a scintilla of evidence (internal citations omitted)"

Fountain v. First Reliance Bank, 398 S.C. 434, 730 S.E.2d 305, 308 (2012)

In his deposition testimony and in his affidavit, Mr. Hodgins opines as to not one, but two breaches of duty on the part of Gunter and All Pro. First, the evidence leads him to conclude that Gunter and/or All Pro cut the roof truss in question. Second, Mr. Hodgins opines that even if neither Gunter nor All Pro cut the referenced truss, given the proximity of their work to the cut truss, they had a duty to advise the general contractor of the cut truss so that the truss could be properly repaired. There is no evidence that this

occurred. He also stated, in the affidavit, that he believes there are other cut trusses at Stoneledge.

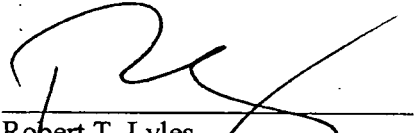
Those opinions, and that evidence, establish at least the required scintilla of evidence to overcome summary judgment. Furthermore, were without the testimony of Mr. Hodgin, the photographs alone could lead to the conclusion, even by a lay person, that the trusses were cut by the mechanical/HVAC contractor. With discovery ongoing, it was, at a minimum, premature to grant the motion of both HVAC contractors.

CONCLUSION

The lower court's findings that the Hodgin affidavit was a sham affidavit, and did not create a question of fact, is an abuse of discretion. Further, Appellants did submit at least a scintilla of evidence establishing a genuine issue of material fact and the lower court's grant of summary judgment should be reversed.

Respectfully submitted,

January 9, 2013



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Tab F

ORIGINAL

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

FEB 05 2013

SC COURT REPORTERS

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0652

Appellate Case No. 2012-212830

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 Nix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou K. Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White, Individually, and on behalf of all others similarly situated.....Appellants,

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. and Miller/Player & Associates, John Ludwig, M Group Construction and Development, LLC, Clearview Construction, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise 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., 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, 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, Defendants.

Of Whom Gunter Heating & Air and All Pro Heating, A/C &
Refrigeration, LLC.....Respondents.

FINAL BRIEF OF RESPONDENT
ALL PRO HEATING A/C & REFRIGERATION, LLC

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February 4, 2013

Of Whom Gunter Heating & Air and All Pro Heating, A/C &
Refrigeration, LLC.....Respondents.

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February 4, 2013

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in excluding Derek Hodgin's affidavit from its consideration of Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment when the affidavit was not timely served on Respondent All Pro Heating, A/C & Refrigeration, LLC within the time required by Rule 56 of the South Carolina Rules of Civil Procedure?
- II. Did the circuit court abuse its discretion in finding Derek Hodgin's affidavit to be a "sham affidavit," where Appellant submitted the affidavit on eve of the summary judgment hearing and it contradicted the affiant's prior deposition testimony?
- III. Did the circuit court abuse its discretion in finding that, even if Derek Hodgin's affidavit was not a "sham affidavit," it could not be considered on summary judgment because it was otherwise inadmissible?
- IV. Was the circuit court correct in granting Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment because even if Derek Hodgin's affidavit was considered on summary judgment it did not create a genuine issue of material fact?

STATEMENT OF THE CASE

This appeal follows the circuit court's order granting Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment on July 27, 2012. This litigation involves a construction dispute at "Stoneledge at Lake Keowee" ("Stoneledge"), an 80-unit town home community located on Lake Keowee in Oconee County. Appellants are homeowners at Stoneledge and have brought an action against All Pro as well as numerous other construction entities.

Appellants originally initiated this action on May 29, 2009, against Bostic Brothers Const., Inc., and Marick Home Builders, LLC ("Marick"), who served as general contractors for most, if not all of Phase I and Phase II of the construction of Stoneledge, respectively. Thereafter, Appellants amended their Complaint on February

9, 2010, to name additional individual homeowners, among others, as Plaintiffs, and additional construction entities, among others, as Defendants.

On March 15, 2010, Marick filed an Answer to Appellants' First Amended Complaint and filed a Third-Party Complaint against several subcontractors. Marick then amended its Third-Party Complaint to name All Pro as an additional Defendant. On April 19, 2011, All Pro filed an Answer to Marick's Amended Third-Party Complaint and on April 22, 2011, All Pro filed an Amended Answer to the same. On June 24, 2011, All Pro filed a Motion for Summary Judgment as to the claims asserted against it by Marick.

Thereafter, on October 7, 2011, Appellants filed a Second Amended Complaint, asserting causes of action directly against a number of the subcontractors, including All Pro. Appellants allege negligence and breach of warranty directly against All Pro, arising from one cut attic truss member that was found one of the Stoneledge units. All Pro filed an Answer to Appellants' Second Amended Complaint on October 31, 2011, and on February 29, 2012, All Pro filed a Motion for Summary Judgment as to Appellants' and Marick's claims, asserting that there was no basis to conclude that All Pro cut the roof truss. Subsequently, Marick's third-party action against All Pro was voluntarily dismissed without prejudice on April 19, 2012, by stipulation of the parties. (R. pp. 62-63). Thus, the only remaining claims against All Pro are those asserted by Appellants.

A hearing on All Pro's remaining Motion for Summary Judgment was held on Monday, April 16, 2012. Counsel for Appellants made oral arguments at the hearing and presented deposition testimony and an affidavit of Derek Hodgin, P.E., with Construction Science and Engineering, Inc. ("CSE"), to support their opposition to the motion. The

circuit court ruled from the bench, granting All Pro's Motion for Summary Judgment and directed All Pro to draft a proposed order for the court's review. The court's order granting All Pro's Motion for Summary Judgment was filed on July 27, 2012. The Notice of Appeal was served by Appellants on August 23, 2012.

STATEMENT OF THE FACTS

In or around 2007, All Pro was hired by Marick to install HVAC units in certain townhomes that were built as part of Phase II of the Stoneledge development. All Pro installed the units as requested, without significant issues or complaints, without retainage, and was paid in full. (R. pp. 71-72).

After some alleged problems with the townhomes at Stoneledge began to arise, Appellants retained Derek Hodgin to investigate possible construction defects at Stoneledge and to serve as an expert witness in this matter. Mr. Hodgin began his investigation on May 22, 2009. (R. p. 147, lines 16-18). On December 22, 2010, before All Pro was named as a party, Mr. Hodgin testified that a representative of CSE found one attic truss member was cut in one of the inspected units. (R. p. 148, lines 7-10). Since the investigation began in 2009, the one cut attic truss at issue has been the only cut truss discovered at Stoneledge to date. (R. p. 154, lines 7-13).

Mr. Hodgin testified that an HVAC installer would be the "likely candidate" to have cut the truss because the truss would have been in the way of the HVAC equipment. (R. p. 150, lines 16-19). This testimony, however, was not based on any direct observations by Mr. Hodgin, but rather on a discussion he had with a building official for Oconee County. (R. p. 148, line 24-p. 149, line 3). Indeed, Mr. Hodgin testified that he had not "done the research to know which unit [referred to by the building official] this

was and how many units were constructed prior to this that would have had that same issue." (R. p. 149, lines 7-12). Most importantly, Mr. Hodgin later testified that these opinions were purely speculative:

- 1 Q. Let me back up. You admit that you don't have any
2 first-hand knowledge of who cut this truss?
3 A. That's correct.
4 Q. And you admit that absent somebody telling you they
5 saw it cut or you being there seeing it cut, your
6 opinions in this regard are speculative?
7 A. Yes, sir.

(R. p. 161, lines 1-7).

Based on Mr. Hodgin's initial speculation that an HVAC contractor could have cut the truss, All Pro and Gunter Heating and Air, another HVAC contractor on the project, were named as parties. Remarkably, after incurring more than \$250,000 in fees for his investigation of the units at Stoneledge, which served as the basis for a multi-million dollar repair estimate, Mr. Hodgin has not offered an opinion that All Pro, or anyone else, cut the truss. Upon information and belief, at least 37 witnesses have been deposed, and not a single individual testified that All Pro cut the truss. Moreover, none of these individuals testified that they knew of *anyone* who cut the truss.

On January 23, 2012, over a year after his initial testimony, Mr. Hodgin testified that the cut truss was the only issue he attributed to the HVAC contractors and that it had been repaired:

- 18 Q. It's my understanding from your earlier testimony,
19 the only HVAC issue you raised deals with the
20 truss?
21 A. I believe that's correct, yes.
22 Q. And you don't know who cut or damaged the truss?
23 A. That's correct.
24 Q. And it's been repaired?
25 A. Yes, sir.

(R. p. 165, lines 18-25). Mr. Hodgins further testified he testified that this cut truss had been repaired for approximately a few hundred dollars:

- 1 Q. And it was repaired for just a few hundred dollars?
2 A. I don't know specifically the cost. That was my --
3 I was trying to give it a range. It's not a huge
4 cost. I'm sure it was done at a reasonable cost.
5 Q. That was your ballpark figure, a few hundred
6 dollars?
7 A. Yes, sir.

(R. p. 166, lines 1-7).

Significantly, Mr. Hodgins testified that after two and a half years on the project and after six to ten visits to the site, (R. p. 187, lines 8-12), he still did not have an opinion as to who cut the truss:

- 14 Q. Let me ask it this way, do you have an opinion
15 within a reasonable degree of engineering certainty
16 whether All Pro Heating and Air was responsible for
17 cutting the trusses indicated in Unit 76? In other
18 words, do you have any evidence that All Pro
19 Heating and Air installed the HVAC in that unit?
20 A. Not without doing further research, no.

(R. p. 164, lines 15-20). Indeed, he did not even have an opinion as to anyone who would have cut the truss:

- 22 Q. And you don't know who cut or damaged the truss?
23 A. That's correct.

(R. p. 165, lines 22-23). Furthermore, Mr. Hodgins was not even able to affirmatively state when the truss was cut:

- 12 Q. Do you know when the truss was cut?
13 A. I would say approximately at the time of the HVAC
14 installation, *if* that's the party that caused the
15 truss to be cut.

(R. p. 159, lines 12-15). (emphasis added).

Moreover, Burgess Metcalf, an associate of CSE and another engineering expert identified by the Appellants, testified that he did not have an opinion as to whom cut the truss and that it did not result in any further damage other than the truss itself:

- 16 Q. So that's what you observed. Is it your opinion
17 that the HVAC people were the ones that cut the
18 truss?
19 A. Again, that's a sequencing issue that I can't speak
20 to.
21 Q. So you don't have an opinion on that?
22 A. No, not a definitive opinion.
4 Q. I understand, but any resulting damage other than
5 the truss being cut itself?
6 A. Not that I'm aware of.

(R. p. 153, lines 16-22; R. p. 154, lines 4-6). Additionally, Mr. Metcalf testified that no other cut trusses had been found at Stoneledge.

- 7 Q. And have you observed, or are you aware of this
8 condition, the cut truss being in any other
9 locations at the project in any other units?
10 A. We have not made any other observations in that
11 area.
12 Q. Do you know if this truss has been fixed, repaired?
13 A. Yes.

(R. p. 154, lines 7-13). Accordingly, the testimony provided by Appellants' experts amounts only to various unknowns surrounding the cut truss, and none of which establish that the truss was cut by All Pro.

Indeed, the only affirmative testimony and evidence in this case shows that All Pro *did not* cut the truss. Nathan Hornaday, the onsite project manager who supervised the day-to-day construction of the project for the general contractor, Marick, specifically testified that neither All Pro, nor any other HVAC contractor, cut the truss. (R. p. 171, lines 13-22). Moreover, Mr. Hornaday testified that there would have been no reason for

the HVAC contractors to cut the truss because it was an open-web truss, which would allow for the installation of ductwork without having to cut it:

- 15 Q. Do you recall who cut the truss?
16 A. No. I guess it was the framer.
17 Q. Could it have been an HVAC contractor?
18 A. It could have been. It could have been a plumber,
19 if he run pipes, but the trusses I don't think they
20 would have cut any of the trusses or anything,
21 because they were open web trusses. So I don't
22 think they would have -- the HVAC or nobody would
23 have cut them.

(R. p. 170, lines 15-23).

Additionally, the material used by All Pro for any HVAC installation was flexible and capable of being routed around the trusses. (R. p. 72). In fact, even Mr. Hodgins testified that it was reasonable to believe that if the material used by the HVAC contractor was flexible, it would lessen the possibility that the HVAC contractor would have a need to cut the truss. (R. p. 162, lines 2-5). Therefore, in addition to the express testimony of Mr. Hornaday that All Pro did not cut the truss, the only other evidence indicates that there would have been no conceivable reason for All Pro to cut the truss.

In addition to Mr. Hornaday's testimony, Steve Logan of All Pro explicitly stated in his Affidavit that he personally supervised all of the work performed by All Pro and that All Pro did not cut the truss. (R. p. 72). Additionally, Mr. Logan stated that All Pro did not even have the tools necessary to cut a truss. (R. p. 72). Therefore, before the circuit court, there was only explicit, affirmative testimony that All Pro did not cut the truss and absolutely no evidence that whoever cut the truss did so at All Pro's direction or request.

Finally, as alluded to by Mr. Hornaday's testimony discussed above, the only evidence present in this case suggests that the framer on the project, Carl Catoe Construction ("Catoe"), cut the truss. As set forth in the documents produced by Catoe, one of its employees most likely cut the truss because Catoe's notes specifically reference labor involved in cutting trusses. (R. pp. 181-184). Indeed, Carl Catoe himself testified that trusses are sometimes cut in the construction process, but that when they are cut, Catoe has a simple policy: just fix the truss and move on. (R. p. 156, line 21-p. 157, line 2).

Overall, after six to ten site visits, incurring \$250,000 in fees, and almost three years on the project, the Appellants' expert offered no testimony or concrete evidence that All Pro cut the truss. On the other hand, both the project manager for the general contractor Marick as well as Steve Logan of All Pro specifically testified that All Pro did not cut the truss.

Notwithstanding the extensive testimony evidencing that All Pro did not cut the truss and Mr. Hodgin's deposition testimony indicating that he did not know when nor who cut the truss, Appellants submitted a last-minute affidavit of Mr. Hodgin purporting to impose additional duties on All Pro. (R. pp. 76-80). All Pro received Mr. Hodgin's affidavit via facsimile on the afternoon of Friday, April 13, 2012—the last business day immediately preceding the hearing on All Pro's Motion for Summary Judgment, which was held on Monday, April 16, 2012. Mr. Hodgin's affidavit was based on photographs of the cut truss, which were taken by his staff at CSE. In his affidavit, Mr. Hodgin surmised that the truss was likely cut to accommodate HVAC duct work because of the proximity of the duct work to the location of the cut truss. (R. p. 78). In addition, the

affidavit claimed that HVAC installers have a duty and obligation to report open and obvious cut trusses to their supervisor or to the upstream contractor at the time of discovery and installation, and that the truss at issue was either caused by an HVAC installer or was open and obvious to an HVAC installer. (R. p. 78). Appellants' causes of action against All Pro are based on the testimony of Mr. Hodgin and his subsequent affidavit.

At the hearing on All Pro's Motion for Summary Judgment, All Pro argued that Mr. Hodgin's affidavit was received the Friday afternoon before the Monday hearing, (R. p. 98, lines 14-16), and that it should not be considered by the court because it was a "sham affidavit," as set forth in *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). (R. p. 98, line 21-p.99, line 12; R. p. 99, line 19-p. 100, line 13). Further, All Pro argued that even if the court looked to Mr. Hodgin's affidavit, it would be otherwise inadmissible. (R. p. 100, lines 18-23). Finally, All Pro contended that summary judgment was warranted because none of the evidence or testimony indicated that the truss was cut by All Pro. Accordingly, there were no genuine issues of fact with regard to this issue.

During the Appellants' response, the circuit court was concerned with the testimony provided in Mr. Hodgin's affidavit, in that it set forth conclusions of fact that were not properly supported. (R. p. 106, lines 20-23; R. p. 107, lines 2-5; R. p. 112, lines 1-4). The circuit court was skeptical of the foundation and authenticity of the photographs relied on by Mr. Hodgin in drawing such conclusions. At the hearing, the circuit court concluded that "a material fact had not been established, and at best it's based on a want of evidentiary support." (R. p. 120, lines 18-20). Accordingly, the court

directed counsel for All Pro to draft a proposed order for the court's review. The final order granting All Pro's Motion for Summary Judgment was filed on July 27, 2012.

ARGUMENTS

I. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Pursuant to Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Likewise, the appellate court must view the evidence and all inferences therefrom in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

However, the evidence presented by the party opposing a motion for summary judgment "must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Where a verdict is not reasonably possible under the facts presented, summary judgment is proper." *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (internal quotation marks and citations omitted). One of the purposes of summary judgment is to determine whether the parties can provide evidentiary support for their version of the facts. If a party has credible evidence for its position, it must make the existence of such evidence known because summary judgment cannot be defeated by the vague hope that something may turn up at trial. *See E. P. Hinkel & Co., Inc. v. Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974).

While the granting of summary judgment is reviewed under the same standard applied by the trial court, the appellate court employs the abuse of discretion standard when reviewing the trial court's admission or exclusion of evidence. The trial judge has considerable latitude when determining the admission of evidence. Accordingly, "his decision will not be reversed absent an abuse of discretion." *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (citing *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)).

"An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citations omitted). In order to constitute an abuse of discretion, the trial court's ruling must be manifestly arbitrary, unreasonable, or unfair. *See id.* (applying standard to the admissibility of an expert's testimony) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). Furthermore, in order "[t]o warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice . . ." *Id.* (citations omitted).

II. The circuit court correctly excluded Derek Hodgin's affidavit from its consideration of Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment because the affidavit was not timely served on Respondent All Pro Heating, A/C & Refrigeration, LLC within the time required by Rule 56 of the South Carolina Rules of Civil Procedure.

The circuit court did not abuse its discretion by rejecting Mr. Hodgin's affidavit from its consideration of All Pro's Motion for Summary Judgment because Appellants did not timely serve the affidavit on All Pro in accordance with Rule 56 to allow them time to fully prepare a response.

Rule 56 explicitly provides “[t]he motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party may *serve opposing affidavits not later than two days before the hearing.*” Rule 56(c), SCRCP (emphasis added); *see also* Rule 6(d), SCRCP (setting forth same requirement). When computing time, the South Carolina Rules of Civil Procedure state that:

the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Rule 6(a), SCRCP.

In the instant matter, the hearing on All Pro’s Motion for Summary Judgment was held on Monday, April 16, 2012. Mr. Hodgin signed the affidavit on Friday, April 13, 2012, and it was received by All Pro via facsimile that afternoon. Accordingly, Appellants were not in compliance with Rules 6(a) and 56(c). Appellant’s affidavit was not served on opposing counsel *no less than two days* prior to the hearing because it was served on a Friday, rendering the first day of computation Monday, April 16, 2012—the same date as the hearing on the motion for summary judgment. *Jernigan v. King*, 312 S.C. 331, 335 n.1, 440 S.E.2d 379, 380 n.1 (Ct. App. 1993) (stating that affidavits served on opposing parties the date of the hearing may not be considered by the trial court). This factor alone was sufficient for the circuit court to exclude Mr. Hodgin’s affidavit from its consideration of All Pro’s Motion for Summary Judgment. *See Smith v. Hastie*, 367 S.C. 410, 419 n.1, 626 S.E.2d 13, 18n.1 (Ct. App. 2005) (noting that it is within the trial court’s discretion to reject an untimely affidavit.”); *Jernigan*, 312 S.C. at 335 n.1, 440 S.E.2d at 380 n.1 (same).

Further, the Supreme Court of South Carolina has held that it is not an abuse of discretion for the trial court to refuse to consider an affidavit on summary judgment when it was not served within the time required under Rule 56(c) and there was no good excuse for the party's failure to comply with Rule 56(c). *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, S.E.2d 327, 329 (1997). Appellants have not set forth any excuse, much less a "good excuse," for their failure to timely serve All Pro with Mr. Hodgin's affidavit. Accordingly, the circuit court did not abuse its discretion by excluding the affidavit and the Court should uphold its decision.

III. The circuit court correctly found that Derek Hodgin's affidavit was a "sham affidavit" where Appellants submitted the affidavit on the eve of the summary judgment hearing and it contradicted the affiant's prior deposition testimony

The circuit court did not abuse its discretion by finding that Mr. Hodgin's affidavit was a "sham affidavit" that could not be considered on All Pro's Motion for Summary Judgment because the affidavit, which contradicts Mr. Hodgin's prior deposition summary, was submitted solely to create issues of fact to preclude summary judgment.

Rule 56 allows a party to oppose a motion for summary judgment, and thereby raise issues of fact, by means of affidavits. Rule 56(e), SCRPC. South Carolina recognizes the general principle that a judge should not exclude an affidavit from consideration on summary judgment when determining whether there is a genuine issue of material fact. *Cothran*, 357 S.C. at 218, 592 S.E.2d at 633 (citing *Hancock v. Bureau of Nat'l Affairs*, 645 A.2d 588, 591 (D.C. 1994)). However, "[w]hen, on a motion for summary judgment, a judge is confronted with a party's deposition and affidavit which contradict each other, the deposition is usually considered more reliable." *Hancock*, 645

A.2d at 590-91. “If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Grace v. Family Dollar Stores, Inc. (In re Family Dollar FLSA Litig.)*, 637 F.3d 508, 513 (4th Cir. 2011) (quoting *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984)).

In following the footsteps of the federal courts—including the Fourth Circuit—South Carolina adopted the sham affidavit rule, which allows judges to excluded contradictory affidavits that are “an attempt to create a sham issue of material fact.” *Cothran*, 357 S.C. at 218-19, 592 S.E.2d at 633 (citing *Hancock*, 645 A.2d at 591). Under this rule, courts should “disregard a subsequent affidavit as a ‘sham,’ that is, as not creating an issue of fact for purposes of summary judgment, but submitting the subsequent affidavit to contradict that parties own prior sworn statement.” *Id.* at 218 (citations omitted).

When determining whether an affidavit is a “sham” affidavit,¹ rather than a clarifying or correcting affidavit, the court considers the following factors:

- (1) whether an explanation is offered for the statements that contradict prior sworn statements;
- (2) the importance to the litigation of the fact about which there is a contradiction;
- (3) whether the nonmovant had access to this fact prior to the previous sworn testimony;
- (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
- (5) whether the previous sworn testimony indicates the witness was confused at the time;
- (6) when, in relation to summary judgment, the second affidavit is submitted.

¹ “Sham” affidavits may also be referred to as “competing” affidavits. *Cothran v. Brown*, 357 S.C. 210, 217, 592 S.E.2d 629, 633.(2004).

Id. Considering these factors, it is evident that Mr. Hodgin's affidavit is a sham submitted solely in attempt to establish an issue of fact to preclude summary judgment by imposing a newly created duty and obligation on All Pro.

First, there was no explanation provided to explain why Mr. Hodgin did not previously mention in his deposition or otherwise the alleged duty that HVAC installers have to report open and obvious cut trusses to their supervisor or the upstream contractor at the time of discovery and installation. Secondly, these contradictory statements are highly important to the litigation involving these parties because they form the entire basis that All Pro is liable for this one cut truss. Third, Mr. Hodgin had an abundance of access to these facts prior to his affidavit. Mr. Hodgin's on-site investigation spanned over three years, beginning in May of 2009, and involved numerous on-site inspections and reports. Fourth, the contradictory statements set forth in the affidavit greatly vary from Mr. Hodgin's prior deposition testimony because he previously testified that any opinion he would have regarding the cut truss would be speculative, (R. p. 161, lines 1-7), but now he is suddenly able to change that opinion to conclude that the cut truss "was either caused by the HVAC installer or was open and obvious to the HVAC installer." (R. p. 78). In addition, Mr. Hodgin previously testified that he did not know when the truss was cut. Without knowledge of when the truss was cut, Mr. Hodgin cannot possibly suggest—as he attempts to do in his affidavit—that the truss would have been cut at the time an HVAC installer worked on the project. Mr. Hodgin's affidavit also mentions for the first time that the truss was "open and obvious," despite the fact that he never personally observed it or mentioned this in his depositions. Furthermore, throughout Mr. Hodgin's lengthy deposition and line of questioning regarding the cut truss, he never

mentioned any duty or obligation of an HVAC installer to report an open and obvious cut truss. Fifth, throughout the relevant portions of Mr. Hodgin's deposition, there were no indications that he was confused. In fact, he repeatedly testified that he did not know who cut the truss or when the truss was cut, and that any opinion formed on the issue would be based on speculation. Lastly, and most importantly, the timing of Mr. Hodgin's affidavit is indicative of Appellants' attempt to merely create an issue of fact to preclude summary judgment. The affidavit was submitted the Friday before the Monday summary judgment hearing. This was also approximately three months after Mr. Hodgin's second deposition, which was taken on January 23, 2012, and almost a year and a half after his first deposition, which was taken on December 22, 2010. The fact that Mr. Hodgin and the Appellants waited until the eve of the summary judgment hearing to abruptly change his testimony to impose a duty on the HVAC installers is highly suggestive of their duplicitous intentions in submitting the affidavit. Looking to the factors as a whole, it is apparent that Mr. Hodgin's affidavit was a sham submitted solely to create an issue of fact to forestall summary judgment. Therefore, the circuit court did not abuse its discretion in finding the affidavit to be a sham and disregarding it from consideration of All Pro's Motion for Summary Judgment.

Appellants contend that the circuit court erred in refusing to consider Mr. Hodgin's affidavit because his deposition is still ongoing and it does not contradict Mr. Hodgin's prior deposition testimony. Generally, summary judgment should not be granted until the opposing party has had a full and fair opportunity for discovery. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). However, "[a] party claiming summary judgment is premature because they have not been provided a full and

fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.” *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) (citation omitted); *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439 (“Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition.” (internal quotation marks and citations omitted)).

In the instant case, it is immaterial that Mr. Hodgin’s lengthy deposition may not be fully complete. Discovery in this case has been ongoing for over three years and Mr. Hodgin’s deposition began in 2010. Appellants cannot argue that they have not been provided a full and fair opportunity to complete discovery. In addition, Appellants have not presented a good reason why further discovery is needed with regard to this one cut truss. There is no indication that further discovery will uncover additional evidence relevant to the issue at hand or that Mr. Hodgin’s deposition needs to continue. *Baughman v. AT&T Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). In his depositions, Mr. Hodgin repeatedly stated his opinion, or lack thereof, for when and who could have possibly cut the truss and testified several times that any conclusion would be purely speculative. Appellants have not advanced any reason nor indication as to why discovery and Mr. Hodgin’s deposition must continue on this issue other than the fact that they set forth contradictory statements in the sham affidavit.

Appellants’ argument that Mr. Hodgin’s affidavit is consistent with his testimony is without merit—a simple comparison of the deposition testimony and the affidavit

unequivocally shows that the statements are conflicting. In addition, Appellants do not demonstrate how the deposition testimony and affidavit align. Rather, Appellants attempt to dismiss the fact that the evidence is contrary by simply stating that the portions of the testimony quoted in All Pro's Motion for Summary Judgment were "taken out of context."²

Appellants further claim that the sham affidavit rule is only used in situations where "the subsequent affidavit was very clearly and squarely contradictory, if not opposite, to the prior testimony or discovery process." (Appellants' Br., p. 11-12). They argue that Mr. Hodgin's affidavit does not contradict, but adds to his deposition testimony. Although All Pro contends that the deposition testimony and affidavit flatly contradict each other, such a requirement is not necessary. In *Jackson v. Consolid. Coal Co.*, 21 F.3d 422 (4th Cir. 1994) (unpublished table decision),³ the Fourth Circuit found that the district court correctly disregarded the plaintiff's affidavit because there was an *inherent contradiction* between his deposition testimony and the affidavit. *Id.* In *Jackson*, the plaintiff asserted a discriminatory discharge claim against the defendant, alleging that he was terminated in retaliation for his receipt of workers' compensation benefits. On several occasions during his deposition, the plaintiff was asked to identify the factual basis for his discriminatory discharge claim and he did not mention any alleged threats from his employer. *Id.* However, after the defendant filed its motion for

² It is noteworthy that while this matter was under advisement and the circuit court was reviewing All Pro's proposed order, the court was in possession of the entire deposition transcript for both days of Mr. Hodgin's deposition.

³ See *Cothran*, 357 S.C. at 218, 592 S.E.2d at 633 ("We find persuasive the reasoning of federal case law. Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement.").

summary judgment, the plaintiff submitted an affidavit stating that he was threatened by his employer. *Id.* Even though the plaintiff was never expressly asked at his deposition whether he had been threatened, the Fourth Circuit found that such statements in the affidavit “clearly conflict[ed] with his deposition testimony.” *Id.* As in *Jackson*, Mr. Hodgin was repeatedly asked various questions surrounding the issue of the cut truss, to which he never mentioned any duty imposed on the HVAC installers to report a cut truss. Therefore, his sudden statements imposing such a duty on HVAC installers should be disregarded as a sham, even though he had not been expressly questioned about whether the HVAC installers had such a duty to report. *See Hancock*, 645 A.2d at 591 (“Where a party emphatically and wittingly swears to a fact, it bears a heavy burden—even in the summary judgment context—when it seeks to jettison its sworn statement.” (citation omitted)).

For the various reasons set forth above, it is abundantly clear that the circuit court did not abuse its discretion in concluding that the affidavit of Derek Hodgin was a sham and could not be considered on All Pro’s Motion for Summary Judgment. Because this sham affidavit was the only pertinent evidence submitted by the Appellants, the circuit court’s granting of summary judgment was appropriate and should be affirmed.

IV. Even if Derek Hodgin’s affidavit was not a “sham affidavit,” the circuit court did not abuse its discretion in refusing to consider the affidavit on summary judgment because it was inadmissible since it did not establish the requisite causal connection between Appellants’ damages and the acts of Respondent All Pro Heating, A/C & Refrigeration, LLC and it provided testimony on an issue of law

Even if the circuit court erred in ruling that Mr. Hodgin’s affidavit was a sham, the court would still not have been able to consider the affidavit on summary judgment because it was otherwise inadmissible. While Appellants argue that that Rule 703 of the

South Carolina Rules of Evidence allows expert opinion to be based on inadmissible evidence, the circuit court did not err in refusing to Hodgin's affidavit because it is still inadmissible due to the fact that it does not establish a causal connection between the cut truss and the actions of All Pro. *Baughman*, 306 S.C. at 111, 410 S.E.2d at 543. The affidavit is also inadmissible because it attempts to set forth a legal opinion regarding All Pro's duties.

Rule 56(e) provides that on summary judgment, "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein." Rule 56(e), SCRPC. In addition to this, Rule 703 of the South Carolina Rules of Evidence states that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 703, SCRE. Accordingly, "'an expert witness may state an opinion based on facts not within his firsthand knowledge. . . . He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions.'" *Dawkins*, 354 S.C. at 64-65, 580 S.E.2d at 436 (quoting *Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 529 S.E.2d 45, 50 (Ct. App. 2000)). Nevertheless, the circuit court's decision should not be disturbed because refusing to consider Mr. Hodgin's affidavit was a harmless error due to the fact that it is otherwise inadmissible since it purports to establish an issue of law and it does not establish that the truss was "most probably" cut by All Pro.

In a negligence action, a plaintiff must show that: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Dorrell v. S.C. Dept. of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). "The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 135-36, 638 S.E.2d 650, 656 (2006) (citations omitted).

"In general, expert testimony on issues of law is inadmissible." *Dawkins*, 354 S.C. at 66, 580 S.E.2d at 437 (citations omitted). Mr. Hodgin's affidavit is inadmissible because it is an attempt on behalf of Appellants to establish that All Pro had a duty to report the cut truss to its supervisor or upstream contractor at the time of discovery and installation. Such a finding is an issue of law for trial court to determine. Therefore, Mr. Hodgin's affidavit inappropriately attempts to usurp the trial court's role in determining whether All Pro owes such a duty of care and was correctly disregarded by the circuit court. *See id.* (holding that the trial court correctly refused to consider an expert's affidavit where it offered some helpful factual information, but was mainly a legal argument as to why summary judgment should be denied).

In addition, "before expert testimony is admissible upon the question of causal connection between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probably' rule." *Baughman*, 306 S.C. at 111, 410 S.E.2d at 543; *see also Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002). It is insufficient for the expert to testify that the injury may or could have resulted from All Pro. "He

must go further and testify that taking into consideration all the data it is his professional opinion that the result in question *most probably* came from the cause alleged.” *Id.* (emphasis added) (quoting *Eubanks v. Piedmont Natural Gas Co.*, 198 F. Supp. 522, 526-27 (W.D.S.C. 1961)). While the expert is not required to explicitly say “most probably,” the testimony must make the impression that it is within his professional judgment as to which cause *most likely* resulted in the injury. *Id.* (quoting *Norland v. Wash. Gen. Hosp.*, 461 F.2d 694, 697 (8th Cir. 1972)). Accordingly, Mr. Hodgin’s affidavit must do more than establish that it is within the realm of possibility that All Pro cut the truss. *Id.*

Mr. Hodgin’s affidavit does not meet the “most probably” rule because he only states that it is “likely” that truss was cut to accommodate the duct work. (R. p. 78). Such a conclusion is insufficient to establish causation, rendering the affidavit inadmissible. Accordingly, it was a harmless error for the circuit court to refuse to consider the affidavit on the basis that it was not supported by admissible evidence when, in fact, the affidavit was inadmissible for other reasons.

V. The circuit court correctly granted Respondent All Pro Heating, A/C & Refrigeration, LLC’s Motion for Summary Judgment because even if Derek Hodgin’s affidavit was considered on summary judgment it did not create a genuine issue of material fact

The circuit court did not err in granting All Pro’s Motion for Summary Judgment because even if the court took Mr. Hodgin’s affidavit into consideration, it does not establish a genuine issue of material fact because it only sets forth speculation that the HVAC installers may have cut the roof truss.

Pursuant to Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Once the moving party meets the initial burden of showing the absence of evidentiary support for

the opponent's case, the opponent cannot rest on mere allegations or denials contained in the pleadings. Rule 56(e), SCRC. Rather, the non-movant must come forward with specific facts showing there is a genuine issue for trial. *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 578-79, 556 S.E.2d 732, 736 (Ct. App. 2001). In doing so, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing there is a genuine issue for trial." *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004) (citation omitted).

In cases asserting negligence and breach of warranty, where the burden of proof is a preponderance of the evidence standard, "the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011). Despite this lowered standard of proof, "[t]o survive summary judgment, the evidence presented **must amount to more than mere speculation and conjecture**. The expert must therefore state this opinion with reasonable certainty." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) (Hearn, J., dissenting) (emphasis added) (internal citations omitted).

Nevertheless, even if the affidavit of Derek Hodgin had been considered, All Pro would still have been entitled to summary judgment. It is uncontroverted that All Pro has met its initial burden under Rule 56(c) of demonstrating an absence of a genuine issue of material fact. There was no evidence concluding that All Pro cut the truss. In fact, the only evidence negated such an inference because: 1) Appellants and Mr. Hodgin do not know who cut the truss or when it was cut; 2) All Pro would not need to cut the truss

since the unit had open web trusses and All Pro used flexible HVAC material that could be routed around the trusses; 3) All Pro did not even have the tools necessary to cut the truss; and 4) the framer, Catoe, provided documents suggesting that one of its employees cut the truss.

Accordingly, the burden shifted to Appellants to show specific facts evidencing a genuine issue of material fact, which Mr. Hodgin's affidavit does not accomplish. The affidavit purports to show that All Pro cut the truss or would have seen the cut truss and been required to report it. However, the affidavit only presents speculation and conjecture, which is insufficient to preclude summary judgment. First, the affidavit states that it is *likely* the truss was cut to accommodate the duct work. Mr. Hodgin claims the truss was either cut by the HVAC installer or was open and obvious to the HVAC installer because of the proximity of the cut truss to the HVAC duct work. Mr. Hodgin's assertions do not set forth an expert opinion with reasonable certainty and are speculative at best. Second, the affidavit attempts to impute a duty on the HVAC installers to report open and obvious cut trusses and concludes that this truss was either cut an HVAC installer or was open and obvious at the time of discovery and installation. However, Mr. Hodgin clearly testified that he does not know who conducted the HVAC installation in this unit; therefore, even if such duty was imputed on HVAC installers, it is unknown whether it was All Pro's or another HVAC installer's duty to uphold. Further, Mr. Hodgin also testified that he does not know when the truss was cut; therefore, there is no evidence showing that it was cut at the time of the HVAC installation. Such speculation only results in "some metaphysical doubt as to the material facts," *B & B Liquors, Inc. v. O'Neil*, 361 S.C. at 270, 603 S.E.2d at 631, which does not impede the granting of

summary judgment under Rule 56. Accordingly, the circuit court's decision to award summary judgment in favor of All Pro should be affirmed.

VI. Respondent All Pro Heating, A/C & Refrigeration, LLC adopts by reference the brief of Respondent Gunter Heating and Air

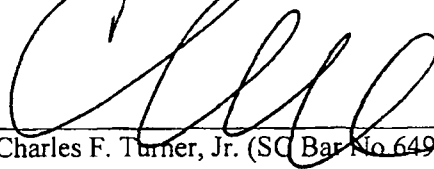
Pursuant to South Carolina Appellate Court Rule 208(b)(6), All Pro adopts by reference any and all arguments made by Respondent Gunter Heating and Air, as set forth in its initial brief.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the circuit court. The circuit court did not err in excluding Mr. Hodgins's affidavit from its consideration on summary judgment because it was not timely served and was a sham affidavit. In addition, the affidavit was otherwise inadmissible due to the fact that it provided testimony on an issue of law and did not establish the requisite causal connection between the cut truss and All Pro's actions. Furthermore, even if the circuit court did consider Mr. Hodgins's affidavit, it would not have established a genuine issue of material fact to preclude the award of summary judgment because it only presented speculation, which is insufficient to survive summary judgment. Accordingly, the circuit court's decision to grant All Pro's Motion for Summary Judgment should be affirmed.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. F. Turner, Jr.', written over a horizontal line.

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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

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0652
Appellate Case No. 2012-212830

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 Nix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou K. Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White, Individually, and on behalf of all others similarly situated.....Appellants,

v.

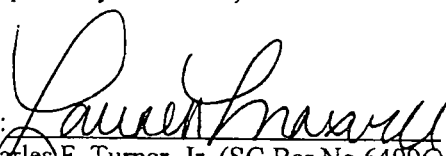
IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion At Keowee, LLC, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc. and Miller/Player & Associates, John Ludwig, M Group Construction and Development, LLC, Clearview Construction, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise 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., 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, 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, Defendants.

Of Whom Gunter Heating & Air and All Pro Heating, A/C &
Refrigeration, LLC.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Respondent All Pro Heating, A/C & Refrigeration, LLC's Final Brief* complies with Rule 211(b), SCACR.

Respectfully submitted,

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February 4, 2013
Greenville, South Carolina

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FEB 05 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SC COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0652
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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. and Miller/Player & Associates, John Ludwig, M Group Construction and Development, LLC, Clearview Construction, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise 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., 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, 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, Defendants.

Of Whom Gunter Heating & Air and All Pro Heating, A/C &
Refrigeration, LLC.....Respondents.

PROOF OF SERVICE

I certify that I have served the *Final Brief of Respondent All Pro Heating, A/C, & Refrigeration* on all parties by depositing a copy of same in the United States Mail, postage prepaid, on February 4, 2013, addressed to their attorneys of record at the addresses listed below:

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Tab G

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 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 PLOURIDE, CAROL C. POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR, AND ROBERT WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.....APPELLANTS,

v.

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, IN., RICK THOENNES, MEL MORRIS, JOE BOSTIC, JEFF BOSTIC, CLEAR VIEW CONTRUCTION, 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-RAMIREZ, ESTER MORGAN 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,

Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN GRANTING GUNTER'S MOTION FOR SUMMARY JUDGMENT?
- II. DID THE CIRCUIT COURT CORRECTLY FIND THAT THE AFFIDAVIT OF DEREK HODGIN WAS A SHAM AFFIDAVIT?
- III. DID THE CIRCUIT COURT CORRECTLY FIND THAT THE AFFIDAVIT OF DEREK HODGIN DID NOT CREATE A GENUINE ISSUE OF MATERIAL FACT?
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- VI. GUNTER ADOPTS BY REFERENCE THE BRIEF OF RESPONDENT ALL-PRO HEATING, A/C REFRIGERATION, LLC

STATEMENT OF THE CASE

Respondent Gunter adopts the Appellant's statement of the case.

STATEMENT OF THE FACTS

Plaintiff Stoneledge at Lake Keowee Owners' Association, Inc. (hereinafter "Stoneledge HOA") was created on May 24, 2005, pursuant to the South Carolina Horizontal Property Regime Act. (R. p. 20). Stoneledge HOA is obligated to maintain, repair, and replace components of the eighty (80) townhomes at Stoneledge at Lake Keowee (hereinafter "the Project"). (R. p. 20, ¶2). The remaining Appellants (hereinafter "Individual Owners") are owners of townhomes located in Phases I and/or II of the Project and have all alleged to have suffered injury and damage, or will suffer injury or damage. (R. p. 20, ¶ 3).

Appellants' allege that Respondent Gunter Heating and Air (hereinafter "Gunter") provided HVAC work for Phase II of the Project. (R. p. 25, ¶ 27). Appellants state that "due to Marick's (the general contractor for the project that subcontracted with Gunter) involvement in the construction of the project, Appellants believe that there is a reasonable basis to assert fault on Gunter." (R. pp. 26-27, ¶ 34). Appellants refer to the Scope of Repair by Construction Science & Engineering dated January 24, 2011 to detail the construction deficiencies associated with their allegations against the various Defendants. (R. p. 29, ¶ 49). On January 23, 2012, Appellants' expert, Derek Hodgin, P.E., specifically relied on Section B2, located on page 2 in the CSE Matrix dated November 21, 2011, to assess liability on Gunter for the cut roof truss in unit number 552 at the Project. (R. p. 159, ll. 5-20, p. 187). However, Hodgin stated that he was unable to provide an opinion within a reasonable degree of engineering certainty as to who cut the truss. (R. p. 163, ll. 23-25, p. 164, ll. 1-3). He admitted that his opinions are speculative at best. (R. 161, p. ll. 1-7).

Prior to this deposition, Hodgin testified on December 22, 2010 that "the likely candidate for the cut truss was the HVAC installer" without further explanation. (R. p. 150, ll. 12-19).

Hodgin further testified that he did not have any direct observations of the condition but had a discussion with a building official from Oconee County about the cut roof truss. (R. p. 148, ll. 24-25, p. 149, ll. 1-3). After spending more than \$250,000 in expert investigation fees and numerous visits to the Project for inspections, to date, the only alleged cut roof truss that has been discovered was the one cut roof truss in unit 552. (R. p. 154, ll. 7-13). Appellants have failed to present one witness to testify that Gunter did in fact cut the roof truss at issue in this case.

However, Gunter presented the Affidavit of Teddy Gunter to show otherwise. Gunter contracted with Marick Home Builders to perform HVAC work in a limited number of units at the Project. (R. p. 74, ¶ 3). Gunter did not perform any work on unit 552. (R. p. 74, ¶¶ 7 and 9). Furthermore, Gunter did not cut any roof trusses at the Project. (R. p. 74, ¶9).

Additionally, Nathan Hornaday, the project manager for Marick, the general contractor, specifically testified that an HVAC subcontractor did not cut the roof truss. (R. p. 171, ll. 13-22). He specifically testified that there would have been no reason for the HVAC subcontractor to have cut the roof truss because it was an open-web truss which would have accommodated the installation of the ductwork without the need to cut it. (R. p. 170, ll. 15-23).

Lastly, during the written discovery phase, it was uncovered that the framer on the project, Carl Catoe Construction (hereinafter "Catoe") specifically notes cutting the truss in question. (R. pp. 181-184). The invoices and project notes specifically reference cutting the roof trusses. Carl Catoe testified that there are occasions wherein roof trusses are cut during the construction process. (R. p. 156, ll. 21-25).

It is clear from the facts presented in this case that Gunter did not cut the roof truss in unit 552 and that Appellants have failed to present any factual evidence to suggest otherwise.

STANDARD OF REVIEW

The Appellate Court applies the same standard which governs the trial court under Rule 56(c), SCRCP, when reviewing the grant of a summary judgment motion. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (2003). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Burriss v. Anderson County Bd. of Educ., 369 S.C. 443, 633 S.E.2d 482 (2006); Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). When determining if any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Wilson v. Style Crest Products, Inc., 367 S.C. 653, 627 S.E.2d 733 (2006). If the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the court. Ward v. Zelinski, 260 S.C. 229, 195 S.E.2d 385 (1973). Once the moving party demonstrates summary judgment is appropriate, the non-moving party must “do more than simply show that there is some metaphysical doubt as to material facts [and] must come forward with **specific facts** showing that there is *a genuine issue for trial*.” George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001) (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1990)) (emphasis in original and further internal quotation marks omitted).

The decision of the circuit court will not be disturbed on appeal absent a clear showing that the circuit court abused its discretion. Em-Co Metal Products, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 280 S.C. 107, 311 S.E.2d 83 (1984). “An abuse of discretion can only arise when either an order based on factual conclusions is without evidentiary support or the judge issuing an order was controlled by an error of law.” Id. “The burden always rests upon the appellant to

show an abuse of discretion; and in determining whether an abuse of discretion occurred, the case must be considered in the light of its underlying circumstances.” Id. In order for a reviewing court to reverse a judgment for an alleged error in the exclusion of evidence (expert testimony) the complaining party must prove both the error of the ruling and the resulting prejudice. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). “A court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair.” Id.

ARGUMENTS

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING GUNTER’S MOTION FOR SUMMARY JUDGMENT.

Appellants failed to present a “mere scintilla of evidence” or “specific facts” that Gunter cut a roof truss in any of the units at the “Project.” In order to prove negligence or breach of warranty applying the preponderance of the evidence standard, Appellants must present a mere scintilla of evidence that Gunter created the condition of which they are complaining of, in this case, a single cut roof truss to withstand a motion for summary judgment. Hancock vs. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). “To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture.” Harris Teeter, Inc. vs. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010). “The expert must therefore state his opinion with reasonable certainty.” Id.

Gunter produced the Affidavit of Teddy Gunter which clearly states that Gunter did not perform any work in unit 552 at the project nor did it cut any roof trusses in any attics at the Project. (R. p. 74). Furthermore, the testimony of Nathan Hornaday, Marick’s project manager, supports Gunter, wherein he testified that an HVAC subcontractor did not cut a roof truss. (R. p.

171, ll. 13-22). He specifically testified that there would have been no reason for the HVAC subcontractor to have cut the roof truss because it was an open-web truss which would have accommodated the installation of the ductwork without the need to cut it. (R. p. 170, ll. 15-23). In addition, Catoe specifically notes cutting the truss in question. The invoices and project notes produced by Catoe specifically reference cutting the roof trusses. (R. pp. 181-184). Carl Catoe testified that there are occasions wherein roof trusses are cut during the construction process. (R. p. 156, ll. 21-25). Gunter met its burden under Rule 56(c), SCRCP, in demonstrating to the Circuit Court that there was not a genuine issue of fact for a jury to consider.

Appellants mistakenly relied solely upon their expert, Derek Hodgin, to meet their burden in showing specific facts that create a genuine issue for trial. Hodgin stated that he does not know who cut the roof truss in unit 552 but that it is his opinion that it could have been cut by the HVAC contractor due to the proximity of that trade's work. (R. p. 159, ll. 5-11). Hodgin further stated he did not know when the truss was cut but probably at the time of the HVAC installation, if that's the party that caused the truss to be cut. (R. p. 159, ll. 12-15)(emphasis added). Hodgin testified that he has no firsthand knowledge of who cut the truss and that his opinions regarding this condition are speculative. (R. p. 161, ll. 1-7)(emphasis added). Furthermore, Hodgin stated that he did not have an opinion to a reasonable degree of engineering certainty whether Gunter damaged or cut the roof truss. (R. p. 165, ll. 7-11).

As a last ditch effort to create a genuine issue for trial, Appellants produced the affidavit of Derek Hodgin less than two (2) days before the motion for summary judgment was scheduled to be heard. Hodgin's affidavit, while the Court correctly excluded it, merely speculates as to the likelihood of Gunter cutting the roof truss and/or seeing the condition and failing to report it. (R. p. 77). Hodgin failed to provide expert opinions with any degree of certainty and his assertions

are speculative at best. Hodgins does not know which HVAC subcontractor installed the HVAC in this unit and therefore cannot support his assertion that Gunter had a duty to report an open and obvious condition when Gunter was never in unit 552 in the first place.

Appellants failed to present a "mere scintilla of evidence" or "specific facts," i.e. to contradict Teddy Gunter or Nathan Hornaday, that Gunter did in fact perform work in the attic of unit 552 and cut the roof truss, to create a genuine issue for trial. For those reasons, the Court did not abuse its discretion in granting Gunter's motion for summary judgment.

II. THE CIRCUIT COURT CORRECTLY FOUND THAT THE AFFIDAVIT OF DEREK HODGIN WAS A SHAM AFFIDAVIT

Rule 56(c), SCRCP, allows a party opposing a motion for summary judgment to serve an affidavit setting forth specific facts showing that there is a genuine issue for trial. Appellants served on Gunter the Affidavit of Derek Hodgins dated April 13, 2012 for consideration by the Court at the hearing scheduled for April 16, 2012. The Circuit Court properly found at that hearing that the Affidavit of Derek Hodgins was a sham affidavit created solely to create a genuine issue of material fact. In the case of Cothran v. Brown, the South Carolina Supreme Court found that Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement. 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). In addition, the "competing affidavit rule" is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. Id. The factors to consider in determining whether an affidavit is a sham affidavit are:

- 1) whether an explanation is offered for the statements that contradict prior sworn statements;
- (2) the importance to the litigation of the fact about which there is a contradiction;
- (3) whether the nonmovant had access to this fact prior to the previous sworn testimony;
- (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
- (5) whether the previous sworn testimony indicates the witness was confused at the time; and
- (6) when, in relation to summary judgment, the second affidavit is submitted.

Id.

Appellants attempt to argue that because Derek Hodgin's deposition testimony is ongoing, the Court should not give any credence or consider his previously provided sworn testimony. This argument is illogical and flawed. Hodgin has testified two separate times, both under oath that he does know with any certainty who cut the roof truss, or when it was cut. He agreed that his testimony was speculative and that some of his opinions were based upon hearsay from others. He further has not opined that any additional time to conduct discovery would assist him in defining or clarifying his opinions.

More importantly, Appellants have not pointed to any deposition testimony from Hodgin that comports with the language used in Hodgin's Affidavit. Hodgin testified very clearly in his deposition that he cannot say with a reasonable degree of engineering certainty who cut the roof truss. (R. p. 159, ll. 5-8). He further stated when asked when the truss was cut "I would say approximately at the time of the HVAC installation, if that's the party that caused the truss to be cut." (R. p. 159, ll. 12-15)(emphasis added). Hodgin testified that "the two most likely

candidates for that work or for that problem are plumbing contractors and HVAC contractors.” (R. p. 160, ll. 15-19). He further testified that absent somebody telling you they saw it cut or him being there to see it being cut, his opinions about this are speculative. (R. p. 161, ll. 4-7).

However, Hodgin’s Affidavit states that “the cut truss was caused by the HVAC installer.” (R. p. 77). There is not an explanation as to the differences between Hodgin’s deposition testimony and the sworn statements contained in his affidavit. Appellants claim that these statements are not competing. Gunter would argue otherwise. Clearly in the affidavit Hodgin is stating that the cut roof truss condition was definitively caused by an HVAC installer, whereas before, he could not state with any certainty which trade cut the truss or if the HVAC installer did cut the truss at all. His opinion, he agreed, was speculative at best.

Furthermore, in Hodgin’s affidavit, he states that “the cut truss was open and obvious to the HVAC installer and that the HVAC installer had a duty and obligation to report open and obvious cut trusses to their supervisor or upstream contractor.” (R. p. 77). This is the first mention of this allegation to date. In his deposition testimony on January 23, 2012, Hodgin stated that he did not have any further opinions to a reasonable degree of engineering certainty that he would attribute to an HVAC contractor’s actions violating any code, standard of care or manufacturer’s instructions. (R. p. 163, ll. 23-25, p. 164, ll. 1-3). The issue of the cut roof truss being open and obvious was first mentioned in Hodgin’s affidavit. This directly contradicts his above-referenced testimony given on January 23, 2012 and supports that this affidavit is a sham affidavit and was drafted solely to create a genuine issue of material fact.

The issues addressed in Hodgin’s affidavit are of great import to Gunter because this one, already repaired, cut truss is the linchpin in the Appellants case against Gunter. If there is no genuine issue of material fact then there is no case against Gunter. In addressing the third

element in Cothran, the Appellants and Derek Hodgin have had since the fall of 2009 to review and determine all construction deficiencies they intended to allege against Gunter. (R. p. 146, ll. 9-12). It is evident that Hodgin and the Appellants have had more than enough time to fully develop their case against Gunter. To address issues that were not disclosed or to create issues three (3) days prior to the hearing on Gunter's motion for summary judgment is suspect at best and fully supports the Circuit Court's finding that Hodgin's affidavit is a sham. It does not appear that Hodgin was confused either at the time of either of his deposition testimonies or at the time of giving his affidavit.

Appellants point to several cases to distinguish their situation based solely on the severity of the allegations surrounding the use of those sham affidavits. Gunter submits that the Hodgin's affidavit meets all six (6) of the factors set forth in Cothran. While they may not be as egregious as in the cases set forth by the Appellants, the factors are all still met. The finding by the Circuit Court that the Hodgin affidavit was a sham is proper.

III. THE CIRCUIT COURT CORRECTLY FOUND THAT THE AFFIDAVIT OF DEREK HODGIN, IF NOT A SHAM AFFIDAVIT, DID NOT CREATE A GENUINE ISSUE OF MATERIAL FACT

Hodgin's affidavit, assuming *arguendo* it was not a sham affidavit, did not create a genuine issue of material fact. A genuine issue must be submitted to a jury whenever there is **material** evidence tending to establish the issue in the mind of a reasonable juror. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997)(emphasis added). "However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury." Id. "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." Id. Hodgin's affidavit merely states that "due to the proximity of the cut truss to

the HVAC duct work, the cut truss was either caused by HVAC installer or was open and obvious to the HVAC installer.” (R. p. 77). In order to create a genuine issue of material fact, Appellants must submit specific facts tending to support their claim against Gunter. Appellants did not set forth when, if ever, Gunter was in the attic of unit 552. Appellants failed to submit any evidence that, assuming *arguendo* Gunter was in the attic of unit 552, it cut the roof truss, or discovered the condition and failed to report it to an upstream contractor. In fact, the only evidence in this case is from Teddy Gunter stating Gunter was never in the attic of unit 552 and that Gunter did not cut any roof trusses at the Project. (R. p. 74). Furthermore, Nathan Hornaday, project manager for Marick, stated that none of the roof trusses were cut by an HVAC subcontractor:

In the instant case, Appellants failed to present material evidence by way of Hodgin’s affidavit to create a genuine issue of material fact, and, therefore, summary judgment by the Circuit Court was proper.

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT THE AFFIDAVIT OF DEREK HODGIN WAS NOT SUPPORTED BY ADMISSIBLE EVIDENCE AND PROPERLY EXCLUDED IT.

The Circuit Court properly found that the Affidavit of Derek Hodgin improperly makes conclusions of fact that are not supported by admissible evidence in violation of Rule 56, SCRCP. Hodgin’s Affidavit without sufficient supporting documentation does not create an issue of fact to withstand summary judgment. See Roberson v. S. Fin. of S. Carolina, Inc., 365 S.C. 6, 615 S.E.2d 112 (2005) (for the proposition that “an abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without

evidentiary support”). The Supreme Court held that affidavits which are conclusory in nature and based almost entirely on hearsay are properly excluded from the trial court’s consideration. Yarborough & Co. v. Schoolfield Furniture Indus., Inc., 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980) (citing 2A CJS, Affidavits, ss 50, 60; cf. Charles R. Allen, Inc. v. Island Cooperative Services Coop. Ass’n., Ltd., 234 S.C. 537, 109 S.E.2d 446 (1959)).

Rule 56(e), SCRCP, states that opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein. The Circuit Court properly excluded Hodgin’s affidavit since said affidavit was not made on personal knowledge as Rule 56(e), SCRCP, requires because he relied upon evidence that was not within his personal knowledge. Hodgin’s affidavit references photographs and observations that were not observed or taken by him, and, thus, are hearsay. Appellants rely upon a photograph of a cut roof truss to show the alleged defective condition they attribute to Gunter but failed to lay the proper foundation for submission to the Circuit Court of this evidence for consideration. Appellants argue that the evidence contained in Hodgin’s affidavit is admissible pursuant to Rule 703 of the South Carolina Rules of Evidence. This argument is flawed. Rule 703 does not permit the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion. Jones vs. Doe, 372 S.C. 53, 640 S.E.2d 514 (Ct. App. 2006). Hodgin testified that he had not personally observed the cut truss, he learned of it through an Oconee building official and he relied upon a photograph taken by staff in forming his opinions that this was a cut roof truss in unit 552. All of this is unqualified hearsay evidence which is not supported under Rule 703, SCRE and not proper for the Circuit Court’s consideration.

Furthermore, Hodgin's affidavit makes improper conclusions of law. In his affidavit, Hodgin states that the cut truss was open and obvious to an HVAC installer and said installer had a duty and obligation to report this condition to its supervisor or upstream contractor. (R. p. 77). In a negligence cause of action, Appellants must show: 1) Gunter owed a duty of care to the Appellants; 2) Gunter breached the duty by a negligent act or omission, 3) Gunter's breach was the actual and proximate cause Appellants' injury, and 4) Appellants suffered injury or damages. Dorrell v. South Carolina Dept. of Transp., 361 S.C. 312, 605 S.E.2d 12 (2004). Hodgin seized the role of the Court and stated that the HVAC installer, whoever it may be, had a duty to report the open and obvious condition. The Court is the proper party to determine if Gunter owed a duty to Appellants and if so, to articulate what the duty is to the jury. Since, Hodgin's affidavit makes improper conclusions, the Circuit Court properly excluded said affidavit.

Due to the deficiencies in Hodgin's affidavit, it was properly excluded from consideration by the Circuit Court.

V. THE CIRCUIT COURT PROPERLY EXCLUDED THE AFFIDAVIT OF DEREK HODGIN AS IT WAS NOT TIMELY SERVED ON RESPONDENT WITHIN THE APPLICABLE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Lastly, Appellants did not timely serve Hodgin's affidavit on Gunter and therefore it was proper for the Circuit Court to exclude it from consideration. Rule 56(c), SCRCP, requires that all opposing affidavits be served not later than two (2) days before the hearing. Rule 6(a), SCRCP, further states that "in computing any period of time, ..., the day of the act designated period of time begins to run is not to be included. When the period of time prescribed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation." Appellants served Derek Hodgin's affidavit on Counsel for Gunter on April 13, 2012. The motion for summary judgment hearing was scheduled and heard on April 16, 2012.

Appellants pursuant to Rules 56 and 6, SCRCP, did not timely serve Hodgin's affidavit, and, therefore, the Circuit Court did not abuse its discretion in failing to comply with the applicable rules of civil procedure.

Furthermore, Appellants failed to provide the court with an excuse as to why they failed to comply with the basic requirements of Rule 56(c), SCRCP, Black vs. Lexington Sch. Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997). For this reason alone, the Circuit Court did not abuse its discretion and its order granting summary judgment should be upheld.

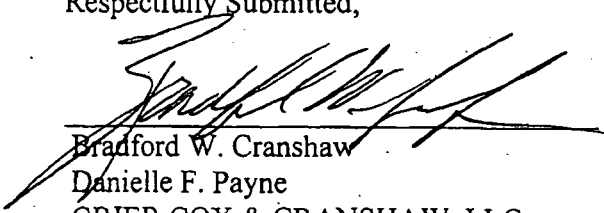
VI. GUNTER ADOPTS BY REFERENCE THE BRIEF OF RESPONDENT ALL-PRO HEATING, A/C REFRIGERATION, LLC

Pursuant to South Carolina Appellate Rule 208(b)(6), Gunter adopts by reference any and all arguments made by Respondent All-Pro Heating, A/C & Refrigeration, LLC in their initial brief.

CONCLUSION

For the above-stated reasons, the Circuit's Courts findings should be affirmed by the Appellate Court as the Court did not abuse of discretion. The evidence supports the Circuit Court's finding that summary judgment was proper after looking at all of the evidence presented in the light most favorable to the Appellants a genuine issue of material fact did not exist to submit the case to the jury. Furthermore, the evidence properly supports the Circuit Court's findings that Derek Hodgin's affidavit was a sham affidavit, it was not supported by admissible evidence, that it was not timely served upon Gunter and, ultimately, it failed to create a genuine issue of material fact. Accordingly, the Circuit Court's decision to grant Gunter's Motion for Summary Judgment should be affirmed.

Respectfully Submitted,



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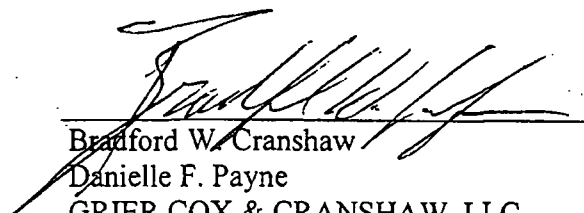
**ATTORNEYS FOR RESPONDENT
GUNTER HEATING & AIR**

West Columbia, South Carolina
January __, 2013.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent Gunter Heating & Air on Appellants by depositing a copy of it in the United States Mail, First Class postage prepaid, on January __, 2013, addressed to Appellants' attorneys of record, Robert Lyles, Esquire, Lyles & Lyles, LLC, Post Office Box 773, Charleston, South Carolina 29401.

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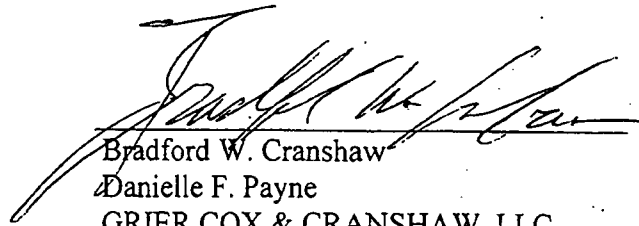
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CERTIFICATE OF COUNSEL

Counsel certifies that Defendant Gunter's Final Brief complies with Rule 211 (b).



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January 31, 2013.

Tab H

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 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.....Appellant,

v.

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, 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,

Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

RECORD ON APPEAL

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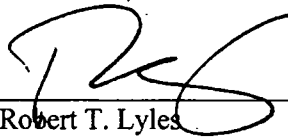
1. Order Granting Defendant All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment filed July 27, 2012.
2. Order Granting Gunter Heating & Air's Motion for Summary Judgment filed July 27, 2012.
3. Plaintiffs' Second Amended Complaint filed October 7, 2011.
4. Answer of Gunter Heating & Air to Plaintiffs' Second Amended Complaint filed October 24, 2011
5. Answer of Defendant All Pro Heating, A/C & Refrigeration, LLC, to Plaintiffs' Second Amended Complaint filed October 31, 2011
6. Stipulation of Dismissal Without Prejudice, filed April 19, 2012.
7. Third-Party Defendant All Pro's Motion for Summary Judgment filed June 24, 2011.
8. Gunter Heating & Air's Notice of and Motion for Summary Judgment dated February 20, 2012.
9. Defendant All Pro Heating, A/C & Refrigeration, LLC's Notice of and Motion for Summary Judgment filed February 29, 2012.
10. Affidavit of Steve Logan filed September 7, 2011.
11. Affidavit of Teddy Gunter dated April 12, 2012.
12. Affidavit of Derek Hodgins, P.E. dated April 13, 2012
13. Memorandum of Law in Support of Third-Party Defendant All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment.
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22. Correspondence from Attorney Catherine H. Bryan, Esquire to Judge Alexander Macaulay dated June 15, 2012.	
23. Documents produced by Carl Catoe detailing cutting roof trusses bates labeled CATOE – 000227, 000228, 000239, 000231	
24. Construction Science & Engineering Matrix dated November 21, 2011, p. 2	

CERTIFICATE OF COUNSEL

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

December 20, 2012



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal:

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I certify that this designation contains no matter which is irrelevant to this appeal.

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Respectfully submitted,



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October 18, 2012
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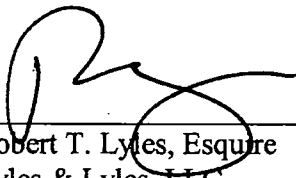
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Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

PROOF OF SERVICE

I certify that I have served the revised Designation of Matter to be Included in the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on October 18, 2012, addressed to Respondent's attorneys of record, Charles F. Turner, Jr., Esquire, 200 East Broad Street, Suite 250, Greenville, S.C. 29601, Bradford W. Cranshaw, Esquire and Danielle F. Payne, Esquire, Post Office Box 2823, Columbia, S.C. 29202, and J. Victor McDade, Esquire, Post Office Box 2125, Anderson, S.C. 29622.

October 18, 2012



Robert T. Lyles, Esquire
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342 East Bay Street
Post Office Box 773
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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 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.....Appellant,

v.

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, 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,

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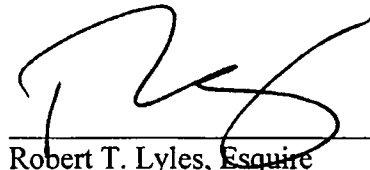
DEC 27 2012

SC Court of Appeals

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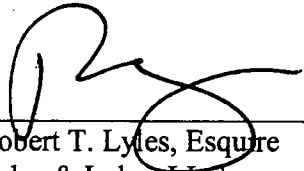
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RECORD ON APPEAL

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Heating & Air*

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5. Answer of Defendant All Pro Heating, A/C & Refrigeration, LLC, to Plaintiffs' Second Amended Complaint filed October 31, 2011
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8. Gunter Heating & Air's Notice of and Motion for Summary Judgment dated February 20, 2012.
9. Defendant All Pro Heating, A/C & Refrigeration, LLC's Notice of and Motion for Summary Judgment filed February 29, 2012.
10. Affidavit of Steve Logan filed September 7, 2011.
11. Affidavit of Teddy Gunter dated April 12, 2012.
12. Affidavit of Derek Hodgins, P.E. dated April 13, 2012
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22. Correspondence from Attorney Catherine H. Bryan, Esquire to Judge Alexander Macaulay dated June 15, 2012.	
23. Documents produced by Carl Catoe detailing cutting roof trusses bates labeled CATOE – 000227, 000228, 000239, 000231	
24. Construction Science & Engineering Matrix dated November 21, 2011, p. 2	

CERTIFICATE OF COUNSEL

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

December 20, 2012

A handwritten signature in black ink, appearing to read 'R. Lyles', is written over a horizontal line.

Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorney for the Appellants

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

C.A. #: 2009-CP-37-652

COUNTY OF OCONEE)

Stoneledge at Lake Keowee Owners' Association)
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Others similarly situated,)

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Porrás Choncoas, MHC Contractors, Miller/)
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Services, Tinsley Electrical, LLC and Hutch N)
Son Construction,)

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AFFIDAVIT OF STEVE LOGAN

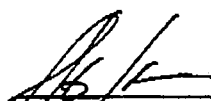
Personally appeared before me, Steve Logan, who after being duly sworn, states as follows:

1. My name is Steve Logan and I am a member of All Pro Heating, A/C & Refrigeration, LLC ("All Pro").

2. I have the authority and the experience to speak on behalf of All Pro and have been a member of the company for over 11 years.
3. All Pro has not been involved in any lawsuits until this matter.
4. In or around 2007, All Pro was hired by Marick Home Builders, LLC ("Marick") to install HVAC units in certain townhomes that were built as part of Phase II of the Stoneledge at Lake Keowee development ("Stonehedge").
5. All Pro performed the work it was hired to do and did not encounter any major issues, nor did it receive any complaints, in regard to its performance.
6. I understand that there is an allegation that we cut a truss in one of the buildings; however, this would have been impossible for a number of reasons.
 - a. First, the material we use to install duct work is flexible conduit, which is easily bent in order to achieve the proper runs. In situations where there is an obstruction, we simply bend the material to avoid the obstruction.
 - b. Second, there would have been no reason to cut the truss, because it was not in the way of the HVAC equipment. In fact, the truss was behind the return unit.
 - c. Third, no one on any of All Pro's crews engages in carpentry work. We have neither the tools, nor the personnel necessary to alter the structure of a building. Any alterations to the truss would had to have been done by the framer.
7. Additionally, I personally supervised the work by our crews, inspected the sites, and did not see any damage to any trusses, or any other problems relating to All Pro's installation of the HVAC units.
8. Based on my direct supervision and observation, All Pro did not cut the truss at issue.

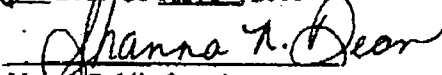
FURTHER THE AFFIANT SAYETH NOT

Dated: Sept 6, 11


Steve Logan, Member, All Pro
Heating, A/C & Refrigeration, LLC

SWORN BEFORE ME THIS

6th DAY OF June, 2011



Notary Public for SC

My Commission Expires: 3 June 2018

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

J. Adam Russell

REPLY TO:

E-Mail: jrussell@turnerpadget.com
Writer's Direct Dial: (864) 552-4627
Direct Fax: (864) 282-5947

April 11, 2012

The Honorable Beverly Whitfield
Oconee County Clerk of Court
P.O. Box 678
Walhalla, SC 29691

Re: *Stoneledge at Lake Keowee Owners' Association, Inc., et al v IMK Development Company, LLC v All Pro Heating A/C & Refrigeration, LLC*
C.A. No.: 2009-CP-37-652
Insured: All Pro Heating & Air
Claim No.: 704352540-001
File No.: 03993.00366

Dear Ms. Whitfield:

Enclosed please find two copies of the Affidavit of Steve Logan, the original of which was previously filed with this Court on September 7, 2011. Please file one copy and return a clocked copy to me in the envelope provided.

Please note that this affidavit was previously filed in support of our Motion for Summary Judgment as to the claims asserted by the Defendant/Third-Party Plaintiff, Marick Homebuilders, LLC, and will now be used in support of our Motion for Summary Judgment as to the claims asserted by the Plaintiffs.

Thank you as always for your assistance in this matter.

BUSINESS • LITIGATION • SOLUTIONS

200 East Broad Street • Suite 250 (29601) • PO Box 1509 • Greenville, SC 29602
Phone (864) 552-4600 • Fax (864) 552-4620 • turnerpadget.com

TURNER PADGET

The Honorable Beverly Whitfield
April 11, 2012
Page 2

Sincerely yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.



J. Adam Russell

JAR:mjs
Enclosures

cc: Robert T. Lyles, Jr., Esquire
Jason M. Inhoff, Esquire

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AFFIDAVIT OF STEVE LOGAN

FILED OCONEE, SC
CLERK OF COURT
2011 SEP -7 P 2:58

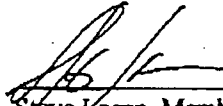
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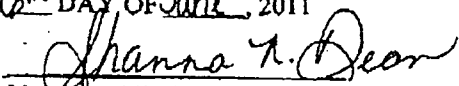
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FURTHER THE AFFIANT SAYETH NOT

Dated: Sept 6, 11


Steve Logan, Member, All Pro
Heating, A/C & Refrigeration, LLC

SWORN BEFORE ME THIS
6th DAY OF June, 2011


Notary Public for SC

My Commission Expires: 3 June 2018

FILED OCOHEE, SC
CLERK OF COURT
2011 SEP - 7 PM 2:58
TPGL 3880200V

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Third-Party Defendants.)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the hereinbelow listed pleading was served upon all counsel of record by depositing in the United States Mail, proper postage affixed thereto, a true and accurate copy thereof on April 11, 2012, as follows:

PLEADING(S): Affidavit of Steve Logan

PARTY SERVED: Robert T. Lyles, Jr.
 Lyles & Lyles, LLC
 P. O. Box 773
 Charleston, SC 29401
 Attorneys for Plaintiffs

BY:



Dottie Rhoden

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

J. Adam Russell

REPLY TO:

E-Mail: jrussell@turnerpadget.com
Writer's Direct Dial: (864) 552-4627
Direct Fax: (864) 282-5947

April 11, 2012

VIA EMAIL AND U.S. MAIL

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29401

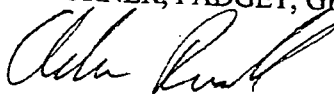
Re: *Stoneledge at Lake Keowee Owners' Association, Inc., et al. v.*
IMK Development Company, LLC v. All Pro Heating A/C & Refrigeration, LLC
C.A. No.: 2009-CP-37-652
Insured: All Pro Heating & Air
Claim No.: 704352540-001
File No.: 03993.00366

Dear Robert:

Enclosed herein and served on you, please find a copy of the Affidavit of Steve Logan that was initially filed with the court on September 7, 2011. This Affidavit will be used in support of our Motion for Summary Judgment, which is currently scheduled to be heard on Monday, April 16, 2012. Please feel free to contact us if you have any questions or concerns.

Sincerely yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.



J. Adam Russell

JAR:pam

Enclosure: Affidavit
cc: Jason M. Imhoff, Esquire (w/enclosure)

BUSINESS • LITIGATION • SOLUTIONS

200 East Broad Street • Suite 250 (29601) • PO Box 1509 • Greenville, SC 29602
Phone (864) 552-4600 • Fax (864) 552-4620 • turnerpadget.com

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owner's Association, et al
☐ Plaintiff

v.

IMK Development, et al

v

Michael Franz, AllPro Heating, A/C Refrigeration, LLC,
et al.

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-37-652

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:
Robert T. Lyles, Jr.
P.O. box 773
Charleston, SC 29401
phone: 843-577-7730 fax: 843-577-7172
e-mail: rtl@lylesfirm.com other:

Defendant AllPro Heating A/C & Refrigeration Attorney:
Charles F. Turner, Jr., Bar No. 64996
PO Box 1509, Greenville, SC 29602
phone: 864-552-4600 fax: 864-552-4620
e-mail: cturner@turnerpadget.com other:

***SEE ATTACHED LIST OF ATTORNEYS
INVOLVED***

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: min Court Reporter Needed: ☐ YES / XX NO

SECTION II: Motion Type

Written motion attached
Form Motion -

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

June 23, 2011

Signature of Attorney for ☐ Plaintiff ☒ Defendant

Date submitted

SECTION III: Motion Fee

XX PAID - AMOUNT: \$25.00

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

JUDGE'S SECTION

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

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

- ☐ MOTION FEE COLLECTED:
☐ CONTESTED - AMOUNT DUE:

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owner's Association, et al

☐ Plaintiff

v.

IMK Development, et al

v

Michael Franz, AllPro Heating, A/C Refrigeration, LLC,
et al.

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-37-652

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:
Robert T. Lyles, Jr.
P.O. box 773
Charleston, SC 29401
phone: 843-577-7730 fax: 843-577-7172
e-mail: rtl@lylesfirm.com other:

Defendant AllPro Heating A/C & Refrigeration Attorney:
Charles F. Turner, Jr., Bar No. 64996
PO Box 1509, Greenville, SC 29602
phone: 864-552-4600 fax: 864-552-4620
e-mail: cturner@turnerpadget.com other:

SECTION I: Hearing Information

Nature of Motion: AllPro Heating A/C & Refrigeration's Motion for Summary Judgment

Estimated Time Needed: min Court Reporter Needed: [] YES / XX NO

SECTION II: Motion Type

Written motion attached

Form Motion --

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

Signature of Attorney for ☐ Plaintiff [X] Defendant

February 28, 2012

Date submitted

SECTION III: Motion Fee

XX 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, SCRPC)
☐ 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

Stone letge 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-37-652

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

, Bar No.

Address:

phone:

fax:

e-mail:

other:

Defendant's Attorney:

Danielle F. Payne, Bar No. 73142

Address:

PO Box 2823

Columbia, SC 29202

phone: 803.731.0030 fax: 803.731.4059

e-mail: DPayne@griercoxandcranshaw other:

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Gunter Heating & Air's Notice of Motion for Summary Judgment

Estimated Time Needed: 15 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

February 20, 2012

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT:

☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ 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

Collected by:

Date Filed:

☐ MOTION FEE COLLECTED:

☐ CONTESTED - AMOUNT DUE: _____

(843) 735-5563 (direct)
(843) 577-7172 (fax)

--
Catherine H. Bryan
LYLES & LYLES, LLC
P.O. Box 773 (29402)
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
(843) 735-5563 (direct)
(843) 577-7172 (fax)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 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.....Appellant,

v.

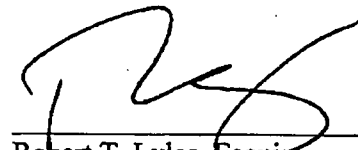
IMK DEVELOPMENT CO., LLC, KEOWEE TOWNHOUSES, LLC, LUDWIG CORPORATION, LLC, SDI FUNDING, LLC, MEDALLION AT KEOWEE, LLC, BRADFORD D. SECKINGER, JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, M GROUP CONSTRUCTION AND DEVELOPMENT, LLC, BOSTIC BROTHERS 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, 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,

Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on December 20, 2012, addressed to Respondent's attorneys of record, Charles F. Turner, Jr., Esquire, 200 East Broad Street, Suite 250, Greenville, S.C. 29601, Bradford W. Cranshaw, Esquire and Danielle F. Payne, Esquire, Post Office Box 2823, Columbia, S.C. 29202, and J. Victor McDade, Esquire, Post Office Box 2125, Anderson, S.C. 29622.

December 20, 2012



Robert T. Lyles, Esquire
Lyles & Lyles, LLC
342 East Bay Street
Post Office Box 773
Charleston, South Carolina 29401
T: 843.577.7730
rtl@lylesfirm.com
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0652
Appellate Case No. 2012-212830

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 Nix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou K. Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White, Individually, and on behalf of all others similarly situated.....Appellants,

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. and Miller/Player & Associates, John Ludwig, M Group Construction and Development, LLC, Clearview Construction, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise 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., 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, 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, Defendants.

Of Whom Gunter Heating & Air and All Pro Heating, A/C &
Refrigeration, LLC.....Respondents.

RESPONDENT ALL PRO HEATING, A/C & REFRIGERATION, LLC'S
DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

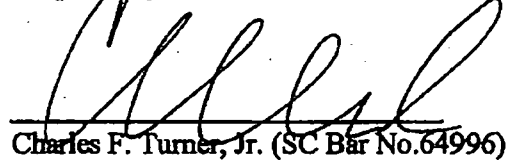
Respondent All Pro Heating, A/C & Refrigeration, LLC proposes the following
be included in the Record on Appeal (some of these may have also been designated by
Appellant):

1. Order Granting Defendant All Pro Heating, A/C & Refrigeration LLC's Motion for Summary Judgment, filed July 27, 2012;
2. Third-Party Defendant All Pro's Motion for Summary Judgment filed June 24, 2011;
3. Plaintiffs' Second Amended Complaint filed October 7, 2011;
4. Answer of Defendant All Pro Heating, A/C & Refrigeration, LLC, to Plaintiffs' Second Amended Complaint filed October 31, 2011;
5. Defendant All Pro Heating, A/C & Refrigeration, LLC's Notice of and Motion for Summary Judgment filed February 29, 2012;
6. Stipulation of Dismissal Without Prejudice, filed April 19, 2012;
7. Memorandum of Law in Support of Third-Party Defendant All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment;
8. Stoneledge Construction Defects Summary Matrix dated November 21, 2011, p. 2;
9. Affidavit of Steve Logan;
10. Deposition of Derek Hodgin on December 22, 2010, pp. 25, 60-61, and 66;
11. Deposition of Burgess Metcalf, pp. 18, 86, and 89;
12. Second Deposition of Derek Hodgin on January 23, 2012, pp. 162, 167-68, and 172-74;
13. Deposition of Nathan Hornaday, pp. 81 and 221;

14. Documents Produced by Carl Catoe, bates labeled CATOE-000227, 000228, 000239, 000231;
15. Deposition of Carl Catoe, pp. 99-100;
16. Affidavit of Derek A. Hodgin, P.E. signed April 13, 2012;
17. Transcript of Record of April 16, 2012 Hearing, pp. 9-11, 17-18, 23, and 31.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,



Charles F. Turner, Jr. (SC Bar No.64996)
Anne R. Culbreath (SC Bar No.15536)
Lauren T. Maxwell (SC Bar No.79846)
Turner Padget Graham & Laney P.A.
P.O. Box 1509
Greenville, South Carolina 29602
Telephone: (864) 552-4600
Fax: (864) 552-4620
**Attorneys for Respondent All Pro
Heating, A/C & Refrigeration, LLC**

November 2, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 2009-CP-37-0652

RECEIVED

NOV 02 2012

SC Court of Appeals

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 PLOURIDE, CAROL C. POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR, AND ROBERT WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.....APPELLANTS,

v.

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, IN., RICK THOENNES, MEL MORRIS, JOE BOSTIC, JEFF. BOSTIC, CLEAR VIEW CONTRUCTION, 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-RAMIREZ, ESTER MORGAN 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.

Of Whom, GUNTER HEATING & AIR. ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

RECEIVED

NOV 02 2012

SC COURT OF APPEALS

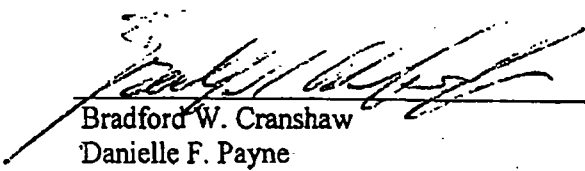
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent Gunter Heating & Air proposes the following to be included in the Record on Appeal:

1. Order granting Defendant Gunter Heating & Air's Motion for Summary Judgment filed July 27, 2012
2. Transcript of Proceedings dated April 16, 2012
3. Affidavit of Teddy Gunter dated April 12, 2012
4. Gunter Heating & Air's Notice of and Motion for Summary Judgment dated February 20, 2012
5. Plaintiffs' second amended complaint filed October 7, 2011
6. Answer of Gunter Heating & Air to Plaintiffs' second amended complaint filed October 24, 2011
7. Construction Science & Engineering Matrix dated November 21, 2011, p. 2
8. Deposition of Derek Hodgin, P.E. dated January 23, 2012, pp. 162, 166, 167, 171-172
9. Deposition of Derek Hodgin, P.E. dated December 22, 2010, pp. 7, 60-61, 66
10. Affidavit of Derek Hodgin, P.E. dated April 13, 2012
11. Deposition of Nathan Hornaday, pp. 81, 221
12. Deposition of Burgess Metcalf, p. 89
13. Deposition of Carl Catoe, p. 99
14. Documents produced by Carl Catoe detailing cutting roof trusses bates labeled CATOE-000227, 000228, 000239, 000231

We certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully Submitted,



Bradford W. Cranshaw

Danielle F. Payne

GRIER COX & CRANSHAW, LLC

Post Office Box 2823

Columbia, South Carolina 29202

Tele: (803)731-0030

Fax: (803)731-4059

J. Victor McDade

Doyle, Tate & McDade, PA

Post Office Box 2125

Anderson, South Carolina 29622

**ATTORNEYS FOR RESPONDENT
GUNTER HEATING & AIR**

West Columbia, South Carolina
November 7, 2012.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 2009-CP-37-0652

RECEIVED
OCT 08 2012
SC Court of Appeals

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.....Appellant,

v.

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, 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,

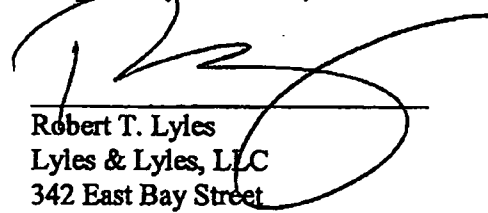
Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal:

1. Order Granting Defendant All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment filed July 27, 2012.
2. Order Granting Gunter Heating & Air's Motion for Summary Judgment filed July 27, 2012.
3. Transcript of Proceedings dated April 16, 2012.
4. Affidavit of Steve Logan filed September 7, 2011.
5. Affidavit of Teddy Gunter dated April 12, 2012.
6. Deposition of Derek Hodgin on January 23, 2012, Page 162.
7. Deposition of Derek Hodgin on January 25, 2012, Page 173.
8. Gunter Heating & Air's Notice of and Motion for Summary Judgment dated February 20, 2012.
9. Defendant All Pro Heating, A/C & Refrigeration, LLC's Notice of and Motion for Summary Judgment dated February 27, 2012.
10. Email correspondence from Attorney Catherine H. Bryan, Esquire to Judge Alexander Macaulay re: Stoneledge et al. v. IMK Development et al CA Number: 2009-CP-37-652 dated April 18, 2012.
11. Correspondence from Attorney Catherine H. Bryan, Esquire to Judge Alexander Macaulay dated June 15, 2012.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'R. Lyles', is written over a horizontal line.

Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorney for the Appellants

October 4, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 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.....Appellant,

v.

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, 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,

Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

RECORD ON APPEAL

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*Attorneys for Respondent Gunter
Heating & Air*

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-37-652

Stoneledge et al
PLAINTIFF(S)

Imk Development Company, LLC 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 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other Rule 40(j) SCRPC
- ☐ 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:

Defendant All Pro Heating, A/C and Refrigeration LLC's Motion for Summary Judgment is GRANTED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

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)

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

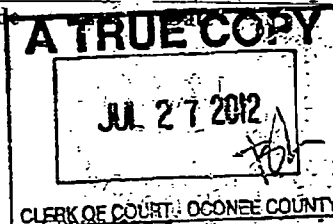
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time 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.

E. Chace
Circuit Court Judge

63

Judge Code

July 26, 2012



Atty ☒ (P) ☒ (D) ☒ Other
DSS ☒
Mailed ☒ Boxed ☒ handed ☒

For Clerk of Court Office Use Only

This judgment was entered on the 27th day of July, 20 12 and a copy mailed first class or placed in the appropriate attorney's box on this 27th day of July, 20 12 to attorneys of record or to parties (when appearing pro se) as follows:

Robert K. Lyles, Esquire

Anne R. Culbreath, Esquire

Turner Padgett

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

Court Reporter: Robin Hild

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUL 27 PM 4 35

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
C.A. #: 2009-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 Nix,
Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac)
Michael D. Plourde, Mary Lou K. Plourde, Carol)
C. Pope, Steven B. Taylor, Bette J. Taylor,
Robert White, Individually, and on behalf of all
Others similarly situated,

Plaintiffs,

v.

IMK Development Company, LLC, Keowee
Townhouses, LLC, Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion at Keowee, LLC
Integrus Keowee Development, LLC, Marick
Home Builders, LLC, Bostic Brothers Const.,
Inc., and Miller/Player & Associates,

Defendants/Third-Party
Plaintiffs,

v.

Michael Franz, Clearview Construction, Miguel
Porras Choncoas, MHC Contractors, Miller/
Player & Assoc., Builders First Source Southeast
Group, 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, Tinsley Electrical, LLC and Hutch N
Son Construction,

Third-Party Defendants.

ORDER GRANTING DEFENDANT
ALL PRO HEATING, A/C &
REFRIGERATION LLC'S MOTION
FOR SUMMARY JUDGMENT

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUL 27 PM 4 35

This matter came before me on April 16, 2012, by way of Defendant All Pro Heating &
Air Conditioning, Inc.'s (All Pro) Motion for Summary Judgment. Catherine Bryan appeared on
behalf of the Plaintiffs and Anne Culbreath appeared on behalf of Defendant All Pro. Counsel



for the Defendant moved for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

This litigation involves a construction dispute at the Stoneledge development located on Lake Keowee. Plaintiffs sued All Pro alleging negligence and breach of warranty. Plaintiffs' causes of action were based upon the testimony of Derek Hodgin of Construction Science Engineering. Mr. Hodgin asserted that the HVAC Contractors may have cut an attic truss.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Burris v. Anderson County Bd. of Educ., 369 S.C. 443, 633 S.E.2d 482 (2006); Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). When determining if any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Wilson v. Style Crest Products, Inc., 367 S.C. 653, 627 S.E.2d 733 (2006). In determining the appropriateness of granting summary judgment, the Court is not "required to single out some one morsel of evidence ... to create an issue of fact that is not genuine." Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)). Once the moving party demonstrates summary judgment is appropriate, the non-moving party must "do more than simply show that there is some metaphysical doubt as to material facts [and] must come forward with specific facts showing that there is a *genuine issue for trial*." George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001) (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1990)) (emphasis in original and further internal quotation marks omitted). Where a defendant establishes an entitlement to judgment as a matter

of law, the court must grant summary judgment. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985).

Use and admissibility of affidavits and deposition testimony to support or rebut a motion for summary judgment is governed by Rule 56(e) and states: "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRPC.

DISCUSSION

Counsel for the Defendant submitted a Memorandum of Law with supporting documentation. Gunter Heating & Air also had a Motion for Summary Judgment pending before the Court and counsel for Gunter Heating & Air submitted documentation in support of its Motion for Summary Judgment.

Plaintiff's counsel submitted deposition testimony and an Affidavit of Derek Hodgins dated April 13, 2012 to support the Plaintiffs' opposition to the Defendant's motion. The Court analyzed both the deposition testimony and the Affidavit of Mr. Hodgins.

This Court concludes that the Affidavit of Mr. Hodgins is a "sham affidavit." A court may disregard a subsequent affidavit as a "sham," that is, an affidavit that fails to create an issue of fact for purposes of summary judgment because the subsequent affidavit is introduced to contradict that party's own prior sworn statement. *Cothran v Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004), *Harris Teeter, Inc. v Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010). In distinguishing between a sham affidavit and a correcting or clarifying affidavit, the following considerations provide guidance: (1) whether an explanation is offered for the

statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted. *Cothran* at 218.

This Court has analyzed the facts and circumstances surrounding the depositions of Mr. Hodgin and Affidavit of Mr. Hodgin, signed on Friday April 13, 2012. In his deposition testimony, Mr. Hodgin agreed that he did not know who cut or damaged the truss and could not state with a reasonable degree of certainty whether All Pro was responsible for cutting the truss or even if All Pro installed the HVAC in the townhome at issue. Deposition testimony of Derek Hodgin, Second Deposition, p. 172, lines 15-20. In his affidavit, Mr. Hodgin appears to create a newly imposed duty on the HVAC contractors—that an HVAC installer has a duty to report cut trusses to their supervisor or to the upstream contractor when discovered. However, in his deposition he testified that he did not even know when the truss was cut. Deposition Testimony of Derek Hodgin, Second Deposition, p. 162, lines 12-15).

Without knowledge of when the truss was cut, Mr. Hodgin cannot state, as he purports to do in his affidavit, that the truss would have even been cut at the time that an HVAC contractor worked on the project. Thus, it is clear that the affidavit is an attempt to create an issue of fact to survive summary judgment. Further, in his Affidavit, Mr. Hodgin infers that only the HVAC contractors would have been working in the area of the truss; however, this is contradicted by his deposition testimony. In his deposition, Mr. Hodgin stated that in addition to HVAC contractors, plumbing contractors also have “conflicts” with trusses and that they, too, are also “likely

candidates" to have cut the truss. (Deposition Testimony of Derek Hodgin, Second Deposition, p. 166, lines 23-25).

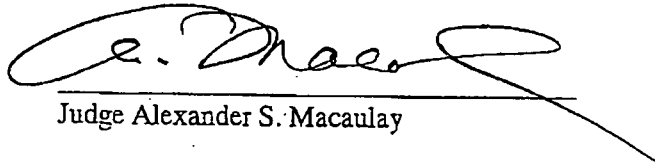
In applying the *Cothran* standards to the present case, the Court concludes that Mr. Hodgin's Affidavit is a "sham affidavit." First, no explanation is offered for Mr. Hodgin's omissions and new opinions. These new opinions, omitted from several days of prior testimony, are important to this litigation, as they form the basis for the Plaintiffs' claim that All Pro is liable for damage to a cut truss. The information contained in the affidavit greatly varies from the deposition testimony in that it imposes a new duty on All Pro and (2) omits the possibility that other contractors. The Plaintiffs, and their expert, had unfettered access to the property for a period of years and made numerous site visits. There is no evidence to suggest that Mr. Hodgin was confused during the days of his deposition. Indeed, he had made a number of site visits and had collected field notes in forming his opinions. Finally, this Affidavit was submitted on Friday afternoon in preparation for a hearing scheduled for the following Monday. Each of the factors set forth in *Cothran* are satisfied and, as such, the Court has not considered Mr. Hodgin's Affidavit.

The Court further concludes that, even if the Affidavit of Mr. Hodgin is not a "sham affidavit, the affidavit fails to satisfy the requirements of Rule 56 (e) of the South Carolina Rules of Civil Procedure. Specifically, the affidavit asserts declarations and conclusions not established by admissible evidence regarding the cut truss and does not establish a genuine issue of fact for trial. *Roberson v Southern Fin. of S.C. Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005).

After considering all of the arguments of the attorneys for the parties, as well as after due consideration of the pleadings, the memorandum of law submitted by defense counsel, and the affidavits, depositions excerpts and other documentation submitted by the parties, the Court

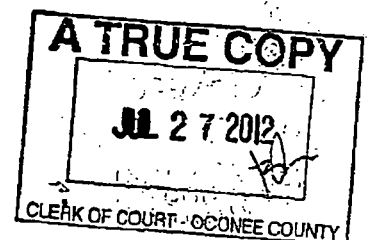
hereby finds, in a light most favorable to the Plaintiffs, that the Plaintiffs failed to establish admissible facts to support their contentions and further found that no genuine issue of material fact exists between the Plaintiffs and All Pro Heating & Air. Accordingly, the Court hereby grants the Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.


Judge Alexander S. Macaulay

Walhalla, South Carolina
July 26, 2012

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BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUL 27 PM 4 35



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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-37-652

Stoneledge et al
PLAINTIFF(S)

Imk Development Company, LLC et al
DEFENDANT(S)

Submitted by:

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

2012 JUL 27 PM 4 32

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

- 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 Rule 40(j) SCRPC.
- ☐ **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.

Defendant Gunter Heating and Air's Motion for Summary Judgment is GRANTED.

ORDER INFORMATION

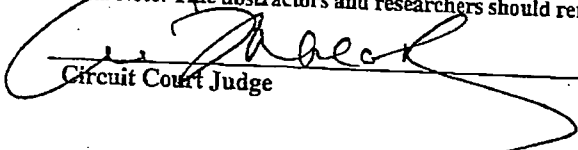
This order ☐ ends ☒ does not end the case.

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)
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

63
Judge Code

July 26, 2012

A TRUE COPY

JUL 27 2012

CLERK OF COURT, OCONEE COUNTY ONLY
Copies: _____
Atty ☒ (P) ☐ (D) ☐ (N) ☐ (O) ☐ (R) ☐ (S) ☐ (T) ☐ (U) ☐ (V) ☐ (W) ☐ (X) ☐ (Y) ☐ (Z)
DSS ☐ other ☐
Mailed ☒ Boxed ☐ handed ☐

For Clerk of Court Office Use Only

This judgment was entered on the 27th day of July, 20 12 and a copy mailed first class or placed in the appropriate attorney's box on this 27th day of July, 20 12 to attorneys of record or to parties (when appearing pro se) as follows:

Robert K. Lyles, Esquire

Danielle F. Payne, Esquire

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

Court Reporter: Robin Hild

FILED COONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUL 27 PM 4 32

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.
Mary Lou K. Plourde, Carol C. Pope,
Steven B. Taylor, Bettie J. Taylor, 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, Intergrys Keowee
Development, LLC, Marick Home Builders,
LLC, Bostic Brothers Construction, Inc.
and Miller/Player & Associates, John
Ludwig, M Group Construction and
Development, LLC, Clearview Construction,
Michael Franz, MHC Contractors, Miguel
Porras Choncoas, Builders First Source
Southeast Group, Mike Green, Southern
Concrete Specialties, Carl Compton d/b/a
Compton Enterprise a/k/a Compton
Enterprises, Gunter Heating & Air, A/C &
All Pro Heating, Refrigeration, LLC,
Coleman Waterproofing, Heyward Electrical
Services, Inc., Tinsley Electrical, LLC, Hutch
N Son Construction, Inc., Carl Catoe
Construction, Inc., T.G. Construction, LLC,
Defino 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. d/b/a

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2009-CP-37-652

ORDER GRANTING GUNTER
HEATING & AIR'S
MOTION FOR SUMMARY
JUDGMENT

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUL 27 PM 4 32

MJF Construction, KMAC of the Carolinas,)
Inc., 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,)
Defendants.)

This matter was before the Court on the Defendant Gunter Hearing & Air's (hereinafter "Defendant") Motion for Summary Judgment on April 16, 2012. Present at the hearing were the Defendant's attorney, Bradford W. Cranshaw, Esquire and Plaintiffs' attorney, Catherine Bryan, Esquire.

This is a large construction case located at the Stoneledge Development at Lake Keowee wherein Plaintiffs sued Gunter Heating & Air for breach of warranty and negligence. Plaintiffs' causes of action were based upon the evidence and affidavit of its expert, Derek Hodgins of Construction Science & Engineering, who attributed one cut truss in the attic of lot 76, unit 552, in Phase II, to one of the two HVAC subcontractors, Gunter Heating & Air or All Pro Refrigeration & Heating, LLC.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Burris v. Anderson County Bd. of Educ., 369 S.C. 443, 633 S.E.2d 482 (2006); Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). When determining if any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Wilson v. Style Crest Products, Inc., 367 S.C. 653, 627 S.E.2d 733 (2006). If the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the court. Ward v. Zelinski, 260 S.C.

229, 195 S.E.2d 385 (1973). Once the moving party demonstrates summary judgment is appropriate, the non-moving party must "do more than simply show that there is some metaphysical doubt as to material facts [and] must come forward with specific facts showing that there is a *genuine issue for trial*." George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001) (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1990)) (emphasis in original and further internal quotation marks omitted).

Use and admissibility of affidavits and deposition testimony to support or rebut a motion for summary judgment is governed by Rule 56(e) and states: "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP.

DISCUSSION

Counsel for Gunter Heating & Air properly argued that the Plaintiffs failed to reach the standard of presenting even a "mere scintilla of evidence" that it cut any trusses in any attic. Counsel further argued and submitted documentation, including an affidavit of Teddy Gunter, deposition excerpts and other items marked as evidence for the hearing, in support of its arguments that it did not cut any trusses in any portion of the Stoneledge project and did not perform any work in Phase II where the cut truss was discovered by Plaintiff's expert.

Plaintiffs' counsel submitted and the Court considered the Affidavit of Derek Hodgins and deposition testimony of Derek Hodgins to support its opposition to Defendant's motion.

After considering all of the arguments of the attorneys for both parties, the filed affidavits and deposition excerpts submitted therewith, the Court hereby finds, in the light most favorable to the Plaintiffs, that the Affidavit of Derek Hodgins, submitted by Plaintiffs' counsel, is a sham

affidavit. In the case of Cothran v. Brown, the Court held that when considering sham affidavits that they find persuasive the reasoning of federal case law. 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). The Court stated that Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement. Id. In addition, the "competing affidavit rule" is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. Id. The factors to consider in determining whether an affidavit is a sham affidavit are: 1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; and (6) when, in relation to summary judgment, the second affidavit is submitted. Id.

With regards to the Cothran factors, the Court finds that the Affidavit of Derek Hodgin, dated April 13, 2012, three days before this hearing, was created in order to create an issue of fact to circumvent summary judgment and is in direct contradiction to Mr. Hodgin's deposition testimony. The crux of Plaintiff's case against the HVAC subcontractors is one cut truss located in the attic of unit 76. See Affidavit of Derek Hodgin. In Hodgin's deposition testimony, he states that he did not know who cut the truss or when it was cut. (Derek Hodgin Depo., p. 172, ll. 15-17; p. 162, ll. 12-15). In Hodgin's Affidavit, Hodgin contradicts his own testimony by

stating that the HVAC Installer caused the condition. See Affidavit of Derek Hodgin. Furthermore, Hodgin states in his Affidavit that the HVAC Installer had a duty to report an open and obvious cut truss, if he himself did not cut the truss, but in his deposition testimony he clearly states that he did not know when the truss was cut, before or after the HVAC Installer's work was completed. See Affidavit of Derek Hodgin. Hodgin also opined in his deposition testimony, that along with HVAC Installers, plumbing contractors also run into issues with the roof trusses and could have created the complained of condition. (See Derek Hodgin' Second Depo., p. 166, ll. 23-25).

There is no explanation in Hodgin's Affidavit about the above-noted inconsistencies between his sworn deposition testimony and sworn Affidavit. Hodgin's Affidavit also does not indicate he was confused at the time of his deposition testimony. These inconsistencies are crucial to this case as they govern the entire basis for the Plaintiffs' claim against the HVAC Subcontractors. Further Hodgin, in his Affidavit, states that he had access to the property in December of 2009, June, July and October of 2010 in order to clarify and further investigate these issues. As the factors detailed in Cothran are clearly met, the Court finds that the law supports its conclusion that the Affidavit of Derek Hodgin is a sham affidavit.

In addition, the Court further finds that the Affidavit of Derek Hodgin improperly makes conclusions of fact that are not supported by admissible evidence in violation of Rule 56, *SCRCP*. This Affidavit without sufficient supporting documentation does not create an issue of fact to withstand summary judgment. See Roberson v. S. Fin. of S. Carolina, Inc., 365 S.C. 6, 615 S.E.2d 112 (2005) (for the proposition that "an abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary

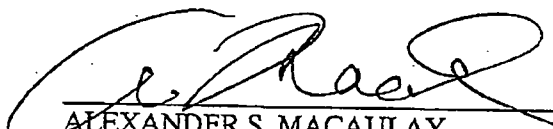
support"). Derek Hodgin's Affidavit references photographs and observations that were not observed or taken by him and are not admissible supporting evidence.

After reviewing all supporting material, including but not limited to the Affidavit of Derek Hodgin and the deposition testimony of Derek Hodgin, the Court finds that Plaintiffs' counsel failed to establish admissible evidence to support their contentions against the HVAC subcontractors and further finds that no genuine issue of material fact exists between the Plaintiffs and Defendant Gunter Heating & Air.

CONCLUSION

It is, therefore, ordered that Defendant Gunter Heating & Air's Motion for Summary Judgment is Granted.

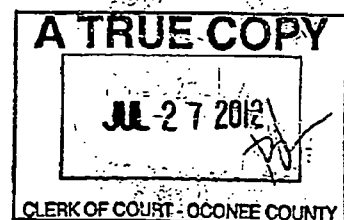
IT IS SO ORDERED.


ALEXANDER S. MACAULAY

Walhalla, South Carolina

26th day of July, 2012.

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUL 27 PM 4 32



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-
RAMIREZ, ESTER MORAN MENTADO, SOCORRO
CASTILLO MONTEL, UPSTATE UTILITIES, INC.,
MJG CONSTRUCTION AND HOMEBUILDERS, INC.

SUMMONS
FOR SECOND AMENDED COMPLAINT

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2011 OCT 17 PM 12 44

D/B/A MJG CONSTRUCTION, KMAC OF THE)
CAROLINAS, INC., 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,)
Defendants,)

TO: ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to Answer the Second Amended Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, Lyles & Lyles, LLC, 342 East Bay Street, Post Office Box 773, Charleston, South Carolina 29402, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Second Amended Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for the relief demanded in the Second Amended Complaint and will seek a default judgment against you.

LYLES & LYLES, LLC

By: Catherine Bryan
Robert T. Lyles, Esquire
Catherine H. Bryan, Esquire
342 East Bay Street
Post Office Box 773 (29402)
Charleston, South Carolina 29401
T: 843.577.7730
F: 843.577.7172
rtl@lylesfirm.com
chb@lylesfirm.com
Attorneys for Plaintiffs

October 12, 2011
Charleston, South Carolina

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2011 OCT 17 PM 12 44

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
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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, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME BUILDERS,
LLC, BOSTIC BROTHERS CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES, JOHN
LUDWIG, M GROUP CONSTRUCTION AND
DEVELOPMENT, LLC, 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.,

SECOND AMENDED COMPLAINT

(Jury Trial Demanded)

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
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Defendants,

CLASS ALLEGATIONS

4. The Project is located in Oconee County, South Carolina.
5. The Individual Owners bring this action individually and pursuant to Rule 23 of the *South Carolina Rules of Civil Procedure*, on behalf of a class of individuals and/or entities composed of each and every other owner at the Project (hereinafter the other owners at the Project sometimes shall be referred to collectively as "Class Plaintiffs"). Excluded from the Class are Defendants, members of their immediate families and their legal representatives, heirs, successors, assigns and any entity in which Defendants have or had a controlling interest. Also excluded from the Class are claims determined to belong exclusively to Stoneledge HOA.
6. For class action purposes, the Individual Owners allege that:
 - a. The class is sufficiently numerous that joinder of all members is impracticable;
 - b. There are questions of law and fact common to the class;
 - c. The claims of the Individual Owners are typical of the claims of the class;
 - d. The Individual Owners will fairly and adequately protect the interest of the class; and
 - e. The amount in controversy exceeds One Hundred and No/100 Dollars (\$100.00) for each member of the class.
7. Venue is proper in this Court because the principal place of business of one or more of the Defendants is in Oconee County, the property at issue is located in Oconee County, and the actions and/or inaction of the Defendants resulting in this lawsuit occurred in Oconee County.

FACTUAL ALLEGATIONS

8. The Defendant, IMK Development Co., LLC ("IMK"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. IMK developed and put certain of the Stoneledge townhomes into the stream of commerce.
9. Defendant Keowee Townhouses, LLC ("Keowee"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee

County. Keowee developed and put certain of the Stoneledge townhomes into the stream of commerce.

10. Defendant Ludwig Corporation, LLC ("Ludwig"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. Ludwig developed and put certain of the Stoneledge townhomes into the stream of commerce.

11. Defendant SDI Funding, LLC ("SDF"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in business in Oconee County, South Carolina.

12. Defendant Medallion at Keowee, LLC ("Medallion"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. Medallion was a developer of the Project and has or will put certain of the Stoneledge townhomes into the stream of commerce.

13. Plaintiffs are informed and believe that Medallion is the successor to SDI, Ludwig, or both of them, that it acquired the assets and liabilities of SDI, Ludwig, or both of them, through a merger, consolidation or equivalent transaction, that there exists a common identity of the officers, directors, and/or stockholders between Medallion and SDI, Ludwig, or both of them, that Medallion is a mere continuation of SDI, Ludwig, or both of them, and/or that the assets of SDI, Ludwig, or both of them, were transferred to Medallion in an effort to avoid or defeat claims of creditors or potential creditors.

14. Upon information and belief, Defendant John Ludwig was a member, manager, owner and/or principal of Ludwig, SDI, or both of them at the time of development and construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Ludwig, SDI, or both of them, and is personally liable for the liabilities of same. Unless specifically

stated otherwise, references to Ludwig and/or SDI when used herein are defined to include John Ludwig.

15. Defendant Integrys Keowee Development, LLC ("Integrys"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. Integrys a developer of the Project and placed certain of the Stoneledge townhomes into the stream of commerce.

16. Defendant Marick Home Builders, LLC ("Marick"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was licensed as a South Carolina residential builder, and was engaged in the business of residential home building in Oconee County, South Carolina. Marick acted as the general contractor for certain of the townhomes at the Project. Marick, acting in concert with IMK, placed certain of the Stoneledge townhomes into the stream of commerce.

17. Upon information and belief, M Group Construction and Development, LLC ("M Group") is a limited liability company organized and existing under the laws of the State of South Carolina that conducts business in Oconee County, South Carolina. Plaintiffs are informed and believe that M Group is the successor to Marick, that it acquired the assets and liabilities of Marick through a merger, consolidation or equivalent transaction, that there exists a common identity of the officers, directors, and/or stockholders between M Group and Marick, that M Group is a mere continuation of Marick, and/or that the assets of Marick were transferred to M Group in an effort to avoid or defeat claims of creditors or potential creditors. Unless specifically stated otherwise, references to Marick and/or Contractors herein are defined to include M Group.

18. Defendant Bostic Brothers Construction, Inc. ("Bostic"), upon information and belief, is a corporation organized and existing pursuant to the laws of a state other than South Carolina which

was, at all times referred to herein, doing business in Oconee County, South Carolina as a general contractor. Bostic acted as the general contractor for certain of the townhomes at the Project. Bostic, acting in concert with Keowee, put certain of the Stoneledge townhomes into the stream of commerce. Marick and Bostic shall be referred to herein as "Contractors.") (IMK, Keowee, Ludwig, SDI, Medallion, Integrys, Marick, and Bostic shall hereinafter collectively be referred to as "Developers.")

19. Upon information and belief, Defendant Clear View Construction, LLC ("Clear View") is a limited liability company organized and existing under the laws of the State of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Upon information and belief, Clear View provided stone work for the Project.

20. Upon information and belief, Defendant Michael W. Franz is the owner and operator of Clear View and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Clear View and is personally liable for the liabilities of Clear View.

21. Upon information and belief, Defendant MHC Contractors, LLC ("MHC Contractors") is a limited liability company organized and existing under the laws of the State of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that MHC Contractors provided work for the Project, including but not limited to stone work.

22. Upon information and belief, Defendant Miguel Porras Choncoa is the owner and operator of MHC Contractors and a resident of Greenville County, South Carolina, and authorized, participated in and/or directed the tortious or otherwise wrongful acts of MHC Contractors and is personally liable for the liabilities of MHC Contractors.

23. Upon information and belief, Defendant Builders FirstSource - Southeast Group, LLC ("Builders FirstSource") is an entity organized under the laws of a state other than South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are

informed and believe that Builders FirstSource provided materials and labor for the Project, including but not limited to, framing work.

24. Upon information and belief, Defendant Mike Green is the principal of Builders FirstSource, and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Builders FirstSource and is personally liable for the liabilities of Builders FirstSource.

25. Upon information and belief, Defendant Southern Concrete Specialties, Inc. ("Southern Concrete") is a corporation organized and existing under the laws of the State of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Southern Concrete provided work for the Project including but not limited to flatwork and basement work.

26. Upon information and belief, Defendant Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises ("Compton") was, at all times relevant herein, conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that Compton provided work for the Project, including but not limited to, roofing work.

27. Upon information and belief, Defendant Gunter Heating and Air ("Gunter") is a South Carolina corporation which, at all times relevant to this action, was conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that Gunter provided work for the Project, including but not limited to HVAC work.

28. Upon information and belief, All Pro Heating, A/C and Refrigeration, LLC ("All Pro") is a limited liability company organized and existing under the laws of the state of South Carolina which, at all times relevant to this action, was conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that All Pro provided work for the Project, including but not limited to, HVAC work.

29. Upon information and belief, Coleman Waterproofing was, at all times relevant herein, conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that Coleman Waterproofing provided work for the Project, including but not limited to, waterproofing work.

30. Upon information and belief, Heyward Electrical Services, Inc. ("Heyward Electrical") is a corporation organized and existing under the laws of the state of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Heyward Electrical provided work for the Project, including but not limited to, electrical work.

31. Upon information and belief, Tinsley Electrical, LLC ("Tinsley") is a limited liability company organized and existing under the laws of the state of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Tinsley provided work for the Project, including but not limited to, electrical work.

32. Upon information and belief, Hutch N Son Construction, Inc. ("Hutch N Son") is a corporation organized and existing under the laws of the state of South Carolina which, at times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Hutch N Son provided work for the Project, including but not limited to, grading work.

33. Upon information and belief, Upstate Utilities, Inc. ("Upstate") is a corporation organized and existing under the laws of the state of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and belief that Upstate provided work for the Project, including but not limited to grading work, pursuant to a subcontract with Hutch N Son.

34. In its Third-Party Complaint, Marick identified Clear View, Michael W. Franz, MHC Contractors, Miguel Porras Choncoa, Builders FirstSource, Mike Green, Southern Concrete, Compton, Gunter, All Pro, Coleman Waterproofing, Heyward Electrical, Tinsley, and Hutch N Son as

subcontractors or principals of same and alleged that they are among the at-fault parties by virtue of their provision of the above-described services and/or products for this Project.

35. Due to Marick's involvement in the construction of the Project, Plaintiffs believe that there is a reasonable basis to assert fault on Clear View, Michael W. Franz, MHC Contractors, Miguel Porras Choncoa, Builders FirstSource, Mike Green, Southern Concrete, Compton, Gunter, All Pro, Coleman Waterproofing, Heyward Electrical, Tinsley, and Hutch N Son.

36. Upon information and belief, Defendant Carl Catoe Construction, Inc. ("Catoe") is a corporation organized and existing under the laws of the State of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Catoe provided labor and materials for framing, installation of windows, doors, siding, trim, and other work at the Project.

37. Upon information and belief, Defendants 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, and Socorro Castillo Montel are individuals or entities which provided services, materials, or both for the Project, pursuant to subcontracts with Catoe, including framing, installation of windows, doors, siding, trim, and other work at the Project.

38. Upon information and belief, Defendants MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; 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 are individuals or entities which, at all times relevant to this action, conducted business in Oconee County by contracting to provide and providing materials, services, or both, for the Project.

39. In its discovery responses and through correspondence from counsel, Bostic identified MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; 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 as subcontractors who provided services, materials or both for the Project, including but not limited to, framing, masonry, roofing, siding, insulation, concrete form work, waterproofing and patio installation.

40. The defendants identified in Paragraphs 33, 35, 36, 37, and 38 above, are hereinafter collectively referred to as "Subcontractors."

41. Defendant Miller/Player & Associates ("MPA"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of architecture in Oconee County. MPA acted as the architect for certain of the townhomes at the Project.

42. The Plaintiffs are informed and believe that IMK was the alter ego of Defendant Marick, M Group, and/or Integrys in that Marick, M Group, and/or Integrys totally dominated and controlled IMK and IMK manifested no separate interest of its own and functioned solely to achieve the goals of Marick, M Group, and/or Integrys and their principals.

43. Because IMK was the alter ego of Marick, M Group, and/or Integrys, to separate the corporate entities promotes wrong and injustice and would contravene the public policy of South Carolina.

44. Additionally or alternatively, IMK, Marick, M Group and/or Integrys are corporate relatives whose interests and activities are so amalgamated as to blur the distinction between the entities. Because of this amalgamation of interests and activities, IMK, Marick, M Group and/or Integrys should be treated as one and the same and be held jointly liable on all theories of liability asserted herein, including Breach of the Implied Warranty of Habitability, Breach of the Implied

Warranty of Workmanlike Service, Negligence, and Breach of Fiduciary Duty. Unless specifically stated otherwise, references to IMK, Marick, M Group, and/or Integrys when used herein, mean each and all of those entities.

45. The Plaintiffs are informed and believe that Ludwig was the alter ego of Defendant SDI in that SDI totally dominated and controlled Ludwig and Ludwig manifested no separate interest of its own and functioned solely to achieve the goals of SDI and its principals.

46. Because Ludwig was the alter ego of SDI, to separate the corporate entities promotes wrong and injustice and would contravene the public policy of South Carolina.

47. Additionally or alternatively, SDI, Ludwig and Medallion are entities whose interests and activities are so amalgamated as to blur the distinction between the entities. Because of this amalgamation of interests and activities, SDI, Ludwig and Medallion should be treated as one and the same and be held jointly liable on all theories of liability asserted herein, including Breach of the Implied Warranty of Habitability, Breach of the Implied Warranty of Workmanlike Service, Negligence, and Breach of Fiduciary Duty. Unless specifically stated otherwise, references to SDI, Ludwig and Medallion when used herein, mean each and all of those entities.

48. The Plaintiffs have become aware of certain problems at the townhomes at the Project, including, but not limited to, water intrusion through the exterior cladding of the townhomes which has resulted in severe rot and deteriorated components of the Project.

49. Repairs and investigation to date at the Project have revealed problems within the Project as outlined and identified in the Scope of Repair by Construction Science & Engineering, dated January 24, 2011, which is incorporated herein by reference.

50. The problems at the Project, including those identified in the preceding Paragraph, and those described in the remaining paragraphs, have resulted in water intrusion and have caused physical injury to the tangible property of others. Upon information and belief, the continuous and/or repeated

exposure to substantially the same general harmful conditions has resulted in rot and other physical damage to the components of the townhomes at the Project.

51. Plaintiffs reported the problems at the Project to some or all of the Defendants who have failed and/or refused to investigate the problems or to repair them.

52. Upon information and belief, there are other latent defects at the Project that have yet to be uncovered and can only be uncovered through additional investigation and testing at the Project.

53. To date, Plaintiffs have expended significant sums in attempting to repair certain townhomes, and will continue to incur costs and expenses to investigate the pervasive deficiencies and to correct them. The repair of the deficiencies will also deprive the owners of the townhomes at the Project, including the Class Plaintiffs, of the use and enjoyment of their townhomes and will also result in the diminution in value of their townhomes because of the stigma associated with the deficiencies.

54. As a result of the above-referenced problems, and those yet to be discovered, Plaintiffs have or will suffer the following damages:

- a. Cost to investigate the problems at the Project, and the individual townhomes within the Project;
- b. The cost to develop a comprehensive repair for the Project, including the individual townhomes at the Project;
- c. The cost of accessing, repairing, and replacing all defective and/or unsuitable and damaged components at the Project and the individual townhomes within the Project;
- d. The diminished market value of the townhomes at the Project;
- e. Damages associated with the loss of use of the townhomes at the Project while repairs are undertaken; and
- f. Such other damages as may result from the conduct of the Defendants.

55. Some or all of the damages outlined in the preceding paragraph are common to all Class Plaintiffs and, in whole or in part, the Stoneledge HOA.

FOR A FIRST CAUSE OF ACTION
(Breach of Warranty: Developers)

56. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

57. In acting as the developers of the Project and placing the individual townhomes into the

stream of commerce, Developers provided an implied warranty of habitability to each owner at the Project and for the benefit of the HOA.

58. The above-referenced problems (and any subsequently-discovered problems) with the Project, and the townhomes within the Project, establish that this warranty has been breached by the Developers.

59. As a direct and proximate cause of the Developers' breach of the warranty of habitability, the Plaintiffs have been and will continue to be damaged as set forth herein.

60. Plaintiffs are entitled to a judgment against the Developers (including SDI) because of their breach of warranty of habitability in such amount as will be proven at trial.

FOR A SECOND CAUSE OF ACTION
(Negligence: Developers)

61. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

62. The Developers owed a duty to the Plaintiffs to ensure that the Project was designed and constructed using a qualified architect and builder.

63. Additionally, the Developers retained control over the Board of the Stoneledge HOA up and until September, 2008, during such time Developers had a duty to inspect, repair, and maintain components of the Project and to assess funding needs and to make provisions for adequate funding.

64. The conditions uncovered to date at the Project establish that the Developers breached their duties to the Plaintiffs in that the defective conditions were not investigated or repaired and insufficient funds existed to effect such repairs at the time control of the Stoneledge HOA was transferred to the owners.

65. As a direct and proximate cause of the Developers' negligence and gross negligence, the Plaintiffs have suffered damages and the Plaintiffs will continue to suffer additional damages.

66. Plaintiffs are entitled to a judgment against the Developers because of their negligence and gross negligence in such amount as will be proven at trial, including punitive damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty: Developers)

67. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.
68. A special relationship exists between the Developers and the Plaintiffs based on the following:
- a. The Developers developed the project;
 - b. The Developers funded the design and construction of the Project;
 - c. The Developers selected the builder and designer and others for the Project;
 - d. The Developers marketed and sold the units at the Project and placed them into the stream of commerce; and,
 - e. The Developers controlled the Stoneledge HOA until September, 2008.
69. Plaintiffs reposed special confidence in the Developers resulting in their owing to the Plaintiffs a fiduciary duty to accomplish the following non-exhaustive list of particulars:
- a. To fund adequately the design, construction, and upkeep of the Project;
 - b. To select a qualified designer and builder for the Project;
 - c. To ensure that the builder and designer produced a quality product free from the types of defects that currently exist at the Project;
 - d. To establish sufficient capital reserves for the Association at its inception to address the maintenance and repairs at the Project;
 - e. To maintain and upkeep all unsold units at the Project and the common areas of the Project; and,
 - f. To ensure that at the time control of the Board of Directors of the Stoneledge HOA was turned over to the owners, in September 2008, that the components of the townhomes which the Stoneledge HOA is obligated to repair, maintain, and replace, were in reasonable condition, free of defects.
70. The deficiencies uncovered to date, which all existed on or before September 2008, establish that the Developers breached their fiduciary duty to the Plaintiffs.
71. As a direct and proximate cause of the Developers' breaches of fiduciary duties, the Plaintiffs have suffered damages and will continue to suffer additional damages.
72. Plaintiffs are entitled to a judgment against the Developers (including SDI) because of their breach of fiduciary duty in such amount as will be proved at trial, including punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Breach of Warranty: Contractors and Subcontractors)

73. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

74. The Contractors and Subcontractors, by virtue of their role in the construction of the Project, extended to the Plaintiffs a warranty of workmanlike service in regard to the construction of the townhomes within the Project.

75. The above-referenced problems (and any subsequently-discovered problems) at the Project establish that this warranty has been breached by the Contractors and Subcontractors.

76. As a direct and proximate result of such breach(es) of the warranty of workmanlike service, the Plaintiffs have been and will continue to be damaged as described herein.

77. Plaintiffs are entitled to a judgment against the Contractors and Subcontractors because of their breach of warranty of workmanlike service in such amount as will be proved at trial.

FOR A FIFTH CAUSE OF ACTION
(Negligence: Contractors and Subcontractors)

78. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

79. The Contractors and Subcontractors, by virtue of their role in the construction of the Project, owed a duty to the Plaintiffs to retain, coordinate, and supervise competent subcontractors, and to accomplish such construction and/or repairs in accordance with all applicable codes, applicable industry standards, and any and all manufacturers' literature/instructions, and, when applicable, to conform such construction to whatever design documents existed at the time of constructing the Project and the townhomes within the Project.

80. The above-referenced problems (and any subsequently-discovered problems) with the Project establish that the Contractors and Subcontractors breached their duty in regard to these responsibilities which has proximately caused the deficiencies at the Project.

81. The violation of applicable building codes and the willful, reckless, and wanton failure to comply with the applicable standards establishes gross negligence on the part of the Contractors and Subcontractors.

82. As a direct and proximate result of the negligence or gross negligence of Contractors and Subcontractors, the Plaintiffs have been and will continue to be damaged as described herein.

83. Plaintiffs are entitled to a judgment against the Contractors and Subcontractors based on their negligence and gross negligence in such amount as will be proved at trial, including punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Negligence: MPA)

84. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

85. Defendant MPA was negligent, and/or grossly negligent in the design and inspection of the Project in one or more of the following particulars:

- a. failure to adequately design a waterproofing system so as to prevent water infiltration into the interior portions of the building;
- b. improper design of waterproofing of the exterior of the building and non-existent or improper design of flashing;
- c. inadequate inspection and acceptance of defective or non-conforming construction work;
- d. failure to design and insure construction in compliance with applicable building codes State and Federal laws and regulations and acceptable building practices; and,
- e. failure to properly specify appropriate materials to be used in the construction of the Project.

86. As a direct and proximate result and consequence of the negligence and gross negligence of Defendant MPA, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use, depreciation in value and such punitive damages as may be appropriate.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Express and Implied Warranty: MPA)

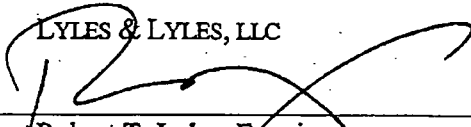
87. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

88. Defendant MPA expressly and impliedly warranted that its design of the Project would be of the highest quality and in conformance with the generally accepted standards of the architectural and construction industry, and further, that the specifications of materials and procedures would comply with the generally accepted principals in the industry.

89. Defendant MPA further expressly and impliedly warranted that the plans and specifications prepared for the Project were suitable and fit for use in constructing the Project, and that the building, when complete, would be free of design defects.

90. The plans and specifications as provided by MPA were not suitable or appropriate for their intended purpose, and as a result of MPA's breach of warranties by designing the Project with severe structural and water intrusion problems, Plaintiffs are entitled to such actual damages as this Court may deem appropriate.

WHEREFORE, the Plaintiffs pray for a judgment against the Defendants on the above causes of action in such amounts as may be proven at trial, including consequential and punitive damages, the costs of this action, including attorney's fees, and for such other relief as the court deems just and proper.


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By: _____
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Attorneys for Plaintiffs

October 4, 2011
Charleston, South Carolina

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 K.)
Plourde, Carol C. Pope, Steven B.)
Taylor, Bettie J. Taylor, Robert)
White, Individually, and on behalf)
of all others similarly situated,)

Plaintiffs,)

v.)

IMK Development Co., LLC,)
Keowee Townhouses, LLC, Ludwig)
Corporation, LLC, SDI Funding,)
LLC, Medallion At Keowee, LLC,)
Intergrys Keowee Development,)
LLC, Marick Home Builders, LLC,)
Bostic Brothers Construction, Inc.)
and Miller/Player & Associates,)

Defendants/ Third-)
Party Plaintiffs,)

v.)

Michael Franz, Clearview)
Construction, Miguel Porras)
Choncoas, MHC Contractors,)
Miller/Player and Associates,)
Builders FirstSource Southeast)
Group, 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)

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2009-CP-37-652

**DEFENDANT GUNTER HEATING & AIR'S
ANSWER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT**

Services, Tinsley Electrical, LLC	)
and Hutch N Son Construction,	)
	)
Third-Party	)
Defendants/Fourth-	)
Party Plaintiffs,	)
	)
vs.	)
	)
Carl Catoe Construction, Inc.	)
	)
Fourth-Party	)
Defendant.	)

The Defendant Gunter Heating and Air (hereinafter "Defendant") hereby answers the Second Amended Complaint as follows:

FOR A FIRST DEFENSE

1. Defendant Gunter denies each and every allegation of the Complaint not herein specifically admitted or denied.
2. Upon information and belief, Defendant admits the allegations contained in paragraphs one (1) and two (2) of the Plaintiffs' second amended complaint.
3. Defendant lacks information or knowledge to admit or deny the allegations contained in paragraph three (3) of the Plaintiffs' second amended complaint, and therefore, denies the same and demands strict proof thereof.
4. Defendant admits the allegations contained in paragraph four (4) of the Plaintiffs' second amended complaint.
5. Defendant denies the allegations contained in paragraphs five (5) and six (6) of the Plaintiffs' second amended complaint.
6. The allegations contained in paragraph seven (7) of Plaintiffs' second amended complaint form legal conclusions, characterizations and allegations that require no response from

this Defendant; however, to the extent a response is required, this Defendant denies the allegations contained therein and demands strict proof thereof.

7. Answering paragraphs eight (8) through twenty-six (26) of the Plaintiffs' second amended complaint, Defendant lacks information or knowledge to admit or deny the allegations contained therein, and therefore, denies the same and demands strict proof thereof.

8. Defendant admits the allegations contained in paragraph twenty-seven (27) of the Plaintiffs' second amended complaint.

9. Answering paragraphs twenty-eight (28) through thirty-three (33) of the Plaintiffs' second amended complaint, Defendant lacks information or knowledge to admit or deny the allegations contained therein, and therefore, denies the same and demands strict proof thereof.

10. Defendant admits the allegations contained in paragraph thirty-four (34) of the Plaintiffs' second amended complaint, upon information and belief.

11. Defendant denies the allegations contained in thirty-five (35) of the Plaintiffs' second amended complaint and demands strict proof thereof.

12. Answering paragraphs thirty-six (36) through forty-seven (47) of the Plaintiffs' second amended complaint, Defendant lacks information or knowledge to admit or deny the allegations contained therein, and therefore, denies the same and demands strict proof thereof.

13. Answering paragraphs forty-eight (48) through fifty (50) of the Plaintiffs' second amended complaint, said allegations do not pertain to this Defendant and, therefore, no response is necessary or required, but if any such allegations could be construed against this Defendant, then those allegations are expressly denied and demands strict proof thereof.

14. Defendant denies the allegations contained in paragraph fifty-one (51) of the Plaintiffs' second amended complaint and demands strict proof thereof.

15. Defendant lacks information or knowledge to admit or deny the allegations contained in paragraphs fifty-two (52), fifty-three (52), fifty-four (54) and fifty-five (55) of the Plaintiffs' second amended complaint, and therefore, denies the same and demands strict proof thereof.

16. Answering paragraphs fifty-six (56) through seventy-two (72) of the Plaintiffs' second amended complaint, said allegations do not pertain to this Defendant and, therefore, no response is necessary or required, but if any such allegations could be construed against this Defendant, then those allegations are expressly denied and demands strict proof thereof.

17. In response to paragraph seventy-three (73) of the Plaintiffs' second amended complaint, this Defendant repeats each and every answer to the previous paragraphs as if repeated verbatim herein.

18. Defendant admits the allegations contained in paragraph seventy-four (74) of the Plaintiffs' second amended complaint.

19. Defendant denies the allegations contained in paragraphs seventy-five (75) through seventy-seven (77) and demands strict proof thereof.

20. In response to paragraph seventy-eight (78) of the Plaintiffs' second amended complaint, this Defendant repeats each and every answer to the previous paragraphs as if repeated verbatim herein.

21. Defendant admits the allegations contained in paragraph seventy-nine (79) of the Plaintiffs' second amended complaint.

22. Defendant denies the allegations contained in paragraphs eighty (80), eighty-one (81), eighty-two (82) and eighty-three (83) of the Plaintiffs' second amended complaint and demands strict proof thereof.

23. Answering paragraphs eighty-four (84) through ninety (90) of the Plaintiffs' second amended complaint, said allegations do not pertain to this Defendant and, therefore, no response is necessary or required, but if any such allegations could be construed against this Defendant, then those allegations are expressly denied and demands strict proof thereof.

FOR A SECOND DEFENSE
(Statute of Limitations)

24. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

25. The claims against Defendant are barred by the applicable statute of limitations and is a complete bar to recovery against Defendant.

FOR A THIRD DEFENSE
(S.C.R.C.P. 12(b)(6))

26. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

27. The Complaint has failed to state facts sufficient to constitute a cause of action against Defendant and, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, all claims against this Defendant should be dismissed with prejudice.

FOR A FOURTH DEFENSE
(Adoption of Defenses)

28. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

29. Defendant hereby adopts and incorporates by reference each and every defense asserted by Marick Home Builders' Answer to Plaintiff's First Amended Complaint, Cross Claim, and Amended Third Party Complaint, as if fully set forth herein verbatim.

FOR A FIFTH DEFENSE
(Sole Negligence of Plaintiff)

30. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

31. Defendant would show the alleged injuries and damages were caused by the sole negligence, gross negligence and/or willfulness on the part of Plaintiffs, and Defendant pleads their sole negligence as a complete bar to the action against it.

FOR A SIXTH DEFENSE
(Intervening Acts of Third-Parties)

37. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

38. The damages alleged were proximately caused by unforeseeable, independent, intervening and/or superseding acts of third-parties beyond Defendant's control and unrelated to any actions and conduct of Defendant, or any of its agents, by reason of which Defendant is not liable in any sum whatsoever.

FOR A EIGHTH DEFENSE
(Spoliation of Evidence)

39. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

40. Defendant pleads spoliation of evidence as a complete defense and bar to the claims against it.

FOR A NINTH DEFENSE

(Mitigation of Damages)

41. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

42. Defendant would show that the Plaintiffs have failed to mitigate their damages, which is required by law, and to the extent it failed to mitigate those damages should be excluded as any damages against Defendant.

FOR A TENTH DEFENSE
(Punitive Damages)

43. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

44. Defendant would show that an award of punitive damages would violate the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that:

a. the judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;

b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

c. any award of punitive damages based upon the wealth of the defendant violates due process guarantees;

d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

e. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

f. the claims for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant.

g. the claims for punitive damages violates the federal doctrine of separation of powers and Article I, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

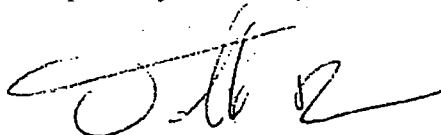
FOR AN ELEVENTH DEFENSE
(Reservation of Additional Defenses)

45. Defendant re-alleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

46. Defendant investigation into the facts of this case have not been completed and, therefore, Defendant reserves any additional and further defenses and affirmative defenses as may be revealed by additional information during the course of any discovery and/or investigation, and as is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the second amended complaint, Defendant prays the second amended complaint against it be dismissed with attorney's fees, costs and for such other and further relief as the court may deem just and proper under the circumstances.

Respectfully submitted,



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**ATTORNEYS FOR DEFENDANT GUNTER
HEATING AND AIR**

Columbia, South Carolina
October 20, 2011

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, 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-
RAMIREZ, ESTER MORAN MENTADO, SOCORRO
CASTILLO MONTEL, UPSTATE UTILITIES, INC.,
MJG CONSTRUCTION AND HOMEBUILDERS, INC.

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

ANSWER OF DEFENDANT ALLPRO
HEATING, A/C & REFRIGERATION, LLC
TO PLAINTIFFS' SECOND AMENDED
COMPLAINT

(Jury Trial Requested)

D/B/A MJG CONSTRUCTION, KMAC OF THE
CAROLINAS, INC., 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,

Defendants,

This Defendant AllPro Heating A/C & Refrigeration, LLC, above named, answering the Complaint of Plaintiffs herein, would show unto this Honorable Court that:

1. As to the allegations contained in Paragraph 1 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

2. As to the allegations contained in Paragraph 2 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

3. As to the allegations contained in Paragraph 3 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

4. As to the allegations contained in Paragraph 4 of Plaintiffs' Complaint, this Defendant admits same.

5. In as much as the allegations contained in Paragraph 5 of Plaintiffs' Complaint are conclusions of law, this Defendant neither admits nor denies same, but demands strict proof thereof.

6. In as much as the allegations contained in Paragraph 6 of Plaintiffs' Complaint are conclusions of law, this Defendant neither admits nor denies same, but demands strict proof thereof.

7. As to the allegations contained in Paragraph 7 of Plaintiffs' Complaint, this Defendant admits same.

8. As to the allegations contained in Paragraph 8 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

9. As to the allegations contained in Paragraph 9 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

10. As to the allegations contained in Paragraph 10 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

11. As to the allegations contained in Paragraph 11 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

12. As to the allegations contained in Paragraph 12 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

13. As to the allegations contained in Paragraph 13 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

14. As to the allegations contained in Paragraph 14 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

15. As to the allegations contained in Paragraph 15 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

16. As to the allegations contained in Paragraph 16 of Plaintiffs' Complaint, upon information and belief this Defendant admits same.

17. As to the allegations contained in Paragraph 17 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

18. As to the allegations contained in Paragraph 18 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

19. As to the allegations contained in Paragraph 19 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

20. As to the allegations contained in Paragraph 20 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

21. As to the allegations contained in Paragraph 21 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

22. As to the allegations contained in Paragraph 22 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

23. As to the allegations contained in Paragraph 23 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
24. As to the allegations contained in Paragraph 24 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
25. As to the allegations contained in Paragraph 25 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
26. As to the allegations contained in Paragraph 26 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
27. As to the allegations contained in Paragraph 27 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
28. As to the allegations contained in Paragraph 28 of Plaintiffs' Complaint, this Defendant specifically admits that AllPro Heating A/C & Refrigeration, LLC is a limited liability company organized and existing under the laws of the State of South Carolina and conducted business in Oconee County, South Carolina; further, this Defendant specifically admits that it provided HVAC work on Phase II of the project; however, this Defendant denies the remaining allegations contained in Paragraph 28 of Plaintiffs' Complaint which are in addition to or inconsistent with these admissions.
29. As to the allegations contained in Paragraph 29 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
30. As to the allegations contained in Paragraph 30 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
31. As to the allegations contained in Paragraph 31 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
32. As to the allegations contained in Paragraph 32 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
33. As to the allegations contained in Paragraph 33 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

34. In as much as the allegations contained in Paragraph 34 of Plaintiffs' Complaint summarizes and restates the Third-Party Complaint brought by Defendant Marick Home Builders against this Defendant, this Defendant neither admits nor denies same, but alleges the Third-Party Complaint speaks for itself; to the extent Plaintiffs are attempting to re-incorporate and reallege those allegations, the allegations of Third-Party Complaint by Marick Home Builders against this Defendant, those allegations are specifically denied.

35. As to the allegations contained in Paragraph 35 of Plaintiffs' Complaint, this Defendant denies same.

36. As to the allegations contained in Paragraph 36 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

37. As to the allegations contained in Paragraph 37 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

38. As to the allegations contained in Paragraph 38 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

39. As to the allegations contained in Paragraph 39 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

40. As to the allegations contained in Paragraph 40 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

41. As to the allegations contained in Paragraph 42 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

42. As to the allegations contained in Paragraph 42 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

43. As to the allegations contained in Paragraph 43 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

44. As to the allegations contained in Paragraph 44 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.

45. As to the allegations contained in Paragraph 45 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
46. As to the allegations contained in Paragraph 46 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
47. As to the allegations contained in Paragraph 47 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
48. As to the allegations contained in Paragraph 48 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief, therefore denies same.
49. As to the allegations contained in Paragraph 49 of Plaintiffs' Complaint, this Defendant denies same.
50. As to the allegations contained in Paragraph 50 of Plaintiffs' Complaint, this Defendant denies same.
51. As to the allegations contained in Paragraph 51 of Plaintiffs' Complaint, this Defendant denies same.
52. As to the allegations contained in Paragraph 52 of Plaintiffs' Complaint, this Defendant denies same.
53. As to the allegations contained in Paragraph 53 of Plaintiffs' Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.
54. As to the allegations contained in Paragraph 54 of Plaintiffs' Complaint, this Defendant denies same.
55. As to the allegations contained in Paragraph 55 of Plaintiffs' Complaint, this Defendant denies same.
56. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.
57. As to the allegations contained in Paragraph 57 of Plaintiffs' Complaint, this Defendant denies same.

58. As to the allegations contained in Paragraph 58 of Plaintiffs' Complaint, this Defendant denies same.
59. As to the allegations contained in Paragraph 59 of Plaintiffs' Complaint, this Defendant denies same.
60. As to the allegations contained in Paragraph 60 of Plaintiffs' Complaint, this Defendant denies same.
61. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.
62. As to the allegations contained in Paragraph 62 of Plaintiffs' Complaint, this Defendant denies same.
63. As to the allegations contained in Paragraph 63 of Plaintiffs' Complaint, this Defendant denies same.
64. As to the allegations contained in Paragraph 64 of Plaintiffs' Complaint, this Defendant denies same.
65. As to the allegations contained in Paragraph 65 of Plaintiffs' Complaint, this Defendant denies same.
66. As to the allegations contained in Paragraph 66 of Plaintiffs' Complaint, this Defendant denies same.
67. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.
68. As to the allegations contained in Paragraph 68 of Plaintiffs' Complaint, this Defendant denies same.
69. As to the allegations contained in Paragraph 69 of Plaintiffs' Complaint, this Defendant denies same.
70. As to the allegations contained in Paragraph 70 of Plaintiffs' Complaint, this Defendant denies same.

71. As to the allegations contained in Paragraph 71 of Plaintiffs' Complaint, this Defendant denies same.
72. As to the allegations contained in Paragraph 72 of Plaintiffs' Complaint, this Defendant denies same.
73. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.
74. As to the allegations contained in Paragraph 74 of Plaintiffs' Complaint, this Defendant denies same.
75. As to the allegations contained in Paragraph 75 of Plaintiffs' Complaint, this Defendant denies same.
76. As to the allegations contained in Paragraph 76 of Plaintiffs' Complaint, this Defendant denies same.
77. As to the allegations contained in Paragraph 77 of Plaintiffs' Complaint, this Defendant denies same.
78. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.
79. As to the allegations contained in Paragraph 79 of Plaintiffs' Complaint, this Defendant denies same.
80. As to the allegations contained in Paragraph 80 of Plaintiffs' Complaint, this Defendant denies same.
81. As to the allegations contained in Paragraph 81 of Plaintiffs' Complaint, this Defendant denies same.
82. As to the allegations contained in Paragraph 82 of Plaintiffs' Complaint, this Defendant denies same.
83. As to the allegations contained in Paragraph 83 of Plaintiffs' Complaint, this Defendant denies same.

84. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

85. As to the allegations contained in Paragraph 85 of Plaintiffs' Complaint, this Defendant denies same.

86. As to the allegations contained in Paragraph 86 of Plaintiffs' Complaint, this Defendant denies same.

87. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

88. As to the allegations contained in Paragraph 88 of Plaintiffs' Complaint, this Defendant denies same.

89. As to the allegations contained in Paragraph 89 of Plaintiffs' Complaint, this Defendant denies same.

90. As to the allegations contained in Paragraph 90 of Plaintiffs' Complaint, this Defendant denies same.

FOR A SECOND DEFENSE

91. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

92. This Defendant would assert that there existed an intervening and superseding act which effectively caused any damages the Plaintiffs may have sustained, thereby shielding this Defendant from responsibility or liability for any damages.

FOR A THIRD DEFENSE

93. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

94. This Defendant would assert that it complied with all plans, directives, and specifications regarding the work it was to perform. It would deny responsibility or liability for any work which it performed which complied with any such plans, directives or specifications if the latter proved to be inadequate, incorrect or defective.

FOR A FOURTH DEFENSE

95. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

96. This Defendant would assert that the Plaintiffs had an obligation to supervise and approve all work performed by its subcontractors, including work performed by this Defendant. If work performed by this Defendant and any other subcontractor combined to create a defect, this Defendant had a duty and opportunity to correct any such defects which it recognized through its duty to inspect or supervise before continuing with other construction work which either enhanced the defects or potential damages.

FOR A FIFTH DEFENSE

97. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

98. Pursuant to Section 15-38-15 of the South Carolina Code, in an action to recover damages for property damages or economic loss resulting from negligence, when more than one party is determined to be at fault, joint and several liability does not apply to a party whose conduct is determined to be less than 50% of the total fault for any indivisible damages sustained. Instead, such a party will be liable for its percentage of fault.

99. This Defendant would assert that if it were determined to be fault in any respect, its fault should be limited to damages which are applicable only to its work and to its percentage of fault for an indivisible damages arising from that work.

FOR A SIXTH DEFENSE

100. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

101. This Defendant would assert that the Plaintiffs were negligent in performing their duties with regard to the construction of the Stoneledge Development and that their acts and delicts proximately caused any asserted damages which the Plaintiffs may have sustained. If this Defendant was negligent in the manner in which it performed its work, said acts or delicts on its part being denied but conditionally admitted for the purposed of this defense only, then the acts and delicts of the Plaintiffs were greater by comparison, thereby barring the Plaintiffs from recovering for any asserted damages it may have sustained. If the Court and jury

should disagree and determine that this Defendant's asserted acts and omissions were greater than those of the Plaintiffs, then the Plaintiffs' recovery should be reduced in proportion to the degree of negligence attributable to them. The Plaintiffs were negligent in the manner in which they performed their duties in the construction of the Stoneledge townhomes as follows:

- a) In failing to properly inspect work performed by a subcontractor;
- b) In failing to ensure work performed at the Stoneledge townhomes was in compliance with applicable plans, specifications and designs;
- c) In failing to determine if the plans, specifications and design utilized at the Stoneledge townhomes were appropriate and correct;
- d) In proceeding with construction work when it recognized, should have recognized or was given notice of inappropriate or defective subcontractor work which could have easily been corrected or resolved;
- e) In continuing with construction work when other units revealed defects which would be repeated with regard to work in subsequent units if not modified;
- f) In failing to take corrective action as soon as reasonably possible to lessen future potential damages at the Stoneledge townhomes; and
- g) In otherwise failing to act as a reasonable and prudent general contractor would have acted under the circumstances.

FOR A SEVENTH DEFENSE

102. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

103. This Defendant alleges Plaintiffs' Complaint fails to state facts sufficient for a cause of action upon which leave can be granted against this Defendant; therefore, this Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR AN EIGHTH DEFENSE

104. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

105. This Defendant alleges that Plaintiffs have failed to mitigate their damages in the manner provided by law. Such failure to mitigate is complete defense and bar to the Plaintiffs' claims.

FOR A NINTH DEFENSE

106. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

107. This Defendant alleges that the Plaintiffs' damages, if any, were caused by the negligent, grossly negligent, intervening acts of a third persons. As such, this Defendant can have no liability to the Plaintiffs.

FOR A TENTH DEFENSE

108. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

109. This Defendant alleges that Plaintiffs have failed to give proper notice of the alleged defects pursuant to the South Carolina Code, or any other applicable state or federal statutes, and accordingly, the Complaint should be dismissed.

FOR AN ELEVENTH DEFENSE

110. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

111. This Defendant alleges the Complaint is barred by the equitable doctrines of laches; therefore, this Complaint should be dismissed.

FOR A TWELFTH DEFENSE

112. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

113. This Defendant alleges the equitable defense of unclean hands; therefore, this Complaint should be dismissed.

FOR A THIRTEENTH DEFENSE

114. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

115. This Defendant's work met all applicable federal requirements, applicable state requirements, applicable construction requirements, and any and all applicable building codes and requirements in the industry; therefore this Complaint should be dismissed.

FOR A FOURTEENTH DEFENSE

116. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

117. This Defendant states that if there is a defect or malfunction with this Defendant's work, the Plaintiffs have not allowed this Defendant the opportunity to remedy said defects; therefore, this Complaint is barred.

FOR A FIFTEENTH DEFENSE

118. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

119. This Defendant would allege that an award of punitive damages would constitute an impermissible and excessive fine under the Eighth Amendment of the Constitution of the United States, and such damages would further be a violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments, respectively, of the United States Constitution, as well as the applicable corresponding sections of the Constitution of the State of South Carolina, Article 1, Section 3.

Plaintiffs' claim for punitive damages violates this Defendant's right to access to the Courts guaranteed by the Seventh and Fourteenth Amendments create the threat of an award of unlimited punitive damages chills this Defendant's exercise of that right.

Plaintiffs' claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons;

(a) The standard or test for determining the requisite mental state of this Defendant for imposition of punitive damages is void for vagueness; and

(b) Insofar as punitive damages are not measured against actual injury to this Third-Party Plaintiffs and are left wholly to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damage that may be awarded is indeterminate at the time of this Defendant's alleged conduct.

FOR A SIXTEENTH DEFENSE

120. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

121. This Defendant alleges the Plaintiffs claims are barred because this Defendant has done all that it agreed to do under any applicable contract.

FOR A SEVENTEENTH DEFENSE

122. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

123. This Defendant pleads that the Plaintiffs' claims are barred in whole or in part by the economic loss rule.

FOR AN EIGHTEENTH DEFENSE

124. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

125. This Defendant alleges that if any injuries and damages were sustained by the Plaintiffs, said injuries and damages were caused by the greater negligence and/or willfulness of the Plaintiffs, which exceeds the negligence and/or willfulness, if any, on the part of this Defendant, without which greater negligence and/or willfulness on the part of the Plaintiffs, said alleged injury or damage would not have occurred or been sustained and for that reason, the Plaintiffs are totally barred from recovery.

FOR A NINETEENTH DEFENSE

126. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

127. Alternatively, this Defendant alleges that if any injuries and damages were sustained by the Plaintiffs, said injuries and damages were caused by the negligence and/or willfulness of the Plaintiffs, combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of this Defendant, and for that reason this Plaintiffs' recovery, if any, shall be reduced in proportion to the amount of their own negligence.

FOR A TWENTIETH DEFENSE

128. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

129. This Defendant alleges that any personal injuries or property damages sustained by the Plaintiffs, as alleged in the Third-Party Complaint, were due to and caused by the sole acts of negligence, recklessness and wantonness on the part of the Plaintiffs and that the sole negligence, recklessness and wantonness of the Plaintiffs was the proximate cause of their injuries.

FOR A TWENTY-FIRST DEFENSE

130. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

131. This Defendant hereby alleges waiver as an affirmative defense to this Complaint; therefore, this Complaint should be dismissed.

FOR A TWENTY-SECOND DEFENSE

132. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

133. This Defendant hereby alleges estoppel and waiver as affirmative defenses to this Complaint; therefore, this Complaint should be dismissed.

FOR A TWENTY-THIRD DEFENSE

134. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

135. This Defendant would show that any express warranties allegedly provided by this Defendant has expired; therefore this Complaint should be dismissed.

FOR A TWENTY-FOURTH DEFENSE

136. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

137. This Defendant would show that any implied warranties have been properly disclaimed; therefore, this Complaint should be dismissed.

FOR A TWENTY-FIFTH DEFENSE

138. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

139. This Defendant would allege that at all times, this Defendant acted in good faith and in accordance with the reasonable commercial standards applicable to its business and as such constitutes complete defense to the claims of the Plaintiffs.

FOR A TWENTY-SIX DEFENSE

140. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

141. This Defendant alleges that any and all causes of action in this Complaint are barred by the applicable statute of limitation; therefore, this Complaint should be dismissed.

FOR A TWENTY-SEVENTH DEFENSE

142. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

143. This Defendant reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

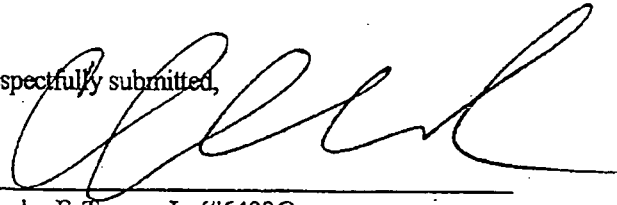
FOR A TWENTY-EIGHTH DEFENSE

144. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

145. This Defendant pleads as an affirmative defense the applicable statute of repose, and alleges that this Complaint as to this Defendant is time barred by such statute; therefore, must be dismissed.

WHEREFORE, this Defendant, having answered the Complaint of the Plaintiffs herein, respectfully requests the court to dismiss this Complaint, for costs in this action, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Charles F. Turner, Jr. (#64996)
TURNER, PADGET, GRAHAM & LANEY, PA
P. O. Box 1509
Greenville, SC 29602
(864) 552-4600
*Attorney for Defendant AllPro Heating
A/C & Refrigeration, LLC*

October 28, 2011

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-

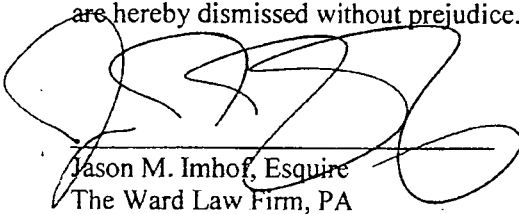
STIPULATION OF DISMISSAL
WITHOUT PREJUDICE

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2012 APR 19 A 10:08

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)
JARMAMILLO, GARCIA PARRA INSULATION,)
INC., J&J CONSTRUCTION, JOSE NINO, JOSE)
MANUEL GARCIA, EASON CONSTRUCTION, INC.,)
AND VINCENT MORALES D/B/A MORALES)
MASONRY,)
Defendants.

Marick Homebuilders, LLC has consented to dismiss all claims against All Pro Heating, A/C & Refrigeration, LLC.

NOW, THEREFORE, pursuant to Rule 41, Marick Homebuilders, LLC and All Pro Heating, A/C & Refrigeration, LLC hereby stipulate that any and all claims, third-party claims or cross claims of Marick Homebuilders, LLC against All Pro Heating, A/C & Refrigeration, LLC are hereby dismissed without prejudice. Each party shall bear its own costs.



Jason M. Imhof, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304
Attorney for Marick Homebuilders, LLC



Charles F. Turner, Jr., Esquire
Anne R. Culbreath, Esquire
Turner Padgett Graham & Laney P.A.
P. O. Box 1509
Greenville, SC 29602
Attorney for All Pro Heating, A/C & Refrigeration, LLC

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
C.A. #: 2009-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 Nix,)
Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac)
Michael D. Plourde, Mary Lou K. Plourde, Carol)
C. Pope, Steven B. Taylor, Bette J. Taylor,)
Robert White, Individually, and on behalf of all)
Others similarly situated,)

Plaintiffs,)

v.)

IMK Development Company, LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee, LLC)
Integrys Keowee Development, LLC, Marick)
Home Builders, LLC, Bostic Brothers Const.,)
Inc., and Miller/Player & Associates,)

Defendants/Third-Party)
Plaintiffs,)

v.)

Michael Franz, Clearview Construction, Miguel)
Porras Choncoas, MHC Contractors, Miller/)
Player & Assoc., Builders First Source Southeast)
Group, Southern Concrete Specialties, Carl)
Compton d/b/a Compton Enterprise a/k/a)
Compton Enterprises, Gunter Heating & Air,)
All Pro Heating, A/C & Refrigeration, LLC,)
Coleman Waterproofing, Heyward Electrical)
Services, Tinsley Electrical, LLC and Hutch N)
Son Construction,)

Third-Party Defendants.)

THIRD-PARTY DEFENDANT ALLPRO'S
MOTION FOR SUMMARY JUDGMENT

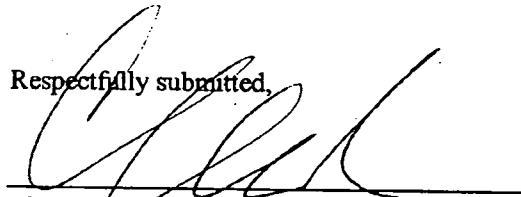
YOU WILL PLEASE TAKE NOTICE that the Third-Party Defendant AllPro Heating, A/C Refrigeration, LLC by and through its undersigned attorneys, will move before the Court on the 10th day of service hereof, or at such other time and place as is convenient to the Court and counsel, for an Order granting this Third-Party Defendant's Motion for Summary Judgment pursuant to Rule 56 of the South

Carolina Rules of Civil Procedure and for an Order dismissing Defendant/Third-Party Plaintiff Marick Home Builders' Third-Party claims against Third-Party Defendant AllPro Heating, A/C Refrigeration, LLC, as set forth below:

1. There is no material issue of fact that Third-Party Defendant AllPro Heating, A/C Refrigeration, LLC improperly installed the HVAC systems in Phase II of the Stoneledge Development and/or caused any damage or construction deficiencies to these units.

2. This Motion is based upon pleadings, written discovery and depositions taken in this matter to date.

Respectfully submitted,



Charles F. Turner, Jr. (#64996)
TURNER, PADGET, GRAHAM & LANEY, PA
P. O. Box 1509
Greenville, SC 29602
Phone: (864) 552-4600; Fax: (864) 552-4620
Attorney for Defendant AllPro Heating & Air

June 23, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2009-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.)
Mary Lou K. Plourde, Carol C. Pope,)
Steven B. Taylor, Bettie J. Taylor, 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, Intergrys Keowee)
Development, LLC, Marick Home Builders,)
LLC, Bostic Brothers Construction, Inc.)
and Miller/Player & Associates, John)
Ludwig, M Group Construction and)
Development, LLC, Clearview Construction,)
Michael Franz, MHC Contractors, Miguel)
Porras Choncoas, Builders First Source)
Southeast Group, Mike Green, Southern)
Concrete Specialties, Carl Compton d/b/a)
Compton Enterprise a/k/a Compton)
Enterprises, Gunter Heating & Air, A/C &)
All Pro Heating, Refrigeration, LLC,)
Coleman Waterproofing, Heyward Electrical)
Services, Inc., Tinsley Electrical, LLC, Hutch)
N Son Construction, Inc., Carl Catoe)
Construction, Inc., T.G. Construction, LLC,)
Defino Construction, Francisco Javier)
Zarate d/b/a Zarate Construction, Alejandro)
Avalos Cruz, Herberto Acros Hernandez,)
Martin Hernandez-Aviles, Francisco)
Villaibos Lopez, Ambrosio Martinez-)
Ramirez, Ester Moran Mentado, Socorro)
Castillo, Montel, Upstate Utilities, Inc. d/b/a)

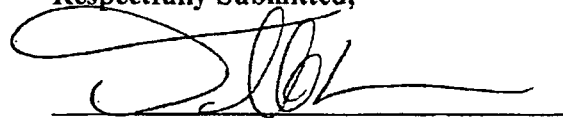
**GUNTER HEATING & AIR'S NOTICE
OF AND MOTION FOR SUMMARY
JUDGMENT**

MJF Construction, KMAC of the Carolinas,)
Inc., 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,)
)
Defendants.)

**TO: ROBERT T. LYLES, ESQUIRE, AND CATHERINE H. BRYAN, ESQUIRE,
ATTORNEYS FOR PLAINTIFFS AND PLAINTIFFS:**

Pursuant to Rule 56 of the *South Carolina Rules of Civil Procedure*, the Third-Party Defendant Gunter Heating & Air, through its undersigned attorney, hereby moves for summary judgment on the above action by the Plaintiffs and Third-Party Plaintiffs on the grounds that the Plaintiffs and Third-Party Plaintiffs are not entitled to any relief for any damages arising out of events alleged in the Complaint, on the grounds that there is no material issue of fact, and the Third-Party Defendant is entitled to a judgment in its favor as a matter of law; said motion to be based upon the pleadings, depositions, affidavits, and any other evidence that may be received by the Court.

Respectfully Submitted,



Bradford W. Cranshaw
Danielle F. Payne
GRIER COX & CRANSHAW, LLC
Post Office Box 2823
Columbia, South Carolina 29202
Tele: (803)731-0030
Fax: (803)731-4059

**ATTORNEY FOR DEFENDANT
GUNTER HEATING & AIR**

West Columbia, South Carolina
February 20, 2012.

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 K. 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., and)
MILLER/PLAYER & ASSOCIATES,)

Defendants,

MARICK HOME BUILDERS, LLC,

Third-Party Plaintiff,

vs.

MICHAEL FRANZ, CLEARVIEW)
CONSTRUCTION, MIGUES PORRAS)
CHONCOAS, MHC CONTRACTORS,)
MILLER/PLAYER & ASSOCIATES,)
BUILDERS FIRSTSOURCE SOUTHEAST)
GROUP, SOUTHERN CONCRETE)

DEFENDANT ALL PRO HEATING, A/C
& REFRIGERATION, LLC'S NOTICE OF
AND MOTION FOR SUMMARY
JUDGMENT

SPECIALTIES; CARL COMPTON d/b/a)
COMPTON ENTERPRIZE a/k/a)
COMPTON ENTERPRISES, GUNTER)
HEATING & AIR, ALL PRO HEATING,)
A/C & RENOVATION, LLC, COLEMAN)
WATERPROOFING, HEYWARD)
ELECTRICAL SERVICES, TINSLEY)
ELECTRICAL, LLC and HUTCH N SON)
CONSTRUCTION;)

Third-Party Defendants,)

BUILDERS FIRSTSOURCE-SOUTHEAST)
GROUP, LLC)

Fourth-Party Plaintiff,)

vs.)

CARL CATOE CONSTRUCTION, INC.)

Fourth-Party Defendant.)

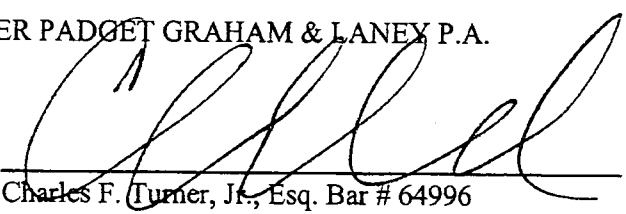
TO: PLAINTIFFS AND THEIR ATTORNEYS ROBERT T. LYLES, ESQUIRE, AND
CATHERINE H. BRYAN, ESQUIRE, ATTORNEYS FOR PLAINTIFFS:

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, the Third-Party Defendant AllPro Heating A/C and Refrigeration, LLC, through its undersigned attorney, hereby moves for summary judgment on the above action by the Plaintiffs and Third-Party Plaintiffs on the grounds that the Plaintiffs and Third-Party Plaintiffs are not entitled to any relief for any damages arising out of the events alleged in the Complaint, on the grounds that there is no material issue of fact, and the Third-Party Defendant is entitled to a judgment in its favor as a matter of law; said motion to be based upon the pleadings, depositions, affidavits, and any other evidence that may be received by the Court.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEX P.A.

By:



Charles F. Turner, Jr., Esq. Bar # 64996

P.O. Box 1509

Greenville, South Carolina 29602

Telephone: (864) 552-4600

Fax: (864) 552-4620

ATTORNEYS FOR ALL PRO HEATING, A/C &
REFRIGERATION

February 27, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
C.A. #: 2009-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 Nix,)
Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac)
Michael D. Plourde, Mary Lou K. Plourde, Carol)
C. Pope, Steven B. Taylor, Bette J. Taylor,)
Robert White, Individually, and on behalf of all)
Others similarly situated,)

Plaintiffs,)

v.)

IMK Development Company, LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee, LLC)
Integrays Keowee Development, LLC, Marick)
Home Builders, LLC, Bostic Brothers Const.,)
Inc., and Miller/Player & Associates,)

Defendants/Third-Party)
Plaintiffs,)

v.)

Michael Franz, Clearview Construction, Miguel)
Porras Choncoas, MHC Contractors, Miller/)
Player & Assoc., Builders First Source Southeast)
Group, 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, Tinsley Electrical, LLC and Hutch N)
Son Construction,)

Third-Party Defendants.)

AFFIDAVIT OF STEVE LOGAN

FILED OCONEE, SC
CLERK OF COURT
2011 SEP - 7 P 2:58

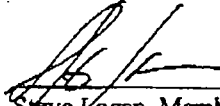
Personally appeared before me, Steve Logan, who after being duly sworn, states as follows:

1. My name is Steve Logan and I am a member of All Pro Heating, A/C & Refrigeration, LLC ("All Pro").

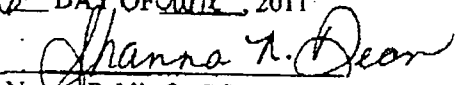
2. I have the authority and the experience to speak on behalf of All Pro and have been a member of the company for over 11 years.
3. All Pro has not been involved in any lawsuits until this matter.
4. In or around 2007, All Pro was hired by Marick Home Builders, LLC ("Marick") to install HVAC units in certain townhomes that were built as part of Phase II of the Stoneledge at Lake Keowee development ("Stonehedge").
5. All Pro performed the work it was hired to do and did not encounter any major issues, nor did it receive any complaints, in regard to its performance.
6. I understand that there is an allegation that we cut a truss in one of the buildings; however, this would have been impossible for a number of reasons.
 - a. First, the material we use to install duct work is flexible conduit, which is easily bent in order to achieve the proper runs. In situations where there is an obstruction, we simply bend the material to avoid the obstruction.
 - b. Second, there would have been no reason to cut the truss, because it was not in the way of the HVAC equipment. In fact, the truss was behind the return unit.
 - c. Third, no one on any of All Pro's crews engages in carpentry work. We have neither the tools, nor the personnel necessary to alter the structure of a building. Any alterations to the truss would had to have been done by the framer.
7. Additionally, I personally supervised the work by our crews, inspected the sites, and did not see any damage to any trusses, or any other problems relating to All Pro's installation of the HVAC units.
8. Based on my direct supervision and observation, All Pro did not cut the truss at issue.

FURTHER THE AFFIANT SAYETH NOT

Dated: Sept 6, 11


Steve Logan, Member, All Pro
Heating, A/C & Refrigeration, LLC

SWORN BEFORE ME THIS
6th DAY OF June, 2011


Notary Public for SC

My Commission Expires: 3 June 2018

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2011 SEP - 7
TPGL 3880200v
2:58

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 K.)
Plourde, Carol C. Pope, Steven B.)
Taylor, Bettie J. Taylor, Robert)
White, Individually, and on behalf)
of all others similarly situated,)

Plaintiffs,)

v.)

IMK Development Co., LLC,)
Keowee Townhouses, LLC, Ludwig)
Corporation, LLC, SDI Funding,)
LLC, Medallion At Keowee, LLC,)
Intergrys Keowee Development,)
LLC, Marick Home Builders, LLC,)
Bostic Brothers Construction, Inc.)
and Miller/Player & Associates,)

Defendants/ Third-)
Party Plaintiffs,)

v.)

Michael Franz, Clearview)
Construction, Miguel Porras)
Choncoas, MHC Contractors,)
Miller/Player and Associates,)
Builders FirstSource Southeast)
Group, 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)

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2009-CP-37-652

AFFIDAVIT OF TEDDY GUNTER

Services, Tinsley Electrical, LLC)
and Hutch N Son Construction,)
Third-Party)
Defendants.)
_____)

Personally appeared before me, Teddy Gunter, who after being duly sworn, states as follows:

1. My name is Teddy Gunter and I am the owner of Gunter Heating & Air (hereinafter "Gunter").
2. Gunter has not been involved in any lawsuits as a Defendant or Third-Party Defendant prior to the current lawsuit.
3. Gunter was hired by Marick Home Builders, LLC in 2005 to perform HVAC work at the following units: 412, 414, 410, 328, 326, 317, 222, 324, 322, 335, 325, 321, 319, 317, 315, 230, 228, 226, 422 and 227 located at Stoneledge at Lake Keowee development (hereinafter "Stoneledge Development").
4. Gunter performed all of its work in accordance with applicable building codes and industry standards.
5. Gunter did not encounter any issues with respect to its work, nor did it receive any complaints with respect to its job performance.
6. It is my understanding that the allegations in this lawsuit against the HVAC subcontractors, Gunter and All Pro Heating, A/C & Refrigeration, LLC, is for a cut truss in the attic of unit 552.
7. Gunter did not perform any work to unit 552 which is located in Phase II of the Stoneledge development.
8. I personally supervised the work by our employees, inspected the site and, did not see any problems with Gunter's work performed at Stoneledge, including but not limited to any damage to any trusses located in the attics of the units at Stoneledge.
9. Based on my direct supervision and observation, Gunter did not cut any trusses at the Stoneledge development, including but not limited to the truss in unit 552.

FURTHER THE AFFIANT SAYETH NOT.

Dated:

4/12/12

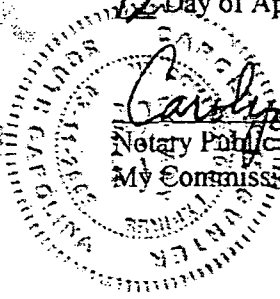
By:

Teddy Gunter

Teddy Gunter, Owner,
Gunter Heating & Air, LLC

SWORN BEFORE ME THIS

12 Day of April, 2012.



Caroline M. Gunter
Notary Public for South Carolina

My Commission Expires: April 20, 2019

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,
HUTCHINSON 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-

AFFIDAVIT OF DEREK A. HODGIN, P.E.

RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
 CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
 SOUTHERN BASEMENTS, INC., MJG)
 CONSTRUCTION AND HOMEBUILDERS, INC.)
 D/B/A MJG CONSTRUCTION, KMAC OF THE)
 CAROLINAS, INC., EUPACIO 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,)

PERSONALLY APPEARED BEFORE ME, Derek A. Hodgin, who, being duly sworn, deposes and says that:

I am over the age of eighteen (18) and the assertions made in this Affidavit are true and are based upon my personal knowledge.

I am a registered professional engineer in the State of South Carolina and 14 other states.

I have over 20 years experience as an engineering consultant including facility condition inspections, failure analysis, damage assessments, and forensic investigations. I have personally investigated construction deficiencies, including deficiencies in roofs, building envelopes, and structural defects in numerous structures.

In the above-referenced matter, my firm Construction Science and Engineering ("CSE") and I have been asked to determine the extent of construction deficiencies at Stoneledge at Lake Keowee, determine the cause and extent of existing damages and to develop a scope of repair.

I performed an initial visual survey of the property on December 1, 2009, and several subsequent surveys in June, July, and October, 2010.

I have observed and/or performed destructive testing in several areas at the project in 2009 and 2010.

I observed numerous construction deficiencies at the subject property, including conditions violating applicable building codes and industry standards, in the roofs, attics, separation walls, exterior walls, windows, exterior doors, balconies/patio areas, and electrical work.

Emergency repairs of some these conditions have taken place over the course of my involvement in this matter.

I have reviewed photographs taken by my staff of a cut roof truss member in the attic located beneath the low sloped roof area in unit 76 at Stoneledge. Some of these photos are attached as Exhibit 1.

The cut truss was discovered in the course of emergency repairs to damage that was unrelated to the cut truss.

This is the only attic that CSE has accessed with similar attic framing and similar HVAC configuration.

At this time, CSE has not done any destructive testing to verify other conditions at similar locations.

The cut truss in question is adjacent to HVAC duct work, some of which is made of a flexible material and some of which is made of a rigid insulation board material.

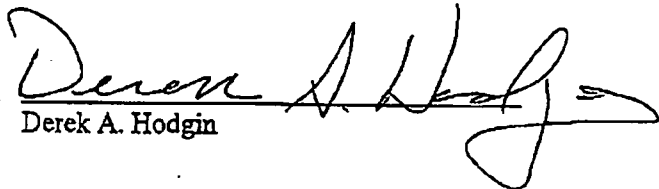
Due to the proximity of the duct work to the location of the cut truss, it is likely that the truss was cut to accommodate the duct work.

In my experience and from my knowledge of construction projects, it is likely that cut trusses would be found at other locations where similar roof framing configuration and HVAC layouts are present.

Due to the proximity of the cut truss to the HVAC duct work, the cut truss was either caused by the HVAC installer or was open and obvious to the HVAC installer.

The HVAC installer has a duty and obligation to report open and obvious cut trusses to their supervisor or to the upstream contractor at the time of discovery and installation.

Truss alterations at Stoneledge, such as a cut truss, are required to be repaired in accordance with R802.10.4 of the IRC 2003.

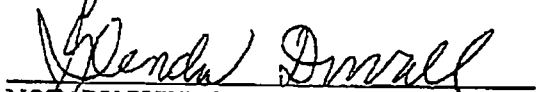

Derek A. Hodgins

Westminster, South Carolina
(city/ town)

April 13, 2012

SWORN to before me this 13th day of

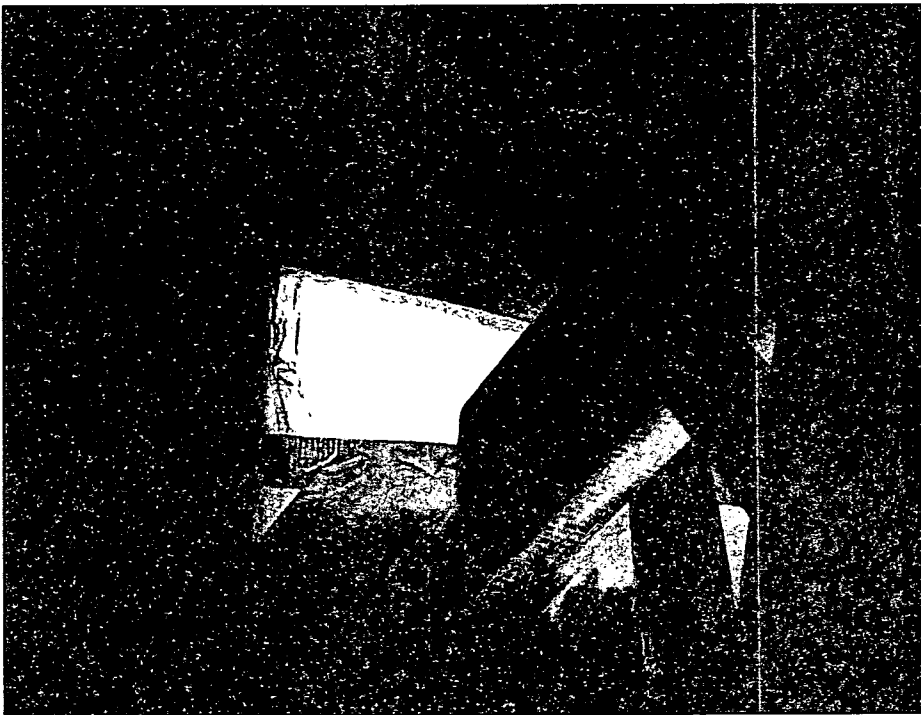
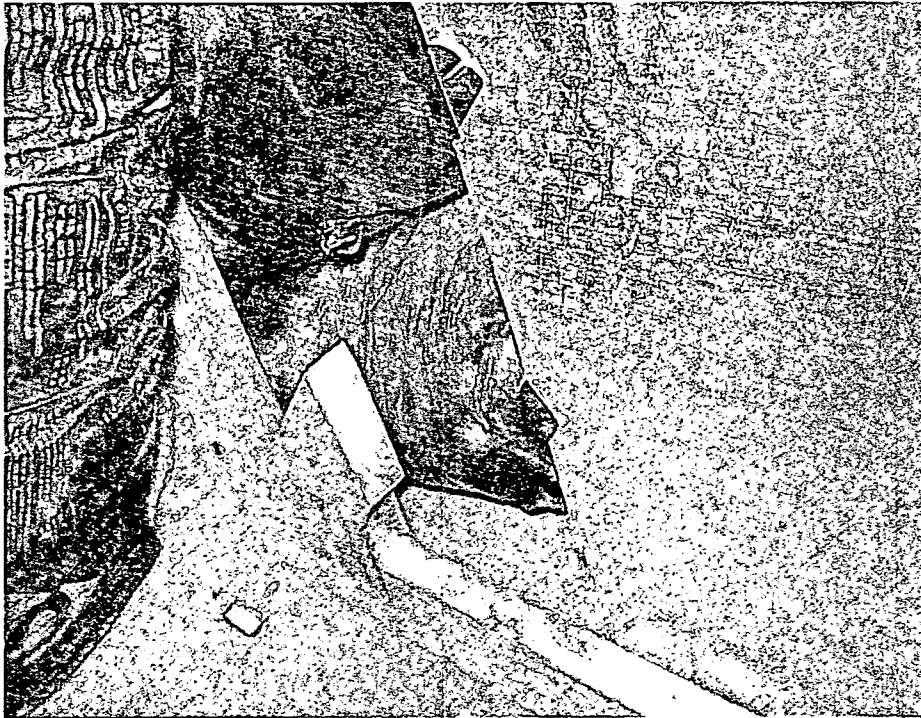
April, 2012.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: _____

MY COMMISSION EXPIRES JUNE 16TH, 2018

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, ET AL. V. IMK DEVELOPMENT, ET AL.
CASE NO.: 2009-CP-37-0652

EXHIBIT I



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

C.A. #: 2009-CP-37-652

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 Nix,)
Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac)
Michael D. Plourde, Mary Lou K. Plourde, Carol)
C. Pope, Steven B. Taylor, Bette J. Taylor,)
Robert White, Individually, and on behalf of all)
Others similarly situated,)

Plaintiffs,)

v.)

IMK Development Company, LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee, LLC)
Integrays Keowee Development, LLC, Marick)
Home Builders, LLC, Bostic Brothers Const.,)
Inc., and Miller/Player & Associates,)

Defendants/Third-Party)
Plaintiffs,)

v.)

Michael Franz, Clearview Construction, Miguel)
Porras Choncoas, MHC Contractors, Miller/)
Player & Assoc., Builders First Source Southeast)
Group, Southern Concrete Specialties, Carl)
Compton d/b/a Compton Enterprise a/k/a)
Compton Enterprises, Gunter Heating & Air,)
All Pro Heating, A/C & Refrigeration, LLC,)
Coleman Waterproofing, Heyward Electrical)
Services, Tinsley Electrical, LLC and Hutch N)
Son Construction,)

Third-Party Defendants.)

**MEMORANDUM OF LAW IN SUPPORT
OF THIRD-PARTY DEFENDANT ALL PRO
HEATING, A/C & REFRIGERATION
LLC'S MOTION FOR SUMMARY JUDGMENT**

**TO: MARICK HOME BUILDERS, LLC AND ITS ATTORNEY OF RECORD, JASON
M. IMHOFF, ESQUIRE:**

This Third-Party Defendant, All Pro Heating, A/C & Refrigeration, LLC ("All Pro")
respectfully submits this memorandum in support of its Motion for Summary Judgment.

PROCEDURAL POSTURE

IMK Development Co., LLC ("IMK") retained Marick Home Builders, LLC ("Marick") to build a development located on Lake Keowee. This development included a number of residential townhomes. After the homes were completed, the Plaintiffs allegedly discovered a number of defects in the homes and allegedly incurred damages resulting from the same.

Plaintiff Paul W. Hund, III, M.D., filed an action as a putative representative of a class of individuals owning real property in the development against Defendants/Third-Party Plaintiffs IMK and Marick. This action arose from the construction defects alleged by the Plaintiff against the developer, IMK, and the builder, Marick. Thereafter, the Plaintiff amended his complaint to add additional Plaintiffs and Defendants. Marick filed an answer to the Plaintiffs' amended complaint and asserted claims against a number of Third-Party Defendants, including All Pro. This Motion follows.

FACTS

In or around 2007, All Pro Heating, A/C & Refrigeration, LLC ("All Pro") was hired by Marick Home Builders, LLC ("Marick") to install HVAC units in certain townhomes that were built as part of Phase II of the Stoneledge at Lake Keowee development ("Stoneledge"). Affidavit of Steve Logan (which is attached hereto as "Exhibit A" and incorporated by reference herein). All Pro installed the units as requested, without significant issues or complaints. Affidavit of Steve Logan. Subsequently, Marick named All Pro as a Third-Party Defendant, alleging problems resulting from All Pro's work that resulted in damage to the homes alleged by the Plaintiffs.

The only damage to property testified to by the Plaintiffs' expert, Derek Hodgin, that could even remotely implicate All Pro is an attic truss member that he found cut in one unit he

inspected. Deposition Testimony of Derek Hodgins, p. 60, ll. 7-10, p. 66, ll. 12-19. Mr. Hodgins testifies that an HVAC installer would be the "likely candidate" because the truss would have been in the way of the HVAC equipment. Deposition Testimony of Derek Hodgins, p. 66, ll. 16-19. This testimony, however, is not based on direct observations by the expert, but rather on a discussion he had with a building official for Oconee County. Deposition Testimony of Derek Hodgins, p. 60, ll. 24-25, p. 61, ll. 1-3. Indeed, he testifies that he has not "done the research to know which unit [referred to by the building inspector] this was and how many units were constructed prior to this that would have had that same issue." Deposition Testimony of Derek Hodgins, p. 61, ll. 7-12.

Aside from the pure speculation of Mr. Hodgins, there is no evidence that All Pro cut a truss. The material used by All Pro for duct work is flexible conduit, which is easily bent and maneuvered to achieve the proper runs and to avoid obstructions. Affidavit of Steve Logan. Moreover, the truss was located behind the return unit and would not have interfered with its installation at all. Affidavit of Steve Logan. Thus, it is illogical, and indeed impossible, that All Pro would have even needed to cut a truss to install duct work. Indeed, All Pro does not even have the personnel or equipment necessary for carpentry and as such, would have been incapable of cutting the truss. Affidavit of Steve Logan.

Even assuming *arguendo* that the truss did have to be cut to install HVAC systems, the Plaintiffs' expert testified that this would be a problem with the design of the trusses.. Deposition Testimony of Derek Hodgins, p. 62, ll. 19-22 (stating, "the design of the trusses were prohibitive to allow for the installation of the HVAC and could have changed the truss design. I don't know specifically."). Moreover, he states that "if the design is changed, then hopefully the design would be changed to create an opening that the HVAC equipment could pass through

without compromising the truss.” Deposition Testimony of Derek Hodgin, p. 66, ll. 23-25, p. 67, l. 1. Thus, the trusses had to either be cut or replaced due to the faulty design. If the trusses had to be cut or replaced anyway, it is impossible that the alleged cut truss caused any damage to the Plaintiffs. Therefore, there is no evidence that All Pro caused any damages to the Plaintiffs or to Marick, and All Pro is entitled to a judgment as a matter of law.

LEGAL STANDARD

Rule 56 of the South Carolina Rules of Civil Procedure states that summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” S.C. R. Civ. P. Rule 56(c); *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). In determining the appropriateness of granting summary judgment, the Court is not “required to single out some one morsel of evidence ... to create an issue of fact that is not genuine.” *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)). Where a defendant establishes an entitlement to judgment as a matter of law, the court must grant summary judgment. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985).

ANALYSIS

1. Equitable Indemnity

“For a party to recover under a theory of equitable indemnification, three things must be proven: (1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a

result of the Plaintiffs' claims against it which were eventually proven to be the fault of the indemnitor." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, (Ct.App. 1999). In the present case, there is no evidence that All Pro is liable for damage to the Plaintiffs' homes. As set forth above, not only would All Pro have no need to cut a truss due to the flexible conduit used to install duct work, but even assuming *arguendo* that they did cut the truss, the Plaintiffs' expert testifies that it would have been necessary due to a faulty design. Affidavit of Steve Logan, Deposition Testimony of Derek Hodgin, p. 62, ll. 19-22. Without any underlying damage caused by All Pro to the Plaintiffs, there can be no recovery under equitable indemnification by Marick against All Pro. Therefore, since there is no genuine issue of material fact, All Pro is entitled to judgment as a matter of law.

2. Breach of Contract

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 686 S.E.2d 200, (Ct.App. 2009) (citations omitted). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* In the present case, All Pro contracted with Marick to install certain HVAC systems in homes Marick was constructing. All Pro fully performed under the contract by installing the systems without major issues or complaints. Affidavit of Steve Logan. Not only did All Pro fully perform under the contract, but even assuming *arguendo* that they did not, the damage the Plaintiffs allege to have occurred (i.e., the cut trusses) would not have resulted as a natural consequence and proximate result of such breach. As indicated by the Plaintiffs' expert, the need to cut the trusses would have been a natural consequence and proximate result of the design flaw in the trusses. Affidavit of Steve Logan, Deposition Testimony of Derek Hodgin, p.

62, ll. 19-22. Therefore, there is no issue of material fact and All Pro is entitled to judgment as a matter of law.

3. Negligence

To prevail in an action found in negligence, the Plaintiff must establish three essential elements: (a) A duty of care owed by the Defendant to the Plaintiff; (b) A breach of that duty by a negligent act or omission; and (c) Damage proximately caused by a breach of duty. If the Plaintiff fails to prove any one of the three elements, the action will fail. *Olsen v. Faculty House of Carolina, Inc.*, 344 S. C. 194, 544 S.E. 2d 38 (Ct. App. 2001). In the present case, All Pro installed the HVAC systems without incident. Affidavit of Steve Logan. There were no major complaints regarding the systems. *Id.* Therefore, All Pro could not have breached its duty.

Even assuming *arguendo* that All Pro allegedly cut a truss, which is denied, its act of cutting the truss would not have damaged the Plaintiffs or Marick. The Plaintiffs' expert testifies that the trusses may have been subject to a design flaw that affected the ability to install the HVAC system. Deposition Testimony of Derek Hodgin, p. 62, ll. 19-22. Therefore, taking this testimony at face value, the trusses would have had to have been replaced anyway. Thus, there is no genuine issue of material fact that All Pro either breached its duty to Marick or that it caused any damages to Marick and as such, All Pro is entitled to a judgment as a matter of law.

4. Breach of Warranties

A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. *Smith v. Breedlove* 377 S.C. 415, 661 S.E.2d 67, (Ct. App. 2008). As set forth above, there is no evidence that All Pro failed to perform the work in a careful, diligent, workmanlike manner. The only implication of damage by All Pro that can be inferred is that it cut a truss to install duct work for a HVAC

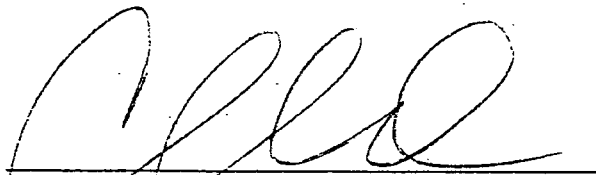
system; however, there is no evidence that this work was not performed in a careful, diligent, workmanlike manner. There were no major complaints or issues regarding All Pro's work. Affidavit of Steve Logan. Additionally, even if All Pro did have to cut a truss, which is denied, there is no evidence to support that this work was not done in a careful, diligent, workmanlike manner, or that it resulted in any damage to the Plaintiffs or to Marick. Indeed, even assuming that All Pro did cut the truss, which is again denied, it would have only been out of necessity due to a faulty design. Deposition Testimony of Derek Hodgin, p. 62, ll. 19-22.

Additionally, the contract that was entered into by the parties specifically states that there would be a "one year" warranty. Since the work was completed by All Pro over a year before this case was filed, the clear and unambiguous terms of the contract would preclude a claim for breach of warranty.

CONCLUSION

As set forth above, All Pro did not cut any trusses on any of the homes, nor would it have even needed to. Moreover, even if it had, which is denied, the trusses were designed improperly and would have to have been replaced anyway. There is no genuine issue of these material fact and as such, All Pro is entitled to judgment as a matter of law.

Respectfully submitted,



Charles F. Turner, Jr. (#64996)
TURNER, PADGET, GRAHAM & LANEY, PA
P. O. Box 1509
Greenville, SC 29602
(864) 552-4600
*Attorney for Third-Party Defendant AllPro
Heating, A/C & Refrigeration, LLC*

September 6, 2011

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

C.A. #: 2009-CP-37-652

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 Nix,)
Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac)
Michael D. Plourde, Mary Lou K. Plourde, Carol)
C. Pope, Steven B. Taylor, Bette J. Taylor,)
Robert White, Individually, and on behalf of all)
Others similarly situated,)

Plaintiffs,)

v.)

IMK Development Company, LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee, LLC)
Integritys Keowee Development, LLC, Marick)
Home Builders, LLC, Bostic Brothers Const.,)
Inc., and Miller/Player & Associates,)

Defendants/Third-Party)
Plaintiffs,)

v.)

Michael Franz, Clearview Construction, Miguel)
Porras Choncoas, MHC Contractors, Miller/)
Player & Assoc., Builders First Source Southeast)
Group, 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, Tinsley Electrical, LLC and Hutch N.)
Son Construction,)

Third-Party Defendants.)

AFFIDAVIT OF STEVE LOGAN

Personally appeared before me, Steve Logan, who after being duly sworn, states as follows:

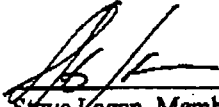
1. My name is Steve Logan and I am a member of All Pro Heating, A/C & Refrigeration, LLC ("All Pro").

TPGL 3880200v1

2. I have the authority and the experience to speak on behalf of All Pro and have been a member of the company for over 11 years.
3. All Pro has not been involved in any lawsuits until this matter.
4. In or around 2007, All Pro was hired by Marick Home Builders, LLC ("Marick") to install HVAC units in certain townhomes that were built as part of Phase II of the Stoneledge at Lake Keowee development ("Stonehedge").
5. All Pro performed the work it was hired to do and did not encounter any major issues, nor did it receive any complaints, in regard to its performance.
6. I understand that there is an allegation that we cut a truss in one of the buildings; however, this would have been impossible for a number of reasons.
 - a. First, the material we use to install duct work is flexible conduit, which is easily bent in order to achieve the proper runs. In situations where there is an obstruction, we simply bend the material to avoid the obstruction.
 - b. Second, there would have been no reason to cut the truss, because it was not in the way of the HVAC equipment. In fact, the truss was behind the return unit.
 - c. Third, no one on any of All Pro's crews engages in carpentry work. We have neither the tools, nor the personnel necessary to alter the structure of a building. Any alterations to the truss would had to have been done by the framer.
7. Additionally, I personally supervised the work by our crews, inspected the sites, and did not see any damage to any trusses, or any other problems relating to All Pro's installation of the HVAC units.
8. Based on my direct supervision and observation, All Pro did not cut the truss at issue.

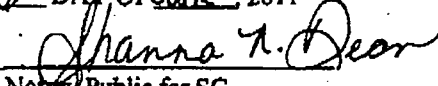
FURTHER THE AFFIANT SAYETH NOT

Dated: Sept 6, 11


Steve Logan, Member, All Pro
Heating, A/C & Refrigeration, LLC

SWORN BEFORE ME THIS

6th DAY OF June, 2011



Notary Public for SC

My Commission Expires: 3 June 2018

TPGL 3880200v1

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 ENTERPRISE 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, 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,)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

 ORIGINAL

MOTIONS FOR SUMMARY JUDGMENT
MOTION TO COMPEL
HEARNINGS BEFORE THE
HONORABLE ALEXANDER S.
MACAULAY, JUDGE
APRIL 16, 2012

Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

1 APPEARANCES:
2 Catherine H. Bryan, Esq.
Attorney for Plaintiffs
3
4 Anne R. Culbreath, Esq.
Attorney for All Pro A/C & Renovation, LLC
5
6 Cynthia Buck Brown, Esq.
Attorney for IMK Development Company, LLC
7
8 John D. Harjehausen, Esq., and
9 Ken Jones, Esq.
Attorneys for Heyward Electrical Services
10
11 J. Victor McDade, Esq., and
12 Bradford W. Cranshaw, Esq.
Attorneys for Gunter Heating & Air
13
14 P. Christopher Smith, Jr., Esq.
Attorney for T.G. Construction
15
16 Jason Imhoff, Esq.
Attorney for Marick Home Builders, LLC
17
18 Nicholas J. Rivera, Esq.
Attorney for Everado Jarmamillo
19
20 William C. Cox, Esquire
21 Attorney for Integrys Keowee Development and IMK
22 Development
23
24 Attorneys also present but court reporter not sure of
25 representation:
Trevor Hughey, Esq.
Joshua T. Thompson, Esq.

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INDEX OF WITNESSES

No witnesses were called.

INDEX OF EXHIBITS

No exhibits were handed to the Court Reporter to Mark for Identification.

Motion for Summary Judgment on Behalf of All Pro	4
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1 ** Start of Requested Certified Transcript of Record **.

2 (Whereupon, the hearing began on Monday, April 16,
3 2012, at approximately 2:25 p.m.)

4 THE COURT: All right. As I understand the case this
5 afternoon will be Stoneledge at Lake Keowee Homeowners'
6 Association et al., et cetera, versus IMK Development
7 Company, LLC, et al., et cetera, versus -- as also
8 defendant/third-party plaintiffs, All Pro Heating &
9 Air-conditioning and refrigeration, LLC, third-party
10 defendant, as well as Gunter Heating & Air.

11 At this time we'll hear All Pro Heating & Air
12 Refrigeration LLC. Ms. Bryan is here on behalf of the
13 Plaintiffs, Ms. Brown is here on behalf of IMK
14 Development. And Ms. Culbreath is here on behalf of All
15 Pro Heating & Air Conditioning and Refrigeration, LLC.

16 It is your motion for summary judgment?

17 MS. CULBREATH: It is, Your Honor.

18 THE COURT: All right. Ms. Culbreath.
19 Motion for Summary Judgment on Behalf of All Pro:

20 MS. CULBREATH: Thank you, Your Honor.

21 Again, for Madam Court Reporter, who has a good
22 number of folks to keep track of, I'm Anne Culbreath and
23 I'm one of the lawyers who represents All Pro in this
24 matter. Your Honor, you are, you and the Clerk were all
25 aware of the lengthy procedural history of this case so

1 I will not belabor the point with the numerous
2 Complaints that have been filed. I think we're up to
3 our Third Amended Complaint.

4 In the Third Amended Complaint the plaintiffs filed
5 allegations against numerous subs, including All Pro.
6 Previously All Pro had just been a third-party defendant
7 in a third party complaint filed by Marick. As it
8 stands today, Jason Imhoff, counsel for Marick
9 defendants, has agreed to dismiss All Pro from all
10 claims that it might have in this action. It's a
11 consent without prejudice but we're in the process of
12 circulating an order.

13 So the only motion that we have outstanding is the
14 summary judgment motion that we filed against the claims
15 of the plaintiffs. So that's where we are today.

16 THE COURT: All right. So this is not IMK or any
17 of the other third-party plaintiffs?

18 MS. CULBREATH: No. This is just a situation where
19 the Marick defendants have agreed to dismiss All Pro,
20 just All Pro, all claims that it might have, be it
21 cross-claims or remaining third-party claims.

22 THE COURT: I was going to ask. Have the
23 plaintiffs alleged an action against All Pro?

24 MS. CULBREATH: They have, Your Honor, in that most
25 recent Amended Complaint -- I think we're up to Third

1 Amended Complaint -- they brought direct actions
2 against ---

3 THE COURT: So you are a Defendant now ---

4 MS. CULBREATH: Yes.

5 THE COURT: --- under the presently constituted --

6 MS. CULBREATH: Yes. We are. The only claim that
7 we are here to argue or dispute over today would be our
8 summary judgment motion against the plaintiff's direct
9 causes of action. And there's two claims, one for
10 negligence and one for breach of warranties, Your Honor.

11 Now, in this particular situation you have a
12 situation where All Pro and Gunter Heating & Air have
13 essentially one allegation aimed at them in this action.
14 Now, this is indeed a large alleged construction defect
15 case. The Plaintiffs have alleged \$16 million in
16 damages. And in terms of allegations against All Pro,
17 it all stems down to one allegation of a cut truss.

18 THE COURT: I was curious. I looked at your
19 memorandum, but of course I haven't looked at all of the
20 pleadings.

21 MS. CULBREATH: Yes, sir.

22 THE COURT: And I notice that was the crux, if you
23 will forgive the pun.

24 MS. CULBREATH: That's the only reason why we are
25 here. We're a tiny little guppy in a very large pool.

1 But what we are here today is to talk about this single
2 allegation and the lack of evidence to support it, as to
3 this allegation against one particular cut truss. It
4 pains me to go through some of this history because this
5 case has been going on for so long.

6 But in 2009 the plaintiffs hired Derek
7 Hodgkin (phonetic) ---

8 THE COURT: I read your memorandum.

9 MS. CULBREATH: Fantastic. May I fast forward,
10 then?

11 THE COURT: Please.

12 MS. CULBREATH: Okay. Your Honor, this is a
13 situation where Derek Hodgkin (phonetic) is the lead
14 investigator for the plaintiffs. He and his team put
15 forth a tremendous investigation that led to the
16 discussion of a 24-page damages grid I guess is what
17 you'd call this and a \$250,000 bill for said
18 investigation.

19 He has been deposed twice. Mr. Hodgkin was deposed
20 in December of 2010 before All Pro or Gunter were
21 involved in the litigation, and in it he's made
22 reference to a cut truss in an attic. He admitted he
23 didn't know who cut it, he didn't even know what unit it
24 was, he didn't know when it was cut, and he said that,
25 well, the HVAC folks are likely candidates. But that's

1 all he discussed. Now, that's got us all, got the HVAC
2 folks in it.

3 He was deposed again 13 months later in January of
4 2012. Again he said he didn't know who cut the truss,
5 he didn't know when it was cut. He indicated that there
6 might be some more likely candidates: Plumbers, framers,
7 et cetera.

8 He admitted that it would be less likely it was the
9 air-conditioning folks, that there was flexible duct
10 used. And more importantly, Your Honor, he goes on to
11 say that, his testimony with regard to who cut it and
12 when it was cut, pure speculation. He admitted that
13 straight out of the gate.

14 So, after two depositions, we are left with an
15 expert who has on his own admission provided speculative
16 testimony. Now, I won't go through all of the other
17 testimony because I did that in our memo from the folks
18 who said, you know, it wasn't the air-conditioning
19 folks. Burgess Metcalf, the other fellow from CSC said
20 he couldn't say who cut that truss.

21 Mike Hornaday (phonetic), the general manager for
22 Marick, indicated that it wasn't All Pro and gave
23 reasons for it. We provided an affidavit from Mr. Steve
24 Logan who said it couldn't have been us because we don't
25 even have the equipment to cut a truss.

1 Then you had Carl Catoe, the framer, and the folks
2 from Gunter are going to submit documentation from
3 Mr. Catoe. He testified that it wasn't his business to
4 cut trusses. We have documentation that supports that
5 he wrote off part of a bill for cut trusses in this
6 building and this particular unit. And he said ---

7 THE COURT: He did write off cut trusses?

8 MS. CULBREATH: Yes, Your Honor. We do have
9 documentation that Gunter will provide when they argue
10 their part of this motion.

11 Now, Your Honor, this, as it stood as of Friday
12 afternoon, you had a clear case where the only thing
13 that the plaintiffs could hang their hat on was the
14 speculative evidence of Mr. Hodgin. And Friday
15 afternoon comes around, and lo and behold we get faxed
16 an affidavit.

17 In looking at the affidavit, it is a host of
18 additional likelies. In his original -- or in his
19 second deposition he talks about likely candidates.
20 Well, his affidavit was a lot more likelies.

21 Your Honor, we are of the position that
22 Mr. Hodgin's affidavit from Friday afternoon is a sham
23 affidavit, the Court should disregard even looking at
24 it. And we can go through some of the factors in the
25 case law that we cited. The affidavit is not a

1 correcting affidavit. There is no confusion set forth.
2 in Mr. Hodgins's testimony. He's very clear.

3 Speculative. Doesn't know.

4 This is not a situation where there was additional
5 evidence that has suddenly come to light. Mr. Hodgins
6 had access to this property since 2009 and, as has been
7 stated by himself and even just as early as this morning
8 in a mediation presentation, free reign to investigate
9 whatever they want at any point in time.

10 Your Honor, if you look at the affidavit, it's not
11 a correcting affidavit, it's a sham in that it tries to
12 create additional duties.

13 THE COURT: Well, didn't you just suggest that I
14 shouldn't look at it?

15 MS. CULBREATH: Well, that's right. But I'm just
16 telling you why it's a sham --

17 THE COURT: If I should, all right ---

18 MS. CULBREATH: -- and why you shouldn't.

19 And that's simply because if you look at the six
20 factors that are set forth in several cases -- I'll just
21 point to the Cochran (phonetic) decision, which we cite
22 to in our brief, the elements listed in the Cochran
23 case -- Mr. Hodgins's affidavit, which would be the third
24 time he's now under oath, the elements support that this
25 is indeed a sham. It doesn't explain any kind of

1 confusing testimony. It doesn't set forth a situation
2 where he is utilizing new evidence. You have a
3 situation where there is no evidence of confusion on
4 Mr. Hodgin, he is not a person who gets easily confused.
5 And then you have a situation where, number six, in
6 relation to summary judgment a second affidavit was
7 submitted. This was submitted on Friday afternoon, and,
8 as is stated in a good number of cases, you have a
9 situation where the affidavit was submitted in an effort
10 to create a genuine issue of fact when indeed there is
11 none.

12 I would ask that you not, that the Court not look
13 at this affidavit because it is such a sham. Even if
14 you looked at it -- and I know you just said, well, why
15 are you even gonna bring this up? But even if you did
16 look at it, Your Honor, when you read this affidavit,
17 this affidavit does not meet the plaintiff's burden of
18 proof. It's an affidavit that when you look at it again
19 does not meet the threshold of admissible expert
20 testimony. You have likely, likely, likely, but you
21 don't have most likely, you don't have most probable,
22 and therefore this should not be admissible evidence for
23 a motion for summary judgment.

24 Your Honor, clearly this is a case where there is
25 no genuine issue of material fact. If you look at all

1 of Mr. Hodgin's testimony, he admits that it is pure
2 speculation. In his affidavit it's clear that he and
3 the plaintiffs are attempting to, as put in the
4 Harris-Teeter case, attempting to rescue their claims
5 with a last-minute affidavit. But, Your Honor, that
6 affidavit is a sham, and even if the Court considered
7 it, it does not give rise to the appropriate burden of
8 proof of an expert or for a Plaintiff.

9 Your Honor, we could go through the negligence and
10 the breach of warranty claims. We've covered that in
11 our brief. There is no evidence to support a claim
12 against All Pro in terms of genuine material fact.

13 THE COURT: Well, that's the point.

14 MS. CULBREATH: Yes.

15 THE COURT: It's not so much a matter of law, it's
16 a matter of fact if there is a genuine issue. I mean,
17 that's why you've got summary judgment, that's what it
18 is, it's not a genuine issue.

19 MS. CULBREATH: Correct. And we have no genuine
20 issue, Your Honor. Speculation cannot give, cannot save
21 a person's claim.

22 THE COURT: All right. Does anybody else want to
23 say anything at this juncture from the other third-party
24 defendants? In other words, does Gunter Heating & Air
25 have anything?

1 MR. CRANSHAW: Your Honor, I'm, my name is Brad
2 Cranshaw. And we've met, Your Honor. It's been many
3 years since I've handled matters in front of you. I
4 represent Gunter Heating & Air, and we are similarly
5 situated, so I believe that maybe now is the best time I
6 would make mention of one of two things. And I want to
7 hand up -- and I provided plaintiff's counsel a copy of
8 these materials -- I have six documents that I've marked
9 as defense exhibits for this hearing and for our motion
10 for summary judgment.

11 And my motion is, I think, that I'll be careful in
12 stating, Marick has not granted to me yet a dismissal,
13 though I imagine that the same arguments that I make for
14 the plaintiff as with regards to the evidence they have
15 against me ---

16 THE COURT: Now, Marick had a, what, Stage 2?

17 MR. CRANSHAW: Marick had -- I believe they had
18 some activities in Stage 1, I believe some activities in
19 Stage 1. But Stage 2, yes, Your Honor.

20 THE COURT: All right.

21 MR. CRANSHAW: Now, that really highlights the
22 difference between my argument and, all due respect to
23 Ms. Culbreath, her argument. Phase 1 and Phase 2 are
24 separate and distinct construction projects. The work
25 that my client did and what I have an affidavit

1 demonstrates my client did work, came out and did spot
2 work for a number of different units for Stage 1.

3 Stage 2 is where the cut truss was found, I think
4 it's undisputed in the record and it's demonstrated in
5 the record, in the documents that I've provided.

6 THE COURT: Let me ask. Because I'm sure Ms. Bryan
7 will be able to take care of that, quote, fact. But has
8 an actual cut truss been found?

9 MR. CRANSHAW: One cut truss was found. One cut
10 truss was found, Your Honor, in Phase 2 in building 19.
11 And my client has provided an affidavit that
12 demonstrates that we have no work in Phase 2.

13 THE COURT: Has anybody gotten an affidavit that
14 says you did? I mean, is there any factual basis --

15 MR. CRANSHAW: Dispute.

16 THE COURT: -- for saying that you had anything to
17 do with Phase 2 or that particular unit?

18 MR. CRANSHAW: Not a scintilla of proof has been
19 presented.

20 THE COURT: That's what I was looking for.

21 MR. CRANSHAW: Not a scintilla of proof has been
22 presented.

23 THE COURT: All right. Is there anything else you
24 want to...

25 MR. CRANSHAW: Nothing further, Your Honor.

1 THE COURT: Okay.

2 Now, Ms. Bryan, it looks like you're going to have
3 to tell me what your opposition to the motion for
4 summary judgment in order to establish a genuine
5 issue --

6 MS. BRYAN: Okay.

7 THE COURT: -- of material fact. A material fact
8 is much has been involved in this case. I'm looking at
9 two great big boxes back here. Apparently there's a
10 lot, and it almost reminds me of the observation about a
11 kingdom is lost for want of a nail. Now, is your cause
12 of action against these two Defendants going to be
13 rescued by the nail?

14 MS. BRYAN: Yes, Your Honor.

15 THE COURT: All right, good.

16 MS. BRYAN: I guess I'll address in reverse order,
17 if I may --

18 THE COURT: Certainly.

19 MS. BRYAN: -- on Mr. Cranshaw's statement about
20 the question of whether Gunter could have had anything
21 to do with this cut truss that was found in Phase 2.
22 The affidavit of Derek Hodgins, on one of the statements
23 in that affidavit is that -- I think he may have
24 testified to this in these depositions as well -- is
25 that due to the proximity of the cut truss to the HVAC

1 equipment in that attic, that there was likely a
2 conflict in the plans where they were having to make
3 some adjustments in order to accommodate HVAC equipment.
4 And so any attic that has the same configuration is
5 likely to have the same problem.

6 Now, they haven't opened up the other attic with
7 the same configuration at this point. Discovery is not
8 over until August 1st. So that's the testimony of that,
9 what's contained in Derek's affidavit, just one of the
10 statements.

11 THE COURT: But you -- has anybody identified the
12 truss forensically, in other words, has seen it in its
13 existence rather than speculative, that I think that is
14 implied that actually the expert didn't see the truss,
15 he talked to some building official here in Ocone
16 County who said, Oh, yeah, there was a truss that was
17 cut in how many units altogether that comprise these two
18 phases, and he couldn't identify which one.

19 MS. BRYAN: Well, and that, Your Honor, was during
20 the --

21 THE COURT: Well, I'm just saying you have now.

22 MS. BRYAN: Yes.

23 THE COURT: You're going to show me the picture?

24 MS. BRYAN: I do have a picture. And this is the
25 affidavit of Derek Hodgin (handing).

1 THE COURT: Thank you.

2 MS. BRYAN: And what's also described in the
3 testimony of Mr. Hodgins about, it was not just his
4 conversation with the building inspector or the former
5 building inspector, Mr. Chambers. It was the fact that
6 he had seen these pictures. What was going on was some
7 of the homeowners were having such problems with water
8 coming in roofs and things like that that they had to
9 send out people to do what we have been referring to as
10 emergency repairs. So it was in the course of these
11 emergency repairs that they happened upon this
12 condition. Those pictures were taken by the repair
13 contractor while Mr. Hodgins's staff was there and
14 observing what was going on.

15 THE COURT: And these pictures were taken in his
16 presence?

17 MS. BRYAN: By his staff.

18 THE COURT: Or under his authority?

19 MS. BRYAN: Either by his staff or by the ---

20 THE COURT: Well, the reason I was asking you, of
21 course, is the first thing in qualifying him is
22 photographs, it represents an accurate scene or what was
23 there. In other words, it's not just, well, we've got a
24 stack of cut trusses that we can bring out at any time.
25 I mean, not that this would be done, but I'm just

1 talking about that's why we do, the photographs
2 authenticate it. And so you do have authentication for
3 these photographs in a particular place that a witness
4 can come in and say, well, yes, I made this photograph
5 and it accurately represents what it portrays?

6 MS. BRYAN: Yes. We can have -- yes.

7 THE COURT: Do you have that in the record now or
8 is that gonna be something before August the 1st?

9 MS. BRYAN: Well, I know that in the affidavit
10 Derek says that he's reviewed these photographs taken by
11 his staff.

12 THE COURT: So he'll have something -- let's see --
13 where will he get his staff? I mean, if you're going to
14 rely on this -- otherwise, I mean, this is one of the
15 things that intrigues me is when we talk about
16 conclusions. Conclusions of law are good because they
17 are based on precedent and statutes and things of that
18 nature. But conclusions of fact, without a factual
19 basis, are not dependable. In fact, our courts usually
20 reject them. And they make a distinction, as I say,
21 between conclusions of law and conclusions of fact. In
22 fact, they've even corrected judges for basing their
23 decisions on conclusions of fact when there is no
24 factual basis.

25 That's all I'm trying to do is I'm trying to get

1 around -- I don't want somebody to look at me someday
2 and saying that, you know, he should have granted that
3 motion for summary judgment 'cause he's taken a
4 conclusion in an affidavit that apparently I haven't
5 looked at it, and you might tell me which paragraph it
6 is, that says, I had somebody do these.

7 MS. BRYAN: I would ask you to look at the page 3
8 of the affidavit.

9 THE COURT: Okay.

10 MS. BRYAN: Which is, and the last four or so
11 paragraphs -- or the --

12 THE COURT: The beginning?

13 MS. BRYAN: The last six paragraphs.

14 THE COURT: The last six.

15 MS. BRYAN: Yes, sir, Your Honor.

16 THE COURT: It's all six of them?

17 MS. BRYAN: Yes, sir.

18 THE COURT: Beginning "at this time"?

19 MS. BRYAN: The cut truss in question.

20 THE COURT: All right. The cut truss.

21 Just a moment, please. (Reading silently.)

22 Well, he says he has -- this is on page 2 -- I've
23 reviewed photographs taken by my staff of a cut roof
24 truss member.

25 All right. That's sort of a stretch. I mean, the

1 best I can read that and say is that somebody on his
2 staff presented him with these photographs.

3 MS. BRYAN: Right. But he's seen the ---

4 THE COURT: He's seen the photographs.

5 MS. BRYAN: Right. But they --

6 THE COURT: It doesn't say where they came from or
7 what they represent other than a cut truss. I mean, I'm
8 not sure if that's not a unique event in construction, a
9 cut truss, that you might find one a lot of different
10 places. And I don't know -- forgive me -- that's one
11 thing why we always talk about sworn testimony, in
12 particular when we're dealing with facts, that you don't
13 have somebody who can authenticate the photograph itself
14 under oath, so you don't have to worry about, Oh, well,
15 I found this in a package of stuff that I think came
16 from the place. I gave it to my boss and he looked at
17 it and he based his conclusion on it.

18 And again, please forgive me. I'm just trying
19 to -- when we have a genuine issue of material fact,
20 that means that the fact has been established and
21 there's an issue as to what it represents.

22 MS. BRYAN: Well, I believe that the, that
23 Mr. Hodgins, you know, is --

24 THE COURT: Let me ask you. And I think I am --
25 this is a complex case, is it not?

1 MS. BRYAN: It is.

2 THE COURT: And it's been assigned to me; is that
3 correct?

4 MS. BRYAN: As far as I know.

5 THE COURT: All right. I'm just saying this.
6 Ultimately, if it's tried, I'll be trying it. Now, what
7 am I going to do when your expert says, Well, these
8 photographs were handed to me, and I'd like to admit
9 them into evidence as being proof of the fact that there
10 were cut trusses in this particular project, and one of
11 these fine people could say "I object" and then
12 authenticate it, as you would a photograph. That not
13 only was, you know, back in the old days we use to talk
14 about was the camera working. You have to say, Oh, yes,
15 I've used this camera 6,000 times, it's been working
16 every time.

17 I mean, do you see what I'm talking about?

18 MS. BRYAN: I do, Your Honor.

19 THE COURT: And if I say, well, I'm sorry, you
20 haven't authenticated the photograph, then how am I
21 going to permit the testimony based on the photograph?
22 Particularly as to expert testimony based on conclusions
23 rather than hands-on direct testimony.

24 MS. BRYAN: Well, I believe you would be entirely
25 within your bounds to allow the expert to testify based

1 on observations that his staff made.

2 THE COURT: Observations that he has made.

3 MS. BRYAN: No, that his staff made.

4 THE COURT: No. Only -- as I say, I'm not exactly
5 sure if -- if he hasn't seen them and he has sent
6 somebody out to find something, and they present him
7 with something, how do I know and how do the other
8 triers of fact know that that was actually what was
9 found? Or it wasn't just a good employee trying to
10 satisfy his boss? "Bring me back a cut truss."

11 "Yes, sir." "Here it is, right here."

12 No. When you say -- again, and I do, and I think
13 somebody is handed me the case, it's talking about
14 default judgments which are based really on facts
15 because that's how you get a default judgment is the
16 fact that the pleadings were served and the fact is that
17 there was no response and the fact is there is -- a
18 person is in default. (Reading):

19 An abuse of discretion in setting
20 aside a default judgment occurs when the
21 Judge issuing the order was controlled
22 by some error of law or when the order,
23 based upon factual as distinguished from
24 legal conclusions, is without
25 evidentiary support.

1 And, of course, evidentiary support has to be
2 something that is authenticated and validated, not just
3 a form of hearsay: Well, I was told that this is what
4 this was.

5 MS. BRYAN: I think at this point the testimony
6 from Mr. Hodgkin ---

7 THE COURT: I'm not looking for testimony now, I'm
8 looking for facts.

9 MS. BRYAN: Right.

10 THE COURT: And again, of course, a question of
11 fact is not only can you prove something, but can you
12 disprove something. In other words, I don't know how
13 they would disprove that since they haven't had anybody
14 here to testify, yes, this was the truss and I was
15 there, and I made the photograph and it accurately
16 represents a truss that would be at issue in this
17 particular case, if they don't have that person here,
18 how are they going to disprove it?

19 MS. BRYAN: If we need -- I think I'm confused
20 because --

21 THE COURT: What are you confused about?

22 MS. BRYAN: -- I need to prove -- I think we're
23 talking about our burden to prove something. We may not
24 prove anything --

25 THE COURT: Well, it's not burden of proving at

1 this point. Just to get past the genuine issue of
2 material fact is you have to establish the material
3 fact.

4 MS. BRYAN: And I'm -- we have evidence that the
5 truss was either cut by the HVAC installer or the
6 installer should have reported it.

7 THE COURT: What says that the photographs that you
8 have attached to the affidavit came from anything, any
9 information here?

10 MS. BRYAN: From the affidavit itself.

11 THE COURT: No. That's the affidavit of the person
12 who received it. The receiver.

13 MS. BRYAN: It says that it was, the cut truss was
14 discovered ---

15 THE COURT: No. It says it was handed to me. Look
16 on page 2, next-to-the-last paragraph.

17 MS. BRYAN: Yes, I see that.

18 THE COURT: Does it say that he took the
19 photographs?

20 MS. BRYAN: No, he did not take them.

21 THE COURT: Wouldn't that be hearsay?

22 MS. BRYAN: But, but construction --

23 THE COURT: Again, maybe you are confused, but I'm
24 not sure why. If you can tell me where the material
25 fact is. Fact, not a conclusion, not based on what

1 somebody told him, but a fact. And material fact here
2 would be that there was a, there was a cut truss --

3 MS. BRYAN: Okay.

4 THE COURT: -- in these projects.

5 MS. BRYAN: I do have some deposition testimony to
6 hand up to Your Honor.

7 THE COURT: Okay.

8 MS. BRYAN: (Handing).

9 THE COURT: And where do you want me to look? I'm
10 looking at the first -- or I say the first. I'm looking
11 at the ---

12 MS. BRYAN: 2012.

13 THE COURT: Yes. January the 23rd, 2012?

14 MS. BRYAN: Yes, Your Honor, on page 162.

15 THE COURT: Very well. Which line?

16 MS. BRYAN: It's consistent with what he says in
17 his affidavit, is that it's based on the proximity where
18 they found the cut truss to the HVAC equipment.

19 THE COURT: Well, no. Where does it say he found
20 the truss, the cut truss?

21 MS. BRYAN: I don't believe that it says he found
22 it. I believe in a lot of his testimony ---

23 THE COURT: Well, then where is it in all of these
24 depositions and affidavits of Mr. Hodgins do you have
25 anything that establishes that, in fact -- and that's

1 what we are talking about is a genuine issue as to
2 material fact. The material fact is that the truss that
3 you are using as a basis of your cause of action even
4 exists ---

5 MS. BRYAN: I don't --

6 THE COURT: --- or it's supposed to?

7 MS. BRYAN: Excuse me, your honor. I don't believe
8 anybody here was contesting --

9 THE COURT: Somebody took a photograph.

10 MS. BRYAN: Right -- I don't believe anybody here
11 is contesting the fact that the photograph that is
12 attached to the affidavit ---

13 THE COURT: He didn't get it until, it was dated
14 the 13th.

15 MS. CULBREATH: Friday, Your Honor. And I did not
16 get any exhibits, Your Honor, with mine.

17 THE COURT: I'm just curious. Let's don't talk
18 about negligence on behalf of others. Let's talk about,
19 just answer my question: Is there anything in the
20 record up until now that establishes that there was a
21 cut truss, in fact? Direct evidence.

22 MS. BRYAN: Your Honor, the deposition of Derek
23 Hodgkin, they went over the photograph, and the
24 photograph is also attached to the affidavit.

25 THE COURT: And he says it was given to him by

1 somebody else which means he didn't produce it.

2 MS. BRYAN: He did not. He didn't take it. It was
3 taken by ---

4 THE COURT: It was given to him. He could not
5 stand here or sit there under oath and say, Well, Judge,
6 I took this picture. I know that it's a fair and
7 accurate representation of what it proposes to
8 represent.

9 MS. BRYAN: Your Honor, if we need to get the
10 person from his firm who took it ---

11 THE COURT: Well, if that's what you're gonna say
12 that that's a fact, that is, at best is at issue.

13 MS. BRYAN: We could certainly have them here.

14 THE COURT: Well, then, why don't you do that
15 sometime. But you might want to renew your motion after
16 you do that. Again, as I say, I'm a little bit, after
17 looking at all this, it seems that I have a lot to
18 decide. And I haven't even, in this particular case, if
19 that's the only evidence of injury, evidence of
20 negligence or breach of a warranty is something that you
21 can't identify.

22 MS. BRYAN: I think Mr. Hodgin has adequately
23 identified ---

24 THE COURT: He has. He said he got them from
25 somebody else. He identified where he got them.

1 MS. BRYAN: Yes, Your Honor.

2 THE COURT: He didn't take them, he didn't see
3 them, he didn't authenticate them.

4 MS. BRYAN: I didn't realize -- I don't think
5 anybody is contesting the fact that that photograph was
6 actually taken by Construction Science Engineering at
7 Stoneledge. I don't think that's ---

8 THE COURT: Then how do you know it even is
9 relevant?

10 MS. BRYAN: Well, I believe that the affidavit,
11 along with Mr. Hodgkin's prior testimony ---

12 THE COURT: Well, he got it from somebody else.

13 MS. BRYAN: --- establishes ---

14 THE COURT: I've heard on the street that somebody
15 gave me this thing. He said that's what it is. Is that
16 dependable?

17 MS. BRYAN: Well, it's from his office, from his
18 staff that he relies on to do his investigations. I
19 believe it creates an issue of fact.

20 THE COURT: I know you do. Thank you. I
21 understand. I'm just curious. All right. Anything
22 else?

23 MS. BRYAN: Thank you, Your Honor.

24 THE COURT: Anything else, Ms. Brown?

25 MS. CULBREATH: Ms. Culbreath?

1 THE COURT: Oh, Ms. Culbreath, excuse me. I'm
2 going all the way back. All right.

3 MS. CULBREATH: No, Your Honor. I would just again
4 say that even if you look at the deposition testimony
5 that was passed up, it continues to rely on hearsay as
6 well as other evidence that would not be admissible.

7 THE COURT: Well, again, the reason hearsay is so
8 criticized is because it is not offered for the truth --
9 or it's offered for the truth but does not establish the
10 fact.

11 MS. CULBREATH: Yes, Your Honor.

12 THE COURT: And that's why we don't use it. And I
13 think it's the same as any time we are talking about
14 factual evidence.

15 MS. CULBREATH: Yes, sir, Your Honor, and this is a
16 situation ---

17 THE COURT: And, as I say, and it's something that
18 was cited throughout, but the case I was relying on was
19 Roberson versus Southern Finance of South Carolina,
20 Supreme Court -- 365 S.C. 6, 2005.

21 MS. CULBREATH: Yes, Your Honor. We would just
22 simply again state for the record based on what we've
23 provided to you in our arguments here today that there
24 is no genuine issue of material fact here today.

25 THE COURT: The only material fact I've heard and

1 the only one that I am dealing with now is that if there
2 was a cut truss, there is no evidence in the record that
3 identifies the actual truss.

4 MS. CULBREATH: That is correct.

5 THE COURT: If it was part of the one third-party
6 defendant or the other third-party defendants.

7 MS. CULBREATH: Yes. In terms of who -- yes.

8 THE COURT: All right.

9 MR. CRANSHAW: Your Honor, may I mention one thing
10 for the record?

11 THE COURT: Certainly.

12 MR. CRANSHAW: And I'm here with Victor McDade, for
13 the record, who is also co-counsel with me, and I've
14 been working on this case for some time, and Victor
15 summed it up with one question. So hats off to Victor.
16 Because in the most recent deposition of Derek Hodgins,
17 their expert, as to my client, Gunter Heating & Air,
18 this is from page 173 of that transcript (reading):

19 Would it be fair to say that you
20 don't have an opinion to a reasonable
21 degree of engineering certainty as to
22 Gunter Heating & Air damaging or cutting
23 that truss?

24 Derek Hodgins's answer: Yes, sir, no
25 opinion.

1 Thank you.

2 THE COURT: And I think you have equivalent
3 testimony in your deposition?

4 MS. CULBREATH: We do, Your Honor.

5 THE COURT: All right. Now, is that the only one
6 that you have, the only motion you have this afternoon?

7 MS. CULBREATH: Those are our motions, yes, Your
8 Honor.

9 I don't know if there are still additional
10 discovery motions?

11 THE COURT: I'm trying to maybe get some resolution
12 here. I'm either going to -- which is simple for me to
13 deny their motion for summary judgment and I just have
14 to write the word "denial." And since I am at this
15 point leaning towards granting your motion for summary
16 judgment for failure to, for the failure to have a
17 genuine issue as to a material fact that has been
18 established. In other words, a material fact has not
19 been established, and at best it's based on a want of
20 evidentiary support. And that's based on the record at
21 this time. That's not what we could do or have done.

22 MR. CRANSHAW: Is that your ruling, Your Honor?

23 THE COURT: Right. So now but you have to forgive
24 me. Although the rule says I am to provide findings of
25 fact and conclusions of law, I'm going to let you do it.

1 The record I think is sufficient to speak for itself.
2 But as far as you memorializing it, I'm gonna let you
3 prepare a proposed order.

4 Now, who wants to do that, Ms. Culbreath or
5 Mr. Cranshaw or Mr. McDade?

6 MS. CULBREATH: I'd be happy to draft one. I think
7 Mr. Cranshaw may want to draft one for his own party.

8 THE COURT: All right. Very good. They are
9 separate motions.

10 MS. CULBREATH: Okay, thank you.

11 THE COURT: Very good.

12 MR. CRANSHAW: Thank you, Your Honor.

13 THE COURT: And, of course, even with that ruling
14 from the bench, until I sign an order, a final order in
15 the matter either denying it, with that simple phrase
16 that I can construct, "denial," or one maybe done with
17 findings of fact and conclusions of law.

18 MR. CRANSHAW: And, Your Honor, if I may, then I am
19 to draft for you --

20 THE COURT: Yours.

21 MR. CRANSHAW: -- an order granting my motion for
22 summary judgment?

23 THE COURT: And Ms. Culbreath may draft one that
24 grants hers.

25 MR. CRANSHAW: Thank you.

1 (Discussion off the record.)

2 (Whereupon, Ms. Culbreath and Mr. Cranshaw and
3 Mr. McDade left the courtroom at approximately 3:55
4 p.m.)

5 Motion to Compel by Plaintiff against IMK:

6 THE COURT: All right. I think the next motion
7 we'll hear is a motion to compel on behalf of the
8 Plaintiff against IMK Development Company, LLC.
9 Ms. Bryan again for the plaintiffs -- and Ms. Brown?

10 MS. BROWN: Yes, Your Honor.

11 THE COURT: -- for the defendant in this case, the
12 defendant, IMK Development Company.

13 And, Mr. Imhoff, are you also here on this motion?

14 MR. IMHOFF: Your Honor, I'm here to intervene, I
15 guess, or offer my opinion of it.

16 THE COURT: An *amicus curiae* of the defendant.

17 MR. IMHOFF: I was gonna say I was an *amicus*, but
18 I'm not certain everybody is friendly, Your Honor.

19 THE COURT: You've got more class than I do. Very
20 well.

21 All right. So this is your motion, Ms. Bryan?

22 MS. BRYAN: Yes, Your Honor. This is just a simple
23 motion. We're asking the Court to order IMK to
24 designate a person or persons to testify for purposes of
25 the 30(b)(6) deposition that we noticed back in

1 February.

2 When we originally noticed the deposition, Your
3 Honor, I believe IMK was not represented but Ms. Brown
4 was representing Mr. Cox who is the registered agent for
5 IMK. And Ms. Brown sent us a letter and told us that
6 Mr. Cox would be able to appear for certain categories
7 of testimony, and then maybe after that letter I believe
8 she called Robert Lyles and informed us that nobody
9 would be able to appear because they had changed their
10 mind and were unable to agree or to designate anyone to
11 testify on IMK's behalf.

12 So, as I said, we'd like to get the official
13 testimony of IMK and would ask that the Court order IMK
14 to produce, to designate witnesses and produce them.
15 Thank you.

16 THE COURT: All right, Ms. Brown?

17 MS. BROWN: Your Honor, just to kind of give a
18 little bit of background on this. IMK is the entity
19 that declared bankruptcy and was Mr. Ford's (phonetic)
20 trustee, found the company had no assets and dismissed
21 the case, and that was the end of the matter as far as
22 we were concerned. However, we had gotten a notice for
23 a 30(b)(6) deposition notice of IMK.

24 IMK -- and this becomes important in a minute --
25 IMK is an LLC made up 50 percent of defendants IK,

1 Integrys Keowee Development, and Marick Builders is the
2 other 50 percent. There is not a majority LLC
3 partnership, there is not a 51-49 percent. There also
4 is no managing agent designated in the operating
5 agreement.

6 So, now we have a situation where we've got a
7 bankrupt corporation, IMK who is made up 50 percent of
8 two codefendants. To further complicate matters, now
9 the IK is made up of Bill Cox and Larry Lollis, who are
10 now individual defendants in the case, and another
11 individual named Tim Robertson (phonetic). Marick's
12 principals as well have also been named as individual
13 defendants in the litigation.

14 I have never argued a motion like this before. I
15 have also, we've done some research. I find that it is
16 unprecedented to be in a situation where we have a
17 corporation that has been declared bankrupt, is in the
18 process of dissolution, it has not been officially
19 dissolved according to the Secretary of State yet,
20 trying to get a 30(b)(6) designee designated when
21 everyone involved are codefendants in that current
22 litigation.

23 The conflicts that arise out of that are
24 independent of the 30(b)(6) deposition and inherent by
25 the very nature of what you are asking them to do. For

1 instance, IK, the 50 percent partner, can designate a
2 person to testify, but Mr. Marick and the Thoennes
3 (phonetic) people are not gonna accept that testimony on
4 behalf of IMK to the extent it causes them to basically
5 throw Marick under the bus and it would work the same
6 way. These two 50-percent partners are not gonna be
7 able to come together to name a 30(b)(6) witness.

8 THE COURT: Well, let's understand that I did
9 practice law for a while, and, unfortunately, I had a
10 lot of codefendants. And that was one of the most, that
11 was always the wonderful strategy we started out with,
12 we're all gonna stand together. And that's what the
13 plaintiff did, was join all of the parties that they
14 could, even if they had maybe, and particularly if they
15 had dissimilar interests.

16 Doesn't the rule provide that they only have to
17 designate one? That if you've got separate entities or
18 separate elements? And of course that happens a lot of
19 times in large corporations where you've got proof that
20 is responsible for one particular area. So, I mean, you
21 understand what I'm getting to?

22 MS. BROWN: I do. And ---

23 THE COURT: And as far as a united front being
24 somewhat, you know, less than perfect, that that's one
25 of the hazards we have when we have multiple interests.

1 MS. BROWN: It's not necessarily the united front.

2 THE COURT: Well, in other words, that's why it's
3 always difficult when you have codefendants.

4 MS. BROWN: Okay. Let me back up a step, too.
5 Procedurally from a corporation standpoint, there would
6 be no way for them to designate one person to testify on
7 behalf of IMK.

8 THE COURT: Designate more.

9 MS. BROWN: Yes. And when we initially, the
10 person initially agreed and indicated that a 30(b)(6)
11 witness would be designated was the bankruptcy attorney,
12 okay? I wasn't aware of that until it got closer to the
13 time for the deposition and I was consulted regarding
14 that by Mr. Cox. And initially I had hoped to be able
15 to produce him in a limited capacity and be there as his
16 personal counsel because I didn't represent IMK at the
17 time.

18 But when it became apparent that it would also
19 require a deputy by Marick since the IMK Defendants do
20 not know anything about the construction part of this
21 project, they only know the accounting and financial
22 side of the project.

23 THE COURT: The answer to that part, that sort of
24 inquiry would be deposition, an interrogatory, and would
25 have no basis for it.

1 MS. BROWN: Right. And that is sort where I was
2 trying to get this resolved before we had to come before
3 you today, and that is what we offered to do, is that
4 the IK people would designate a 30(b)(6) representative.
5 Because IK I can get a 30(b)(6) representative for.

6 THE COURT: Or representatives.

7 MS. BROWN: Exactly. But IK, the 50 percent
8 owner of IMK, is willing to designate a 30(b)(6) for IK
9 and testify with regard to its knowledge of the dealings
10 with IMK. And Mr. -- or Marick Builders through
11 Mr. Thoennes (phonetic) has been deposed a number of
12 times already regarding the construction of the project.

13 However, that solution does not seem to suit
14 Mr. Lyles because he perceives he has to have the
15 30(b)(6) of IMK. Procedurally, just from a corporate
16 standpoint, I have not figured out how I could even do
17 that if I wanted to.

18 THE COURT: All right. Is that it?

19 MS. BROWN: I think so. There's no law out there
20 on this, okay? The only law -- the only close ---

21 THE COURT: I'm finding out that there is, you all
22 haven't been much help to me, other than challenge me
23 and I appreciate that.

24 MS. BROWN: There is one case out there that is
25 somewhat -- it's not a case, these are the federal rules

1 and advisory notes to federal rules, meaning federal
2 judges have made these rulings that are not published.

3 THE COURT: Under 30(b)(6)?

4 MS. BROWN: Yes, Your Honor. And one of them
5 relates to an employer agent who has an independent or
6 conflicting interest in litigation cannot be compelled
7 to provide 30(b)(6) testimony. And that is where we are
8 today. And that is Mr. Cox and Mr. Lollis and the
9 Thoennes (phonetic) individual defendants, as well as IK
10 and Marick, the partners of IMK, all have conflicting
11 interests that are independent of each other where it
12 involves an inherent conflict as to where it would
13 behoove them to testify against the other and cause
14 issues between the parties in a 30(b)(6) situation.

15 MS. BRYAN: Your Honor, if I may?

16 THE COURT: Yes, ma'am, you may.

17 MS. BRYAN: If I may, you know, the plaintiffs,
18 many of the plaintiffs bought their units at Stoneledge
19 from IMK Development, LLC. It was IMK's name that's on
20 the deed.

21 THE COURT: I was gonna ask, who signed for IMK?

22 MS. BRYAN: And I don't know the answer to that.

23 THE COURT: I mean, I'm just curious. If they say
24 there is no managing partner, I would imagine there is
25 someone who is authorized to act for and bind the LLC.

1 MS. BRYAN: And I don't pretend to know the
2 operating agreement between those business partners.

3 THE COURT: Maybe that would require some time.

4 MS. BRYAN: But I do believe the plaintiffs are
5 entitled to get the official testimony.

6 THE COURT: I think so. And the thing is, if you
7 got these conflicts, as I say, that's not unusual. I
8 mean, every time you have more than one defendant,
9 you're gonna have a potential conflict. And, as a
10 matter of fact, that's why we have rules to bring in
11 defendants sometimes.

12 But anyway, I'm going to suggest that y'all go back
13 and see if you can't -- and my preliminary ruling is
14 going to be that they are entitled to a 30(b)(6)
15 designation on all entities, all, LLC being, if they
16 have independent interests within the LLC.

17 Is that correct?

18 MS. BRYAN: I'm sorry. You mean the two 50
19 percent, the same difference?

20 THE COURT: Yes, ma'am. They're independent. And
21 then each of the independent entities will designate one
22 or more, as the rule says, until they are satisfied they
23 got all of the things. The rule doesn't limit, as I
24 read it, how many people, individuals ---

25 MS. BRYAN: Right.

1 THE COURT: So you can designate one or more
2 officers, directors, managing agents or other persons.
3 Not even, it could be somebody that, you know, was
4 familiar with how it operated on a day-by-day basis. I
5 would trust that you would want to designate somebody
6 that you have confidence in rather than, the term that's
7 been used, can throw you under the bus.

8 That's just it. I'm going to let y'all do your
9 homework and, because I think that the plaintiffs are
10 entitled to be able to explore or to participate in
11 discovery.

12 MS. BROWN: The way that I read the rule,
13 anticipating that this would be your ruling, the way
14 that I read the rule, we, IMK's position is there is no
15 managing agent. I believe it is incumbent upon the
16 person desiring to take the 30(b)(6) deposition then to
17 determine or to designate or to discover possibly
18 through other depositions who the other managing agent
19 is.

20 THE COURT: Well, I don't know. Let me read the
21 rules to you. Maybe you read more than I do. (Reading):

22 In that event the organization so
23 named shall designate one or more
24 officers, directors or managing agents
25 or other persons who consent to testify

1 on its behalf and may set forth each
2 person designated and matters upon which
3 he will testify.

4 MS. BROWN: And what I'm saying is that we don't
5 have a procedure to do that in the individual --

6 THE COURT: Well, the rule provides the procedure.
7 You've got an organization of some sort. In fact, in
8 South Carolina we have what we call unincorporated
9 associations. In other words, you don't have to be a
10 corporation or a partnership or anything. Any
11 unincorporated association that can be named as a
12 party --

13 MS. BROWN: The only ---

14 THE COURT: -- and can be sued.

15 MS. BROWN: Yes. And the only person that --

16 THE COURT: And a good place for that is a lot of
17 these mutual insurance companies that operate under a
18 flag, Kepra (phonetic) comes to mind because they all
19 operate under one flag, yet they are all individual
20 companies.

21 MS. BROWN: The only individual for IMK that is
22 currently doing anything other than dissolving the
23 corporation is Mr. Cox who is the registered agent and
24 the registered agent is certainly --

25 THE COURT: And he doesn't know who he's been

1 dealing with all of these years?

2 MS. BROWN: Well, he's been dealing with Marick to
3 some extent.

4 THE COURT: Well, I mean, that's just it. Maybe
5 Marick is gonna be the only one, then. I don't know. I
6 mean, that's just it. I don't see where the party
7 seeking the information has the responsibility of
8 delving into the operations of an organization to find
9 out who it should be. It looks like it says the
10 organization so named shall designate one or more
11 officers, directors or other persons.

12 MS. BROWN: And the other persons, and maybe I
13 skipped that step too many times, but the other persons
14 who could testify, which would be Bill Cox and Larry
15 Lollis -- let me say this the correct way. We will do
16 what the Court orders us to do. However, those two
17 individuals ---

18 THE COURT: What now?

19 MS. BROWN: Of course we will do what the Court
20 orders us to do.

21 THE COURT: I would appreciate it. Because if they
22 are individuals, it might mean that they are failing to
23 cooperate in discovery.

24 MS. BROWN: It's not that -- they're uncomfortable
25 because of the conflicts of interest being asked to

1 testify in this manner, which is the rule that I was
2 talking about.

3 THE COURT: Well, if you want to protect your order
4 or something like that, I'd be glad to consider that.
5 But the thing is, I don't think any -- the idea that we
6 have discovery is so that we can find out what will lead
7 to relevant matters that will lead to things that would
8 be admissible.

9 MS. BROWN: And I understand that. And we're
10 really not trying to preclude any discovery.

11 THE COURT: I appreciate that.

12 MS. BROWN: Which is why I said IK is happy to
13 designate a 30(b)(6) witness and the individuals are
14 perfectly willing to testify about everything they know
15 and what they did during the operation.

16 THE COURT: You can even limit it.

17 MS. BROWN: I understand. And we can designate
18 them to do that. They're just not comfortable doing
19 that on behalf of IMK because IMK is the insured entity,
20 not the individuals that are involved.

21 THE COURT: Well, that's what the rule provides.

22 MS. BROWN: So I guess what we're saying is we
23 can...

24 THE COURT: You need to look in your organization,
25 and I guess that's the one that they use in the rule,

1 and find out who you feel more comfortable with
2 performing this responsibility.

3 MS. BROWN: And I guess is the Court willing to
4 entertain if we do that discovery to figure out who we
5 might name, then move in for a protective order?

6 THE COURT: Certainly.

7 MS. BROWN: Okay.

8 THE COURT: I mean, the Court is not -- if
9 anything, the Court is more interested in protecting
10 involuntary witnesses, in other words, ones who don't
11 come in, let me tell you what I got. And particularly
12 if they're dealing with matters that should be
13 protected. And I'm sure that the plaintiffs will
14 cooperate, too, or their attorneys will, who will see
15 that their clients do.

16 MS. BRYAN: May I ask what would be the basis for
17 asking that rule?

18 THE COURT: I don't know. She knows right now.
19 That's just it. She's got to go back and say, well, the
20 Court is going to order that we designate somebody under
21 the rules. And so then she's going to find -- and of
22 course, as I say, part of the rules, you may set forth
23 for each person so designated on matters upon which he
24 will testify.

25 MS. BRYAN: If I may, Your Honor, I think from our

1 previous discussions and correspondence that we have
2 exchanged that you haven't had the benefit of listening
3 to, it sounds like IMK, the two, the individuals that
4 got together and formed IMK are having some difficulty
5 because they have this conflict of interest. And I
6 appreciate those conflicts. But it doesn't change the
7 fact that we need to get -- they don't want one to bind
8 the other.

9 THE COURT: Listen. I have no problem with that.
10 Listen. I understand.

11 MS. BRYAN: But I will offer this concession. If I
12 cannot or do not want to offer a designee, then we can
13 get it on the record that IMK doesn't want to offer a
14 designee and will not offer a designee to give the
15 30(b)(6) testimony, and we'll --

16 THE COURT: You mean you don't really need it?

17 MS. BRYAN: Well, this is the developer who sold us
18 the units, and so we would like to get that official
19 testimony. But if they are not willing to do that, then
20 if we can put on the record that they are unwilling to
21 offer the official testimony --

22 THE COURT: But it's on the record. It's on the
23 record. At least as far as I'm concerned it's been put
24 on the record this afternoon. They resisted appointing
25 or designating persons to testify under 30(b)(6) for

1 whatever reasons, they, you know, propounded here.

2 MS. BRYAN: Well, and I guess what I'm asking is if
3 it could be more clear that -- and I think their
4 position is they don't feel like they have a mechanism
5 to do it.

6 THE COURT: Well, that's not your problem. That's
7 more their problem because I think the rules, you know,
8 provide, as I say, for designation.

9 MS. BRYAN: Well, certainly that's what we've come
10 to ask for is that they designate someone.

11 THE COURT: Well, let's see. As I say, I'm going
12 to give you some time to do that. Or, if you can work
13 it out. I mean, I'm a little bit let's say nonplus as
14 to why you would to just not to go through whatever you
15 were seeking. At one time apparently they were some
16 matters you were interested in or you wouldn't have
17 named them as a party.

18 MS. BRYAN: Right. And we tried -- Ms. Brown and I
19 did discuss some alternatives and tried to figure out a
20 way work it out, but it comes down to the fact that we
21 need to get the testimony --

22 THE COURT: Well, let me ask you something. And
23 again, you might say this is Judge Macaulay's closet
24 rule. How long do you all want to stay in that closet
25 before I make the decision? In other words, if you can

1 work something out and come out of the closet with
2 something, then without, obviously that will be what we
3 will do. It will either be that you're going to abandon
4 your request or motion to compel they do this or you're
5 going to be able to think that you can cooperate.

6 Because it's going to come out some way.

7 Apparently all of the principals are parties, individual
8 parties to the matter.

9 MS. BROWN: Yes, Your Honor.

10 THE COURT: You're either going to pick them off
11 one at a time or they're going to -- at least one
12 name -- but have the opportunity to coordinate. Because
13 that's how one of the provisions of the rules, that if
14 they don't know anything about a particular thing, they
15 can designate that.

16 MS. BRYAN: Your Honor, we don't need any more time
17 to go into the closet, because we noticed that in
18 February and mediation is fast approaching, and so we do
19 want to move forward and get the testimony.

20 THE COURT: Well, even if you don't get anything,
21 in other words, I'll rule on the record tonight, I mean
22 this afternoon, that the party designated as IMK
23 Development Company, LLC, has advised the Court that
24 they cannot participate and will not participate.

25 MS. BRYAN: That would be disappointing if that's

1 your ruling.

2 THE COURT: Well, that's the only thing I can.
3 Otherwise, I'm trying to give you an opportunity to work
4 it out rather than me just ordering that your motion to
5 compel is granted and that the defendant IMK Development
6 Company, LLC, will comply within 30 days or suffer the
7 sanctions of Rule 37.

8 MS. BROWN: I think that's what the ruling would
9 be. And I guess my question to the Court again would be
10 again, we just got served with the third amended summons
11 last week, so we have not answered that yet.

12 THE COURT: Well, that's fine. Again, maybe I'm
13 putting too much credit for what I find has, felt was
14 y'all's willingness to work through something rather
15 than creating a problem for this Court to try to bully
16 its way through. And so, I mean, if you need time, I'll
17 give you time. But if you're not going to cooperate at
18 the end and you're gonna accept non cooperation, I'll
19 put that in the -- that will be the order.

20 MS. BROWN: Yeah. That ruling is fine with --

21 THE COURT: I'm gonna give you 30 days or do you
22 need more? Have you been served with the Amended
23 Complaint?

24 MS. BROWN: Yes. Just last week.

25 THE COURT: All right. So let's say 45 days,

1 whatever that is, that you will report back to the Court
2 either with a proposed order designating who would be
3 acceptable to you. In other words, that's why there
4 would be a proposed order, I won't say consented to, but
5 it will be under the rule that you have at least seen
6 it, Rule 5 I think it is. And that if I -- and then if
7 I find it's acceptable, I'll enter the Order. Now, I'll
8 either designate your -- or you can at that time say,
9 well, we'll accept their failure to say that they can't
10 designate. That's all you do.

11 I'm sorry. You know, it's like a lot of things.
12 Once you get served with these motions and pleadings and
13 all that, something has to be done. It can't be a
14 little bit served.

15 MS. BROWN: Do you want me to draft the order or
16 are you going to draft it?

17 THE COURT: I'm not gonna draft anything. You
18 wouldn't want me to.

19 MS. BROWN: No. Okay.

20 THE COURT: That's what I'm saying. You are
21 resisting their motion. I'm giving you an opportunity
22 to see if there is any way that you can work it out.
23 And I understand it's a unique situation that you've got
24 varying interests, but that's not without frequency in
25 other cases, too.

1 And, but if you are saying that will satisfy you
2 that when she says that she can't do it, and that
3 becomes their position, and you are back compelling
4 that, then I'll permit you to draft an order noting
5 whatever you wanted to and that they wouldn't cooperate
6 and that you don't seek sanctions.

7 MS. BRYAN: Okay. Thank you.

8 MR. IMHOFF: (Nods head.)

9 MS. BROWN: All right. Thank you.

10 THE COURT: You're welcome.

11 MR. IMHOFF: Your Honor, thank you. I hope I was
12 helpful.

13 THE COURT: You were. You're a good friend. Good
14 friend. Good friend.

15 MR. IMHOFF: Just be quiet. That helps. We
16 appreciate your time this afternoon.

17 THE COURT: All right. Is there anything else?

18 MS. BRYAN: I want to make sure that I understand.

19 THE COURT: All right. Well, let's do if there is
20 a question.

21 MS. BRYAN: Is 45 days to a prepare a proposed
22 order that will designate?

23 THE COURT: Designate or say they will not
24 cooperate.

25 MS. BRYAN: Or we have the option of having some

1 stipulation that they will not produce somebody.

2 MS. BROWN: Right. And and I guess the answer is
3 you need to serve me with a revised 30(b)(6) notice I
4 guess dated today, and I've got 45 days from today to
5 get you either the designations or let you know I can't
6 do it.

7 MR. IMHOFF: Right.

8 MS. BROWN: That's my understanding. Is that
9 correct?

10 THE COURT: Yes.

11 MS. BROWN: Send me a revised 30(b)(6) notice and
12 I'll get back to you with either we'll designate on
13 these or we can't designate it all or asking for a
14 protective order, I guess.

15 THE COURT: Or a protective order or she can
16 abandon -- the thing is, as I see it, you will either
17 designate or you won't.

18 MR. IMHOFF: Right.

19 THE COURT: She will either accept the fact that
20 you won't do it or she will move to compel the
21 enforcement of the Court's Order that you do designate.

22 MS. BROWN: Right.

23 THE COURT: And if you fail to cooperate and to
24 participate in discovery and not honor the Court's
25 Order, then she would be entitled, if I find that that

1 is the case, then she would be entitled to sanctions.
2 Those sanctions are all laid out in I think it's Rule
3 37. You all know what they are.

4 MS. BRYAN: So this, for tomorrow I do need to send
5 you a proposed order that, what we just talked about,
6 that we'll ask for the designation within 45 days?

7 THE COURT: Right. You can. I thought I was
8 operating under your motion to compel here. I ruled on
9 that and said they will have 45 days to so designate.

10 MS. BRYAN: But we don't need it. Okay.

11 THE COURT: I'll enter, I'll put a short order in
12 just saying that you have 45 days and that Ms. Brown has
13 45 days to respond.

14 MS. BRYAN: Okay.

15 THE COURT: But I mean ---

16 MS. BRYAN: I understand now.

17 THE COURT: And if not, that her response is going
18 to be to you.

19 MS. BRYAN: Yes.

20 THE COURT: And then you have to decide what you're
21 going to do. Are you going to move for sanctions or are
22 you going to accept the failure to designate?

23 MS. BRYAN: Thank you.

24 THE COURT: You're welcome.

25 MS. BRYAN: That clears it up.

1 THE COURT: All of you are from Charleston or
2 somewhere? Where are you from, Mr. Imhoff?

3 MR. IMHOFF: Spartanburg, Your Honor.

4 MS. BROWN: Greenville.

5 MR. RIVERA: Charleston.

6 UNIDENTIFIED LAWYER: Greenville.

7 MR. JONES: Atlanta.

8 THE COURT: Oh, my goodness.

9 (Discussion off the record.)

10 (Court adjourned at 4:30 p.m.)

11 ** End of Requested Certified Transcript of Record **

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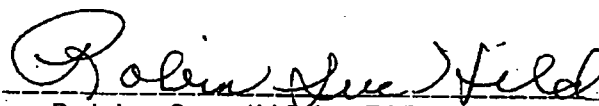
Stoneledge, etc., v. IMK, etc. -- April 16, 2012

Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, FCRR, RPR,
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 Record of the proceedings had and the
evidence introduced in the hearing of the captioned
case, relative to appeal, in the Court of Common Pleas
for Oconee County, South Carolina, on the 16th day of
April, 2012.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

June 18, 2012


Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-652

Stoneledge at Lake Keowee
Owner's Association, Inc.
et.al,
Plaintiffs,

vs.

IMK Development Co. LLC,
et. al.,
Defendants/Third-Party
Plaintiffs.

vs.

Michael Franz, Clearview
Construction, et. al.
Third-Party Defendants.

Deposition of DEREK A. HODGIN, P.E.

Pursuant to notice of deposition and/or agreement
in the above-entitled case, a deposition was taken on
the 22nd of December 2010 commencing at approximately
9:42 a.m. attended by counsel as follows:

1 EXHIBIT NO. 1; ATTACHED TO DEPOSITION).

2 WITNESS ANSWERS:

3 A. Okay.

4 Q. We've now marked as Defense Exhibit Number 1 your
5 CV; is that correct?

6 A. Yes, sir.

7 Q. And is this up to date?

8 A. I believe it is, yes.

9 Q. And again, we'll go through that in more depth some
10 other time. When were you first retained to look
11 at the Stoneledge project?

12 A. It was sometime in the fall of 2009, based on my
13 report. There's a section called "Observations."
14 I did my first visual survey on December 1st, 2009.

15 Q. What were you asked to do in the fall of 2009?

16 A. At that time there were some repairs being made to
17 a particular unit. The balcony of a particular
18 unit -- excuse me -- in Phase II. And there were
19 concerns about the repairs and the extent of
20 repairs. And I was supposed to look at just the
21 ongoing work. And at the same time, even though I
22 was looking at the one particular unit, just to
23 familiarize myself with the general construction of
24 the buildings, any other issues that I saw while I
25 was out there.

1 or noncompliance with the design documents.

2 A. Okay.

3 Q. But I think the best way to do it is just to follow
4 along starting at Page 5 of 13 where you begin your
5 "Issues." Do you think that's the most efficient
6 way to do this?

7 A. Yes, sir.

8 Q. All right. And the first of your issues is the
9 roof. Let's talk about that. What generally
10 problems have you found with the roof at
11 Stoneledge? And we'll talk in more detail after
12 you ---

13 A. Before I answer that I have a clarification. You
14 had asked me when I got involved. And actually,
15 the report on Page 3 provides an earlier date than
16 I had indicated. It's May 22nd was the -- 2009 was
17 the first observations when we looked at the
18 repairs.

19 BY MR. ROOT:

20 And if I could interrupt. I'm sorry. Madam Court
21 Reporter, David Root. I'm only interested in Phase
22 II. And I don't want to have to go back through
23 everything. So when I was studying this, Derek,
24 it's not really broken down to Phase I and Phase
25 II. So I don't know if these observations are

1 Phase II, so I think that this was an area where
2 the plywood was removed in one of those emergency
3 repairs in Phase II.

4 Q. But do you expect to find this condition anywhere
5 else in the community?

6 A. No.

7 Q. Let's move on. Have we covered everything in
8 Section B regarding the attic that you believe is
9 important?

10 A. No, number two is the truss member that was cut.

11 Q. Okay. I'm sorry. And that's at B2.1?

12 A. Correct.

13 Q. And again, do you believe that is an anomaly?

14 A. I don't know about that particular condition. I
15 will tell you that on the day that I was scheduled
16 to present the PowerPoint presentation to the HOA.
17 to the homeowners and discuss issues that we had
18 found to date, I made a courtesy call to Channon
19 Chambers, who is the head -- is a chief building
20 official for Oconee County, invited him to our
21 office to observe the PowerPoint presentation. I
22 wanted to make sure there wasn't anything I was
23 missing or if he had anything to add to the issues
24 that we described. And when we got to this
25 particular issue, Mr. Chambers recalled there being

1 issues with HVAC units. I don't know if it's the
2 duct work or the HVAC units themselves, but having
3 conflicts with the trusses. I have not done more
4 research to figure out if there was a change in the
5 truss configuration that allowed -- that was more
6 accommodating for the HVAC equipment. But based on
7 Chambers' comments, I believe that this was
8 likely -- the trusses were likely cut in more than
9 this one location, but I haven't done the research
10 to know which unit this was and how many units were
11 constructed prior to this that would have had that
12 same issue.

13 Q. Let me back up there a minute. Did you not take
14 this photo, B2.1?

15 A. I did not take the photo, no.

16 Q. Who took this photo?

17 A. It would like be someone else from Construction
18 Science like Burgess Metcalf. He was probably the
19 most involved with the emergency repairs and
20 destructive testing.

21 Q. Is this unit -- does this photograph depict a unit
22 which is different from the one depicted in photo
23 B1.1?

24 A. I don't know without doing some research. I'm
25 thinking it's probably the same unit, just because

1 cutting of the trusses and the absence of the
2 roofing felt.

3 Q. And please do that as we go through. I'll try to
4 remember to ask you that same question at the end
5 and bring it back up. Okay.

6 BY MR. ORR:

7 May we go off the record?

8 (OFF THE RECORD).

9 BY MR. IMHOFF:

10 Back on the record.

11 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

12 Q. Do you have an opinion as to who might have cut
13 that truss?

14 A. Yes.

15 Q. Who?

16 A. I would say that the likely candidate would be the
17 installer, due to the conflict that presented
18 itself with the web member of the truss being in
19 the way of the installation of the HVAC equipment.

20 Q. And I suppose the other possibility would be the
21 framer, if the truss design had been changed? Is
22 that ---

23 A. Well, if the design is changed, then hopefully the
24 design would be changed to create an opening that
25 the HVAC equipment could pass through without

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 BURGESS A. METCALF (DAY 2)

Pursuant to notice, a deposition was taken in the
above case on the November 23, 2011, commencing at
approximately 9:42 a.m. attended by counsel as follows:

DEPOSITIONS AND , INC.

1 in and then ---

2 Q. When you say, "turned in," turned in ---

3 A. To the rough opening.

4 Q. Right, but at what -- on the right and left ---

5 A. Yes, at this point ---

6 Q. At the bottom?

7 A. --- right and left and bottom to top would not be
8 turned in because it would be cut at the top of the
9 window rough opening. The weather ---

10 Q. Would we -- I'm sorry, go ahead.

11 A. The weather barrier would be cut at the top.

12 Q. Would we do anything else with the top of the WRB?

13 A. Yes, then the two additional cuts would be made,
14 moving from the top left and right corners out at
15 diagonals to create an area of weather barrier
16 folded back then to allow for later integration of
17 the top window nailing flange with the weather
18 barrier.

19 Q. When you say, "folded back," you're talking about
20 tacked up on the outboard side of the sheathing; is
21 that correct?

22 A. Correct. And then, from that point, jamb flashing
23 should be installed -- not jamb, sill flashing,
24 self-adhered flashing should be installed at the
25 bottom of the window opening.

1 that condition to?

2 A. I'm not sure I attribute it to any ---

3 Q. Okay.

4 A. --- particular ---

5 Q. Okay, so this condition, do you have an opinion as
6 to how it occurred?

7 A. I think we noted yesterday that the observation in
8 question, just for the record, is ---

9 Q. I'm sorry.

10 A. --- "Truss web member removed or cut"; is that what
11 you're referring to?

12 Q. Right. That's right, in Phase II, Unit Number 76.

13 A. We observed the cut member. We also observed in
14 proximity to that a HVAC -- I believe it was a duct,
15 and that's what we observed.

16 Q. So that's what you observed. Is it your opinion
17 that the HVAC people were the ones that cut the
18 truss?

19 A. Again, that's a sequencing issue that I can't speak
20 to.

21 Q. So you don't have an opinion on that?

22 A. No, not a definitive opinion.

23 Q. Do you know of any evidence of who is responsible
24 for this condition?

25 A. I would say whoever cut it.

1 you see any resulting damage from that cut truss to
2 the unit itself?

3 A. Well, the truss being cut is a damage.

4 Q. I understand, but any resulting damage other than
5 the truss being cut itself?

6 A. Not that I'm aware of.

7 Q. And have you observed, or are you aware of this
8 condition, the cut truss being in any other
9 locations at the project in any other units?

10 A. We have not made any other observations in that
11 area.

12 Q. Do you know if this truss has been fixed, repaired?

13 A. Yes.

14 Q. Do you know who repaired it?

15 A. Trehel.

16 Q. Do you know when it was repaired?

17 A. Not off the top of my head, no.

18 Q. Do you know how much it cost to repair it?

19 A. No.

20 Q. Did you see any evidence of a truss being moved in
21 the area where the truss was cut?

22 A. No.

23 Q. You also noted in your matrix a broken truss in
24 another unit. That's the entry above the cut truss
25 on the matrix. Let me just look at it and make sure.

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 CARL CATOE

Pursuant to notice, a deposition was taken in the
above case on the December 5, 2011, commencing at
approximately 10:15 a.m. attended by counsel as follows:

1 a cut truss and that would be similar to an issue
2 that you had dealt with already on the job working
3 there?

4 A. Yes. I do remember specifically one time going
5 into a building and doing a repair or giving
6 instructions on a repair for a broken truss or a
7 cut truss.

8 Q. And that was -- again, that was during your time on
9 the job?

10 A. That's correct.

11 Q. Do you know who cut the truss?

12 A. I have no idea.

13 Q. Do you know how the truss was cut?

14 A. I have no idea.

15 Q. The picture that you saw of the cut truss in that
16 particular situation, do you know who cut that
17 truss?

18 A. I have no idea.

19 Q. Do you know why that truss was cut?

20 A. I do not.

21 Q. Is that unusual to have cusses -- trusses cut?

22 A. It's not unusual to cuss the person that cut the
23 truss. Very rarely. I mean, sometimes you will
24 have a person say, oh, I'm sorry, I cut the truss.
25 I didn't mean to or whatever. Kind of hard to

1 understand that, but, you know, we have a simple
2 policy, just fix the truss and move on.

3 Q. And again, that would have been \$100 or less?

4 A. Oh, yeah. Nobody would have ever known it. Nobody
5 would have ever gotten a bill. We would have just
6 fixed the truss and moved on.

7 Q. And if you had been made aware of a cut truss prior
8 to the filing of this lawsuit, would you have
9 gone -- be happy to go out there and fix it?

10 A. When I was there, sure, I would have been glad to
11 fix it.

12 Q. Do you know of any work that my client did, All Pro
13 Heating & Air, Steve Logan out of Easley? Do you
14 know of any work that they did that was deficient
15 or improper?

16 A. I have no knowledge of your client or of their work
17 or anything else.

18 BY MR. TURNER:

19 That's all the questions I have. Thank you.

20 EXAMINATION BY MR. BAILEY:

21 Q. How are you doing, sir? I'm Rhodes Bailey. I'm
22 representing Gunter Heating & Air. I just have one
23 question. Kind of a variation on his. Gunter
24 Heating & Air, do you have any knowledge or have
25 you heard anything about any work they did that was

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 DEREK HODGIN (DAY 1)

Pursuant to notice, a deposition was taken in the
above case on the January 23, 2012, commencing at
approximately 9:25 a.m. attended by counsel as follows:

1 repaired. And there was damage to the plywood roof
2 deck that caused it to be partially removed. And
3 after the roof deck was removed then this truss was
4 observed.

5 Q. The truss itself appears to have been cut. Do you
6 have an opinion within a reasonable degree of
7 engineering certainty as to who cut the truss?

8 A. I wouldn't know for certain. I would say the
9 proximity of the HVAC duct work and it being a
10 potential conflict makes that contractor the most
11 likely candidate.

12 Q. Do you know when the truss was cut?

13 A. I would say approximately at the time of the HVAC
14 installation, if that's the party that caused the
15 truss to be cut.

16 Q. And your opinions, as I understand them, would be
17 solely based on the proximity of the cut truss to
18 the HVAC conduit?

19 A. That would be my personal knowledge about that
20 particular issue. I do recall this issue being
21 discussed with Mr. Chambers of the Oconee County
22 Building Department and him indicating that this
23 was an issue that they observed on more than one
24 occasion. But I believe, because he told me that,
25 that they would have instructed the contractor or

1 to make sure that it was handled appropriately?

2 A. I don't know specifically. I would -- and I don't
3 know if I'm recalling this from a conversation or
4 I'm making an assumption that he dealt with the GC.
5 I don't remember him saying specifically he dealt
6 with the HVAC contractor on the issue.

7 Q. Did he ever tell you that the HVAC contractors or
8 contractor had been responsible for cutting the
9 truss on the occasions that he was involved?

10 A. I don't know that he named them specifically, no.

11 Q. And just so I'm clear, your opinions about the
12 truss being cut most probably being the HVAC
13 contractor is based solely on the fact that it was
14 near HVAC conduit or some type of HVAC work?

15 A. I would say that and just my experience with
16 trusses being cut in the field. I mean, the two
17 most likely candidates for that work or for that
18 problem are plumbing contractors and HVAC
19 contractors. Electrical guys can usually work
20 around trusses. Insulation guys. I'm just trying
21 to think of all the contractors that go into
22 attics. Insulation guys don't need to cut web
23 members. HVAC guys have conflicts and plumbing
24 contractors have conflicts. They're the two most
25 likely candidates.

1 Q. Let me back up. You admit that you don't have any
2 first-hand knowledge of who cut this truss?

3 A. That's correct.

4 Q. And you admit that absent somebody telling you they
5 saw it cut or you being there seeing it cut, your
6 opinions in this regard are speculative?

7 A. Yes, sir.

8 Q. And going to the issue of tradesmen who would be in
9 the attic. There's a number of tradesmen who would
10 be in the attic working at some point in time
11 during the construction phase of this unit,
12 wouldn't there?

13 A. Less in this particular attic space than the main
14 attic space. But I agree with you, yes, there
15 could be other trades.

16 Q. And do you know or do you have any information that
17 the conduit that is show in Photograph B2.1 whether
18 that's flexible or not?

19 A. It appears to be flexible ductwork, yes.

20 Q. The fact that it's flexible, would that lessen the
21 likelihood that it would be an HVAC contractor who
22 cut the truss?

23 A. I would say it would lessen the potential for a
24 truss member to be a conflict. I don't think I
25 would say it lessens the likelihood that that

1 contractor cut the truss.

2 Q. Well, if it lessens the likelihood that it's going
3 to be a conflict, doesn't it lessen the likelihood
4 that that contractor would need to cut it?

5 A. That sounds reasonable.

6 Q. Let me ask you this, you didn't observe this first
7 hand yourself, did you?

8 A. No.

9 Q. I mean the ---

10 A. I don't think so.

11 Q. Do you know if there is any evidence that the
12 trusses had been moved in this particular attic?

13 A. Been moved?

14 Q. Moved.

15 A. No, sir.

16 Q. If there is evidence that trusses in this attic had
17 been moved, would that -- could that affect your
18 opinions regarding the likelihood of an HVAC
19 contractor cutting this truss?

20 A. Yes.

21 Q. And I understand that a cut truss is something
22 that's got to be fixed. It's a life safety issue.
23 There's no -- I take no issue with you there. My
24 question is, do you know if it had been -- it has
25 been fixed? I've seen it and it looks like it has

1 we had to use a ladder to get up there. But you
2 slide a piece over and that's how you -- in the
3 closet of an upstairs bedroom, that's how you
4 actually access the attic space. Does that help
5 you at all or ---

6 A. In terms of how many we've looked at?

7 Q. Yeah.

8 A. I don't. Well, one thing we could try to do is
9 look at the unit numbers that are listed in this
10 section of attics.

11 Q. Yes, sir.

12 A. And see which -- how many numbers are different.
13 So the first issue 28, 31, 76, 32, 11, 33, 37, 42.
14 76 is a repeat.

15 Q. Right.

16 A. 87.

17 Q. And 32.

18 A. And 32 is a repeat. So the total minus two, nine.
19 Now, I can't say that's all the attics we went
20 into. If there were others, apparently there were
21 no issues that were observed. But nine sounds
22 right to me.

23 Q. Do you have any opinions to a reasonable degree of
24 engineering certainty as to whether other actions
25 that you would attribute to an HVAC contractor did

1 violate any codes, standard of care or
2 manufacturer's instructions?

3 A. No, sir.

4 Q. Have you received or do you have any opinions about
5 existing complaints or problems at Stoneledge that
6 relate to the original design and installation of
7 HVAC equipment?

8 A. None that I recall. I'm hesitating because we have
9 all those home owner surveys.

10 Q. Right.

11 A. I did try to skim those before today, so I could be
12 familiar with what was being experienced by the
13 homeowners. I don't recall any HVAC issues.

14 Q. Let me ask it this way, do you have an opinion
15 within a reasonable degree of engineering certainty
16 whether All Pro Heating and Air was responsible for
17 cutting the trusses indicated in Unit 76? In other
18 words, do you have any evidence that All Pro
19 Heating and Air installed the HVAC in that unit?

20 A. Not without doing further research, no.

21 BY MR. TURNER:

22 Mr. Hodgin, that's all the questions I have. Thank
23 you.

24 BY THE WITNESS:

25 All right. You bet.

1 EXAMINATION BY MR. McDADE:

2 Q. Good afternoon.

3 A. Good afternoon.

4 Q. I promise I'll be shorter than he was. And I have
5 some of the same issues or same questions. I
6 represent Gunter Heating and Air. I'm Victor
7 McDade. Would it be fair to say that you don't
8 have an opinion to a reasonable degree of
9 engineering certainty as to Gunter Heating and Air
10 damaging or cutting that truss?

11 A. Yes, sir.

12 Q. Do you know what work Gunter Heating and Air
13 performed on this project?

14 A. Not specifically, no.

15 Q. Do you know whether they worked on Phase I or Phase
16 II?

17 A. No, sir.

18 Q. It's my understanding from your earlier testimony,
19 the only HVAC issue you raised deals with the
20 truss?

21 A. I believe that's correct, yes.

22 Q. And you don't know who cut or damaged the truss?

23 A. That's correct.

24 Q. And it's been repaired?

25 A. Yes, sir.

1 Q. And it was repaired for just a few hundred dollars?

2 A. I don't know specifically the cost. That was my --

3 I was trying to give it a range. It's not a huge
4 cost. I'm sure it was done at a reasonable cost.

5 Q. That was your ballpark figure, a few hundred
6 dollars?

7 A. Yes, sir.

8 BY MR. McDADE:

9 All right, sir. Thank you.

10 BY THE WITNESS:

11 You bet.

12 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

13 Q. Before we took a break to talk about the truss a
14 little bit, we were talking about other instances
15 of either missing or inadequate underlayment at the
16 eaves. And we made some copies that went ---

17 BY MR. IMHOFF:

18 Greg, where did you put those copies? Or did they
19 come back? Are they still ---

20 BY MR. HORTON:

21 There's a lady helping. She's a little bit backed
22 up.

23 By MR. IMHOFF:

24 Okay.

25 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
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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 DEREK HODGIN (DAY 3)

Pursuant to notice, a deposition was taken in the
above case on the January 25, 2012, commencing at
approximately 9:10 a.m. attended by counsel as follows:

DEPOSITIONS AND , INC.

1 otherwise the plans are sufficient to build a
2 building that's water tight?

3 A. I'd say conceptually yes.

4 Q. With regard to the permitting, it's my understanding
5 that Marick or IMK, which was the developer, re-
6 permitted all of the buildings in Phase II except
7 for about 11 buildings. And I'm not asking you for
8 any legal opinions, but based on your knowledge of
9 the construction industry, when a general contractor
10 permits a building for construction and eventually
11 seeks a Certificate of Occupancy, what are his
12 responsibilities to the end consumer of that
13 product?

14 BY MR. LYLES:

15 Object to the form of the question.

16 BY MR. IMHOFF:

17 Object to the form.

18 WITNESS ANSWERS:

19 A. I would say in general to deliver a code-compliant
20 functional, habitable building free of defects.

21 Q. And if a general contractor takes a building that's
22 partially completed but has to re-permit it, is he
23 responsible to confirm that the building, in all
24 facets, complies with the code and industry
25 standards?

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 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.

1 was -- the way the unit was set up, it wasn't the
2 way -- because we had plans and some units were
3 flipped around backwards. The bathroom was on the
4 other side of the room and the plans wasn't showing
5 in reverse. You had to look at the plans and
6 reverse them yourself. So they had to do the roof
7 in that bathroom different. And ---

8 Q. And was there a cut structural member?

9 A. I think it was cut and stick built. I think it
10 was -- I think it was a truss cut and then they had
11 to add stick built on the side of it. The
12 inspector -- so the inspector wanted to strengthen
13 it back, but I can't exactly -- I think it was just
14 one or two.

15 Q. Do you recall who cut the truss?

16 A. No. I guess it was the framer.

17 Q. Could it have been an HVAC contractor?

18 A. It could have been. It could have been a plumber,
19 if he run pipes, but the trusses I don't think they
20 would have cut any of the trusses or anything,
21 because they were open web trusses. So I don't
22 think they would have -- the HVAC or nobody would
23 have cut them.

24 Q. Prior to your involvement at Stoneledge, had you
25 ever installed felt ---

Nathan Hornday --
Cross examination by Adam Russell

Page 221

1 properly and has been checked off?

2 A. Yes.

3 BY MR. SMITH:

4 I think that's all I have.

5 EXAMINATION BY MR. RUSSELL:

6 Q. Nathan, my name is Adam Russell and my firm
7 represents All Pro Heating and Air. Are you
8 familiar with them?

9 A. Yeah.

10 Q. I just want to touch base with something that you
11 testified on earlier this morning. You testified
12 that a truss was cut, at least one that you knew
13 of. And correct me if I'm wrong, but you said that
14 you cannot say with certainty that you knew exactly
15 who cut the truss; is that correct?

16 A. That's right. It -- I don't -- in your case, I
17 don't think heating and air -- All Pro Heating and
18 Air did it, because it was -- the only truss I
19 remember being cut was in the ceiling.

20 Q. So you do not think that All Pro Heating and Air
21 cut any trusses?

22 A. No.

23 BY MR. RUSSELL:

24 That's all the questions I have.

25 RE-DIRECT EXAMINATION BY MR. GOLDSMITH:



Ashley Poulnot <ap@lylesfirm.com>

Fwd: Stoneledge et al. v IMK Development et al CA Number: 2009-CP-37-652

Catherine Bryan <chb@lylesfirm.com>
To: Ashley Poulnot <ap@lylesfirm.com>

Tue, May 1, 2012 at 10:35 AM

please print

----- Forwarded message -----

From: Catherine Bryan <chb@lylesfirm.com>

Date: Wed, Apr 18, 2012 at 11:13 AM

Subject: Re: Stoneledge et al. v IMK Development et al CA Number: 2009-CP-37-652

To: amacaulayj@sccourts.org, "Macaulay, Alexander S. Law Clerk (Matthew Couvillion)"

<AMacaulayLC@sccourts.org>

Cc: "Danielle Payne (DPayne@GrierCoxandCranshaw.com)" <DPayne@griercoxandcranshaw.com>, "bcranshaw@griercoxandcranshaw.com" <bcranshaw@griercoxandcranshaw.com>, "vmcdade@dotmlaw.com" <vmcdade@dotmlaw.com>, "Turner, Chuck" <CTurner@turnerpadget.com>, "Culbreath, Anne R." <ACulbreath@turnerpadget.com>

Dear Judge Macaulay:

I have reviewed the Proposed Order submitted yesterday afternoon by Ms. Culbreath. There are a few issues I need to bring to the Court's attention.

First, the proposed Order is over my objections as I believe Plaintiffs established, by admissible testimony, the scintilla of evidence required to overcome the motions for summary judgment as to our claims against the HVAC subcontractors.

I take exception to the last two sentences of the first full paragraph on page 2 of the Proposed Order which read: "Plaintiffs' causes of action were based upon the testimony of Derek Hodgins of Construction Science Engineering. Mr. Hodgins asserted that the HVAC Contractors may have cut an attic truss."

I do not believe those sentences accurately reflect or paraphrase the substance of Derek's testimony and affidavit. Instead, the Order should either quote the affidavit or include a statement which accurately reflects the substance of the affidavit, such as:

"Plaintiffs' causes of action against All Pro are based upon the affidavit of Plaintiff's expert, Derek Hodgins of Construction Science and Engineering, which states that an attic truss at Stoneledge was either cut by the HVAC installer (All Pro or Gunter Heating & Air) or was open and obvious to the HVAC installer and that the HVAC installer had a duty to report the cut truss. Mr. Hodgins also stated that additional cut trusses would likely be found in the attics of other townhomes at Stoneledge."

In the second paragraph of the Discussion section (page 3), the first and second sentences refer to Mr. Hodgins' affidavit but do not mention that Plaintiffs' counsel submitted deposition testimony or that the Court considered deposition testimony of Mr. Hodgins. Those sentences should reflect that Plaintiffs' counsel submitted the Affidavit of Derek Hodgins and deposition testimony of Mr. Hodgins, and that the Court considered the Affidavit and deposition testimony of Mr. Hodgins and found that it failed to . . .).

Also, the proposed order includes no reference or mention of the case which your honor cited at the hearing as being a case upon which you relied — this is the case of Roberson v. Southern Finance of SC, 365 S.C. 6, 615 S.E.2d 112 (2005): I believe this should be included in the Order if, as I understood Monday, that was a basis of your ruling.

Likewise, although the proposed order includes a general statement that the Court found the affidavit failed to present admissible evidence, there is no reference or mention of any particular admissibility issue. I believe that the

evidence is admissible and I ask that the Order include some statement of your honor's finding/conclusion as to the authentication (photograph) issue and any other issue regarding the admissibility of the affidavit and testimony.

Please let me know if I can provide additional information. Thank you for your consideration.

Kind regards,
Catherine Bryan

On Tue, Apr 17, 2012 at 1:46 PM, Culbreath, Anne R. <ACulbreath@turnerpadget.com> wrote:

Dear Judge Macaulay,

Attached is the proposed order granting Defendant All Pro's motion for summary judgment. If this order meets with your approval, please sign the order and direct the Clerk of Court to file same.

I have copied Ms. Bryan and counsel for Gunter with this email.

Thank you for your assistance. Please let me know if you need anything further.

Sincerely,

Anne Culbreath

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.

/..

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--
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Catherine H. Bryan
Associate

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June 15, 2012

VIA ELECTRONIC & U.S. MAIL

The Honorable Alexander Stephens Macaulay
Oconee County Courthouse
Post Office Drawer 428
Walhalla, S.C. 29691-0428
amacaulayj@sccourts.org
amacaulaylc@sccourts.org

Re: *Stoneledge at Lake Keowee Owners' Association, Inc., et al.*
vs. IMK Development Co., LLC, et al.
Case Number: 2009-CP-37-652

Dear Judge Macaulay:

I received Matthew's email regarding your ruling on the motions for summary judgment that were heard in April and have reviewed the revised proposed orders submitted by counsel for All Pro and Gunter.

First, I must reiterate the objections and comments set forth in my emails of April 18, 2012, to the extent those objections and comments have not been addressed by the Court's revised ruling or the revised proposed orders which were submitted by the defendants on Wednesday. Those emails are attached here for your convenience. Specifically, I believe the affidavit is admissible and the proposed orders do not identify any specific admissibility issue to justify the affidavit's exclusion.

Second, I object to the portions of the proposed orders that state:

"During the hearing, the Court informed Plaintiffs' counsel that, prior to signing the Order, it would accept any additional information or admissible evidence that Plaintiffs' believed to support their contention that a genuine issue of fact [...] existed. To date, the Court has not received any additional documentation or admissible evidence from the Plaintiffs."¹

¹ This is taken from the proposed order submitted by counsel for All Pro. The proposed order submitted by counsel

It was not my understanding that the Court, during the hearing, invited Plaintiffs to submit additional information and/or evidence following the hearing. At the hearing, your honor ruled on the motions, granted the defendants' motions, and asked the defendants' to prepare the orders. The orders were submitted shortly after the hearing, on April 17, which supports my belief that the Court did not invite Plaintiffs to submit additional information and evidence in opposition to the motion. For that reason, I strongly object to the portions of the proposed orders that indicate otherwise.

Finally, because the sham or competing affidavit rule was raised for the first time in the memorandum of law submitted by counsel for All Pro at the hearing, which memorandum was provided to Plaintiff's counsel just minutes before the hearing, Plaintiff did not prepare to respond to defendant's arguments on that issue. Because your honor did not address this issue at the hearing, and at the time of the hearing, it was not a stated basis for your ruling, I do not believe I responded to the argument except perhaps to point out that Mr. Hodgin's affidavit is consistent with his prior deposition testimony. In any event, because the sham affidavit rule was not addressed at the hearing, but now forms a basis for the Court's ruling, I will address it here.

As a preliminary matter, to be clear, Mr. Hodgin has been deposed on two separate days (December 22, 2010 and January 23, 2012) and the deposition has not been completed. Thus, Mr. Hodgin's testimony cannot be said to be complete. Further, Mr. Hodgin's affidavit is consistent with his deposition testimony, which was submitted to the Court at the hearing by counsel for Plaintiffs and counsel for defendants. While three of four lines of Mr. Hodgin's deposition testimony, taken out of context, and read in isolation from the remainder of his testimony, may appear to be contrary to a statement in the affidavit, the deposition testimony as a whole is consistent with the affidavit. A review of the pages of the depositions that were previously submitted to the Court will confirm that the affidavit is not contrary to, but consistent with, that testimony.

The South Carolina cases cited in the proposed orders do not support application of the sham affidavit under the circumstances in this case. The sham or competing affidavit rule is an exception to the general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). As stated above, Mr. Hodgin's affidavit is not contradictory to but is actually consistent with his prior deposition testimony, read as a whole. Also, the affidavit was not provided to create an issue of fact where none existed previously. Mr. Hodgin's deposition testimony, standing alone, demonstrates a question of fact. The affidavit merely restates certain testimony and provides the court with additional testimony on matters about which Mr. Hodgin has not yet been thoroughly questioned during his deposition. Though the defendants have suggested that Mr. Hodgin was exhaustively

for Gunter contains a similar statement.

questioned on this subject, such is not the case. Importantly, his deposition has not been concluded and Plaintiff's counsel has not yet had the opportunity to question Mr. Hodgin. In any event, Mr. Hodgin's affidavit is not contradictory, as the defendants suggest, merely because it restates and adds to previous, and still incomplete, deposition testimony.

In Cothran, which was cited by the defendants to support application of the competing affidavit rule, the court actually reversed the trial court's decision to exclude the affidavit and determined that the competing affidavit rule did not apply. The only other South Carolina case cited by the defendants on this issue is that of Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010). In the Harris Teeter case, while the court ultimately determined that the post-deposition affidavits of two experts were properly excluded by the trial court, the opinion does not provide enough information about the deposition testimony or affidavits to allow a meaningful comparison of the competing testimony or why it was contradictory. What we do know is that Mr. Hodgin's affidavit is not a "post-deposition" affidavit since his deposition has not been completed.²

Mr. Hodgin's affidavit in this case is clearly distinguished from affidavits in cases where the sham affidavit rule has been applied. For example, the federal cases cited in Cothran as illustrative of the sham affidavit rule, are inapposite to the situation before this court. In a decision from the Second Circuit, plaintiff submitted affidavits characterized by the court as "false", delayed errata sheets, and supplemental answers to interrogatories attempting to recant prior deposition testimony, which the district court found so egregious it imposed Rule 11 sanctions on the plaintiff and its counsel. Margo v. Weiss, 213 F.3d 55 (2nd Cir. 2000). The errata sheets, supplemental discovery responses and affidavits in Margo, under no uncertain terms, attempted to *change* and *recant* the testimony given during the deposition and information given in prior discovery responses. *Id.* In fact, the court found the conduct so appalling that, in addition to affirming the award of attorney's fees and costs below, the court awarded double costs on appeal. *Id.*

In Martin v. Merrell Dow Pharmaceuticals, Inc., the court found the plaintiff's affidavit "flatly contradicted" no less than 8 of her prior sworn statements. 851 F.2d 703, 705 (3rd Cir. 1988). Some explanation of the prior testimony and subsequent affidavit is necessary to an understanding of the court's exclusion of the affidavit and to understand how very different the instant case is from those where the sham affidavit rule has been applied. The Plaintiff mother sued the manufacturer of a drug called Bendectin, used to alleviate morning sickness, that allegedly caused birth defects in her child. During Mother's deposition, she testified that she began taking Bendectin on May 19, around the second month of her pregnancy, that she did not have any pills leftover from a prior pregnancy, that the May 19 prescription she obtained was her

² The timing of the affidavit was ___ not by Plaintiff but by defendants who pressed to have their motions heard during active discovery.

only source of Bendectin, that she first took Bendectin during her second month of pregnancy, and she did not do anything at home, prior to May 19, to try to alleviate her nausea. Her answers to interrogatories were consistent with this testimony. Then, after the drug company moved for summary judgment based on its expert's opinion that the birth defects could not have been caused by ingesting the drug after the first month of pregnancy, the mother submitted an affidavit stating that she did have pills left from a previous pregnancy and that she did take them before May 19, probably around one month into her pregnancy, in order to alleviate her morning sickness. Not all have been listed here, but the court remarked the affidavit, submitted after the motion for summary judgment was filed, "flatly contradicted no less than eight of [Mother's] prior sworn statements."

Finally, in Barwick v. Celotex, 736 F.2d 946 (4th Cir. 1984), the court determined that an asbestosis Plaintiff's affidavit was properly excluded from consideration by the district court under similar circumstances. In Barwick, during the plaintiff's lengthy deposition, he testified he could not identify the manufacturer of any asbestosis-containing product that he had ripped out of any installation during his employment at a particular facility. However, after motions for summary judgment were filed, Plaintiff submitted an affidavit stating that while he was employed at the facility, he was exposed to products manufactured by Keene Corporation, and went on to identify several products by name, including Thermoseal Pipe Covering and Eighty-Five Percent Magnesia Pipe Cover and Block. Importantly, during his deposition, he testified he had *no personal knowledge* of being exposed to Thermosil or Eighty-Five Percent Magnesia block and pipe covering material. Also, importantly, a very specific pretrial order required Plaintiff to name every product (by name and manufacturer) that he was exposed to. None of the products named in his affidavit had been identified in the disclosure required by the pre-trial order. Under these circumstances, the Court of Appeals for the Fourth Circuit found the affidavit should not be considered.

In each of these cases where sham affidavit rule has been applied, the subsequent affidavit was very clearly and squarely contradictory, if not opposite, to the prior testimony or discovery responses. In this case, defendants have attempted to demonstrate that Mr. Hodgin's affidavit is contradictory to his prior testimony by taking select lines of testimony out of context and ignoring other testimony of Mr. Hodgin. I will not provide the Court with an exhaustive restatement of Mr. Hodgin's deposition testimony since it was submitted to the Court at the hearing in April. As I believe I pointed out to the Court at the hearing, Mr. Hodgin's affidavit is consistent with the testimony he gave at his deposition.

The sham affidavit rule is not applicable to the affidavit of Mr. Hodgin and is properly considered by the Court for the purposes of summary judgment. (As I stated in my prior e-mail, the proposed orders fail to set forth any specific admissibility issue which would justify its exclusion.) Even if this court chooses not to consider the affidavit, which we believe would be

The Honorable Alexander Stephens Macaulay
June 15, 2012
Page 5

error, Mr. Hodgin's deposition testimony demonstrates, at least, the scintilla of evidence required to overcome the motions for summary judgment.

If you require further information from me, please let me know. Thank you for your consideration.

Very truly yours,

LYLES & LYLES, LLC



Catherine Bryan

CHB/aep
Enclosures

cc: Via Electronic mail only
Charles F. Turner, Esquire
Anne Culbreath, Esquire
Bradford W. Cranshaw, Esquire
Danielle F. Payne, Esquire
James V. Dade, Esquire
Mr. Robert White
Ms. Donna Furnari



Catherine Bryan <chb@lylesfirm.com>

Stoneledge et al. v IMK Development et al CA Number: 2009-CP-37-652

Catherine Bryan <chb@lylesfirm.com>

Wed, Apr 18, 2012 at 11:13 AM

To: amacaulayj@sccourts.org, "Macaulay, Alexander S. Law Clerk (Matthew Couvillion)"

<AMacaulayLC@sccourts.org>

Cc: "Danielle Payne (DPayne@GrierCoxandCranshaw.com)" <DPayne@griercoxandcranshaw.com>, "bcranshaw@griercoxandcranshaw.com" <bcranshaw@griercoxandcranshaw.com>, "vmcdade@dotmlaw.com" <vmcdade@dotmlaw.com>, "Turner, Chuck" <CTurner@turnerpadget.com>, "Culbreath, Anne R." <ACulbreath@turnerpadget.com>

Dear Judge Macaulay:

I have reviewed the Proposed Order submitted yesterday afternoon by Ms. Culbreath. There are a few issues I need to bring to the Court's attention.

First, the proposed Order is over my objections as I believe Plaintiffs established, by admissible testimony, the scintilla of evidence required to overcome the motions for summary judgment as to our claims against the HVAC subcontractors.

I take exception to the last two sentences of the first full paragraph on page 2 of the Proposed Order which read: "Plaintiffs' causes of action were based upon the testimony of Derek Hodgins of Construction Science Engineering. Mr. Hodgins asserted that the HVAC Contractors may have cut an attic truss."

I do not believe those sentences accurately reflect or paraphrase the substance of Derek's testimony and affidavit. Instead, the Order should either quote the affidavit or include a statement which accurately reflects the substance of the affidavit, such as:

"Plaintiffs' causes of action against All Pro are based upon the affidavit of Plaintiffs' expert, Derek Hodgins of Construction Science and Engineering, which states that an attic truss at Stoneledge was either cut by the HVAC installer (All Pro or Gunter Heating & Air) or was open and obvious to the HVAC installer and that the HVAC installer had a duty to report the cut truss. Mr. Hodgins also stated that additional cut trusses would likely be found in the attics of other townhomes at Stoneledge."

In the second paragraph of the Discussion section (page 3), the first and second sentences refer to Mr. Hodgins' affidavit but do not mention that Plaintiffs' counsel submitted deposition testimony or that the Court considered deposition testimony of Mr. Hodgins. Those sentences should reflect that Plaintiffs' counsel submitted the Affidavit of Derek Hodgins *and deposition testimony of Mr. Hodgins*, and that the Court considered the Affidavit *and deposition testimony of Mr. Hodgins* and found that it failed to).

Also, the proposed order includes no reference or mention of the case which your honor cited at the hearing as being a case upon which you relied – this is the case of Roberson v. Southern Finance of SC, 365 S.C. 6, 615 S.E.2d 112 (2005). I believe this should be included in the Order if, as I understood Monday, that was a basis of your ruling.

Likewise, although the proposed order includes a general statement that the Court found the affidavit failed to present admissible evidence, there is no reference or mention of any particular admissibility issue. I believe that the evidence is admissible and I ask that the Order include some statement of your honor's finding/conclusion as to the authentication (photograph) issue and any other issue regarding the admissibility of the affidavit and testimony.

Please let me know if I can provide additional information. Thank you for your consideration.

Kind regards,
Catherine Bryan



Catherine Bryan <chb@lylesfirm.com>

Stoneledge - Motions Hearings Monday, April 16

Catherine Bryan <chb@lylesfirm.com>

Wed, Apr 18, 2012 at 12:29 PM

To: "Macaulay, Alexander S. Law Clerk (Matthew Couvillion)" <AMacaulayLC@sccourts.org>

Cc: Brad Cranshaw <BCranshaw@griercoxandcranshaw.com>, Robert Lyles <rtl@lylesfirm.com>, "J. Victor McDade" <jvmcdade@dotmlaw.com>, Danielle Payne <DPayne@griercoxandcranshaw.com>

Dear Judge Macaulay:

I have reviewed the proposed order submitted yesterday afternoon by Ms. Payne. This order is substantially the same as the proposed order submitted by Ms. Culbreath. For that reason, I have the same objections, exceptions, and requests to Ms. Payne's order as I communicated this morning with respect to All Pro's proposed order.

Please let me know if you require anything further from me.

Kind regards,
Catherine Bryan
[Quoted text hidden]

CARL CATOE CONSTRUCTION, INC.

1ST CHECK

Subcontractor: CELSO CONCHA-PEREZCheck Number: 44548Date: May 20, 2006Amount: \$7,050.00

JOB NAME	AMOUNT	TOTAL JOB	ITEM		BLDG. #
STONEEDGE	\$ 1,750.00		402-15	ROOF FRAMING	B17
	\$ 500.00		402-09	PUNCH	B17
	\$ 1,000.00		402-22	SHEETROCK	B19
	\$ 1,000.00		402-03	POST/COLUMNS	B17
	\$ 3,000.00	\$ 7,250.00	414	ROOF TRUSS	B19
SUBTOTAL:		\$ 7,250.00			
DEDUCT				DUO-FAST	
DEDUCT		\$ (200.00)		MOTEL	
TOTAL:		\$ 7,050.00			

To Whom It May Concern:

The undersigned has been employed by Carl Catoe Construction, Inc. To furnish labor for the building(s) in the County of _____ State of _____ known as _____

Upon receipt of this check, the subcontractor acknowledges payment for the above described work.

Upon receipt of this check, the subcontractor also acknowledges full responsibility for any and all taxes incurred.

The subcontractor is responsible for meeting OSHA requirements for job safety and is fully responsible for OSHA inspections.

Subcontractor: _____

5/27/06
Stoneledge
at Keowee
Victorina Concha

Bld 19 Roof Truss	3000
Bld 17 Roof	1750
Bld 19 Stack	1000
Bld 17 columns	1000
Bld 17 Punch	500

Hotel	7250
	<u>- 200</u>
	7050

Rene Cruz.

06/20/2006

Set roof bldg. 16 100% 3030.00

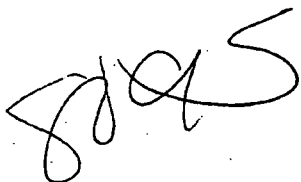
Frame 1~~2~~ porch bldg. 16 in hickoryframe platform for hvc and ~~cut~~ ~~truss~~
and frame ceiling. 2 men 20 hrs total 280.00

Set roof bldg. 15 100% \$4,449.00

frame 2 porch bldg. 15 in hickory

frame platform for hvc and cut truss
and frame ceiling 8 man 8 hrs. (11 for each)
4 11 616.00

bldg. 20

frame 3 porch in unit hickory
2 man move walls in unit hickory is wrong
the plan and 402-09. 15 hrs. (7:30 each)
210.00


Bld #20 Roof
Over paid By - \$490.00
Mistake Last
Week 35 hours
Per Rodolfo

Called L
by CC 6/7/06

Victorino Concha
Stoneledge

W/E 6/3/06

Blay 19

Roof Truss -	2,615 -
Roof Plywood -	1,100 -
Punch out	1,688 -
Sheet Rock	<u>400 -</u>

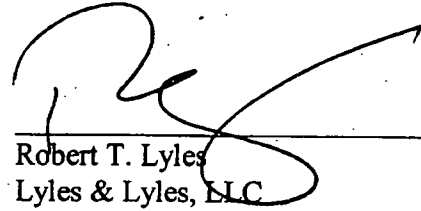
5,803 -

Item	Type	Code	Action	Date	Description	Observed Condition	Potential Damage	Required Construction	Required Construction	Required Construction
7		31 (412)	1	Observation	7/14/2010	Improper shingle installation - spliced shingle in body of roof / broken shingle.	Roof assembly is vulnerable to water intrusion at unprotected areas.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	Inspect steep slope roof(s) for improper shingle installation. Repair shingle(s) as required.
		76 (552)	2	Emergency Repair	9/13/2010					All low slope roofs to be repaired per Repair Item A3a.
8		21 (220)	1	Observation	7/2/2010			R905.2.8.4 Sidelow Flashing. Flashing against a vertical sidewall shall be by the step-flashing method.	R905.2.8.4 Sidelow Flashing. Flashing against a vertical sidewall shall be by the step-flashing method.	
		32 (412)	1	Emergency Repair	3/30/2010	Improper / inconsistent sidewall flashing.	Not code compliant. Potential damage due to lack of required weather protection.	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Remove all roof-to-wall flashing (including sidewall flashing) and associated roof covering as required. Properly install new roof-to-wall flashing. Properly integrate with all adjacent existing material to remain and new material required per the CSE Scope of Repair Documents.
		76 (552)	2	Observation	9/13/2010					
9		11 (223)	1	Observation	7/2/2010			R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	
		21 (220)	1	Observation	7/2/2010					
		31 (412)	1	Emergency Repair	7/14/2010	Improper roof-to-wall flashing.	Not code compliant. Potential damage due to lack of required weather protection.	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Remove all roof-to-wall flashing (including sidewall flashing) and associated roof covering as required. Properly install new roof-to-wall flashing. Properly integrate with all adjacent existing material to remain and new material required per the CSE Scope of Repair Documents.
		33 (416)	1	Observation	12/1/2009					
		63 (526)	2	Destructive Test	7/1/2010					
		67 (534)	2	Observation	6/30/2010					
10		31 (412)	1	Emergency Repair	7/14/2010	Inadequate roof sheathed deck attachment.	Not code compliant. Roof assembly is vulnerable to damage during a wind event.	Table R503.2.1.1(1): Allowable Spans and Loads for Wood Structural Panels for Roof and Subfloor Sheathing and Combination Subfloor Underlayment.	Table R503.2.1.1(1): Allowable Spans and Loads for Wood Structural Panels for Roof and Subfloor Sheathing and Combination Subfloor Underlayment.	Inspect all roof slopes for deflection indicative of damaged framing and/or sheathing attachment. Repair as required pursuant to building code requirements.
11		33 (416)	1	Observation	12/1/2009	Inadequate construction for adjacent roof constructions.	Roof assemblies are vulnerable to water intrusion due to improper integration between adjacent roof constructions.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." Not installed according to industry standard(s)-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual" and National Roofing Contractors Association; The NRCA Roofing and Waterproofing Manual.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." Not installed according to industry standard(s)-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual" and National Roofing Contractors Association; The NRCA Roofing and Waterproofing Manual.	Inspect all roof slopes for improper roof integration between adjacent roof slopes. Repair as required to provide proper construction.
12		21 (220)	1	Destructive Test	7/2/2010			R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	
		28 (402)	1	Emergency Repair	7/2/2010	Improper ventilation material / flashing.	Damage observed to interior walls and ceiling at multiple locations. Damage is not considered to be isolated to this issue.	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Remove all roof-to-wall flashing (including improper ventilation components) and associated roof covering as required. Properly install new roof-to-wall flashing. Properly integrate with all adjacent existing material to remain and new material required per the CSE Scope of Repair Documents. CSE to confirm required additional means of attic ventilation prior to repairs.
13		33 (416)	1	Observation	12/1/2009	Improper skylight installation.	Damage observed			
8	Attics									
1		28 (402) or 31 (412)	1	Per Trench Report / Photos	N/A	Broken truss.	Not code compliant. Potential damage due to inadequate structural capacity.	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	All broken truss(es) are to be reviewed by registered engineer. Repair to be determined on a case by case basis.
2		76 (552)	2	Emergency Repair	9/13/2010	Truss web member removed/cut.	Not code compliant. Potential damage due to inadequate structural capacity. (See also other issues under roofing, exterior walls and windows.)	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	All removed / cut truss(es) are to be reviewed by registered engineer. Repair to be determined on a case by case basis.

CERTIFICATE OF COUNSEL

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

January 9, 2013

A handwritten signature in black ink, appearing to read 'R. Lyles', is written over a horizontal line.

Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorney for the Appellants

General Notes:									
A. Document is a work in progress.									
B. All issue numbers in brackets indicate that the issue is not included in the CSE scope of repair documents dated 1/24/2011.									
Summary of Construction Defects									
Stoneledge at Lake Keowee									
West Union, South Carolina									
CSE Job Number: 237.01									
Applicable Building Codes: 2000 International Residential Code for One and Two Family Dwellings (Phase 1) 2003 International Residential Code for One and Two Family Dwellings (Phase 2)									
No.	Unit	Issue No.	Issue	Observed	Observed Date	Observed Condition	Construction Defect	Required Construction	Required Construction
A Roofing									
1		11 [323]	1	Observation	7/2/2010	No Kickout Flashing installed.	Damage observed to sheathing at base of roof-to-wall intersections at multiple locations. Damage is not considered to be isolated to the lack of Kickout Flashing. See also Missing / Inadequate underlayment at eave of Roofing. Incomplete / Inconsistent sidewall flashing of Roofing, and Missing/Incomplete WRB on Exterior Walls.	Kickout flashing should be installed according to Industry standard - National Roofing Contractors Association: "The NRCA Roofing and Waterproofing Manual".	Kickout flashing should be installed according to Industry standard - National Roofing Contractors Association: "The NRCA Roofing and Waterproofing Manual".
		32 [414]	1	Observation	3/15/2010				
		76 [552]	2	Observation	9/14/2010				
		89 [578]	2	Observation	7/1/2010				
		21 [220]	1	Observation	7/2/2010				
2		31 [412]	1	Observation	7/14/2010	Missing / Inadequate underlayment at eave.	Inadequate protection of roof sheathed deck resulting in observed water damage to bottom edge of roof sheathed deck (at eave). Damage is not considered to be isolated to the missing / inadequate underlayment. See also No Kickout Flashing installed of Roofing. Incomplete / Inconsistent sidewall flashing of Roofing and Missing/Incomplete WRB on Exterior Walls.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." R905.2.2: "For roof slopes from two units vertical in 12 units horizontal (2:12) up to four units vertical in 12 units horizontal (4:12), double underlayment application is required in accordance with R905.2.7."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." R905.2.2: "For roof slopes from two units vertical in 12 units horizontal (2:12) up to four units vertical in 12 units horizontal (4:12), double underlayment application is required in accordance with R905.2.7."
		33 [416]	1	Observation	12/1/2009				
		63 [526]	2	Observation	7/1/2010				
		67 [534]	2	Observation	6/30/2010				
		76 [552]	2	Observation	9/13/2010				
3a		33 [416]	1	Observation	3/16/2010	Missing underlayment. (Low Slope - 4:12 or less).	Not code compliant. Potential damage due to lack of required weather protection.	R905.2.2: "For roof slopes from two units vertical in 12 units horizontal (2:12) up to four units vertical in 12 units horizontal (4:12), double underlayment application is required in accordance with R905.2.7."	R905.2.2: "For roof slopes from two units vertical in 12 units horizontal (2:12) up to four units vertical in 12 units horizontal (4:12), double underlayment application is required in accordance with R905.2.7."
		76 [552]	2	Destructive Test	9/14/2010				
3b		31 [412]	1	Observation	7/14/2010	Missing underlayment. (Steep Slope - 4:12 or more).	Not code compliant. Potential damage due to lack of required weather protection.	R905.1: "Roof coverings shall be applied in accordance with the applicable provisions of this section and manufacturer's installation instructions." R905.2.3: "Unless otherwise noted required underlayment shall conform with ASTM D 226, Type I or ASTM D 4869, Type I."	R905.1: "Roof coverings shall be applied in accordance with the applicable provisions of this section and manufacturer's installation instructions." R905.2.3: "Unless otherwise noted required underlayment shall conform with ASTM D 226, Type I or ASTM D 4869, Type I."
		76 [552]	2	Emergency Repair	9/13/2010				
4		33 [416]	1	Observation	12/1/2010	Missing fasteners at shingles.	Not code compliant. Shingles are vulnerable to blow-off damage during wind events due to lack of required attachment.	R905.2.5: "Fasteners for asphalt shingles shall be galvanized steel, stainless steel, aluminum or copper roofing nails, minimum 12 gauge shank with a minimum 3/8-inch diameter head, ASTM 1667, of a length to penetrate through the roofing materials and a minimum of 3/4" into the roof sheathing." R905.2.6 Asphalt shingles shall have the minimum number of fasteners required by the manufacturer.	R905.2.5: "Fasteners for asphalt shingles shall be galvanized steel, stainless steel, aluminum or copper roofing nails, minimum 12 gauge shank with a minimum 3/8-inch diameter head, ASTM 1667, of a length to penetrate through the roofing materials and a minimum of 3/4" into the roof sheathing." R905.2.6 Asphalt shingles shall have the minimum number of fasteners required by the manufacturer.
		31 [220]	1	Observation	7/2/2010				
5		63 [526]	2	Observation	7/1/2010	Excessive edge distances between shingles, roof sheathed deck and/or trim.	Shingles are vulnerable to blow-off damage during a wind event.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."
		89 [576]	2	Destructive Test	7/1/2010				
6		28 [402]	1	Observation	7/2/2010	Shingles do not overhang roof sheathed deck and/or trim.	Roof assembly is vulnerable to water intrusion in unprotected areas.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."

ID#	Type	Observation				Observed Condition	Consequence / Damage	Required Construction		Repair Required
		Unit No. Address	Count	Task	Date Observed			(If Strength) Constructed under the Applicable Building Code Was	(If Strength) Constructed under the Applicable Building Code Was	
7		31 (412)	1	Observation	7/14/2010	Improper shingle installation - spliced shingle in body of roof / broken shingle.	Roof assembly is vulnerable to water intrusion in unprotected areas.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	Inspect steep slope roof(s) for improper shingle installation. Repair shingle(s) as required.
		76 (552)	2	Emergency Repair	9/13/2010					All low slope roofs to be repaired per Repair Item A3a.
8		21 (220)	1	Observation	7/2/2010			R905.2.8.4 Sidewall Flashing. Flashing against a vertical sidewall shall be by the step-flashing method.	R905.2.8.4 Sidewall Flashing. Flashing against a vertical sidewall shall be by the step-flashing method.	Remove all roof-to-wall flashing (including sidewall flashing) and associated roof covering as required. Properly install new roof-to-wall flashing. Properly integrate with all adjacent existing material to remain and new material required per the CSE Scope of Repair Documents.
		32 (412)	1	Emergency Repair	3/30/2010	Improper / inconsistent sidewall flashing.	Not code compliant. Potential damage due to lack of required weather protection.	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	
		76 (552)	2	Observation	9/13/2010					
9		11 (323)	1	Observation	7/2/2010			R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	Remove all roof-to-wall flashing (including sidewall flashing) and associated roof covering as required. Properly install new roof-to-wall flashing. Properly integrate with all adjacent existing material to remain and new material required per the CSE Scope of Repair Documents.
		21 (220)	1	Observation	7/2/2010					
		31 (412)	1	Emergency Repair	7/14/2010	Improper roof-to-wall flashing.	Not code compliant. Potential damage due to lack of required weather protection.	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	
		33 (416)	1	Observation	12/1/2009					
		63 (526)	2	Destructive Test	7/1/2010					
		67 (534)	2	Observation	6/30/2010					
10		31 (412)	1	Emergency Repair	7/14/2010	Inadequate roof sheathed deck attachment.	Not code compliant. Roof assembly is vulnerable to damage during a wind event.	Table R503.2.1.1(1): Allowable Spans and Loads for Wood Structural Panels for Roof and Subfloor Sheathing and Combination Subfloor Underlayment.	Table R503.2.1.1(1): Allowable Spans and Loads for Wood Structural Panels for Roof and Subfloor Sheathing and Combination Subfloor Underlayment.	Inspect all roof slopes for deflection indicative of damaged framing and/or sheathing attachment. Repair as required pursuant to building code requirements.
11		33 (416)	1	Observation	12/1/2009	Inadequate construction for adjacent roof constructions.	Roof assemblies are vulnerable to water intrusion due to improper integration between adjacent roof constructions.	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." Not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual" and National Roofing Contractors Association, "The NRCA Roofing and Waterproofing Manual".	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure." Not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual" and National Roofing Contractors Association, "The NRCA Roofing and Waterproofing Manual".	Inspect all roof slopes for improper roof integration between adjacent roof slopes. Repair as required to provide proper construction.
[12]		21 (220)	1	Destructive Test	7/2/2010			R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	R903.1: "Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure."	Remove all roof-to-wall flashing (including improper ventilation components) and associated roof covering as required. Properly install new roof-to-wall flashing. Properly integrate with all adjacent existing material to remain and new material required per the CSE Scope of Repair Documents. CSE to confirm required additional means of attic ventilation prior to repairs.
		28 (402)	1	Emergency Repair	7/2/2010	Improper ventilation material / flashing.	Damage observed to interior walls and ceiling at multiple locations. Damage is not considered to be isolated to this issue.	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	Flashing not installed according to industry standard-The Asphalt Roofing Manufacturer's Association, "Residential Asphalt Roofing Manual".	
		33 (416)	1	Observation	12/1/2009					
[13]						Improper skylight installation.	Damage observed			
B Attics										
1		28 (402) or 31 (412)	1	Per Trehd Report / Photos	N/A	Broken truss.	Not code compliant. Potential damage due to inadequate structural capacity.	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	All broken truss(es) are to be reviewed by registered engineer. Repairs to be determined on a case by case basis.
2		76 (552)	2	Emergency Repair	9/13/2010	Truss web member removed/cut.	Not code compliant. Potential damage due to inadequate structural capacity. (See also other issues under roofing exterior walls and windows.)	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	R802.10.4: Alterations to trusses. "Trusses shall not be cut, notched, drilled, spliced or otherwise altered in any way without the approval of a registered design professional."	All removed / cut truss(es) are to be reviewed by registered engineer. Repairs to be determined on a case by case basis.

No.	Unit	Observation				Observed Condition	Consequence/ Damage	Required Construction		Repair Required
		ULC No. (RATED)	Phase	Findings	Date Observed			Building(s) Constructed Under the Applicable Building Code Until 2000 International Residential Code for One and Two Family Dwellings	Building(s) Constructed Under the Applicable Building Code After 2000 International Residential Code for One and Two Family Dwellings	
C	Life Safety / Fire Protection									
1		32 (414)	1	Emergency Repair	3/15/2010	Missing fire protection between adjacent units. The fire protection is not continuous for entire wall.	Not code compliant. Potential damage or loss of life due to inadequate fire protection.	R321.2.1 Continuity. "The common wall for townhouses shall be continuous from the foundation to the underside of the roof sheathing, deck or slab and shall extend the full length of the common wall."	R317.2.1 Continuity. "The common wall for townhouses shall be continuous from the foundation to the underside of the roof sheathing, deck or slab and shall extend the full length of the common wall."	As required, construct all interior two hour rated wall assemblies per UL #U366 Config. B, per Original Construction Documents. Construct all exterior rated wall assemblies per either UL #U309 or UL # U301, using DensGlass Fireguard Sheathing on exterior side of stud wall.
2		11 (323)	1	Observation	10/26/2010	Incomplete fire protection between adjacent units. Fire rated gypsum board is not taped or mudded per wall assembly requirements.	Not code compliant. Potential damage or loss of life due to inadequate fire protection.	R321.2.1 Continuity. "The common wall for townhouses shall be continuous from the foundation to the underside of the roof sheathing, deck or slab and shall extend the full length of the common wall."	R317.2.1 Continuity. "The common wall for townhouses shall be continuous from the foundation to the underside of the roof sheathing, deck or slab and shall extend the full length of the common wall."	Tape and mud all joint and fastener locations as required per wall assembly requirements.
		33 (416)	1	Observation	12/1/2009					
		37 (424)	1	Observation	10/26/2010					
		42 (438)	2	Observation	10/26/2010					
		76 (552)	2	Observation	10/26/2010					
		87 (574)	2	Observation	10/26/2010					
3		32 (414)	1	Emergency Repair	3/15/2010	Window(s) installed in fire protection walls separating adjacent units.	Not code compliant. Potential damage or loss of life due to inadequate fire protection.	R321.2.1 Continuity. "The common wall for townhouses shall be continuous from the foundation to the underside of the roof sheathing, deck or slab and shall extend the full length of the common wall."	R321.2.1 Continuity. "The common wall for townhouses shall be continuous from the foundation to the underside of the roof sheathing, deck or slab and shall extend the full length of the common wall."	Remove all windows located in rated wall assemblies. Install to integrate with surrounding wall assembly.
D	Exterior Walls									
1		11 (323)	1	Destructive Test	7/2/2010	Missing / incomplete WRB at exterior side of wall(s).	Damage observed to wall sheathing, wall framing and exterior ceilings. Interior gypsum wall and ceiling damage observed. Damage is not considered to be isolated in missing / incomplete WRB. See also Missing / inadequate underlayment at eave of Roofing. Incomplete / inconsistent sidewall flashing of Roofing. No kickout flashing installed at roof / wall intersections, and inadequate flashing of windows in Exterior Walls.	R703.1 General. "Exterior walls shall provide the building with a weather-resistant wall envelope."	R703.1 General. "Exterior walls shall provide the building with a weather-resistant wall envelope."	Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Repair and/or replace all other associated damage as required to match existing finishes and all other requirements established in the CSE Scope of Repair Documents.
		21 (220)	1	Destructive Test	7/2/2010					
		22 (219)	1	Destructive Test	7/2/2010					
		31 (412)	1	Emergency Repair	7/14/2010					
		32 (414)	1	Emergency Repair	3/15/2010					
		33 (416)	1	Destructive Test	3/15/2010					
		63 (526)	2	Destructive Test	7/1/2010					
		67 (534)	2	Destructive Test	6/30/2010					
		73 (546)	2	Destructive Test	10/7/2009					
		76 (552)	2	Destructive Test	9/13/2010					
		89 (578)	2	Destructive Test	7/1/2010					
		11 (323)	1	Destructive Test	7/2/2010					
		2		21 (220)	1					
32 (414)	1			Emergency Repair	3/15/2010	Inadequate siding attachment.	Not code compliant. Siding is vulnerable to blow-off damage during a wind event.	GA-253-99 - 2.4: "Gypsum sheathing used in building construction shall be not less than 8 in from the finish grade in fully weather and water-protected siding systems, and not less than 12 in. from the ground for properly drained and ventilated crawl spaces."	GA-253-99 - 2.4: "Gypsum sheathing used in building construction shall be not less than 8 in from the finish grade in fully weather and water-protected siding systems, and not less than 12 in. from the ground for properly drained and ventilated crawl spaces."	Improper use of material- not per typical manufacturer's installation instructions.
55 (510)	2			Destructive Test	6/30/2010					
67 (534)	2	Destructive Test	6/30/2010			See Table R703.4: Weather-resistant Siding Attachment and Minimum Thickness	See Table R703.4: Weather-resistant Siding Attachment and Minimum Thickness	Remove existing siding in conjunction with other required repairs. Install siding per applicable building code.		

No.	Defect	Observation				Observed Condition	Consistency/Damage	Required Consensus		Repair/Resolution
		Location	Area	Test	Date Observed			International Residential Code (IRC) or International Building Code (IBC)	Building Code When the Building Was Constructed	
4		55 [510]	2	Observation	6/30/2010	Improper sealant at weep side of flashing.	Not installed according to industry standards. Potential damage due to inability to weep.	R703.1 General. "Exterior walls shall provide the building with a weather-resistant wall envelope."	R703.1 General. "Exterior walls shall provide the building with a weather-resistant wall envelope."	Remove sealant at weep side of flashing. Install all required sealants per CSE Scope of Repair Documents.
		67 [534]	2	Destructive Test	6/30/2010			Not installed according to industry standard - Western Red Cedar Lumber Association: "How to Install Western Red Cedar Siding."	Not installed according to industry standard - Western Red Cedar Lumber Association: "How to Install Western Red Cedar Siding."	
5		15 [315]	1	Destructive Test	7/2/2010					Install flashing per Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
		32 [414]	1	Emergency Repair	3/15/2010		Damage observed to sheathing and wall framing. Interior gypsum wall and floor damage observed. Damage is not considered to be isolated to the lack of flashing between the cedar lapped siding and the cultured stone veneer water table. See also No flashing installed between cultured stone veneer water table and cultured stone veneer at Exterior Walls and WRB reversed lapped at intersection of cedar lapped siding and cultured stone veneer on Exterior Walls.	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 3 - "Under and at the ends of masonry, wood or metal copings and sills."	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 3 - "Under and at the ends of masonry, wood or metal copings and sills."	
		33 [416]	1	Observation	12/1/2009	No flashing installed between cedar lapped siding and cultured stone veneer water table.		Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	
		55 [510]	2	Observation	6/30/2010					
		73 [546]	2	Observation	10/7/2009					
6		81 [562]	2	Destructive Test	6/30/2010					Install flashing per Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
		32 [414]	1	Emergency Repair	3/15/2010	No flashing installed at the water table in cultured stone veneer.	Damage observed to sheathing and wall framing. Interior gypsum wall and floor damage observed. Damage is not considered to be isolated to the lack of flashing at the water table in the cultured stone veneer. See also no flashing installed between cultured stone veneer water table and cultured stone veneer at exterior walls and WRB reversed lapped at intersection of cedar lapped siding and cultured stone veneer on exterior walls.	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 3 - "Under and at the ends of masonry, wood or metal copings and sills."	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 3 - "Under and at the ends of masonry, wood or metal copings and sills."	
		55 [510]	2	Destructive Test	6/30/2010	No flashing installed at the water table in cultured stone veneer.	Not code compliant. Damage not observed at this location (concrete wall located behind cultured stone veneer).	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	
7		32 [414]	1	Emergency Repair	3/15/2010		Damage observed to sheathing and wall framing. Interior gypsum wall and floor damage observed. Damage is not considered to be isolated to the reverse laps in the WRB. See also No flashing installed between cultured stone veneer water table and cultured stone veneer at Exterior Walls and WRB reversed lapped at intersection of cedar lapped siding and cultured stone veneer on Exterior Walls.	R703.2: Weather-resistant sheathing paper. "Such felt or material shall be applied horizontally, with the upper layer lapped over the lower layer not less than 2 inches."	R703.2: Weather-resistant sheathing paper. "Such felt or material shall be applied horizontally, with the upper layer lapped over the lower layer not less than 2 inches."	Properly integrate all WRB and flashing per CSE Scope of Repair Documents and Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
		55 [510]	2	Destructive Test	3/30/2010	WRB reversed lapped at intersection of cedar lapped siding and cultured stone veneer.		Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	
		73 [546]	2	Destructive Test	10/7/2009					
8		15 [315]	1	Destructive Test	7/2/2010	No flashing installed beneath wood trim at the sill of window(s) within the cultured stone veneer.	Exposure of building components to elevated moisture conditions and associated damages.	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 3 - "Under and at the ends of masonry, wood or metal copings and sills" and Note 4 - "Continuously above all projecting wood trim"	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 3 - "Under and at the ends of masonry, wood or metal copings and sills" and Note 4 - "Continuously above all projecting wood trim"	Install flashing per CSE Scope of Repair Documents and Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
9		15 [315]	1	Destructive Test	7/2/2010					Install flashing per CSE Scope of Repair Documents and Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
		55 [510]	2	Destructive Test	6/30/2010	No flashing installed beneath wood trim at the sill of window(s) within the cultured stone veneer.	Exposure of building components to elevated moisture conditions and associated damages.	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	
		81 [562]	2	Destructive Test	6/30/2010					

No.	Unit No. (RPT#)	Observation Details			Observed Condition	Consequence / Damage	Required Construction		Repair/Repair	
		Unit No. (RPT#)	Task	Date Observed			Building(s) Constructed When the Applicable Building Code Was:	Building(s) Constructed When the Applicable Building Code Was:		
							2008 International Residential Code for One and Two Family Dwellings	2003 International Residential Code for One and Two Family Dwellings		
10		8 (329)	1	Destructive Test	7/2/2010	No base-of-wall flashing at cultured stone veneer.	Exposure of building components to elevated moisture conditions and associated damages.	R703.7.5 Flashing shall be located beneath the first course of masonry above finished ground level above the foundation wall or slab and at other points of support, including structural floors, shelf angles and lintels when masonry veneers are designed in accordance with Section R703.7.	R703.7.5 Flashing shall be located beneath the first course of masonry above finished ground level above the foundation wall or slab and at other points of support, including structural floors, shelf angles and lintels when masonry veneers are designed in accordance with Section R703.7.	Install flashing per CSE Scope of Repair Documents and Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
	22 (219)	1	Destructive Test	7/2/2010						
	59 (518)	2	Destructive Test	7/1/2010						
	65 (530)	2	Destructive Test	7/1/2010						
	66 (532)	2	Observation	12/1/2010						
11		8 (329)	1	Destructive Test	7/2/2010	Cultured stone veneer installed below grade.	Exposure of building components to elevated moisture conditions and associated damages.	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Install cultured stone veneer per CSE Scope of Repair Documents in conjunction with other required repairs.
	15 (315)	1	Observation	7/2/2010						
	22 (219)	1	Destructive Test	7/2/2010						
	30 (410)	1	Observation	12/6/2010						
	59 (518)	2	Destructive Test	7/2/2010						
12		65 (530)	2	Destructive Test	7/1/2010	Cultured stone veneer adhesion failure.	Potential damage/injury due to inadequate attachment.	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Install cultured stone veneer per CSE Scope of Repair Documents and Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
	66 (532)	2	Observation	12/1/2010						
	25 (225)	1	Observation	11/5/2010						
	73 (546)	2	Observation	11/4/2010						
	91 (582)	2	Observation	11/9/2009						
13		33 (416)	1	Observation	3/15/2010 & 12/1/2009	Cultured stone veneer cracked / damaged.	Damage to numerous pieces of cultured stone observed. Cracked units are vulnerable to displacement from the wall surface.	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Install cultured stone veneer per CSE Scope of Repair Documents and Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
	73 (546)	2	Observation	10/7/2009						
14		8 (329)	1	Destructive Test	7/2/2010	Inconsistent waterproofing details at exterior side of below grade wall(s).	Exposure of building components to elevated moisture conditions and associated damages.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	To Be Determined
	22 (219)	1	Destructive Test	7/2/2010						
	59 (518)	2	Destructive Test	7/1/2010						
	65 (530)	2	Destructive Test	7/1/2010						
	66 (532)	2	Observation	12/1/2010						
[15]		66 (532)	2	Destructive Test	12/6/2010	Water intrusion at base of below grade wall (basement); Corroded metal at concrete wall joint(s) (cold joints).	Damage to interior finishes observed. Microbial growth observed on interior surfaces. Potential air quality concerns.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	To Be Determined
[16]		66 (532)	2	Destructive Test	12/6/2010	Water intrusion at base of below grade wall (basement); Open cell foam material between concrete slab and cast concrete wall (observed from interior).	Damage to interior finishes observed. Microbial growth observed on interior surfaces. Potential air quality concerns.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	To Be Determined
	69 (538)	2	Destructive Test	12/6/2010						

No.	JTS	Observation				Observed Condition	Damage to Interior Finishes / Observed Condition	Required Construction		
		Unit No. (Apartment)	Floor	Test	Date			Building(s) Constructed Under the Alternative Building Code	Building(s) Constructed Under the Alternative Building Code	
[17]		69 [538]	2	Destructive Test	12/6/2010	Water intrusion at base of below grade wall (basement); Open joints around pipe penetration through cast concrete wall (top of basement wall[s]).	Damage to interior finishes observed. Microbial growth observed on interior surfaces. Potential air quality concerns.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	To Be Determined
[18]		30 [410]	1	Destructive Test	12/6/2010	Water intrusion at main floor bath. Bath located partially below grade. Opening in slab at drain beneath tub / soil beneath slab visible.	Damage to interior finishes observed.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	To Be Determined
[19]		32 [414]	1	Emergency Repair	3/25/2010	Inadequate wall sheathing attachment.	The structural integrity of the wall assembly is below code requirements.	See Table R602.3(1); Fastener Schedule for Structural Members	See Table R602.3(1); Fastener Schedule for Structural Members	Install additional fasteners to undamaged wall sheathing as required. Install replacement wall sheathing (as needed) in accordance with building code requirements.
[20]		6 [333]	1	Observation	7/9/2010	Cultured stone veneer installed in contact with concrete path / stoop.	Not installed in accordance with industry standard. Potential damage due to improper weep / waterproofing.	Not installed according to Manufacturer's Installation Instructions; Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions; Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Install cultured stone veneer per CSE Scope of Repair Documents. and Owens Corning Cultured Stone, "Best Practices for Flashing Details" in conjunction with other required repairs.
		76 [552]	2	Destructive Test	7/1/2010					
		22 [219]	1	Destructive Test	7/2/2010					
		28 [402]	1	Destructive Test	7/2/2010					
		31 [412]	1	Destructive Test	7/14/2010	W/B reverse lapped with metal flashing.	Damage observed to wall sheathing, wall framing and exterior ceilings. Interior gypsum wall and ceiling damage observed. Damage is not considered to be isolated to W/B reverse lapped with metal flashing. See also Missing / Inadequate underlayment at eave of roofing. Incomplete / inconsistent sidewall flashing of roofing. No kickout flashing installed of roofing, and inadequate flashing of windows in Exterior Walls.	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope."	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope."	Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Repair and/or replace all other associated damage as required to match existing finishes and all other requirements established in the CSE Scope of Repair Documents.
		32 [414]	1	Emergency Repair	3/15/2010					
[22]		67 [534]	2	Destructive Test	6/30/2010					
		25 [225]	1	Observation	11/5/2009	Hole in sheathing / insulation at pipe penetration[s].	Potential damage due to bulk water intrusion.	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope."	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope."	Install additional sheathing / insulation as required. Integrate with required repairs for D24 and D25.
		28 [402]	1	Observation	7/9/2010					
[23]		35 [420]	1	Observation	7/12/2010					
		28 [402]	1	Observation	7/9/2010					
		66 [532]	2	Destructive Test	12/1/2010 & 12/6/2010	Water intrusion at framing, below grade and under front porch.	Damage to framing observed.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	Install exterior below grade waterproofing in accordance with building code requirements. Remove and replace soil, plantings, site drainage, concrete, equipment, etc. as required.
		69 [538]	2	Destructive Test	12/6/2010					

No.	Title	Observation				Conservation / Damage	Required Construction		Repair Required
		Unit No. (Address)	Phase	Type	Date Observed		Building(s) Constructed When the Applicable Building Code Was 7000 International Residential Code for One and Two Family Dwellings	Building(s) Constructed When the Applicable Building Code Was 2003 International Residential Code for One and Two Family Dwellings	
[24]		35 (420)	1	Observation	7/2/2010	Water intrusion at below grade base of wall on front elevation. Damaged gypsum and / or interior trim observed.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	R406.1 Except where required to be waterproofed by Section R402.2, foundation walls that retain earth and enclose habitable or usable spaces located below grade shall be dampproofed from the top of the footing to the finished grade.	Install exterior below grade waterproofing in accordance with building code requirements. Remove and replace soil, plantings, site drainage, concrete, equipment, etc. as required.
		56 (512)	2	Observation	12/1/2010				
		57 (514)	2	Observation	12/6/2010				
		66 (532)	2	Destructive Test	12/1/2010				
		69 (538)	2	Observation	12/1/2010				
[25]		73 (546)	2	Destructive Test	10/7/2009	No flashing installed between cedar lapped siding and the cedar trim board. Damage observed to sheathing and wall framing. Interior gypsum wall and floor damage observed. Damage is not considered to be isolated to the lack of flashing between the cedar lapped siding and the cedar trim board. See also No flashing installed between cultured stone veneer water table and cultured stone veneer at Exterior Walls and WRS (reverted lapped at intersection of cedar lapped siding and cultured stone veneer on Exterior Walls.	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 4 - "Continuously above all projecting wood trim" Not installed according to industry standard - Western Red Cedar Lumber Association: "How to Install Western Red Cedar Siding."	R703.8 "Approved corrosion-resistant flashings shall be installed at all of the following locations." Note 4 - "Continuously above all projecting wood trim" Not installed according to industry standard - Western Red Cedar Lumber Association: "How to Install Western Red Cedar Siding."	Install flashing per CSE Scope of Repair Documents in conjunction with other required repairs.
E Windows	1	32 (414)	1	Emergency Repair	3/30/2009	Incomplete / inadequate rough opening flashing at window(s). Damage observed to sheathing and wall framing. Interior gypsum wall and ceiling damage observed. Damage is not considered to be isolated to the incomplete / inadequate rough opening flashing at window(s). See also Incomplete / inconsistent sidewall flashing of Roofing. No Kickout flashing installed at Roofing. Missing / Incomplete WRS at exterior side of wall(s), and inadequate flashing of window(s).	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturer's Association, "Installation Masters Training Manual") (2) Journal of Light Construction/JLC Field Guide to Residential Construction." Not installed according to typical Andersen Window Instructions.	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturer's Association, "Installation Masters Training Manual") (2) Journal of Light Construction/JLC Field Guide to Residential Construction." Not installed according to typical Andersen Window Instructions.	Remove window(s). Reinstall window(s) per CSE Scope of Repair and in conjunction with other required repairs. Do not reinstall windows in fire rated wall assemblies. Repair/replace damaged window(s) to match existing.
		33 (416)	1	Observation	12/1/2009				
		15 (315)	1	Destructive Test	7/2/2010				
	2	28 (402)	1	Emergency Repair	7/2/2010	Damage observed to sheathing and wall framing. Interior gypsum wall and ceiling damage observed. Damage is not considered to be isolated to the incomplete / inadequate rough opening flashing at window(s). See also Incomplete / inconsistent sidewall flashing of Roofing. No Kickout flashing installed at Roofing. Missing / Incomplete WRS at exterior side of wall(s), and inadequate flashing of window(s).	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturer's Association, "Installation Masters Training Manual") (2) Journal of Light Construction/JLC Field Guide to Residential Construction." Not installed according to typical Andersen Window Instructions.	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturer's Association, "Installation Masters Training Manual") (2) Journal of Light Construction/JLC Field Guide to Residential Construction." Not installed according to typical Andersen Window Instructions.	Remove window(s). Reinstall window(s) per CSE Scope of Repair and in conjunction with other required repairs. Do not reinstall windows in fire rated wall assemblies. Repair/replace damaged window(s) to match existing.
		32 (414)	1	Emergency Repair	3/30/2009				
		33 (416)	1	Observation	3/15/2010				
		81 (562)	2	Destructive Test	6/30/2010				
3		32 (414)	1	Emergency Repair	3/15/2010	Improper material used as flashing at window(s). Ideal of TM 587 A/B fiberglass duct tape installed around window nailing fl.	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturer's Association, "Installation Masters Training Manual") (2) Journal of Light Construction/JLC Field Guide to Residential Construction." Not installed according to typical Andersen Window Instructions.	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturer's Association, "Installation Masters Training Manual") (2) Journal of Light Construction/JLC Field Guide to Residential Construction." Not installed according to typical Andersen Window Instructions.	Remove window(s). Reinstall window(s) per CSE Scope of Repair and in conjunction with other required repairs. Do not reinstall windows in fire rated wall assemblies. Repair/replace damaged window(s) to match existing.

No.	Type	Observation				Observed Condition	Confirmed Exterior Damage	Required Construction		Repair Required		
		Unit No./Street Address	Phase	Task	Date Observed			Building(s) Constructed When the Applicable Building Code was in Effect 2000 International Residential Code 2003 International Residential Code	Building(s) Constructed When the Applicable Building Code was in Effect 2003 International Residential Code 2009 and 2012 Family Dwelling Code			
4		32 (414)	1	Emergency Repair	3/15/2010		Water intrusion into wall assembly	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	Remove window(s). Reinstall window(s) and trim per CSE Scope of Repair and in conjunction with other required repairs. Do not reinstall windows in fire rated wall assemblies. Repair/replace damaged window(s) to match existing.		
	55 (510)	2	Destructive Test	6/30/2010	Flashing above wood trim at window head reverse lapped with WRB.							
	63 (526)	2	Destructive Test	7/1/2010		Not installed according to typical Andersen Window instructions.		Not installed according to typical Andersen Window instructions.				
5	F Exterior Doors	15 (315)	1	Destructive Test	7/2/2010		Water intrusion into wall assembly	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	Remove window(s). Reinstall window(s) per CSE Scope of Repair and in conjunction with other required repairs. Do not reinstall windows in fire rated wall assemblies. Repair/replace damaged window(s) to match existing.		
		28 (402)	1	Emergency Repair	7/2/2010	Window sill nailing in sealed with self adhered flashing.						
		32 (414)	1	Emergency Repair	3/15/2010							
		55 (510)	2	Destructive Test	6/30/2010							
		81 (562)	2	Destructive Test	6/30/2010							
1	2	28 (402)	1	Destructive Test	7/9/2010	Incomplete / inadequate rough opening flashing at exterior door(s).	Damage observed to balcony framing and ceiling below door. Damage observed to interior subfloor decking adjacent to exterior door(s).	Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction." R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction." R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	Remove exterior door(s). Reinstall door(s) per CSE Scope of Repair and in conjunction with other required repairs. Repair/replace damaged door(s) to match existing.		
		43 (440)	2	Destructive Test	7/9/2010							
		28 (402)	1	Destructive Test	7/9/2010							
		33 (416)	1	Observation	12/1/2009	Incomplete / inadequate pan flashing at exterior door(s).						
		73 (546)	2	Observation	5/22/2009							
[3]		28 (402)	1	Destructive Test	7/9/2010	Inadequate threshold height above balcony floor.	Damage observed to balcony framing and ceiling below door. Damage observed to interior subfloor decking adjacent to exterior door(s).	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	R703.1 General, "Exterior walls shall provide the building with a weather-resistant wall envelope." Not installed according to Industry Standard(s): (1) AAMA (American Architectural Manufacturers' Association, "Installation Masters Training Manual" (2) Journal of Light Construction, JLC Field Guide to Residential Construction."	Remove exterior door(s). Reinstall door(s) per CSE Scope of Repair and in conjunction with other required repairs. Repair/replace damaged door(s) to match existing.		
G	Balcony and Patio Area(s)											
		33 (416)	1	Destructive Test	7/2/2010	Incomplete / inadequate WRB at post(s) with cultured stone veneer.	Damage observed to sheathing and wood framing. Damage observed to ceiling(s) beneath post(s). Damage included vertical patio framing, wood columns, wood floor framing and wood balcony subfloor (significant damage to floor trusses in Phase I).	R407.1 wood columns shall be protected against decay as set forth in Section R323 (Protection Against Decay). Nonpreservative treated wood structure used for columns does not conform with contract documents which require cast concrete structural columns). Not installed according to Manufacturer's Installation Instructions; Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions; Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Remove cultured stone veneer. Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Install new cultured stone veneer to match existing style and color. All repairs to be performed in conjunction with other repairs per the CSE Scope of Repair Documents.		
1a		35 (420)	1	Destructive Test	7/2/2010							
1b		76 (552)	2	Destructive Test	7/1/2010	Incomplete / inadequate WRB at post(s) with cultured stone veneer.	Damage observed to sheathing and wood framing. Damage observed to ceiling(s) beneath post(s). Damage included vertical patio framing, wood columns, wood floor framing and wood balcony subfloor (significant damage to floor trusses in Phase I).	R407.1 wood columns shall be protected against decay as set forth in Section R323 (Protection Against Decay). Not installed according to Manufacturer's Installation Instructions; Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions; Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Remove cultured stone veneer. Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Install new cultured stone veneer to match existing style and color. All repairs to be performed in conjunction with other repairs per the CSE Scope of Repair Documents.		

No.	Type	Observation			Date Observed	Observed Condition	Consequence/Damage	Required Construction		Repair Required
		Unit No. (Per Address)	Floor	Room				Buildings Constructed Under the Antismoke Building Code Was 2000 International Residential Code for One and Two Family Dwellings	Buildings Constructed When the Antismoke Building Code Was 2000 International Residential Code for One and Two Family Dwellings	
2	3a	28 (402)	1	Destructive Test	7/9/2010	W/RB reverse lapped with flashing extending out from the edge of the concrete deck.	Damage observed to sheathing and wood framing. Damage observed to ceiling(s) beneath post(s). Damages included vertical patio framing, wood columns, wood floor framing and wood balcony subfloor (significant damage to floor trusses in Phase I).	R407.1 wood columns shall be protected against decay as set forth in Section R323 (Protection Against Decay). Nonpreservative treated wood structure used for columns (does not conform with contract documents which requires cast concrete structural columns). Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Industry Standard: Journal of Light Construction, "JLC Field Guide to Residential Construction."	Remove cultured stone veneer. Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Install new cultured stone veneer to match existing style and color. All repairs to be performed in conjunction with other repairs per the CSE Scope of Repair Documents.
		33 (416)	1	Destructive Test	7/2/2010	Incomplete / inadequate W/RB at column(s) with cultured stone veneer.	Damage observed to sheathing and wood framing. Damages included vertical patio framing, wood columns, wood floor framing and wood balcony subfloor (significant damage to floor trusses in Phase I).	R407.1 wood columns shall be protected against decay as set forth in Section R323 (Protection Against Decay). Nonpreservative treated wood structure used for columns (does not conform with contract documents which requires cast concrete structural columns). Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Remove cultured stone veneer. Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Install new cultured stone veneer to match existing style and color. All repairs to be performed in conjunction with other repairs per the CSE Scope of Repair Documents.
		35 (420)	1	Destructive Test	7/2/2010					
3b	4a	70 (540)	2	Destructive Test	5/22/2009	Incomplete / inadequate W/RB at column(s) with cultured stone veneer.	Damage observed to sheathing and wood framing. Damages included vertical patio framing, wood columns, wood floor framing and wood balcony subfloor (significant damage to floor trusses in Phase I).	R407.1 wood columns shall be protected against decay as set forth in Section R323 (Protection Against Decay). Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Remove cultured stone veneer. Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Install new cultured stone veneer to match existing style and color. All repairs to be performed in conjunction with other repairs per the CSE Scope of Repair Documents.
		91 (582)	2	Destructive Test	6/30/2010					
		6 (333)	1	Observation	7/9/2010					
	4b	24 (223)	1	Observation	11/9/2009	Cultured stone veneer installed in contact with top of concrete deck.	Damage observed to sheathing and wood framing. Damage observed to ceiling(s) beneath post(s). Damages included vertical patio framing, wood columns, wood floor framing and wood balcony subfloor (significant damage to floor trusses in Phase I).	R407.1 wood columns shall be protected against decay as set forth in Section R323 (Protection Against Decay). Nonpreservative treated wood structure used for columns (does not conform with contract documents which requires cast concrete structural columns). Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Remove cultured stone veneer. Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Install new cultured stone veneer to match existing style and color. All repairs to be performed in conjunction with other repairs per the CSE Scope of Repair Documents.
		35 (420)	1	Destructive Test	7/2/2010					
		76 (552)	2	Observation	7/1/2010	Cultured stone veneer installed in contact with top of concrete deck.	Damage observed to sheathing and wood framing. Damage observed to ceiling(s) beneath post(s). Damages included vertical patio framing, wood columns, wood floor framing and wood balcony subfloor (significant damage to floor trusses in Phase I).	R407.1 wood columns shall be protected against decay as set forth in Section R323 (Protection Against Decay). Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Remove cultured stone veneer. Repair and/or replace all damaged wall sheathing and wall framing as required. All damaged framing is to be reviewed by CSE. CSE will determine repairs to the framing on a case by case basis. Install new cultured stone veneer to match existing style and color. All repairs to be performed in conjunction with other repairs per the CSE Scope of Repair Documents.
[5]	H	25 (225)	1	Observation	11/5/2010					
		33 (416)	1	Observation	7/2/2010	Cultured stone veneer applied in hanging horizontal location.	Stone vulnerable to dislodging from horizontal surface causing property damage and/or injury.	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Not installed according to Manufacturer's Installation Instructions: Owens Corning Cultured Stone, "Best Practices for Flashing Details."	Remove cultured stone veneer applied in hanging horizontal location. Provide new hard coat stucco properly integrated with adjacent materials.
		76 (552)	2	Observation	7/1/2010					
I	Electrical	32 (414)	1	Emergency Repair	3/25/2010					
		73 (546)	2	Observation	10/7/2009	No exterior electrical box at exterior outlet; outlet installed in wood blocking.	Not code compliant. Potential of electrical shock or fire damage / loss of life.	E3902.9 Wet locations. Where a receptacle is installed in a wet location and where the product intended to be plugged into it is not attended while in use, the receptacle shall have an enclosure that is weatherproof both when the attachment cap plug is inserted and when it is removed. Where a receptacle is installed in a wet location and where the product intended to be plugged into it will be attended while in use, the receptacle shall have an enclosure that is weatherproof when the attachment plug is removed.	E3902.9 Wet locations. Where a receptacle is installed in a wet location and where the product intended to be plugged into it is not attended while in use, the receptacle shall have an enclosure that is weatherproof both when the attachment cap plug is inserted and when it is removed. Where a receptacle is installed in a wet location and where the product intended to be plugged into it will be attended while in use, the receptacle shall have an enclosure that is weatherproof when the attachment plug is removed.	Remove/reinstall existing exterior electrical outlets as required. Reinstall per applicable building code and in accordance with the cultured stone veneer manufacturer's installation instructions, as applicable.
		81 (562)	2	Observation	6/30/2010					

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No.: 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.....Appellant,

v.

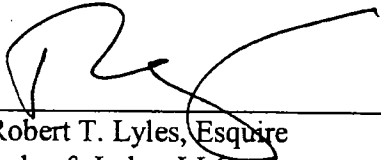
IMK DEVELOPMENT CO., LLC, KEOWEE TOWNHOUSES, LLC, LUDWIG CORPORATION, LLC, SDI FUNDING, LLC, MEDALLION AT KEOWEE, LLC, BRADFORD D. SECKINGER, JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, M GROUP CONSTRUCTION AND DEVELOPMENT, LLC, BOSTIC BROTHERS 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, AMBRÓSIO 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,

Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on January 9, 2013, addressed to Respondent's attorneys of record, Charles F. Turner, Jr., Esquire, 200 East Broad Street, Suite 250, Greenville, S.C. 29601, Bradford W. Cranshaw, Esquire and Danielle F. Payne, Esquire, Post Office Box 2823, Columbia, S.C. 29202, and J. Victor McDade, Esquire, Post Office Box 2125, Anderson, S.C. 29622.

January 9, 2013



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