

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

S.C. Supreme Court

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No. 2013-001404

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

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

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

And Builders First Source-Southeast Group, Southern Concrete Specialties, Inc., Clear View Construction, LLC and Michael Franz are the Respondents,

Bostic Construction, Inc., Third Party Plaintiffs,

v.

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

RECORD ON APPEAL
Volume III of IV

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., et al

☐ Plaintiff

v.

Imk Development Co., LLC, et al

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-37-0652

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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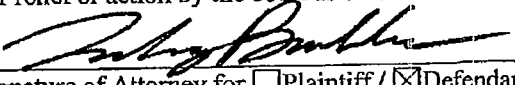
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- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information	
Nature of Motion: Motion for Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes	
Estimated Time Needed: 15 min Court Reporter Needed: ☒ YES / ☒ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order	
I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant	August 24, 2012 Date submitted
SECTION III: Motion Fee	
☒ PAID – AMOUNT: \$25.00 ☐ EXEMPT: (check reason)	
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, 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 OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
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PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

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

**DEFENDANTS CLEAR VIEW
CONSTRUCTION LLC AND MICHAEL
FRANZ'S MOTION FOR SUMMARY
JUDGMENT AS TO THE CROSS-
CLAIMS OF MARICK HOME
BUILDERS, LLC AND RICK THOENNES**

August 24, 2012

By:



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CERTIFICATE OF SERVICE

I hereby certify that I have this date, electronically mailed a true and correct copy of Clear View Construction, LLC and Michael Franz's Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Tick Thoennes to the following counsel of record:

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This 24th day of August, 2012
Spartanburg, SC

By: Lindsey K. Demirjian
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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,)
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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,)
HUTCHINSON CONSTRUCTION, INC., CARL)
CATOE CONSTRUCTION, INC., T.G.)
CONSTRUCTION, LLC, DELFINO)
CONSTRUCTION, FRANCISCO JAVIER ZARATE)
D/B/A ZARATE CONSTRUCTION, ALEJANDRO)

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

**DEFENDANTS CLEAR VIEW
CONSTRUCTION LLC AND MICHAEL
FRANZ'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
AS TO THE CROSS-CLAIMS OF
MARICK HOME BUILDERS, LLC AND
RICK THOENNES**

Defendants,

RELEVANT BACKGROUND FACTS

A. Stoneledge Background

2

defendant Bostic Brothers Construction. Phase II of Stoneledge consists of units numbered 41-43 and 55-94 and was constructed by general contractor defendant Marick, which is the subject of this motion.

B. CVC Defendants Background

Clear View was a limited liability company dissolved on March 10, 2009, as recorded in the South Carolina Secretary of State's Business Filings database. Michael Franz was a member of Clear View prior to dissolution and termination. Clear View provided services related to the stonework for certain townhomes located in Phase II of Stoneledge. (See CVC Defendants Answer to Medallion Cross-Claims ¶ 105.) Clear View performed no work on the construction of Phase I of Stoneledge. (See Marick's Responses to CVC Defendants' Requests for Admission) (Attached hereto as Exhibit 1.) Clear View acted as a stone mason subcontractor for Marick on the project during the general time period of July 2006 through August 2007, as evidenced by the copies of Clear View Invoices. (Invoices from Marick's Project File are attached hereto as Exhibit 2.) No evidence has been produced to date that Michael Franz performed any stone installation at Stoneledge, either in his individual capacity or in furtherance of Clear View's services on the project.

C. Plaintiffs' Claims Against CVC Defendants and Marick Defendants

Plaintiffs are the Stoneledge at Lake Keowee Owners' Association, Inc., ("Stoneledge HOA") and individual owners of townhomes located at Stoneledge. (See Plaintiffs' Third Am. Compl. ¶ 1-3.) Plaintiffs originally brought suit on May 29, 2009, and through subsequent amendments have added alleged developers, design professionals, contractors, and subcontractors and other entities that played a part in the development and construction of Stoneledge, including Marick Defendants and CVC Defendants, the parties to the present motion

before the Court. (*See Id* at ¶ 18-19, 25-26.) Plaintiffs allege that the townhomes at Stoneledge have construction and design defects leading to water intrusion which has damaged and deteriorated the building components of the units (*See* Plaintiffs' Third Am. Compl ¶ 62.)

UNDISPUTED MATERIAL FACTS

D. Marick Defendants' Cross-Claims against CVC Defendants

Marick Defendants assert claims for styled equitable indemnity, breach of contract, negligence, and breach of warranty against CVC Defendants. (*See* Marick Defendants' Answer to the Third Amended Complaint ¶¶ 134-174.) Despite the individual styling of these four defenses as separate cross-claims, the only damages Marick Defendants seek arise from their involvement in this litigation. (*See* Marick Defendants' Answer to the Third Amended Complaint ¶¶ 158, 162, 169-170, and 174.)

E. Marick Defendants' Fault

Marick Defendants engaged professional engineer Randy Still to assess construction issues at Stoneledge. In his capacity as Marick's retained expert, Still admitted that Marick, as the general contractor, bears the overall responsibility for the construction of Stoneledge.¹ (*See* R. Still Dep. pp. 87:3-7.) (Pertinent pages of R. Still's depositions are attached hereto as Exhibit 3.) Still further admitted that in least in some areas of construction, as the general contractor on the project, Marick violated the applicable building code. (*See* R. Still Dep. pp. 89:4-11.) Moreover Rick Thoennes, Marick's corporate designee, testified that Marick was the permit holder for Phase II of Stoneledge, and therefore is the party responsible for compliance with the building code. (*See* R. Thoennes Dep. pp. 81:2-4.) (Pertinent pages of R. Thoennes' deposition are attached hereto as Exhibit 4.)

CVC Defendants' retained professional engineer J. Drew Wilkie also testified to the general contractor's overall responsibility for the project and for coordinating the work of subcontractors. (*See* D. Wilkie Dep. pp. 205:2-206:1.) (Pertinent pages of D. Wilkie's deposition are attached hereto as Exhibit 6.)

Lastly, the nature of alleged construction defects in this matter show that Marick cannot be without fault given the general contractor's duty to coordinate the work of subcontractors and ensure at least to the extent construction defects are visible or obvious during construction that they are repaired. There are allegations of missing flashing, weep screeds, and visible framing underlying veneer material that a general contractor would be responsible for remedying or at least bringing to the attention of the appropriate subcontractor.

STANDARD OF REVIEW

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. In deciding a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party; however, a court "cannot ignore facts unfavorable to that party and [it] must determine whether a ruling for the party opposing the motion would be reasonable under the facts of the case." *Bloom v. Ravoria*, 399 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by "pointing out to the court that there is an absence of evidence to support the nonmoving party's case." *Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

A party opposing a Motion for Summary Judgment “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing there is a genuine issue for trial.” Rule 56(e), SCRCF. “The purpose of summary judgment is to expedite the resolution of cases that do not require a fact finder.” *Shirley's Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 5 (Ct. App. 2010).

LEGAL ANALYSIS AND ARGUMENT

I. THE CROSS CLAIMS ASSERTED BY MARICK DEFENDANTS ARE ALL CLAIMS FOR INDEMNITY

The Court should not regard Marick Defendants’ cross-claims against CVC Defendants for breach of contract, breach of warranty, and negligence as separate claims, but as claims for equitable indemnity. All of Marick Defendants’ cross-claims are claims equitable indemnity because of potential damages claims, regardless of how they are styled. “Indemnity is that form of compensation in which a first party [CVC Defendants] is liable to pay a second party [Marick Defendants] for a loss or damage the second party [Marick] incurs to a third party [Plaintiffs].” *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)).

Although Marick Defendants have styled their cross-claims as four separate causes of action, it is the allegations and remedies sought that determines the character of the action. *See State v. Yelsen Land Co.*, 257 S.C. 401, 403 (1972). “The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited.” *Winn v. Grantham*, 263 S.C. 368, 372, 210 S.E.2d 602, 604 (quoting 210 *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919)). As

noted above, Marick Defendants' cross-claims claim damages stemming directly from the potential damages they could face if found liable for Plaintiffs' allegations against them. This is the precise nature of a claim for indemnification, thus all of Marick Defendants' cross-claims are for equitable indemnity.

II. CVC DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON MARICK DEFENDANTS CROSS-CLAIMS FOR EQUITABLE INDEMNITY

A. Marick is Not Without Fault

CVC Defendants are entitled to summary judgment on Marick Defendants' equitable indemnity claims because Marick cannot be adjudged without fault. The most important element of an equitable indemnity action is that the party seeking indemnification must be without fault. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992); *Stuck v. Pioneer Loggins Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Marick was the general contractor and permit holder for Phase II construction at Stoneledge. The party pulling a permit is ultimately responsible for compliance with the building code. Marick's own expert Randy Still confirmed both that in some areas of construction Marick violated the building code and that Marick has responsibility for construction of the project. Because Marick was the permit holder for Phase II construction, it violated the building code, and is ultimately responsible for construction, it cannot be adjudged without fault, and thus its claims for equitable indemnity must fail.

B. No Special Relationship

The lack of special relationship acts as a further bar to Rick Thoennes' claim against both Clear View and Michael Franz. Likewise, there is no special relationship to support Marick's claim against Michael Franz. "Equitable indemnity is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (internal citations omitted). For there to be an equitable indemnification between two parties, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." *See Id* at 390, 237.

There has been no evidence produced that Michael Franz performed any stonework or other construction related activities at Stoneledge, therefore there is no subcontractor relationship or otherwise with Marick or Rick Thoennes. Likewise Clear View did not act as a subcontractor for Rick Thoennes, but for Marick. Clear View's subcontractor relationship with Marick is the only relationship between the parties to this motion that can sustain a claim of equitable indemnity, and Marick's claim fails because Marick cannot be adjudged to be without fault.

III. POTENTIAL CLAIMS BY MARICK DEFENDANTS FOR CONTRACTUAL INDEMNITY

Although not plead, should Marick argue that it is entitled to contractual indemnity from CVC Defendants, this claim must also fail. Clear View's subcontractor agreement with Marick is not specific and does not reference Stoneledge. The subcontractor agreement also postdates all work performed by Clear View at Stoneledge.

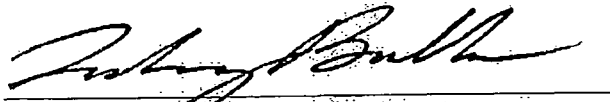
CVC Defendants also specifically adopt the arguments of defendants Carl Catoe Construction, Inc., and Builders FirstSource Southeast Group, LLC in regard to potential claims for contractual indemnity.

CONCLUSION

Based on the foregoing undisputed facts, legal authority and arguments, CVC Defendants respectfully request that this Court grant their motion for summary judgment.

August 31, 2012

By:



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127 Dunbar Street, Suite 200
Spartanburg, SC 29306
(864) 591-1113

Attorneys for Defendant Clear View Construction,
LLC and Michael Franz.

EXHIBIT 1

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

DEFENDANT MARICK HOME
BUILDERS, LLC'S RESPONSES TO
DEFENDANTS CLEAR VIEW
CONSTRUCTION LLC AND MICHAEL
FRANZ'S REQUESTS FOR ADMISSION

AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,)
 MARTIN HERNANDEZ-AVILES, FRANCISCO)
 VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-)
 RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
 CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
 SOUTHERN BASEMENTS, INC., MJG)
 CONSTRUCTION AND HOMEBUILDERS, INC.)
 D/B/A MJG CONSTRUCTION, KMAC, INC.,)
 D/B/A KMAC NORTH CAROLINA, EUFACIO)
 GARCIA, EVERADO JARMAMILLO, GARCIA)
 PARRA INSULATION, INC., J&J CONSTRUCTION,)
 JOSE NINO, JOSE MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT MORALES)
 D/B/A MORALES MASONRY, MILLER/PLAYER &)
 ASSOCIATES,)

Defendants,

COMES NOW the Defendant Marick Home Builders, LLC, by and through its undersigned counsel, who responds to the Defendants Clear View Construction, LLC and Michael Franz's First Requests to Admit to Defendant Marick Home Builders, LLC (hereinafter "Marick") as follows:

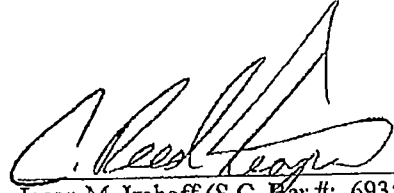
REQUESTS FOR ADMISSION

1. Admit that Clear View Defendants performed no construction related services on any townhome during Phase I of the Stoneledge at Lake Keowee project.

RESPONSE: Upon information and belief, it is admitted that Clear View Defendants did not perform construction related services during original construction for Marick on phase I at the Stoneledge at Lake Keowee project. However, Marick can neither admit nor deny whether Clear View Defendants performed repair work on phase I or original construction at phase I for entities other than Marick.

2. If you deny this request to admit, identify the factual basis for your denial and any documents, witnesses, or statements supporting your denial.

RESPONSE: N/A.



Jason M. Imhoff (S.C. Bar #: 69355)

C. Reed Teague (S.C. Bar #: 79933)

The Ward Law Firm, P.A.

PO Box 5663

Spartanburg, SC 29304

(864) 582-3075

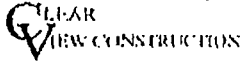
(864) 585-3090

jimhoff@wardfirm.com

rteague@wardfirm.com

June 28 2012
Spartanburg, South Carolina

EXHIBIT 2



121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

INVOICE STONE WORK SERVICES

INVOICE #100
DATE: AUG 7, 2006
FOR: STONELEDGE AT KEOWEE BUILDING # 20

(DRAW #1)

Draw	DESCRIPTION	PAY	AMOUNT
1	INSTALL STONE ON EXTERIOR OF BUILDING	\$4.75 SQFT * 8400sqft =	\$39,900.00
	Requested amount to be drawn every 2 weeks broken into 3 equal payments or six weeks to complete, per rick and mikes agreement.		\$13,300.00
	Balance Due		\$26,600.00
TOTAL			\$13,300.00

Make all checks payable to Clear-View Construction

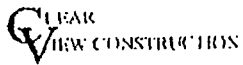
Thank you for your business!

APPROVED
8/11/06

Marick 009998

08-07-2006 04:58

PAGE1



121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29601
(864) 232-5555

INVOICE STONE WORK SERVICES

INVOICE #100
DATE: AUG 7, 2006
FOR: STONELEDGE AT KROWE BUILDING # 19

(DRAW #1)

Draw	DESCRIPTION	PAY	AMOUNT
1	INSTALL STONE ON EXTERIOR OF BUILDING	\$4.75 SQFT * 0600 sqft =	\$40,850.00
	Requested amount to be drawn every 2 weeks broken into 3 equal payments or six weeks to complete, per risk and mikes agreement.		\$13,616.67
	Balance Due		\$27,233.33
		TOTAL	\$13,616.67

Make all checks payable to Clear-View Construction

Thank you for your business!

SENT

8-7-06

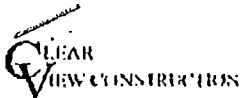
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Marick 009999

000677

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CHUCK



121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

INVOICE STONE WORK SERVICES

INVOICE #101
DATE: AUG 21, 2006
FOR: STONELEDGE AT KEOWEE BUILDING # 19

(DRAW #2)

DRAW	DESCRIPTION	PAY	AMOUNT
2	INSTALL STONE ON EXTERIOR OF BUILDING	\$4.75 SQFT * 8600 sqft =	\$40,850.00
	PAID -- DRAW # 1		\$13,616.67 ✓
	Requested amount to be drawn every 2 weeks broken into 3 equal payments or six weeks to complete, per Rick and Mike's agreement.		\$13,616.67
	Balance Due		\$13,616.67
	DRAW # 2	TOTAL	\$13,616.67 ✓

Make all checks payable to Clear-View Construction

APPROVED

Thank you for your business!

Units * 75-90

SENT

8-21-06

Marick 010297

000678

INVOICE

Vendor: ClearView
 Address: _____
 Phone(s): _____
 Federal ID# SSN: _____

DATE: 9/2/06
 INVOICE#:

Job Information

Billing Information

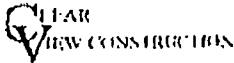
Subdivision: <u>Stoneledge</u>	Name: <u>Marick Home Builders</u>
Lot: _____	Address: <u>501 Brixton Circle</u>
Name: <u>Bldg 20</u>	<u>Simpsonville, SC 29681</u>
	Phone: <u>864.232.5555</u>
	Fax: <u>864.232.5504</u>

DATE	TOTAL CONTRACT (break down):
	<u>Stone Labor</u>
	TOTAL <u>39,900</u>

Previously paid:	\$ <u>26,600</u>
Payment requested today:	\$ <u>13,300</u>
Total of today & previous:	\$ <u>39,900</u>
Balance remaining	\$ <u>0</u>

08-27-2006 06:38

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121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

INVOICE STONE WORK SERVICES

INVOICE #101
DATE: AUG 21, 2006
FOR: STONELEDGE AT KHOWEE BUILDING # 20

(DRAW #2)

Draw	DESCRIPTION	PAY	AMOUNT
2	INSTALL STONE ON EXTERIOR OF BUILDING	\$4.75 SQFT * 8400sqft =	\$39,900.00
	PAID - DRAW # 1		\$13,300.00
	Requested amount to be drawn every 2 weeks broken into 3 equal payments or six weeks to complete, per Rick and Mike's agreement.		\$13,300.00
	Balance Due		\$13,300.00
	DRAW # 2	TOTAL	\$13,300.00

Make all checks payable to Clear-View Construction

Stone Labor
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Thank you for your business!

SENT

8-21-06

APPROVED

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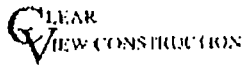
DUE - 10/10/06

Marick 010663

000680

10-16-2006 09:16

PH022



121 Clearview Drive
Greer, SC 29651
Phone (864) 320-4135

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

INVOICE STONE WORK SERVICES

INVOICE # 100
DATE: OCT 16, 2006
FOR: STONELEDGE AT KEOWEE BUILDING #23

(DRAW#1)

Draw	DESCRIPTION	PAY	AMOUNT
#1	INSTALL STONE ON EXTERIOR OF BUILDING	\$4.75 SQFT * 1372 sqft =	\$6517.00
	Requested amount to be drawn every 2 weeks broken into 3 equal payments or six weeks to complete, per rick and mikas agreement.		\$6517.00
	Balance Due AFTER FINAL MEASUREMENT STEPS, GARAGE ECT.		
TOTAL			\$6517.00

Make all checks payable to Clear-View Construction

Thank you for your business!

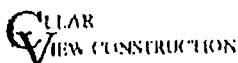
[Stamp: PAID]
i- 5/10/12 labor
j- Stoneledge units 92
93
94
date - 10/27/06

Marick 010852

000682

11-27-2006 06:15

PAGE 1



121 Clearview Drive
Greer, SC 29651
Phone (864) 920-4139

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(804) 232-5555

INVOICE
STONE WORK SERVICES

INVOICE #200
DATE: NOV 15, 2006
FOR: STONELEDGE AT KROWE BUILDING #18,19,20
FINAL SQ FT ADJUSTMENTS AFTER NATHAN MEASURED

[illegible]

PAGE 1

RECEIVED
DEC 26 2006

INVOICE
STONE WORK SERVICES

FOR: STONLEDGE CLUBHOUSE

TO:
Marick Home Builders
501 Brixton Circle
Simpsonville, SC 29681
(864) 232-5555

(DRAW #1)

[illegible]

Make all checks payable to Clear-View Construction

Thank you for your business!

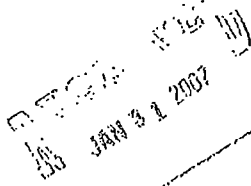
our business!

Frame
Foundation

Marick 012046

000684

PAGE 1



INVOICE
STONE WORK SERVICES

FOR: STONELEDGE AT KEOWEE GARAGE #18

(DRAW#1)

Make all checks payable to Clear-View Construction

Thank you for your business!

Thanks

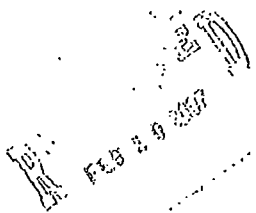
APPROVED

43 UNIT 3

175-GL (.690) * 6.50

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INVOICE
STONE WORK SERVICES

FOR: STONELEDGE

INVOICE 0107
DATE: FEB 19, 2007

(DRAW #7)

Make all checks payable to Clear-View Construction

43 units



170. GL (.690)⁵ 46.26

000688

PAGE 1

INVOICE

STONE WORK SERVICES

FOR: STONELEDGE

(DRAW #4)

Make all checks payable to Clear-View Construction

RECEIVED
MAR 23 2007

INSURANCE CO. (INC) - 12.99

Marick 013532

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Wrote 15-80

Make all checks payable to Clear-View Construction

11-1-06

Thank you for your business!

RECEIVED
MAR 23 2007

Southern Concrete -
Refund of credit previously
with-held

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EXHIBIT 3

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee

Owners' Association, et.al.,

Plaintiffs,

vs.

IMK Development Company, Inc.

Keowee Townhouses, LLC,

Ludwig Corporation, LLC,

SDI Funding, LLC, Medallion

At Keowee, LLC, Integrys

Keowee Development, LLC,

Marick Home Builders, LLC,

Bostic Brothers Construction,

Miller/Player & Associates,

et. al.

Defendants.

Deposition of RANDY STILL

Pursuant to notice, a deposition was taken in the
above case on the August 15, 2012 commencing at
approximately 10:20 a.m. attended by counsel as follows:

DEPOSITIONS AND __, INC.
(864) 585-0642

000694

1 A. I think it would be advisable for him to do that,
2 yes.

3 Q. Would you agree with me that the general
4 contractor's role on a construction project like
5 Stoneledge is the overall responsibility for the
6 construction of the entire project?

7 A. Yes.

8 Q. Since your last deposition have you reviewed or have
9 you developed any opinions about sufficiency of the
10 plans and specifications that were provided to
11 Marick Home Builders by Miller/Player?

12 A. I have looked at the plans. I haven't spent a lot
13 of time looking at them. They don't have an
14 enormous amount of detail to them.

15 Q. But do you have an opinion as to whether or not the
16 plans as provided by Miller/Player were sufficient?

17 BY MR. ORR:

18 Object to the form.

19 WITNESS ANSWERS:

20 A. I hesitate on that because you're asking me to opine
21 on the duty of an architect to prepare plans. As an
22 engineer I'm not sure I can do that. I can tell you
23 that there are details that I would've liked to have
24 seen in those plans that would've clarified areas.

25 Q. But you don't have any opinions about whether or not

1 conditions that you observed in Phase II among the
2 Marick Home Builders' subcontractors?

3 A. No.

4 Q. Do you acknowledge that at least in some respects
5 that we have discussed today as the general
6 contractor on the project, Marick Home Builders
7 violated the applicable building code?

8 A. I would agree with you that there are components
9 that have sustained damage at those isolated areas
10 we've talked about that now appear to be a code
11 violation because of failure.

12 Q. In other words, the fact that damage has occurred
13 indicates that the code has been violated?

14 A. At least in part. Some of it may be -- like we
15 talked about that stone that rolled out. You can't
16 isolate on the edge of the deck between the lack of
17 sealing that joint or maintaining that joint to the
18 contribution of what that would cause versus what
19 would come across the membrane, for example. We
20 haven't talked about those type issues. You can't
21 segregate that.

22 Q. What type issues haven't we talked about?

23 A. Maintenance. I mean, if the homeowner -- there is
24 some maintenance that's required and I have not
25 tried to go into that, but the issue we just talked

1 construction, the contractor and subcontractors to,
2 in broad scope do their job. But one of the
3 problems is nobody can certify that.

4 Q. Absent a ---

5 A. Tear it down and start over.

6 Q. Do you know of any reason why the owners of these
7 Stoneledge units should assume risk of code
8 non-compliance in their property?

9 A. I think they did the day they bought it. I think
10 you do in everything you do.

11 Q. So the risk was the assumption of that the -- as you
12 say the code officials, the design professionals,
13 the contractors and subcontractors, were going to in
14 broad strokes do what they were supposed to do?

15 A. Absolutely.

16 Q. And we know that not to be the case?

17 BY MS. LANG:

18 Object to the form.

19 BY MR. IMHOFF:

20 Object to form.

21 BY MR. ROOT:

22 Object to form.

23 WITNESS ANSWERS:

24 A. At least in isolated areas that's true.

25 Q. And the areas that we don't know about are areas

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,

6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.

9 Keowee Townhouses, LLC,

10 Ludwig Corporation, LLC,

11 SDI Funding, LLC, Medallion

12 At Keowee, LLC, Integrys

13 Keowee Development, LLC,

14 Marick Home Builders, LLC,

15 Bostic Brothers Construction,

16 Miller/Player & Associates,

17 et. al.

18 Defendants.

19

20 Certificate

21 This is to certify that the foregoing deposition of
22 RANDY STILL was taken by the within court reporter, a
23 notary public for the state of South Carolina, duly
24 commissioned and qualified as such, on August 15, 2012
25 at Womble, Carlyle, Sandridge & Rice, 550 South Main

1 Street, Suite 400, Greenville, South Carolina.

2 That the deponent was duly placed under oath and
3 admonished to speak the whole truth; that the oral
4 deposition was duly taken and transcribed as to the
5 questions propounded and the answers given; that the
6 foregoing 190 pages is a true, accurate, and correct
7 record of the testimony given by the deponent; together
8 with such changes as said deponent may have made, if
9 any, during the reading over and signing procedure.

10 That the court reporter has retained the original
11 deposition in its possession for the purpose of sealing
12 and filing same with the proper official.

13 That all offered exhibits, stipulations and
14 objections, if any, involved in this cause are duly
15 attached or included herein.

16 In witness whereof, I have set my hand and official
17 seal.

18

19 Date: 8-18-12

20

21 _____
22 Joanne S. Quebe, Court Reporter
23 Notary Public for South Carolina
24 My Commission Expires 12-7-21

25

EXHIBIT 4

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee

Owners' Association, et.al.,

Plaintiffs,

vs.

SDI Funding, LLC, Ludwig
Corporation, LLC, et.al.,

_____ Defendants, _____

Marick Home Builders, LLC,

Third-Party Plaintiff,

vs.

Michael Franz, Clearview
Construction, et. al.

_____ Third-Party Defendants,

Builders FirstSource-SE Group,

Fourth-Party Plaintiff,

vs.

Carl Catoe Construction, Inc.,

Fourth-Party Defendant. _____

DEPOSITION of FREDERICK (RICK) R. THOENNES

Pursuant to notice, a deposition was taken in the
above case on the November 21, 2011, commencing at
approximately 10:10 a.m. attended by counsel as follows:

1 A. The one-year warranty.

2 Q. Did Marick pull the building permits for all of the
3 Phase II units?

4 A. Yes.

5 Q. And did Marick complete the construction of all of
6 the Phase II units?

7 A. No.

8 Q. What units did Marick not complete?

9 A. I couldn't tell you the specific units.

10 Q. Do you know how many of the Phase II units?

11 A. I don't. I would -- no, I don't.

12 Q. Did Marick apply the siding and stone to all of the
13 Phase II units?

14 A. Yes. Well, our subcontractors did.

15 Q. Subcontractors did. And set the windows and doors
16 for the Phase II units?

17 A. Correct.

18 Q. And put the roof on and the shingles in Phase II
19 units?

20 A. We did all of the construction on Phase II up until
21 the time we sold them to SDI.

22 Q. But the exterior of the units, the building
23 envelopes were completed by Marick or its
24 subcontractors, or were there units that SDI had to
25 complete?

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3 Stoneledge at Lake Keowee
4 Owners' Association, et.al.,
5 Plaintiffs,

6 vs.

7 SDI Funding, LLC, Ludwig
8 Corporation, LLC, et.al.,

9 _____ Defendants, _____

10 Marick Home Builders, LLC,
11 Third-Party Plaintiff,

12 vs.

13 Michael Franz, Clearview
14 Construction, et. al.

15 _____ Third-Party Defendants,
16 Builders FirstSource-SE Group,
17 Fourth-Party Plaintiff,

18 vs.

19 Carl Catoe Construction, Inc.,
20 Fourth-Party Defendant.

21

22 Certificate

23 This is to certify that the foregoing deposition of
24 FREDERICK (RICK) THOENNES was taken by the within court
25 reporter, a notary public for the state of South

1 Carolina, duly commissioned and qualified as such, on
2 November 21, 2011 at Womble, Carlyle, Standbridge &
3 Rice, 550 South Main Street, Suite 400, Greenville,
4 South Carolina.

5 That the deponent was duly placed under oath and
6 admonished to speak the whole truth; that the oral
7 deposition was duly taken and transcribed as to the
8 questions propounded and the answers given; that the
9 foregoing 245 pages is a true, accurate, and correct
10 record of the testimony given by the deponent; together
11 with such changes as said deponent may have made, if
12 any, during the reading over and signing procedure.

13 That the court reporter has retained the original
14 deposition in its possession for the purpose of sealing
15 and filing same with the proper official.

16 That all offered exhibits, stipulations and
17 objections, if any, involved in this cause are duly
18 attached or included herein.

19 In witness whereof, I have set my hand and official
20 seal.

21

22 Date: 11-30-11

23

24 _____
Joanne S. Quebe, Court Reporter
25 Notary Public for South Carolina

EXHIBIT 5

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

Deposition of J. DREW WILKIE

Pursuant to notice, a deposition was taken in the
above case on the August 16, 2012 commencing at
approximately 10:12 a.m. attended by counsel as follows:

DEPOSITIONS AND __, INC.
(864) 585-0642

000706

1 A. That's my opinion, yes.

2 Q. And in that situation where the general contractor
3 has pulled the permit for the project, hired all the
4 subs, the general contractor has the ultimate
5 responsibility for the project; correct?

6 A. That's my opinion.

7 Q. Within that framework would the general contractor
8 have ultimate responsibility for the selection of
9 materials?

10 A. No, because the selection of materials would be
11 guided in part by the contents of the plan.

12 Q. Right.

13 A. So if the plans call out enough detail about what
14 materials it takes to build that project the general
15 contractor would at least need to follow that. If
16 they deviate from that then that's another area
17 where they're on their own.

18 Q. Right. Would the general contractor under that
19 framework have ultimate responsibility for
20 coordinating the work of the subcontractors?

21 BY MR. IMHOFF:

22 Object to form.

23 WITNESS ANSWERS:

24 A. I think that the general contractor who hires
25 subcontractors is responsible for coordinating their

1 work.

2 Q. I don't think I have any other questions for you. I
3 appreciate it.

4 EXAMINATION BY MR. ORR:

5 Q. Mr. Wilkie, my name is Larry Orr. I represent
6 Miller/Player & Associates in this case. I
7 understand you are not going to offer any opinions
8 on the standard of care of an architect or deviation
9 from the standard of care on the part of the
10 architect in this case?

11 A. That's correct.

12 Q. Thank you, sir. That's all I have.

13 EXAMINATION BY MR. GRAYSON SMITH (via telephone):

14 Q. This is Grayson Smith with Hutch N Son. Just
15 briefly -- can y'all hear me okay?

16 BY MR. IMHOFF:

17 Yes.

18 EXAMINATION RESUMED BY MR. SMITH:

19 Q. Is there a requirement that the stone must not
20 extend below grade?

21 BY MS. NICHOLS:

22 Did you hear that?

23 BY THE WITNESS:

24 I did hear the question.

25 WITNESS ANSWERS:

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3

4 Stoneledge at Lake Keowee

5 Owners' Association, et.al.,

6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.

9 Keowee Townhouses, LLC,

10 Ludwig Corporation, LLC,

11 SDI Funding, LLC, Medallion

12 At Keowee, LLC, Integrys

13 Keowee Development, LLC,

14 Marick Home Builders, LLC,

15 Bostic Brothers Construction,

16 Miller/Player & Associates,

17 et. al.

18 Defendants.

19

20 Certificate

21 This is to certify that the foregoing deposition of
22 J. DREW WILKIE was taken by the within court reporter, a
23 notary public for the state of South Carolina, duly
24 commissioned and qualified as such, on August 16, 2012
25 at Womble, Carlyle, Sandridge & Rice, 550 South Main

1 Street, Suite 400, Greenville, South Carolina.

2 That the deponent was duly placed under oath and
3 admonished to speak the whole truth; that the oral
4 deposition was duly taken and transcribed as to the
5 questions propounded and the answers given; that the
6 foregoing 213 pages is a true, accurate, and correct
7 record of the testimony given by the deponent; together
8 with such changes as said deponent may have made, if
9 any, during the reading over and signing procedure.

10 That the court reporter has retained the original
11 deposition in its possession for the purpose of sealing
12 and filing same with the proper official.

13 That all offered exhibits, stipulations and
14 objections, if any, involved in this cause are duly
15 attached or included herein.

16 In witness whereof, I have set my hand and official
17 seal.

18

19 Date: 8-19-12

20

21 _____
22 Joanne S. Quebe, Court Reporter
23 Notary Public for South Carolina
24 My Commission Expires 12-7-21
25

CERTIFICATE OF SERVICE

I hereby certify that I have this date, electronically mailed a true and correct copy of *Clear View Construction, LLC and Michael Franz's Brief in Support of Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes* to the following counsel of record:

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Thoennes, III, and M Group Construction
& Development, LLC*

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Attorneys for Ludwig Corporation, LLC

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Post Office Box 908
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Attorney for Alejandro Avalos Cruz

This 31 day of August, 2012
Spartanburg, SC

By: 
Lindsay Builder, Esq.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

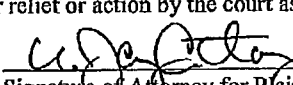
Stoneledge at Lake Keowee Owners' Association,
Inc., et al,
☐ Plaintiff

CASE NO. 2009-CP-37-0652

v.
IMK Development Co., LLC, et al

**MOTION INFORMATION FORM
AND COVER SHEET**

☒ Defendant Southern Concrete Specialties, Inc.
check box above indicating submitting party

name, S.C. Bar no. and address of plaintiff's attorney Robert T. Lyles, Jr. Catherine H. Bryan Lyles & Lyles, LLC Post Office Box 773 Charleston, SC 29402 Telephone: 843-577-7730 fax: 843-577-7172 Email: rtl@lylesfirm.com; chb@lylesfirm.com		name, S.C. Bar no. and address of defendant's attorney K. Jay Anthony, SC Bar # 77433 Elmore Goldsmith, PA Post Office Box 1887 Greenville, SC 29602 telephone: 864-255-9500 fax: 864-255-9505 email: janthony@elmoregoldsmith.com	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III) ☐ FORM MOTION, NO HEARING REQUESTED (complete Sections II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>SUMMARY JUDGMENT</u>		Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion – I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for Plaintiff/Defendant		<u>8/30/12</u> Date submitted	
SECTION III: Motion Fee			
☒ PAID – AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ Code: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		DATE FILED	

SCCA/233(1/2003)

000714

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

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

Plaintiffs,

vs.

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

C.A. NO: 2009-CP-37-00652

SOUTHERN CONCRETE
SPECIALTIES, INC.'S NOTICE OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT .

Construction and Homebuilders, Inc. d/b/a MJG)
Construction; KMAC Inc. d/b/a KMAC North)
Carolina; Everado Jaramillo; J&J Construction;)
Jose Nino; Jose Manuel Garcia; Eason)
Construction, Inc.; and Vincent Morales d/b/a)
Morales Masonry; Southern Stone, Inc. and Buck)
Smith Construction,)

Defendants.)
_____)

PLEASE TAKE NOTICE that Defendant Southern Concrete Specialties, Inc., by and through its undersigned counsel, will move before this Court, at a time and place to be designated by the Court, but no sooner than ten (10) days after the service hereof, for an Order granting Partial Summary Judgment to this Defendant pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

This Motion will be supported by the pleadings, depositions, legal memoranda and other Affidavits or other documentary evidence as may be timely filed and served, as well as the entire record herein. This motion is based on the common and statutory law of the State of South Carolina, and Rule 56 of the South Carolina Rules of Civil Procedure.

Respectfully submitted,

ELMORE GOLDSMITH

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Attorneys for Defendant Southern Concrete Specialties., Inc.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

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 Town-)
houses, LLC; Ludwig Corporation, LLC; SDI)
Funding, LLC; Medallion at Keowee, LLC;)
Integrays Keowee Development, LLC; Marick)
Home Builders, LLC; Bostic Brothers)
Construction, Inc.; Miller/Player & Associates;)
Bradford D. Seckinger; John Ludwig; William)
Cox; Larry D. Lollis; Rick Thoennes; M Group)
Construction and Development, LLC; Mel)
Morris; Joe Bostic; Jeff Bostic; Clear View)
Construction, LLC; Michael Franz; MHC)
Contractors; Miguel Porras Choncoas; Builders)
FirstSource Southeast Group; Mike Green;)
Southern Concrete Specialties, Inc.; Carl)
Compton d/b/a Compton Enterprize a/k/a)
Compton Enterprises; Gunter Heating and Air;)
All Pro Heating, A/C & Refrigeration, LLC;)
Coleman Waterproofing; Heyward Electrical)
Services, Inc.; Tinsley Electrical, LLC; Hutch N)
Son Construction, Inc.; Upstate Utilities, Inc.;)
Southern Basements, Inc.; Carl Catoe)
Construction, Inc.; T. G. Construction, LLC;)
Delfino Construction; Francisco Javier Zarate)
d/b/a Zarate Construction; Alejandro Avalos)
Cruz; Herberto Acros Hernandez; Martin)
Hernandez-Aviles; Francisco Villalobos Lopez;)
Ambrosio Martinez-Ramirez; Ester Moran)
Mentado; Socorro Castillo Montel; MJG)

C.A. NO: 2009-CP-37-00652

SOUTHERN CONCRETE
SPECIALTIES, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT.

Construction and Homebuilders, Inc. d/b/a MJG)
Construction; KMAC Inc. d/b/a KMAC North)
Carolina; Everado Jarmamillo; J&J Construction;)
Jose Nino; Jose Manuel Garcia; Eason)
Construction, Inc.; and Vincent Morales d/b/a)
Morales Masonry; Southern Stone, Inc. and Buck)
Smith Construction,)

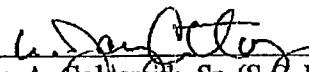
Defendants.)
_____)

TO: JASON IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS

Defendant Southern Concrete Specialties, Inc. (hereinafter "Southern Concrete") hereby moves this Court for Summary Judgment against the claims of Plaintiffs pursuant to Rule 56, SCRPC. As more fully explained in the memorandum, which will be provided at a later date, Southern Concrete states that Marick Home Builders is not entitled to equitable indemnity as it is not without fault in the matters giving rise to this litigation. Consequently, Southern Concrete is entitled to Summary Judgment as a matter of law on this claim.

Respectfully submitted,

ELMORE GOLDSMITH

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Stoneledge at Lake Keowee Owners' Association, et al v. IMK Development, et al
Case No.: 2009-CP-37-0652

**CERTIFICATE OF SERVICE
AS TO SOUTHERN CONCRETE SPECIALTIES, INC.'S
NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT**

I, Robin G. Smith, an employee of Elmore Goldsmith, PA, pursuant to Rule 5(b)(1) SCRPC and counsel's regular business practices, do hereby certify that I have this date, mailed a copy of SOUTHERN CONCRETE SPECIALTIES, INC.'S NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT and SOUTHERN CONCRETE SPECIALTIES, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT to Jason M. Imhoff, Attorney for Defendant Marick Home Builders, Inc., by United States Postal Service, First Class, postage pre-paid and affixed thereto and addressed as follows:

Jason M. Imhoff, Esquire
The Ward Firm, P.A.
Post Office Box 5663
Spartanburg, SC 29304

and electronically mailed a true and correct copy to counsel of record as follows:

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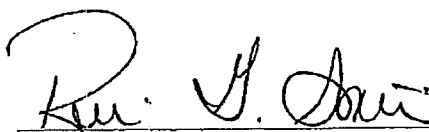
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Attorneys for KMAC, Inc. d/b/a KMAC North Carolina

Dated: August 30, 2012


ROBIN G. SMITH

STATE OF SOUTH CAROLINA

COMMON PLEAS
COUNTY OF OCONEE

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

Plaintiffs,

vs.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders FirstSource Southeast Group; Mike Green; Southern Concrete Specialties, Inc.; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating and Air; All Pro Heating, A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.;

IN THE COURT OF

C.A. NO: 2009-CP-37-00652

MEMORANDUM IN OPPOSITION TO
MARICK HOME BUILDERS, LLC'S
MOTION FOR SUMMARY
JUDGMENT AND IN FURTHER
SUPPORT OF BUILDERS FIRST
SOURCE SOUTHEAST GROUP,
SOUTHERN CONCRETE
SPECIALTIES, INC., AND CLEAR
VIEW CONSTRUCTION, LLC'S
MOTION FOR SUMMARY
JUDGEMENT AS TO THE CROSS
CLAIMS OF MARICK HOME
BUILDERS, LLC FOR BREACH OF
CONTRACT

Southern Basements, Inc.; Carl Catoe	)
Construction, Inc.; T. G. Construction, LLC;	)
Delfino Construction; Francisco Javier Zarate	)
d/b/a Zarate Construction; Alejandro Avalos	)
Cruz; Herberto Acros Hernandez; Martin	)
Hernandez-Aviles; Francisco Villalobos Lopez;	)
Ambrosio Martinez-Ramirez; Ester Moran	)
Mentado; Socorro Castillo Montel; MJG	)
Construction and Homebuilders, Inc. d/b/a MJG	)
Construction; KMAC Inc. d/b/a KMAC North	)
Carolina; Everado Jarmamillo; J&J Construction;	)
Jose Nino; Jose Manuel Garcia; Eason	)
Construction, Inc.; and Vincent Morales d/b/a	)
Morales Masonry; Southern Stone, Inc. and Buck	)
Smith Construction,	)
	)
Defendants.	)
	)

MEMORANDUM OF LAW

At the motions hearing held on September 5, 2012, Marick Home Builders, LLC (hereinafter "Marick") sought summary judgment against various parties including Builders First Source Southeast Group (hereinafter "Builders First Source"), Southern Concrete Specialties, Inc. (hereinafter "Southern Concrete"), and Clear View Construction, LLC (hereinafter "Clear View Construction") (hereinafter collectively "Defendants"). Marick's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims listed four cross-claims against all defendants: (1) Negligence, (2) Breach of Contract, (3) Breach of Warranties, and (4) Equitable Indemnity. Defendants were therefore surprised to find a claim for Contractual Indemnification listed in Marick's Motion for Summary Judgment.¹ As set forth more fully below, the Defendants submit

¹ Marick attempted to merge a claim for Contractual Indemnification with its cause of action for Breach of Contract, styling the claim as "Breach of Contract/Contractual Indemnification."

that Marick's claims for contractual indemnity must be dismissed or barred as a matter of law because (1) the claims were not properly pled; (2) to the extent Marick argues, outside of the pleadings, that it has contracts that contain indemnification provisions, it has offered no evidence that the contracts applied to the Stoneledge project or would be enforceable in this matter; and (3) such contracts were signed after work was completed and are not supported by consideration.

BACKGROUND

Stoneledge at Lake Keowee (hereinafter "the Project") is a community of townhomes located on Lake Keowee in Oconee County, South Carolina. The development was built in two phases. Phase I, which lies along the west bank of Lake Keowee, was built by Bostic Brothers Construction. Phase II was built on an adjacent peninsula and was constructed by Marick Home Builders in 2006 and 2007.

Marick hired a number of subcontractors to perform the work on Phase II, and among them Builders First Source, Southern Concrete, and Clear View Construction. The involvement of these Defendants was as follows:

- Builders First Source's scope of work was to perform framing work. Builders First Source completed its work by June 10, 2007.
- Southern Concrete's scope of work was to waterproof the foundation walls and pour and waterproof the elevated decks, as well as other flatwork. Southern Concrete performed its work on the foundation walls in May of 2006 through June of 2007.
- Clear View Construction's scope of work was to perform stonework on the Project. Clear View completed its stonework on Phase II townhomes no later than February of 2007. Invoices indicate Clear View performed some punch list work and provided

miscellaneous labor for work on the Clubhouse, but this work was completed no later than August 30, 2007.

In making its claim for contractual indemnity, Marick is presumably referencing a one-page document entitled "Agreement" and signed by representatives for each of the Defendants. These documents, attached as Exhibits A – C, provide in part "Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, and expenses and fees arising out of or resulting from performance of the Subcontractors." The "Agreements," which do not reference the Stoneledge Project, were each signed in October of 2007.

As noted, Marick's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims listed only four cross-claims against all defendants: (1) Negligence, (2) Breach of Contract, (3) Breach of Warranties, and (4) Equitable Indemnity. Marick asserted a claim for Contractual Indemnification listed in its Motion for Summary Judgment, attempting to fold a claim for Contractual Indemnity into the cause of action for Breach of Contract.

LAW

To obtain summary judgment, the moving party must demonstrate there is "no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCF. A trial court should grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

DISCUSSION

As shown below, Marick's claims for contractual indemnity must be dismissed or barred by summary judgment for the following reasons: (1) Marick failed to plead Contractual Indemnity, (2) Marick has failed to demonstrate that the Agreement relates to the Stoneledge Project, and (3) the Agreements are not supported by consideration.

I. Claim for Contractual Indemnity was not pled in Marick's Cross-Claims

Rule 8, SCRCF, provides that "[a] pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends . . . (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled."

Marick's Cross-Claims, as set forth in its Answer to the Plaintiffs' Third Amended Complaint:

- make no mention of Contractual Indemnity;
- make no mention of the Agreement; and
- make no allegation that any of the Defendants agreed to indemnify or hold harmless Marick.

The cause of action for Breach of Contract, into which Marick seeks to fold its claim for Contractual Indemnity, provides in pertinent part:

160. [Defendants] entered into a legally binding contract whereby Marick agreed to pay each contractor and subcontractor for furnishing appropriate and non-defective materials and work in each contractor's and subcontractor's specialty for Plaintiffs.
161. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for purpose of this defense and Cross Claim, contractors and subcontractors have provided defective materials or services in breach of their contracts with Marick.

162. If the Plaintiffs allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, said breach of contract has resulted or could result in damage to Plaintiff, which could or will be assessed against Marick.
163. If the Plaintiffs allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, each contractor or subcontractor breached the terms of its contract with Marick and Marick is informed and believes it is entitled to judgment against each contractor or subcontractor for actual damages, together with attorney's fees, and interest thereon.

Marick's Answer to Plaintiffs' Third Amended Answer, p. 25-26. These allegations provide no suggestion that they contain claims for Contractual Indemnity.

It is established in considering summary judgment, "the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." See Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). However, in the instant case, the facts supporting a claim for contractual indemnity are simply not alleged, and therefore no inferences can be drawn. In considering a motion to dismiss, the court must base its ruling solely on the allegations set forth in the complaint. See Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (S.C. 2007). Marick's Cross-Claims fail to comply with Rule 8, SCRPC, and fail to set forth even the most basic allegations which would suggest a claim for contractual indemnity. Consequently, any attempt by Marick to make such a claim must be barred.

II. Marick has not demonstrated that any written agreement relates to Stoneledge

As noted, Marick makes no mention of the "Agreement" with the various Defendants in its Cross-Claims. However, even if the Court finds that Marick sufficiently pleaded Contractual Indemnity, Marick has failed to show that the Agreement relates to the Stoneledge Project.

"It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms. See Edens v. Laurel

Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). Furthermore, the assent must be as to all of the terms of the contract. Id.

In the instant case, the Agreements each were signed after the Defendants completed their work on the Project. Moreover, the Agreement provides as a definition for "Project" "on all projects for this subcontractor." (emphasis in original). Nowhere in the Agreement is the Stoneledge Project referenced. Given these facts, even if we were to assume arguendo that the Agreement was referenced in the Cross-Claims, the document itself does not specify its application to the Stoneledge Project and, in fact, the timing of the execution of the Agreement suggests that it does not apply. Finally, Marick has failed to present any evidence demonstrating to this Court that the Agreement applies to the Stoneledge Project. Consequently, the terms of the alleged contract are not sufficiently definite to be enforced as Marick wishes.

III. The Agreement is not supported by consideration

As demonstrated above, Marick's claim for Contractual Indemnity must fail as the claim was not properly alleged in the Cross-Claims and it has not been shown that the Agreement applies to the Stoneledge project. Yet even assuming that Marick did comply with the rules of pleading and assuming the Agreement applies to Stoneledge, summary judgment for the Defendants remains appropriate, as the Agreement is not supported by consideration.

"In South Carolina, the formation of a contract is governed by well-settled principles. Quite simply, '[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.' See Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993), citing Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984). "In general, valuable consideration to support a contract may consist of some right, interest, profit or benefit

accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.” See 30 S.C. Jur. Contracts § 13, citing J.C. White Lumber Co., Inc. v. Allen, 306 S.C. 183, 410 S.E.2d 588 (Ct. App. 1991); Sanchez v. Tilley, 285 S.C. 449, 330 S.E.2d 319 (Ct. App. 1985). A promise by a party to do that which it has already legally obligated itself to do is not a valid consideration. See City of Spartanburg v. Spartan Villa, 273 S.C. 1, 5, 253 S.E.2d 501, 503 (1978). “Consideration that is wholly past is not valuable consideration.” Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996).

As noted, the Agreements that may form the basis for Marick’s claim for Contractual Indemnity were signed after all work was completed by the Defendants. See Deposition of Green, p.44, lines 1-21 (attached as Exhibit D). Consequently, any other agreement under which the work was performed does not encompass the Agreement. The past work of the parties similarly cannot constitute consideration for the Agreement. Moreover, when asked in his deposition, Rick Thoennes, III, owner and principal of Marick, listed no consideration supporting the Agreement. See Deposition of Thoennes, p. 152, ll. 1-23, a copy of which is attached hereto as Exhibit E. As the Agreement is not supported by consideration, it is not a valid and binding contract.

CONCLUSION

For the reasons stated above, Defendants submit that Marick’s motion for summary judgment for contractual indemnity must be denied as (1) the claims were not properly pled; (2) to the extent Marick argues, outside of the pleadings, that it has contracts that contain indemnification provisions, it has offered no evidence that the contracts applied to the Stoneledge project or would be enforceable in this matter; and (3) such contracts were signed after work was completed and are not supported by consideration. For these same reasons,

Defendants' motion for summary judgment as to Matick's cross claims for breach of contract should be granted.

Respectfully submitted,

ELMORE GOLDSMITH

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Attorneys for Defendant Builders First Source

October 4, 2012

10/31/2007 09:28 FAX

10/30/2007 11:00 FAX

002
10/31/2007



COPY

AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

Fri Jul 31 12:13:50 2009



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10/31/2007 08:28 FAX
10/30/2007 11:00 FAX

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8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 16th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY:

DATE:

10/1/07

BY:

DATE:

10/1/07

Rick Thoennes

NAME and TITLE

Sharon Gowder

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Southern Concrete Spec. Inc.

COMPANY NAME

WITNESSED BY

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle - Simpsonville, SC 29681
marickhomebuilders.com

Fri Jul 31 12:13:51 2009

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MARICK COPY HOME BUILDERS

AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

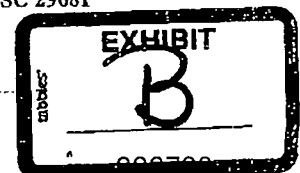
This agreement is between Marick Home Builders (Contractor) and
Clear-View-Construction (Subcontractor).

Protect yourself. Protect your business. The Contractor and Subcontractor for the operations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (Please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and Stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

07/31/2009 10:56 AM





8. Payment schedule:

~~Bills received by the 1st of the month will be paid on the 15th~~

Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

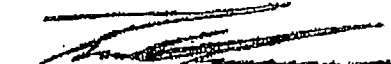
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: 

BY: 

DATE: 10/1/07

DATE: 10/30/07

Rick Thoennes

NAME and TITLE

Mike Owner

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Clearview Const.

COMPANY NAME

Kim Waters

WITNESSED BY



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First Source (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured. *provided by form LA 2002 0005.*
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (Description of Subcontract work):
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements





8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors, but only to the extent of Subcontractor's negligence or willful misconduct.

BY: _____ BY: Deryl Ward *DATE: 10/1/07 DATE: 10/1/07 *

Rick Thoennes Deryl Ward *

NAME and TITLE NAME and TITLE

Marick Home Builders, LLC Marick Home Builders, LLC

COMPANY NAME COMPANY NAME

_____ WITNESSED BY _____ Subject To Written Changes

10/25/2007 13:11 FAX

003/003



Dear Vendor:

We are currently in the process of updating our files and verifying our contract and insurance compliance criteria.

Please fill out the following documents and fax them back to us as soon as possible. We will need to have these documents in receipt before your next payment can be issued.

Agreement Between Contractor & Subcontractor - areas marked with a star

W9 - If you have not provided one to us previously, please do so now; please make sure you enter your company name exactly as it was recorded when you received your tax ID number from the IRS.

Also, please see item 2 on the Agreement and ask your insurance agent to send us an updated certificate of insurance with the criteria listed.

Thank you!

Suzanne Blinder
Office Manager

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

BFS 3368

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1 Q. Let me show you what I marked as Exhibit 105, which
2 for you guys down the table is a contract -- what
3 appears to be a contract between Marick Home
4 Builders and Builders First Source. And it's got
5 Bates number BFS 3366 on it. Do you recognize
6 that?

7 A. I do.

8 Q. And is that a copy of the contract between Builders
9 First Source and Marick?

10 BY MR. ROOT:

11 Object to form.

12 DIRECT EXAMINATION RESUMED BY MR. LYLES:

13 Q. A contract between Builders First Source and
14 Marick?

15 A. It is a contract between Builders First Source and
16 Marick.

17 Q. Is this the contract that governed the work that
18 was performed by Builders First Source for Marick
19 on the Stoneledge project?

20 A. I wouldn't believe so, because it was signed after
21 we were complete at Stoneledge, I believe.

22 Q. The signature date on that is 10/1/07?

23 A. Yes, sir.

24 Q. Would your contract -- do you remember doing
25 another job with Marick after Stoneledge?



1 Q. Let me show you a document and I'll ask that we mark
2 that as an exhibit, wherever we are in the
3 numbering.

4 (COURT REPORTER MARKS TWO-PAGE DOCUMENT AS EXHIBIT NO.
5 69; ATTACHED TO DEPOSITION)

6 EXAMINATION RESUMED BY MR. ANTHONY:

7 Q. Does this look like, and you can take a moment to
8 review that, but does this look like the contract
9 that you asked the subcontractors to sign?

10 A. Yes.

11 Q. And what is the agreement date listed on that
12 contract?

13 A. (Reviews document). October 1st, '07.

14 Q. Do you believe that was before or after the
15 subcontractors performed their work?

16 A. I don't know.

17 Q. Well, what would you say you gave as consideration
18 for this contract?

19 A. Gave? Money. Is that what you mean?

20 Q. Well, however you want to answer it.

21 A. Money.

22 Q. Okay.

23 A. We didn't barter.

24 Q. Fair enough. I will -- I should have a copy of
25 this, but in your Answer and cross claims against

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiff,

vs.

IMK Development Co., LLC, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-37-0652

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

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Defendant's Attorney:
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Post Office Box 999, Charleston, SC 2940
Phone: 843-722-3400 E-mail: ghorton@wcsr.com
dlang@wcsr.com

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

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss or for Summary Judgment

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

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

Signature of Attorney for ☐ Plaintiff / ☒ Defendant Carl Catoe Construction, Inc.

August 23, 2012
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, 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

Collected by: _____ Date Filed: _____

- ☐ MOTION FEE COLLECTED: \$ _____
☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT
) Civil Action No.: 2009-CP-37-0652

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

Plaintiffs,

vs.

IMK Development Co., LLC *et al.*,

Defendants.

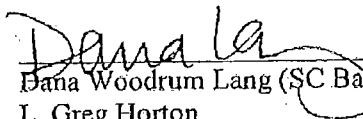
CARL CATOE CONSTRUCTION, INC.'S
MOTION TO DISMISS OR FOR SUMMARY
JUDGMENT
AS TO MARICK HOME BUILDERS, LLC

TO: JASON IMHOFF, ATTORNEY FOR MARICK HOME BUILDERS, LLC

YOU WILL PLEASE TAKE NOTICE that the Defendant Carl Catoe Construction, Inc., ("Catoe"), by and through its undersigned attorneys and pursuant to Rule 12(b) and/or Rule 56 of the South Carolina Rules of Civil Procedure, will move before this Court for dismissal of all causes of action asserted against it by Marick Home Builders, LLC ("Marick") or for judgment as a matter of law as to all causes of action asserted against it by Marick. This motion shall be heard in ten (10) days time or as soon thereafter as the Court may allow.

The basis for this Motion is that Marick fails to state a claim upon which relief may be granted and that Catoe is entitled to judgment as a matter of law. Rule 12(b) S.C. Rule Civ. P. Further, there exists no genuine issue of material fact and Catoe is entitled to judgment as a matter of law. Rule 56, S.C. Rule Civ. P. Catoe will rely upon its memorandum of law to be filed, and the pleadings on file with the Court in support of this motion. If matters outside the pleadings are presented to and not excluded by the Court, this motion shall be treated as one for summary judgment and be considered under South Carolina Rule of Civil Procedure 56.

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Fax: (864) 271-7502

Charleston, South Carolina
August 23, 2012

Attorneys for Carl Caloe Construction, Inc.

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., et al,
vs. IMK DEVELOPMENT CO., LLC, et al.
Case No.: 2009-CP-37-0652

CERTIFICATE OF SERVICE

I do hereby certify that on the 23rd day of August 2012, I served a copy of the foregoing *Carl Catoe Construction, Inc. Motion to Dismiss or for Summary Judgment as to Marick Home Builders, LLC* in the above-entitled matter by sending a copy via electronic mail and regular mail to counsel for Marick Home Builders, LLC; all other counsel were served via electronic mail only.

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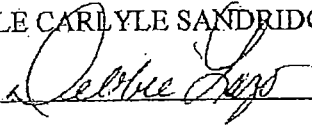
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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
Stoneledge at Lake Keowee Owners' Association, Inc. <i>et al.</i> ,	)	Civil Action No.: 2009-CP-37-0652
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT OF CARL CATOE
	)	CONSTRUCTION, INC.'S MOTION TO DISMISS
	)	AS TO MARICK HOME
IMK Development Co., LLC <i>et al.</i> ,	)	BUILDERS' CLAIMS
	)	
Defendants.	)	

TO: JASON IMHOFF, ATTORNEY FOR MARICK HOME BUILDERS, LLC

Defendant Carl Catoe Construction, Inc., ("Catoe"), by and through its undersigned attorneys and pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, has moved before this Court for dismissal of all causes of action asserted against it by Marick Home Builders, LLC and Rick Thoennes, Jr. (collectively, "Marick"). This memorandum of law is filed in support of that motion.

RELEVANT FACTS

Marick Home Builders, LLC served as General Contractor for Phase II of the townhome development known as Stoneledge. Marick entered into a subcontract with Builders First Source -Southeast, LLC ("BFS") to provide materials and labor to perform certain construction tasks, including framing, cladding, installation of windows and doors. BFS, in turn, contracted with Catoe to perform the labor associated with those tasks. Catoe has no contract, written or oral, with either Marick Home Builders or Rick Thoennes, Jr.

Stoneledge homeowners and Homeowners Association ("Plaintiffs") filed suit against a host of parties, including Marick and Catoe, for certain construction defects. Marick has filed cross-claims against Catoe for (1) negligence, (2) breach of warranty and (3) equitable indemnity.

ARGUMENT

Marick's claims against Catoe for negligence and breach of warranty should be dismissed because they are merely disguised indemnity claims. Other South Carolina circuit courts have so ruled in similar cases. (Orders attached as Exhibits A and B.) The indemnity claim should be dismissed because Marick and Catoe have no special relationship, and because Marick is not without fault. Finally, to the extent Marick alleges contractual claims against Catoe, those should be dismissed because no contract exists between Catoe and Marick, and because Marick is an unlicensed contractor, prohibited by law from access to the Courts in order to enforce contract claims.

I. Disguised indemnity claims should be dismissed.

Marick's breach of warranty and negligence claims against Catoe should be dismissed because these claims are merely disguised claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party [Catoe] is liable to pay a second party [Marick] for a loss or damage the second party [Marick] incurs to a third party [Plaintiffs]." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." State v. Yelsen Land Co., 257 S.C. 401, 403 (1972); Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the

pleaders have recited.” Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 (“The character of an action is primarily determined by the allegations contained in the complaint.”).

Marick’s claims in this case are all disguised indemnity claims. The cross-claim for breach of warranty against Catoe states:

Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of the above named parties breach of their express and/or implied warranties; as a result, Marick is informed and believes that it is entitled to recover from [Catoe] such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick’s Answer to Plaintiffs’ Third Amended Complaint & Cross-claims, ¶ 174.)

Similarly, Marick’s cross-claim for negligence states:

Should Plaintiff’s prevail on their claims, Marick will be damages as a direct and proximate result of [Catoe’s] negligence; as a result, Marick is informed and believe that it is entitled to recover from [Catoe] such as it may incur legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick’s Answer to Plaintiffs’ Third Amended Complaint & Cross-claims, ¶ 169.)

Marick’s cross-claims seek to recover the amount Marick will owe the Plaintiff after trial due ostensibly to the acts or omissions of others, plus attorney fees. The “damages” are contingent on the outcome of the trial. Marick does not seek damages from Catoe for personal injury, property damages, or other damages actually incurred by Marick. These cross-claims are textbook claims for indemnity. See Vermeer Carolina’s, Inc., 336 S.C. at 60, 518 S.E.2d at 305. Therefore, the Court can and should characterize the breach of warranty and negligence claims as equitable indemnity claims.

As noted by South Carolina’s federal district court, “a rose by any other name is still a rose,” and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one’s liability to a third party are “nothing more than claims for ...

indemnification with a slight change in wording.” SCNB v. Stone, 749 F.Supp. 1419, 1433 (D.S.C. 1990).

Trial courts in South Carolina have granted summary judgment in similar cases, concluding that claims couched in terms of indemnity fold into and are absorbed by overarching causes of action for indemnification. For example, in Nelson v. John Wieland Homes, 2009-CP-10-6573, the plaintiff homeowner sued her homebuilder, alleging construction defects. The homebuilder in turn filed third-party claims against its subcontractors for negligence, breach of warranty, breach of contract, and indemnity, alleging that if the homebuilder was liable to the plaintiff, it was due to the actions or omissions of the third-party subcontractors. Judge Roger M. Young granted summary judgment on claims of negligence, breach of warranty, and breach of contract, finding that these claims were disguised indemnity claims. (Order of Young, J., Exhibit A.)

Similarly, in Kirkland v. Cambridge Building Corp., 2005-CP-07-1312, plaintiffs brought an action alleging construction defects, and a defendant brought a third-party action against the manufacturers of the synthetic stucco applied to the residence, alleging negligence and breach of warranty. Judge Curtis L. Coltrane stated: “The Court concludes as a matter of law that [defendant’s] claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action.” Order of Coltrane, J., Exhibit B.

Appellate courts in other states, in similar cases, have also concluded that a cross-claim or third-party claim couched in terms of indemnity folds into and is absorbed by an overarching cause of action for indemnification. Dodge Trucks, Inc. v. Wilson, 231 S.E.2d 818, 821 (Ga. Ct. App. 1976) (stating “regardless of what [Plaintiff] may name [his claim], it is an action for contribution and indemnity”), aff’d, 235 S.E.2d 142, 144 (Ga. 1977); Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1258-59 (Ill. 1983) (observing that, although the claims

were "stated as counts for breach of implied warranty," they could be regarded as claims for indemnity); Warner v. Reagan Buick, Inc., 483 N.W.2d 764, 770 (Neb. 1992) (noting that, although the third-party plaintiff made claims for breach of contract, "[t]he gravamen of the [buyer's] third party petition is indemnification, and we shall treat it as such"); Adkinson v. Int'l Harvester Co., 975 F.2d 208, 216 (5th Cir. 1992) (treating third-party plaintiff's claim for breach of warranty as one for indemnity) (internal citations omitted).

II. The claims for equitable indemnity should be dismissed.

1. No special relationship exists between Marick and Catoe.

Marick's claims for equitable indemnity fail because Marick had no contractual or special relationship with Catoe, and, in fact, no such relationship has been alleged. (See Third-party Compl. ¶¶ 187-193.) "A right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). In order to maintain a claim for equitable indemnity, Marick must demonstrate that a special relationship existed between it and Catoe. Toomer v. Norfolk Southern Railway Company, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637 (Ct. App. 2001); Scott v. Fruehauf Corp., 302 S.C. 364, 368, 396 S.E.2d 354, 358 (1990) ("[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them").

The South Carolina Supreme Court's most recent comprehensive analysis of equitable indemnity held that an attenuated relationship will not support an equitable indemnity claim. Rock Hill Tel. Co. v. Globe Comm'n, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005)(certified question). There, a utility company hired a contractor to perform certain construction work.

That contractor, in turn, hired a subcontractor. A third party was injured at the site. After settlement, the utility brought suit against the second-tier subcontractor for equitable indemnity. The court, answering a certified question, held that the “subcontractor is merely a remote or distant independent contractor, and therefore does not have a special relationship” with the utility, and an equitable indemnity claim is inappropriate. *Id.* at 390, 611 S.E.2d at 237.

Catoe and Marick, like the utility and the subcontractor in Rock Hill, have no contractual relationship between them. Thus, the relationship will not support an indemnity obligation. *Id.* Marick alleges that BFS directly hired Catoe to perform work at Stoneledge. South Carolina case law is devoid of any suggestion that a downstream contractor or supplier has any special relationship with the prime contractor. The lack of a special relationship between Marick and Catoe is fatal to Marick’s equitable indemnity claims as a matter of law.

2. *Marick cannot be adjudged without fault.*

Alternatively, because Marick cannot be adjudged without fault, summary judgment on Marick’s equitable indemnity claims is proper. Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. *Stuck*, 279 S.C. at 24, 301 S.E.2d at 553. Here, Marick’s own corporate witnesses and experts admit that Marick is not without fault.

Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has “overall responsibility for construction of the entire project.” Still Dep. 87:3-7 (Aug. 15, 2012).

Because Marick is the permit holder for Stoneledge Phase II, it cannot be adjudged without fault. The party pulling a permit is “solely responsible” for compliance with the building code. (Ex. C, Representative Building Permit and Application from Oconee County.) Marick—not Catoe—was the entity that obtained the permits for construction of Phase II of Stoneledge.

Marick's own expert Still further acknowledged that, in some instances, Marick violated the building code.^{1 2} Because Marick was the permit holder for Phase II and violated code according to its own expert, it cannot be adjudged without fault for building code violations.

III. Marick Has No Right to Enforce Contractual Claims in Law or Equity.

Marick alleges that "Catoe...expressly and/or impliedly warranted to Marick..." certain guarantees. (Marick's Answer and Crossclaim against Catoe). Express warranty claims are contractual. Marick had no contract with Catoe, so these claims should be dismissed as a matter of law.³

Even if some implied contract terms exist (which is denied), Marick had no contractor's license during construction and is therefore prohibited from enforcing any contract terms as a matter of law. South Carolina Code Section 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, South Carolina Code Section 40-11-370(C) it "may not bring an action either at law or in equity to enforce the provisions of a contract." The same prohibition exists as to residential home builders. S.C. Code Ann. §40-59-30. The plainly

1

Q. Do you acknowledge that at least in some respects that we have discussed today as the general contractor on the project, Marick Home Builders violated the applicable building code?

A. I would agree with you that there are components we've talked about that now appear to be a code violation because of failure. Still 89: 4:11.

2

Q. So you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?

A. At the time that we looked at it, yes. Still Dep. 92:25-93:5.

3

Q. Carl Catoe was not your subcontractor, correct?

A. That's correct.

Marick 30(b)(6) Dep 224:10-12.

worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

Marick is not a licensed contractor. Although Mr. Thoennes, Marick's 30(b)(6) designee, testified he was personally licensed⁴ at the time Stoneledge was constructed, no public records for the State of South Carolina reflect that Marick Home Builders has ever had a contracting license. The attached exhibits are the results of searches performed on South Carolina's Labor, Licensing, and Regulation website. (Ex. D, Information from SC LLR). Those searches reflect that no commercial or residential builder's license has ever been issued to Marick at any time. *Id.* Because Marick was unlicensed, it cannot enforce any contractual obligations, including warranty claims.

CONCLUSION

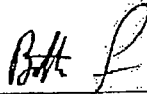
Marick's Cross-claims against Catoe consist solely of a single equitable indemnity claim. Marick improperly seeks recovery under tort, contract and warranty theories not for its own independent injury or property damage, but merely for the liability it might incur to Plaintiffs. Moreover, each of the claims explicitly seeks indemnification for any losses Marick might sustain regarding the Stoneledge development. Accordingly, each claim fails to state facts sufficient to constitute independent causes of action for negligence, breach of warranties or breach of contract. Marick's sole claim against Catoe is one for equitable indemnity.

That equitable indemnity claim must fail. No special relationship exists between Marick and Catoe. Further, Marick has not been—and, according to its own expert's testimony, cannot

⁴ Mr. Thoennes is reflected as the qualifying party for a commercial contractors' license issued to "Rick Thoennes Builders." Rick Thoennes Builders, Inc., which is registered with the South Carolina Secretary of State, is (presumably) a separate entity from Marick Home Builders, LLC. Pursuant to statute, a person may serve as the qualifying party for only one entity, subject to certain exceptions. S.C. Code Ann. §40-11-230. Thus, Mr. Thoennes is not the license holder for Marick Home Builders, LLC.

be—adjudged without fault in this matter. Therefore, Marick and Catoe are, at best, joint tortfeasors, with no right of indemnity between them.

Finally, to the extent Marick alleges contractual claims against Catoe, those claims are unenforceable, because Marick has no contract with Catoe and it is an unlicensed contractor. Marick is thus precluded from bringing these claims even if they were properly pled.



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August 30, 2012

EXHIBIT A

(mcm)

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CASE NO. 05-CP-07-1312

Carl T. Kirkland, Mary Alice Kirkland,
Carl T. Kirkland Qualified Personal
Residence Trust and Mary Alice Kirkland
Qualified Residence Trust,

Plaintiffs,

v.

Cambridge Building Corporation, MAJ
Enterprises, Southern Roof and Wood Care
Corp., T.R. Johnson Builders, Inc.,
Figueroa's Exterior Trim & Woodwork,
William Vitto, Susanne T. Sheik,
Lang's Heating & Air Conditioning,
Andersen Windows, Inc., and
Clarence R. Floyd d/b/a Wiggins Iron
and Fence,

Defendants.

Cambridge Building Corp.

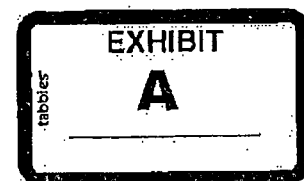
Third-Party Plaintiff,

v.

Sto Corp. and Acrocrete, Inc.,

Third-Party Defendants.

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT
OF STO CORP. AND
ACROCRETE, INC.**



This matter is before the Court on the motion of Third-Party Defendants Sto Corp. ("Sto") and Acrocrete, Inc. ("Acrocrete") for summary judgment as to the claims asserted by the Third-Party Plaintiff, Cambridge Building Corporation ("Cambridge"). The case involves the construction of a house on Hilton Head Island, South Carolina, now owned by the Plaintiffs, who bought it in 1997. Cambridge served as general contractor for the house, which was built in 1993 for a previous owner. As originally constructed, the exterior siding of the house was an Exterior Insulation and

CU # 1019

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Finish System ("EIFS"), sometimes referred to as synthetic stucco. It is undisputed that Cambridge's EIFS subcontractor mixed materials sold by two different manufacturers, Acrocrete and Sto, when installing the EIFS on this house.

Plaintiffs, in their Fourth Amended Complaint, assert claims against Cambridge for faulty construction resulting in water damage to the structure.¹ Cambridge's Third-Party Complaint against Sto and Acrocrete contains causes of action for indemnity, negligence and breach of warranty. For the reasons stated below, the Court concludes that summary judgment should be granted.

I. Summary judgment standard.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered forthwith when depositions and other evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a summary judgment motion, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. The non-moving party, however, can not rest on the mere allegations of its pleadings but must present specific, admissible facts which reasonably create a genuine issue for trial, and the Court need not consider unreasonable inferences from the proffered evidence. *Main v. Corley*, 281 S.C. 525, 526-527, 316 S.E.2d 406, 407 (1984); *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991); *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1992).

¹ As part of a settlement with Sto and Acrocrete, the Plaintiffs amended their Complaint to clarify that they do not allege the remaining defendants, including Cambridge, are liable in any way for supplying a defective product. It is clear that the Plaintiffs' claims against Cambridge relate solely to construction defects, including but not limited to the failure to properly supervise the installation of EIFS.

2. *The negligence and breach of warranty claims.*

The Court concludes as a matter of law that Cambridge's claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

Although Cambridge contends otherwise, a fair reading of the language of its third-party complaint reveals that the first and second causes of action for negligence and breach of warranty are, in reality, claims for indemnity. In stating both claims, Cambridge seeks recovery, not for its own independent personal injury or property damage, but merely for the liability it might incur to the Plaintiffs. In stating the negligence cause of action, paragraph 89 of the Third-Party Complaint reads as follows:

If Cambridge is liable to the Plaintiffs in any respect, which is denied, then such liability arose from [Sto and Acrocrete's] breach of the duties described above. Such breaches constitute negligence, and [Sto and Acrocrete] should indemnify Cambridge, in whole or in part, for any liability that may be adjudged against it in the Plaintiffs' favour. (emphasis added).

Likewise, the cause of action for breach of warranty contains virtually identical language seeking reimbursement of any amounts which Cambridge is found to owe to Plaintiffs. The causes of action for negligence and breach of warranty mimic that for

indemnity. These claims not only seek a form of relief that could only be defined as indemnity but also actually use the word "indemnify." Therefore, there can be no doubt that Cambridge's negligence and warranty claims are, essentially, indemnity claims in disguise.

Proof of a breach of warranty or negligence may be relevant for an indemnitee to establish the indemnitor's fault in causing a plaintiff's damages, which is an essential element of a claim for equitable indemnity. Such proof does not support stand-alone claims, however. Thus, to recover against Sto or Acrocrete, Cambridge must still establish the other elements of equitable indemnity. The Supreme Court of South Carolina recognized as much when it observed the following:

The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.

Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992). As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." *SCNB v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

The highest courts in other states have also concluded that a third-party plaintiff's claims for breach of warranty necessarily fold into and are absorbed by an overarching cause of action for indemnification. See *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 820 (Ga. Ct. App. 1976); *aff'd*, 235 S.E.2d 142, 144 (Ga. 1977) (claim couched as

breach of warranty was really one for indemnity); *Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (claims "stated as counts for breach of implied warranty" should be regarded as claims for indemnity); *Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) ("[t]he gravamen of the third party petition is indemnification, and we shall treat [claims titled breach of warranty] as such"); *Adkinson v. International Harvester Co.*, 975 F.2d 208 (5th Cir. 1992) (interpreting third-party claim for breach of warranty as one for indemnity).

... Since Cambridge has not alleged or submitted evidence of any damages other than Plaintiffs' potential judgment against it and the costs incurred in defending Plaintiffs' claims, the only viable cause of action against Sto or Acrocrete is one for indemnity.² Therefore, the Court grants summary judgment on the causes of action for negligence and breach of warranty

3. *Equitable indemnity - lack of a special relationship.*

The Court also concludes as a matter of law that there is no special relationship between Cambridge and Sto or Acrocrete on which to base Cambridge's right to equitable indemnity.³ Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). In order to maintain a claim for equitable indemnity, Cambridge must demonstrate that a special relationship existed between it and Sto or Acrocrete. *See Toomer v. Norfolk Southern Railway Company*, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637, (Ct. App. 2001); *see also, Scott v. Fruehauf Corp.*, 302 S.C. 364, 368, 396 S.E.2d

² To the extent that Cambridge's request to be indemnified "in part" for any liability it incurs to Plaintiffs can be construed as a request for contribution, such request is meritless since any contribution claim was extinguished by Sto and Acrocrete's good faith settlements with the Plaintiffs. S.C. Code § 15-38-50.

³ There was no contract between Cambridge and Sto or Acrocrete so there can be no claim for contractual indemnity; the only applicable legal concept is that of equitable indemnity.

354, 358 (1990) (“[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them”).

The South Carolina Supreme Court recently clarified that this special relationship “must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another’s wrongdoing.” *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, fn. 3 (2005). The Court believes that *Rock Hill* is controlling precedent. Applying its principles to the instant case, it is clear that there is no special relationship between Cambridge and Sto or Acrocrete to support a claim for equitable indemnity. First, in its Third-Party Complaint, Cambridge fails to even allege that any such special relationship exists. Second, any relationship that did exist was even more attenuated than the relationship between the utility and subcontractor in *Rock Hill*, who were separated by just one level - the contractor. Here, Cambridge is separated from any dealings with Sto or Acrocrete by at least two levels - the EIFS subcontractor and the respective distributors of Sto and Acrocrete materials.

Furthermore, the undisputed facts of the case reveal that there was no relationship of any kind between Cambridge and Sto or Acrocrete at the time the house in question was built. The contract between Cambridge and the original owner of the house did not specify any particular manufacturer’s products or system and simply called for the use of synthetic stucco or “EIFS” generically. Sto and Acrocrete submitted uncontradicted testimony from Cambridge’s construction supervisor that Cambridge was not in the practice of specifying which manufacturer’s system to use and generally left it to the

discretion of the EIFS subcontractor. This was confirmed by the uncontradicted testimony of Cambridge's EIFS subcontractor that he had "free reign" to decide which manufacturer's EIFS materials to use on the job. Furthermore, there is no evidence in the record that Cambridge possessed or relied on any Sto or Acrocrete product literature at the time the house was built.

The EIFS subcontractor freely admitted in deposition testimony that he commonly mixed materials from various manufacturers on jobs and did just that in this case with Acrocrete and Sto materials. As pointed out by Sto and Acrocrete, no party or expert witness in the case has been able to determine where Acrocrete materials stop and Sto materials begin. The only evidence in the record on the issue is the uncontradicted testimony of Plaintiffs' expert that the EIFS materials were "hopelessly mixed" and that the EIFS system on the house was a "home-made" system and could not be said to be either an Acrocrete or a Sto system.

There is simply no evidence in the record that Cambridge had any sort of relationship with Sto or Acrocrete on which to base a right of indemnity. As such, Cambridge's claim fails to meet the standard set forth in the *Rock Hill* case, and the Court grants summary judgment on the cause of action for equitable indemnity.

4. *Equitable indemnity - alternative grounds.*

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second is not. [cites omitted]. If the second party is also at fault, he comes to court without equity and has no right to indemnity. [cites omitted]. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."

Vermeer v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). See *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). It is not enough for Cambridge to prove that the alleged defective design of EIFS contributed, in part, to the moisture damage on the house at issue. Under the established law of equitable indemnity, Cambridge must prove that it was **wholly** without fault in causing Plaintiffs' damages. See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, 237 fn. 2 (2005).

There is no evidence in the record that Cambridge was wholly without fault. In fact, the only evidence in the record is that Cambridge was at least partly at fault for the water intrusion damage to Plaintiffs' house. Sto and Acrocrete submitted the uncontradicted testimony of Plaintiffs' expert that many of the problems causing the water intrusion were the result of Cambridge's negligence in failing to properly sequence the work of its subcontractors on the project. The expert testified, without rebuttal, that there was no damage on the house caused solely by the alleged defective design of EIFS and that any damage to the house was caused, at least in part, by the improper workmanship of Cambridge and its subcontractors. Cambridge's inability to establish its own lack of fault bars any claim for equitable indemnity. Therefore, Acrocrete and Sto would be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

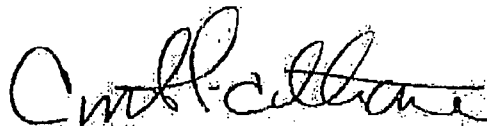
The Court concludes that there is yet another reason summary judgment is proper on the equitable indemnity claim. It is axiomatic that there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). The claims against Cambridge in the Fourth Amended

Complaint all relate to defective construction work, including but not limited to faulty EIFS installation. Plaintiffs do not allege in any way that Cambridge is responsible for supplying a defective product. As a result of the settlement with Acrocrete and Sto, Plaintiffs have removed the EIFS design issue from the case. Therefore, Cambridge can never be held liable to Plaintiffs for something Sto or Acrocrete did. As such, Cambridge is a mere joint tortfeasor with no right to indemnity.

The Court agrees with Sto and Acrocrete's argument that, while Cambridge may defend itself on the grounds that Plaintiffs' damages were caused by the alleged defective design of the EIFS product and not by improper construction work, the right to defend itself and establish its lack of liability does not establish a right to indemnity in favor of Cambridge. Therefore, Acrocrete and Sto would also be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

NOW, THEREFORE, IT IS ORDERED that summary judgment is granted to Sto Corp. and Acrocrete, Inc. on all causes of action in Cambridge's Third-Party Complaint, which is hereby dismissed with prejudice,

AND IT IS SO ORDERED.



Curtis L. Coltrane, Master-In-Equity
and Special Circuit Judge for Beaufort County,
South Carolina

BEAUFORT, SC
May 30, 2006

EXHIBIT B

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-6573

CHERYL H. NELSON

JOHN WIELAND HOMES AND
NEIGHBORHOODS OF SOUTH CAROLINA

PLAINTIFF(S)

ET AL
DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 40(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICATION):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Order Granting In Part and Denying in Part Third-Party Defendant
ARS's Motion for Summary Judgment.

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

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

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

Circuit Court Judge

EXHIBIT

B

2134
Judge Code

Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Cheryl H. Nelson,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc. and McGee
Brothers Co., Inc.

Defendants.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc.,

Third-Party Plaintiff,

vs.

Benjamin Mora d/b/a Mora Construction,
Sondles Builders, LLC, Carolina Custom
Security & Sound, Inc., Barr Construction,
Inc., Brancifort Concrete Industries, Inc.
American Residential Services, LLC d/b/a
American Residential Services of South
Carolina, Inc. f/k/a Atlas Services, Inc. and
Coastline Construction, Inc. f/k/a Coastline
Construction,

Third-Party Defendants

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2009-CP-10-6573

2011 OCT 26 PM 12:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

ORDER GRANTING IN PART AND
DENYING IN PART THIRD-PARTY
DEFENDANT AMERICAN
RESIDENTIAL SERVICES OF SOUTH
CAROLINA, INC.'S MOTION FOR
SUMMARY JUDGMENT

This matter came before the Court for a hearing on July 25, 2011, for consideration of Third-Party Defendant American Residential Services of South Carolina Inc's ("ARS") Motion for Summary Judgment. Counsel for the parties were present, and this Court entertained and

considered oral arguments as well as memorandums of law and affidavits submitted by the parties.

Facts

Plaintiff homeowner brings this suit, filed on October 19, 2009, to recover damages resulting from alleged faulty construction or repair of her home. Defendant Wieland Homes filed a third-party complaint against Third-Party Defendant ARS on December 2, 2010, alleging the work ARS did in installing the HVAC system in 1996 cause or contributed to the Plaintiff's damages. Defendant Wieland Homes brings four causes of action against ARS including 1) indemnity, 2) negligence, 3) breach of warranty, and 4) breach of contract.

ARS contends it is entitled to summary judgment as a matter of law to the claims of negligence, breach of warranty, and breach of contract, because these claims are disguised indemnity claims. It also argues that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes owes no liability to the Plaintiff as a result of ARS's work.

Standard of Review

Summary judgment is only appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 627, 541 S.E.2d 831, 833 (2001). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id.

Discussion

I. ARS's Motion for Summary Judgment as to the Claims of Negligence, Breach of Warranty and Breach of Contract.

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." Seebalt v. First Fed.



Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Courts may use the allegations in the complaint to determine the correct character of an action. Id. "Indemnity is that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party," Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (citations omitted).

In this case, Defendant Wieland Homes' Complaint requests the remedy of "any monies [Wieland Homes] is adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claims." Third-Party Complaint ¶ 160, 170, 164. Because these claims seek to recover the amount Wieland Homes paid to Plaintiffs, rather than personal injury or property damages, the claims are claims for indemnity. Vermeer Carolina's Inc., 336 S.C. at 60, 518 S.E.2d at 305.

This court finds that the causes of action for negligence, breach of warranty, and breach of contract are all disguised indemnity claims and Wieland Homes has failed to state facts sufficient to constitute independent causes of action and therefore Third-Party Defendant ARS is entitled to Summary Judgment as a matter of law.

II. ARS's Motion for Summary Judgment as to the Claim of Indemnity.

Third-Party Defendant ARS contends that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes has failed to present evidence that it is liable to the Plaintiff as a result of ARS's work and because all claims arising out of ARS's work are barred by the applicable three-year statute of limitations.

After thorough review, this Court finds that there is evidence in the record that Plaintiff has been damaged by excessive water and moisture damage in her home and there is a genuine issue of material fact regarding whether ARS's HVAC work contributed to Plaintiff's damage.

Additionally, the Plaintiff's Complaint alleges that the applicable statute of repose does not apply because the conduct is subject to the statutory exception for reckless conduct. S.C. Code Ann. §15-3-670. If the statutory exception applies, then the exception could apply to the work ARS did in installing the HVAC system in 1996.

For these reasons, the Third-Party Defendant ARS's Motion for Summary Judgment as to the claim of indemnity is denied.

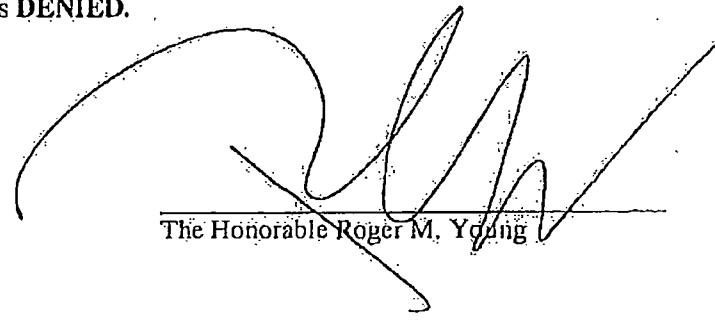
Conclusion

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

- 1) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Negligence, Breach of Warranty, and Breach of Contract is **GRANTED**.
- 2) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Indemnity is **DENIED**.

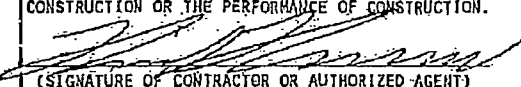
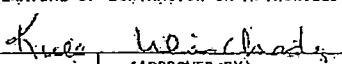
AND IT IS SO ORDERED.


_____, 2011
Charleston, South Carolina.



The Honorable Roger M. Young

EXHIBIT C

BUILDING PERMITS			
PERMIT #: 06-00466		MASTER PERMIT #: 06-00466	
DATE ISSUED 03/08/06		REF #:	
PROJECT #: 06- QV		OCONEE COUNTY	
PROJECT ADDRESS: SUNSET POINT DR 542 WEST UNION SC 29696			
SUBDIVISION: STONELEDGE LOT 71		LOT #: BLK #:	
OWNER NAME: IMK DEV CO LLC		PHONE: (864)-232-5555	
ADDRESS: 501 BRIXTON CIR			
CITY: SIMPSONVILLE		STATE: SC ZIP: 29681	
CONTRACTOR: MARICK HOME BUILDERS		PHONE: ()-	
ADDRESS: 6 MILAN DR			
CITY: GREENVILLE		STATE: SC ZIP: 29609	
ENGINEER:			
DESIGNER:			
PROP. USE: 501 BRIXTON CIR SIMPSONVILLE SC 29681			
WORK: NEW CONST OF TOWNHOME			
DESC:			
VALUATION: 263,785.32	FEES DUE: 952.00		
	FEES PAID: 952.00		
SPECIAL CONDITIONS:	WORK CLASS: S2H	SQ. FTG: 3,830	
	FIRE ZONE: Y	OCCUP TYPE: R3	
	USE ZONE:	CONST TYPE: VU	
APPLICATION ACCEPTED BY	PLANS CHECKED BY	APPROVED FOR ISSUANCE BY	
***** NOTICE *****			
THIS PERMIT BECOMES NULL AND VOID IF WORK OR CONSTRUCTION AUTHORIZED IS NOT COMMENCED WITHIN 6 MONTHS, OR IF CONSTRUCTION OR WORK IS SUSPENDED, OR ABANDONED FOR A PERIOD OF 6 MONTHS AT ANY TIME AFTER WORK IS STARTED.			
I HEREBY CERTIFY THAT I HAVE READ AND EXAMINED THIS DOCUMENT AND KNOW THE SAME TO BE TRUE AND CORRECT. ALL PROVISIONS OF LAWS AND ORDINANCES GOVERNING THIS TYPE OF WORK WILL BE COMPLIED WITH WHETHER SPECIFIED HEREIN OR NOT. GRANTING OF A PERMIT DOES NOT PRESUME TO GIVE AUTHORITY TO VIOLATE OR CANCEL THE PROVISIONS OF ANY OTHER STATE OR LOCAL LAW REGULATING CONSTRUCTION OR THE PERFORMANCE OF CONSTRUCTION.			
 (SIGNATURE OF CONTRACTOR OR AUTHORIZED AGENT)		3/8/06 DATE	
 (APPROVED BY)		3/8/06 DATE	



Parkside

OCONEE COUNTY
BUILDING PERMIT APPLICATION

Permit Type: (Please circle the appropriate type) Commercial Industrial Residential Storage
Project Type: (Please circle the appropriate type) New Construction Modular Installation Renovation/Upgrade
Method of Payment (Please circle one): CASH OR CHECK # _____

OWNER & PROPERTY INFORMATION

Project Address: 542 Sunset Point Drive
West Union, SC 29696 Tax Map #: 178-05-D-071
Subdivision & Lot #: Stoneledge Lot 71 Gate Code: * 3331
Owner Name: IMK Dev. Co., LLC Phone # w/area code: (864) 232-5555
(As shown on last record) 501 Brixtan Circle
Simpsonville, SC 29681

CONTRACTOR INFORMATION

Contractor Type: Residential General Specialty - list specialty _____ Owner/Builder
(Please circle appropriate type) 6/30/06 Marick Home Bldr
SC License #: 614526 18936 Expiration Date: 10-31-06
Contractor Name: Rick Thoennes Company Name: Rick Thoennes Builder
Mailing Address: 414 Lodgewood Trail Phone # w/area code: (864) 444-9331
Greer, SC 29651

PROJECT INFORMATION

Power Company: Blue Ridge Duke Power Seneca L&W Other, please specify: _____
(Please circle the appropriate company)
Gas Company (if applicable): None Propane Gas Natural Gas
(Please circle type of gas)
General Description of Project: Single Family Townhouse
w/ Detached Garage
Proposed use of structure: Residence Occupancy Type: R Construction Type: _____
Value of Completed Project: \$236,600 (Based on typical replacement cost)
Please answer the following that apply: 3830
Total Square Footage of Structure: 3522 Heated 3380 Un-heated 142 449
Frame Type: Wood Foundation Type: Conc. Roof Type: Shingle Exterior Finish: Cedar & stone
Number of Stories: 1 1/2 Bathrooms: 3 1/2 Bedrooms: 3 Kitchens: 1
Septic Tank Permit #: Attached Water Source: Seneca Heat Source: Elect. 263,785.32
Central Air Conditioning: YES or NO Garage: Yes or No _____ Square feet 308
Basement Information: Square Footage 1265 Finished SF 1265 Un-finished SF 0
(Please circle all that apply)

I warrant that the information furnished on this application is true and correct to the best of my knowledge and belief, and that I am not aware of any facts or circumstances which would render the same false or misleading. I understand that the Oconee County Building Department may require me to provide additional information or documentation to support the information furnished on this application. I understand that the Oconee County Building Department may require me to provide additional information or documentation to support the information furnished on this application. I understand that the Oconee County Building Department may require me to provide additional information or documentation to support the information furnished on this application.

Rick Thoennes 01.05.06
Signature Date
Rick Thoennes
Permit Holder or Applicant

EXHIBIT D

Professional Licensing Boards | Board Member Lookup

Main Menu : **Residential Builders** Note: All fields are not required for searching

Last Name:	First name:
Licensee number:	City:
Company name: marick	
License Type: All	

To perform a lookup retype the characters in the box to the right



Find

Your search returned: 0 record(s)

Search Tip:

- IF YOUR SEARCH RETURNED 0 RECORDS, YOU MAY WANT TO TRY SEARCHING UNDER "CONTRACTORS - COMMERCIAL" LICENSING BOARD.
- When searching for a specific licensee, search the INDIVIDUALS NAME. Enter just a few letters to do a multiple search listing if you don't know the exact way a person or company is licensed.
- When SEARCHING by license number, ENTER NUMBERS ONLY.
- IF YOU ARE AN APPLICANT CHECKING THE STATUS OF YOUR APPLICATION AND THE SEARCH RETURNS "0 RECORDS", CHECK HERE FIRST TO SEE IF YOUR APPLICATION IS PENDING BEFORE CONTACTING THE LICENSING BOARD: PENDING APPLICATION CHECK. IF YOU ARE SHOWN TO BE PENDING, YOUR APPLICATION HAS BEEN RECEIVED AND IS BEING PROCESSED. YOU WILL BE CONTACTED BY MAIL OR FAX IF ITEMS ARE MISSING OR INCOMPLETE.

Status Clarification:

- **ACTIVE:** Licensee is current and properly licensed to work and pull permits in the state of SC.
- **APPROVED:** Applicant/Licensee is in final stages of becoming ACTIVE.
- **PENDING:** License has not been issued, cannot do work over \$200.00.
- **INACTIVE:** Licensee cannot work until license is in an active status.
- **LAPSED:** This license is lapsed/cancelled; the licensee cannot perform any work over \$200.00
- **SUSPENDED:** The license has been suspended by the board until further notice. No work or permits can be pulled during this time.

Notes:

The information on this page is a secure, primary source for license verification provided by South Carolina Department Labor, Licensing and Regulation. This website is maintained by LLR staff and is updated nightly reflecting changes to our licensing and enforcement database.

Janet Baumberger
Administrator

Phone: (803) 896-4696
Fax: (803) 896-4814
PO Box 11329
Columbia, S.C. 29211-1329

South Carolina Department of Labor, Licensing & Regulation



Professional Licensing Boards | Board Member Lookup

Main Menu : Commercial Contractors Note: All fields are not required for searching

Last Name:	First name:
License number:	City:
	Company name: marick
	Classification: All

To perform a lookup retype the characters in the box to the right

PNK 

Your search returned: 0 record(s).

Search Tip:

- IF YOUR SEARCH RETURNED 0 RECORDS, YOU MAY WANT TO TRY SEARCHING UNDER "RESIDENTIAL BUILDERS" LICENSING BOARD.
- When searching for a specific licensee, search either the COMPANY NAME or the INDIVIDUALS NAME; you CANNOT search both together. Enter just a few letters to do a multiple search listing if you don't know the exact way a person or company is licensed.
- When SEARCHING by license number, ENTER NUMBERS ONLY. do not enter G or M.
- Do not use any punctuation marks when searching a "Company name"
- IF YOU ARE AN APPLICANT CHECKING THE STATUS OF YOUR APPLICATION AND THE SEARCH RETURNS "0 RECORDS", CHECK HERE FIRST TO SEE IF YOUR APPLICATION IS PENDING BEFORE CONTACTING THE LICENSING BOARD: [PENDING APPLICATION CHECK](#). IF YOU ARE SHOWN TO BE PENDING, YOUR APPLICATION HAS BEEN RECEIVED AND IS BEING PROCESSED. YOU WILL BE CONTACTED BY MAIL OR FAX IF ITEMS ARE MISSING OR INCOMPLETE.

Status Clarification:

- **ACTIVE:** Licensee is current and properly licensed to work and pull permits in the state of SC.
- **APPROVED:** Applicant/Licensee is in final stages of becoming ACTIVE.
- **PENDING:** before accepting any jobs FROM THIS ENTITY, you must first contact this board at (803) 896-4686 to see if the contractor is within a 90-day grace period and can still work; otherwise, they can only do work that is unregulated UNTIL THEY BECOME "ACTIVE": [No License Required by SC Contractor's Licensing Board \(pdf\)](#)
- **INACTIVE:** Contractor cannot bid, pull permits, or do any regulated contracting work above the \$5,000 contract limit. See work/jobs that are unregulated here: [No License Required by SC Contractor's Licensing Board \(pdf\)](#)
- **LAPSED:** This license is lapsed/cancelled; the contractor cannot bid, pull permits, or do any regulated contracting work above the \$5,000 contract limit. See work/jobs that are unregulated here: [No License Required by SC Contractor's Licensing Board \(pdf\)](#)
- **SUSPENDED:** The license has been suspended by the board until further notice. No work or permits can be pulled during this time.

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Questions / Contact Information

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PO Box 11329
Columbia, S.C. 29211-1329

South Carolina Department of Labor, Licensing & Regulation

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., et al,
v, IMK DEVELOPMENT CO., LLC, et al.
Case No.: 2009-CP-37-0652

CERTIFICATE OF SERVICE

I do hereby certify that on the 30th day of August, 2012, I served a copy of the foregoing *Memorandum in Support of Carl Catoe Construction, Inc.'s Motion to Dismiss as to Marick Home Builders' Claims* in the above-entitled matter by sending a copy via electronic mail and regular mail to counsel for Marick Home Builders; all other counsel were served via electronic mail only.

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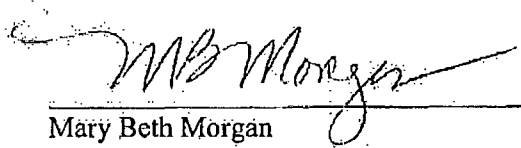
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Mary Beth Morgan

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Stoneledge at Lake Keowee Owners' Association,)
et al.,)

CASE NO. 2009-CP-37-0652

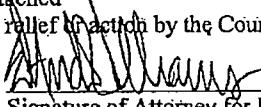
Plaintiff(s))

MOTION INFORMATION FORM
AND COVER SHEET

vs.)

IMK Development Co., LLC, et al.,)
Defendant(s))

check box above indicating submitting party

Name, SC Bar No. and address of Plaintiff's attorney	Name, SC Bar No. and address of UM carrier attorney
Robert T. Lyles, Esquire Catherine H. Bryan, Esquire 342 East Bay Street Post Office Box 773 (29402) Charleston, SC 29401 rtl@lylesfirm.com chb@lylesfirm.com	D. Andrew Williams, Esquire Joshua D. Shaw, Esquire Turner, Padgett, Graham & Laney, P.A. P. O. Box 1473 Columbia, SC 29202 Phone: (803) 227-4212 Fax: (803) 400-1492 dwilliams@turnerpadgett.com jshaw@turnerpadgett.com
☐ MOTION HEARING REQUESTED (Attach written motion and complete SECTIONS I & III) ☐ FORM ORDER, NO HEARING REQUESTED (Complete SECTIONS II & III)	
SECTION I: Hearing Information	
Nature of Motion: Motion for Summary Judgment Estimated Time Needed: _____ Court Reporter Needed: Yes No	
☒ Written Motion Attached I hereby move for relief in action by the Court as set forth in the attached proposed Motion.  Signature of Attorney for Defendant Martin Hernandez-Aviles August 24, 2012	
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, 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 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: _____ (Print Name) MOTION FEE COLLECTED: _____ CONTESTED - AMOUNT DUE: _____	Date Filed: _____
(SCCA/233 (1/2003))	

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Civil Action 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. Hend, Ruth E. Isaac, Michael D. Plourde,
Mary Lou Plourde, Carol C. Pope, Steven B.
Taylor, Bettie J. Taylor, Robert White,

Plaintiffs,

vs.

IMK Development Co., LLC, Keowee
Townhouses, LLC, Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion at Keowee, LLC,
Integrays Keowee Development, LLC, Marick
Home Builders, LLC, Bostic Brothers
Construction, Inc., Miller/Player & Associates,
John Ludwig, 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 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 Morran 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
Jarniamillo, Garcia Parra Insulation, Inc., J&J
Construction, Jose Nino, Jose Manuel Garcia,
Eason Construction, Inc., Vincent Morales
D/B/A Morales Masonry, and Miller/Player &
Associates

Defendants.

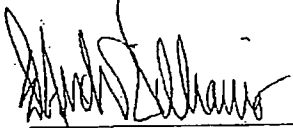
**DEFENDANT MARTIN HERNANDEZ-
AVILES' MOTION FOR MOTION FOR
SUMMARY JUDGMENT AS TO THE CROSS-
CLAIMS OF MARICK HOME BUILDERS, LLC
AND RICK THOENNES**

TO: COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant Martin Hernandez-Aviles, by and through his undersigned attorney, will move this honorable Court, on the tenth (10th) day after service hereof or at such other time and place as shall be convenient to the Court and counsel, for an Order granting summary judgment as to the cross-claims of Marick Home Builders, LLC and Rick Thoennes, in the above-captioned matter upon the grounds that there exists no genuine issue as to any material fact and that the Defendant Martin Hernandez-Aviles is entitled to judgment as a matter of law in its favor.

This Motion is based upon the pleadings in the within action, upon Rule 56 of the South Carolina Rules of Civil Procedure, and upon such additional law and argument as shall be appropriate.

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

By: 

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Columbia, South Carolina
August 24, 2012

ATTORNEYS FOR DEFENDANT
MARTIN HERNANDEZ-AVILES

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

CERTIFICATE OF SERVICE

I, Danya B. Friedman, an employee of Turner Padget Graham & Laney P.A., pursuant to Rule 5(b)(1), SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **DEFENDANT MARTIN HERNANDEZ-AVILES' MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-CLAIMS OF MARICK HOME BUILDERS, LLC AND RICK THOENNES** to the following counsel of record:

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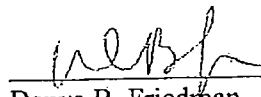
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IMK Development*

By:


Danya B. Friedman
Legal Secretary

This 24 day of August, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO: 2009-CP-37-00652

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 FirstSource
Southeast Group, Mike Green,
Southern Concrete Specialties, Carl
Compton d/b/a Compton Enterprize
a/k/a Compton Enterprises, Gunter
Heating & Air, All Pro Heating, A/C &
Refrigeration, LLC, Coleman
Waterproofing, Heyward Electrical
Services, Inc., Tinsley Electrical, LLC,
Hutch N Son Construction, Inc., Carl
Catoe Construction, Inc., T.G.
Construction, LLC, Delfino

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 AUG 31 PM 3:06

) ESTER MORAN MENTADO'S MOTION
) FOR SUMMARY JUDGMENT AS TO
) THE CROSS-CLAIMS OF MARICK
) HOME BUILDERS, LLC AND RICK
) THOENNES

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.)
 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)

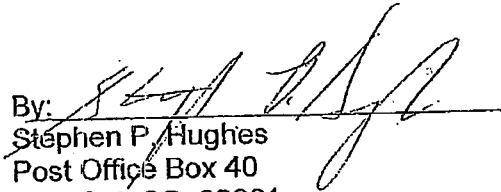
TO: JASON M. IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS LLC AND RICK THOENNES:

YOU WILL PLEASE TAKE NOTICE THAT the Defendant, Ester Moran Mentado, (hereinafter "Mentado"), by and through her undersigned counsel, Howell, Gibson & Hughes, P.A., will appear before this Honorable Court on the 10th day after service hereof, or at such other place and time as may be directed by the Court, and then and there move for the issuance of an Order granting summary judgment in favor of Mentado as to the cross-claims of Marick Home Builders, LLC, and Rick Thoennes (hereinafter collectively "Marick").

The within motion, made pursuant to the provisions of Rule 56, South Carolina Rules of Civil Procedure, is based upon the grounds that there is no genuine issue as to any material fact concerning the Marick's alleged causes of action against Mentado, and Mentado is, therefore, entitled to judgment in his favor as a matter of law.

The Motion is supported by the pleadings, discovery conducted to date, other documents on file, relevant statutory and common law, and such memorandum or memoranda of law as may be submitted, as well as any other evidence submitted to the Court for consideration.

HOWELL, GIBSON & HUGHES, P.A.

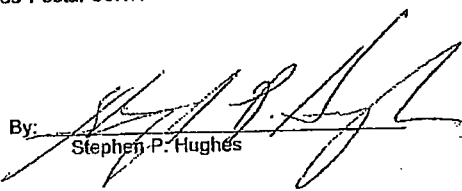
By: 
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorney for Defendant Ester Moran
Mentado

Beaufort, South Carolina

August 28, 2012

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion for Summary Judgment upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on 28 day of August, 2012.

By: 
Stephen P. Hughes

2012 AUG 31 PM 3 06

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

RULE 11 CERTIFICATION

I certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that

- ☐ I have consulted with opposing counsel and have been unable to resolve the matter.
- ☐ Consultation with opposing counsel would serve no useful purpose, or is not required.
- ☐ Consultation with opposing counsel could not be timely held
- ☒ I certify that there is no duty of consultation for the attached motion (to dismiss, for summary judgment, for new trial, for judgment NOV, in real estate foreclosures, or with pro se litigants.)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

COUNTY OF OCONEE)

CASE NO.: 2009-CP-37-0652

STONELEDGE AT LAKE LEOWEE ET AL.)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

IMK DEVELOPMENT CO. LLC ET AL)

Defendant.)

Plaintiff's Attorney:

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Address:

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Phone: 843.577.7730 Fax 843.577.7172

E-mail: rl@lylesfirm.com Other: _____

Defendant's Attorney:

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PO Box 31188, Charlotte NC 28231

Phone: 704.247.8524 Fax 704.943.0543

E-mail: emartineau@martineauking.com Other: _____

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

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

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

SECTION I: Hearing Information

Nature of Motion: Summary Judgment

Estimated Time Needed: 30 Min

Court Reporter Needed: ☒ YES/ ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

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

Signature of Attorney for: ☐ Plaintiff/ ☒ Defendant

Date submitted: 8-23-12

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

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

☐ Other: _____

JUDGE CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED - AMOUNT DUE: \$** _____

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

STONELEDGE AT LAKE KEOWEE OWNERS')
ASSOCIATION, INC., C. DAN CARSON, JEFFREY)
J. DAULER, JOAN W. DAVENPORT, MICHAEL)
FURNARI, DONNA FURNARI, JESSY B. GRASSO,)
NANCY E. GRASSO, ROBERT P. HAYES, LUCY)
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.)
HUND, III, RUTH E. ISAAC, MICHAEL D.)
PLOURDE, MARY LOU PLOURDE, CAROL C.)
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,)
AND ROBERT WHITE, INDIVIDUALLY AND ON)
BEHALF OF ALL OTHERS SIMILARLY SITUATED)

Plaintiffs,)

vs.)

IMK DEVELOPMENT CO., LLC, KEOWEE)
TOWNHOUSES, LLC, LUDWIG CORPORATION,)
LLC, SDI FUNDING, LLC, MEDALLION AT)
KEOWEE, LLC, 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

**HERBERTO ARCOS HERNANDEZ'S
MOTION FOR SUMMARY JUDGMENT
AS TO CROSS CLAIMS OF MARICK
HOME BUILDERS, LLC AND RICK
THOENNES**

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,)

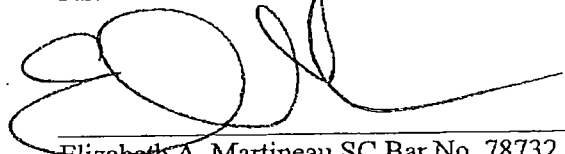
Defendants.)

**TO: JASON IMHOFF, ESQ., ATTORNEY FOR MARICK HOME BUILDERS, LLC
AND RICK THOENNES**

You will please take notice that Defendant Herberto Arcos Hernandez ("Hernandez"), by and through his undersigned attorney, will move before this Court for an order granting summary judgment as to the cross-claims of Defendant Marick Home Builders, LLC and Defendant Rick Thoennes, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This motion shall be heard in ten (10) days or at such other time and place as the Court will allow, including, but not limited to, the Non-Jury Motions Roster for the week of September 4, 2012.

The basis for the foregoing motion is that there exists no genuine issue as to any material fact with respect to Marick and Thoennes' claims against Hernandez, that the facts do not support a claim of equitable indemnity against Hernandez, and that Hernandez is entitled to judgment as a matter of law. This motion is supported by the pleadings and discovery to date, applicable statutory and common law, and upon such additional law and argument the Court deems appropriate.

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August 23rd, 2012

000793

CERTIFICATE OF SERVICE

I, Eric W. Rowell, an employee of Martineau King PLLC, pursuant to Rule 5(b)(1), SCRCP and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of Defendant Heriberto Arcos Hernandez's Notice of Motion and Motion for Summary Judgment to the following counsel of record, and mailed a hard copy to Jason Imhoff

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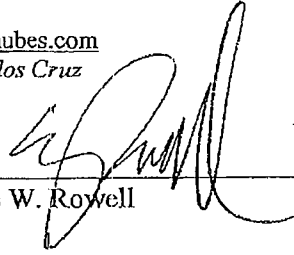
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Attorney for Alejandro Avalos Cruz

This 23 day of August, 2012
Charlotte, N.C.

By: _____

Eric W. Rowell

A handwritten signature in black ink, appearing to read 'Eric W. Rowell', written over a horizontal line.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY J.
DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY H.
HAYES, TY HIX, JENNIFER D. HIX, PAUL W. HUND,
III, RUTH E. ISAAC, MICHAEL D. PLOURDE, MARY
LOU PLOURDE, CAROL C. POPE, STEVEN B.
TAYLOR, BETTE J. TAYLOR, AND ROBERT WHITE,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT Co., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION, LLC,
SDI FUNDING, LLC, MEDALLION AT KEOWEE, LLC,
BRADFORD D. SECKINGER, JOHN LUDWIG,
LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS
KEOWEE DEVELOPMENT, LLC, MARICK HOME
BUILDERS, LLC, M GROUP CONSTRUCTION AND
DEVELOPMENT, LLC, BOSTIC BROTHERS
CONSTRUCTION, INC., RICK THOENNES, MEL
MORRIS, JOE BOSTIC, JEFF BOSTIC, CLEAR VIEW
CONSTRUCTION, LLC, MICHAEL FRANZ, MHC
CONTRACTORS, MIGUEL PORRAS CHONCOAS,
BUILDERS FIRST SOURCE SOUTHEAST GROUP,
MIKE GREEN, SOUTHERN CONCRETE SPECIALTIES,
CARL COMPTON D/B/A COMPTON ENTERPRIZE
A/K/A COMPTON ENTERPRISES, GUNTER HEATING
& AIR, ALL PRO HEATING, A/C & REFRIGERATION,
LLC, COLEMAN WATERPROOFING, HEYWARD
ELECTRICAL SERVICES, INC., TINSLEY
ELECTRICAL, LLC, HUTCH N SON CONSTRUCTION,
INC., CARL CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO CONSTRUCTION,
FRANCISCO JAVIER ZARATE D/B/A ZARATE
CONSTRUCTION, ALEJANDRO AVALOS CRUZ,
HERBERTO ACROS HERNANDEZ, MARTIN
HERNANDEZ-AVILES, FRANCISCO VILLALOBOS
LOPEZ, AMBROSIO MARTINEZ-RAMIREZ, ESTER
MORAN MENTADO, SOCORRO CASTILLO MONTEL,
UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS,

CASE NUMBER: 2009-CP-37-0652

**DEFENDANT ALEJANDRO CRUZ'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT AS TO
CROSS-CLAIMS OF MARICK HOME
BUILDERS, LLC AND RICK THOENNES**

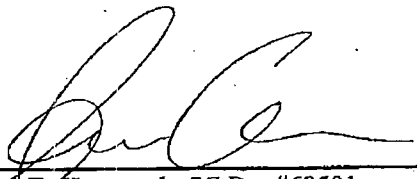
INC., MJG CONSTRUCTION AND HOMEBUILDERS,)
INC. D/B/A MJG CONSTRUCTION, KMAC, INC.,)
D/B/A KMAC NORTH CAROLINA, EUFACIO)
GARCIA, EVERADO JARMAMILLO, GARCIA PARRA)
INSULATION, INC., J&J CONSTRUCTION, JOSE)
NINO, JOSE MANUEL GARCIA, EASON)
CONSTRUCTION, INC., AND VINCENT MORALES)
D/B/A MORALES MASONRY, MILLER/PLAYER &)
ASSOCIATES,)
Defendants,)

TO: JASON IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS, LLC AND RICK THOENNES:

YOU WILL PLEASE TAKE NOTICE that the Defendant Alejandro Avalos Cruz, by and through his undersigned attorney, will move this honorable Court, on the tenth (10th) day after service hereof or at such other time and place as shall be convenient to the Court and counsel, for an Order granting summary judgment as to the cross-claims of Marick Home Builders, LLC and Rick Thoennes, in the above-captioned matter upon the grounds that there exists no genuine issue as to any material fact and that the Defendant Alejandro Avalos Cruz is entitled to judgment as a matter of law in its favor.

This Motion is based upon the pleadings in the within action, upon Rule 56 of the South Carolina Rules of Civil Procedure, and upon such additional law and argument as shall be appropriate.

August 23, 2012


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STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

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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 &)
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CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
SOUTHERN BASEMENTS, INC., MJG)

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

CERTIFICATE OF SERVICE

CONSTRUCTION AND HOMEBUILDERS, INC.)
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 D/B/A KMAC NORTH CAROLINA, EUFACIO)
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 ASSOCIATES,)
 Defendants,)

I, Diane Kuzniar, a paralegal at Clawson and Staubes, pursuant to Rule 5(b)(1), SCRCF and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of Defendant Alejandro Avalos Cruz's Notice of Motion and Motion for Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes to Jason Imhoff, Attorney for Marick Home Builders, LLC and Rick Thoennes, postage prepaid, in the United States mail, with due and proper postage affixed thereto:

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August 23, 2012

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STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

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

Plaintiff(s))

vs.)

IMK Development Co., LLC, Keowee Townhouses,)
LLC, et. al.)

Defendant(s))

IN THE COURT OF COMMON PLEAS

**MOTION AND ORDER INFORMATION FORM
AND COVER SHEET**

C/A No: 2009-CP-37-0652°

Plaintiff's Attorney: Robert T. Lyles, Jr., Esquire Lyles & Lyles, LLC 342 East Bay Street Post Office Box 773 (29402) Charleston, South Carolina 29402 (843) 577-7730	Defendant's Attorney: G. Thomas Chase Bar No. 66452 Geoffrey W. Gibbon Bar No. 74918 Address: McAngus, Goudelock & Courie, LLC Post Office Box 2980 75 Beattie Place, Suite 300 (29601) Greenville, South Carolina 29602 (864) 239-4000 Fax: (864) 242-3199 e-mail: tchase@mcclaw.com Email: ggibbon@mcclaw.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion for Summary Judgment Estimated Time Needed: Court Reporter Needed: 15 mins. ☒ 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.	
SECTION III: Motion Fee	
☒ PAID – AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions ☐ State Agency v. Indigent Party ☐ Post-Conviction Relief ☐ Motion for Execution (Rule 69, SCRPC) 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: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

000803

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

STONELEDGE AT LAKE KEOWEE
OWNERS' ASSOCIATION, INC., C. DAN
CARSON, JEFFREY J. DAULER, JOAN
W. DAVENPORT, MICHAEL FURNARI,
DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P.
HAYES, LUCY H. HAYES, TY HIX,
JENNIFER D. HIX, PAUL W. HUND, III,
RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE,
CAROL C. POPE, STEVEN B. TAYLOR,
BETTE J. TAYLOR, AND ROBERT
WHITE, INDIVIDUALLY, AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC,
KEOWEE TOWNHOUSES, LLC,
LUDWIG CORPORATION, LLC, SDI
FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME
BUILDERS, LLC, BOSTIC BROTHERS
CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES,
BRADFORD D. SECKINGER, JOHN
LUDWIG, 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 ENTERPRISE A/K/A
COMPTON ENTERPRISES, GUNTER
HEATING & AIR, ALL PRO HEATING,
A/C & REFRIGERATION, LLC,

Civil Action No. 2009-CP-37-0652

**SOCORRO CASTILLO MONTEL'S
MOTION FOR SUMMARY
JUDGMENT AS TO CROSS-CLAIMS
OF MARICK HOME BUILDERS, LLC
AND RICK THOENNES**

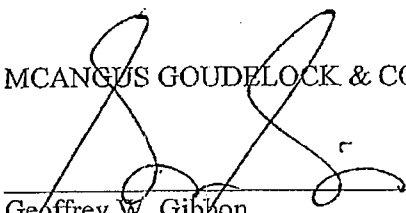
COLEMAN WATERPROOFING,)
 HEYWARD ELECTRICAL SERVICES,)
 INC., TINSLEY ELECTRICAL, LLC,)
 HUTCHINSON CONSTRUCTION, INC.,)
 CARL CATO CONSTRUCTION, INC.)
 T.G. CONSTRUCTION, LLC, DELFINO)
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 HOMEBUILDERS, INC. D/B/A MJG)
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)
)
 Defendants.)
)
)

**TO: JASON IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS,
 LLC AND RICK THOENNES:**

You will please take notice that Defendant, Socorro Castillo Montel (hereinafter "Montel"), by and through his undersigned attorney, will move before this Honorable Court for an Order granting Montel summary judgment as to the cross-claims of Marick Home Builders, LLC and Rick Thoennes (hereinafter collectively "Marick"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This motion shall be heard in ten (10) days time or as soon thereafter as the Court may allow including, but not limited to, the September 5, 2012 motion roster term.

The basis for this motion is that there is no genuine issue as to any material fact with respect to Marick's causes of action against Montel and, accordingly, Montel is entitled to summary judgment. This motion is supported by the pleadings, discovery to date, and other documents on file, applicable statutory and common law, and any memorandum of law to be submitted, and any other evidence the Court would consider.

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SOCORRO CASTILLO MONTEL

August 23, 2012

Re: Stoneledge at Lake Keowee Owners' Association, Inc., et al. v. IMK Development Co., LLC et. al.
C.A. No. 2009-CP-37-0652

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of August, 2012 served a copy of the foregoing document by electronically mailing a true and correct copy to the following counsel of record and also by mailing a hard copy to Jason Imhoff, postage prepaid, in the United States mail, with sufficient postage affixed thereto:

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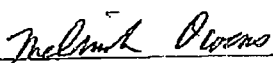
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STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

STONELEDGE AT LAKE KEOWEE
OWNERS' ASSOCIATION, INC., C. DAN
CARSON, JEFFREY J. DAULER, JOAN
W. DAVENPORT, MICHAEL FURNARI,
DONNA FURNARI, JESSY B. GRASSO,
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BETTE J. TAYLOR, AND ROBERT
WHITE, INDIVIDUALLY, AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC,
KEOWEE TOWNHOUSES, LLC,
LUDWIG CORPORATION, LLC, SDI
FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME
BUILDERS, LLC, BOSTIC BROTHERS
CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES,
BRADFORD D. SECKINGER; JOHN
LUDWIG, 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 ENTERPRISE A/K/A
COMPTON ENTERPRISES, GUNTER

Civil Action No. 2009-CP-37-0652

MEMORANDUM IN SUPPORT OF
SOCORRO CASTILLO MONTEL'S
MOTION FOR SUMMARY
JUDGMENT AS TO MARICK HOME
BUILDERS, LLC

Union, South Carolina. The Stoneledge project was constructed in two phases, Phase I and Phase II. It is Montel's understanding that Marick performed limited work in Phase I but was the general contractor for all of Phase II. Marick contracted directly with various subcontractors related to Phase II. Marick had no such contract with Montel.

Plaintiffs' Third Amended Complaint alleges various causes of action against all above-captioned Defendants. In response to Plaintiffs' Third Amended Complaint, Marick filed an Answer which included cross-claims against numerous defendants, including Montel. Marick has asserted cross-claims for equitable indemnity, negligence, and breach of warranty against Montel. Marick did not include Montel in its breach of contract cause of action in its cross-claim. (See Exhibit A – Excerpts of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims). Marick's cross-claims for indemnity, negligence, and breach of warranty each request the same relief from Montel: generally, indemnity for any damages recovered by Plaintiffs against Marick, plus attorneys' fees and costs. (See Exhibit A).

Further, neither Plaintiffs nor Marick have alleged that Montel has any relationship with Marick, contractual or otherwise. (See Exhibit B – Excerpts from Plaintiffs' Third Amended Complaint and Exhibit A). In fact, Marick omitted Montel from its breach of contract cross-claim while specifically including other Defendants with which Marick had a contractual relationship. The only allegation as to Montel's scope of work is that he was a Phase II subcontractor for Carl Catoe Construction, LLC ("Catoe").¹ (See Exhibit B and Exhibit C – Excerpts from Catoe's July 9, 2012 Cross-Claims).

¹ Montel denies he had any involvement in the construction project at issue in any respect and Catoe has admitted it had no written contract with Montel. Nonetheless, even as alleged Montel is several steps removed from Marick as Catoe was a subcontractor of Builders FirstSource – Southeast Group, who in turn was a subcontractor of Marick, thus making Montel an alleged fourth-tier subcontractor in this case.

Argument

Marick's Cross-Claims as to Montel must fail on the grounds that there is no relationship between Montel and Marick. Further, Marick's Cross-Claims must fail as they are strictly equitable indemnification claims and Plaintiffs have alleged that Marick is a joint tortfeasor.

I. Standard of Review

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate where there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56, SCRPC.

II. Marick's non-indemnity claims are merely disguised indemnity claims, and thus barred.

Marick's non-indemnity cross-claims are merely disguised claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Woodchuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." State v. Yelsen Land Co., 257 S.C. 401, 403, 185 S.E.2d 897, 898 (1972); Seebaldt v. First Fed. Sav. Y Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." Walsh v. Evans, 112 S.C. 131, 136, 99

S.E.2d 546, 548 (1919). Stated simply, courts may use the allegations in the complaint to determine the correct character of the action. See Seebaldt at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

As stated by South Carolina's federal district court, "a rose by any other name is still a rose," and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for...indemnification with a slight change in wording." SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

As noted above, all three of Marick's cross-claims against Montel request the same relief, generally, that Montel indemnify Marick for any and all damages recovered by Plaintiffs against Marick, including attorneys' fees and costs. In other words, Marick's cross-claims seek to recover the amount Marick is found to be liable to Plaintiffs at trial and are contingent on the outcome of trial. Marick does not seek damages from Montel for personal injury, property damage, or other damages actually incurred by Montel, and the cross-claims are therefore really duplicative claims for indemnity which should be dismissed.

III. Marick's indemnity claims are barred.

Equitable indemnity is not available to Marick because they are an alleged joint tortfeasor. The law of South Carolina is clear that for a party to recover under a theory of equitable indemnification the party must be exonerated from any liability for causing Plaintiff's damages. See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). In fact, the most important requirement for a finding of equitable indemnity is that a party seeking to be indemnified is adjudicated without fault. Id. In this action, if Plaintiffs' are successful on their claims, it is clear that Marick, as the general

contractor for Phase II, will be found to be at fault for the loss.

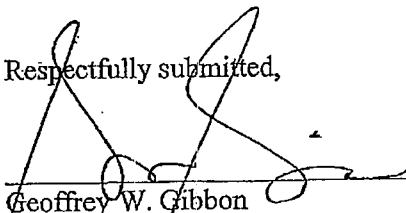
IV. No Relationship between Marick and Montel.

There is no contract between Marick and Montel nor has any relationship of any kind been alleged to exist between Marick and Montel. In order to assert a claim in equitable indemnity, one must establish a special relationship. See Rock Hill Telephone Co. v. Global Communications, 363 S.C. 385, 611 S.E.2d 235 (2005). In Rock Hill, a Utility company hired an independent contractor to complete work on a project and the independent contractor subsequently subcontracted the work to another subcontractor. The Court ultimately found that the relationship between the Utility company and the subcontractor was too remote and attenuous to constitute a special relationship. The relationship between Marick and Montel is even more remote and, therefore, Marick's cross-claim must be dismissed.

Conclusion

For the reasons set forth herein, Montel prays its Motion for Summary Judgment as to Marick's cross-claims be granted.

Respectfully submitted,



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ATTORNEYS FOR SOCORRO CASTILLO
MONTEL

August 30 2012

EXHIBIT A

128. Defendants incorporate herein the allegations of their foregoing defenses not inconsistent herewith.

129. Plaintiffs' claims are barred in whole or in part by the economic loss rule.

FOR A FOURTEENTH DEFENSE

130. Defendants incorporate herein the allegations of their foregoing defenses not inconsistent herewith.

131. Defendants reserve and do not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

FOR A FIFTEENTH DEFENSE

132. Defendants incorporate herein the allegations of their foregoing defenses not inconsistent herewith.

133. Defendants allege that any and all causes of action against it are barred by the applicable statute of limitations.

FOR A SIXTEENTH DEFENSE AND BY WAY OF CROSS CLAIM
(Equitable Indemnity)

134. These Defendants incorporate herein the allegations of their foregoing defenses not inconsistent herewith.

135. Upon information and belief, Clearview Construction is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided stone work on the project at issue in this case. Michael Franz is the owner operator of Clearview Construction and a resident of Greenville County in the State of South Carolina.

136. Upon information and belief, MHC Contractors is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided stone work on the project at issue in this case. Miguel Porras Choncoas is the owner operator of MHC Contractors and a resident of Greenville County in the State of South Carolina.

137. Upon information and belief, Miller/Player and Associates is a South Carolina Corporation conducting business in Oconee County, South Carolina, and provided architectural design for the project at issue in this case.

138. Upon information and belief, Builders FirstSource is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided framing work on the project at issue in this case.

139. Upon information and belief, Southern Concrete Specialties is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided concrete flatwork and basement work for the project at issue in this case.

140. Upon information and belief, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises are alternatively South Carolina corporations conducting business in Oconee County, South Carolina and/or the owner and/or operator of said companies and is a citizen and resident of Greenville County in the State of South Carolina and conducting business in Oconee County, South Carolina by providing roofing work for the project at issue in this case.

141. Upon information and belief, Gunter Heating and Air is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided HVAC work for the project at issue in this case.

142. Upon information and belief, All Pro Heating, A/C, and Refrigeration, LLC is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided HVAC work for the project at issue in this case.

143. Upon information and belief, Coleman Waterproofing is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided waterproofing work for the project at issue in this case.

144. Upon information and belief, Heyward Electrical Services is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided electrical work for the project at issue in this case.

145. Upon information and belief, Tinsley Electrical, LLC is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided electrical work for the project at issue in this case.

146. Upon information and belief, Hutch N Son Construction is a South Carolina corporation conducting business in Oconee County, South Carolina, which provided grading work for the project at issue in this case.

147. Upon information and belief, Bostic Brothers Construction, Inc. is a corporation organized and conducting business under the laws of the State of South Carolina and doing business in Oconee County, South Carolina as a general contractor for certain townhomes at the project.

148. Upon information and belief, Upstate Utilities, Inc. is a corporation conducting business in Oconee County, South Carolina, which provided grading work and other work for the project at issue in this case.

149. Upon information and belief, Southern Basement, Inc. is a corporation conducting business in Oconee County, South Carolina, which provided basement work for the project at issue in this case.

150. Upon information and belief, Carl Catoe Construction, Inc. is a corporation conducting business in Oconee County, South Carolina, which provided labor and materials for framing, installation of windows, doors, sidings, trim, and other work at the project at issue in this case.

151. Upon information and belief, 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 Scocorro Castillo Montel are individuals or entities conducting business in Oconee County, South Carolina, which provided services, materials, or both including framing, installation of windows, doors, siding, trim, and other work at the project at issue in this case.

152. Upon information and belief, MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC of the Carolinas, Inc., Eufacio Garcia, Everado Jaramillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Marales d/b/a Marales Masonry are individuals or entities conducting business in Oconee County, South Carolina, which provided materials, services or both to the Project at issue in this case.

153. Upon information and belief, each of the design professionals, contractors, and subcontractors named above provided services and/or products to Plaintiffs, Bostic, and/or Marick which Plaintiffs allege are defective in their Third Amended Complaint.

154. If Plaintiffs' allegations are true, which are specifically denied and admitted solely for this defense and Cross Claim and no other, in that the goods and services supplied by the design professionals, contractors, and subcontractors above are defective and failed and they were damaged by these goods and services, which has been denied by Marick, the conduct, acts and/or omissions of 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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 have led to those damages and may lead to additional damages being asserted against Marick Home Builders without any fault by it.

155. Assuming the allegations of Plaintiffs' Third Amended Complaint are true, which is expressly denied by Marick and admitted solely for the purpose of this defense and Cross claim and no other, the design professionals, contractors and

subcontractors have breached their duties to Plaintiffs and Marick, and as a result of that breach Plaintiffs and Marick have or will be damaged.

156. Due to the potential of liability and damages being assessed against Marick Home Builders, without any fault by it, Marick Home Builders alleges that if Plaintiffs are awarded damages against Marick Home Builders for the defective or deficient work, services, and/or products provided by 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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 it is entitled to equitable indemnity from said contractors, subcontractors, and design professionals.

157. Marick alleges that the damages, if any, sustained by the Plaintiffs in this case were a direct and proximate result of the actions of design professionals, contractors and subcontractors listed above.

158. Marick alleges that if Plaintiffs are entitled to recovery by judgment or otherwise against it, Marick is entitled to equitable indemnity against 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jarnamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry in the same amount. Marick further alleges that it should be reimbursed and indemnified for the cost of the action, including, but not limited to, attorney's fees and costs incurred in the defense.

FOR A SEVENTEENTH DEFENSE AND BY WAY OF CROSS CLAIM
(Breach of Contract-Contractors)

159. Defendants incorporate herein the allegations of their foregoing defenses not inconsistent herewith.

160. 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, and Southern Basement entered into a legally binding contract whereby Marick agreed to pay each contractor and subcontractor for furnishing appropriate and non-defective materials and work in each contractor's and subcontractor's specialty for Plaintiffs.

161. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, contractors and subcontractors have provided defective materials or services in breach of each of their contracts with Marick.

162. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, said breach of contract has resulted or could result in damage to Plaintiff, which could or will be assessed against Marick.

163. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, each contractor or subcontractor breached the terms of its contract with Marick and Marick is informed and believes it is entitled to judgment against each contractor or subcontractor for actual damages, together with attorney's fees, and interest thereon.

FOR AN EIGHTEENTH DEFENSE AND BY WAY OF CROSS CLAIM
(Negligence)

164. Defendants incorporate herein the allegations of their foregoing defenses not inconsistent herewith.

165. As subcontractors, material men, or design professionals providing materials and work on the Property, 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Eberado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry had a duty to perform their work in accordance with the plans and specifications, accepted building standards and practices, manufacturers instructions, or other direction and to provide materials and services conforming therewith.

166. To the extent that the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, each of the above named breached their respective duties and were negligent in the work performed or material provided including, but not limited to, the following:

- i. Improper installation of roof;

- ii. Improper installation of HVAC units;
- iii. Defective framing;
- iv. Improper installation of stone cladding;
- v. Improper installation of siding;
- vi. Improper installation of windows;
- vii. Improper installation of concrete;
- viii. Defective electrical work;
- ix. Improper grading;
- x. Improper design;
- xi. Defective construction;
- xii. Use of improper materials;
- xiii. Improper or deficient supervision;
- xiv. Improper hiring; and
- xv. Defective or deficient design.

167. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Cross Claim, the negligence, gross negligence, reckless, willful, and wanton conduct of each of the above named combined, concurred, or was a cause of the Plaintiffs' alleged resulting damages as alleged in the Third Amended Complaint.

168. If the Plaintiffs' allegations are true, which is denied by Defendants and admitted solely for the purpose of this defense and Cross Claim, the above named are all jointly and severally liable as each parties' work and/or materials proximately caused resulting property damage to other construction work product on the Property causing

Marick to incur attorneys' fees, costs, and face potential liability to the Plaintiffs for which they sue.

169. Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiello Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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 negligence; as a result, Marick is informed and believes that it is entitled to recover from 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic

Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiello Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jaramamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

170. Marick is entitled to recover against each jointly and severally any and all damages recovered by the Plaintiffs against Marick including reasonable attorneys' fees and costs.

FOR A NINETEENTH DEFENSE AND BY WAY OF CROSS CLAIM
(Breach of Warranties)

171. Defendants incorporate herein the allegations of their foregoing defenses not inconsistent herewith.

172. 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz,

Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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 expressly and/or impliedly warranted to Marick that their service and materials would be provided in a good and workmanlike manner free from defects and in accordance with applicable building codes and industry standards, manufacturers' instructions, or other applicable standards.

173. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Defendants, 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garoia, 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 breached their express and/or implied warranties.

174. Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of the above named parties' breach of their express and/or implied warranties; as a result, Marick is informed and believes that it is entitled to recover from 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiello Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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 such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

WHEREFORE, Marick Home Builders having fully answered the Plaintiffs' Third Amended Complaint and Cross Claiming against 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiello Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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, prays that this court:

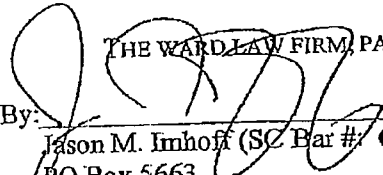
- a. Dismiss Plaintiffs' Third Amended Complaint with prejudice;
- b. In the alternative, that Marick Home Builders be granted judgment against Michael Franz, Clearview Construction, Miguel Porras Chioncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez,

Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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 in the sum to be determined by a jury for both actual and punitive damages, attorney's fees, for the costs of this action, interest, and for such other and further relief as this court may deem just and proper;

c. In the alternative, that Marick Home Builders be indemnified in whole or in part by 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, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio 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;

d. For the cost of this action from parties other than Marick Home Builders; and

e. For such other and further relief as this court may deem just and equitable.

By:  THE WARD LAW FIRM, PA
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jimhoff@wardfirm.com
Attorneys for Marick Home Builders, LLC

April 5, 2012
Spartanburg, South Carolina

EXHIBIT B

41. Upon information and belief, Southern Basements, Inc. ("Southern Basements") 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. Based on discovery responses provided by Marick, Plaintiffs believe Southern Basements provided work for the Project, including but not limited to basement work.

----- 42. ----- 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, Hutch N Son, and Southern Basements.

43. 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.

44. 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, at all times relevant herein, were conducting business in Oconee County by contracting to provide 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.

EXHIBIT C

FOR A NINETEENTH DEFENSE
(Offset)

51. CCC is entitled to an offset for any settlement amounts paid on behalf of other parties.

FOR A TWENTIETH DEFENSE AND BY WAY OF ADDITIONAL CROSS-CLAIMS AGAINST
DEFENDANTS T.G. CONSTRUCTION, LLC, DELFINO CONSTRUCTION, ZARATE CONSTRUCTION,
ALEJANDRO AVALOS CRUZ, HERBERTO ARCOS HERNANDEZ, MARTIN HERNANDEZ-AVILES,
FRANCISCO VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-RAMIREZ, ESTER MORAN MENTADO,
SOCORRO CASTILLO MONTEL, AND FRANCISCO JAVIER ZARATE

52. CCC incorporates its preceding answers to Medallion's and Seckinger's Cross-Claim, to the extent such answers are not inconsistent herewith.

53. CCC asserts its Additional Cross-Claims against Defendants T.G. Construction, LLC, Delfino Construction, Zarate Construction, Alejandro Avalos Cruz, Herberto Arcos Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, and Francisco Javier Zarate ("CCC's Subcontractors"), jointly and severally, which follow.

54. During and throughout 2006, CCC provided construction services at a townhome development in West Union, South Carolina, which is known as Stoneledge at Lake Keowee ("Stoneledge").

55. Stoneledge was constructed in two phases. CCC performed construction services for Phase II only.

56. In 2006, CCC entered into agreements with each of the Defendants identified above as "CCC's Subcontractors" by which they each agreed to provide construction services on behalf of CCC on Phase II of Stoneledge.

57. The Court is vested with jurisdiction over this subject matter by virtue of the South Carolina Constitution, Article V, § 11, and South Carolina Code § 14-5-350.

58. The Court is vested with personal jurisdiction over CCC's Subcontractors by virtue of their individual and collective conduct, through South Carolina Code § 36-2-803.

59. Venue is proper pursuant to South Carolina Code § 15-7-30.

FOR A FIRST CAUSE OF ACTION OF THE ADDITIONAL CROSS-CLAIM
(BREACH OF CONTRACT)

60. CCC incorporates its preceding answers to Medallion's and Seckinger's Cross-Claim, to the extent such answers are not inconsistent herewith.

61. In 2006, CCC entered into an agreement with each of CCC's Subcontractors by which the Subcontractors would provide construction services at Stoneledge on behalf of CCC. In exchange for each Subcontractor's services, CCC would provide a certain amount of payment.

62. Each of the 2006 agreements between CCC and CCC's Subcontractors regarding Stoneledge was supported by consideration.

63. Each of the 2006 agreements between CCC and CCC's Subcontractors regarding Stoneledge was a valid, enforceable contract.

64. CCC rendered full performance to each of CCC's Subcontractors under their respective construction services agreements.

65. To the extent the Cross-Claim of Medallion and Seckinger makes allegations of construction deficiencies attributable to CCC and CCC is held liable on such allegations, CCC's Subcontractors breached their contracts with CCC, and CCC will be entitled to judgment against CCC's Subcontractors in the amount of sums CCC pays pursuant to judgment, settlement, or otherwise.

FOR A SECOND CAUSE OF ACTION OF THE ADDITIONAL CROSS-CLAIM
(BREACH OF WARRANTY)

66. CCC incorporates its preceding answers to Medallion's and Seckinger's Cross-Claim, to the extent such answers are not inconsistent herewith.

67. Medallion and Seckinger have named CCC as a party to the Cross-Claim, alleging inter alia, defects related to work performed and materials supplied by CCC.

68. Each of CCC's Subcontractors expressly and/or impliedly warranted that their respective services would be performed in a careful, diligent, and workmanlike manner, that their respective services would be carried out in a manner consistent with standards of proper workmanship, and that the product of their services would be reasonably fit for their intended purposes.

69. To the extent the Cross-Claim of Medallion and Seckinger makes allegations of construction deficiencies attributable to CCC and CCC is held liable on such allegations, CCC's Subcontractors breached their express and/or implied warranties, and CCC will be entitled to judgment against CCC's Subcontractors in the amount of sums CCC pays pursuant to judgment, settlement, or otherwise.

FOR A THIRD CAUSE OF ACTION OF THE ADDITIONAL CROSS-CLAIM
(NEGLIGENCE)

70. CCC incorporates its preceding answers to Medallion's and Seckinger's Cross-Claim, to the extent such answers are not inconsistent herewith.

71. Medallion and Seckinger have named CCC as a party to the Cross-Claim, alleging inter alia, defects related to work performed and materials supplied by CCC.

72. While providing construction services on behalf of CCC for Stoneledge at Lake Keowee, CCC's Subcontractors owed CCC a duty to exercise due care and to perform all

services in a manner consistent with, among other things, product specifications, industry standards, and code requirements.

73. To the extent the Cross-Claim of Medallion and Seckinger makes allegations of construction deficiencies attributable to CCC and CCC is held liable on such allegations, CCC's Subcontractors were negligent, grossly negligent, willful and/or wanton in the performance of their services, and CCC will be entitled to judgment against CCC's Subcontractors in the amount of sums CCC pays pursuant to judgment, settlement, or otherwise.

FOR A FOURTH CAUSE OF ACTION OF THE ADDITIONAL CROSS-CLAIM
(EQUITABLE INDEMNIFICATION)

74. CCC incorporates its preceding answers to Medallion's and Seckinger's Cross-Claim, to the extent such answers are not inconsistent herewith.

75. CCC relied on CCC's Subcontractors to provide construction services in a manner consistent with industry standards, in a workmanlike manner, and following the applicable building codes.

76. Medallion and Seckinger have named CCC as a party to the Cross-Claim, alleging, *inter alia*, that CCC is or may be liable as a direct and proximate consequence of work performed or materials supplied.

77. Under the laws of South Carolina, a special relationship existed between CCC and each of CCC's Subcontractors.

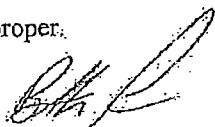
78. As a result of the allegations made by Medallion and Seckinger in the Cross-Claim, CCC has been forced to defend against the action and incur attorneys' fees, costs, and expenses, and faces an uncertain amount of liability exposure.

79. If CCC is found liable on any ground arising from or related to the scope of work or materials provided by any of CCC's Subcontractors, the fault would lie entirely with such at-

fault subcontracting party. CCC's liability would be secondary and passive to that Party's liability.

80. CCC is therefore entitled to full indemnification from any of CCC's Subcontractors for any liability which may be imposed on CCC, or which CCC pays in settlement of any claims presented in this litigation, including recovery of reasonable attorneys' fees and costs incurred in the defense of this lawsuit, arising from or related to the scope of work or materials provided by CCC's Subcontractors.

WHEREFORE, having fully answered the Cross-Claims of Defendants Medallion and Seckinger, and having asserted claims for relief against CCC's Subcontractors in the Additional Cross-Claim, CCC respectfully requests an Order of the Court which dismisses the claims presented in Defendants' Cross-claim, awards the relief requested in the Additional Cross-Claim, for the costs, fees, and expenses associated with litigating this action, and for such other or further relief as the Court deems just and proper.



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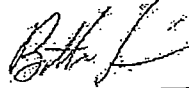
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July 9, 2012

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DEMAND FOR TRIAL BY JURY

I, the undersigned legal representative for Carl Catoe Construction, Inc., respectfully request that a trial by jury be had upon all issues presented in this matter, for which a jury trial is available.



R. Batten Farrar

Re: Stoneledge at Lake Keowee Owners' Association, Inc., et al. v. IMK Development Co., LLC et. al.
C.A. No. 2009-CP-37-0652

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of August, 2012 served a copy of the foregoing document by electronically mailing a true and correct copy to the following counsel of record and also by mailing a hard copy to Jason M. Imhoff, Attorney for Marick Home Builders, LLC postage prepaid, in the United States mail, with sufficient postage affixed thereto:

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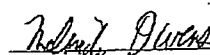
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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners' Association, et al.

☐ Plaintiff

v.

IMK Development Co., LLC, Et Al. (T.G. Construction, LLC's Motion)

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009--CP-37-0652

MOTION INFORMATION FORM
AND COVER SHEET

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e-mail: other:

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

SECTION I: Hearing Information

Nature of Motion: T.G. Construction, LLC Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes

Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

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

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

August 23, 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, 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: _____

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.)
d/b/a MJG Construction, KMAC of the)
Carolinas, Inc., Eufacio Garcia, Everado)

**DEFENDANT T.G.
CONSTRUCTION, LLC'S MOTION
FOR SUMMARY JUDGMENT AS
TO CROSS-CLAIMS OF MARICK
HOME BUILDERS, LLC AND
RICK THOENNES**

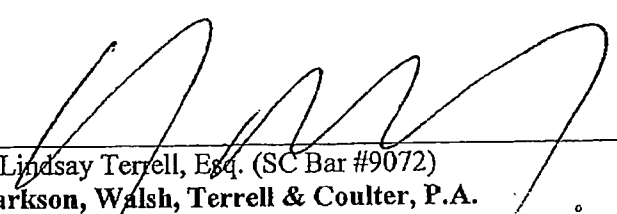
Jarmamillo, Garcia Parra Insulation, Inc., J&J)
Construction, Jose Nino, Jose Manuel Garcia,)
Eason Construction, Inc., and Vincent Morales)
d/b/a Morales Masonry,)
Defendants,)

TO: JASON IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS, LLC AND RICK THOENNES

You will please take notice that Defendant T.G. Construction, LLC, by and through its undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, will move before this Court for an order granting it summary judgment, in part or in total, as to the claims of Marick Home Builders, LLC and Rick Thoennes (collectively "Marick"). This motion shall be heard in ten (10) days' time or as soon thereafter as the Court may allow.

The basis for T.G. Construction, LLC's Motion is that there is no genuine issue as to any material fact with respect to the causes of action asserted against T.G. Construction, LLC by Marick and, as a result, T.G. Construction, LLC is entitled to summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

This motion is supported by the pleadings and other documents on file, applicable case law and statutory law, and any memorandum of law and/or any



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August 23, 2012

CERTIFICATE OF SERVICE

I, Shannon Henderson, an employee of Clarkson, Walsh, Terrell & Coulter, P.A., pursuant to Rule 5(b)(1), SCRCP and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **T.G. Construction LLC's Motion for Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes** to the following counsel of record:

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This 23rd day of August, 2012
Greenville, SC

By:

Shannon Henderson
Shannon Henderson, Legal Assistant

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT Co., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME BUILDERS,
LLC, BOSTIC BROTHERS CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES, JOHN
LUDWIG, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO
AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,
MARTIN HERNANDEZ-AVILES, FRANCISCO
VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-

MARICK HOME BUILDERS, LLC AND
RICK THOENNES' MEMORANDUM IN
OPPOSITION TO UPSTATE UTILITIES,
HUTCH N SON CONSTRUCTION,
MILLER/PLAYER & ASSOCIATES,
CLEARVIEW CONSTRUCTION,
BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, CARL CATOE CONSTRUCTION,
TG CONSTRUCTION, ALEJANDRO CRUZ,
HERBERTO ARCOS HERNANDEZ,
MARTIN HERNANDEZ-AVILES,
SOCORRO CASTILLO MONTEL, KMAC,
INC. JOSE NINO, AND VINCENT
MORALES D/B/A MORALES MASONRY'S
MOTION FOR SUMMARY JUDGMENT

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., 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,)
)
)
Defendants,)

Defendants, Marick Home Builders, LLC (hereinafter "Marick") and Rick Thoennes (hereinafter "Thoennes") (hereinafter both Defendants collectively referred to as "Defendants" "Marick") hereby submit this Memorandum in Opposition to Upstate Utilities, Hutch N Son Construction, Miller/Player & Associates, Clearview Construction, Builders FirstSource-Southeast Group, Carl Catoe Construction, T.G. Construction, Alejandro Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Socorro Castillo Montel, KMAC, Inc., Jose Nino, and Vincent Morales d/b/a Morales Masonry's Motions for Summary Judgment and/or Motions to Dismiss concerning Marick and Rick Thoennes Cross-claims (hereinafter collectively "subcontractors.")

FACTS/PROCEDURAL POSTURE

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter “Hund”). (See Plaintiff’s Complaint). Hund’s complaint alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the project.

Upon information and belief, Stoneledge Owners Association (hereinafter "SOA") took the position that Dr. Hund's Complaint was improper as the SOA was responsible for the exterior of the units and it retained Jim Logan to review its options. In November of 2009, the owners voted to retain Mr. Lyles to represent the SOA and amend the lawsuit to include the SOA and both Phase I and Phase II of the project.

Dr. Hund amended the complaint to add the SOA and additional individual homeowners as Plaintiffs and included new allegations concerning Phase I of the project. Plaintiffs again alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, inadequate installation of building components, improper site work, and undisclosed latent defects.

Stoneledge at Lake Keowee (hereinafter "Stoneledge") is an 80 unit lakefront townhome development located in West Union, South Carolina along the shores of Lake Keowee. Stoneledge was constructed in two separate phases. The general contractor for phase I construction was Bostic Brothers Construction, Inc. (hereinafter "Bostic Brothers"). Following completion of the exterior of all phase I units and completion of a majority of the interiors of all phase I units, Bostic Brothers terminated construction at Stoneledge. A majority of the subcontractors and suppliers used by Bostic for phase I construction are different from the subcontractors and suppliers used during phase II construction.

After Bostic Brothers exit, the remaining unsold units and vacant land was purchased by IMK Development Co., LLC (hereinafter "IMK"). Once purchased, Marick Home Builders, LLC (hereinafter "Marick") was retained as the general contractor to construct phase II at Stoneledge. While preparing to begin phase II

construction, Marick also contracted to assist phase I homeowners with repairs and internal construction which was not performed by Bostic Brothers prior to Bostic Brothers departure from the development. Therefore, in reference to phase I, Marick made repairs to units sold by Bostic Brothers and completed some interior construction to phase I units.

Additionally, Marick was the general contractor in charge of phase II construction which began in January 2006. Upon information and belief, most of the subcontractors and suppliers that provided services and supplies to phase II construction were not involved with the construction of phase I.

Prior to completion of phase II, on or about June 13, 2008, Ludwig Corporation, LLC (hereinafter "Ludwig") purchased/acquired all unsold units from IMK Development and Integrys. At that point, Ludwig took over construction and finished phase II. Ludwig also acquired finished units located in phase I. Ludwig took over all general contracting roles previously performed by Marick. Further, after conducting an auction and selling some of the units acquired from IMK/Integrys, Ludwig sold/transferred the remaining unsold units to Medallion at Lake Keowee (hereinafter "Medallion").

Therefore, Phase II involved different subcontractors from phase I, different general contractors (Marick, Ludwig and Medallion rather than Bostic Brothers), different developers, the addition of amenities which were not built during phase I construction, in addition to numerous other differences between the two phases of construction.

STANDARD OF REVIEW

1. Motion to Dismiss

When reviewing a motion to dismiss, the Court must accept all well-pled facts in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *Nemet Chevrolet, LTD. V. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Trulock v. Freech*, 275 F.3d 302, 307 (4th Cir. 2001) and *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). To avoid dismissal, the “complaint must contain sufficient factual matter...[that when]...accepted as true...state[s] a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1958 (2007)). To be facially plausible, a complaint must contain factual content that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Nemet Chevrolet, LTD.*, 591 F.3d at 256 (citing *Iqbal*, 129 S.Ct. at 1952). However, this plausibility standard does not necessitate the plaintiff make a showing of the probability of success on the claim asserted. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965). The question to be answered is whether in a light most favorable to the plaintiff, and with every doubt resolved in plaintiff’s behalf, the Complaint states any valid claim for relief. *Washington v. Lexington County Jail*, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct.App. 1999).

2. Motion for Summary Judgment

“Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Thomas Sand Co. v. Colonial Pipeline Co.*, 563 S.E.2d 109, 112 (S.C. Ct. App. 2002). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston*

Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRC. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefore must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997).

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, **the non-moving party is only required to submit a mere scintilla of evidence** in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009); *See: Thomas Sand, Co.*, 563 S.E.2d at 112 (on negligence cause of action, "[a]t the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.")

LAW & ANALYSIS

In Defendants Third Amended Answer, Defendants asserted cross-claims for (1) Equitable Indemnification; (2) Breach of Contract; (3) Negligence; and (4) Breach of Warranties. A number of the parties have filed Motions for Summary Judgment and/or to Dismiss Defendants' cross-claims.

THE LAW

1. EQUITABLE INDEMNIFICATION

Subcontractors' Motions to Dismiss and for Summary Judgment of equitable indemnity causes of action should be denied because, at worst, genuine issues of material fact exist regarding Defendants' wrongdoing and subcontractors' contractual obligations. The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor. The Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight.

All of the subcontractors prosecuting motions allege that Marick cannot recover under Equitable Indemnity as Marick is not without fault. Specifically, they allege that defense expert Randy Still has admitted fault on behalf of Marick. This is an incorrect twisting of Mr. Still's words. Mr. Still specifically testified that Marick was not at fault and did not breach its obligation of supervision and oversight.

Deposition of Randy Still

Q: ... For clarification, just because there is an item on your scope of repair which you believe needs some modification or repair, does that, in your opinion, mean that Marick, my client, your client, breached any duty or obligation?

A: I don't think so, no.

Q: And, in fact, there are items on your scope of repair for Phase I which Marick did not build?

A: That is correct.

Q: And do you believe that Marick breached any obligation in its—or construction obligations in Phase I?

A: No.

(Still Dep. 163:19 – 164:6.)

Q: And additionally there have been repairs and modifications to Phase II which are now no longer original construction but you've included those in your repair scope as well?

A: That is correct.

Q: But that does not mean, and it is not your opinion that inclusion in your repair scope means or should imply that you believe Marick did something wrong; correct?

A: That is correct.

(Still Dep. 164:9-18.)

Q: Do you believe that Marick violated any obligation, whether it be through a contract document, manufacturer's installation instructions, code or any other obligation regarding the installation of the low slope roofs in Phase I?

A: No.

(Still Dep. 165:2-7.)

Q: In your opinion is it fair—is it acceptable for a general contractor to rely on that experience and education of a subcontractor in a particular trade?

A: I think in many cases he has to.

(Still Dep. 170:7-10.)

Q: I may have asked this but let me ask it another way: If Marick did no do any exterior construction in Phase I, do you have an opinion based on the inspections, investigation and your knowledge of the facts and allegations in this case whether Marick violated any code section?

A: I don't see how he could have, because the conditions we found only occurred after extensive destructive testing occurred.

Q: Do you believe that Marick violated any code in the installation of the weather-resistant barrier in Phase II? And I'm specifying Marick. Did

Marick violate any code in the installation of the weather-resistant barrier in Phase II?

A: No, I'm not aware he installed any WRB.

(Still Dep. 173:11-25.)

Q: Do you believe or do you have an opinion that Marick violated any code, manufacturers' instructions, design drawings in the installation of the cedar shake and plank siding in Phase II?

A: No.

Q: Do you have any opinion that Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of the doors and windows in Phase II?

A: I am not aware that he installed any of those components.

Q: Is that a "no"?

A: No.

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the stone installation in Phase II?

A: No.

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of any of the waterproofing, framing, grading, or other construction components in Phase II?

A: No.

(Still Dep. 174:1:24.)

While he admitted that Marick as the general contractor has overall responsibility for the construction of the entire project, he did not state that Marick Home Builders was at fault for the failures and code violations at the project for work performed by subcontractors. Instead, he admitted issues at the project, but not that Marick was

responsible. In this case, there is a factual issue as to whether or not Marick breached its obligations of supervision and oversight, as Mr. Still testified that Marick had not breached its standard of supervision and oversight.

Further, as an example of the testimony and as an example of evidence in the case, Southern Concrete's superintendent Jason Carlan admitted that Southern Concrete selected the products for waterproofing, familiarized itself with the manufacturer's installation instructions, installed the waterproofing per manufacturer's installation instructions, showed Nathan Hornaday, Marick's Superintendant, that it was installed in compliance with the manufacturer's installation instructions and Nathan Hornaday inspected Southern Concrete's work to ensure that the waterproofing was installed per manufactures installation instructions:

Deposition of Jason Carlan

A: This was the best product out there for what we were doing.

Q: What were you doing?

A: Waterproofing a deck to pour concrete on top of it.

Q: And when you said it met or exceeded what you needed, how was what you need defined?

A: By what details we had on the plans.

Q: And where did those details come from?

A: From the plans.

Q: The Miller/Player plans?

A: The Miller/Player plans.

Q: Did you discuss the product that you were going to use with anyone from Marick?

A: No. Other than what we priced. Our pricing, Polyguard membrane was on there.

(Carlan Dep. 40:1-20.)

Q: And how about any representative of Marick Home Builders? Did they inspect?

A: Yes.

Q: They came and looked at your installation?

A: On more than one occasion, yes.

(Carlan Dep. 46:22 – 47:1.)

Q: So did he ask you questions.

A: Yes.

Q: --- about how it was installed?

A: Oh, yeah.

(Carlan Dep. 47:15-18.)

Q: And is that how you told Nathan it should be done?

A: Yes.

Q: And is that how you told Nathan it was being done?

A: That's how I told Nathan we were doing it and how it needed to be done.

Q: And that Southern Concrete believed it was sufficient?

A: Yes.

(Carlan Dep. 79:25 – 80:5.)

Q: And did you show Nathan that you were putting the slope in by sloping the concrete?

A: Yes.

Q: And told him that's what you were doing?

A: Yes.

(Carlan Dep. 84:1-5.)

Based upon the above testimony and evidence, it is clear that there is a factual issue concerning whether or not Marick appropriately supervised and oversaw this project. Marick did not perform any of its own construction on the project, and therefore relied on the subcontractors for their knowledge, expertise, experience, and installation. Clearly, there is testimony and evidence that Marick did not breach its standard of supervision and oversight. Based upon the above, there is a question of fact concerning whether or not Marick had fault; thus, the subcontractors' motions for summary judgment as to equitable indemnity and unclean hands should be denied.

a. **Indirect subcontractors**

The motions of subcontractors without direct contracts with Marick should be dismissed under rules of equity and fairness. Although Marick did not specifically contract with many of its subcontractor's subcontractors, it still allegedly had obligations to supervise and oversee that work. It would be inequitable to allow the subcontractors which were supervised and overseen by Marick, and for which Marick is being sued, to escape liability to Marick while Marick suffers liability at the hands of those subcontractors.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994). "The right is created by operation of law 'in cases of imputed fault or where some special

relationship exists between the first and second parties.” *Id.* (Internal citation omitted)

“Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury.” *Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (Internal citation omitted).

With equitable indemnification, it does not matter that there is no contractual provision for indemnity. “The very nature of equitable indemnification is that a contract for indemnity is unnecessary.” *Winnsboro II*, 307 S.C. at 132, 414 S.E.2d at 121. It is true if a jury finds a party negligent, then as an adjudicated tortfeasor equitable indemnity would not be available. See South Carolina Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to -70 (Supp.1995). However, if the jury were to find a party not negligent, then the party would be entitled to equitable indemnification. *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct.App.1990).

We note that the modern trend concerning the right to indemnity is to look to principles of equity. According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 312-13, 476 S.E.2d 708, 710 (Ct. App. 1996)(emphasis added).

The cases relied upon by the indirect subcontractors establish that our courts do not find a special relationship between remote or independent contractors and general contractors. However, these subcontractors have not produced a case where a general contractor does not have a special relationship with a subcontractor’s subcontractor who he supervises and oversaw on a daily basis. Therefore, this Court should hold that a

subcontractor who is overseen and supervised on a daily basis, has a special relationship with the general contractor; thus, the motions for summary judgment should be denied.

b. Phase I subcontractors

The Phase I subcontractors' motions to dismiss should be denied because the allegations set a scenario under which Marick would have a special relationship or cognizable causes of actions against Phase I subcontractors. Specifically, Plaintiff has alleged that Marick was responsible for the exterior construction in Phase I, although Marick denies that or that it is responsible for all of the construction in Phase I, because it pulled permits and requested Certificates of Occupancy. If Plaintiff is successful in proving that Marick performed general contracting work in Phase I, oversaw the construction of Phase I units or is otherwise liable for Phase I subcontractor work, it would have a special relationship as the general contractor with subcontractors who constructed the exteriors.

Alternatively, Plaintiff has alleged that Marick is in either in a joint venture or is the alter ego of the developer, IMK. If proven at trial, Marick could be liable to Plaintiffs as a developer. Under this scenario, if Marick is found to be the developer, Marick would have viable causes of action against the Phase I subcontractors.

2. CONTRACTUAL INDEMNIFICATION

Marick's cross claims for contractual indemnity and breach of contract should not be dismissed. Marick and Clearview Construction, Southern Concrete, and Builders FirstSource entered into contracts which required these subcontractors to defend, indemnify, and reimburse Marick for damages caused by their individual work. (See attached exhibits). Marick has alleged and prosecuted these claims for contractual

indemnity, and, to date, no party or insurance carrier has agreed to defend or indemnify Marick. The causes of action for breach of contract and contractual indemnity are not disguised as indemnity claims, rather they arise from legitimate negotiation and executed contracts.

The Subcontractors have alleged that the contracts referenced herein do not apply to the project at issue in this case. That allegation is a factual issue which needs to be resolved at the trial of this case by the jury. Marick has alleged and stands by its assertion that the contracts with Builders FirstSource, Clearview Construction and Southern Concrete (many others) for this project are enforceable and apply to the Stoneledge Project. This is true even if they were executed after or during the work. Specifically, Marick alleges that the contracts were executed ex post facto, and executed after work the work was performed. As an example of evidence supporting an ex post facto contract, Southern Concrete's principal testified:

Deposition of Jeffrey Gowder

Q: Do you know if Southern Concrete had any other projects that it was intending to work on for Marick after October of 2007?

A: I do not.

Q: Did Shannon Gowder have full authority to sign contracts on behalf of Southern Concrete?

A: Yes.

(J. Gowder Dep. 55:10-16.)

Based upon that testimony, there was no reason for Southern Concrete to execute an indemnity contract with Marick for any other project, thus creating an issue of fact for the jury to determine whether that indemnity contract applied to Stoneledge.

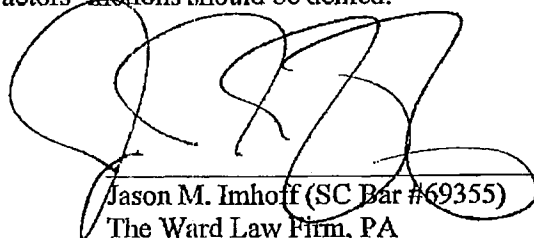
Based upon the above, the breach of contract and contractual indemnity causes of action should not be dismissed as there are issues of material fact to determine the timing and intent of the indemnity contract, which should be left for a jury.

Marick's licensure

As with the contractual indemnity claims, there is an issue of fact regarding the execution and applicability of the contracts. Marick should not be denied the ability to enforce its contract due to South Carolina Section 40-1137(c), which requires a general contractor to be licensed. Marick, like many other contractors, is licensed through its individuals and/or principals. This is clearly allowed, expected and is not a bar to contractual obligations of the contractor. (See: SC. ST §40-11-230)

Conclusion

For the foregoing reasons, Subcontractors' motions should be denied.



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September 24th, 2012

*Attorney for Marick Home Builders,
LLC and Rick Thoennes*

A



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First Source (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured. - per endorsement form LA-2002-0503.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

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MARICK

HOME BUILDERS

8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.

Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors, but only to the extent of Subcontractor's negligence or willful misconduct.

BY:

BY:

DATE:

DATE:

Rick Thoennes

NAME and TITLE

Deryl Ward

Senior Attorney

Marick Home Builder, LLC

COMPANY NAME

Builder First Source Southeast Group, LLC

COMPANY NAME

EE Binder

WITNESSED BY

Subject To Written Changes

3



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature]

DATE: 10/1/07

Rick Thoennes
NAME and TITLE

Marick Home Builder, LLC.
COMPANY NAME

[Signature]
WITNESSED BY

BY: [Signature] *

DATE: 10-30-07 *

Mike Owner *

NAME and TITLE

Cleavon Const. *

COMPANY NAME

2

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001/003



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

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10/30/2007 11:00 FAX

003



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature] BY: Sharon Barker *
DATE: 10/1/07 DATE: 10/1/07 *

Rick Thoennes Sharon Barker *
NAME and TITLE NAME and TITLE

Marick Home Builder, LLC. Southern Concrete Spec. Inc. *
COMPANY NAME COMPANY NAME

[Signature]
WITNESSED BY

Office (864) 232-5555 ~ Fax (864) 232-8504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

000875

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

THE TENTH JUDICIAL CIRCUIT

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

Plaintiffs,)

vs.)

IMK Development Co., LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee,)
LLC, Integrys Keowee Development, LLC,)
Marick Home Builders, LLC, Bostic Brothers)
Construction, Inc., Miller/Player & Associates,)
Bradford D. Seckinger, John Ludwig, William)
Cox, Larry D. Lollis, Rick Thoennes, M)
Group Construction and Development, LLC,)
Mel Morris, Joe Bostic, Jeff Bostic, Clear)
View Construction, LLC, Michael Franz,)
MHC Contractors, Miguel Porras Choncoas,)
Builders FirstSource Southeast Group, Mike)
Green, Southern Concrete Specialties, Carl)
Compton d/b/a Compton Enterprize a/k/a)
Compton Enterprises, Gunter Heating & Air,)
All Pro Heating, A/C & Refrigeration, LLC,)
Coleman Waterproofing, Heyward Electrical)
Services, Inc., Tinsley Electrical, LLC, Hutch)
N Son Construction, Inc., Upstate Utilities,)
Inc., Southern Basements, Inc., Carl Catoe)
Construction, Inc., T.G. Construction, LLC,)
Delfino Construction, Francisco Javier Zarate)
d/b/a Zarate Construction, Alejandro Avalos)
Cruz, Herberto Acros Hernandez, Martin)
Hernandez-Aviles, Francisco Villalobos)

CASE NUMBER: 2009-CP-37-0652

**Supplemental Memorandum in
Opposition to Defendants, Builders First
Source, Southern Concrete Specialties,
Clear View Construction, LLC and
Michael Franz's Motion for Summary
Judgment**

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 OCT 2 AM 11 25

Lopez, Ambrosio Martinez-Ramirez, Ester)
 Moran Mentado, Socorro Castillo Montel,)
 Upstate Utilities, Inc., MJG Construction and)
 Homebuilders, Inc. d/b/a MJG Construction,)
 KMAC of the Carolinas, Inc., Eufacio Garcia,)
 Everado Jarmamillo, Garcia Parra Insulation,)
 Inc., J&J Construction, Jose Nino, Jose Manuel)
 Garcia, Eason Construction, Inc., and Vincent)
 Morales d/b/a Morales Masonry, and)
 Miller/Player & Associates,)

Defendants.)

This matter came before the Court on September 5, 2012 by way of Defendants, Builders First Source (hereinafter "BFS"), Southern Concrete Specialties (hereinafter "Southern Concrete"), Clear View Construction and Michael Franz's (hereinafter "Clear View") Motions for Summary Judgment as to the cross-claims for breach of contract/contractual indemnity asserted by Marick Home Builders, LLC and Rick Thoennes (hereinafter "Marick"). Marick incorporates its previous Memorandum to this Court by reference.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC. The movant must first demonstrate that there is no genuine dispute of material fact. *See Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)).

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Thomas Sand Co. v. Colonial Pipeline Co.*, 563 S.E.2d 109, 112 (S.C. Ct. App. 2002). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law. *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefore must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997). If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

DISCUSSION

Marick entered into separate contracts with Defendants BFS, Southern Concrete and Clear View (see: Exhibits "A", "B" and "C"). In the contracts, BFS, Southern Concrete and Clear View each agreed to indemnify Marick for liability attributed to Marick as a result of those Defendants' work. By failing to indemnify Marick for the faulty work that each performed at the Stoneledge project, BFS, Southern Concrete and Clear View are breaching the terms of the contracts.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 451, 453-54, 438 S.E.2d 271, 272 (Ct.

App. 1993) (internal citations omitted). "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." *Rock Hill Tel. Co., Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)

The Court, at the hearing on September 5, 2012, found that Marick's cross-claims for negligence and breach of warranties merged into its equitable indemnification claim. BFS, Southern Concrete and Clear View errantly assert that Marick's cross-claim for breach of contract should also be merged into the equitable indemnity claim.

BFS, Southern Concrete and Clear View each entered into a contract with Marick (see: Exhibits "A", "B" and "C"). Set forth in each contract is a "Hold Harmless" provision. Due to the contracts entered into between Marick and BFS, Southern Concrete and Clear View, Marick's cross-claim for breach of contract is a separate and distinct cause of action different from equitable indemnification. BFS cited *S. Carolina Nat. Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990), "that a rose by any other name is still a rose" for the proposition that Marick's cross-claim for breach of contract is nothing more than an equitable indemnity claim. However, as is evident from the attached contracts, the "Hold Harmless" provision set forth in each contract establishes a separate and distinct claim, and thus should be viewed separately from the equitable indemnity claim. Although the Federal District Court in *S. Carolina Nat. Bank v. Stone* held that "a rose by any other name is still a rose", it in no way found that a tulip is another name for a rose. Thus, a party's breach of a specific contractual provision should be

determined based upon the terms of the contract and not subsumed by equitable indemnity. *Rock Hill Tel. Co.*, 363 S.C. 385, 611 S.E.2d 235 (2005).

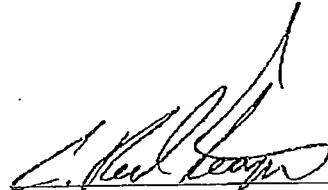
Since Marick's cross-claim for breach of contract is not an equitable claim, whether or not Marick has unclean hands is not a determinative factor; rather, the contracts set forth a completely separate contractual indemnity claim. Thus, the contracts should be construed in accordance with the terms. Therefore, due to the legal costs and expenses incurred by Marick as a result of this litigation and the continued potential liability for which Marick has been subjected, the jury should decide if BFS, Southern Concrete and Clear View breached the "Hold Harmless" provision of the contracts.

Further, at the hearings on September 5, 2012, BFS, along with other parties, handed forth to the Court two non-binding South Carolina Circuit Court Orders discussing similar issues to those currently before the Court: *Nelson v. John Wieland Homes*, 2009-CP-10-6573 (Order of Young, J.) and *Kirkland v. Cambridge Building Corp.*, 2005-CP-07-1312 (Order of Coltrane, J.). Neither of those Orders discusses a separate and distinct contractual "Hold Harmless" provision entered into between the parties. The South Carolina circuit court holdings do not discuss whether or not a separate and distinct contractual claim would be subsumed by an associated equitable indemnity claim. Had these courts addressed the issue before this Court, Marick asserts that they would have concluded that a party's claim pursuant to a mutually binding contract shall be determined separately, and not merged with an equitable cause of action.

CONCLUSION

As set forth in the attached contracts, BSF, Southern Concrete and Clear View each entered into separate contracts with Marick which contained specific "Hold Harmless" provisions for which Marick bases its cross-claims for breach of contract/contractual indemnity.

Thus, BFS, Southern Concrete and Clear View's Motions for Summary Judgment should be denied.



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C. Reed Teague (SC Bar #: 79933)
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(864) 582-3075
(864) 585-3075
jimhoff@wardfirm.com

*Attorney for Defendants Marick Home
Builders, LLC and Rick Thoennes*

September 28, 2012

EXHIBIT "A"



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First Source (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following outline):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$2,000,000
 - Personal & Advertising Injury: \$1,000,000
 - Bath Occurrence: \$1,000,000
 - Damage to Rented Premises: \$100,000
 - Medical Payments: \$5,000
 - With "Marick Home Builders" as Additional Insured. per endorsement form LA-2002-0505
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

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8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and
job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general
liability insurance (see item 2 for details) - due in office before first
payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor
shall indemnify the Contractor, owner and their agent(s) from and against
claims, damages, losses, expenses and fees arising out of or resulting from
performance of the Subcontractors, but only to the extent of Subcontractor's
negligence or willful misconduct.

BY:

BY:

DATE:

10/24/07

DATE:

12/21/07

Rick Thoennes

NAME and TITLE

Deryl Ward

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Builder First Source Southeast (map) LLC

COMPANY NAME

EE Bender

WITNESSED BY

Subject to Written Changes

EXHIBIT "B"



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) – due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature] BY: [Signature] ★
DATE: 10/1/07 DATE: 10-30-07 ★

Rick Thoennes Mike [Signature] Owner ★
NAME and TITLE NAME and TITLE

Marick Home Builder, LLC. Clemson Const. ★
COMPANY NAME COMPANY NAME

[Signature]
WITNESSED BY

EXHIBIT "C"

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AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

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8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see Item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature] BY: Shannon Bowder *
DATE: 10/1/07 DATE: 10/1/07 *

Rick Thoennes Shannon Bowder *
NAME and TITLE NAME and TITLE

Marick Home Builder, LLC. Southern Concrete Spec. Inc. *
COMPANY NAME COMPANY NAME

[Signature]
WITNESSED BY

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

FILED O'CONNOR, SC
BEVERLY H. WHITEHEAD
CLERK OF COURT
2012 OCT 2 AM 11 25

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRCF and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Defendant Marick Home Builders, LLC and Rick Thoennes' Supplemental Memorandum in Opposition to Defendants, Builders First Source, Southern Concrete Specialties, Clear View Construction, LLC and Michael Franz** to the following counsel of record:

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This 1 day of October, 2012
Spartanburg, SC

By:


Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

vs.

Marick Home Builders, LLC et al

Plaintiff

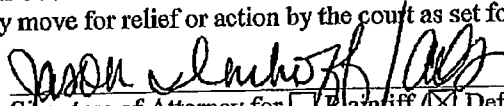
Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-37-652

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney: Robery T. Lyles, Esquire, Bar No. _____ Address: PO Box 733 Charleston, SC 29401 Phone: 864-577-7730 Fax 843-577-7172 E-mail: _____ Other: _____		Defendant's Attorney: Jason M. Imhoff, Esquire, Bar No. 69355 Address: PO Box 5663 Spartanburg, SC 29304 Phone: 864-582-3075 Fax 864-585-3090 E-mail: jimhoff@wardfirm.com Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for Reconsideration and at Alter Judgment			
Estimated Time Needed: 30 mins		Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant		January 23, 2013 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$			
☐ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE _____ Date: _____	

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
JAN 24 PM 1 55

000894

CLERK'S VERIFICATION

Collected by: ts Date Filed: _____
☒ MOTION FEE COLLECTED: \$ 25.00
☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

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, JOB BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO
AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,
MARTIN HERNANDEZ-AVILES, FRANCISCO
VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-

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

DEFENDANTS MARICK HOME
BUILDERS, LLC AND RICK THOENNES'
MOTION FOR RECONSIDERATION AND
TO ALTER JUDGMENT

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 JAN 24 PM 1 55

RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
SOUTHERN BASEMENTS, INC., MJG)
CONSTRUCTION AND HOMEBUILDERS, INC.)
D/B/A MJG CONSTRUCTION, KMAC, INC.,)
D/B/A KMAC NORTH CAROLINA, EUFACIO)
GARCIA, EVERADO JARMAMILLO, GARCIA)
PARRA INSULATION, INC., J&J CONSTRUCTION,)
JOSE NINO, JOSE MANUEL GARCIA, EASON)
CONSTRUCTION, INC., AND VINCENT MORALES)
D/B/A MORALES MASONRY, MILLER/PLAYER &)
ASSOCIATES,)

Defendants,)

BOSTIC CONSTRUCTION, INC.)

Third-Party Plaintiffs,)

vs.)

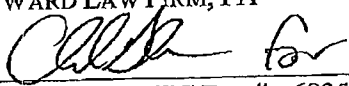
SOUTHERN STONE, INC. AND BUCK SMITH)
CONSTRUCTION,)

Third-Party Defendants.)

COME NOW, Defendants Marick Home Builders, LLC and Rick Thoennes (collectively "Marick"), pursuant to Rule 59, S.C. R. Civ. P. through its undersigned attorney and respectfully request that this Honorable Court vacate and/or reconsider the Order dated January 11, 2013 granting Summary Judgment to Defendants Builders FirstSource—Southeast Group, LLC, Southern Concrete Specialties, Inc., Clear View Construction, LLC, and Michael Franz as to the Cross-Claims of Marick Home Builders, LLC for Breach of Contract and Breach of Warranty. The grounds for this Motion are that the Court's ruling is inconsistent with South Carolina law.

THE WARD LAW FIRM, PA

By: _____


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Janaury 23, 2013
Spartanburg, South Carolina

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for Reconsideration and to Alter Judgment** to the following counsel of record:

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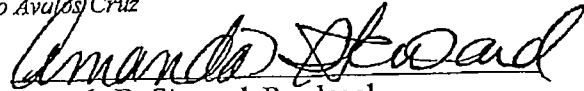
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Attorney for Alejandro Avuloso Cruz

This 23 day of January, 2013
Spartanburg, SC

By:


Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE) FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

STONELEDGE AT LAKE KEOWEE OWNERS')
ASSOCIATION, INC., C. DAN CARSON, JEFFREY)
J. DAULER, JOAN W. DAVENPORT, MICHAEL)
FURNARI, DONNA FURNARI, JESSY B. GRASSO)
NANCY E. GRASSO, ROBERT P. HAYES, LUCY)
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.)
HUND, III, RUTH E. ISAAC, MICHAEL D.)
PLOURDE, MARY LOU PLOURDE, CAROL C.)
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,)
AND ROBERT WHITE, INDIVIDUALLY AND ON)
BEHALF OF ALL OTHERS SIMILARLY SITUATED)

Plaintiffs,)

vs.)

IMK DEVELOPMENT Co., LLC, KEOWEE)
TOWNHOUSES, LLC, LUDWIG CORPORATION,)
LLC, SDI FUNDING, LLC, MEDALLION AT)
KEOWEE, LLC, BRADFORD D. SECKINGER,)
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.)
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,)
MARICK HOME BUILDERS, LLC, M GROUP)
CONSTRUCTION AND DEVELOPMENT, LLC,)
BOSTIC BROTHERS CONSTRUCTION, INC., RICK)
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF)
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,)
MICHAEL FRANZ, MHC CONTRACTORS,)
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST)
SOURCE SOUTHEAST GROUP, MIKE GREEN,)
SOUTHERN CONCRETE SPECIALTIES, CARL)
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A)
COMPTON ENTERPRISES, GUNTER HEATING &)
AIR, ALL PRO HEATING, A/C &)
REFRIGERATION, LLC, COLEMAN)
WATERPROOFING, HEYWARD ELECTRICAL)
SERVICES, INC., TINSLEY ELECTRICAL, LLC,)
HUTCH N SON CONSTRUCTION, INC., CARL)

copy
MARICK HOME BUILDERS AND RICK
THOENNES MEMORANDUM IN SUPPORT OF
THE S.C.R.C.P. 59(e) MOTION CONCERNING
SOUTHERN CONCRETE

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 APR 10 AM 10 38

FACTS

The Stoneledge Owners Association (hereinafter "SOA") filed suit against the architect, general contractors, subcontractors, developers and some of the individuals associated with the defendant entities in relation to both phases of construction at Stoneledge.

The Court is fully aware of the allegations at issue in this lawsuit. Marick was the general contractor for phase II construction at Stoneledge. Marick did not perform the actual construction at the project; subcontractors performed all of the construction labor. Marick contracted directly with Southern Concrete for Southern Concrete to install concrete and waterproofing in phase II of the project (see: Contract attached hereto as Exhibit "2").

STANDARD OF REVIEW

"Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes. See *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). We explained in *Elam* that 'there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.' *Id.* at 22, 602 S.E.2d at 779. Indeed, 'it is inherently unfair to disallow such an opportunity.'" *Home Med. Sys., Inc. v. S. Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

I. SUMMARY JUDGMENT WAS IMPROPER

Marick's Third Amended Answer asserted cross-claims for (1) Equitable Indemnification; (2) Negligence; (3) Breach of Warranties and (4) Breach of Contract against Southern Concrete. In the January 11, 2013 Order, the Court summarily dismissed Marick's cross-claims for breach of contract and breach of warranty pled against Southern Concrete (See:

Exhibits "1"). The Order states that a separate order was filed addressing Marick's cross-claims for indemnification and negligence pled against Southern Concrete; however, Marick is not aware that such an order was ever entered. Thus, Marick seeks clarification on this issue.

First and foremost, discovery is not complete in this case. Plaintiffs' expert's, Derrick Hodgin, deposition is still open and has not been completed and Marick's expert's, Randy Still, deposition is still open and has not been completed. Thus, since discovery is not complete in this matter, the Court's Orders awarding summary judgment were premature in this matter. *Bayle v. S. Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

Since the Court has not entered an order addressing Southern Concrete's Motion for Summary Judgment concerning Marick's claims for indemnification and negligence, Marick will only address breach of contract and breach of warranty. However, Marick feels compelled to address the issue of unclean hands, as it is alluded to in the attached Order.

A. A QUESTION OF FACT EXISTS AS TO FAULT/UNCLEAN HANDS

Based on the testimony presented in this case, Marick has presented evidence that it was not at fault for the alleged defective work performed by Southern Concrete and that Marick provided Southern Concrete with the supervision and oversight required of a general contractor.

The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor. The Court imposed a duty on a general contractor to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub-contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight. *Id.*

As stated earlier, Marick was the general contractor and provided no construction related labor associated with actual construction of the project at Stoneledge; Marick only provided supervision and oversight (see: Rick Thoennes Dep. at 36:17-22 and Randy Still Dep. at 172:21-24). Thus, the only function that Marick served (as the general contractor) was to hire subcontractors, provide supervision and coordinate the construction schedule.

Rick Thoennes, one of the owners of Marick Home Builders, testified that Marick had a superintendent at the project supervising the subcontractors and scheduling construction (see: Thoennes Dep. at 30:17-19). Thoennes testified that Nathan Hornaday was employed by Marick to serve as the superintendent responsible for providing supervision of the project (see: Thoennes Dep. at 31:6-12). In addition to Hornaday's supervision and oversight, Thoennes visited the project weekly to oversee construction (see: Thoennes Dep. at 131:8-132:3). Further, Thoennes had daily communications with Hornaday concerning construction of the project (see: Thoennes Dep. at 176:4-6). According to Thoennes, during construction, Nathan Hornaday provided supervision on site at Stoneledge 10-12 hours per day. (Thoennes Dep. at 176:23 -177:4). According to Thoennes, on several occasions, Hornaday contacted separate subcontractors to discuss construction related issues noticed during Hornaday's inspections of work performed by subcontractors (Thoennes Dep. at 224:18 - 225:7, 244).

Hornaday also testified that he provided supervision and oversight at the project
(Hornaday Dep. at 18:15-16).

Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I
~~don't like the way you're doing that~~'?

A: I did.

Q: And was it corrected to your satisfaction?

A: Yes.

(Hornaday Dep. at 19:21 – 20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision and oversight was provided at the project. In addition to Marick's representatives' testimony, Jason Carlan, Southern Concrete's 30(b)(6) designee, testified that Marick provided supervision and oversight at the project (see: Carlan Dep. at 47:5-24, 56:6-25, 80:11-19, 81:4-9, and 151:16 - 152:20). Carlan further testified that he told Nathan and Marick that work performed by Southern Concrete was performed in accordance with manufacturer's instructions (see: Carlan Dep. at 82:11 – 83:25).

Further, Jason Carlan admitted that Southern Concrete selected the products for waterproofing, familiarized itself with the manufacturer's installation instructions, installed the waterproofing per manufacturer's installation instructions, showed Nathan Hornaday, Marick's Superintendent, that it was installed in compliance with the manufacturer's installation instructions and Nathan Hornaday inspected Southern Concrete's work to ensure that the waterproofing was installed per manufacture's installation instructions:

Deposition of Jason Carlan

A: This was the best product out there for what we were doing.

Q: What were you doing?

A: Waterproofing a deck to pour concrete on top of it.

Q: And when you said it met or exceeded what you needed, how was what you need defined?

A: By what details we had on the plans.

Q: And where did those details come from?

A: From the plans.

Q: The Miller/Player plans?

A: The Miller/Player plans.

Q: Did you discuss the product that you were going to use with anyone from Marick?

A: No. Other than what we priced. Our pricing, Polyguard membrane was on there.

(Carlan Dep. 40:1-20.)

Q: And how about any representative of Marick Home Builders? Did they inspect?

A: Yes.

Q: They came and looked at your installation?

A: On more than one occasion, yes.

(Carlan Dep. 46:22 - 47:1.)

Q: So did he ask you questions.

A: Yes.

Q: -- about how it was installed?

A: Oh, yeah.

(Carlan Dep. 47:15-18.)

Q: And is that how you told Nathan it should be done?

A: Yes.

Q: And is that how you told Nathan it was being done?

~~A: That's how I told Nathan we were doing it and how it needed to be done.~~

Q: And that Southern Concrete believed it was sufficient?

A: Yes.

(Carlan Dep. 79:25 – 80:5.)

Q: And did you show Nathan that you were putting the slope in by sloping the concrete?

A: Yes.

Q: And told him that's what you were doing?

A: Yes.

(Carlan Dep. 84:1-5.)

Marick's expert, Randy Still, testified that a general contractor can rely on a subcontractor's assurance that they will perform their craft appropriately (Still Dep. at 84 – 85).

Mr. Still stated further:

Q: In your experience and education and in your work, do you hold the opinion that a general contractor is always liable for all defects in construction which were performed by subcontractors?

A: I think what I have found is the term "liable" is a legal term and my belief is that the general contractor can rely on the subcontractors who have the specialty crafts and knowledge to perform their work correctly.

Q: Is it fair to say that in many cases a subcontractor is in fact more experienced and better qualified to perform their particular trade than a general contractor?

A: Yes.

Q: Is that because they have specialized over the years in that particular area and have focused their education and experience in that area?

A: Yes, and they've performed the work and they know what works and what doesn't work.

Q: In your opinion is it fair – is it acceptable for a general contractor to rely on that experience and education of a subcontractor in a particular trade?

A: I think in many cases he has to.

Q: Would you agree that obviously a general contractor cannot see every nail which is driven or every board which is installed?

A: Yes.

Q: Would you agree that he must, out of necessity, rely on a subcontractor's experience and knowledge and compliance with good building practices and the code?

A: Yes.

(Still Dep. at 169:12 – 170: 18.)

Mr. Still further testified:

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of any of the waterproofing, framing, grading, or other construction components in Phase II?

A: No.

(Still Dep. 174:18:24.)

Thus, in South Carolina, the non-moving party is merely required to present a mere scintilla of evidence to survive summary judgment, and certainly, the fact that Marick's representatives testified that supervision was provided at the project, that Southern Concrete's 30(b)(6) designee testified that guidance and supervision was provided by Marick and that Marick's expert, Randy Still, testified that Marick had a right to rely on the expertise of the subcontractors, presents more than a scintilla of evidence that Marick supervised and was not at fault for the alleged damages associated with the work Southern Concrete contracted to perform

at Stoneledge. Based upon these facts, a jury must determine whether or not Marick is at fault for the alleged deficient work performed by Southern Concrete.

(2) The Court Erred in Collapsing Marick's Cross-Claims Into One Claim for Equitable Indemnification.

The Court erred in collapsing Marick's cross-claims for breach of warranty and breach of contract into one claim for equitable indemnification. First and foremost, Southern Concrete entered into a binding contract with Marick for Southern Concrete to perform subcontracting services associated with concrete installation and waterproofing of concrete applied to the structures at the project (see: Contract attached as Exhibit "2"). The Contract contains a hold harmless provision requiring that Southern Concrete indemnify Marick for all claims, damages, fees and expenses incurred by Marick as a result of Southern Concrete's work. Thus, by failing to indemnify and hold Marick harmless for Southern Concrete's alleged deficient work in this action, Southern Concrete has breached the Contract.

The Court cited no binding case law in support of its holding. In support of its holding, the Court cited two non-binding federal district court cases (*U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)) and two non-binding unpublished South Carolina circuit court orders (*Nelson v. John Weiland Home*, 2009-CP-10-6573 (Order by Judge Roger M. Young, October 26, 2011) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006)).

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Marick asserts cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants

which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n.

3. However, in this case, Plaintiffs continue to allege defective work, which Southern Concrete was responsible for performing, against Marick. Marick continues to incur attorney fees and costs associated with Southern Concrete's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Marick asserts that the federal court holdings should not be persuasive in this matter. Marick further asserts that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Marick may recover special damages at law under theories of breach of warranty and breach of contract as to Southern Concrete. Marick's claims for breach of warranty and breach of contract are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1900) citing *Addy v. Bolton*, 257, S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains

[the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

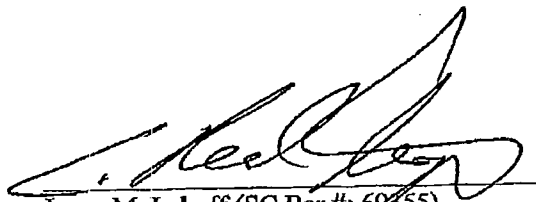
The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs' claims arising from the Defendant Subcontractor's tortious conduct (negligent performance of work), breach of warranty (failure to perform work in a workmanlike manner) and breach of contract (which includes an indemnification clause); thus, Marick properly filed claims for breach of warranty and breach of contract against Southern Concrete seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including special damages claims against Southern Concrete as Southern Concrete was sued directly by Plaintiffs for their defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under breach of contract and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by Southern Concrete to Marick constitute separate causes of action which did not arise through Plaintiffs' relationship to the parties. The Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th

1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, separate causes of action for negligence and breach of contract do not collapse into a single indemnity claim. Marick had a contractual relationship and was owed separate duties by Southern Concrete, which it was overseeing to perform the work at issue in this action; if Southern Concrete failed to perform the work it was hired to perform properly, it breached duties and contractual obligations owed to Marick and thus should be liable to Marick.

CONCLUSION

For the reasons stated hereinabove, Marick respectfully requests that this Court alter and/or amend its January 11, 2013 Order and deny summary judgment to Southern Concrete as clearly there are questions of fact for a jury to determine in this case.



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*Attorney for Marick Home Builders,
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April 9, 2013

EXHIBIT 1

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

Circuit Court Judge

SCRPC Form 4C (12/2011)

2063
Judge Code

01/11/2013
Date

Page 1

000916

For Clerk of Court Office Use Only

This judgment was entered on the 14th day of January, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of January, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. Whitfield
CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON
PLEAS

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,)
Integrus Keowee Development, LLC, Marick)
Home Builders, LLC, Bostic Brothers)
Construction, Inc., Miller/Player & Associates,)
John Ludwig, William Cox, Larry D. Lolis, Rick)
Thoenes, M Group Construction and)
Development, LLC, Mel Morris, Joe Bostic, Jeff)
Bostic, Clear View Construction, LLC, Michael)
Franz, MHC Contractors, Miguel Porras)
Choncoas, Builders FirstSource Southeast Group,)
Mike Green, Southern Concrete Specialties, Carl)
Compton d/b/a Compton Enterprize a/k/a)
Compton Enterprises, Gunter Heating & Air, All)
Pro Heating, A/C & Refrigeration, LLC, Coleman)
Waterproofing, Heyward Electrical Services, Inc.,)
Tinsley Electrical, LLC, Hutch N Son)
Construction, Inc., Upstate Utilities, Inc., Southern)
Basements, Inc., Carl Catoe Construction, Inc.,)
T.G. Construction, LLC, Delfino Construction,)
Francisco Javier Zarate d/b/a Zarate Construction,)
Alejandro Avalos Cruz, Herberto Acros)

ORDER GRANTING SUMMARY
JUDGMENT TO DEFENDANTS
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC,
SOUTHERN CONCRETE
SPECIALTIES, INC., CLEAR VIEW
CONSTRUCTION, LLC, AND
MICHAEL FRANZ AS TO THE
CROSS-CLAIMS OF MARICK
HOMEBUILDERS, LLC FOR
BREACH OF CONTRACT AND
BREACH OF WARRANTY

FILED OCONEE, SC
BEVERLY L. WHITEFIELD
CLERK OF COURT
2013 JAN 14 PM 3 49

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Hernandez, Martin Hernandez-Aviles, Francisco)
Villalobos Lopez, Ambrosio Martinez-Ramirez,)
Ester Moran Mentado, Socorro Castillo Montel,)
Upstate Utilities, Inc., MJG Construction and)
Homebuilders, Inc. d/b/a MJG Construction,)
KMAC of the Carolinas, Inc., Eufacio Garcia,)
Everado Jaramillo, Garcia Parra Insulation, Inc.,)
J&J Construction, Jose Nino, Jose Manuel Garcia,)
Eason Construction, Inc., and Vincent Morales)
d/b/a Morales Masonry, and Miller/Player &)
Associates,)

Defendants.

This matter came before the Court on September 5, 2012 for hearing on dispositive motions filed by Defendants Builders FirstSource – Southeast Group, LLC (“BFS”), Southern Concrete Specialties, Inc. (“Southern Concrete”), Clear View Construction, LLC, and Michael Franz (collectively “Clear View”)¹ as to the cross-claims of Defendant Marick Home Builders, LLC (“Marick”).² Appearing were David A. Root on behalf of BFS, Mason A. Goldsmith on behalf of Southern Concrete, Melissa M. Nichols on behalf of Clear View, and Jason M. Imhoff on behalf of Marick.

Procedural Posture

In its answer to Plaintiffs’ Third Amended Complaint, Marick asserted cross-claims against Defendants BFS, Southern Concrete, and Clear View alleging causes of action for Equitable Indemnity, Breach of Contract, Negligence, and Breach of Warranties. This Court has,

¹ Michael Franz was a member of Clear View Construction, LLC during the construction of Stoneledge. No evidence has been produced that Franz performed any construction related services on the project.

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by separate orders, determined that BFS, Southern Concrete, and Clear View are entitled to judgment as a matter of law as to Marick's causes of action for negligence and equitable indemnity. Thus, this order addresses the remaining causes of action asserted by Marick in its Cross-Claims, which are styled "Breach of Contract" and "Breach of Warranty." As Marick's claims for Breach of Contract and Breach of Warranty are merely reworded equitable indemnity claims, which are barred by Marick's unclean hands, and in that Marick has no viable claims for contractual indemnity, this Court finds that Defendants BFS, Southern Concrete, and Clear View are entitled to summary judgment on Marick's causes of action for Breach of Contract and Breach of Warranty.

Standard

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. The movant must first demonstrate that there is no genuine dispute of material fact. See Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. See Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him, thereby

²While these defendants filed separate motions for summary judgment, they are being treated together in this order as they are similarly postured in relation to the claims of Marick.

showing that there is a genuine issue for trial. See Miller, 365 S.C. at 220, 225, 616 S.E.2d at 730, 732.

When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for a jury. See National Bank of Honea Path v. Thomas J. Barrett, Jr. & Co., 173 S.C. 1, 174 S.E. 581 (1934). Moreover, "a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be *reasonably* possible under the facts.'" Bloom v. Ravoir, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)) (emphasis added). Based on the aforementioned considerations, summary judgment is appropriate in this case.

Discussion

This case arises out of the construction of the Stoneledge at Lake Keowee townhouse complex located in West Union, South Carolina (the "Project"). The Project includes 80 townhouse units. There are three (3) to seven (7) individual townhouse units per building. The Project was constructed in two phases. Phase 1 consists of thirty-seven townhouse units. Phase 2 consists of forty-three townhouse units.

Marick was the general contractor during original construction of Phase 2 of the Project. BFS, Southern Concrete, and Clear View served as subcontractors for construction of Phase 2. BFS provided materials and labor for framing, siding, and related construction components. Southern Concrete provided flat work and basement work. Clear View provided stone work.

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Dr.

**Marick's claims for Breach of Contract and Breach of Warranty
are claims for Equitable Indemnity and thus fail.**

~~BFS, Southern Concrete, and Clear View are entitled to summary judgment as to~~
Marick's Breach of Contract and Breach of Warranty causes of action because these claims by
Marick are merely disguised, or reworded, claims for equitable indemnity and are not viable as
alternative causes of action. "Indemnity is that form of compensation in which a first party [here
allegedly BFS, Southern Concrete, or Clear View] is liable to pay a second party [here Marick]
for a loss or damage the second party incurs to a third party [Plaintiffs]." Vermeer Carolina's
Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999)
(quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502
(Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co.
v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005); U.S. Fidelity & Guaranty Co.
v. Patriot's Point Development Authority, 788 F. Supp. 880, 881 (D.S.C. 1992) (stating that the
non-settling defendants did not have independent claims apart from indemnification and
contribution because the claims were nothing more than claims for indemnity and because they
would not exist without plaintiff suing the non-settling defendants); and S.C. National Bank v.
Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990) (holding that the cross-claims against the settling
defendants for breach of contract, negligence, and fraud were nothing more than claims for
contribution or indemnification with a slight change in wording). The circuit courts in South
~~Carolina have likewise found that claims for negligence, breach of warranty, and breach of~~
contract are absorbed by the equitable indemnification claim. See Nelson v. John Weiland
Homes, 2009-CP-10-6573 (unpublished order); Kirkland v. Cambridge Building Corp., 2006-
CP-07-1312 (unpublished order).

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The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." State v. Yelsen Land Co., 257 S.C. 401, 403 (1972); Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Further, courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

After thoroughly reviewing the allegations contained in Marick's cross-claims for Breach of Contract and Breach of Warranty, the Court finds that they are claims for indemnity, regardless of the phraseology employed by Marick. In Marick's cross-claim for Equitable Indemnity³ it alleges that if Plaintiffs are entitled to judgment against it, then it is entitled to recovery from BFS, Southern Concrete, and Clear View, among others. This is a typical indemnification framework. Verneer Carolina's, Inc., *supra*. Likewise, Marick's claims for Breach of Contract and Breach of Warranty set forth the same indemnity framework. (Marick's Answer to the Third Amended Complaint ¶¶ 162 and 174.) Though Marick uses different wording, the gravamen of its claims are the same; i.e., if Plaintiffs are entitled to judgment against Marick, then it is entitled to corresponding recovery from BFS, Southern Concrete, and Clear View; Marick is not alleging personal injury or property damage as to it. As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal

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claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

As established by this Court's orders granting these Defendants summary judgment as to Marick's causes of action labelled Equitable Indemnity and Negligence, Marick is not without fault as to Plaintiffs' claimed damages, and thus, summary judgment on Marick's claims for equitable indemnity, termed "Breach of Contract" and "Breach of Warranty," is proper.⁴

Marick has no viable claims for contractual indemnity

To the extent Marick has argued that it is entitled to contractual indemnity, such claims also fail. As a preliminary matter, nowhere in its Answer and Cross-Claims does Marick allege an entitlement to contractual indemnity. Rather, Marick's Breach of Contract cause of action is premised on the notion that if Plaintiffs' allegations are proven true, then BFS, Southern Concrete, and Clear View provided defective materials or services in breach of their contract with Marick (Marick's Answer to the Third Amended Complaint ¶161), and such actions have

³As noted above, Marick's claim for Equitable Indemnity was disposed of by separate order, based primarily on Marick's inability to show that it was without fault as to the relevant construction deficiencies at the Project.

⁴Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Among other basis for ascribing fault to Marick is that Marick's own expert testified that Marick is not without fault; Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." Still Dep. 87:3-7 (Aug. 15, 2012). Still acknowledged that, in certain instances, Marick violated the building code.

Because Marick is the permit holder for Stoneledge Phase 2, it cannot be adjudged without fault. The party pulling a permit is ultimately responsible for compliance with the building code. Because Marick was the permit holder for Phase 2 and violated the building code according to its own expert, it cannot be adjudged without fault, and thus its claims for equitable indemnity fail.

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"resulted or could result in damage to Plaintiff, which could or will be assessed against Marick."

(Id. ¶ 162.) Marick's Breach of Contract causes of action makes no mention of a contract between it and BFS, Clear View, or Southern Concrete which contains contractual indemnification provisions which it is attempting to enforce. Further, to the extent Marick argues that it does have contracts with these parties that contain indemnification provisions, it has offered no evidence that the contracts applied to the Project or would otherwise be enforceable in this matter.⁵ Finally, Marick has presented no evidence to rebut evidence demonstrating that such contracts were not supported by consideration. The documents in question were signed after the subcontractors completed their work and Marick appears to have paid the subcontractors only for the work performed.⁶

Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds that no genuine issue of material fact exists and that BFS, Southern

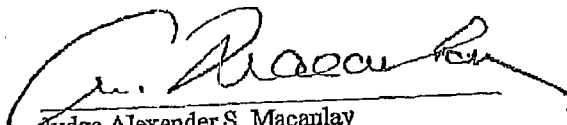
⁵The Court also takes notice that evidence was presented during its hearing on the various motions for summary judgment as to Marick's cross-claims that Marick had no contractor's license, and would thus be prohibited from enforcing a contract as a matter of law. (See Memorandum in Support of Carl Catoe Construction, Inc.'s Motion to Dismiss as to Marick Home Builders' Claims, dated August 30, 2012.) South Carolina Code § 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, it "may not bring an action either at law or in equity to enforce the provisions of a contract." South Carolina Code § 40-11-370(C). The same prohibition exists as to residential home builders. S.C. Code Ann. § 40-59-30. The plainly worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

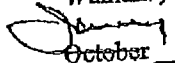
⁶ Marick submitted a Supplemental Memorandum in Opposition to this motion, which included BFS, Southern Concrete and Clear View's "contracts" with Marick. While Marick argued a "hold harmless" provision in these contracts should apply, the Court notes that Marick provided no supporting evidence for the application of these documents to the Stoneledge Project and that they do not postdate the work performed by BFS, Southern Concrete and Clear View.

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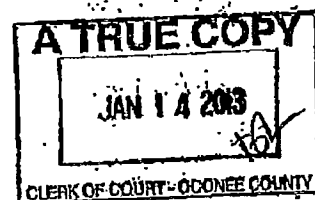
Concrete, and Clear View are entitled to judgment as a matter of law as to the Cross-Claims of Marick for Breach of Contract and Breach of Warranty.

IT IS SO ORDERED.


Judge Alexander S. Macanlay

Walhalla, South Carolina

October 11, 2013

FILED OCTONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 JAN 14 PM 3 44



000926

EXHIBIT 2

10/31/2007 09:28 FAX
10/30/2007 11:00 FAX

1002
10/31/07



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
Concrete
5. License, permits & bonds to be supplied and paid as follows:
As required per job
6. General provisions:
As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
Amount to be determined per job requirements

Office (864) 232-5558 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

10/31/2007 08:28 FAX
10/30/2007 11:00 FAX

0003



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature] *
DATE: 10/1/07 *
BY: Michaela Paul *
DATE: 10/1/07 *

Rick Thoennes *
NAME and TITLE
Marick Home Builder, LLC. *
COMPANY NAME
Southern Concrete Spec. Inc. *
COMPANY NAME

[Signature]
WITNESSED BY

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

~~Steneledge at Lake Keowee~~
Owners' Association, et.al.,
Plaintiffs,

vs.

SDI Funding, LLC, Ludwig
Corporation, LLC, et.al.,
Defendants,

Marick Home Builders, LLC,
Third-Party Plaintiff,

vs.

Michael Franz, Clearview
Construction, et. al.

Third-Party Defendants,
Builders FirstSource-SE Group,
Fourth-Party Plaintiff,

vs.

Carl Catoe Construction, Inc.,
Fourth-Party Defendant.

DEPOSITION of **FREDERICK (RICK) R. THOENNES**

Pursuant to notice, a deposition was taken in the
above case on the November 21, 2011, commencing at
approximately 10:10 a.m. attended by counsel as follows:

DEPOSITIONS AND ... INC.
(864) 585-0642

000930

1 A. I don't know.

2 Q. How about this, at the height of Marick's existence
3 when it was at its busiest, how many employees did
4 it have?

5 A. Probably three or four.

6 Q. Describe the job duties or titles of those
7 employees.

8 A. Administrative Assistant in the office. Would have
9 had a superintendent, assistant superintendent and
10 probably a laborer.

11 Q. So when Marick was doing its construction it
12 subcontracted out its work?

13 A. Correct.

14 Q. And who at Marick was responsible for selecting and
15 contacting with subcontractors?

16 A. Me.

17 Q. And who at Marick was responsible for observing and
18 supervising the work of subcontractors?

19 A. Our superintendents.

20 Q. Can you name your superintendents at Marick, and
21 tell me the years that they were with Marick?

22 A. I don't know about that, but I can tell you some of
23 the superintendents.

24 Q. Okay.

25 A. Matthew Gooch ---

1 Q. Can you spell that last name?

2 A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday,
3 ~~just like it sounds. There's a couple I can picture~~
4 but I can't name. There are probably two, maybe
5 three others.

6 Q. Who was the superintendent who was responsible for
7 observation and supervision of the subcontractors in
8 connection with what Marick did at the Stoneledge
9 project?

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

13 Q. Did Mr. Hornaday hold any sort of license,
14 contractor's license?

15 A. I don't know. Not that I know of.

16 Q. Who hired Mr. Hornaday?

17 A. I did.

18 Q. Are you the one that assigned him to the -- his
19 responsibilities in connection with the Stoneledge
20 project?

21 A. Yes.

22 Q. What were his qualifications such that you felt
23 comfortable he could supervise subcontractors' work
24 at the Stoneledge project?

25 A. He had worked as a subcontractor for us for years

1 A. There were one or two laborers down there and an
2 on-site administrative assistant.

3 Q. What would you have expected the role of the
4 laborers of Marick to be at the Stoneledge project?

5 A. Well, Nathan hired them and supervised them so he
6 would have told them what their responsibilities
7 would have been.

8 Q. What was your expectation of what work they would
9 have been performing for Marick?

10 A. Whatever Nathan needed.

11 Q. Okay. Do you know as you're testifying today what
12 work was, at Stoneledge, was actually done by
13 laborers employed by Marick?

14 A. I know some. They would clean up, keep the streets
15 clean, keep the units clean. Those are things I
16 observed when I went down there.

17 Q. Is there any aspect of the construction of the
18 Stoneledge units that was done by Marick that you
19 believe was self-performed by Marick or was it all
20 done by subcontractors?

21 A. I think it was all subcontracted other than the
22 cleanup like they -- like I mentioned.

23 Q. Okay. Did Mr. Hornaday ever express to you any
24 concern about the quality of the work at Stoneledge
25 that was being performed by the subcontractors?

1 Q. Had you had any experience with Carl Catoe before?

2 A. No.

3 Q. Did you have occasion to talk with or observe the
4 work being done by Carl Catoe or his crews?

5 A. Some.

6 Q. Did you have any questions about the work they were
7 doing?

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

25 Larry, I'm sorry, I couldn't. Was that once a week

1 he was on site?

2 WITNESS ANSWERS:

3 A. ~~A week to a week and a half.~~

4 Q. He was on site once a week or once every week and a
5 half. During the time that the framing work was
6 being done, did Nathan ever indicate to you that he
7 had any problems or had corrected any of the work
8 that Carl Catoe was doing?

9 A. I don't recall any workman type problems except for
10 one. We had a floor truss that was put in wrong and
11 we had to support it. That's the only thing that
12 jumps out at me. Of course, we always looked at
13 scheduling, and for the most part he manned the job
14 the way he was supposed to.

15 Q. Any problems associated with the installation of the
16 building wrap or the flashing?

17 A. Not that I know of. Nathan would've seen that.

18 Q. Pardon?

19 A. Nathan would've seen that and he didn't mention it
20 to me.

21 Q. If there had been a problem, would he have mentioned
22 it to you?

23 A. You have to ask him.

24 Q. Would you, I mean, based upon you working with him
25 over the time, would you have expected him to ---

- 1 A. No.
- 2 Q. You were on site approximately once a week?
- 3 A. Once to once, every week and a half.
- 4 Q. And your communications, though, with Nathan were
- 5 how consistent?
- 6 A. Daily.
- 7 Q. What kind of ---
- 8 A. Well, I say "daily," there may have been a day he
- 9 was gone or I was gone, but for the most part daily.
- 10 Q. As far as a quantity of time, how much time during a
- 11 typical week would you spend talking to Nathan?
- 12 A. No idea.
- 13 Q. Couldn't say?
- 14 A. Wouldn't even venture to guess. One week it could
- 15 be, you know, an hour, next week it could be five
- 16 minutes, next week it could be two hours.
- 17 Q. I understand. Was there any particular stage of
- 18 construction during which you were on the site more
- 19 frequently than another stage?
- 20 A. Probably during the layout, like when they were
- 21 staking or that kind of thing. If they were doing
- 22 any work on the lake itself, then I was there.
- 23 Q. As to Nathan's onsite time, you said essentially for
- 24 a vacation or something where you would expect
- 25 someone to be absent from the site, he was generally

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

5 Q. Ten to twelve. Did you have any, during the course
6 of the construction of Phase II, any interactions
7 with any employees or representatives of Builders
8 First Source, BFS?

9 A. Yes.

10 Q. Who?

11 A. Lots of people. Mike Green, Brock Bauknight,
12 Elaine, can't remember her last name, for the
13 windows ---

14 Q. And that's what I was going to get to next if you
15 want to say that while you go through their names,
16 you can tell me what you dealt with them about. You
17 said Elaine you dealt with windows?

18 A. Right. I think windows and doors.

19 Q. Mike Green?

20 A. Mike Green, I dealt with materials and labor.

21 Q. All right, go ahead.

22 A. And Brock Bauknight was my outside representative
23 that I dealt with on all of those things.

24 Q. General outside sales?

25 A. That's right. He handled my account.

1 Catoe? That is, who did monthly inspections for
2 subcontractor payment?

3 A. Nathan would inspect -- well, there was a draw
4 schedule that Mike Green and I worked out ---

5 Q. Okay.

6 A. --- for all aspects when we did the contract and
7 then all Nathan had to do was look and see what
8 portion of that schedule was done and then he'd sign
9 off on it and then we'd pay it. Not Carl, BFS.

10 Q. Yeah, right, because Carl was -- Carl Catoe was not
11 your subcontractor, correct?

12 A. That's correct.

13 Q. Only Builders First Source was?

14 A. Correct.

15 Q. But nonetheless you got to occasionally communicate
16 with Carl Catoe by virtue of being on the site?

17 A. Sure.

18 Q. Did anyone at Marick ever call or otherwise contact
19 Carl Catoe Construction regarding any warranty
20 issues?

21 A. I'm sure Nathan did.

22 Q. You say that you're sure he did. What do you know
23 that he did?

24 A. Siding that had warped and popped, a truss, the
25 truss that was over-spanned.

1 Q. Was Nathan calling Carl Catoe or Builders First
2 Source with these issues?

3 A. Both. I mean it would start with Carl to see if it
4 could be worked out in the field, I'm sure, but then
5 it would go -- if it couldn't be worked out in the
6 field with Carl then it would go to Builders First
7 Source.

8 Q. I had asked you about warranty issues, and to me
9 typically that means issues once you've left a
10 site ---

11 A. Oh, oh, I don't know of -- I don't know of any.

12 Q. But you were starting to tell me about some issues
13 while construction was ongoing ---

14 A. Right.

15 Q. --- and you mentioned some siding that was warping
16 and popping and then you mentioned the over-spanned
17 truss issue that you already talked about with
18 David. On the siding that was warping or popping,
19 was it an isolated board, was it widespread or was
20 it somewhere in between those two?

21 A. No, I mean, it was an isolated board according to
22 Nathan. He called and asked Carl to fix it.
23 Normally they were on site, but after they had left
24 site then he'd have to call Builders First Source.

25 Q. And was Builders First Source generally responsive?

- 1 A. Would ----
- 2 Q. I'm sorry, the finished floor, not the finished
- 3 grade.
- 4 A. No.
- 5 Q. Would you expect it to show the grade at the
- 6 building?
- 7 A. Yes, within plus or minus.
- 8 Q. Would you expect it to show the slope away from the
- 9 building?
- 10 A. Yes.
- 11 Q. If the Freeland drawings don't show or did not show
- 12 the grade at the building, how would the -- to your
- 13 knowledge, how would the grading subcontractor know
- 14 where to set the grade?
- 15 A. You're asking a hypothetical question there. It
- 16 should show it, period.
- 17 Q. I think you said that you assumed that Nathan
- 18 contacted Hutch N Son regarding some issues with the
- 19 grade, do you know that for sure or do you just
- 20 assume that?
- 21 A. No, I know that for sure.
- 22 Q. Okay. And that was relating to this standing water?
- 23 A. Standing water and the slope.
- 24 Q. And the slope?
- 25 A. Yes.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,
vs.
IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.
Defendants.

Deposition of **RANDY STILL**

Pursuant to notice, a deposition was taken in the
above case on the August 15, 2012 commencing at
approximately 10:20 a.m. attended by counsel as follows:

DEPOSITIONS AND ..., INC.
(864) 585-0642

000941

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You
4 would expect they would but I don't know
5 contractually. I think it becomes a legal question
6 of duty.

7 Q. It is a duty, is it not, of the general contractor
8 to comply with the applicable building codes in the
9 performance of a project?

10 A. I would think so.

11 Q. Is it the duty of a general contractor to coordinate
12 the work of subcontractors?

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

16 A. I would think so to the extent he understands that
17 coordination effort.

18 Q. And if he doesn't understand the coordination effort
19 what should the general contractor do?

20 A. Ask questions.

21 Q. Of whom?

22 A. Subcontractors, make sure they're putting them
23 together correctly.

24 Q. Is it a duty of the general contractor on a project
25 like the Stoneledge Project to supervise the work of

subcontractors he has retained?

BY MR. IMHOFF:

Object to the form.

WITNESS ANSWERS:

A. I'm thinking about the word "supervise." You would think that he would make sure they were doing what entity they were supposed to be doing. In other words, you would want a framing contractor doing framing and you would rely upon them to perform their craft appropriately. And the supervisory condition would be, I would think, contractual.

Q. Between the general contractor and the subcontractors?

A. I would think so.

Q. Do you think a general contractor has any obligation to insure that his subcontractors(phone ringing) ---

(OFF THE RECORD).

DIRECT EXAMINATION RESUMED BY MR. LYLES:

Q. Is it an obligation of a general contractor to insure his subcontractor's in compliance with the contract documents?

BY MR. IMHOFF:

Object to form.

WITNESS ANSWERS:

A. I'm not sure I'd use the word "insure." I would

1 obligation in the construction or installation of
2 the low slope roofs, whether it be code violation,
3 violation of the design documents or non-compliance
4 with the design documents or violation of
5 manufacturers' installation instructions or any
6 other obligation on the installation of the low
7 slope roofs?

8 A. I think the only place in the low slope roofs that
9 there is question is there's some very limited areas
10 where felts are missing, and that is an omission of
11 felts, a single layer of felts.

12 Q. Let's talk about that for just a minute. In your
13 experience and education and in your work, do you
14 hold the opinion that a general contractor is always
15 liable for all defects in construction which were
16 performed by subcontractors?

17 A. I think what I have found is the term "liable" is a
18 legal term and my belief is that the general
19 contractor can rely on the subcontractors who have
20 the specialty crafts and knowledge to perform their
21 work correctly.

22 Q. Is it fair to say that in many cases a subcontractor
23 is in fact more experienced and better qualified to
24 perform their particular trade than a general
25 contractor?

1 A. Yes.

2 Q. Is that because they have specialized over the years
3 in that particular area and have focused their
4 education and experience in that area?

5 A. Yes, and they've performed the work and they know
6 what works and what doesn't work.

7 Q. In your opinion is it fair -- is it acceptable for a
8 general contractor to rely on that experience and
9 education of a subcontractor in a particular trade?

10 A. I think in many cases he has to.

11 Q. Would you agree that obviously a general contractor
12 cannot see every nail which is driven or every board
13 which is installed?

14 A. Yes.

15 Q. Would you agree that he must, out of necessity, rely
16 on a subcontractor's experience and knowledge and
17 compliance with good building practice and the code?

18 A. Yes.

19 Q. Let me go back to my question then again. If based
20 upon that, if there are violations of code such as a
21 completely missing felt under a roof, do you hold
22 the opinion that the general contractor has violated
23 the code or some other obligation if the work was
24 done by a subcontractor?

25 A. No, but clearly when something like felt is missing

1 or a prototypical installation and that will serve
2 as the standard by which an installation is
3 accepted. For example, if you put a window in and

4 you've got a mock-up wall and you put in the rough
5 opening flashing and you put in the -- all the
6 flashings that would be there, all the peel-and-
7 stick and you've got all of the entities, for
8 example, the window manufacturer and the wrap
9 manufacturer and the peel-and-stick manufacturer and
10 the exterior cladding person there. And if they're
11 all there and they say, "Yeah, this is the way it
12 needs to be done." And your subcontractor who's
13 doing all those different components install it that
14 way, says he's going to install it that way, that's
15 how it should be installed. I'm not sure that
16 answers your question but ---

17 Q. Okay. Let me try to get to it a little bit
18 different way. Are you familiar with the term
19 "paper contractor"?

20 A. I'm not sure.

21 Q. Do you know if Marick actually drove any nails or
22 constructed any part of Stoneledge?

23 A. I think my understanding is he did not self-perform
24 any work.

25 Q. What in your opinion is the role of a general

1 Q. Do you believe or do you have an opinion that Marick
2 violated any code, manufacturers' instructions,
3 design drawings in the installation of the cedar
4 shake and plank siding in Phase II?

5 A. No.

6 Q. Do you have any opinion that Marick violated any
7 code, manufacturers' installation instructions,
8 design drawings or any other obligation in the
9 installation of the doors and windows in Phase II?

10 A. I am not aware that he installed any of those
11 components.

12 Q. Is that a "no"?

13 A. No.

14 Q. Do you believe Marick violated any code,
15 manufacturers' installation instructions, design
16 drawings or any other obligation in the stone
17 installation in Phase II?

18 A. No.

19 Q. Do you believe Marick violated any code,
20 manufacturers' installation instructions, design
21 drawings or any other obligation in the installation
22 of any of the waterproofing, framing, grading or
23 other construction components in Phase II?

24 A. No.

25 Q. I don't think I have any more questions for you

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3
4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.

18 Defendants.
19

20
21 Deposition of **NATHAN HORNADAY**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the March 30, 2012 commencing at
25 approximately 10:15 a.m. attended by counsel as follows:

DEPOSITIONS AND ..., INC.
(864) 585-0642

000948

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

4 Q. Had you ever -- when you went to Stoneledge, had
5 you ever been a supervisor or superintendent on a
6 job?

7 A. No.

8 Q. When you went over there, did you think that you
9 had the skills to be -- did you call yourself
10 supervisor or superintendent first of all. Let me
11 ask you that. Or what title did you use, if you
12 used one?

13 A. Supervisor. I mean, I was mostly just supervising
14 everything that was being done.

15 Q. Were you supervising subcontractors?

16 A. Yes.

17 Q. Or did Marick have any other employees doing such
18 things as framing or other work of that type?

19 A. No.

20 Q. So it was all -- all the work was being done by
21 subcontractors?

22 A. Yes.

23 Q. Prior to the time you went to Stoneledge, had you
24 ever supervised subcontractors?

25 A. No.

1 Q. When you arrived at Stoneledge, did you feel like
2 you were up to that job?

3 A. Yes.

4 Q. In other words, you felt like you had enough
5 general experience to be able to monitor what the
6 different subs were doing and to determine whether
7 they were doing it correctly or not?

8 A. Yes.

9 Q. And were there times when you thought they were not
10 doing something correctly?

11 A. No.

12 Q. So basically the subs you felt like were proceeding
13 correctly?

14 A. I believe each sub, depending on what he did, I
15 mean, obviously knew more than I did about it.
16 That's why we hired them. And each sub, you know,
17 was an expert in their field. So I was basically
18 there to make sure -- schedule them to do their
19 work, when to come in, and make sure they got it
20 done.

21 Q. I understand that. Did you ever see something that
22 caused you to say to a sub, "Wait a minute, I don't
23 like the way you're doing that"?

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

2 Q. Do you remember specific instances, or are you just
3 saying that from time to time ---

4 A. From time to time I would see something that they
5 would cut a corner on, but I would talk to them and
6 they would fix it. But it was nothing major. It
7 was like nail guards on pipes, painting, you know,
8 caulking, stuff like that, on the inside -- the
9 interior unit.

10 Q. Did you do any work on Phase I?

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

14 Q. And what -- I'm sorry.

15 A. --- supervised a lot of repair work.

16 Q. By the way, if I start to ask you a question before
17 you finish -- I'll try not to do that, but
18 sometimes you can't help it.

19 A. Okay.

20 Q. Just let me know there's more in your answer.

21 A. Okay.

22 Q. Did this supervising of repair work in Phase I, was
23 that going on while ---

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19

20
21 Deposition of **JASON CARLAN**
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the July 9, 2012 commencing at
25 approximately 2:38 p.m. attended by counsel as follows:

DEPOSITIONS AND ..., INC.
(864) 585-0642

JASON CARLAN

1 This was the best product out there for what we
2 were doing.

3 Q. What were you doing?

4 A. Waterproofing a deck to pour concrete on top of it.

5 Q. And when you said it met or exceeded what you
6 needed, how was what you needed defined?

7 A. By what details we had on the plans.

8 Q. And where did those details come from?

9 A. From the plans.

10 Q. The Miller/Player plans?

11 A. The Miller/Player plans.

12 Q. Did you discuss the product that you were going to
13 use with anyone from Marick?

14 A. No. Other than what we priced. Our pricing,
15 Polyguard membrane was on there.

16 Q. Was there any sort of product or product detail
17 submittal to Marick or to the architect?

18 A. I'm not sure on that.

19 Q. Did ---

20 A. Not my me.

21 Q. Who else at Southern Concrete would have been
22 responsible for gathering together anything to be
23 put into a submittal and sending it to the
24 contractor or the architect?

25 A. Jeff or -- that would have been it at that time.

1. WITNESS CONTINUES: --

2. A. There shouldn't be any reason that there
3. shouldn't -- the membrane should run up on all the
4. columns.

5. Q. And do you run the Polyguard completely on a porch
6. or balcony and then get Polyguard down before you
7. pour the concrete?

8. A. Yes.

9. Q. So everything on the Polyguard is in place? All
10. the edges are done; is that right?

11. A. Yes.

12. Q. It's run up the wall, it's glued down, and then you
13. pour the concrete?

14. A. Yes.

15. Q. Did anyone from Polyguard come out and look at your
16. installation of their product?

17. A. No.

18. Q. Did the architect ever come look at your
19. installation of the product -- of your installation
20. of the Polyguard product?

21. A. Not to my knowledge.

22. Q. And how about any representative of Marick Home
23. Builders? Did they inspect?

24. A. Yes.

25. Q. They came and looked at your installation?

1 A. On more than one occasion, yes.

2 Q. Did they compare the way you had installed it with
3 the Polyguard installation details and
4 requirements?

5 A. Probably not, but Nathan came out and inspected and
6 looked at our decks on more than one occasion.

7 Q. Do you have reason to believe that he knew how
8 Polyguard was to be installed?

9 A. Don't know.

10 Q. And the reason I'm asking, I mean, if he came by
11 and looked you would think he would have to know
12 what he's looking at; right?

13 A. Or ask questions.

14 Q. So did he ask you questions ---

15 A. Yes.

16 Q. --- about how it was installed?

17 A. Oh, yeah.

18 Q. Like what kinds of questions?

19 A. Just what we did in the corners. How you terminate
20 this. What are you going to -- why are you running
21 it inside the doorway. We don't have a choice. We
22 don't have enough room to do anything else. Your
23 door pan's got to sit there, so we have to turn it
24 in, just typical questions.

25 Q. And was the concrete when it was poured, at the

1 A. Three inches. Two and a half to three inches of
2 depth in the concrete. But since it's a top end
3 slab and not structural, then you know, it doesn't
4 pose a problem. But it's just we don't like to do
5 it.

6 Q. In response to your request for a change in the
7 framing, what did Nathan tell you?

8 A. They were going in like they were going in. The
9 elevation was already set.

10 Q. And so what options did that leave you with?

11 A. The less concrete on the outside edge.

12 Q. Less than?

13 A. Had it in three inches versus four. Or three and a
14 half, whatever it ended up being.

15 Q. And did having three inches rather than four
16 concern you?

17 A. No. I mean, it's a top end slab. It's not
18 structural. It's not going to hurt anything. But
19 I just -- to keep it from cracking and falling
20 apart, you know, I don't like going less than
21 three.

22 Q. Were you satisfied with the manner in which
23 Southern Concrete achieved the slope that it tried
24 to achieve at Stoneledge?

25 A. Yes.

1 see the insulation.

2 Q. Did you ever have any disputes with anyone from
3 Marick including Nathan or Rick Thoennes about how

4 a particular construction item was to be done?

5 A. Not disputes. We made suggestions maybe once or
6 twice. No disputes.

7 Q. Was any site -- or surveyors on site at any time to
8 point out grades or shoot levels or talk to you
9 about where to put the waterproofing?

10 A. No.

11 Q. You don't remember talking to anybody about that?

12 A. No surveyors, no.

13 Q. It's your testimony, I believe earlier, that you
14 would take the membrane on the raised balconies and
15 run it up four to six inches above where your final
16 top level of the concrete would be; is that right?

17 A. Yes.

18 Q. Did you secure or seal the membrane to the wall ---

19 A. Yes.

20 Q. --- at that location?

21 A. Yes, to the -- whatever sheathing was there.

22 Q. And then you would put the weather resistant
23 barrier over the top of your membrane?

24 A. Yes.

25 Q. And is that how you told Nathan it should be done?

1 A. Yes.

2 Q. And is that how you told Nathan it was being done?

3 A. That's how I told Nathan we were doing it and how
4 it needed to be done. As to whether after we left
5 it was done that way I wouldn't know.

6 Q. You mean after you left someone changes it?

7 A. After we left -- after we poured our concrete, I
8 mean, we may not come back to that area for weeks
9 at a time. I don't -- didn't go back and check to
10 make sure somebody else did their part, no.

11 Q. But what you told Nathan and showed Nathan was that
12 you ran it four to six inches up the wall above the
13 concrete and adhered it to the framing?

14 A. Yes.

15 Q. And you told him that was the proper way?

16 A. Yes.

17 Q. And you showed him that several times was how you
18 were doing it?

19 A. Yes.

20 Q. And then on the exterior edge you ran the membrane
21 down the outside exterior or outside face of the
22 deck?

23 A. Yes.

24 Q. And adhered it to the outside face of the deck?

25 A. Yes.

1 Q. And is that how you told Nathan it should be done?

2 A. It could have been done a number of ways, but yes.

3 That's how we told him to do it.

4 Q. Well, did you tell him that was an appropriate way
5 to do it?

6 A. Yes.

7 Q. And is that how you showed him when he would come
8 inspect how you were doing it?

9 A. Yes.

10 Q. And where the membrane came to the columns ---

11 A. Yes?

12 Q. --- you would run the membrane up the already
13 framed column?

14 A. Yes.

15 Q. Again, four to six inches above the top of the
16 concrete?

17 A. Yes.

18 Q. And below the concrete you were taking more
19 membrane and sealing those corners?

20 A. Yes.

21 Q. Because if you ran it up you'd have to cut it?

22 A. Yeah.

23 Q. And it would leave a gap there?

24 A. Yes. You have to cut it to get it to make it
25 around the corners, and then go back and piece the

1 corner in.

2 Q. And then you would put the membrane right there to
3 piece the corner edges?

4 A. Yes.

5 Q. And is that the way you told Nathan it should be
6 done?

7 A. Yes.

8 Q. And is that how you showed Nathan that you were
9 doing it?

10 A. Yes.

11 Q. And at the door cutout, let's talk about that
12 again. You would run the membrane up the wall
13 where it was framed, and then you would cut it on
14 an angle I believe you said?

15 A. Yes.

16 Q. And then you laid it in the entry?

17 A. Fold it in on the sides and on the bottom.

18 Q. Did you put some more pieces in that rough opening?

19 A. Yes. To make the corners take another piece, fold
20 it in the corner to make the corner, and then cut
21 the outside to lap over it.

22 Q. And would you adhere that then to the rough opening
23 or just leave it plain?

24 A. It would adhere to the rough opening.

25 Q. And is that how you informed Nathan that it should

1 be done?

2 A. Yes.

3 Q. Per the manufacturer's instructions?

4 A. Yes.

5 Q. When you showed him when he would come to expect --
6 inspect, is that how you were showing him it was to
7 be done?

8 A. Yes.

9 Q. And with the slope on the decks did you have
10 discussions with Nathan or Rick about how much
11 slope needed to be on the concrete surfaces to get
12 the water off?

13 A. We had conversations versus the fact that we were
14 restrained on how much slope we could do, yes. But
15 as far as what they required, no. The plans just
16 called for slope away.

17 Q. But you believe that the slope that you were able
18 to obtain on those concrete decks was sufficient?

19 A. Yes.

20 Q. And you informed Nathan and/or Rick or someone from
21 Marick that you believed it was sufficient?

22 A. Yes.

23 Q. And that Southern Concrete believed it was
24 sufficient?

25 A. Yes.

1 Q. And did you show Nathan that you were putting the
2 slope in by sloping the concrete?

3 A. Yes.

4 Q. And told him that's what you were doing?

5 A. Yes.

6 Q. Were you ever told to -- I'm jumping around. Were
7 you ever told to come back and add additional
8 waterproofing up higher on the foundation walls?

9 A. To the best of my knowledge, no.

10 Q. Do you know anything about an extension or a riser
11 or an additional cap on the foundation walls which
12 was poured after the original foundation wall was
13 poured?

14 A. No.

15 Q. And what I'm talking about is if the walls were
16 poured and then you decided they were six inches
17 too short and go out there and add an additional
18 six inches on top of the wall?

19 A. No.

20 Q. Did that ever happen?

21 A. Not to my knowledge. That would be something hard
22 to miss.

23 Q. If there appears to be a seam between three and six
24 inches below the top of the foundation wall, do you
25 have any idea what that seam would be from?

1 Q. Do you know if any of the stone masons were ever
2 involved in any of the conversations regarding how
3 the outboard edge of the deck was going to be
4 handled?

5 A. Not to my knowledge.

6 Q. As you sit here today, do you know the names of any
7 of the stone masons that were involved in the
8 construction of Phase II?

9 A. No, ma'am.

10 Q. Either individuals or companies?

11 A. No, ma'am.

12 Q. Did you have any concerns with the way that you
13 understood Marick planned to handle the outboard
14 edge of the deck?

15 A. No.

16 Q. And you have -- I know you testified you've been to
17 Stoneledge since this litigation was begun;
18 correct?

19 A. Yes.

20 Q. And you've observed the outboard edge of the decks
21 on some of the decks?

22 A. Yes.

23 Q. Was the construction you observed what you
24 understood Nathan planned to have constructed?

25 A. Minus the caulk joint between the stone and the

1 concrete, yes.

2 Q. And did Nathan ever discuss with you a caulk joint?

3 A. We discussed it, yes. That was the intent was to
4 have a half inch by half inch caulk joint between
5 the two.

6 Q. Was that something that you recommended to Nathan
7 specifically?

8 A. Yes, because the mortar to concrete was always
9 going to be a crack. There was no way to
10 permanently fix that. I mean, even caulking's not
11 a permanent fix, but it is a waterproof fix to --
12 water tight fix.

13 Q. And you don't have any knowledge as to whether or
14 not Nathan ever passed on that instruction or
15 information to the stone masons that were involved
16 in ---

17 A. No, ma'am.

18 Q. --- installing the stone on the outboard edge, do
19 you?

20 A. No, ma'am.

21 Q. And I know you testified a couple of times that on
22 prior projects the kick-out flashing has been
23 installed sometimes by the general contractor,
24 sometimes by the stone mason; is that right?

25 A. Yes.

CERTIFICATE OF SERVICE

2013 APR 10 AM 10 38

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1),
SCRCF and counsel's regular business practices, do hereby certify that I have this date, electronically
mailed a true and correct copy of the Defendants Marick Home Builders, LLC and Rick Thoennes'
Memorandum in Support of the SCRCF 59(e) Motion Concerning Southern Concrete to the
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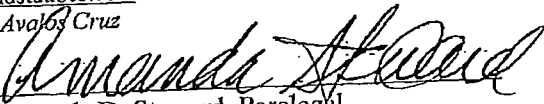
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This 9 day of April, 2014
Spartanburg, SC

By:


Amanda D. Steward, Paralegal