Vol 4 of 4

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, Individually and on Behalf of All others similarly situated, Plaintiffs,

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

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RECORD ON APPEAL
Volume IV of IV

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Jason M. Imhoff (SC Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
The Ward Law Firm, PA
PO Box 5663
Spartanburg, SC 29304
*Attorneys for Appellants Marick Home Builders, LLC and Rick Thoennes*

Michael B.T. Wilkes, Esquire
Lindsay L. Builder, Esquire
Wilkes Law Firm, PA
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
*Attorneys for Respondents Clear View Construction, LLC and Michael Franz*

Mason A. Goldsmith, Esquire
Elmore Goldsmith, PA
PO Box 1887
Greenville, SC 29602
*Attorneys for Respondents Southern Concrete Specialties*

David A. Root, Esquire
Kernodle, Root, & Coleman
PO Box 13897
Charleston, SC 29422
*Attorneys for Respondents Builders FirstSource*

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29401
*Attorneys for Respondents Stoneledge at Lake Keowee Owners' Association, Inc. (Plaintiffs)*

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE TENTH JUDICIAL CIRCUIT |
| COUNTY OF OCONEE | ) | 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

**MARICK HOME BUILDERS AND RICK THOENNES' MEMORANDUM IN SUPPORT OF THE S.C.R.C.P. 59(e) MOTION AS TO CLEAR VIEW CONSTRUCTION AND MICHAEL FRANZ**

COPY

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BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 10 AM 11 01

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

Defendants,

Defendants, Marick Home Builders, LLC and Rick Thoennes' (hereinafter collectively referred to as "Marick") filed cross-claims alleging negligence, breach of contract, breach of warranty and indemnification against a stonemason associated with phase II construction, Clear View Construction, LLC and its owner, Michael Franz (hereinafter collectively referred to as "Clear View"). In an order dated January 11, 2013, the Court granted summary judgment in favor of Clear View as to Marick's cross-claims for equitable indemnification and negligence (see: Exhibit "1"). In a separate order dated January 11, 2013, the Court granted summary judgment in favor of Clear View as to Marick's cross-claims for breach of contract and breach of warranty (see: Exhibit "2").

Marick timely filed a Motion to Alter and/or Amend the Orders pursuant to S.C.R.C.P. 59(e). Marick submits this Memorandum to the Court in support of its Motion.

## FACTS

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

The Court is fully aware of the allegations at issue in this lawsuit. Clear View is a direct subcontractor of Marick, as Clear view and Marick entered into a contract wherein Clear View agreed to perform all "brick and stone labor" at Phase II of the project (see: Exhibit "3", Contract). Thus, Marick performed none of the actual labor associated with the stone installed at the project. Marick subcontracted that labor to Clear View. Marick paid Clear View to perform the stone labor and installation and Marick supervised the project.

## STANDARD OF REVIEW

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

### I. SUMMARY JUDGMENT WAS IMPROPER

Marick's Third Amended Answer asserted cross-claims for (1) Equitable Indemnification; (2) Negligence; (3) Breach of Warranties; and (4) Breach of Contract. The Court summarily dismissed all claims against Clear View (See: Orders attached hereto as Exhibit "1" and "2").

First and foremost, discovery is not complete in this case. Plaintiffs' expert's, Derrick Hodgin, deposition is still open and has not been completed and Marick's expert's, Randy Still, deposition is still open and has not been completed. Thus, since discovery is not complete in this matter, the Court's Orders awarding summary judgment were premature in this matter. *Bayle v. S. Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland,* 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the **non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment**." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

This Memorandum will first address the Court's determination that Marick cannot be found to have no fault and thus is not entitled to indemnity. The second section of this Memorandum will discuss the errant determination that all pled causes of action collapse into one action for equitable indemnification.

**(1) INDEMNITY**

The Court's Order held that Marick's equitable indemnity claims failed because Marick cannot be adjudged without fault (see: Exhibit "1", Order). Based on the testimony presented in

this case, Marick has presented evidence that it was not at fault for the alleged defective stone installation at the project.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994).

The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor. The Court imposed a duty on a general contractor to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub-contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight. *Id.*

Plaintiffs' expert, Derrick Hodgin, testified that there are defects associated with the stone application at Phase II of the project (see: Hodgin's Dep. (Day 2) at 87:15 – 88:11, 89:22-25, 127:13-17, 133:4-12, 153:12-22, and 165:22 – 167:3). In Hodgin's opinion, the stone was not applied in accordance with the manufacturer's instructions, the stone was improperly installed below grade, the stone was improperly installed in contact with abutting concrete and the stone was not adhered to the base properly. *Id.* Further, Hodgin testified that the flashing and weather resistant barrier applied in connection with the stone was installed improperly or inadequately (see: Hodgin's Dep. (Day 2) at 81:14 – 83:11, 87:15 – 88:11, 91:12 – 92:7, 96:20 – 97:7, 107:3-10, 108:11 – 109:1, 123:18 -124:20, and 126:4-17). As a result of the alleged improper stonework, Hodgin opines that it is necessary to remove all stone in Phase II to remediate the problems (see: Hodgin Dep. (Day 2) at 105:23 – 106:2).

As stated earlier, Marick was the general contractor and provided no construction related labor associated with actual construction of the project at Stoneledge; Marick only provided supervision (see: Rick Thoennes Dep. at 36:17-22 and Randy Still Dep. at 172:21-24). Thus, the only function that Marick served (as the general contractor) was to hire subcontractors, schedule construction and provide supervision.

Rick Thoennes, one of the owners of Marick Home Builders, testified that Marick had a superintendent at the project supervising the subcontractors and scheduling construction (see: Thoennes Dep. at 30:17-19). Thoennes testified that Nathan Hornaday was employed by Marick to serve as the superintendent responsible for providing supervision of the project (see: Thoennes Dep. at 31:6-12). In addition to Hornaday's supervision and oversight, Thoennes visited the project weekly to oversee construction (see: Thoennes Dep. at 131:8-132:3). Further, Thoennes had daily communications with Hornaday concerning construction of the project (see: Thoennes Dep. at 176:4-6). According to Thoennes, during construction, Nathan Hornaday provided supervision on site at Stoneledge 10-12 hours per day. (Thoennes Dep. at 176:23 -177:4). According to Thoennes, on several occasions, Hornaday contacted separate subcontractors to discuss construction related issues noticed during Hornaday's inspections of work performed by subcontractors (Thoennes Dep. at 224:18 – 225:7, 244).

Hornaday also testified that he provided supervision at the project (Hornaday Dep. at 18:15-16).

> Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I don't like the way you're doing that"?
>
> A: I did.
>
> Q: And was it corrected to your satisfaction?
>
> A: Yes.

(Hornaday Dep. at 19:21 – 20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision was provided at the project. In addition to Marick's representatives' testimony, Clear View's own expert, Drew Wilkie, admits that Hornaday provided supervision at the project:

> Q: Do you have any idea what amount of supervision and direction was given to Clear View?
>
> A: Based on some of the testimony I've read, I believe Mr. Hornaday, there was some supervision provided and I think he was - - Mr. Hornaday was in a role of providing for that supervision.

(Drew Wilkie Dep. at 153:1-6.)

Mr. Wilkie further admits that some of the alleged defects associated with the stone may not have been noticeable to the general contractor at the time of construction (see: Wilkie Dep. at 165:9 – 168:2). Thus, if the alleged defects to the stone were not noticeable during construction, but only became noticeable over time, there is no way the general contractor could have prevented the alleged damage/defects to the stone.

Additionally, Marick's expert, Randy Still, testified that a general contractor relies on the subcontractors that they will perform their craft appropriately (Still Dep. at 84 – 85). Mr. Still stated further:

> Q: In your experience and education and in your work, do you hold the opinion that a general contractor is always liable for all defects in construction which were performed by subcontractors?
>
> A: I think what I have found is the term "liable" is a legal term and my belief is that the general contractor can rely on the subcontractors who have the specialty crafts and knowledge to perform their work correctly.
>
> Q: Is it fair to say that in many cases a subcontractor is in fact more experienced and better qualified to perform their particular trade than a general contractor?

A: Yes.

Q: Is that because they have specialized over the years in that particular area and have focused their education and experience in that area?

A: Yes, and they've performed the work and they know what works and what doesn't work.

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

A: I think in many cases he has to.

Q: Would you agree that obviously a general contractor cannot see every nail which is driven or every board which is installed?

A: Yes.

Q: Would you agree that he must, out of necessity, rely on a subcontractor's experience and knowledge and compliance with good building practices and the code?

A: Yes.

(Still Dep. at 169:12 – 170: 18.)

Mr. Still further testified:

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

A: No.

(Still Dep. 174:18:24.)

Thus, in South Carolina, the non-moving party is merely required to present a mere scintilla of evidence to survive summary judgment, and certainly, the fact that Marick's representatives testified that supervision was provided at the project, that Clear View's expert testified that "some supervision" was provided and that Marick's expert, Randy Still, testified

that Marick had a right to rely on the expertise of the subcontractors, presents more than a scintilla of evidence that Marick supervised and was not at fault for the alleged damages associated with the stone application at Stoneledge. Based upon these facts, a jury is required to determine fault.

In addition to equitable indemnification which Marick is entitled to if a jury finds Clear View solely at fault for the alleged defects to the stone, attached as exhibit "3" is a contract entered into between Marick and Clear View which includes an indemnification provision. Thus, contractually, Clear View is obligated to indemnify Marick for liability associated with the stonework it contracted to perform.

**(2) The Court Erred in Collapsing all of Marick's Cross-Claims Into One Claim for Equitable Indemnification.**

The Court erred in collapsing Marick' cross-claims for breach of warranty, breach of contract, and negligence into one claim for equitable indemnification. The Court cited no binding case law in support of its holding. In support of its holding, the Court cited two non-binding federal district court cases *(U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)) and two non-binding unpublished South Carolina circuit court orders (*Nelson v. John Weiland Home*, 2009-CP-10-6573 (Order by Judge Roger M. Young, October 26, 2011) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006).

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Marick asserts cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants

which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n. 3. However, in this case, Plaintiffs continue to allege defective stonework against Marick. Thus, Marick is required to continue litigating claims associated with Clear View's defective work. Marick continues to incur attorney fees and costs associated with Clear View's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Marick asserts that the federal court holdings should not be persuasive in this matter. Marick further asserts that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Marick may recover special damages at law under theories of negligence, breach of warranty, and breach of contract as to Clear View. Marick's claims for breach of warranty, negligence and breach of contract are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

> if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

*Griffin v. Van Norman*, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (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 negligence, breach of warranty and breach of contract against Clear View seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including special damages claims against subcontractors as Clear View was sued directly by Plaintiffs for their defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence, breach of contract and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by Clear View to Marick constitute separate causes of action which did not arise through Plaintiffs' relationship to the parties. The

Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, separate causes of action for negligence and breach of contract do not collapse into a single indemnity claim. Marick had a contractual relationship and was owed separate duties by Clear View, which it was overseeing to perform the work at issue in this action; if Clear View failed to perform the work it was hired to perform properly, it breached duties and contractual obligations owed to Marick and thus should be liable to Marick.

**CONCLUSION**

For the reasons stated hereinabove, Marick respectfully requests that this Court alter and/or amend its January 11, 2013 Orders and deny summary judgment to Clear View as clearly there are questions of fact for a jury to determine in this case.

Jason M. Imhoff (SC Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
The Ward Law Firm, PA
PO Box 5663
Spartanburg, SC 29304
(864) 582-3075
(864) 585-3090
jimohff@wardfirm.com

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

April 9, 2013

# EXHIBIT 1

FORM 4

STATE OF SOUTH CAROLINA — JUDGMENT IN A CIVIL CASE

COUNTY OF Oconee

IN THE COURT OF COMMON PLEAS — CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al — IMK Development Co LLC; et al

PLAINTIFF(S) — DEFENDANT(S)

| Submitted by: | Attorney for : ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(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 APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

**ORDER INFORMATION**

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

**INFORMATION FOR THE JUDGMENT INDEX**

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

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |

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

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

S/ALEXANDER S. MACAULAY — 2063 — 01/11/2013

Circuit Court Judge — Judge Code — Date

## 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:

Robert T Lyles Jr
Lyles & Lyles LLC
P O Box 773
Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jason M Imhoff
The Ward Law Firm
P O Box 5663
Spartanburg, SC 29304

Melissa M. Nichols
Michael B. T. Wilkes
Lindasy L. Builder
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

**Court Reporter:** N/A

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>~~COUNTY OF OCONEE~~<br><br>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<br><br>Plaintiffs,<br><br>vs.<br><br>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<br>FOR THE TENTH JUDICIAL CIRCUIT<br>~~CASE NUMBER: 2009-CP-37-0652~~<br><br>**ORDER GRANTING DEFENDANTS CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-CLAIMS OF MARICK HOME BUILDERS, LLC FOR NEGLIGENCE AND EQUITABLE INDEMNIFICATION** |

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

Defendants,

This matter came before the Court on the Motion of Defendants Clear View Construction, LLC ("Clear View") and Michael Franz's (collectively hereinafter "Clear View Defendants") for Summary Judgment. Clear View Defendants seek summary judgment as to the cross-claims of Marick Home Builders, LLC ("Marick")[1] against Clear View Defendants. The Court conducted a hearing on this Motion on September 5, 2012. Attorney Melissa M. Nichols appeared on behalf of Clear View Defendants and Attorney Jason M. Imhoff appeared on behalf of Marick.

The present action concerns the Stoneledge at Lake Keowee townhome community located on Lake Keowee in Oconee County, South Carolina ("Stoneledge"). Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Phase II of Stoneledge is the subject of this motion. Phase II of Stoneledge consists of units numbered 41-43 and 55-94

[1] The caption of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross Claims against Clear View Defendants appears to indicate that the cross claims were being asserted by both Marick and Rick Thoennes. In the body of the cross claims, however, only Marick asserted claims. Thus, there is not a cross claim by Defendant Rick Thoennes against Clear View Defendants. To the extent Rick Thoennes claims he has submitted claims against Clear View Defendants, this order shall also apply in full to those claims.

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and was constructed by general contractor defendant Marick. Marick subcontracted with Clear View to provide stonework on Phase II townhomes. Plaintiff has alleged deficiencies in Clear View's work such as the installation of stone below grade and complete lack of flashing at the water table at intersections of differing building components.

Clear View Defendants moved for summary judgment on Marick's cross-claims for equitable indemnity, breach of contract, negligence, and breach of warranty against Clear View Defendants. Clear View Defendants' Motion for Summary Judgment on Marick's cross-claims for breach of contract and breach of warranty against Clear View Defendants will be addressed in a separate order. For the reasons set forth below, Clear View Defendants' Motion for Summary Judgment as to Marick's equitable indemnity and negligence claims is hereby GRANTED.

**STANDARD OF REVIEW**

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by "pointing out to the court that there is an absence of evidence to support the nonmoving party's case." *Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

**DISCUSSION**

**A. Marick's Negligence Claim is a Claim for Equitable Indemnification**

Marick's cross-claims for negligence and equitable indemnity against Clear View Defendants stem from the potential liability Marick faces from the claims brought against it by the Plaintiffs in this matter, the Stoneledge at Lake Keowee Owners' Association and individual townhome owners (hereinafter collectively "Plaintiffs"). Plaintiffs allege that the townhomes at Stoneledge have construction and design defects leading to water intrusion which has damaged and deteriorated the building components of the townhomes.

Marick's negligence claims are subsumed by its equitable indemnification claims because the allegations and remedies sought by both actions stem directly from the potential liability they could face for the damages claimed by Plaintiffs.[2] "Indemnity is that form of compensation in which a first party [here allegedly Clear View] is liable to pay a second party [here Marick] for a loss or damage the second party incurs to a third party [Plaintiffs]." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992)). *See also Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005); *U.S. Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) (stating that the non-settling defendants did not have independent claims apart from indemnification and contribution because the claims were nothing more than claims for indemnity and because they would not exist without plaintiff suing the non-settling defendants); and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990) (holding that the cross-claims against the settling

[2] Marick's cross-claim labeled as a claim for negligence states:

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

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).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." *State v. Yelsen Land Co.*, 257 S.C. 401, 403 (1972); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Further, courts may use the allegations in the complaint to determine the correct character of an action. *See Seebaldt*, 269 S.C. at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

After reviewing Marick's cross-claim for negligence cited above, this Court finds that Marick's negligence claim is a claim for equitable indemnification.

**B. Marick's Equitable Indemnity Claims Fail because Marick is Not without Fault**

Clear View Defendants are entitled to summary judgment on Marick's equitable indemnity claims because Marick cannot be adjudged without fault. Marick Defendants engaged Randall Still, P.E. ("Still") to assess construction issues at Stoneledge. Still was deposed August 15, 2012. Still testified about Marick's responsibility for Phase II construction as follows:

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

A: Yes.

(Deposition of Randall Still, page 87.) Still went on to testify about Marick's violation of the building code during construction of Stoneledge:

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

A: I would agree that there are [building] components [of the townhomes] that have sustained damage at those isolated areas we've talked about that now appear to be a [building] code violation because of failure.

(Deposition of Randall Still, page 89.) Marick's corporate designee, Defendant Rick Thoennes ("Thoennes"), was also deposed in this matter on November 21, 2011. Thoennes echoed Still's opinions regarding Marick's responsibility for building code violations when asked about the Marick's position as the permit holder for Phase II construction:

Q: Did Marick pull the building permits for all of the Phase II units?

A: Yes.

(Deposition of Frederick (Rick) Thoennes, page 81.) Clear View Defendants' retained expert J. Drew Wilkie, P.E. ("Wilkie"), was also deposed in this matter on August 16, 2012. Wilkie testified that about the general contractor's responsibility for the construction:

Q: And in a situation where the general contractor has pulled the permit for the project, hired all the subs, the general contractor has the ultimate responsibility for the project; correct?

A: That's my opinion.

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(Deposition of J. Drew Wilkie, page 205.) Based on the deposition testimony in the record and Plaintiffs' allegations in this matter, it is clear that should Plaintiffs' allegations be proven, Marick would be partially at fault for the damages due to its role as the general contractor for Phase II construction.

According to well established South Carolina case law, a party can only recover under equitable indemnity if the party is without fault, which is also known as the doctrine of unclean hands. The most important element of an equitable indemnity action is that the party seeking indemnification must be without fault. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *Town of Wimnsboro 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) (stating that right to equitable indemnification do not exist between joint tortfeasors). Marick was the general contractor and permit holder for Phase II construction at Stoneledge. The party pulling a permit is ultimately responsible for compliance with the building code. Marick's own expert Randy Still confirmed both that in some areas of construction Marick violated the building code and that Marick was responsible for Phase II construction. Because Marick was the permit holder for Phase II construction, it violated the building code, and is ultimately responsible for construction, it cannot be adjudged without fault, and thus its claims for equitable indemnity must fail.

**C. No Special Relationship between the Individual Defendants**

Michael Franz is also entitled to summary judgment because there is no special relationship between Marick and Michael Franz. "Equitable indemnity is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party." *Rock Hill Tel.*

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*Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). For there to be an equitable indemnification between two parties, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." *Rock Hill*, 363 S.C. at 390, 611 S.E.2d at 237.

There is no evidence in the record that Michael Franz performed any stonework or other construction related activities at Stoneledge, therefore there is no subcontractor relationship with Marick to support claims for equitable indemnification against Michael Franz.

**CONCLUSION**

Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds there is no genuine issue of material fact that Marick's negligence cross-claim is subsumed by its equitable indemnification claim. This Court finds that Marick has at least some fault for the construction defects alleged and therefore cannot recover against Clear View Defendants under equitable indemnity because it is a joint tortfeasor. As an additional basis, this Court finds that there is no special relationship between Michael Franz and Marick to support claims for equitable indemnity.

The Court hereby GRANTS Defendants Clear View and Michael Franz's Motions for Summary Judgment as to Marick's cross-claims for negligence and equitable indemnity.

**IT IS SO ORDERED.**

Judge Alexander S. Macaulay

Walhalla, South Carolina

October 11, 2012

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BARBARA M. WHITFIELD
CLERK OF COURT

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# EXHIBIT 2

FORM 4

STATE OF SOUTH CAROLINA — JUDGMENT IN A CIVIL CASE

COUNTY OF Oconee

IN THE COURT OF COMMON PLEAS — CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al — IMK Development Co LLC; et al

PLAINTIFF(S) — DEFENDANT(S)

| Submitted by: | Attorney for : ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(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 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) |
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| | | $ |
| | | $ |
| | | $ |

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

2063 — Judge Code

01/11/2013 — Date

## 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:

Robert T Lyles Jr
Lyles & Lyles LLC
P O Box 773
Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jason M Imhoff
The Ward Law Firm
P O Box 5663
Spartanburg, SC 29304

Trent M. Kernodle
PO Box 13897
James Island, 29422-3897

Mason A Goldsmith
PO Box 1887
Greenville, SC 29602

Keith A Gowder
PO Box 1887
Greenville, SC 29602

Steven E. Buckingham
PO Box 10589
Greenville, SC 29603

Dana W. Lang
PO Box 999
Charleston, SC 29402

Melissa M. Nichols
Lindsay L. Builder
Michael B. T. Wilkes
Wilkes Law Firm
127 Dunbar St., Ste. 200
Spartanburg, SC 29306

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

**Court Reporter:** N/A

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF OCONEE | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br><br>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, John Ludwig, William Cox, Larry D. Lollis, Rick Thoennes, M Group Construction and Development, LLC, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders FirstSource Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Upstate Utilities, Inc., Southern Basements, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros

CASE NUMBER: 2009-CP-37-0652

**ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALTIES, INC., CLEAR VIEW CONSTRUCTION, LLC, AND MICHAEL FRANZ AS TO THE CROSS-CLAIMS OF MARICK HOMEBUILDERS, LLC FOR BREACH OF CONTRACT AND BREACH OF WARRANTY**

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CLERK OF COURT
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Hernandez, Martin Hernandez-Aviles, Francisco )
Villalobos Lopez, Ambrosio Martinez-Ramirez, )
Ester Moran Mentado, Socorro Castillo Montel, )
Upstate Utilities, Inc., MJG Construction and )
~~Homebuilders, Inc. d/b/a MJG Construction,~~ )
KMAC of the Carolinas, Inc., Eufacio Garcia, )
Everado 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 for hearing on dispositive motions filed by Defendants Builders FirstSource – Southeast Group, LLC ("BFS"), Southern Concrete Specialities, Inc. ("Southern Concrete"), Clear View Construction, LLC, and Michael Franz (collectively "Clear View")[1] as to the cross-claims of Defendant Marick Home Builders, LLC ("Marick").[2] Appearing were David A. Root on behalf of BFS, Mason A. Goldsmith on behalf of Southern Concrete, Melissa M. Nichols on behalf of Clear View, and Jason M. Imhoff on behalf of Marick.

**Procedural Posture**

In its answer to Plaintiffs' Third Amended Complaint, Marick asserted cross-claims against Defendants BFS, Southern Concrete, and Clear View alleging causes of action for Equitable Indemnity, Breach of Contract, Negligence, and Breach of Warranties. This Court has,

[1] Michael Franz was a member of Clear View Construction, LLC during the construction of Stoneledge. No evidence has been produced that Franz performed any construction related services on the project.

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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

[2]While 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. Ravoira, 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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**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).

5.69

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 Indemnity[3] it alleges that if Plaintiffs are entitled to judgment against it, then it is entitled to recovery from BFS, Southern Concrete, and Clear View, among others. This is a typical indemnification framework. Vermeer Carolina's, Inc., supra. Likewise, Marick's claims for Breach of Contract and Breach of Warranty set forth the same indemnity framework. (Marick's Answer to the Third Amended Complaint ¶¶ 162 and 174.) Though Marick uses different wording, the gravamen of its claims are the same; i.e., if Plaintiffs are entitled to judgment against Marick, then it is entitled to corresponding recovery from BFS, Southern Concrete, and Clear View; Marick is not alleging personal injury or property damage as to it. As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal

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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

[3]As 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.

[4]Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Loggins Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). 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.

"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 is 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

[5]The Court also takes notice that evidence was presented during its hearing on the various motions for summary judgment as to Marick's cross-claims that Marick had no contractor's license, and would thus be prohibited from enforcing a contract as a matter of law. (See Memorandum in Support of Carl Catoe Construction, Inc.'s Motion to Dismiss as to Marick Home Builders' Claims, dated August 30, 2012.) South Carolina Code § 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, it "may not bring an action either at law or in equity to enforce the provisions of a contract." South Carolina Code § 40-11-370(C). The same prohibition exists as to residential home builders. S.C. Code Ann. §40-59-30. The plainly worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

[6] Marick submitted a Supplemental Memorandum in Opposition to this motion, which included BFS, Southern Concrete and Clear View's "contracts" with Marick. While Marick argued a "hold harmless" provision in these contracts should apply, the Court notes that Marick provided no supporting evidence for the application of these documents to the Stoneledge Project and that they do not postdate the work performed by BFS, Southern Concrete and Clear View.

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Concrete, and Clear View are entitled to judgment as a matter of law as to the Cross-Claims of Marick for Breach of Contract and Breach of Warranty.

**IT IS SO ORDERED.**

Judge Alexander S. Macaulay

Walhalla, South Carolina
January 11
~~October~~ ____, 2013.

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CLERK OF COURT
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CLERK OF COURT - OCONEE COUNTY

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# EXHIBIT 3

MARICK
HOME BUILDERS

# 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

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

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.

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 Weathers
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

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.

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DEPOSITION of *DEREK HODGIN (DAY 2)*

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Pursuant to notice, a deposition was taken in the above case on the January 24, 2012, commencing at approximately 9:15 a.m. attended by counsel as follows:

believe the document that I looked at was Phase II, based on a 2003 date. I can't be sure. I can't be certain without looking at it closer. The exterior wall details really don't have much of any flashing details. The only place that I saw flashing would be at a roof/wall intersection. And all it does is point to the intersection and say "flashing." There's no blow up of how the flashing would be installed or integrated. I don't recall seeing any flashing detail at this location.

Q. Let's look so that we can put our eyes on it. Are you going to start with 55?

A. Sure.

Q. Phase II, 55?

A. Sure.

Q. Since we're there already.

A. I believe the photographs that depict this condition would be best reflected in Images 4646 through, I guess 4648. There's some additional photos after that, but they're a little bit below the water table.

Q. Let's go back.

A. Okay.

Q. A couple -- or a page to 4636.

A. Okay.

Q. And the reason I want to do that is I want to see it before you tore it apart.
A. Okay.
Q. Or 4635.
A. Yes, sir.
Q. It appears to me that the siding actually terminates, I don't know, inches above the water -- the stone water table. And there is a piece of trim installed there with a piece of flashing over it.
A. Yes, sir.
Q. Matter of fact, I think that may have been one of the pieces we were just talking about.
A. Yes, sir.
Q. That has the caulk joint. Okay. Is this -- does this installation still require yet another piece of flashing between the trim and the stone water table? Is that what you call a water table?
A. Yes.
Q. Okay.
A. I believe it's the manufacturer's requirements that have the flashing above the water table. I would think that it would be important to segregate the two sections of cladding with flashing. And just for clarification, the trim flashing is required by

the code. But I think toward the end of 703.8 it says flashing shall be installed over projected wood trim. Something like that, that you can't have flat pieces of wood coming out of the wall that aren't flashed. So the trim is really a separate building code requirement that it be flashed, which they did. There's some minor issues with how that was done. But this is a separate issue down at the stone water table level.

Q. So in your opinion this needs to be double flashed?

A. Correct.

Q. Let's go ahead and look at the Code Section 703.8, I guess, is what you ---

A. Okay.

Q. --- cited.

A. It'd probably just be easier for me to ---

Q. You haven't looked at the code?

A. It should be in the report. But I was going to look at it.

Q. Are you looking at 2003 or 2000?

A. I'm looking at the 2000 IRC and the commentary. Also I don't know if you have the commentary. Do you want to look at it at my copy and then let me know if there's something you want me to read into the record?

top of the stone water table. But we will need to look at the manufacturer's instructions. I have had some repairs where I violate the manufacturer's instructions because I don't agree with them. And I don't know if this is that case or not.

Q. But the issue we're talking about right now is the flashing at the top of the stone water table which you're not sure that it would be necessary or appropriate anyway?

A. I think the manufacturer requires it. I think that's why it's included in our matrix -- or the table as an identified deviation from what was required of the contractor when he constructed the buildings at Stoneledge.

Q. Do you have those manufacturer installation instructions close by?

A. I think they should be in the reference binder.

Q. Would they be attached to the back of your report?

A. I think so.

Q. Owens Corning Cultured Stone?

A. Yes, sir. I don't know if there's one specific to cedar siding. I'm looking at a page of details from Owens Corning Cultured Stone, Best Practices for Flashing Details.

Q. Yes. Do you have a page?

A. I think it's Page 4. And at the bottom left it looks like 1-B. I believe it's stucco above the water table. But the detail is generically identified as "sheathing and wood studs, water table or wainscot." So basically this is when your entire wall is not covered with stone, you've got to interrupt and you've got this water table feature. There is a GSM flashing identified. It says, "See note A2." It extends, in this case, from behind the stucco out onto the stone sill. I think GSM is metal flashing.

Q. Will you flip to page 8 for me, please?

A. Sure.

Q. And this may not be right, but it seems closer. Where you have at 1B, "Sheathing/wood studs, horizontal trim, recessed base flashing." Is this -- and there's another one right next to it also that has wood, the horizontal trim piece, and then the stone below.

A. I don't think any of them have exactly what we have. I mean, the reason I picked the -- that first one was because it has the sill component. And it was identified as water table -- as the water table detail. But it doesn't matter which one you look at. All three of them, that one on

page 4, and then two of them on page 8, both the 1.14A and 1.14B also call out that same GSM flashing. See note A2.

Q. So I don't know that that helped or not. Were you actually able to get your hands on the Owens Corning instructions that were provided with the stones installed at the project?

A. I don't know that -- we have various dates, I think from late nineties or early 2000s to 2009 maybe. This one looks like 2006 is this date. All the versions I've seen include I believe those same set of details.

Q. Is this condition causing damage?

A. Well, I know that we've seen -- I believe there's been some damage below the water table feature in the areas of the stone. But I don't know that I could directly correlate it to that one particular detail. Again, I would say one set of flashing, either above or below that sill, would be sufficient to keep water from migrating behind the stone.

Q. Have you composed a remedy for this issue?

A. Well, I think generically it's to remove the stone and install it in accordance with the manufacturer's instructions.

A. You'll have to look at the photographs to see the extent of destructive testing in the area with the stone.

Q. Well, let's look at -- well, we're at 55. Aren't we? 55 in D6 and 81 in D5, let's look at those.

A. Okay.

Q. Let's do 55 first.

A. Were you asking about damages at 55?

Q. Right.

A. There's no stone removed below this improper detail.

Q. Oh. What's 4649 and 4650?

A. That's, I think probably a bigger problem than the flashing, is that -- I mean, I think I talked about it briefly earlier is that, I think properly they've installed an additional layer of weather-resistant barrier. I believe in most cases it was identified to be felt. Asphalt-saturated building felt.

Q. Is that the Grace Vycor Plus?

A. No. That would be self adhered flashing. Do you see in 4649 and 4650 where there's -- somebody's finger is pinching the felt in 49. And then a knife being placed behind the felt in 50?

Q. Yes.

A. That means that any water that comes down the face of the weather-resistant barrier from above is going to go directly behind that felt and be in intimate contact with the one layer of weather-resistant barrier behind it. That's a significant problem particularly in brick veneer and any kind of intimate masonry exterior wall assembly.

Q. Back to the damage, do you see -- so no stone was taken off of this one. So as to Unit 55 we can't say whether or not this condition caused the damage?

A. Not directly, no. I would have to -- and I would probably take off stone toward the base of the wall just from a gravity standpoint, that water would migrate to the base of the wall and collect at that location.

Q. Let's look at Unit 73. Are we back to Dr. Hund's unit, I guess?

A. I believe se, yes. I've seen photographs of the specific issue that we're discussing. But again, no stone removed from below that detail.

Q. So as to Unit 73, we cannot say whether or not that condition is causing damage?

A. I think I agree with that.

Q. Let's go to 81.

weather-resistant barriers.

Q. Well, that's what I'm asking you. I mean, obviously, you know, hindsight is 20/20. But at the time that the contractors built this building were they -- did they deviate from a code requirement or an industry standard in regard to the way they constructed it and the barriers that they used?

A. I would say from a code standpoint, only -- the other thing we saw in 703.8 was that flashing should have been installed below the water table. The above the water table came from the manufacturer. And the double layer of weather-resistant barrier came from the manufacturer. So the only violations you would have would be 703.8 for the under the water table. And the manufacturer for the over the water table and possibly if there is a mixture of weather barriers that are used that are not approved by the manufacturer. I haven't researched that. You know, I guess one thing that would violate the code is that when you do put a weather-resistant barrier on it has to be installed in a weather lapped fashion. So I would say that's a code violation, that they put that second layer behind the stone on

top of the first layer.

Q. But anyway, it shouldn't have lapped behind the weather-resistant barrier above it?

A. Right. So from water migrating from above, you totally lost the benefit of that second layer. And now you've got water trapped between the two layers of the weather-resistant barrier.

Q. I don't want to get into a philosophical argument about how this should be done or not. But it seems to me that the manufacturer's instructions and the code and what you're saying are all inconsistent with each other. In other words, it could be read to require three sets of flashing, one above the trim, one above the water table, one below the water table?

A. I think that is what's required, yes.

Q. Which would make it impossible to incorporate the water -- or the weather-resistant barrier into all three of those effectively unless you were cutting out strips of weather-resistant barrier at each one of those locations?

A. Right. It would be interlaced, kind of like you do cedar shakes. You would have layers of weather-resistant barrier between those three sets of flashing.

code allow an on-site builder to use alternate and adequate means of construction?

A. You'll have to be more specific than that. There's a section in the code that talks about alternate products that can be used. And if they're not specifically addressed by the code, the building official can ask for code evaluation reports or some evidence of code compliance.

Q. Can I see your ---

A. Yeah.

Q. --- code there a minute, please? And this is the only one you have? This is 2000?

A. Correct.

Q. Well, we'll have to come back to that. I can't find it in my notes.

A. Is that what you were talking about though? The alternate materials?

Q. No. We'll just have to come back to that.

**BY MR. IMHOFF:**

All right. What time is it?

**(OFF THE RECORD).**

**DIRECT EXAMINATION RESUMED BY MR. IMHOFF:**

Q. Does your repair scope include removing all of the stone on all of the Stoneledge units?

A. I can't think of any place that we are able to

salvage it, no. I'm sorry. I think the answer is yes.

Q. And you have provided that repair scope despite the fact that your testimony is today that you don't know whether or not there's any damage behind the stone?

A. Not on Phase II. That's correct. I just know the details are the same between the two phases. And we've found extensive damage behind the stone in Phase I.

Q. I'm going to hand you Exhibit Number 72 again. It looks like 7 and 8 may need a line between them?

A. I need to borrow Randy's version, I think.

Q. When you do it, will you state if for the record for the table, please?

A. There's a couple pages.

Q. Go ahead and tell us what you did, please.

A. The first line that I drew between Issues 7 and 8 are between Unit Number 73 and 15. If you go to the next page, I added three lines. Between Issues 10 and 11, the line goes between Unit 66 and Unit 8. Between 11 and 12 between Unit 66 and 25 and between 12 and 13 between Units 91 and 33.

Q. Let's move on to D7.

A. Okay.

Q. And just in general describe what that defect is, please.

A. I think this reverse lap is what we got sidetracked onto in our previous discussion that in addition to not having the proper flashing at the intersection of the stone and the cedar that the second layer of weather-resistant barrier installed behind the stone was simply put on top of the first layer, allowing any water migrating from up above to go directly behind that second layer.

Q. Your consequence damage there says, "Damage observed to sheathing and wall framing, interior gypsum wall and floor damage observed." Is that from the emergency repair that you did in Phase I?

A. I believe so. Are 55 and 73 the ones we've previously looked at?

Q. Yeah. Well, 55 is directly above in 6, and 73 is directly above in 5. So it was one of the four that we -- the -- two of the four that we just looked at.

A. Okay. So the damage that we observed is definitely the emergency repair on 32.

Q. And not the issue at 55 and 73?

A. Correct. Would you like to look at the pictures of 32?

Q. I'll let somebody else do that, because we're moving pretty slow.

A. All right.

Q. Let's move on to 8, and I guess 9 at the same time. It looks like they're both talking about windows?

A. Yes.

Q. Well, back to Unit 55, I guess, since we're here.

A. 55 is not part of Issue Number 8.

Q. No, but it's part of Issue Number 9.

A. Okay.

Q. It looks like for both 8 and 9, again, you've cited the general provision of 703.8. Well, no, you cite Note 3 and Note 4 about "Under and at the ends of masonry wood or metal copings and sills," and Note 4, continuously above all projecting wood trim," corrosion-resistant flashing needs to be installed. All right. Let's look at that, and identify a picture, if you would. Or a photo, I should say.

A. I don't know that that's an issue a whole lot different than Number 6. I mean, I know it's in that same area. So what this is saying is that there should be flashing not only at the cedar to stone intersection, but also the window stone intersection. There should be flashing below the -- between the window and that stone sill, I

guess it would be called at this location.

Q. Let me make sure that I understand. What is the trim material?

A. Around the window?

Q. Well, around the window and above the stone water table?

A. Cedar.

Q. That's a piece of cedar trim?

A. Yes, sir.

Q. So if we look at, I guess Photograph 4636 where you can see the bottom of the trim piece around the window right above the water table feature, the stone water table feature?

A. Yes, sir.

Q. That's where you say a piece of flashing needs to be put?

A. I believe it would be below the sill. Below the window sill, which we have been calling a water table at -- running away from the window we call it a water table. Here it's a sill. And there should be flashing that extends out below that location based on that section of the code.

Q. Below the piece of stone?

A. Right.

Q. That creates the sill?

hard time. I'm giving you a hard time -- I'm just asking you questions to try to identify what you've done, and what your opinions are, and why you have come to those opinions. And then what your scope of repair is going to be.

A. Right. And my only point was this is not such a different repair scope than it would be if I was working for you on the defense.

BY MR. IMHOFF:

What time is it? It's 12:40.

DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

Q. I think we're done with 9.

A. Okay.

Q. Let's do 10 real quick and then we'll stop.

A. Okay.

Q. All right. Essentially -- well, tell us in general what this is -- what this condition is?

A. I believe in our observations -- and it has several units listed. But again, this is one of those issues that you can walk around the project and see repeatedly on, I believe all the buildings. Is that the stone continues in an uninterrupted manner down to grade -- and actually, the next issue is below grade, without any base of wall flashing or weep provision.

Q. Let's go ahead and look at 59, if we could?
A. Okay.
Q. This looks to be the new one. The one we talked about before.
A. I seem to have two sets of the same photographs. I'm not sure. Yeah, there's a tag that says "duplicate photos." There's some field notes from Mr. Metcalf on July 1st, 2010. And then some photographs at the base of one of the stone clad walls.
Q. And this just evidences the lack of the -- what do you call it, through flashing at the base of the wall?
A. You might be referring to through wall flashing, which is flashing that would extend from behind the weather-resistant barrier, through the outer masonry veneer to daylight. That's what we -- what would be missing.
Q. Is that what this issue is?
A. Yes.
Q. I think you've told me previously that you have not actually taken any stone off to see if there's damage to this wall. I don't see that you've done that here, and I don't see any photographs on damage to the wall. Am I wrong about that?

Q. Let's go to 66, which I think is the next one.
A. All right.
Q. This looks to be a fairly large file.
A. All right. I found some exterior wall photos, but the stone goes below grade, and there is no excavation to see where the stone actually terminates. But my earlier point was that the entire purpose of the base of the wall flashing would be to exit water in front of the wood framed wall areas. And so you would see this flashing extending through a linear, horizontal joint at the base of the wall between the concrete foundation and the wood framing, which you don't see in Photographs 0595 through 0603. So they're kind of overview pictures. But what's being shown is the absence of any flashing that would extend through the stone.
Q. And you haven't done any investigation or destructive testing to determine if there's any damage between or behind the stone on any of the units that you looked at in Phase II?
A. The only thing -- and I didn't think about it a minute ago when you asked me the question. We were looking at these photographs -- and maybe that's the reason we were taking pictures of this outside

wall. Because there seems to be extensive flooding of the basement of this particular unit where he has wet carpet and stains coming down the inside of the concrete wall and damages to the base of the wall in the finished basement. It's hard to say. Certainly this detail, even though it's intended to protect the wood framing, would contribute to the amount of water that the concrete wall below sees or is exposed to. So you can't really separate those. I mean, it's got to be a contributing factor. But I wouldn't be able to say to what extent it contributes to his flooding.

Q. It looks like we've knocked Number 11 out too, because it is the same units in Phase I, 59, 65, and 66, and is -- the fact that you've pointed out that the stone veneer is installed below grade?

A. Yes, sir.

BY MR. IMHOFF:

Lunch?

BY WITNESS:

Sure.

BY MR. IMHOFF:

Okay, let's just stop here for lunch?

(OFF THE RECORD).

EXAMINATION RESUMED BY MS. MONTAGUE:

regarding the stone veneer, its termination, presence or absence of any weep system and the extent that it extended below grade.

Q. So what is your opinion as to why the stone veneer being installed below grade is incorrect?

A. Well, if there was a proper weep hole and flashing system, I don't think all by itself it would necessarily be a significant issue. What makes it more important on these buildings is that there's a totally uninterrupted path for termites to get behind the stone and travel up to the OSB wall sheathing and wood framing.

Q. Have you seen any evidence of live termites or termite damage?

A. The only place that I recall stone being removed near the base of the wall was the emergency repair on 32.

Q. So this is Unit Number 32?

A. Right, Unit Number 32. And I don't recall, we'll have to look at those photographs to see the extent of any termites that may have been present. So we haven't explored the extent of any termite damage at the base of the wall.

Q. Do you mind pulling up 32? Do you have that in front of you, so we can see those photos? Is 32 in

drawings that show wood framed balconies. I think I've only seen the CMU and concrete. But somebody made a switch to have the wood trusses and the pressure treated framing.

Q. All right, let's pick back up where we left off on your on Exhibit Number 72.

A. Okay.

Q. I think we're at 12; is that ---

A. I think that's right.

Q. Seem about right?

A. Yeah.

Q. This seems fairly obvious. Some of the stone wasn't adhered properly and may fall off?

A. Yes.

Q. It looks like you've identified three units where that has happened. Let's go ahead to 73.

A. Okay.

Q. I guess this is Dr. Hund's unit again?

A. I believe so, yes. It looks like stone that's popped off here is right below the ceiling in Photos -- well, you can see it kind of in the background, 2141.

Q. I got to get there. Just a minute, please. Okay.

A. And then the other one, it cuts off the image number on the bottom. So if you just go from 2141

Q. Oh, yeah. 19. I think it was 19. Well, no, I skipped 19, because that's just in Phase I; is that right?

A. It looks like it, yeah.

Q. "Inadequate wall sheathing attachment," you're talking about the OSB or the plywood or whatever exterior sheathing?

A. Yes.

Q. Didn't have enough nails or something like that?

A. Correct.

Q. And you found that in one place in Phase I?

A. It looks like it was just found during exterior wall emergency repair.

Q. And you didn't find that anywhere in Phase II?

A. No. I don't think we were looking for it in Phase I, it just happened to be observed during an emergency repair. And I wouldn't propose that that's some kind of widespread issue. To the extent that OSB is exposed during a repair process and nails are found to be inadequate, then you would just add some nails.

Q. Let's talk about 20. "Cultured stone veneer is installed in contact with the concrete path/stoop." Let's go ahead and look at 76.

A. Okay.

Q. So we can get an idea of what ---
A. It says, "7/1/2010" at the set of notes. It looks like the photographs -- there's a series of photographs, but in terms of regarding this particular condition it would be images 7241 through 7246 prior to removing the stone, seeing how it terminates against the top of a concrete balcony.
Q. And maybe I misunderstood that. This is talking about on top of the balcony or on the balcony?
A. Well, it could be at other locations. Like it could be below the balcony, where that same column would hit the slab on grade foundation. Or it could be -- we don't show it, but there would be at the front entrance in that 7240, those stone clad base of columns would come down against a concrete entry porch.
Q. And that is, according to your chart here, a manufacturer's installation instruction violation?
A. Yes, sir.
Q. What is the violation, exactly?
A. Well, they were supposed to be held up off of these surfaces. I can think of a couple of reasons why that would be important. I don't know exactly what the manufacturer details, without looking at it,

but I know that there's a flashing detail or a termination detail a certain height above concrete surfaces.

Q. To allow it to drain?

A. To allow it to drain. And to the extent that you have flashing that's coming up from below, you don't want to have say your weep screed or some other accessory penetrate the flashing too low on the column. That would cause a water penetration point. Weep screed is W-E-E-P S-C-R-E-E-D.

Q. Can we go to the Owens Corning ---

A. Yes.

Q. --- installation instructions? I'm not sure I'm following it. And while you're looking, this is purely an installation instruction issue? It's not a code issue, other than the code requires you to follow a manufacturer's instructions?

A. I mean, I guess you could throw in the 703.1 or maybe 703.8. We could look at it to see, but I would say primarily it would be a manufacturer-related issue. I don't see any detail that shows exactly what we have. I do see like a paving surface, like paver block surfaces on Page 3 of the instructions that are including in our report, which is "Owens Corning Cultured Stone Best

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

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

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:

A. I don't know.
Q. How about this, at the height of Marick's existence when it was at its busiest, how many employees did it have?
A. Probably three or four.
Q. Describe the job duties or titles of those employees.
A. Administrative Assistant in the office. Would have had a superintendent, assistant superintendent and probably a laborer.
Q. So when Marick was doing its construction it subcontracted out its work?
A. Correct.
Q. And who at Marick was responsible for selecting and contacting with subcontractors?
A. Me.
Q. And who at Marick was responsible for observing and supervising the work of subcontractors?
A. Our superintendents.
Q. Can you name your superintendents at Marick, and tell me the years that they were with Marick?
A. I don't know about that, but I can tell you some of the superintendents.
Q. Okay.
A. Matthew Gooch ---

Q. Can you spell that last name?
A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday, just like it sounds. There's a couple I can picture but I can't name. There are probably two, maybe three others.
Q. Who was the superintendent who was responsible for observation and supervision of the subcontractors in connection with what Marick did at the Stoneledge project?
A. Nathan.
Q. Hornaday?
A. Yes.
Q. Did Mr. Hornaday hold any sort of license, contractor's license?
A. I don't know. Not that I know of.
Q. Who hired Mr. Hornaday?
A. I did.
Q. Are you the one that assigned him to the -- his responsibilities in connection with the Stoneledge project?
A. Yes.
Q. What were his qualifications such that you felt comfortable he could supervise subcontractors' work at the Stoneledge project?
A. He had worked as a subcontractor for us for years

A. There were one or two laborers down there and an on-site administrative assistant.
Q. What would you have expected the role of the laborers of Marick to be at the Stoneledge project?
A. Well, Nathan hired them and supervised them so he would have told them what their responsibilities would have been.
Q. What was your expectation of what work they would have been performing for Marick?
A. Whatever Nathan needed.
Q. Okay. Do you know as you're testifying today what work was, at Stoneledge, was actually done by laborers employed by Marick?
A. I know some. They would clean up, keep the streets clean, keep the units clean. Those are things I observed when I went down there.
Q. Is there any aspect of the construction of the Stoneledge units that was done by Marick that you believe was self-performed by Marick or was it all done by subcontractors?
A. I think it was all subcontracted other than the cleanup like they -- like I mentioned.
Q. Okay. Did Mr. Hornaday ever express to you any concern about the quality of the work at Stoneledge that was being performed by the subcontractors?

Q. Had you had any experience with Carl Catoe before?
A. No.
Q. Did you have occasion to talk with or observe the work being done by Carl Catoe or his crews?
A. Some.
Q. Did you have any questions about the work they were doing?
A. No, they seemed to be doing fine, and then of course I got most of my input from Nathan who was there every day.
Q. You indicated that you would -- how often would you talk with him about what was going on?
A. We'd talk daily, or every other day.
Q. How frequently would you actually visit the site?
A. Depends on when it was, depended on what was going on, so you'd have to be a little more specific.
Q. During the time the framing was being done and the building wrap was installed, the flashing installed, how frequently ---
A. Probably once a week.
Q. About once a week?
A. Uh-huh (indicates affirmative response). Maybe every week and a half, week to week and a half.
BY MR. ROOT:
Larry, I'm sorry, I couldn't. Was that once a week

he was on site?

WITNESS ANSWERS:

A. A week to a week and a half.

Q. He was on site once a week or once every week and a half. During the time that the framing work was being done, did Nathan ever indicate to you that he had any problems or had corrected any of the work that Carl Catoe was doing?

A. I don't recall any workman type problems except for one. We had a floor truss that was put in wrong and we had to support it. That's the only thing that jumps out at me. Of course, we always looked at scheduling, and for the most part he manned the job the way he was supposed to.

Q. Any problems associated with the installation of the building wrap or the flashing?

A. Not that I know of. Nathan would've seen that.

Q. Pardon?

A. Nathan would've seen that and he didn't mention it to me.

Q. If there had been a problem, would he have mentioned it to you?

A. You have to ask him.

Q. Would you, I mean, based upon you working with him over the time, would you have expected him to ---

A. No.
Q. You were on site approximately once a week?
A. Once to once, every week and a half.
Q. And your communications, though, with Nathan were how consistent?
A. Daily.
Q. What kind of ---
A. Well, I say "daily," there may have been a day he was gone or I was gone, but for the most part daily.
Q. As far as a quantity of time, how much time during a typical week would you spend talking to Nathan?
A. No idea.
Q. Couldn't say?
A. Wouldn't even venture to guess. One week it could be, you know, an hour, next week it could be five minutes, next week it could be two hours.
Q. I understand. Was there any particular stage of construction during which you were on the site more frequently than another stage?
A. Probably during the layout, like when they were staking or that kind of thing. If they were doing any work on the lake itself, then I was there.
Q. As to Nathan's onsite time, you said essentially for a vacation or something where you would expect someone to be absent from the site, he was generally

there every day?

A. Correct.

Q. Typical eight to ten-hour workday?

A. Typical ten to twelve.

Q. Ten to twelve. Did you have any, during the course of the construction of Phase II, any interactions with any employees or representatives of Builders First Source, BFS?

A. Yes.

Q. Who?

A. Lots of people. Mike Green, Brock Bauknight, Elaine, can't remember her last name, for the windows ---

Q. And that's what I was going to get to next if you want to say that while you go through their names, you can tell me what you dealt with them about. You said Elaine you dealt with windows?

A. Right. I think windows and doors.

Q. Mike Green?

A. Mike Green, I dealt with materials and labor.

Q. All right, go ahead.

A. And Brock Bauknight was my outside representative that I dealt with on all of those things.

Q. General outside sales?

A. That's right. He handled my account.

Catoe? That is, who did monthly inspections for subcontractor payment?

A. Nathan would inspect -- well, there was a draw schedule that Mike Green and I worked out ---

Q. Okay.

A. --- for all aspects when we did the contract and then all Nathan had to do was look and see what portion of that schedule was done and then he'd sign off on it and then we'd pay it. Not Carl, BFS.

Q. Yeah, right, because Carl was -- Carl Catoe was not your subcontractor, correct?

A. That's correct.

Q. Only Builders First Source was?

A. Correct.

Q. But nonetheless you got to occasionally communicate with Carl Catoe by virtue of being on the site?

A. Sure.

Q. Did anyone at Marick ever call or otherwise contact Carl Catoe Construction regarding any warranty issues?

A. I'm sure Nathan did.

Q. You say that you're sure he did. What do you know that he did?

A. Siding that had warped and popped, a truss, the truss that was over-spanned.

Q. Was Nathan calling Carl Catoe or Builders First Source with these issues?
A. Both. I mean it would start with Carl to see if it could be worked out in the field, I'm sure, but then it would go -- if it couldn't be worked out in the field with Carl then it would go to Builders First Source.
Q. I had asked you about warranty issues, and to me typically that means issues once you've left a site ---
A. Oh, oh, I don't know of -- I don't know of any.
Q. But you were starting to tell me about some issues while construction was ongoing ---
A. Right.
Q. --- and you mentioned some siding that was warping and popping and then you mentioned the over-spanned truss issue that you already talked about with David. On the siding that was warping or popping, was it an isolated board, was it widespread or was it somewhere in between those two?
A. No, I mean, it was an isolated board according to Nathan. He called and asked Carl to fix it. Normally they were on site, but after they had left site then he'd have to call Builders First Source.
Q. And was Builders First Source generally responsive?

A. Would ---
Q. I'm sorry, the finished floor, not the finished grade.
A. No.
Q. Would you expect it to show the grade at the building?
A. Yes, within plus or minus.
Q. Would you expect it to show the slope away from the building?
A. Yes.
Q. If the Freeland drawings don't show or did not show the grade at the building, how would the -- to your knowledge, how would the grading subcontractor know where to set the grade?
A. You're asking a hypothetical question there. It should show it, period.
Q. I think you said that you assumed that Nathan contacted Hutch N Son regarding some issues with the grade, do you know that for sure or do you just assume that?
A. No, I know that for sure.
Q. Okay. And that was relating to this standing water?
A. Standing water and the slope.
Q. And the slope?
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.

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Deposition of *NATHAN HORNADAY*

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Pursuant to notice, a deposition was taken in the above case on the March 30, 2012 commencing at approximately 10:15 a.m. attended by counsel as follows:

A. Yes.
Q. --- generally?
A. Yes.
Q. Had you ever -- when you went to Stoneledge, had you ever been a supervisor or superintendent on a job?
A. No.
Q. When you went over there, did you think that you had the skills to be -- did you call yourself supervisor or superintendent first of all. Let me ask you that. Or what title did you use, if you used one?
A. Supervisor. I mean, I was mostly just supervising everything that was being done.
Q. Were you supervising subcontractors?
A. Yes.
Q. Or did Marick have any other employees doing such things as framing or other work of that type?
A. No.
Q. So it was all -- all the work was being done by subcontractors?
A. Yes.
Q. Prior to the time you went to Stoneledge, had you ever supervised subcontractors?
A. No.

Q. When you arrived at Stoneledge, did you feel like you were up to that job?
A. Yes.
Q. In other words, you felt like you had enough general experience to be able to monitor what the different subs were doing and to determine whether they were doing it correctly or not?
A. Yes.
Q. And were there times when you thought they were not doing something correctly?
A. No.
Q. So basically the subs you felt like were proceeding correctly?
A. I believe each sub, depending on what he did, I mean, obviously knew more than I did about it. That's why we hired them. And each sub, you know, was an expert in their field. So I was basically there to make sure -- schedule them to do their work, when to come in, and make sure they got it done.
Q. I understand that. 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.
Q. Do you remember specific instances, or are you just saying that from time to time ---
A. From time to time I would see something that they would cut a corner on, but I would talk to them and they would fix it. But it was nothing major. It was like nail guards on pipes, painting, you know, caulking, stuff like that, on the inside -- the interior unit.
Q. Did you do any work on Phase I?
A. I did a lot of repair work.
Q. On Phase I?
A. Yes. I ---
Q. And what -- I'm sorry.
A. --- supervised a lot of repair work.
Q. By the way, if I start to ask you a question before you finish -- I'll try not to do that, but sometimes you can't help it.
A. Okay.
Q. Just let me know there's more in your answer.
A. Okay.
Q. Did this supervising of repair work in Phase I, was that going on while ---
BY MR. GOLDSMITH:
Do we have someone on the line?

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

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

Plaintiffs,

vs.

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

Defendants.

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Deposition of ***J. DREW WILKIE***

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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:

Q. Do you have any idea what amount of supervision and direction was given to Clear View?

A. Based on some of the testimony I've read by, I believe Mr. Hornaday, there was some supervision provided and I think he was -- Mr. Hornaday was in a role of providing for that supervision. Aside from what Mr. Hornaday said in his deposition I'm not aware of what other supervision there was.

Q. Do you know what supervision of its employees was provided by Clear View?

A. I do not.

Q. Do you know what direction was provided by Clear View?

A. I do not.

Q. Do you know if Clear View had the Owens Corning manufacturer's installation instructions?

A. I do not.

Q. Where could a subcontractor obtain installation instructions for this type of stone; do they come with the box of stone or on the side or is it something you need to go and search out on the web or how does that -- how do you get those instructions?

A. In 2006 I don't know whether the instructions would've been adhered to the packaging of the

outboard of the weather-resistant barrier that's on the wall sheathing underneath it. So it's -- this is all occurring outboard so I don't think that that -- that the presence of that gap or crack is a condition that by itself is a violation of the building code. Is that what you were asking?

Q. Right.

A. Okay.

Q. Do you know or do you have an opinion why that mortar has cracked or shrunk or gapped at that area?

A. There are several reasons that that crack or gap could form. Do you want me to ---

Q. Yes.

A. --- give you examples of what some of them could be?

Q. Sure.

A. I don't know what the major reason is or what all of the reasons are but there are several that could be occurring there. One is simply that the mortar joint between the edge of the slab and the nosing stone can become wet and be subjected to changes in temperature, freeze/thaw and could just become loose, some of those stones could become loose due to freeze/thaw action, that's one possibility. Another force that could be applied to that stone is from the bottom rail of the guard assembly. The

bottom rail of the guard assembly is comprised of wood and in some places the guard assembly is sitting so close and actually in contact with what amounts to be the back of the mortar joint for the nosing stone, that if and when that wood expands and contracts due to wetting and drying cycles, it can exert force onto that nosing stone and cause it to de-bond from its substrate. Another possible force that could be applied to that stone to cause it to de-bond is that the wood materials that are directly underneath the outboard edge of the balcony slab, in places where destructive testing was performed, they were damp. The increase in moisture content of those wooden materials can expand the wood and exert force on the back of that nosing stone and cause it to dislodge. Another possibility is that the waterproofing membrane itself is terminated right behind the nosing stone and the buildup of water and -- can create in cold situations, possibly ice, behind that as a result of there being a waterproof membrane layer that terminates there could exert force on the back of that stone. Those are several reasons or possible forces that could be applied to that stone to cause it to become dislodged, but I've not determined what exactly caused it to become

dislodged.

Q. Two further reasons that that mortar would crack or gap or shrink there would be that the mortar was improperly mixed; is that a possible reason why the mortar has failed and cracked?

A. That's a possibility, yes.

Q. Is another possibility that the mortar was improperly installed, too thick, too thin, not enough in those areas?

A. Yes, those are all things that ought to be considered.

Q. Would any of those items that we just went through be immediately obvious at the time of construction to anyone that was inspecting that installation?

A. In the case of your mortar mixing example there are instances where the mortar could be of such a low quality that it would be observable at the time of installation.

Q. Do you have any evidence to support that the mortar was so poorly mixed that it was observable at the time it was installed?

A. I do not.

Q. What about any other ones, would they be immediately observable at the time that the mortar was installed or the stone was installed?

A. I believe the other examples I gave would take time. You wouldn't be able to see those right away.

Q. Do you have any opinion as to the overall quality of the stone installation done by Clear View at the project?

A. I have not made an assessment of any and all areas that Clear View may have installed stone, but I have surveyed areas where it's apparent to me that, by the documents I have available, that they did perform work that in the areas where I've observed the stonework looks normal. I wouldn't say that it's the best work I've ever seen and it's certainly not the worst. It looks like a normal type of installation of cultured stone veneer to me.

Q. My photographs may be numbered differently than yours, but mine is Wilkie 479. Would you look at that photograph, please?

A. Okay. (Witness complies).

Q. And I'll try to read the same thing.

**BY MS. NICHOLS:**

You're reading a Bates number, aren't you?

**BY MR. IMHOFF:**

Wilkie ---

**BY MS. NICHOLS:**

Do you have a Bates number?

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.

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Deposition of *RANDY STILL*

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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:

Object to the form.

WITNESS ANSWERS:

A. I think that's a legal question for "duty." You would expect they would but I don't know contractually. I think it becomes a legal question of duty.

Q. It is a duty, is it not, of the general contractor to comply with the applicable building codes in the performance of a project?

A. I would think so.

Q. Is it the duty of a general contractor to coordinate the work of subcontractors?

BY MR. IMHOFF:

Object to form.

WITNESS ANSWERS:

A. I would think so to the extent he understands that coordination effort.

Q. And if he doesn't understand the coordination effort what should the general contractor do?

A. Ask questions.

Q. Of whom?

A. Subcontractors, make sure they're putting them together correctly.

Q. Is it a duty of the general contractor on a project 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

obligation in the construction or installation of the low slope roofs, whether it be code violation, violation of the design documents or non-compliance with the design documents or violation of manufacturers' installation instructions or any other obligation on the installation of the low slope roofs?

A. I think the only place in the low slope roofs that there is question is there's some very limited areas where felts are missing, and that is an omission of felts, a single layer of felts.

Q. Let's talk about that for just a minute. 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 practice and the code?
A. Yes.
Q. Let me go back to my question then again. If based upon that, if there are violations of code such as a completely missing felt under a roof, do you hold the opinion that the general contractor has violated the code or some other obligation if the work was done by a subcontractor?
A. No, but clearly when something like felt is missing

or a prototypical installation and that will serve as the standard by which an installation is accepted. For example, if you put a window in and you've got a mock-up wall and you put in the rough opening flashing and you put in the -- all the flashings that would be there, all the peel-and-stick and you've got all of the entities, for example, the window manufacturer and the wrap manufacturer and the peel-and-stick manufacturer and the exterior cladding person there. And if they're all there and they say, "Yeah, this is the way it needs to be done." And your subcontractor who's doing all those different components install it that way, says he's going to install it that way, that's how it should be installed. I'm not sure that answers your question but ---

Q. Okay. Let me try to get to it a little bit different way. Are you familiar with the term "paper contractor"?

A. I'm not sure.

Q. Do you know if Marick actually drove any nails or constructed any part of Stoneledge?

A. I think my understanding is he did not self-perform any work.

Q. What in your opinion is the role of a general

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

A. No.

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

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

Q. Is that a "no"?

A. No.

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

A. No.

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

A. No.

Q. I don't think I have any more questions for you

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CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRCP and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Defendants Marick Home Builders, LLC and Rick Thoennes' Memorandum in Support of the SCRCP 59(e) Motion as to Clearview Construction and Michael Franz** to the following counsel of record:

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
PO Box 773
Charleston, SC 29401
rtl@lylesfirm.com
chb@lylesfirm.com
*Attorney for Plaintiffs*

David Root, Esquire
Kernodle, Root & Coleman
Post Office Box 13897
Charleston, S.C. 29422
droot@kernodlelaw.com
*Attorney for Mike Green and Builders FirstSource Southeast Group*

Shelley Montague, Esquire
Gallivan, White & Boyd, PA
Post Office Box 7368
Columbia, S.C. 29202
smontague@gwblawfirm.com
*Attorney for Hutch N Son Construction*

K. Lindsay Terrell, Esquire
Chris Smith, Esquire
Clarkson Walsh Rheney & Terrell,PA
1164 Woodruff Road
Greenville, SC 29607
lterrell@clarksonwalsh.com
csmith@clarksonwalsh.com
*Attorney for T. G. Construction, LLC*

D. Andrew Williams, Esquire
Joshua D. Shaw, Esquire
Turner Padget Graham & Laney, PA
Post Office Box 1473
Columbia, SC 29202
Dwilliams@turnerpagdget.com
jshaw@turnerpadget.com
*Attorneys for Defendant Martin Hernandez-Aviles*

Erin Culbertson, Esquire
Kehl Culbertson, LLC
Post Office Box 1904
Greenville, SC 29602
erin@culbertsonalexander.com
*Attorneys for Medallion at Keowee,LLC and Bradford D. Seckinger*

Alan Belcher, Esquire
Hall, Booth, Smith & Slover, P.C.
2113 Middle Street, Suite 305
Sullivan's Island, S.C. 29482
abelcher@hbss.net
*Attorney for Bostic Brothers Construction, Inc.*

Lawrence B. Orr, Esquire
Ashley B. Nance, Esquire
Orr, Elmore & Ervin, LLC
Post Office Box 2527
Florence, S.C. 29503
lbo@orrfirm.com
abn@orrfirm.com
*Attorneys for Miller/Player & Associates*

Mason A. Goldsmith
Kenneth Jay Anthony
Elmore Goldsmith, PA
Post Office Box 1887
Greenville, SC 29602
mag@elmoregoldsmith.com;
janthony@elmoregoldsmith.com;
*Attorneys for Southern Concrete Specialties*

Charles G. Blackburn, Esquire
Ryan Oates, Esquire
Murphy & Grantland, PA
Post Office Box 6648
Columbia, S.C. 29260
cblackburn@murphygrantland.com
roates@murphygrantland.com
*Attorney for Tinsley Electrical, LLC*

James P. Walsh, Esquire
Clarkson Walsh Terrell & Coulter, PA
1164 A Woodruff Road
Greenville, S.C. 29607
jwalsh@clarksonwalsh.com
*-and-*
Shawn T. Pinkston, Esquire
Hall Booth Smith & Slover, P.C.
2113 Middle Street, Suite 305
Charleston, S.C. 29482
spinkston@hbss.net
*-and-*
Ken Jones, Esquire
Hall Booth Smith & Slover, PC
191 Peachtree Street NE, Suite 2900
Atlanta, GA 30303
kjones@hbss.net
*Attorneys for Heyward Electrical Services*

S. Markey Stubbs, Esquire
Baker Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
mstubbs@brblegal.com
*Attorney for Upstate Utilities, Inc*

Stephen P. Hughes, Esquire
William T. Young, Esquire
Howell Gibson & Hughes, PA
Post office Box 40
Beaufort, SC 29901
steve@hghpa.com
byoung@hghpa.com
*Attorney for Ester Moran Mentado*

Geoffrey Gibbon, Esquire
McAngus Goudelock & Courier
Post Office Box 2980
Greenville, SC 29602
ggibbon@mgclaw.com
*Attorney for Socorro Castillo Montel*

Elizabeth Martineau, Esquire
Eric W. Rowell, Esquire
Martineau King, PLLC
Post Office Box 31188
Charlotte, NC 28231
emartineau@martineauking.com
erowell@martineauking.com
*Attorneys for Herberto Acros Hernandez*

David M. Yokel, Esquire
David M. Yokel, LLC
P.O. Box 10453, F.S.
Greenville, S.C. 29603
dyokel@yokellawfirm.com
-and-
William I. Bouton, Esquire
Robert Wilkins, Esquire
Wilkins & Bouton, LLC
15 Washington Park
Greenville, SC 29601
wbouton@wilkinsbouton.com
rwilkins@wilkinsbouton.com
*Attorney for KMAC, Inc., d/b/a KMAC North Carolina*

Christopher G. Lewis, Esquire
Teague Campbell Dennis & Gorham
22 South Park Square, Suite 800
Asheville, NC 28801
clweis@tcdg.com
*Attorney for Francisco Villalobos Lopez*

Chad E. Poteat, Esquire
Brown and Brehmer
PO Box 7966
Columbia, SC 29202
cep@brownandbrehmer.com
*Attorney for Eason Construction, Inc.*

Michael B. T. Wilkes, Esquire
Melissa M. Nichols, Esquire
Lindsay L. Builder, Esquire
Wilkes Law Firm, PA
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
mwilkes@wilkeslaw.com
mnichols@wilkeslaw.com
lbuilder@wilkeslaw.com
*Attorneys for Clear View Construction, LLC and Michael Franz*

Roy R. Hemphill, Esquire
McDonald Patrick Poston Hemphill & Roper, LLC
Post Office Box 1547
Greenwood, SC 29648
rhemphill@mcdonaldpatrick.com
*Attorney for Rick Thoennes, Rick Thoennes, III, and M Group Construction & Development, LLC*

Francis M. Mack, Esquire
Emily R. Gifford, Esquire
Richardson Plowden
1900 Barnwell Street
Columbia, SC 29201
fmack@richardsonplowden.com
egifford@richardsonplowden.com
*Attorneys for SDI Funding, LLC*

Frank Smith, Esquire
Jarred Garraux, Esquire
Richardson Plowden
1900 Barnwell Street
Columbia, SC 29201
fsmith@richardsonplowden.com
jgarraux@richardsonplowden.com
*Attorneys for Ludwig Corporation, LLC*

Cynthia Buck Brown, Esquire
Harper Lambert & Brown, PA
Post Office Box 908
Greenville, SC 29602
Cbrown@hlblegal.com
-and-
Wallace K. Lightsey
Wyche Burgess Freeman & Parham, PA
Post Office Box 728
Greenville, SC 29602
wlightsey@wyche.com
*Attorneys for IMK Development Co., LLC, Integrys Keowee Development, LLC, William C. Cox, and Larry D. Lollis*

Edward D. Buckley, Jr., Esquire
Nicholas J. Rivera, Esquire
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401
ebuckley@ycrlaw.com
nrivera@ycrlaw.com
*Attorneys for Everado Jarmamillo*

Paul E. Hammack, Esquire
Clawson & Staubes, LLC
223 W. Stone Avenue, Suite 100
Greenville, SC 29609

Ronald G. Tate, Jr., Esquire
Steven B. Buckingham, Esquire
Duffie Powers, Esquire
Batten Farrar, Esquire
Gallivan, White & Boyd, PA
Post Office Box 10589
Greenville, S.C. 29603
rtate@gwblawfirm.com
sbuckingham@gwblawfirm.com
dpowers@gwblawfirm.com
bfarrar@gwblaw.com
-and-
Dana W. Lang, Esquire
Greg Horton, Esquire
Womble Carlyle, PLLC
Post Office Box 999
Charleston, S.C. 29402
dlang@wcsr.com
ghorton@wcsr.com
*Attorneys for Carl Catoe Construction, Inc.*

J.J. Anderson, Esquire
Curtis Martin, Esquire
Anderson & Reynolds, LLC
37 Broad Street
Charleston, SC 29401
janderson@arlawsc.com
cmartin@arlawsc.com
-and-
William B. Woods, Esquire
Woods Law Firm, LLC
PO Box 2444
Lexington, SC 29071
Bwoods@woodslawsc.com
*Attorneys for Jose Nino*

Anne R. Culbreath, Esquire
Turner Padget Graham & Laney, PA
PO Box 22129
Charleston, SC 29413
jallen@turnerpadget.com
-and-
C. Clay Olson, Esquire
David D. Ashley, Esquire
Watson Law Group
180 Meeting Street, Suite 210
Charleston, SC 29401
colson@watsonlawgroup.com
dashley@watsonlawgroup.com
*Attorneys for Vincente Morales d/b/a Morales Masonry*

phammack@clawsonandstaubes.com
*Attorney for Alejandro Avalos Cruz*

This 9 day of April, 2014
Spartanburg, SC

By: Amanda Steward
Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE ) 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 D. 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

**MARICK HOME BUILDERS AND RICK THOENNES' MEMORANDUM IN SUPPORT OF THE S.C.R.C.P. 59(e) MOTION AS TO BUILDERS FIRST SOURCE**

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

Defendants, Marick Home Builders, LLC and Rick Thoennes (hereinafter collectively referred to as "Marick") filed cross-claims alleging negligence, breach of contract, breach of warranty and indemnification against subcontractor Builders First Source (hereinafter "BFS") associated with phase II construction. In an Order dated January 11, 2013, the Court granted summary judgment in favor of BFS as to Marick's cross-claims for breach of contract and breach of warranty (see: January 11, 2013 Order attached hereto as Exhibit "1"). In a separate Order dated January 11, 2013, the Court granted summary judgment in favor of BFS as to Marick's cross-claims for indemnification and negligence (see: January 11, 2013, Order attached hereto as Exhibit "2").

Marick timely filed a Motion to Alter and/or Amend the Orders pursuant to S.C.R.C.P. 59(e). Marick submits this Memorandum to the Court in support of its Motion.

## FACTS

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

The Court is fully aware of the allegations at issue in this lawsuit. Marick was the general contractor for phase II construction at Stoneledge. Marick did not perform the construction labor at the project; subcontractors performed all of the construction labor. Marick contracted directly with BFS for BFS to provide supplies to the project and install the framing, decks, doors, siding and windows (see: Contract attached hereto as Exhibit "3") (Terry Rosamond Dep. at 61:14-24). As further proof that a contract existed between Marick and BFS, BFS 30(b)(6) designee, Terry Rosamond, testified that BFS contracted directly with Marick (see: Rosamond Dep. at 15:14-19). BFS then subcontracted with Carl Catoe Construction, Inc. (hereinafter "Catoe") to perform the construction related labor and installation services (see: Carl Catoe Dep. at 45-47). Catoe then subcontracted the labor and installation services out to subcontractors. Thus, BFS was a supplier of goods to the project and provided oversight of Catoe and Catoe's Subcontractors.

## 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 BFS. In the January 11, 2013 Orders, the Court summarily dismissed all of Marick's cross-claims pled against BFS (See: Exhibits "1" and "2").

First and foremost, discovery is not complete in this case. Plaintiffs' expert's, Derrick Hodgin, deposition is still open and has not been completed and Marick's expert's, Randy Still, deposition is still open and has not been completed. Thus, since discovery is not complete in this matter, the Court's Orders awarding summary judgment were premature in this matter. *Bayle v. S. Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the **non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment**." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

This Memorandum will first address the Court's determination that Marick had unclean hands. The second section of this Memorandum will discuss the Court's holding that all pled causes of action collapse into one action for equitable indemnification.

### (1) INDEMNITY

The Court's Order held that Marick's equitable indemnity claims failed because Marick cannot be adjudged without fault and/or that Marick had unclean hands. (see: Exhibits "2" ). In reviewing the Order addressing indemnification (Exhibit "2"), it is unclear whether or not the Court determined that Marick had or did not have a "special relationship" with BFS. As BFS was hired directly by Marick and entered into a contract with Marick, it is evident that under South Carolina law Marick is entitled to seek equitable indemnity from BFS. Thus, Marick seeks a clarification concerning whether Marick had a "special relationship" with BFS. For the reasoning set forth in Marick's Memorandum in support of its Motion to Alter and/or Amend Judgment as to Carl Catoe, Marick asserts that Marick definitely has a "special relationship" with BFS (in addition to the contractual relationship).

**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 BFS and its subcontractors and that Marick provided the supervision and oversight required of a general contractor. Marick incorporates by reference its Memorandum to the Court addressing its Motion to Alter and/or Amend Judgment concerning Catoe and the Catoe 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 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. *Id.*

Plaintiffs' expert, Derrick Hodgin, testified that there are alleged defects associated with the wood-siding installation and the failure to apply appropriate flashing and weather resistant barrier to the structures at Phase II of the project (see: Hodgin Dep. (Day 1) at 38:22-39:3, 97:1 – 98:12, 104:2-7, 113:16-25 and Hodgin Dep. (Day 2) at 16:14 – 18:25, 24:5-14, 25:18 – 26:12, 49:20 – 50:18). Hodgin also testified that the weather resistant barrier applied to the structures, Which BFS was responsible for installing, was not integrated properly with the flashing (see: Hodgin Dep. (Day 2) at 20:21 – 21:5). Further, Hodgin testified that the siding fasteners installed by the Catoe Subcontractors were not spaced properly which could result in future damage (see: Hodgin Dep. (Day 2) at 63:5 – 64:16). Additionally, Hodgin opines that the flashing applied between the windows and the stone is inadequate and that flashing associated with windows throughout phase II is inadequate (see: Hodgin Dep. (Day 2) at 108:11 – 109:1, 195:1-6). Hodgin also located the following deficiencies which correlate with the work which BFS contracted to perform: improper flashing of doors, deficient framing, improper construction of exterior balconies and damage to balconies (see: Hodgin Dep. (Day 2) at 151:14-21, 211:9 – 213:9, and 224:9 – 228:4).

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. Further, BFS and

Catoe were responsible for providing supervision and oversight to the Catoe Subcontractors (see: Rosamond Dep. at 37:6-14).

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 (see: 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 (see: Thoennes Dep. at 224:18 – 225:7, 244).

Hornaday also testified that he provided supervision and oversight at the project (see: 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, Terry Rosamond (BFS 30(b)(6) designee) testified that Marick provided supervision and oversight at the project (see: Rosamond Dep. at 48:23 – 49:6). Rosamond further testified that he had no evidence that Marick was negligent in its performance of its duties at Stoneledge (see: Rosamond Dep. at 53:11-17). Rosamond also provided the following testimony concerning BFS's supervision of the work performed by its subcontractors:

> Q: In general, if there was a deviation from the architectural drawings that was required, how would you expect a BFS subcontractor to deal with that?
>
> A: In general, the subcontractor should notify our person on site if there's something different than the plans or needs to be done. Then we normally would take that to our contract - - contact for the general contractor, in this case Marick's guy. We would say something like, "This is not working in the field. There needs to be a change. Tell us what we would do from there." That's the general way sequencing works.
>
> Q: How about if the, again speaking generally, if the change came from the general contractor, would he be expected to communicate directly with the subcontractor or would he go through BFS?
>
> A: He's expected to go through BFS.

(Rosamond Dep. at 63:12 – 64:3.)

Rosamond further testified that if BFS did not have sufficient plans and specifications to perform the work, it would request additional detail and even stop work if it or its subcontractors were not provided sufficient detail (see: Rosamond Dep. at 84:13 – 85:13). There is nothing in the record to indicate that BFS stopped work due to insufficient plans or specifications.

Thus, based on the testimony provided by BFS, Marick was required to go through BFS's supervisor when coordinating changes to construction being performed by BFS's subcontractors. Thus, if BFS was not relaying the appropriate information to its subcontractors and/or was not providing proper supervision to its subcontractors, Marick should be indemnified by BFS.

Further, since BFS continued work at the project, according to Mr. Rosamond, it had enough supervision and specifications to complete the work properly.

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 BFS 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 BFS contracted to perform at Stoneledge. Based upon these facts, a jury is required to determine fault.

**(2) The Court Erred in Collapsing all of Marick's Cross-Claims Into One Claim for Equitable Indemnification.**

The Court erred in collapsing Marick' cross-claims for breach of warranty, breach of contract, and negligence into one claim for equitable indemnification. First and foremost, BFS entered into a binding contract with Marick for BFS to perform subcontracting services and to supply materials to the project (see: Contract attached as Exhibit "3"). Further, BFS's 30(b)(6) designee testified that BFS entered into a contract with Marick (see: Rosamond Dep. at 15:14-19). The Contract contains a hold harmless provision requiring that BFS indemnify Marick for all claims, damages, fees and expenses incurred by Marick as a result of BFS's work. Thus, by

failing to indemnify and hold Marick harmless for BFS's alleged deficient work in this action, BFS 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 BFS was responsible for performing, against Marick. Thus, Marick is required to continue litigating claims associated with BFS's defective work. Marick continues to incur attorney fees and costs associated with BFS's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Marick asserts that the federal court holdings should not be persuasive in this matter. Marick further asserts that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Marick may recover special damages at law under theories of negligence, breach of warranty, and breach of contract as to BFS. Marick's claims for breach of warranty, negligence and breach of contract are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

> if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

*Griffin v. Van Norman*, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (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 Plaintiffs' claims arising from the Defendant Subcontractor's tortious conduct (negligent performance of work), breach of warranty (failure to perform work in a workmanlike manner) and breach of contract (which includes an indemnification clause); thus, Marick properly filed claims for negligence, breach of warranty

and breach of contract against BFS 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 a special damages claim against BFS as BFS was sued directly by Plaintiffs for its defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence, breach of contract and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by BFS 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 BFS, which it was overseeing to perform the work at issue in this action; if BFS failed to perform the work it was hired to perform properly, it breached duties and contractual obligations owed to Marick and thus should be liable to Marick.

## CONCLUSION

For the reasons stated hereinabove, Marick respectfully requests that this Court alter and/or amend its January 11, 2013 Orders and deny summary judgment to BFS as clearly there are questions of fact for a jury to determine in this case.

Jason M. Imhoff (SC Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
The Ward Law Firm, PA
PO Box 5663
Spartanburg, SC 29304
(864) 582-3075
(864) 585-3090
jimohff@wardfirm.com

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

April 9, 2013

# EXHIBIT 1

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

PLAINTIFF(S)

IMK Development Co LLC; et al

DEFENDANT(S)

| Submitted by: | Attorney for : ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(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 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

2063
Judge Code

01/11/2013
Date

## 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:

Robert T Lyles Jr
Lyles & Lyles LLC
P O Box 773
Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jason M Imhoff
The Ward Law Firm
P O Box 5663
Spartanburg, SC 29304

Trent M. Kernodle
PO Box 13897
James Island, 29422-3897

Mason A Goldsmith
PO Box 1887
Greenville, SC 29602

Keith A Gowder
PO Box 1887
Greenville, SC 29602

Steven E. Buckingham
PO Box 10589
Greenville, SC 29603

Dana W. Lang
PO Box 999
Charleston, SC 29402

Melissa M. Nichols
Lindsay L. Builder
Michael B. T. Wilkes
Wilkes Law Firm
127 Dunbar St., Ste. 200
Spartanburg, SC 29306

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Stutfield
CLERK OF COURT

**Court Reporter:** N/A

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

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, John Ludwig, William Cox, Larry D. Lollis, Rick Thoennes, M Group Construction and Development, LLC, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders FirstSource Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Upstate Utilities, Inc., Southern Basements, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros

CASE NUMBER: 2009-CP-37-0652

**ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALTIES, INC., CLEAR VIEW CONSTRUCTION, LLC, AND MICHAEL FRANZ AS TO THE CROSS-CLAIMS OF MARICK HOMEBUILDERS, LLC FOR BREACH OF CONTRACT AND BREACH OF WARRANTY**

FILED OCONEE, SC
BERNETTE W. WHITFIELD
CLERK OF COURT
2013 JAN 14 PM 3 44

1.09

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, and Miller/Player & Associates,

Defendants.

This matter came before the Court on September 5, 2012 for hearing on dispositive motions filed by Defendants Builders FirstSource – Southeast Group, LLC ("BFS"), Southern Concrete Specialities, Inc. ("Southern Concrete"), Clear View Construction, LLC, and Michael Franz (collectively "Clear View")[1] as to the cross-claims of Defendant Marick Home Builders, LLC ("Marick").[2] Appearing were David A. Root on behalf of BFS, Mason A. Goldsmith on behalf of Southern Concrete, Melissa M. Nichols on behalf of Clear View, and Jason M. Imhoff on behalf of Marick.

**Procedural Posture**

In its answer to Plaintiffs' Third Amended Complaint, Marick asserted cross-claims against Defendants BFS, Southern Concrete, and Clear View alleging causes of action for Equitable Indemnity, Breach of Contract, Negligence, and Breach of Warranties. This Court has,

[1] Michael Franz was a member of Clear View Construction, LLC during the construction of Stoneledge. No evidence has been produced that Franz performed any construction related services on the project.

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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

[2]While 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. Ravoira, 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.

4-09

**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 Indemnity[3] it alleges that if Plaintiffs are entitled to judgment against it, then it is entitled to recovery from BFS, Southern Concrete, and Clear View, among others. This is a typical indemnification framework. Vermeer Carolina's, Inc., supra. Likewise, Marick's claims for Breach of Contract and Breach of Warranty set forth the same indemnity framework. (Marick's Answer to the Third Amended Complaint ¶¶ 162 and 174.) Though Marick uses different wording, the gravamen of its claims are the same; i.e., if Plaintiffs are entitled to judgment against Marick, then it is entitled to corresponding recovery from BFS, Southern Concrete, and Clear View; Marick is not alleging personal injury or property damage as to it. As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal

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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

[3]As 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.

[4]Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Loggins Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). 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.

"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 is 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

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[5]The 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.

Concrete, and Clear View are entitled to judgment as a matter of law as to the Cross-Claims of Marick for Breach of Contract and Breach of Warranty.

**IT IS SO ORDERED.**

Judge Alexander S. Macaulay

Walhalla, South Carolina
January 11
~~October~~ ____, 2013

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 JAN 14 PM 3 44

A TRUE COPY
JAN 14 2013
CLERK OF COURT - OCONEE COUNTY

9 of 9

# EXHIBIT 2

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

PLAINTIFF(S)

IMK Development Co LLC; et al

DEFENDANT(S)

| Submitted by: | Attorney for : ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(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 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.**

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|---|---|---|
| | | $ |
| | | $ |
| | | $ |

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

2063
Judge Code

01/11/2013
Date



SCRCP Form 4C (12/2011)

## 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:

Robert T. Lyles Jr.
Lyles & Lyles LLC
P O Box 773
Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jason M. Imhoff
The Ward Law Firm
P O Box 5663
Spartanburg, SC 29304

Melissa M. Nichols
Michael B. T. Wilkes
Lindasy L. Builder
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

**Court Reporter:** N/A

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE ) 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

**ORDER GRANTING DEFENDANTS CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-CLAIMS OF MARICK HOME BUILDERS, LLC FOR NEGLIGENCE AND EQUITABLE INDEMNIFICATION**

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BEVERLY H. WHITFIELD
CLERK OF COURT
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D.

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

Defendants,

This matter came before the Court on the Motion of Defendants Clear View Construction, LLC ("Clear View") and Michael Franz's (collectively hereinafter "Clear View Defendants") for Summary Judgment. Clear View Defendants seek summary judgment as to the cross-claims of Marick Home Builders, LLC ("Marick")[1] against Clear View Defendants. The Court conducted a hearing on this Motion on September 5, 2012. Attorney Melissa M. Nichols appeared on behalf of Clear View Defendants and Attorney Jason M. Imhoff appeared on behalf of Marick.

The present action concerns the Stoneledge at Lake Keowee townhome community located on Lake Keowee in Oconee County, South Carolina ("Stoneledge"). Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Phase II of Stoneledge is the subject of this motion. Phase II of Stoneledge consists of units numbered 41-43 and 55-94

[1] The caption of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross Claims against Clear View Defendants appears to indicate that the cross claims were being asserted by both Marick and Rick Thoennes. In the body of the cross claims, however, only Marick asserted claims. Thus, there is not a cross claim by Defendant Rick Thoennes against Clear View Defendants. To the extent Rick Thoennes claims he has submitted claims against Clear View Defendants, this order shall also apply in full to those claims.

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and was constructed by general contractor defendant Marick. Marick subcontracted with Clear View to provide stonework on Phase II townhomes. Plaintiff has alleged deficiencies in Clear View's work such as the installation of stone below grade and complete lack of flashing at the water table at intersections of differing building components.

Clear View Defendants moved for summary judgment on Marick's cross-claims for equitable indemnity, breach of contract, negligence, and breach of warranty against Clear View Defendants. Clear View Defendants' Motion for Summary Judgment on Marick's cross-claims for breach of contract and breach of warranty against Clear View Defendants will be addressed in a separate order. For the reasons set forth below, Clear View Defendants' Motion for Summary Judgment as to Marick's equitable indemnity and negligence claims is hereby GRANTED.

**STANDARD OF REVIEW**

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by "pointing out to the court that there is an absence of evidence to support the nonmoving party's case." *Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

**DISCUSSION**

**A. Marick's Negligence Claim is a Claim for Equitable Indemnification**

Marick's cross-claims for negligence and equitable indemnity against Clear View Defendants stem from the potential liability Marick faces from the claims brought against it by the Plaintiffs in this matter, the Stoneledge at Lake Keowee Owners' Association and individual townhome owners (hereinafter collectively "Plaintiffs"). Plaintiffs allege that the townhomes at Stoneledge have construction and design defects leading to water intrusion which has damaged and deteriorated the building components of the townhomes.

Marick's negligence claims are subsumed by its equitable indemnification claims because the allegations and remedies sought by both actions stem directly from the potential liability they could face for the damages claimed by Plaintiffs.[2] "Indemnity is that form of compensation in which a first party [here allegedly Clear View] is liable to pay a second party [here Marick] for a loss or damage the second party incurs to a third party [Plaintiffs]." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992)). *See also Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005); *U.S. Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) (stating that the non-settling defendants did not have independent claims apart from indemnification and contribution because the claims were nothing more than claims for indemnity and because they would not exist without plaintiff suing the non-settling defendants); and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990) (holding that the cross-claims against the settling

[2] Marick's cross-claim labeled as a claim for negligence states:

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

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).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." *State v. Yelsen Land Co.*, 257 S.C. 401, 403 (1972); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Further, courts may use the allegations in the complaint to determine the correct character of an action. *See Seebaldt*, 269 S.C. at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

After reviewing Marick's cross-claim for negligence cited above, this Court finds that Marick's negligence claim is a claim for equitable indemnification.

**B. Marick's Equitable Indemnity Claims Fail because Marick is Not without Fault**

Clear View Defendants are entitled to summary judgment on Marick's equitable indemnity claims because Marick cannot be adjudged without fault. Marick Defendants engaged Randall Still, P.E. ("Still") to assess construction issues at Stoneledge. Still was deposed August 15, 2012. Still testified about Marick's responsibility for Phase II construction as follows:

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

A: Yes.

(Deposition of Randall Still, page 87.) Still went on to testify about Marick's violation of the building code during construction of Stoneledge:

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

A: I would agree that there are [building] components [of the townhomes] that have sustained damage at those isolated areas we've talked about that now appear to be a [building] code violation because of failure.

(Deposition of Randall Still, page 89.) Marick's corporate designee, Defendant Rick Thoennes ("Thoennes"), was also deposed in this matter on November 21, 2011. Thoennes echoed Still's opinions regarding Marick's responsibility for building code violations when asked about the Marick's position as the permit holder for Phase II construction:

Q: Did Marick pull the building permits for all of the Phase II units?

A: Yes.

(Deposition of Frederick (Rick) Thoennes, page 81.) Clear View Defendants' retained expert J. Drew Wilkie, P.E. ("Wilkie"), was also deposed in this matter on August 16, 2012. Wilkie testified that about the general contractor's responsibility for the construction:

Q: And in a situation where the general contractor has pulled the permit for the project, hired all the subs, the general contractor has the ultimate responsibility for the project; correct?

A: That's my opinion.

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(Deposition of J. Drew Wilkie, page 205.) Based on the deposition testimony in the record and Plaintiffs' allegations in this matter, it is clear that should Plaintiffs' allegations be proven, Marick would be partially at fault for the damages due to its role as the general contractor for Phase II construction.

According to well established South Carolina case law, a party can only recover under equitable indemnity if the party is without fault, which is also known as the doctrine of unclean hands. The most important element of an equitable indemnity action is that the party seeking indemnification must be without fault. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *Town of Winnsboro v. Wiedeman-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) (stating that right to equitable indemnification do not exist between joint tortfeasors). Marick was the general contractor and permit holder for Phase II construction at Stoneledge. The party pulling a permit is ultimately responsible for compliance with the building code. Marick's own expert Randy Still confirmed both that in some areas of construction Marick violated the building code and that Marick was responsible for Phase II construction. Because Marick was the permit holder for Phase II construction, it violated the building code, and is ultimately responsible for construction, it cannot be adjudged without fault, and thus its claims for equitable indemnity must fail.

**C. No Special Relationship between the Individual Defendants**

Michael Franz is also entitled to summary judgment because there is no special relationship between Marick and Michael Franz. "Equitable indemnity is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party." *Rock Hill Tel.*

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*Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). For there to be an equitable indemnification between two parties, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." *Rock Hill*, 363 S.C. at 390, 611 S.E.2d at 237.

There is no evidence in the record that Michael Franz performed any stonework or other construction related activities at Stoneledge, therefore there is no subcontractor relationship with Marick to support claims for equitable indemnification against Michael Franz.

**CONCLUSION**

Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds there is no genuine issue of material fact that Marick's negligence cross-claim is subsumed by its equitable indemnification claim. This Court finds that Marick has at least some fault for the construction defects alleged and therefore cannot recover against Clear View Defendants under equitable indemnity because it is a joint tortfeasor. As an additional basis, this Court finds that there is no special relationship between Michael Franz and Marick to support claims for equitable indemnity.

The Court hereby GRANTS Defendants Clear View and Michael Franz's Motions for Summary Judgment as to Marick's cross-claims for negligence and equitable indemnity.

**IT IS SO ORDERED.**

Judge Alexander S. Macaulay

Walhalla, South Carolina

October 11, 2012

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# EXHIBIT 3

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MARICK
HOME BUILDERS

9. 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 and willful misconduct.

BY: _____ BY: _____

DATE: 10/25/07 DATE: 10/25/07

Rick Thoennes
NAME and TITLE

Muriek Home Builder, LLC.
COMPANY NAME

_____
WITNESSED BY

Deryl Ward
Senior Attorney
NAME and TITLE

Builders First Source Southeast Group, LLC
COMPANY NAME

Subject To Written Changes

Office (864) 232-5656 – Fax (864) 233-3504 – 501 Pinion Circle – Simpsonville, SC 29681
marickhomebuilders.com

B

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,
vs.
IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.
Defendants.

DEPOSITION of ***DEREK HODGIN (DAY 1)***

Pursuant to notice, a deposition was taken in the above case on the January 23, 2012, commencing at approximately 9:25 a.m. attended by counsel as follows:

side of the front porch. And I removed siding from the top of a stone clad area, just above the water table feature on the stone. And then at the rear of the unit I removed some siding from above the cantilevered window area that comes out over the open balcony. And we may have -- I can't remember if there were ceiling pieces removed from his basement patio ceiling, or if we removed them and then looked at the framing outboard of his patio door.

Q. The cedar ceiling above the ground floor?

A. Correct.

Q. Why did you choose to remove siding at the front of his unit?

A. It was easy to get to. It was an area that I was concerned about the flashing detail between the siding and the stone, and -- well, I think one of the biggest reasons it was easy to get to.

Q. Well, did he have complaints about that particular area or water damage that he identified there?

A. No, not at all.

Q. Was there damage you found behind the siding?

A. There was.

Q. Water damage?

A. Yes.

Q. And this is the connection between -- or the intersection between the lap siding and the stone?
A. Yes.
Q. And you said you took siding off of, I think, a cantilevered window area above the open second floor patio?
A. That's correct.
Q. Below a window?
A. Well, it would be below a window, at the very base of the wall. It would be probably two or more feet below a window, just above -- I guess you would call it a soffit. I don't know what you call it. It's an overhanging, cantilevered window. And it has -- so it has a very short, maybe foot or two soffit or ceiling area that was stained. And so I took siding off just above that -- the base of that wall.
Q. Did you find damage there?
A. I did.
Q. Did you prepare any reports or anything in writing about your findings at Dr. Hund's unit?
A. I don't think any of the work I did for Dr. Hund ever made it into a written report. I think it was visual only and then discussed verbally either with him or then communicating that to the HOA later, as

A is "Roofing," B is "Attics," C is "Life Safety/ Fire Protection," D is "Exterior Walls." Okay. So A "Roofing," I guess, let's do ---

A. Well ---

Q. Go ahead.

A. I was thinking it must follow -- it follows the format of the written report.

Q. The 2010 report?

A. The November 1, 2010 report, yes.

Q. Great. What is the construction defect identified in Number 1?

A. That the wood siding is what's referred to as a drainage type cladding, that incidental moisture will get behind the wood siding. And at a roof/wall intersection effort needs to be made to properly waterproof the intersection to preclude water penetration at that point. And that would be accomplished by the installation of a kickout flashing.

Q. Is this a code compliance issue with damage, a life safety issue, or a physical damage issue?

A. It's not a life safety issue. But I do think it would represent the other two. There is physical damage at roof/wall intersections. I would guess at most if not all of the observations listed. And

from a code standpoint, I would say only -- there's a couple of generic paragraphs that you could say it would violate the code. One is the 703.1 which says, "Exterior walls shall provide weather protection." And then a flashing paragraph later on, maybe 703.8 that says, "Flashing shall be installed in a manner to preclude water intrusion," or something to that effect. So there's not specific detail that says, install kickout flashing, but there are two code paragraphs that I would say have been violated by the as-built conditions that have led to the damage.

Q. And you don't reference the code. You actually reference an industry standard, NRCA Roofing and Waterproofing Manual?

A. Yes, sir.

Q. That is an industry group? What did you call it earlier?

A. I think we said industry group, yes.

Q. That publishes an industry standard?

A. Yes, sir.

Q. Is the NRCA Roofing and Waterproofing Manual section that you've identified citing the code?

A. No. That's what makes it an industry standard.

Q. So this is an -- now, is there an alternate means

Q. Unit 32?
A. Yes, sir. While I'm looking for that one, this last illustration is a great example of what I was talking about earlier. You see the siding is taken off and there is totally unprotected interior-grade drywall with no weather barrier and no adequate flashing. So that even though my damage might be very localized, there is no possible way from an engineering standpoint for me to fix that in a localized way. I have to tear off all the siding far back enough to either get to where there is some weather barrier or take off all the siding to install weather barrier. I have to see all the extent of damage to the drywall sheathing so I make sure I repair that during the process. So I know that's kind of off the subject, but you asked me earlier about the statistics and how do I pick how many places. When you see that type of a defect, it just causes you to have a more comprehensive repair scope. I found some roof/wall intersection photographs, but I -- I want to make sure I've found all of them before we start talking about it.
Q. Are these all on discs?
A. I think so.
(OFF THE RECORD).

visible flashing.

BY MR. ROOT:

Thank you. Sorry.

BY THE WITNESS:

What was the next one?

DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

Q. 89, I believe you have listed. 578 is the address. And while you're looking, do you know why you chose this unit?

A. No. 578 -- I'm sorry, was that the unit number? 578?

Q. According to your document, yeah. Yes.

A. 89. How about if we stick to the unit numbers.

Q. Okay.

A. Because that's the way the tabs are.

Q. Yeah, 89.

A. 89, 7/1/2010 is the date of the observations. And there's a pretty clean looking intersection shown in Image 4714. Actually, I don't know if that's the -- yeah, that's shown close up in 4715. And then we take the siding off and there's torn weather barrier, no kickout flashing, water stained siding and damage to the unprotected interior gypsum wall sheathing below, shown in Image 4722 and 4725.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,
vs.
IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.
Defendants.

DEPOSITION of ***DEREK HODGIN (DAY 2)***

Pursuant to notice, a deposition was taken in the above case on the January 24, 2012, commencing at approximately 9:15 a.m. attended by counsel as follows:

A. No, I don't know if this one was reported to have a leak at that window or not.

Q. What would be an efficient remedy for this particular issue on 63?

A. Whenever you can identify areas that are localized in nature like that, you could just remove the siding at the base of the wall and then what I would probably do is maybe take a six=inch wide piece of self-adhered flashing and slip it underneath the weather barrier where it stops short and over the top of that flashing and then put the siding back.

Q. I'm sorry, I've asked you to go to 67.

A. That's okay. On 67 it looks like there's some trim at the base of one of those cantilevered window sections. And this is field notes dated June 30, 2010. Above the trim there's a reverse lap with the metal flashing and the weather barrier. So the weather barrier extends down behind the flashing and behind some trim.

Q. What picture are you looking at?

A. Well, I'm going to tell you. And then stops short behind the trim. The photo images would be 4622, it's really through the rest of the page. But that particular area 4623, 4624. I think that would be

it. The rest are photographs of the moisture meter showing reasonable moisture levels, with the exception of the adjacent trim piece, which is 4627 is the image number.

Q. You call it cantilevered, but this is an overhang over the exterior doors onto the back or lakeside patio porch?

A. Yes, sir.

Q. So the siding actually comes down -- I'm looking back up at 4604. The siding actually comes down and stops. And there is a piece of trim with a -- what did you call this piece of flashing?

A. Well, it's just metal flashing, but you could call it "Z flashing" perhaps. That's a common term for it.

Q. And was that Z flashing at about the same level as the termination of the WRB?

A. No, I think it actually went a little bit further down. If you look at the -- well, if you look at 4623 and 4624 you can see, you're looking at the bottom of that flashing. So that WRB comes down like maybe another inch or so below it.

Q. Can we assume that they were trying to flash or incorporate the house wrap and the flashing at about the level where the house wrap stopped? I

mean, was that the idea of why it stops there so that they could flash it out and then put the trim piece there?

A. I would think so. I mean, they're both right there at the same level. It's just, if they're going to do that then the weather barrier would need to go over the vertical leg of the Z flashing to keep the water from going behind the trim.

Q. Right. Do we know if it was done that way? Is there a photograph that shows that it was not?

A. Yeah, the first -- let's see, look at 4604 with the knife stuck in behind the vertical leg of the flashing. So they just put the Z flashing over the weather barrier. They didn't properly incorporate it, like you were talking about. So now the water is going to run behind the flashing and get the trim and the OSB wet.

Q. Not having been there, it's a little difficult for me to see this. I want to look at 4606.

A. Okay.

Q. Does the Z flashing change color?

A. It does. I mean, there's the outboard part of the horizontal leg is painted brown. But I think when they installed it, it's actually -- comes to the site with a white painted finish.

A. Correct. I think this is pretty common in most flashing integrations, that they put all the flashing on the outboard side of the weather barrier. So I agree with you. I mean, I think that's probably the bigger problem is that integration.

Q. Let's look at the next one which is 73. Did I ask you why you chose Unit 67?

A. I believe so. And I believe I said, I don't know. Which is the next one? 77?

Q. 73. And again, do you know why you chose this unit?

A. No, sir.

Q. And I think we're looking for incomplete weather barrier; is that right?

A. Yes, sir. I see a couple of images. I'm not finished looking at all the images. But if we want to -- I'm going backwards, if that's okay, in the photos.

Q. Okay.

A. The first image numbers are behind the October 7 2009 tab. And they are images 4044 and 4045. And it's just some trim that protrudes from the exterior wall. The weather barrier came down to the top of the trim and stopped. And then there

was flashing installed improperly over the outboard side of the weather barrier. And there's just a very narrow gap. That one looks like it would have been really easy to properly integrate the flashing, but was not properly integrated.

Q. Is this essentially the same issue as what we found in 67?

A. It is. But instead of terminating behind the trim, it terminates just above the trim.

Q. But could have been integrated with the flashing at the length it is?

A. Correct. And this one, it's cut off, you know, pretty cleanly above the trim. You could have just lifted that weather barrier, put the vertical leg of the flashing underneath and it actually have been a functional detail.

Q. Is that the repair for these two items, you just put the weather barrier over the flashing, put the siding back on and you're done?

A. Sure. I think if that's the only issue that you have to deal with, that would be a reasonable fix, yes.

Q. Let's go to 76, please.

A. I'm sorry, there's more on this.

Q. Oh, I'm sorry.

Q. But when you walk down to this door, this wall would be on your right side. Looking at Photographs 3998 and on, you're lifting something up. What is that?

A. That's the weather barrier that went behind the metal flashing and then I'm looking at the damaged drywall.

Q. Where does it show the weather barrier behind the flashing?

A. That would be Photos 3960, 3961 I'll say through about 3967 are probably good ones.

Q. And you found some damage from this condition at the parking lot side of this unit?

A. Correct.

Q. And is the fix, again, to just lap the weather-resistant barrier over the flashing?

A. I would say you've got some -- you have some sheathing that you might need to replace. But, yes, I mean, as far as what went wrong with that particular location, the flashing would be -- should be properly integrated with the weather-resistant barrier. I think also from a durability standpoint, the Z flashing extends below the vertical flashing at the corner. If you look at -- I think there's a better shot. But at least 3975

and 3976 -- oh, here's a close up, 3970. And then at least a couple before that. The flashing goes underneath that vertical trim. That's a bad detail from a trim standpoint. You can see the close up of how water is wicking up at the end of that trim. Cedar is not as susceptible, but I get involved with a lot of other trim products, in particular engineered trim products like MDF and it just disintegrates or gets really soft and swells at the base. The better detail would be to have an end dam on that flashing and then butt the two pieces of trim tight together and have a caulk joint. If you don't do that, you need to run the flashing continuously around the corner and raise that trim up, like a -- even just a quarter inch to get it off of the flashing so water doesn't wick up the end of it.

Q. We're sort of jumping back and forth. The missing weather-resistant barrier house wrap is on that one, I want to call it, side or patio side next to the exterior doors on the patio. Did you find that anywhere else on this unit?

A. No, I think it was just three destructive test areas: above the cantilevered window, that adjacent wall on the screened-in, closed porch and then that

front wall.

Q. And you found it on the front wall and on the cantilevered window, you just didn't find it on that side wall. Is that fair?

A. We found it to be incomplete on the two back patio. I mean, that one -- the first one we looked at had that -- just that little gap.

Q. Where are we looking? Give me the picture number, please.

A. 4044 and 4045. Where it comes right down to the trim but there's a gap and then the flashing was put on the outboard side of it.

Q. Well, I understand that, but it's long enough to lap over the trim?

A. Yes.

Q. Which it's your opinion should have been done; right?

A. Yeah. In terms of it's there. It would just be incomplete and not properly integrated. As far as missing, it would just be that side wall of the screened-in, closed porch.

Q. And I didn't see, Mr. Hodgin, any field notes for all of these first sets of pictures. Am I wrong about that? Are they missing?

A. I don't see them in mine either.

Q. It appears that there is some weather barrier there in the corner with lettering on it.
A. I agree.
Q. Is there a bigger picture which would show how far that extends or where it came from?
A. Let me look. I don't see it in these photographs, no.
Q. How do you know that the weather barrier wasn't removed to show the water damaged gypsum in 4722?
A. We would have indicated that in our field notes and I don't think we would have photographed it and included it as incomplete weather barrier if we were the ones who removed the weather barrier.
Q. Again, this shows some incomplete weather barrier here in Unit 89?
A. Yes, sir.
Q. And that ---
A. And ---
Q. Go ahead.
A. Well, I was just going to agree with you that, I mean, the patterns that we came across are very strange in terms of where the weather barrier is included and where it is not. I mean, there's two things on this unit, before we leave it. One is you've got kind of a swath of missing weather

barrier at a very critical location directly below the roof/wall intersection. And then you have kind of a triangular missing section above the roof line. It's in the same wall area, but completely removed and separate from the area below. So we -- it's a very odd pattern where there's large areas of weather barrier that are completely missing from some locations.

Q. In regard only to the weather barrier and its repair, how would you repair these two locations?

A. You'd have to remove the siding to the extent that you could identify the areas of missing weather barrier. And then you could -- if you were satisfied that there's no damage below the areas that do have weather barrier, you could try to integrate new weather barrier with the laps that we talked about and then tape joints and then put the siding back.

Q. Okay. Were those all of the units that you investigated in Phase II for this issue?

A. I don't know. I mean, I think Burgess' attempt was to have each of the issues identified and then to the extent possible show photographic examples of each issue. But I don't know that there's been an effort made to identify every single issue with all

exterior walls D3.

A. Okay.

Q. And tell us about, I guess just in general terms, what this observed condition consists of?

A. I believe it would just be that in some locations where we pulled off siding we also measured the fasteners, and found the fasteners spacing to be excessive.

Q. Let's go ahead and take a look at that. You've identified Units 55 and 67?

A. Yes, sir.

Q. We already have 67 open. Let's look at that one first.

A. Okay.

Q. Don't you? Don't you have that right in front of you?

A. Yep.

Q. I'm getting familiar with these units looking back at them. I recognize the Clemson paw every time we come by this unit.

A. Yep. It looks like there's -- I guess there's only one set of field notes, June 30, 2010. And if you look at the siding that was removed -- and I would say if it was documented by us it's probably -- hopefully I won't be taking us back later. But

it's usually pretty bad. You know, if it's close to 16 inches or where it should be, I don't know that we would make a big deal about it, particularly in the Upstate. We don't have as significant of a code prescribed wind load. But on this one if you look at Image 4607 through 4610, there are fasteners that were 46 inches, 41 inches, 47 1/2 inches. These are just the spacing of the fasteners that are marked on the back of the siding that we removed. In 4607 the spacings are 41 inches and 46 inches. In 4608 the spacings are 40 1/2 and 47 1/2 inches. In 4609 it might be the same 40 1/2 inches. I can't be sure. And then 72 1/4 inches. And in the last image I see 28 inches. So it was, I would say, excessive in terms of the spacing of fasteners used to attach the siding.

Q. Let's look at 55 real quick also.

A. Okay. Are you ready?

Q. Yeah.

A. I don't see as many locations measured. But there's some siding taken off adjacent to a window. And all I can see is what's written on the weather barrier, 25, 16 ---

Q. Where are you?

A. Oh, I'm sorry. The image number is 4667.

Q. I'll let somebody else do that, because we're moving pretty slow.

A. All right.

Q. Let's move on to 8, and I guess 9 at the same time. It looks like they're both talking about windows?

A. Yes.

Q. Well, back to Unit 55, I guess, since we're here.

A. 55 is not part of Issue Number 8.

Q. No, but it's part of Issue Number 9.

A. Okay.

Q. It looks like for both 8 and 9, again, you've cited the general provision of 703.8. Well, no, you cite Note 3 and Note 4 about "Under and at the ends of masonry wood or metal copings and sills," and Note 4, continuously above all projecting wood trim," corrosion-resistant flashing needs to be installed. All right. Let's look at that, and identify a picture, if you would. Or a photo, I should say.

A. I don't know that that's an issue a whole lot different than Number 6. I mean, I know it's in that same area. So what this is saying is that there should be flashing not only at the cedar to stone intersection, but also the window stone intersection. There should be flashing below the -- between the window and that stone sill, I

guess it would be called at this location.

Q. Let me make sure that I understand. What is the trim material?

A. Around the window?

Q. Well, around the window and above the stone water table?

A. Cedar.

Q. That's a piece of cedar trim?

A. Yes, sir.

Q. So if we look at, I guess Photograph 4636 where you can see the bottom of the trim piece around the window right above the water table feature, the stone water table feature?

A. Yes, sir.

Q. That's where you say a piece of flashing needs to be put?

A. I believe it would be below the sill. Below the window sill, which we have been calling a water table at -- running away from the window we call it a water table. Here it's a sill. And there should be flashing that extends out below that location based on that section of the code.

Q. Below the piece of stone?

A. Right.

Q. That creates the sill?

concrete taken up so the flashing details can be reworked and make it a whole repair. I don't think you're ever going to have it all fixed unless it's taken down to that level. And I'm not sure I'm not sure of the extent of the other repairs, if that was addressed or not.

Q. And if it hasn't been, it needs to be done?

A. Correct.

Q. In your opinion?

A. Yes.

Q. You've testified, I guess, repeatedly that you found consistent methods and manner of construction between Phase I and Phase II?

A. I think I've testified about certain details. The last one that we talked about was the stone veneer details of flashing and so forth. And maybe about the grading. But there are -- I mean, there are some differences I would acknowledge. I said that mostly because of the balconies. With the balconies there is a significant difference in the framing and the damage at the balconies.

Q. There's a framing structural issue in Phase I that is not present in Phase II; is that fair?

A. Right. I've got water intrusion and staining on pressure treated wood components, but they would be

Q. Let's look at Unit 81.
A. Okay.
Q. This talks about inadequate flashing of the windows, sort of a -- it looks like sort of in a general sense.
A. Yes.
Q. There is only one Phase II unit listed, that's this Unit 81. Do you have an opinion, I like your word, of whether the absence of adequate flashing on this unit is an anomaly or is prevalent across Phase II?
A. I think our destructive tests -- we'll have to see how many Phase II areas we've looked at around windows. I have a hard time not lumping them together. And I know Phase II is important to you, or more important to you than Phase I. I think that at least from a head flashing standpoint I don't remember seeing anything different than what we talked about earlier, always the flashing is installed outboard of the weather-resistant barrier and would not be weather lapped properly. But as far as Phase II goes, I'm going to have to go basically unit by unit from the table to remember what conditions. I just don't have them that cleanly segregated in my head as to what I saw where without ---

A. Okay.
Q. Tell us what these ---
A. Wait a minute. Sorry.
Q. Yeah, it looks like we need a separation between 1 and 2; is that right?
A. No, I was going to circle the screw up on this. These are actually not a problem. Where are we going next?
Q. Exterior doors. Why don't you do ahead and tell us what the issue is and then use a Phase II example, if you wanted to show us.
A. So the first Phase II exterior door looks like Unit 43 on July 9, 2010. It looks like in the photograph there's a balcony door where some trim is removed. If you're standing looking out the doors it would be the right side of the door and then at the middle location. And it looks like if you just go all the way from 7704 to 7783 that should encompass all the door photographs. So the trim's taken off the right side first, if you're standing at the balcony looking at the rear wall. And then you can see at the top of the door 7714, which is the top right photograph on this index sheet, the weather barrier comes over to the rough opening and just simply folds in to the rough

opening. There's no additional protection at that location. There's a close-up view of it in 7715. And then the bottom of the door is observed in 7716.

Q. It looks like the house wrap is wrapped incorrectly at the bottom, because it's closer, but much further away at the top. Is that a camera trick or -- I mean, am I wrong about that?

A. I don't think we can move the framing with the camera. It's a wider gap for sure at the top of the door; it looks like an inch or more. I don't -- I can look and see if there's any comments about it. I don't see anything about the framing. It's all about the flashing and the weather barrier details.

Q. Well, tell us about the weather barrier. What should have happened or what should be there?

A. Well, it should be, you would think, some type of termination detail at the base of the wall where some flashing would extend to the -- well, I'm sorry, this is the trim. There's stone above here. The stone should have been raised up and have the weep screed detail at the base. The trim is probably fine to extend all the way down, but there needed to be some type of flashing at the base of

the door to preclude water intrusion.

Q. At the base of the door or at the base of that piece of trim?

A. I don't think the trim needs flashing. I think the door should probably have sill pan flashing below it. It does at least to be -- at least seem to be a small step, like a piece of wood, below the aluminum threshold of the door and the concrete balcony surface.

Q. Right.

A. There's some minor staining at the base of the OSB sheathing next to the door. And then it looks like they took that wood block out. You can see in 7722?

Q. Yeah.

A. And so the concrete extends below the threshold.

Q. Do you mean it's lower than the threshold?

A. Yeah. I mean, the concrete goes between or goes below where that brown aluminum threshold comes out. That's 7723.

Q. Right.

A. And it looks like there's no flashing or waterproofing that comes up from below the concrete to integrate with the door opening flashing and then no sill pan or effective flashing at the base

into it and see the success, you know, in Charleston. If that works that could save some labor costs.

Q. Let's talk about the balconies a little bit. I think everybody wants to get out of here, so I'm not going to -- I'm not going to try to belabor this. Okay?

A. Okay.

Q. Can you give us sort of general overview of the issues with the balconies?

A. Sure. If it's okay -- well, let me just first discuss the differences between Phase I and Phase II. Neither Phase I or Phase II, I believe, followed the architects plans for CMU and concrete construction. They both got switched to wood frame balconies. Phase ---

Q. Let me stop you there a minute. You have not seen the wood framed balcony plans?

A. No.

Q. You don't know if they exist or not?

A. I don't think I've seen them. I mean, if I've got them, I don't recall seeing them. I just remember seeing CMU and concrete.

Q. Okay.

A. Regardless, they're constructed with wood framing

on both Phase I and Phase II. Phase I is parallel cord wood floor trusses. Phase II includes pressure treated 2-by floor framing. Both exhibit water intrusion, but because the Phase II buildings were using the pressure treated wood, all you really have, that I've seen, is water stained wood framing. I don't know that the framing has been damaged to the point that it needs to be repaired or replaced.

Q. Are you talking about the wood framing that is supporting the concrete deck?

A. Yes.

Q. Or also that is -- was used to create the supporting columns?

A. I think and I hope, it would be both. Pressured treated wood, I believe, was used in both vertical and horizontal framing.

Q. Now, is the boxing of the columns a different story or is that also pressure treated wood boxing? Do you understand what I'm asking?

A. Yeah, I don't know. I don't know in Phase II. I just know what I did with the borescope, looking at the framing and the ceilings on Phase II and told them everything is okay structurally. You know, it's not an issue. But on Phase I had concerns

about the trusses -- the floor trusses being damaged.

Q. So you've got a structural problem in Phase I that you don't have in Phase II?

A. Right.

Q. We've talked a little bit about the integration of the waterproofing under the cement deck with the heated space; is that what you called it?

A. Yes.

Q. Where the slab meets the wall?

A. The rear wall, yes.

Q. The rear wall. Okay. You've also described some slope issues on the deck?

A. Yes.

Q. Have you found any slope on any of the decks?

A. I don't think so.

Q. Do you know how many you've tested?

A. No.

Q. Have you read any testimony that the decks are sloped?

A. No, I haven't.

Q. At this time can you disagree with that?

A. No. I mean, if there are some that sloped, I mean, it could be that those are ones I didn't look at.

Q. And an additional problem with the rear patios and

decks, I guess, is that the water is getting into the columns?

A. Yes.

Q. And rotting them?

A. Yes.

Q. Especially at the bottom?

A. Yes. Do you mind if I ask a question?

Q. No.

A. When you said "slope," can you clarify, did you mean that there's testimony that the framing was sloped or that the topping -- the concrete topping was sloped?

Q. The concrete top.

A. Thanks.

Q. That still doesn't change your testimony?

A. No, I just wanted to be clear that -- what the testimony was.

Q. I may be wrong about that. And people are welcome to correct me, but -- all right, in your opinion, what is the defect that is allowing water to get into the columns?

A. Well, I can say it very generally and then you can try to hone down on what the particulars are. But there is just a terrible installation of waterproofing details including weather-resistant

barriers, self-adhered flashing, lathe and stone. I mean, that installation over the balconies, I would say, did a very ineffective job of protecting the underlying wood framing.

Q. All of those are just -- you're just talking about columns? That they're self-adhesive flashing weather barrier, you said some other things, stone, lathe. That's all -- you're just talking about the columns? We're not back at the heated space, we're out ---

A. Well ---

Q. --- I think my observations will be primarily at the columns?

A. Well, I think my observations may be primarily at the columns. But I think you can see some of the same defects on the arches between it. There's really not a whole lot of stone to talk about at the balcony. I mean, there's the columns and then there's the arches between the columns.

Q. Yeah.

A. So when I've been up on a ladder looking at the exterior of some of the columns, and you can see bare OSB. I've seen rusty metal lathe. I've seen incomplete weather barrier. It's just very poorly constructed, in terms of the ability of the

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.

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Deposition of ***RANDY STILL***

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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:

Object to the form.

WITNESS ANSWERS:

A. I think that's a legal question for "duty." You would expect they would but I don't know contractually. I think it becomes a legal question of duty.

Q. It is a duty, is it not, of the general contractor to comply with the applicable building codes in the performance of a project?

A. I would think so.

Q. Is it the duty of a general contractor to coordinate the work of subcontractors?

BY MR. IMHOFF:

Object to form.

WITNESS ANSWERS:

A. I would think so to the extent he understands that coordination effort.

Q. And if he doesn't understand the coordination effort what should the general contractor do?

A. Ask questions.

Q. Of whom?

A. Subcontractors, make sure they're putting them together correctly.

Q. Is it a duty of the general contractor on a project 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

obligation in the construction or installation of the low slope roofs, whether it be code violation, violation of the design documents or non-compliance with the design documents or violation of manufacturers' installation instructions or any other obligation on the installation of the low slope roofs?

A. I think the only place in the low slope roofs that there is question is there's some very limited areas where felts are missing, and that is an omission of felts, a single layer of felts.

Q. Let's talk about that for just a minute. 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 practice and the code?
A. Yes.
Q. Let me go back to my question then again. If based upon that, if there are violations of code such as a completely missing felt under a roof, do you hold the opinion that the general contractor has violated the code or some other obligation if the work was done by a subcontractor?
A. No, but clearly when something like felt is missing

or a prototypical installation and that will serve as the standard by which an installation is accepted. For example, if you put a window in and you've got a mock-up wall and you put in the rough opening flashing and you put in the -- all the flashings that would be there, all the peel-and-stick and you've got all of the entities, for example, the window manufacturer and the wrap manufacturer and the peel-and-stick manufacturer and the exterior cladding person there. And if they're all there and they say, "Yeah, this is the way it needs to be done." And your subcontractor who's doing all those different components install it that way, says he's going to install it that way, that's how it should be installed. I'm not sure that answers your question but ---

Q. Okay. Let me try to get to it a little bit different way. Are you familiar with the term "paper contractor"?

A. I'm not sure.

Q. Do you know if Marick actually drove any nails or constructed any part of Stoneledge?

A. I think my understanding is he did not self-perform any work.

Q. What in your opinion is the role of a general

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

A. No.

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

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

Q. Is that a "no"?

A. No.

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

A. No.

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

A. No.

Q. I don't think I have any more questions for you

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 TERRY ROSAMOND

Pursuant to notice, a deposition was taken in the above case on the January 16, 2012, commencing at approximately 10:25 a.m. attended by counsel as follows:

A. It's my understanding we had one subcontractor that was supplying labor for us, and that was Carl Catoe Construction.

Q. Are you the best person to testify on behalf of Builders First Source about the subcontractors, independent contractors that provided labor and/or supplies on the project for Builders First Source?

A. I think myself and Mike could answer some more details about the actual contract we had with Catoe. But I have reviewed and I know he was the one subcontractor that we had a contract with.

Q. So Mike Greene may be better ---

A. Maybe. Can get more details, yes, sir.

Q. Okay. Three, "Any contract(s) between you and any person or entity relating in any way to the project"?

A. My understanding, we had two contracts; one was Carl Catoe, and the other one was with Marick Builders. They were our only two contracts in the project.

Q. Are you or Mike Greene in the best position to testify about those contracts?

A. I guess Mike since Mike wrote those contracts.

Q. Okay. "Any contract(s) between you and any person or entity relating" -- well, it looks like I got -- 3 and 4 looks like exactly the same question, so

he has several field guys and one of his field guys was on site.

Q. Was Mike on site?

A. Yes, sir, from time to time. Not every day but he was periodically out there, is my understanding.

Q. Is it accurate to say that when BFS signed a contract with Marick Home Builders to perform the framing install at Stoneledge, that BFS itself had no intention of actually performing that work, the install work?

A. With in-house employees?

Q. Correct.

A. No, we don't do any work, self-performed, other than supervisory work.

Q. So it was the intention of BFS, once it got that install contract, to then sub that work out to somebody else?

A. Yes, sir.

Q. Was it the intent of BFS that the entity who served as its subcontractor would actually perform the install services?

A. Correct.

Q. Do you know -- are you familiar with the Carl Catoe Company?

A. Yes, sir.

A. I do not.
Q. You don't know?
A. I don't know.
Q. Who at BFS would know that?
A. I'm assuming that Mike Greene would be the best since he was the one that had the most contacts with Marick. That's normally the location wherever the market's at, that the job is done, who they work with would be who they would contact.
Q. Do you know when Marick was first contacted by me and my client about alleged deficiencies in the work performed by BFS?
A. I do not know exactly.
Q. But to your knowledge, Marick, other than through the lawsuit, has never made a demand on BFS to go to the Stoneledge Project and investigate alleged deficiencies?
A. To my knowledge, there has not been any communication like that.
Q. Would you or Mike be in the best position to testify about how Marick staffed the Stoneledge Project?
A. Mike would be.
Q. As you're testifying, do you know whether or not Marick performed any supervisory function with regard to the work performed by BFS and its

subcontractor?

A. Mike could better testify, but I know that they did have someone on site, because I've seen it in some of the documents, that they had supervisory position out there. Which it's common for general contractors to always have their own people there.

Q. Mike may be better able to testify about this, but did Marick have the ability to control the work of BFS' subcontractors at the project? In other words, could Marick stop that work? Could Marick make demands that those subcontractors do the work differently or in a different sequence, in a different order or a different manner than they were doing it?

A. Yes.

BY MR. IMHOFF:

Object to the form.

WITNESS CONTINUES:

A. A general contractor does have that authority.

Q. Do you intend to go back out to the Stoneledge project and perform any further investigation?

A. If our experts deem that that is necessary, then I'm sure I will be present when we go out to do some.

Q. Okay.

A. I would like to be.

A. I really don't. I mean this is legal language to me and I don't understand exactly all of it.

Q. Well, if we step away from the Complaint just a minute, and your familiarity with the Stoneledge Project, do you know of any evidence that you have either heard about from somebody other than your lawyer or have observed yourself, that indicates negligence or fault on the part of anybody else in connection with the Stoneledge Project?

A. Not at this time, I don't.

Q. So you haven't formed any beliefs or opinions about whether or not Marick Home Builders was negligent or whether or not Carl Catoe was negligent or whether or not the architects and engineers on this project were negligent?

A. No, I haven't formed any opinions. I thought that's what all these legal proceedings were for.

Q. Well, so with regard to Paragraph 37, you don't know whether or not Plaintiffs' damages were caused by the actual omissions of any other party over whom BFS had any control or no control?

A. There again I don't know.

Q. Okay. Paragraph 38 says that my clients' claims are "barred by the doctrines of comparative negligence and/or assumption of the risk." Do you have any

been the one reviewing them.

Q. That's all I have. Thank you.

A. Okay.

BY MR. IMHOFF:

I don't have any questions for you, Mr. Rosamond. Thank you.

EXAMINATION BY MR. ANTHONY:

Q. I have just a couple. I'll come down there. I don't think I'll be very long. Mr. Rosamond, my name is Jay Anthony, and we represent South Concrete Specialties which did some concrete and waterproofing work.

A. Okay.

Q. Can you tell me what the scope of your, if you know it -- and I understand that some of these questions are maybe better be put to Mr. Greene so just let me know if that's the case. Can you tell me what the scope of the contract with Marick was?

A. My understanding from the review of the documents, our scope was to provide turnkey framing, installation of exterior doors and windows and also the exterior siding and trim work. And the framing consisted of the walls, floor to roof systems, anything to do with the framing.

Q. And I assume Builders First Source sold all of the

me if this is better put to Mr. Greene as well, generally how do your supervisors interact with the general contractors' supervisors?

A. I can tell you as a general rule of thumb, our supervisory position works directly with the general contractors' supervisory, working on schedules and details of the plans, different products like that or items like that. For this particular job, Mike would be better to clarify what the relationship was between Marick's supervisory role and our supervisory role.

Q. In general, if there was a deviation from the architectural drawings that was required, how would you expect a BFS subcontractor to deal with that?

A. In general, the subcontractor should notify our person on site if there's something different than the plans or needs to be done. Then we normally would take that to our contract -- contact for the general contractor, in this case Marick's guy. We would say something like, "This is not working in the field. There needs to be a change. Tell us what we would do from here." That's the general way sequencing works.

Q. How about if the, again speaking generally, if the change came from the general contractor, would he be

expected to communicate directly with the subcontractor or would he go through BFS?

A. He's expected to go through BFS.

Q. In practice is that typically how it goes or not?

A. Most of the time.

Q. When you received the -- well, I'll save that question for Mr. Greene. I think that's all I have. Thank you.

A. Thank you.

EXAMINATION BY MR. POWERS:

Q. How are you doing?

A. Pretty good.

Q. My name's Duffie Powers. I'm here on behalf of Carl Catoe Construction.

A. Okay.

Q. How is Builders First Source Southeast, BFS Southeast set up in terms of operation, management responsibility?

A. BFS Southeast Group is comprised of like 30 something operation, distribution and manufacturing facilities; is that what you're asking me?

Q. Yes, sir.

A. Okay. It is part of a holding group which is BFS. These are Delaware LLCs that are part of BFS holding group. Each one is a separate entity, Greenville

A. Normally.
Q. Can BFS supplement plans, architectural plans? Can their Install Services supplement architectural plans if they feel something's missing?
BY MR. ROOT:
Object to form.
WITNESS ANSWERS:
A. I don't understand what you're -- we don't -- we would not revise or draw up a plan or something to change the architect's plan, no. We don't have any architecturally -- architects in-house or -- I'm not even sure what your question is.
Q. If there was a lack of detail, say if there was a lack of framing detail on plans that you're working on a project and you didn't feel they were sufficient, could you supplement those plans?
A. When you say "supplement," how -- by verbally telling the guy how to do something or ---
Q. How would you deal with that situation?
A. Normally if we needed some details, we'd try to go back to, you know, the general contractor and say, "The plans are not clear here. What do you want us to do? How do we correct this?"
Q. If you couldn't find resolution that way, how else would you handle it? How else would BFS normally

handle it?

BY MR. ROOT:

Object to form.

WITNESS ANSWERS:

A. I don't know that you would ever have a situation where you wouldn't get a resolution from somebody. I mean, we've actually stopped work before until somebody gives us an answer. I mean, you can't -- you can't just continue on if you don't know how to frame it.

Q. And you'd stop work because you'd want to make sure -- BFS would want to make sure it was done right; correct?

A. Yeah. I mean, we have stopped projects until we get some clarification from an architect or structural engineer or somebody.

Q. Does BFS generally provide submittals for their work, install services work?

A. Yes, and it's usually provided based on what the general contractor's requirements are. Most of the time they want roof trusses, floor trusses for approvals. Sometimes they want to know the window specs. They want to see what kind of windows we're supplying, doors. So yes, we have to submit a lot of submittals for approval.

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.

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Deposition of ***NATHAN HORNADAY***

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Pursuant to notice, a deposition was taken in the above case on the March 30, 2012 commencing at approximately 10:15 a.m. attended by counsel as follows:

A. Yes.
Q. --- generally?
A. Yes.
Q. Had you ever -- when you went to Stoneledge, had you ever been a supervisor or superintendent on a job?
A. No.
Q. When you went over there, did you think that you had the skills to be -- did you call yourself supervisor or superintendent first of all. Let me ask you that. Or what title did you use, if you used one?
A. Supervisor. I mean, I was mostly just supervising everything that was being done.
Q. Were you supervising subcontractors?
A. Yes.
Q. Or did Marick have any other employees doing such things as framing or other work of that type?
A. No.
Q. So it was all -- all the work was being done by subcontractors?
A. Yes.
Q. Prior to the time you went to Stoneledge, had you ever supervised subcontractors?
A. No.

Q. When you arrived at Stoneledge, did you feel like you were up to that job?

A. Yes.

Q. In other words, you felt like you had enough general experience to be able to monitor what the different subs were doing and to determine whether they were doing it correctly or not?

A. Yes.

Q. And were there times when you thought they were not doing something correctly?

A. No.

Q. So basically the subs you felt like were proceeding correctly?

A. I believe each sub, depending on what he did, I mean, obviously knew more than I did about it. That's why we hired them. And each sub, you know, was an expert in their field. So I was basically there to make sure -- schedule them to do their work, when to come in, and make sure they got it done.

Q. I understand that. 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?

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:

A. Yes.
Q. Do you remember specific instances, or are you just saying that from time to time ---
A. From time to time I would see something that they would cut a corner on, but I would talk to them and they would fix it. But it was nothing major. It was like nail guards on pipes, painting, you know, caulking, stuff like that, on the inside -- the interior unit.
Q. Did you do any work on Phase I?
A. I did a lot of repair work.
Q. On Phase I?
A. Yes. I ---
Q. And what -- I'm sorry.
A. --- supervised a lot of repair work.
Q. By the way, if I start to ask you a question before you finish -- I'll try not to do that, but sometimes you can't help it.
A. Okay.
Q. Just let me know there's more in your answer.
A. Okay.
Q. Did this supervising of repair work in Phase I, was that going on while ---
BY MR. GOLDSMITH:
Do we have someone on the line?

A. I don't know.
Q. How about this, at the height of Marick's existence when it was at its busiest, how many employees did it have?
A. Probably three or four.
Q. Describe the job duties or titles of those employees.
A. Administrative Assistant in the office. Would have had a superintendent, assistant superintendent and probably a laborer.
Q. So when Marick was doing its construction it subcontracted out its work?
A. Correct.
Q. And who at Marick was responsible for selecting and contacting with subcontractors?
A. Me.
Q. And who at Marick was responsible for observing and supervising the work of subcontractors?
A. Our superintendents.
Q. Can you name your superintendents at Marick, and tell me the years that they were with Marick?
A. I don't know about that, but I can tell you some of the superintendents.
Q. Okay.
A. Matthew Gooch ---

Q. Can you spell that last name?
A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday, just like it sounds. There's a couple I can picture but I can't name. There are probably two, maybe three others.
Q. Who was the superintendent who was responsible for observation and supervision of the subcontractors in connection with what Marick did at the Stoneledge project?
A. Nathan.
Q. Hornaday?
A. Yes.
Q. Did Mr. Hornaday hold any sort of license, contractor's license?
A. I don't know. Not that I know of.
Q. Who hired Mr. Hornaday?
A. I did.
Q. Are you the one that assigned him to the -- his responsibilities in connection with the Stoneledge project?
A. Yes.
Q. What were his qualifications such that you felt comfortable he could supervise subcontractors' work at the Stoneledge project?
A. He had worked as a subcontractor for us for years

A. There were one or two laborers down there and an on-site administrative assistant.

Q. What would you have expected the role of the laborers of Marick to be at the Stoneledge project?

A. Well, Nathan hired them and supervised them so he would have told them what their responsibilities would have been.

Q. What was your expectation of what work they would have been performing for Marick?

A. Whatever Nathan needed.

Q. Okay. Do you know as you're testifying today what work was, at Stoneledge, was actually done by laborers employed by Marick?

A. I know some. They would clean up, keep the streets clean, keep the units clean. Those are things I observed when I went down there.

Q. Is there any aspect of the construction of the Stoneledge units that was done by Marick that you believe was self-performed by Marick or was it all done by subcontractors?

A. I think it was all subcontracted other than the cleanup like they -- like I mentioned.

Q. Okay. Did Mr. Hornaday ever express to you any concern about the quality of the work at Stoneledge that was being performed by the subcontractors?

A. From time to time he would tell me if somebody was doing a good job or he would tell me if somebody was doing a bad job, what he felt was a bad job. Which may have been scheduling, may have been that he didn't have enough people on the site, or vice-versa, the subcontractor was on schedule and was manning the job properly.

Q. Did he have the authority to hire and fire subcontractors?

A. No.

Q. That was your job?

A. That would've fallen to me.

Q. What role did Rick, your son, play in Marick Construction?

A. Mostly the marketing. It's Marick Builders, but ---

Q. Marick Builders.

A. --- he handled mostly the marketing end of things, whether it was sales of homes or sales of townhomes or -- and he would also work on the financing aspects of it for us. When we were building the spec house, he would line up the financing.

Q. Who maintained the records of Marick Builders?

A. Well we had an administrative assistant that did that.

Q. And who was that?

Q. Had you had any experience with Carl Catoe before?
A. No.
Q. Did you have occasion to talk with or observe the work being done by Carl Catoe or his crews?
A. Some.
Q. Did you have any questions about the work they were doing?
A. No, they seemed to be doing fine, and then of course I got most of my input from Nathan who was there every day.
Q. You indicated that you would -- how often would you talk with him about what was going on?
A. We'd talk daily, or every other day.
Q. How frequently would you actually visit the site?
A. Depends on when it was, depended on what was going on, so you'd have to be a little more specific.
Q. During the time the framing was being done and the building wrap was installed, the flashing installed, how frequently ---
A. Probably once a week.
Q. About once a week?
A. Uh-huh (indicates affirmative response). Maybe every week and a half, week to week and a half.

BY MR. ROOT:

Larry, I'm sorry, I couldn't. Was that once a week

he was on site?

WITNESS ANSWERS:

A. A week to a week and a half.

Q. He was on site once a week or once every week and a half. During the time that the framing work was being done, did Nathan ever indicate to you that he had any problems or had corrected any of the work that Carl Catoe was doing?

A. I don't recall any workman type problems except for one. We had a floor truss that was put in wrong and we had to support it. That's the only thing that jumps out at me. Of course, we always looked at scheduling, and for the most part he manned the job the way he was supposed to.

Q. Any problems associated with the installation of the building wrap or the flashing?

A. Not that I know of. Nathan would've seen that.

Q. Pardon?

A. Nathan would've seen that and he didn't mention it to me.

Q. If there had been a problem, would he have mentioned it to you?

A. You have to ask him.

Q. Would you, I mean, based upon you working with him over the time, would you have expected him to ---

A. No.
Q. You were on site approximately once a week?
A. Once to once, every week and a half.
Q. And your communications, though, with Nathan were how consistent?
A. Daily.
Q. What kind of ---
A. Well, I say "daily," there may have been a day he was gone or I was gone, but for the most part daily.
Q. As far as a quantity of time, how much time during a typical week would you spend talking to Nathan?
A. No idea.
Q. Couldn't say?
A. Wouldn't even venture to guess. One week it could be, you know, an hour, next week it could be five minutes, next week it could be two hours.
Q. I understand. Was there any particular stage of construction during which you were on the site more frequently than another stage?
A. Probably during the layout, like when they were staking or that kind of thing. If they were doing any work on the lake itself, then I was there.
Q. As to Nathan's onsite time, you said essentially for a vacation or something where you would expect someone to be absent from the site, he was generally

there every day?
A. Correct.
Q. Typical eight to ten-hour workday?
A. Typical ten to twelve.
Q. Ten to twelve. Did you have any, during the course of the construction of Phase II, any interactions with any employees or representatives of Builders First Source, BFS?
A. Yes.
Q. Who?
A. Lots of people. Mike Green, Brock Bauknight, Elaine, can't remember her last name, for the windows ---
Q. And that's what I was going to get to next if you want to say that while you go through their names, you can tell me what you dealt with them about. You said Elaine you dealt with windows?
A. Right. I think windows and doors.
Q. Mike Green?
A. Mike Green, I dealt with materials and labor.
Q. All right, go ahead.
A. And Brock Bauknight was my outside representative that I dealt with on all of those things.
Q. General outside sales?
A. That's right. He handled my account.

Q. Was Nathan calling Carl Catoe or Builders First Source with these issues?
A. Both. I mean it would start with Carl to see if it could be worked out in the field, I'm sure, but then it would go -- if it couldn't be worked out in the field with Carl then it would go to Builders First Source.
Q. I had asked you about warranty issues, and to me typically that means issues once you've left a site ---
A. Oh, oh, I don't know of -- I don't know of any.
Q. But you were starting to tell me about some issues while construction was ongoing ---
A. Right.
Q. --- and you mentioned some siding that was warping and popping and then you mentioned the over-spanned truss issue that you already talked about with David. On the siding that was warping or popping, was it an isolated board, was it widespread or was it somewhere in between those two?
A. No, I mean, it was an isolated board according to Nathan. He called and asked Carl to fix it. Normally they were on site, but after they had left site then he'd have to call Builders First Source.
Q. And was Builders First Source generally responsive?

Catoe? That is, who did monthly inspections for subcontractor payment?

A. Nathan would inspect -- well, there was a draw schedule that Mike Green and I worked out ---

Q. Okay.

A. --- for all aspects when we did the contract and then all Nathan had to do was look and see what portion of that schedule was done and then he'd sign off on it and then we'd pay it. Not Carl, BFS.

Q. Yeah, right, because Carl was -- Carl Catoe was not your subcontractor, correct?

A. That's correct.

Q. Only Builders First Source was?

A. Correct.

Q. But nonetheless you got to occasionally communicate with Carl Catoe by virtue of being on the site?

A. Sure.

Q. Did anyone at Marick ever call or otherwise contact Carl Catoe Construction regarding any warranty issues?

A. I'm sure Nathan did.

Q. You say that you're sure he did. What do you know that he did?

A. Siding that had warped and popped, a truss, the truss that was over-spanned.

A. Would
Q. I'm sorry, the finished floor, not the finished grade.
A. No.
Q. Would you expect it to show the grade at the building?
A. Yes, within plus or minus.
Q. Would you expect it to show the slope away from the building?
A. Yes.
Q. If the Freeland drawings don't show or did not show the grade at the building, how would the -- to your knowledge, how would the grading subcontractor know where to set the grade?
A. You're asking a hypothetical question there. It should show it, period.
Q. I think you said that you assumed that Nathan contacted Hutch N Son regarding some issues with the grade, do you know that for sure or do you just assume that?
A. No, I know that for sure.
Q. Okay. And that was relating to this standing water?
A. Standing water and the slope.
Q. And the slope?
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 CARL CATOE

Pursuant to notice, a deposition was taken in the above case on the December 5, 2011, commencing at approximately 10:15 a.m. attended by counsel as follows:

A. I don't know.
Q. What did you do in connection with the roof? What did Carl Catoe do?
A. We installed the roof trusses.
Q. And sheeting?
A. Sheeting.
Q. How about the felt or paper?
A. I don't think that was in my scope of work.
Q. But you didn't install the shingles?
A. We did not install the shingles.
Q. But you set the windows and set the doors?
A. We set the windows and set the doors.
Q. And y'all did the rough opening flashing for the windows?
A. I don't understand the question.
Q. You framed the stud walls; correct?
A. Correct.
Q. And then y'all set the windows; correct?
A. Correct.
Q. And in setting the windows, was Carl Catoe responsible for flashing the rough opening that the windows were set in?
A. I wouldn't call it flashing. I would call it -- it's called wrap or -- is that what you're referring to?

Q. Sure.
A. Yes, we were required to install the house wrap.
Q. How about flashing around windows?
A. Window tape.
Q. Y'all were required to do that?
A. Yes.
Q. And did Carl Catoe install the siding?
A. Yes.
Q. And did Carl Catoe install the sheathing? The exterior wall sheathing?
A. Yes.
Q. And did Carl Catoe install the building wrap?
A. Yes.
Q. And all that was the responsibility of Carl Catoe?
A. Yes.
Q. In Phase II?
A. That's correct.
Q. And in connection with the porches and the decks, Carl Catoe was responsible for framing those porches and decks; is that right?
A. That's correct.
Q. And flashing the components of the decks that needed to be flashed?
BY MR. ROOT:
Objection.

WITNESS ANSWERS:

A. No flashing at all.

Q. Carl Catoe didn't do the stone work?

A. No.

Q. And there was no flashing that was required between the heated walls and the decks?

A. That's correct.

Q. And that is there was no flashing required in the plans or that's just not something that would ever be flashed?

A. When the question come up in the beginning about any flashing behind the band, and I was told not to do any flashing.

Q. And who told you that?

A. I believe it was Nathan and Mike. They were not going to do anything. The waterproofer would install all the flashing on the deck.

Q. How does the waterproofer install flashing after the siding has gone up?

A. He doesn't.

Q. Did the waterproofer do his work after you did your work?

A. No.

Q. So the waterproofer was actually there before Carl Catoe finished its work?

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BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 10 AM 10 44

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRCP and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Defendants Marick Home Builders, LLC and Rick Thoennes' Memorandum in Support of the SCRCP 59(e) Motion as to Builders FirstSource** to the following counsel of record:

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
PO Box 773
Charleston, SC 29401
rtl@lylesfirm.com
chb@lylesfirm.com
*Attorney for Plaintiffs*

David Root, Esquire
Kernodle, Root & Coleman
Post Office Box 13897
Charleston, S.C. 29422
droot@kernodlelaw.com
*Attorney for Mike Green and Builders FirstSource Southeast Group*

Shelley Montague, Esquire
Gallivan, White & Boyd, PA
Post Office Box 7368
Columbia, S.C. 29202
smontague@gwblawfirm.com
*Attorney for Hutch N Son Construction*

K. Lindsay Terrell, Esquire
Chris Smith, Esquire
Clarkson Walsh Rheney & Terrell,PA
1164 Woodruff Road
Greenville, SC 29607
lterrell@clarksonwalsh.com
csmith@clarksonwalsh.com
*Attorney for T. G. Construction, LLC*

D. Andrew Williams, Esquire
Joshua D. Shaw, Esquire
Turner Padget Graham & Laney, PA
Post Office Box 1473
Columbia, SC 29202
Dwilliams@turnerpagdget.com
jshaw@turnerpadget.com
*Attorneys for Defendant Martin Hernandez-Aviles*

Erin Culbertson, Esquire
Kehl Culbertson, LLC
Post Office Box 1904
Greenville, SC 29602
erin@culbertsonalexander.com
*Attorneys for Medallion at Keowee,LLC and Bradford D. Seckinger*

Alan Belcher, Esquire
Hall, Booth, Smith & Slover, P.C.
2113 Middle Street, Suite 305
Sullivan's Island, S.C. 29482
abelcher@hbss.net
*Attorney for Bostic Brothers Construction, Inc.*

Lawrence B. Orr, Esquire
Ashley B. Nance, Esquire
Orr, Elmore & Ervin, LLC
Post Office Box 2527
Florence, S.C. 29503
lbo@orrfirm.com
abn@orrfirm.com
*Attorneys for Miller/Player & Associates*

Mason A. Goldsmith
Kenneth Jay Anthony
Elmore Goldsmith, PA
Post Office Box 1887
Greenville, SC 29602
mag@elmoregoldsmith.com;
janthony@elmoregoldsmith.com;
*Attorneys for Southern Concrete Specialties*

Charles G. Blackburn, Esquire
Ryan Oates, Esquire
Murphy & Grantland, PA
Post Office Box 6648
Columbia, S.C. 29260
cblackburn@murphygrantland.com
roates@murphygrantland.com
*Attorney for Tinsley Electrical, LLC*

James P. Walsh, Esquire
Clarkson Walsh Terrell & Coulter, PA
1164 A Woodruff Road
Greenville, S.C. 29607
jwalsh@clarksonwalsh.com
*-and-*
Shawn T. Pinkston, Esquire
Hall Booth Smith & Slover, P.C.
2113 Middle Street, Suite 305
Charleston, S.C. 29482
spinkston@hbss.net
*-and-*
Ken Jones, Esquire
Hall Booth Smith & Slover, PC
191 Peachtree Street NE, Suite 2900
Atlanta, GA 30303
kjones@hbss.net
*Attorneys for Heyward Electrical Services*

S. Markey Stubbs, Esquire
Baker Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
mstubbs@brblegal.com
*Attorney for Upstate Utilities, Inc*

Stephen P. Hughes, Esquire
William T. Young, Esquire
Howell Gibson & Hughes, PA
Post office Box 40
Beaufort, SC 29901
steve@hghpa.com
byoung@hghpa.com
*Attorney for Ester Moran Mentado*

Geoffrey Gibbon, Esquire
McAngus Goudelock & Courier
Post Office Box 2980
Greenville, SC 29602
ggibbon@mgclaw.com
*Attorney for Socorro Castillo Montel*

Elizabeth Martineau, Esquire
Eric W. Rowell, Esquire
Martineau King, PLLC
Post Office Box 31188
Charlotte, NC 28231
emartineau@martineauking.com
erowell@martineauking.com
*Attorneys for Herberto Acros Hernandez*

David M. Yokel, Esquire
David M. Yokel, LLC
P.O. Box 10453, F.S.
Greenville, S.C. 29603
dyokel@yokellawfirm.com
-and-
William I. Bouton, Esquire
Robert Wilkins, Esquire
Wilkins & Bouton, LLC
15 Washington Park
Greenville, SC 29601
wbouton@wilkinsbouton.com
rwilkins@wilkinsbouton.com
*Attorney for KMAC, Inc., d/b/a KMAC North Carolina*

Christopher G. Lewis, Esquire
Teague Campbell Dennis & Gorham
22 South Park Square, Suite 800
Asheville, NC 28801
clweis@tcdg.com
*Attorney for Francisco Villalobos Lopez*

Chad E. Poteat, Esquire
Brown and Brehmer
PO Box 7966
Columbia, SC 29202
cep@brownandbrehmer.com
*Attorney for Eason Construction, Inc.*

Michael B. T. Wilkes, Esquire
Melissa M. Nichols, Esquire
Lindsay L. Builder, Esquire
Wilkes Law Firm, PA
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
mwilkes@wilkeslaw.com
mnichols@wilkeslaw.com
lbuilder@wilkeslaw.com
*Attorneys for Clear View Construction, LLC and Michael Franz*

Roy R. Hemphill, Esquire
McDonald Patrick Poston Hemphill & Roper, LLC
Post Office Box 1547
Greenwood, SC 29648
rhemphill@mcdonaldpatrick.com
*Attorney for Rick Thoennes, Rick Thoennes, III, and M Group Construction & Development, LLC*

Francis M. Mack, Esquire
Emily R. Gifford, Esquire
Richardson Plowden
1900 Barnwell Street
Columbia, SC 29201
fmack@richardsonplowden.com
egifford@richardsonplowden.com
*Attorneys for SDI Funding, LLC*

Frank Smith, Esquire
Jarred Garraux, Esquire
Richardson Plowden
1900 Barnwell Street
Columbia, SC 29201
fsmith@richardsonplowden.com
jgarraux@richardsonplowden.com
*Attorneys for Ludwig Corporation, LLC*

Cynthia Buck Brown, Esquire
Harper Lambert & Brown, PA
Post Office Box 908
Greenville, SC 29602
Cbrown@hlblegal.com
-and-
Wallace K. Lightsey
Wyche Burgess Freeman & Parham, PA
Post Office Box 728
Greenville, SC 29602
wlightsey@wyche.com
*Attorneys for IMK Development Co., LLC, Integrys Keowee Development, LLC, William C. Cox, and Larry D. Lollis*

Edward D. Buckley, Jr., Esquire
Nicholas J. Rivera, Esquire
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401
ebuckley@ycrlaw.com
nrivera@ycrlaw.com
*Attorneys for Everado Jarmamillo*

Paul E. Hammack, Esquire
Clawson & Staubes, LLC
223 W. Stone Avenue, Suite 100
Greenville, SC 29609

Ronald G. Tate, Jr., Esquire
Steven E. Buckingham, Esquire
Duffie Powers, Esquire
Batten Farrar, Esquire
Gallivan, White & Boyd, PA
Post Office Box 10589
Greenville, S.C. 29603
rtate@gwblawfirm.com
sbuckingham@gwblawfirm.com
dpowers@gwblawfirm.com
bfarrar@gwblaw.com
-and-
Dana W. Lang, Esquire
Greg Horton, Esquire
Womble Carlyle, PLLC
Post Office Box 999
Charleston, S.C. 29402
dlang@wcsr.com
ghorton@wcsr.com
*Attorneys for Carl Catoe Construction, Inc.*

J.J. Anderson, Esquire
Curtis Martin, Esquire
Anderson & Reynolds, LLC
37 Broad Street
Charleston, SC 29401
janderson@arlawsc.com
cmartin@arlawsc.com
-and-
William B. Woods, Esquire
Woods Law Firm, LLC
PO Box 2444
Lexington, SC 29071
Bwoods@woodslawsc.com
*Attorneys for Jose Nino*

Anne R. Culbreath, Esquire
Turner Padget Graham & Laney, PA
PO Box 22129
Charleston, SC 29413
jallen@turnerpadget.com
-and-
C. Clay Olson, Esquire
David D. Ashley, Esquire
Watson Law Group
180 Meeting Street, Suite 210
Charleston, SC 29401
colson@watsonlawgroup.com
dashley@watsonlawgroup.com
*Attorneys for Vincente Morales d/b/a Morales Masonry*

phammack@clawsonandstaubes.com
*Attorney for Alejandro Avalos Cruz*

This 9 day of April, 2014
Spartanburg, SC

By: Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA )
)
COUNTY OF OCONEE )

IN THE COURT OF COMMON PLEAS
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

**MARICK HOME BUILDERS AND RICK THOENNES' MEMORANDUM IN SUPPORT OF THE S.C.R.C.P. 59(e) MOTION AS TO CARL CATOE AND AFFILIATED SUBCONTRACTORS HIRED BY CARL CATOE**

COPY

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 10 AM 10 52

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

Defendants, Marick Home Builders, LLC and Rick Thoennes (hereinafter collectively referred to as "Marick") filed cross-claims alleging negligence, breach of warranty and indemnification against subcontractor Carl Catoe Construction, Inc. (hereinafter "Catoe") associated with phase II construction. Additionally, Marick filed cross-claims for breach of warranty, negligence and equitable indemnification against the following subcontractors retained by Catoe: T.G. Construction, LLC, Alejandro Avalos Cruz, Herbert Acros Hernandez, Martin Hernandez Aviles, Ester Moran Mentado, Socorro Castillo Montel, and Zarate Construction (collectively referred to as "Catoe Subcontractors"). In an order dated January 11, 2013, the Court granted summary judgment in favor of Catoe and the Catoe Subcontractors as to Marick's cross-claims for equitable indemnification, negligence and breach of warranty (see: January 11, 2013 Order attached hereto as Exhibit "1").

Marick timely filed a Motion to Alter and/or Amend the Order pursuant to S.C.R.C.P. 59(e). Marick submits this Memorandum to the Court in support of its Motion.

## FACTS

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

The Court is fully aware of the allegations at issue in this lawsuit. Marick was the general contractor for phase II construction at Stoneledge. Marick did not perform the actual construction labor at the project; subcontractors performed all of the construction labor. Marick contracted directly with Builders First Source for Builders First Source to provide supplies to the project and install the framing, decks, doors, siding and windows. Builders First Source then subcontracted with Catoe to perform the construction related labor and installation services (see: Carl Catoe Dep. at 45-47). Catoe then subcontracted the labor and installation services out to the Catoe Subcontractors. Thus, Builders First Source (hereinafter "BFS") was a supplier of goods to the project and provided oversight of its subcontractors. Catoe did not perform the work, but merely hired the Catoe Subcontractors; thus, Catoe provided oversight for its subcontractors.

Catoe and the Catoe Subcontractors did not have a contractual relationship with Marick.

## 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; and (3) Breach of Warranties against Catoe and the Catoe Subcontractors. In its January 11, 2013 Order, the Court summarily dismissed all of Marick's cross-claims pled against Catoe and the Catoe Subcontractors (See: Exhibit "1", Order).

First and foremost, discovery is not complete in this case. Plaintiffs' expert's, Derrick Hodgin, deposition is still open and has not been completed and Marick's expert's, Randy Still, deposition is still open and has not been completed. Thus, since discovery is not complete in this matter, the Court's Orders awarding summary judgment were premature in this matter. *Bayle v. S. Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the **non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment**." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

This Memorandum will first address the Court's holding that Marick had unclean hands. The second section of this Memorandum will discuss the errant determination that all pled causes of action collapse into one action for equitable indemnification.

**(1) INDEMNITY**

The Court's Order held that Marick's equitable indemnity claims failed because Marick cannot be adjudged without fault and/or that Marick had unclean hands (see: Exhibit "1", Court's Order). The Court further ordered that Marick had no "special relationship" with Catoe or the Catoe Subcontractors. First, Marick will address the issue of fault and second, the "special relationship" between Marick, Catoe and the Catoe Subcontractors.

**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 the Catoe 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 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. *Id.*

Plaintiffs' expert, Derrick Hodgin, testified that there are alleged defects associated with the wood-siding installation and failure to apply appropriate flashing and weather resistant barrier to the structures at Phase II of the project (see: Hodgin Dep. (Day 1) at 38:22-39:3, 97:1 – 98:12, 104:2-7, 113:16-25 and Hodgin Dep. (Day 2) at 16:14 – 18:25, 24:5-14, 25:18 – 26:12, 49:20 – 50:18). Hodgin also testified that the weather resistant barrier installed by the Catoe

Subcontractors did not integrate properly with the flashing (see: Hodgin Dep. (Day 2) at 20:21 – 21:5). Further, Hodgin testified that the siding fasteners installed by the Catoe Subcontractors were not spaced properly which could result in future damage (see: Hodgin Dep. (Day 2) at 63:5 – 64:16). Additionally, Hodgin opines the flashing applied between the windows and the stone is inadequate and that flashing associated with windows throughout phase II is inadequate (see: Hodgin Dep. (Day 2) at 108:11 – 109:1, 195:1-6). Among other things, Hodgin located the following deficiencies which correlate with work performed by the Catoe Subcontractors: improper flashing of doors, improper construction of exterior balconies and damage to balconies (see: Hodgin Dep. (Day 2) at 151:14-21, 211:9 – 213:9, and 224:9 – 228:4).

In addition to Mr. Hodgin's testimony, Catoe's expert, William Cary, testified that he noticed work performed by the Catoe Subcontractors that was not proper and construction performed by the Catoe Subcontractors that deviated from the plans (see: William Cary Dep. at 127:13 – 128:2, 101:19 – 102:3, 113:14-17, 144:2-9, 146:7-19, and 147:24-148:5).

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/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, schedule construction and provide supervision/oversight. Further, Builders First Source and Catoe were responsible for providing supervision and oversight to the Catoe Subcontractors.

Rick Thoennes, one of the owners of Marick Home Builders, testified that Marick had a superintendent at the project supervising the subcontractors and scheduling construction (see: Thoennes Dep. at 30:17-19). Thoennes testified that Nathan Hornaday was employed by Marick to serve as the superintendent responsible for providing supervision of the project (see: Thoennes

Dep. at 31:6-12). In addition to Hornaday's supervision and oversight, Thoennes visited the project weekly to oversee construction (see: Thoennes Dep. at 131:8-132:3). Further, Thoennes had daily communications with Hornaday concerning construction of the project (see: Thoennes Dep. at 176:4-6). According to Thoennes, during construction, Nathan Hornaday provided supervision on site at Stoneledge 10-12 hours per day. (Thoennes Dep. at 176:23 -177:4). According to Thoennes, on several occasions, Hornaday contacted separate subcontractors to discuss construction related issues noticed during Hornaday's inspections of work performed by subcontractors (Thoennes Dep. at 224:18 – 225:7, 244).

Hornaday also testified that he provided supervision at the project (Hornaday Dep. at 18:15-16).

> Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I don't like the way you're doing that"?
>
> A: I did.
>
> Q: And was it corrected to your satisfaction?
>
> A: Yes.

(Hornaday Dep. at 19:21 – 20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision was provided at the project. In addition to Marick's representatives' testimony, Carl Catoe testified that Marick provided supervision and oversight at the project.

> A: There was a question about the offsets, what happened there. Was this rated? Was this a two-hour wall? Was this a one-hour wall? Is this - - has it got to go horizontal? Does it continue? How far does it continue? Different things like that.
>
> Q: And who provided you with the direction that you used to build those conditions?
>
> A: Nathan.

Q: So that came directly from Marick?

A: Yes.

(Catoe Dep. at 90:21-25.)

Catoe further testified that when he needed additional plans to perform his work, he would ask Nathan and Nathan would provide him with additional plans to follow (see: Catoe Dep. at 159:20 – 160:6). Thus, Carl Catoe testified that Marick provided supervision, oversight and guidance concerning construction of the project. Additionally, Catoe's expert, William Cary, testified that Marick provided supervision and guidance to Catoe when issues arose concerning the plans (see: Cary Dep. at 152:6-16.)

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 Carl Catoe and Catoe's expert 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 performed by the Catoe Subcontractors at Stoneledge. Based upon these facts, a jury is required to determine fault.

**B. SPECIAL RELATIONSHIP**

BFS was Marick's direct subcontractor, BFS subcontracted with Catoe who in turn hired the Catoe Subcontractors to perform the construction labor. Due to the supervision which Marick was required to provide Catoe and the Catoe Subcontractors, Marick had a special relationship entitling it to equitable indemnification. *First Gen. Servs.*, 314 S.C. at 442, 445 S.E.2d at 448.

In the attached Order, the Court held that the relationship between Marick and Catoe/Catoe Subcontractors was too remote to establish the special relationship required to seek equitable indemnification under South Carolina law citing *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

The Court erred in finding that Marick had no special relationship with Catoe and the Catoe Subcontractors, as Marick was responsible for providing direct oversight and supervision to Catoe and the Catoe Subcontractors. Plaintiffs' Complaint alleges that Marick failed to provide proper supervision of the work performed at the property. The Catoe Subcontractors were performing the labor at the project under the direction of Catoe, BFS and Marick; thus, according to Plaintiffs, Marick was responsible for providing oversight of the work performed by Catoe and its subcontractors.

The Court's Order cites *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005), as precedence for its determination that the relationship between Catoe/Catoe Subcontractors and Marick was too remote to warrant Marick's request for equitable indemnity. Marick asserts that a determination concerning a general contractor's right to equitable indemnity from a subcontractor's subcontractor in a construction setting has not been decided by a court in South Carolina.

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 deficient work. Where there is a wrong, there is a remedy; thus, if found without fault, Marick should be indemnified.

Thus, Marick respectfully requests that the Court hold that in a construction setting, a general contractor that oversees the project has a special relationship with all subcontractors for which it is required to oversee and supervise.

**(2) The Court Erred in Collapsing all of Marick's Cross-Claims Into One Claim for Equitable Indemnification.**

The Court erred in collapsing Marick' cross-claims for breach of warranty and negligence into one claim for equitable indemnity. 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 siding application, inadequate flashing, inadequate flashing around windows and exterior doors, defective construction of

The facts in *Rock Hill Telephone Co.* involve a utility company that hired an independent contractor to perform installation work for the Utility Company. There are no allegations that the Utility was providing any oversight or guidance to the hired independent contractor. The independent contractor was overseeing the job, hired its own subcontractors to perform the work and provided oversight for those subcontractors. There is nothing in the case indicating that the Utility was overseeing the independent contractor's or the subcontractor's work. *Id.*

However, in a construction related setting, as is at issue in the present case before the Court, the general contractor is responsible for providing oversight and supervision for the entire project. Thus, Marick's obligations are different from the obligations of the Utility in *Rock Hill Tele. Co.* If Marick was responsible for overseeing and supervising Catoe and its subcontractors, then a "special relationship" exists between those parties, thus warranting a right to equitable indemnity.

As stated above, "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). Thus, if Marick is responsible for providing oversight and guidance on a daily basis for the work performed by Catoe and its subcontractors, then a sufficient relationship between the parties exists to obligate Catoe and the Catoe Subcontractors to indemnify Marick for exposing Marick to liability for the alleged deficient work performed. Marick has admitted no fault in this action; thus, if a jury determines that Marick has no fault associated with the alleged deficient work performed by Catoe and the Catoe Subcontractors, Marick should be entitled to indemnity. It would be inequitable to allow the subcontractors which were supervised and

balconies, inadequate or improper installation of weather resistant barrier (among other deficiencies) against Marick. Thus, Marick is required to continue litigating claims associated with Catoe and the Catoe Subcontractors' alleged defective work. Marick continues to incur attorney fees and costs associated with Catoe and the Catoe Subcontractors' failure to perform duties owed to 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's claims for breach of warranty and negligence 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) and breach of warranty (failure to perform work in a workmanlike manner); thus, Marick properly filed claims for negligence and breach of warranty against Catoe and the Catoe Subcontractors 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 the subcontractors as Catoe and the Catoe Subcontractors were sued directly by Plaintiffs for their defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence 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 duties owed by Catoe and the Catoe Subcontractors 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 obligations and duties from a party, a separate cause of action for negligence does not collapse into a single indemnity claim.

## 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 Catoe and the Catoe Subcontractors as clearly there are questions of fact for a jury to determine in this case.

Jason M. Imhoff (SC Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
The Ward Law Firm, PA
PO Box 5663
Spartanburg, SC 29304
(864) 582-3075
(864) 585-3090
jimohff@wardfirm.com

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

April 9, 2013

# EXHIBIT 1

FORM 4

~~STATE OF SOUTH CAROLINA~~ ~~JUDGMENT IN A CIVIL CASE~~

~~COUNTY OF~~ Oconee

~~IN THE COURT OF COMMON PLEAS~~ CASE NO. 2009-CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(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 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

2063
Judge Code

01/11/2013
Date

## 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:

~~Robert L Lyles Jr~~
Lyles & Lyles LLC
P O Box 773
Charleston, SC 29402

~~Jason M Imhoff~~
The Ward Law Firm
P O Box 5663
Spartanburg, SC 29304

Trent M. Kernodle
PO Box 13897
James Island, 29422-3897

Steven E. Buckingham
PO Box 10589
Greenville, SC 29603

Dana W. Lang
PO Box 999
Charleston, SC 29402

Kevin L Terrell
PO Box 6728
Greenville, SC 29606

D. Andrew Williams
P O Box 1473
Columbia, SC 29202

Finley B. Clarke
P O Box 1865
Florence, SC 29503

Paul E. Hammack
223 W. Stone Avenue
Greenville, SC 29609

Elizabeth A. Martineau
P O Box 31188
Charlotte, NC 28231

Eric W. Rowell
P O Box 31188
Charlotte, NC 28231

Stephen P. Hughes
P O Box 40
Beaufort, SC 29901

G. Thomas Chase
P O Box 2980
Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

**Court Reporter:** N/A

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

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

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 Morales d/b/a Morales Masonry, and Miller/Player & Associates, et al.

Defendants.

**ORDER GRANTING BFS', CATOE'S & CATOE SUBCONTRACTORS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AS TO CROSS CLAIMS OF MARICK HOME BUILDERS, LLC**

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This matter came before the Court on September 5, 2012 by way of Motions to Dismiss and for Summary Judgment as to the cross claims asserted by Marick Home Builders, LLC ("Marick")[1] against Builders FirstSource – Southeast Group, LLC ("BFS"), Carl Catoe Construction, Inc. ("Catoe") and Catoe's subcontractors T.G. Construction LLC, Alejandro Avalos Cruz, Herbert Acros Hernandez, Martin Hernandez Aviles, Ester Moran Mentado, Socorro Castillo Montel, and Zarate Construction (collectively, "Catoe's Subcontractors"). For simplicity, BFS, Catoe and Catoe's Subcontractors are collectively referenced here as the Moving Defendants.

This litigation involves construction defect claims by owners at Stoneledge at Lake Keowee. Marick served as the General Contractor for Phase II of the townhome development. Marick subcontracted a portion of its work to BFS. BFS, in turn, subcontracted the labor portion

[1] The caption of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross Claims against the subcontractor defendants appears to indicate that the cross claims were being asserted by both Marick and Rick Thoennes. In the body of the cross claims, however, only Marick asserted the claims. Thus, there is not a cross claim by Defendant Rick Thoennes against the moving Defendants.

of its work to Catoe, which hired the Catoe Subcontractors. Neither Catoe nor any of the Catoe Subcontractors had a direct contractual relationship with Marick.

Plaintiffs have brought suit for construction defects and related damages against all defendants. Marick, asserted cross-claims against its subcontractors and other remote contractors alleging breach of warranty, negligence, and equitable indemnity.

## STANDARD OF REVIEW

In ruling on a Rule 12(b)(6) motion, the Court will base its decision solely on the allegations contained in the Complaint. Baird v. Charleston Cty., 333 S.C. 519, 511 S.E.2d 69, 73 (1999). While viewing the allegations in the light most favorable to the non-moving party, the motion must be granted where, as here, the facts alleged in the Complaint and inferences reasonably deducible therefrom do not entitle the claimant to relief. Jarrell v. Petro Seed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered "when it is clear that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Toomer v. Norfolk S. Ry Co., 344 S.C. 486, 492-93, 544 S.E.2d 634, 637 (Ct. App. 2001) (affirming summary judgment award on equitable indemnity claim); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 518 S.E.2d 301, (Ct. App. 1999) (affirming summary judgment on equitable indemnity claim).

## DISCUSSION

### *A. Negligence and Breach of Warranty Claims*

#### *1. As to claims against Catoe and Catoe's Subcontractors*

At the September hearing, counsel for Marick conceded that the neglicence and breach of warranty claims against Catoe and Catoe's Subcontractors should be dismissed, leaving equitable

indemnity as the only remaining claim against those parties. Although the issue was conceded, the Court addresses the issue herein for the remaining parties.

Marick's breach of warranty and negligence claims against Catoe and Catoe's Subcontractors are merely disguised, or mislabeled, 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, 336 S.C. at 60, 518 S.E.2d at 305 (internal citations omitted).

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.").

The Court has reviewed Marick's pleadings and concludes that equitable indemnity is the only cause of action pled in fact against Catoe and Catoe's Subcontractors. For example, the cross-claim labeled as a breach of warranty claim 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 labeled as a claim for negligence states:

> Should Plaintiff's prevail on their claims, Marick will be damaged as a direct and proximate result of [Catoe's] negligence; as a result, Marick is informed and believes 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. (Id. ¶ 169.)

The cross claims against Catoe's Subcontractors and BFS are identically worded. Marick seeks recovery of the amount Marick will owe Plaintiffs after trial due, ostensibly, to the acts or omissions of others. Marick does not seek damages from Moving Defendants for personal injury, property damages, or other damages actually incurred by Marick. Therefore, these cross-claims are textbook claims for indemnity and will be treated as such. See Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.

Legal claims, whether labeled as negligence or breach of warranty, asserting damages arising out of 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). Put another way, Marick failed to state a claim for negligence or breach of warranty--Marick merely pled equitable indemnity against Catoe and Catoe's Subcontractors, and those claims are properly dismissed. See also J. Roger Young, Order Granting Partial Summary Judgment, Nelson v. John Wieland Homes, 2009-CP-10-6573 (Oct. 26, 2011) & J. Curtis Coltrane, Order Granting Summary Judgment, Kirkland v. Cambridge Building Corp., 2005-CP-07-1312 (May 30, 2006).

*2. As to Claims Against Builder's FirstSource*

For the reasons set forth above, Marick's claim against BFS for negligence is dismissed as a disguised indemnity claim. Marick's claims against its direct subcontractor, BFS, for breach of warranty and breach of contract are addressed in a separate order.

*B. Equitable Indemnity Claims*

The Court grants the Moving Defendants summary judgment as to Marick's equitable indemnity claims. Equitable indemnity claims are proper when a party is compelled to pay damages because of another party's negligence, which has been imputed to him, "subject to the proviso that no personal negligence of his own has joined in causing the injury." Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.

Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). "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, 336 S.C. at 63, 518 S.C. at 307. The equitable maxim, "he who seeks equity must do equity," prevents Marick from recovering on these claims. Norton v. Matthews, 249 S.C. 71, 152 S.E.2d 680 (1967); Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287, 291 (2000).

Further, Marick must demonstrate that a special relationship existed between it and the alleged indemnitor, in this case, BFS, Catoe, and Catoe's subs. 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"). "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, 279 S.C. at 24, 301 S.E.2d at 553.

~~Under the undisputed facts of this case, Marick has unclean hands and cannot be~~ adjudged without fault. Additionally, no special relationship exists between Marick and Catoe or Catoe's Subcontractors.

*1. Without Fault*

Marick's own expert admits that Marick is not without fault. Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." (Still Dep. 87:3-7 (Aug. 15, 2012).) When asked, "So, you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?" Still answered, "At the time that we looked at it, yes." (Still Dep. 92:25-93:5.) Whether Plaintiffs should recover for the damages alleged is the purview of the jury. However, to the extent the jury finds for the Plaintiffs, Marick, as the party having "overall responsibility" for the project, cannot under these facts be adjudged without fault.

Marick points to Field v. J. Walters Builders, Inc. for the proposition that a general contractor is not "automatically responsible" for its subcontractor's work. 658 S.E.2d 80, 88 (S.C. 2008). While that is true, Fields also holds that "[a] builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code . . . and in a good and workmanlike manner." Id., at 88. Marick's own project supervisor Nathan Hornaday testified that Marick had no obligation to supervise the quality or code compliance of its subcontractors.

The following exchanges with Mr. Hornaday demonstrate Marick cannot be found to have discharged its duties of supervision:

> Q. This question is, did Marick supervise the work of its subcontractors to ensure that that work was consistent with industry standards?
> A. As far as I know, no. (Dep. Hornaday 113:9-12.)
>
> Q. And would a supervisor on a construction project be responsible for ensuring that the subcontractor's work complies with the applicable building code?
> A. No. That's what the inspections were for. The building code -- the building inspector would come out and they would inspect every part of everything. (Dep. Hornaday 61:2-8.)

Additionally, Marick is the permit holder for Stoneledge Phase II. The building code in effect at the time of construction states that it is "unlawful for any person, firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code." 2003 International Residential Code §R113.1. The permit application executed by Marick to obtain the necessary building permits states that Marick is "solely responsible" for compliance with the building code. Marick—not BFS, Catoe, or Catoe's subcontractors—was the entity that obtained the permits for construction of Phase II of Stoneledge.

Marick's own expert admits that construction of some parts of the Phase II project violates the building code in at least some aspects, and Plaintiffs sued Marick and others for these violations. Marick executed an application agreeing to be responsible for building code violations. Thus, Marick cannot be adjudged without fault for building code violations, to the extent the jury determines they exist. Marick and each of the Moving Defendants are at most joint tortfeasors, and consequently Marick has no right of indemnity against the Moving Defendants.

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*2. No Special Relationship*

Alternatively, summary judgment as to the indemnity claims against the Catoe defendants is proper because Marick had no special relationship with Catoe or Catoe's Subcontractors. The South Carolina Supreme Court comprehensively analyzed our state's equitable indemnity jurisprudence in Rock Hill Telephone, and 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). Specifically, the Court clarified that "a remote or distant independent contractor . . . does not have a special relationship" with an upstream party, so an equitable indemnity claim was inappropriate. Id. at 390, 611 S.E.2d at 237.

Here, neither Catoe nor Catoe's Subcontractors have any relationship, contractual or otherwise, with Marick. Marick hired BFS to perform and supply materials for a limited scope of work in Phase II. BFS subcontracted the labor to Catoe, who subcontracted portions of the labor to Catoe's subcontractors. These remote relationships will not support an indemnity obligation. Id. 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, or Marick and Catoe's Subcontractors, is fatal to Marick's equitable indemnity claims.

In summary, all claims by Marick against Catoe and Catoe's Subcontractors are dismissed. Marick's claims for negligence and equitable indemnity against BFS are likewise dismissed.

**IT IS SO ORDERED.**

Judge Alexander S. Macaulay

Walhalla, South Carolina
October 11, 2012

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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.

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DEPOSITION of ***DEREK HODGIN (DAY 1)***

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Pursuant to notice, a deposition was taken in the above case on the January 23, 2012, commencing at approximately 9:25 a.m. attended by counsel as follows:

side of the front porch. And I removed siding from the top of a stone clad area, just above the water table feature on the stone. And then at the rear of the unit I removed some siding from above the cantilevered window area that comes out over the open balcony. And we may have -- I can't remember if there were ceiling pieces removed from his basement patio ceiling, or if we removed them and then looked at the framing outboard of his patio door.

Q. The cedar ceiling above the ground floor?

A. Correct.

Q. Why did you choose to remove siding at the front of his unit?

A. It was easy to get to. It was an area that I was concerned about the flashing detail between the siding and the stone, and -- well, I think one of the biggest reasons it was easy to get to.

Q. Well, did he have complaints about that particular area or water damage that he identified there?

A. No, not at all.

Q. Was there damage you found behind the siding?

A. There was.

Q. Water damage?

A. Yes.

Q. And this is the connection between -- or the intersection between the lap siding and the stone?

A. Yes.

Q. And you said you took siding off of, I think, a cantilevered window area above the open second floor patio?

A. That's correct.

Q. Below a window?

A. Well, it would be below a window, at the very base of the wall. It would be probably two or more feet below a window, just above -- I guess you would call it a soffit. I don't know what you call it. It's an overhanging, cantilevered window. And it has -- so it has a very short, maybe foot or two soffit or ceiling area that was stained. And so I took siding off just above that -- the base of that wall.

Q. Did you find damage there?

A. I did.

Q. Did you prepare any reports or anything in writing about your findings at Dr. Hund's unit?

A. I don't think any of the work I did for Dr. Hund ever made it into a written report. I think it was visual only and then discussed verbally either with him or then communicating that to the HOA later, as

A is "Roofing," B is "Attics," C is "Life Safety/ Fire Protection," D is "Exterior Walls." Okay. So A "Roofing," I guess, let's do ---

A. Well ---

Q. Go ahead.

A. I was thinking it must follow -- it follows the format of the written report.

Q. The 2010 report?

A. The November 1, 2010 report, yes.

Q. Great. What is the construction defect identified in Number 1?

A. That the wood siding is what's referred to as a drainage type cladding, that incidental moisture will get behind the wood siding. And at a roof/wall intersection effort needs to be made to properly waterproof the intersection to preclude water penetration at that point. And that would be accomplished by the installation of a kickout flashing.

Q. Is this a code compliance issue with damage, a life safety issue, or a physical damage issue?

A. It's not a life safety issue. But I do think it would represent the other two. There is physical damage at roof/wall intersections. I would guess at most if not all of the observations listed. And

from a code standpoint, I would say only -- there's a couple of generic paragraphs that you could say it would violate the code. One is the 703.1 which says, "Exterior walls shall provide weather protection." And then a flashing paragraph later on, maybe 703.8 that says, "Flashing shall be installed in a manner to preclude water intrusion," or something to that effect. So there's not specific detail that says, install kickout flashing, but there are two code paragraphs that I would say have been violated by the as-built conditions that have led to the damage.

Q. And you don't reference the code. You actually reference an industry standard, NRCA Roofing and Waterproofing Manual?

A. Yes, sir.

Q. That is an industry group? What did you call it earlier?

A. I think we said industry group, yes.

Q. That publishes an industry standard?

A. Yes, sir.

Q. Is the NRCA Roofing and Waterproofing Manual section that you've identified citing the code?

A. No. That's what makes it an industry standard.

Q. So this is an -- now, is there an alternate means

Q. Unit 327.

A. Yes, sir. While I'm looking for that one, this last illustration is a great example of what I was talking about earlier. You see the siding is taken off and there is totally unprotected interior-grade drywall with no weather barrier and no adequate flashing. So that even though my damage might be very localized, there is no possible way from an engineering standpoint for me to fix that in a localized way. I have to tear off all the siding far back enough to either get to where there is some weather barrier or take off all the siding to install weather barrier. I have to see all the extent of damage to the drywall sheathing so I make sure I repair that during the process. So I know that's kind of off the subject, but you asked me earlier about the statistics and how do I pick how many places. When you see that type of a defect, it just causes you to have a more comprehensive repair scope. I found some roof/wall intersection photographs, but I -- I want to make sure I've found all of them before we start talking about it.

Q. Are these all on discs?

A. I think so.

(OFF THE RECORD).

visible flashing.

BY MR. ROOT:

Thank you. Sorry.

BY THE WITNESS:

What was the next one?

DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

Q. 89, I believe you have listed. 578 is the address. And while you're looking, do you know why you chose this unit?

A. No. 578 -- I'm sorry, was that the unit number? 578?

Q. According to your document, yeah. Yes.

A. 89. How about if we stick to the unit numbers.

Q. Okay.

A. Because that's the way the tabs are.

Q. Yeah, 89.

A. 89, 7/1/2010 is the date of the observations. And there's a pretty clean looking intersection shown in Image 4714. Actually, I don't know if that's the -- yeah, that's shown close up in 4715. And then we take the siding off and there's torn weather barrier, no kickout flashing, water stained siding and damage to the unprotected interior gypsum wall sheathing below, shown in Image 4722 and 4725.

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Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

DEPOSITION of *DEREK HODGIN (DAY 2)*

Pursuant to notice, a deposition was taken in the above case on the January 24, 2012, commencing at approximately 9:15 a.m. attended by counsel as follows:

A. No, I don't know if this one was reported to have a leak at that window or not.

Q. What would be an efficient remedy for this particular issue on 63?

A. Whenever you can identify areas that are localized in nature like that, you could just remove the siding at the base of the wall and then what I would probably do is maybe take a six-inch wide piece of self-adhered flashing and slip it underneath the weather barrier where it stops short and over the top of that flashing and then put the siding back.

Q. I'm sorry, I've asked you to go to 67.

A. That's okay. On 67 it looks like there's some trim at the base of one of those cantilevered window sections. And this is field notes dated June 30, 2010. Above the trim there's a reverse lap with the metal flashing and the weather barrier. So the weather barrier extends down behind the flashing and behind some trim.

Q. What picture are you looking at?

A. Well, I'm going to tell you. And then stops short behind the trim. The photo images would be 4622, it's really through the rest of the page. But that particular area 4623, 4624. I think that would be

it. The rest are photographs of the moisture meter showing reasonable moisture levels, with the exception of the adjacent trim piece, which is 4627 is the image number.

Q. You call it cantilevered, but this is an overhang over the exterior doors onto the back or lakeside patio porch?

A. Yes, sir.

Q. So the siding actually comes down -- I'm looking back up at 4604. The siding actually comes down and stops. And there is a piece of trim with a -- what did you call this piece of flashing?

A. Well, it's just metal flashing, but you could call it "Z flashing" perhaps. That's a common term for it.

Q. And was that Z flashing at about the same level as the termination of the WRB?

A. No, I think it actually went a little bit further down. If you look at the -- well, if you look at 4623 and 4624 you can see, you're looking at the bottom of that flashing. So that WRB comes down like maybe another inch or so below it.

Q. Can we assume that they were trying to flash or incorporate the house wrap and the flashing at about the level where the house wrap stopped? I

mean, was that the idea of why it stops there so that they could flash it out and then put the trim piece there?

A. I would think so. I mean, they're both right there at the same level. It's just, if they're going to do that then the weather barrier would need to go over the vertical leg of the Z flashing to keep the water from going behind the trim.

Q. Right. Do we know if it was done that way? Is there a photograph that shows that it was not?

A. Yeah, the first -- let's see, look at 4604 with the knife stuck in behind the vertical leg of the flashing. So they just put the Z flashing over the weather barrier. They didn't properly incorporate it, like you were talking about. So now the water is going to run behind the flashing and get the trim and the OSB wet.

Q. Not having been there, it's a little difficult for me to see this. I want to look at 4606.

A. Okay.

Q. Does the Z flashing change color?

A. It does. I mean, there's the outboard part of the horizontal leg is painted brown. But I think when they installed it, it's actually -- comes to the site with a white painted finish.

A. Correct. I think this is pretty common in most flashing integrations, that they put all the flashing on the outboard side of the weather barrier. So I agree with you. I mean, I think that's probably the bigger problem is that integration.

Q. Let's look at the next one which is 73. Did I ask you why you chose Unit 67?

A. I believe so. And I believe I said, I don't know. Which is the next one? 77?

Q. 73. And again, do you know why you chose this unit?

A. No, sir.

Q. And I think we're looking for incomplete weather barrier; is that right?

A. Yes, sir. I see a couple of images. I'm not finished looking at all the images. But if we want to -- I'm going backwards, if that's okay, in the photos.

Q. Okay.

A. The first image numbers are behind the October 7 2009 tab. And they are images 4044 and 4045. And it's just some trim that protrudes from the exterior wall. The weather barrier came down to the top of the trim and stopped. And then there

was flashing installed improperly over the outboard side of the weather barrier. And there's just a very narrow gap. That one looks like it would have been really easy to properly integrate the flashing, but was not properly integrated.

Q. Is this essentially the same issue as what we found in 67?

A. It is. But instead of terminating behind the trim, it terminates just above the trim.

Q. But could have been integrated with the flashing at the length it is?

A. Correct. And this one, it's cut off, you know, pretty cleanly above the trim. You could have just lifted that weather barrier, put the vertical leg of the flashing underneath and it actually have been a functional detail.

Q. Is that the repair for these two items, you just put the weather barrier over the flashing, put the siding back on and you're done?

A. Sure. I think if that's the only issue that you have to deal with, that would be a reasonable fix, yes.

Q. Let's go to 76, please.

A. I'm sorry, there's more on this.

Q. Oh, I'm sorry.

Q. But when you walk down to this door, this wall would be on your right side. Looking at Photographs 3998 and on, you're lifting something up. What is that?

A. That's the weather barrier that went behind the metal flashing and then I'm looking at the damaged drywall.

Q. Where does it show the weather barrier behind the flashing?

A. That would be Photos 3960, 3961 I'll say through about 3967 are probably good ones.

Q. And you found some damage from this condition at the parking lot side of this unit?

A. Correct.

Q. And is the fix, again, to just lap the weather-resistant barrier over the flashing?

A. I would say you've got some -- you have some sheathing that you might need to replace. But, yes, I mean, as far as what went wrong with that particular location, the flashing would be -- should be properly integrated with the weather-resistant barrier. I think also from a durability standpoint, the Z flashing extends below the vertical flashing at the corner. If you look at -- I think there's a better shot. But at least 3975

and 3976 -- oh, here's a close up, 3970. And then at least a couple before that. The flashing goes underneath that vertical trim. That's a bad detail from a trim standpoint. You can see the close up of how water is wicking up at the end of that trim. Cedar is not as susceptible, but I get involved with a lot of other trim products, in particular engineered trim products like MDF and it just disintegrates or gets really soft and swells at the base. The better detail would be to have an end dam on that flashing and then butt the two pieces of trim tight together and have a caulk joint. If you don't do that, you need to run the flashing continuously around the corner and raise that trim up, like a -- even just a quarter inch to get it off of the flashing so water doesn't wick up the end of it.

Q. We're sort of jumping back and forth. The missing weather-resistant barrier house wrap is on that one, I want to call it, side or patio side next to the exterior doors on the patio. Did you find that anywhere else on this unit?

A. No, I think it was just three destructive test areas: above the cantilevered window, that adjacent wall on the screened-in, closed porch and then that

barrier at a very critical location directly below the roof/wall intersection. And then you have kind of a triangular missing section above the roof line. It's in the same wall area, but completely removed and separate from the area below. So we -- it's a very odd pattern where there's large areas of weather barrier that are completely missing from some locations.

Q. In regard only to the weather barrier and its repair, how would you repair these two locations?

A. You'd have to remove the siding to the extent that you could identify the areas of missing weather barrier. And then you could -- if you were satisfied that there's no damage below the areas that do have weather barrier, you could try to integrate new weather barrier with the laps that we talked about and then tape joints and then put the siding back.

Q. Okay. Were those all of the units that you investigated in Phase II for this issue?

A. I don't know. I mean, I think Burgess' attempt was to have each of the issues identified and then to the extent possible show photographic examples of each issue. But I don't know that there's been an effort made to identify every single issue with all

exterior walls D3.

A. Okay.

Q. And tell us about, I guess just in general terms, what this observed condition consists of?

A. I believe it would just be that in some locations where we pulled off siding we also measured the fasteners, and found the fasteners spacing to be excessive.

Q. Let's go ahead and take a look at that. You've identified Units 55 and 67?

A. Yes, sir.

Q. We already have 67 open. Let's look at that one first.

A. Okay.

Q. Don't you? Don't you have that right in front of you?

A. Yep.

Q. I'm getting familiar with these units looking back at them. I recognize the Clemson paw every time we come by this unit.

A. Yep. It looks like there's -- I guess there's only one set of field notes, June 30, 2010. And if you look at the siding that was removed -- and I would say if it was documented by us it's probably -- hopefully I won't be taking us back later. But

it's usually pretty bad. You know, if it's close to 16 inches or where it should be, I don't know that we would make a big deal about it, particularly in the Upstate. We don't have as significant of a code prescribed wind load. But on this one if you look at Image 4607 through 4610, there are fasteners that were 46 inches, 41 inches, 47 1/2 inches. These are just the spacing of the fasteners that are marked on the back of the siding that we removed. In 4607 the spacings are 41 inches and 46 inches. In 4608 the spacings are 40 1/2 and 47 1/2 inches. In 4609 it might be the same 40 1/2 inches. I can't be sure. And then 72 1/4 inches. And in the last image I see 28 inches. So it was, I would say, excessive in terms of the spacing of fasteners used to attach the siding.

Q. Let's look at 55 real quick also.

A. Okay. Are you ready?

Q. Yeah.

A. I don't see as many locations measured. But there's some siding taken off adjacent to a window. And all I can see is what's written on the weather barrier, 25, 16 ---

Q. Where are you?

A. Oh, I'm sorry. The image number is 4667.

Q. I'll let somebody else do that, because we're moving pretty slow.

A. All right.

Q. Let's move on to 8, and I guess 9 at the same time. It looks like they're both talking about windows?

A. Yes.

Q. Well, back to Unit 55, I guess, since we're here.

A. 55 is not part of Issue Number 8.

Q. No, but it's part of Issue Number 9.

A. Okay.

Q. It looks like for both 8 and 9, again, you've cited the general provision of 703.8. Well, no, you cite Note 3 and Note 4 about "Under and at the ends of masonry wood or metal copings and sills," and Note 4, continuously above all projecting wood trim," corrosion-resistant flashing needs to be installed. All right. Let's look at that, and identify a picture, if you would. Or a photo, I should say.

A. I don't know that that's an issue a whole lot different than Number 6. I mean, I know it's in that same area. So what this is saying is that there should be flashing not only at the cedar to stone intersection, but also the window stone intersection. There should be flashing below the -- between the window and that stone sill, I

guess it would be called at this location.

Q. Let me make sure that I understand. What is the trim material?

A. Around the window?

Q. Well, around the window and above the stone water table?

A. Cedar.

Q. That's a piece of cedar trim?

A. Yes, sir.

Q. So if we look at, I guess Photograph 4636 where you can see the bottom of the trim piece around the window right above the water table feature, the stone water table feature?

A. Yes, sir.

Q. That's where you say a piece of flashing needs to be put?

A. I believe it would be below the sill. Below the window sill, which we have been calling a water table at -- running away from the window we call it a water table. Here it's a sill. And there should be flashing that extends out below that location based on that section of the code.

Q. Below the piece of stone?

A. Right.

Q. That creates the sill?

concrete taken up so the flashing details can be reworked and make it a whole repair. I don't think you're ever going to have it all fixed unless it's taken down to that level. And I'm not sure -- I'm not sure of the extent of the other repairs, if that was addressed or not.

Q. And if it hasn't been, it needs to be done?

A. Correct.

Q. In your opinion?

A. Yes.

Q. You've testified, I guess, repeatedly that you found consistent methods and manner of construction between Phase I and Phase II?

A. I think I've testified about certain details. The last one that we talked about was the stone veneer details of flashing and so forth. And maybe about the grading. But there are -- I mean, there are some differences I would acknowledge. I said that mostly because of the balconies. With the balconies there is a significant difference in the framing and the damage at the balconies.

Q. There's a framing structural issue in Phase I that is not present in Phase II; is that fair?

A. Right. I've got water intrusion and staining on pressure treated wood components, but they would be

Q. Let's look at Unit 81.
A. Okay.
Q. This talks about inadequate flashing of the windows, sort of a -- it looks like sort of in a general sense.
A. Yes.
Q. There is only one Phase II unit listed, that's this Unit 81. Do you have an opinion, I like your word, of whether the absence of adequate flashing on this unit is an anomaly or is prevalent across Phase II?
A. I think our destructive tests -- we'll have to see how many Phase II areas we've looked at around windows. I have a hard time not lumping them together. And I know Phase II is important to you, or more important to you than Phase I. I think that at least from a head flashing standpoint I don't remember seeing anything different than what we talked about earlier, always the flashing is installed outboard of the weather-resistant barrier and would not be weather lapped properly. But as far as Phase II goes, I'm going to have to go basically unit by unit from the table to remember what conditions. I just don't have them that cleanly segregated in my head as to what I saw where without ---

A. Okay.
Q. Tell us what these ---
A. Wait a minute. Sorry.
Q. Yeah, it looks like we need a separation between 1 and 2; is that right?
A. No, I was going to circle the screw up on this. These are actually not a problem. Where are we going next?
Q. Exterior doors. Why don't you do ahead and tell us what the issue is and then use a Phase II example, if you wanted to show us.
A. So the first Phase II exterior door looks like Unit 43 on July 9, 2010. It looks like in the photograph there's a balcony door where some trim is removed. If you're standing looking out the doors it would be the right side of the door and then at the middle location. And it looks like if you just go all the way from 7704 to 7783 that should encompass all the door photographs. So the trim's taken off the right side first, if you're standing at the balcony looking at the rear wall. And then you can see at the top of the door 7714, which is the top right photograph on this index sheet, the weather barrier comes over to the rough opening and just simply folds in to the rough

opening. There's no additional protection at that location. There's a close-up view of it in 7715. And then the bottom of the door is observed in 7716.

Q. It looks like the house wrap is wrapped incorrectly at the bottom, because it's closer, but much further away at the top. Is that a camera trick or -- I mean, am I wrong about that?

A. I don't think we can move the framing with the camera. It's a wider gap for sure at the top of the door; it looks like an inch or more. I don't -- I can look and see if there's any comments about it. I don't see anything about the framing. It's all about the flashing and the weather barrier details.

Q. Well, tell us about the weather barrier. What should have happened or what should be there?

A. Well, it should be, you would think, some type of termination detail at the base of the wall where some flashing would extend to the -- well, I'm sorry, this is the trim. There's stone above here. The stone should have been raised up and have the weep screed detail at the base. The trim is probably fine to extend all the way down, but there needed to be some type of flashing at the base of

the door to preclude water intrusion.

Q. At the base of the door or at the base of that piece of trim?

A. I don't think the trim needs flashing. I think the door should probably have sill pan flashing below it. It does at least to be -- at least seem to be a small step, like a piece of wood, below the aluminum threshold of the door and the concrete balcony surface.

Q. Right.

A. There's some minor staining at the base of the OSB sheathing next to the door. And then it looks like they took that wood block out. You can see in 7722?

Q. Yeah.

A. And so the concrete extends below the threshold.

Q. Do you mean it's lower than the threshold?

A. Yeah. I mean, the concrete goes between or goes below where that brown aluminum threshold comes out. That's 7723.

Q. Right.

A. And it looks like there's no flashing or waterproofing that comes up from below the concrete to integrate with the door opening flashing and then no sill pan or effective flashing at the base

into it and see the success, you know, in Charleston. If that works that could save some labor costs.

Q. Let's talk about the balconies a little bit. I think everybody wants to get out of here, so I'm not going to -- I'm not going to try to belabor this. Okay?

A. Okay.

Q. Can you give us sort of general overview of the issues with the balconies?

A. Sure. If it's okay -- well, let me just first discuss the differences between Phase I and Phase II. Neither Phase I or Phase II, I believe, followed the architects plans for CMU and concrete construction. They both got switched to wood frame balconies. Phase ---

Q. Let me stop you there a minute. You have not seen the wood framed balcony plans?

A. No.

Q. You don't know if they exist or not?

A. I don't think I've seen them. I mean, if I've got them, I don't recall seeing them. I just remember seeing CMU and concrete.

Q. Okay.

A. Regardless, they're constructed with wood framing

on both Phase I and Phase II. Phase I is parallel cord wood floor trusses. Phase II includes pressure treated 2-by floor framing. Both exhibit water intrusion, but because the Phase II buildings were using the pressure treated wood, all you really have, that I've seen, is water stained wood framing. I don't know that the framing has been damaged to the point that it needs to be repaired or replaced.

Q. Are you talking about the wood framing that is supporting the concrete deck?

A. Yes.

Q. Or also that is -- was used to create the supporting columns?

A. I think and I hope, it would be both. Pressured treated wood, I believe, was used in both vertical and horizontal framing.

Q. Now, is the boxing of the columns a different story or is that also pressure treated wood boxing? Do you understand what I'm asking?

A. Yeah, I don't know. I don't know in Phase II. I just know what I did with the borescope, looking at the framing and the ceilings on Phase II and told them everything is okay structurally. You know, it's not an issue. But on Phase I had concerns

front wall.

Q. And you found it on the front wall and on the cantilevered window, you just didn't find it on that side wall. Is that fair?

A. We found it to be incomplete on the two back patio. I mean, that one -- the first one we looked at had that -- just that little gap.

Q. Where are we looking? Give me the picture number, please.

A. 4044 and 4045. Where it comes right down to the trim but there's a gap and then the flashing was put on the outboard side of it.

Q. Well, I understand that, but it's long enough to lap over the trim?

A. Yes.

Q. Which it's your opinion should have been done; right?

A. Yeah. In terms of it's there. It would just be incomplete and not properly integrated. As far as missing, it would just be that side wall of the screened-in, closed porch.

Q. And I didn't see, Mr. Hodgin, any field notes for all of these first sets of pictures. Am I wrong about that? Are they missing?

A. I don't see them in mine either.

Q. It appears that there is some weather barrier there in the corner with lettering on it.

A. I agree.

Q. Is there a bigger picture which would show how far that extends or where it came from?

A. Let me look. I don't see it in these photographs, no.

Q. How do you know that the weather barrier wasn't removed to show the water damaged gypsum in 4722?

A. We would have indicated that in our field notes and I don't think we would have photographed it and included it as incomplete weather barrier if we were the ones who removed the weather barrier.

Q. Again, this shows some incomplete weather barrier here in Unit 89?

A. Yes, sir.

Q. And that ---

A. And ---

Q. Go ahead.

A. Well, I was just going to agree with you that, I mean, the patterns that we came across are very strange in terms of where the weather barrier is included and where it is not. I mean, there's two things on this unit, before we leave it. One is you've got kind of a swath of missing weather

about the trusses -- the floor trusses being damaged.

Q. So you've got a structural problem in Phase I that you don't have in Phase II?

A. Right.

Q. We've talked a little bit about the integration of the waterproofing under the cement deck with the heated space; is that what you called it?

A. Yes.

Q. Where the slab meets the wall?

A. The rear wall, yes.

Q. The rear wall. Okay. You've also described some slope issues on the deck?

A. Yes.

Q. Have you found any slope on any of the decks?

A. I don't think so.

Q. Do you know how many you've tested?

A. No.

Q. Have you read any testimony that the decks are sloped?

A. No, I haven't.

Q. At this time can you disagree with that?

A. No. I mean, if there are some that sloped, I mean, it could be that those are ones I didn't look at.

Q. And an additional problem with the rear patios and

decks, I guess, is that the water is getting into the columns?

A. Yes.

Q. And rotting them?

A. Yes.

Q. Especially at the bottom?

A. Yes. Do you mind if I ask a question?

Q. No.

A. When you said "slope," can you clarify, did you mean that there's testimony that the framing was sloped or that the topping -- the concrete topping was sloped?

Q. The concrete top.

A. Thanks.

Q. That still doesn't change your testimony?

A. No, I just wanted to be clear that -- what the testimony was.

Q. I may be wrong about that. And people are welcome to correct me, but -- all right, in your opinion, what is the defect that is allowing water to get into the columns?

A. Well, I can say it very generally and then you can try to hone down on what the particulars are. But there is just a terrible installation of waterproofing details including weather-resistant

barriers, self-adhered flashing, lathe and stone. I mean, that installation over the balconies, I would say, did a very ineffective job of protecting the underlying wood framing.

Q. All of those are just -- you're just talking about columns? That they're self-adhesive flashing weather barrier, you said some other things, stone, lathe. That's all -- you're just talking about the columns? We're not back at the heated space, we're out ---

A. Well ---

Q. --- I think my observations will be primarily at the columns?

A. Well, I think my observations may be primarily at the columns. But I think you can see some of the same defects on the arches between it. There's really not a whole lot of stone to talk about at the balcony. I mean, there's the columns and then there's the arches between the columns.

Q. Yeah.

A. So when I've been up on a ladder looking at the exterior of some of the columns, and you can see bare OSB. I've seen rusty metal lathe. I've seen incomplete weather barrier. It's just very poorly constructed, in terms of the ability of the

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.

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Deposition of ***WILLIAM CARY***

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Pursuant to notice, a deposition was taken in the above case on the April 27, 2012 commencing at approximately 10:20 a.m. attended by counsel as follows:

A. They're all covered.

Q. Do you know why Carl Catoe and his subcontractors would have installed WRB at some of these locations and not others?

A. Well, it's kind of an odd -- an oddity on these buildings. A lot of times when you're building a building like this, you're moving pretty fast. You're doing the big areas fast and moving pretty fast on the large areas to try to cover as much ground as possible. These smaller areas, like the side of these screen porches may have been done later. You know, they're susceptible to a little bit more wind in a small area that may have had a small triangle of WRB that blew off. I don't know -- I don't know why it's not there. That's why I assumed they're missing on all ten.

Q. The fastening of the cedar siding?

A. Yes.

Q. And you say, "Verify all siding is attached to the structure at a maximum spacing of 18 inches." And then you have suggested adding fasteners. And I believe you said just a moment ago that only two or three percent of the cedar siding is blind nailed?

A. Yes. Somewhere in there. There was some blind nails that I saw. That may have been just to hold

the board in place until they got the nail guns out to start nailing it. But it's almost all face nailed.

Q. Have you observed in any of the CSE photographs areas where the siding is blind nailed and there are facing -- excuse me, there are fastener spacing issues?

A. No, I haven't seen that.

Q. Let's go over and look, if we can, at Section A. You have provided a detail for the repair of the Parkside overhang condition; is that right?

A. Yes.

Q. And you've got a description of that which is Sheet Number SK-3 of 4. And you indicate it was to "Remove the bottom row of siding and the trim board in the area designated by Section A. Remove the base of wall Z-shaped metal flashing." And then "Add new galvanized metal flashing per Section A behind WRB; paint metal to match the trim board color; replace the trim board and the removed flashing. Replace the siding with salvaged or new material and apply the exterior grade coating to all affected areas." Is that right?

A. Yes.

Q. If we could flip over to SK 4 of 4, you are showing

EXAMINATION BY MR. ANTHONY:

Q. My name's Jay Anthony, and I represent Southern Concrete Specialties.

A. Okay.

Q. They did work on Phase II only. You testified that you omitted the decks from your repair scope. Can you tell me why you did that?

A. Well, as I said earlier, it looked like Carl Catoe Construction built them according to the drawings, which is flat. And it looked like the work that he performed matched the drawings, so I didn't go any further than that. And I was only dealing with what he was working on.

Q. You're aware of complaints of some water intrusion into the cedar ceilings below the decks and into some units?

A. Yes.

Q. Who do you hold responsible for those if not Carl Catoe?

BY MR. TATE:

Object to form.

BY MS. LANG:

Object to form.

WITNESS ANSWERS:

A. I don't know where the water's coming from, so I

based on Mr. Catoe saying that the decks were built and framed level, and he did not do the waterproofing or concrete work?

A. That's right.

Q. Any other reason you decided not to investigate the decks?

A. Well, it looks like there were -- it seems like everybody was assuming they're going to be torn down or fixed or something done to them, so I didn't investigate them. It looked like Carl Catoe had done his work according to the drawings and the direction he got from his general contractor.

Q. Did you ask Mr. Catoe any questions regarding his work on the columns? And I guess by "columns" I should define -- I think I was actually calling them "piers" yesterday. But the -- basically the column that comes up above the deck.

A. No. He said he built the wood columns, but I don't know much more than that.

Q. Did you examine the plans to see how those were supposed to be built?

A. Yes.

Q. And did it look like they were built in conformance with the plans?

A. I haven't torn one apart. I've seen pictures that

show the plywood going across the top of the deck level, and the drawings don't show that, but ---

Q. So that's a deviation from the plans?

A. Well, there's lots of deviations from the plans on this job, yes.

Q. Are there any other ways that the decks weren't built in accordance with the plans from a framing standpoint?

A. I don't know of any. I mean, it's kind of hard to tell. They don't match some details, but then they match some other details. I mean, some of the details on the drawings don't match another part of the same drawing. I mean, they show beams with stone all the way around them and then another part of that same sheet shows framing coming out to that beam, so depends on what part of the drawings you're looking at. But it looks like from the intent on the framing drawings that he built the framing according to those.

Q. So you're aware that the plans did not show that plywood bottom, I guess, of the piers?

A. Right. It looks like that they just call for blocking at that level. Then the plywood stops and it doesn't go into that pier.

Q. So this should be an opening essentially for water

Q. And I understood ---
A. On the outside edge, yes. The concrete is right adjacent on the very outside edge. The stone is adjacent to the concrete.
Q. And I understood your earlier testimony to be that that is one condition that makes it difficult for water to exit. Am I misunderstanding earlier testimony?
A. No, that's correct.
Q. Have you reviewed the plans at all to determine whether or not the stone in that location was built in accordance with the plans?
A. I don't think that detail shows on the drawings anywhere.
Q. If you were to design the decks, is there a way that you would design the intersection of the concrete and the stonework differently? Is there any feature or detail that you would include at that location that you don't believe is shown in the as-built condition?
A. I would have the concrete -- I wouldn't have the concrete butting into stone. I would have the concrete or whatever that top surface is that's draining overhang the stone. I would have a drip edge to where that water could drip off the edge

BY MR. ORR:

Adequately before trial?

BY MR. TATE:

Yes, sir.

(OFF THE RECORD).

EXAMINATION RESUMED BY MR. ORR:

Q. Would you look at Exhibit Number 176, please, which is your scope of repair?

A. Yes.

Q. On SK-2, which is the side of Unit 62, how was it determined that there was no WRB behind that area?

A. I took a pry bar and pried up some of the siding and looked under it.

Q. Okay. As you look at this, I assume we're looking at the -- is that the parking lot side?

A. Yes.

Q. So on Unit 62, more towards the parking lot, there was no WRB?

A. Yes.

Q. Did you look at the area below the intersection of the roof of 63 with the wall of 62 to determine the condition of the wall there?

A. Where? At the bottom of the hatch pattern?

Q. Yes.

A. Oh, no, I did not.

Q. Yeah, in the wall -- the wall area on the parking lot side of the front wall of Unit 63.

A. I didn't look at the base of any wall there, no. Just in the main field.

Q. Did you investigate any or look at any of the wall areas that were adjacent to the step flashing where the roof and the walls intersect?

A. Yes.

Q. Did you observe any deterioration of those walls?

A. No.

Q. Did you look at any roof sheathing to determine the condition of that?

A. No, I couldn't see the roof sheathing from where I was looking.

Q. As I understand it, the issue that you found with the cantilevered sections on the Parkside units was there was some discoloration of the cedar ceiling board adjacent to this intersecting wall?

A. Yes.

Q. And that was due to the end of the cedar ceiling board being more porous and so it absorbed some of the moisture from the cedar trim board?

A. Yes.

Q. You indicated that it appeared to you that Mr. Catoe or Catoe Construction Company or whoever

constructed the elevated decks according to the plans?

A. According to most of the details on the plans, yes.

Q. Are there details on the plans he did not follow?

A. Yes.

Q. What were those?

A. I can show you on the drawings.

Q. May I come look over your shoulder?

A. Absolutely. We'll start with the framing plan first, because that's where a framer, I think, would start his particular looking at the drawings. And this is sheet A-11. And it's the middle detail -- the middle plan in here and it's the ground floor framing plan. It shows treated 2x10's at 12 inches on center. There's a cloud around it. I think at one time it was 16 inches on center. And it shows the perimeter boards at the lake side, the lake edge of the decks and the screen porch. And they have a little symbol and a triangle -- I mean, a diamond shape. And the schedule calls for that to be four 2x10's. And those four 2x10's are drawn to be flush with the outside face of the columns. If you look back at A-8 and you look at column detail 15A-8, it shows those four 2x10's coming into the middle of the column. So I'm not

take for it. I don't know.

Q. And you don't know what Carl Catoe Construction -- what issue, if any, Carl Catoe Construction raised or with whom?

A. I do not.

Q. As I understood what you said when you were deciding not to investigate the decks any further, said it -- as I wrote down it looked like Catoe constructed the deck in accordance with the plan and as directed by the general contractor. Did he tell you a specific direction he got from the general contractor about constructing the decks?

A. I believe he told me he asked if he was supposed to build them flat or not. And I think he was told to build them according to the drawings as best he could and to build them flat.

**BY MR. ORR:**

I think that's all I have. Thank you.

**BY THE WITNESS:**

Okay.

**BY MS. LANG:**

Anybody on the phone have any questions?

**BY MR. BELCHER:**

Alan Belcher. No questions.

**BY MR. LYLES:**

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:

A. I don't know.
Q. How about this, at the height of Marick's existence when it was at its busiest, how many employees did it have?
A. Probably three or four.
Q. Describe the job duties or titles of those employees.
A. Administrative Assistant in the office. Would have had a superintendent, assistant superintendent and probably a laborer.
Q. So when Marick was doing its construction it subcontracted out its work?
A. Correct.
Q. And who at Marick was responsible for selecting and contacting with subcontractors?
A. Me.
Q. And who at Marick was responsible for observing and supervising the work of subcontractors?
A. Our superintendents.
Q. Can you name your superintendents at Marick, and tell me the years that they were with Marick?
A. I don't know about that, but I can tell you some of the superintendents.
Q. Okay.
A. Matthew Gooch ---

Q. Can you spell that last name?
A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday, just like it sounds. There's a couple I can picture but I can't name. There are probably two, maybe three others.
Q. Who was the superintendent who was responsible for observation and supervision of the subcontractors in connection with what Marick did at the Stoneledge project?
A. Nathan.
Q. Hornaday?
A. Yes.
Q. Did Mr. Hornaday hold any sort of license, contractor's license?
A. I don't know. Not that I know of.
Q. Who hired Mr. Hornaday?
A. I did.
Q. Are you the one that assigned him to the -- his responsibilities in connection with the Stoneledge project?
A. Yes.
Q. What were his qualifications such that you felt comfortable he could supervise subcontractors' work at the Stoneledge project?
A. He had worked as a subcontractor for us for years

A. There were one or two laborers down there and an on-site administrative assistant.
Q. What would you have expected the role of the laborers of Marick to be at the Stoneledge project?
A. Well, Nathan hired them and supervised them so he would have told them what their responsibilities would have been.
Q. What was your expectation of what work they would have been performing for Marick?
A. Whatever Nathan needed.
Q. Okay. Do you know as you're testifying today what work was, at Stoneledge, was actually done by laborers employed by Marick?
A. I know some. They would clean up, keep the streets clean, keep the units clean. Those are things I observed when I went down there.
Q. Is there any aspect of the construction of the Stoneledge units that was done by Marick that you believe was self-performed by Marick or was it all done by subcontractors?
A. I think it was all subcontracted other than the cleanup like they -- like I mentioned.
Q. Okay. Did Mr. Hornaday ever express to you any concern about the quality of the work at Stoneledge that was being performed by the subcontractors?

Q. Had you had any experience with Carl Catoe before?
A. No.
Q. Did you have occasion to talk with or observe the work being done by Carl Catoe or his crews?
A. Some.
Q. Did you have any questions about the work they were doing?
A. No, they seemed to be doing fine, and then of course I got most of my input from Nathan who was there every day.
Q. You indicated that you would -- how often would you talk with him about what was going on?
A. We'd talk daily, or every other day.
Q. How frequently would you actually visit the site?
A. Depends on when it was, depended on what was going on, so you'd have to be a little more specific.
Q. During the time the framing was being done and the building wrap was installed, the flashing installed, how frequently ---
A. Probably once a week.
Q. About once a week?
A. Uh-huh (indicates affirmative response). Maybe every week and a half, week to week and a half.
BY MR. ROOT:
Larry, I'm sorry, I couldn't. Was that once a week

he was on site?

WITNESS ANSWERS:

A. A week to a week and a half.

Q. He was on site once a week or once every week and a half. During the time that the framing work was being done, did Nathan ever indicate to you that he had any problems or had corrected any of the work that Carl Catoe was doing?

A. I don't recall any workman type problems except for one. We had a floor truss that was put in wrong and we had to support it. That's the only thing that jumps out at me. Of course, we always looked at scheduling, and for the most part he manned the job the way he was supposed to.

Q. Any problems associated with the installation of the building wrap or the flashing?

A. Not that I know of. Nathan would've seen that.

Q. Pardon?

A. Nathan would've seen that and he didn't mention it to me.

Q. If there had been a problem, would he have mentioned it to you?

A. You have to ask him.

Q. Would you, I mean, based upon you working with him over the time, would you have expected him to ---

A. No.
Q. You were on site approximately once a week?
A. Once to once, every week and a half.
Q. And your communications, though, with Nathan were how consistent?
A. Daily.
Q. What kind of ---
A. Well, I say "daily," there may have been a day he was gone or I was gone, but for the most part daily.
Q. As far as a quantity of time, how much time during a typical week would you spend talking to Nathan?
A. No idea.
Q. Couldn't say?
A. Wouldn't even venture to guess. One week it could be, you know, an hour, next week it could be five minutes, next week it could be two hours.
Q. I understand. Was there any particular stage of construction during which you were on the site more frequently than another stage?
A. Probably during the layout, like when they were staking or that kind of thing. If they were doing any work on the lake itself, then I was there.
Q. As to Nathan's onsite time, you said essentially for a vacation or something where you would expect someone to be absent from the site, he was generally

there every day?
A. Correct.
Q. Typical eight to ten-hour workday?
A. Typical ten to twelve.
Q. Ten to twelve. Did you have any, during the course of the construction of Phase II, any interactions with any employees or representatives of Builders First Source, BFS?
A. Yes.
Q. Who?
A. Lots of people. Mike Green, Brock Bauknight, Elaine, can't remember her last name, for the windows ---
Q. And that's what I was going to get to next if you want to say that while you go through their names, you can tell me what you dealt with them about. You said Elaine you dealt with windows?
A. Right. I think windows and doors.
Q. Mike Green?
A. Mike Green, I dealt with materials and labor.
Q. All right, go ahead.
A. And Brock Bauknight was my outside representative that I dealt with on all of those things.
Q. General outside sales?
A. That's right. He handled my account.

Catoe? That is, who did monthly inspections for subcontractor payment?

A. Nathan would inspect -- well, there was a draw schedule that Mike Green and I worked out ---

Q. Okay.

A. --- for all aspects when we did the contract and then all Nathan had to do was look and see what portion of that schedule was done and then he'd sign off on it and then we'd pay it. Not Carl, BFS.

Q. Yeah, right, because Carl was -- Carl Catoe was not your subcontractor, correct?

A. That's correct.

Q. Only Builders First Source was?

A. Correct.

Q. But nonetheless you got to occasionally communicate with Carl Catoe by virtue of being on the site?

A. Sure.

Q. Did anyone at Marick ever call or otherwise contact Carl Catoe Construction regarding any warranty issues?

A. I'm sure Nathan did.

Q. You say that you're sure he did. What do you know that he did?

A. Siding that had warped and popped, a truss, the truss that was over-spanned.

Q. Was Nathan calling Carl Catoe or Builders First Source with these issues?

A. Both. I mean it would start with Carl to see if it could be worked out in the field, I'm sure, but then it would go -- if it couldn't be worked out in the field with Carl then it would go to Builders First Source.

Q. I had asked you about warranty issues, and to me typically that means issues once you've left a site ---

A. Oh, oh, I don't know of -- I don't know of any.

Q. But you were starting to tell me about some issues while construction was ongoing ---

A. Right.

Q. --- and you mentioned some siding that was warping and popping and then you mentioned the over-spanned truss issue that you already talked about with David. On the siding that was warping or popping, was it an isolated board, was it widespread or was it somewhere in between those two?

A. No, I mean, it was an isolated board according to Nathan. He called and asked Carl to fix it. Normally they were on site, but after they had left site then he'd have to call Builders First Source.

Q. And was Builders First Source generally responsive?

A. Would ---
Q. I'm sorry, the finished floor, not the finished grade.
A. No.
Q. Would you expect it to show the grade at the building?
A. Yes, within plus or minus.
Q. Would you expect it to show the slope away from the building?
A. Yes.
Q. If the Freeland drawings don't show or did not show the grade at the building, how would the -- to your knowledge, how would the grading subcontractor know where to set the grade?
A. You're asking a hypothetical question there. It should show it, period.
Q. I think you said that you assumed that Nathan contacted Hutch N Son regarding some issues with the grade, do you know that for sure or do you just assume that?
A. No, I know that for sure.
Q. Okay. And that was relating to this standing water?
A. Standing water and the slope.
Q. And the slope?
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.

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Deposition of ***RANDY STILL***

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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:

Object to the form.

WITNESS ANSWERS:

A. I think that's a legal question for "duty." You would expect they would but I don't know contractually. I think it becomes a legal question of duty.

Q. It is a duty, is it not, of the general contractor to comply with the applicable building codes in the performance of a project?

A. I would think so.

Q. Is it the duty of a general contractor to coordinate the work of subcontractors?

BY MR. IMHOFF:

Object to form.

WITNESS ANSWERS:

A. I would think so to the extent he understands that coordination effort.

Q. And if he doesn't understand the coordination effort what should the general contractor do?

A. Ask questions.

Q. Of whom?

A. Subcontractors, make sure they're putting them together correctly.

Q. Is it a duty of the general contractor on a project 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

obligation in the construction or installation of the low slope roofs, whether it be code violation, violation of the design documents or non-compliance with the design documents or violation of manufacturers' installation instructions or any other obligation on the installation of the low slope roofs?

A. I think the only place in the low slope roofs that there is question is there's some very limited areas where felts are missing, and that is an omission of felts, a single layer of felts.

Q. Let's talk about that for just a minute. 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 practice and the code?
A. Yes.
Q. Let me go back to my question then again. If based upon that, if there are violations of code such as a completely missing felt under a roof, do you hold the opinion that the general contractor has violated the code or some other obligation if the work was done by a subcontractor?
A. No, but clearly when something like felt is missing

or a prototypical installation and that will serve as the standard by which an installation is accepted. For example, if you put a window in and you've got a mock-up wall and you put in the rough opening flashing and you put in the -- all the flashings that would be there, all the peel-and-stick and you've got all of the entities, for example, the window manufacturer and the wrap manufacturer and the peel-and-stick manufacturer and the exterior cladding person there. And if they're all there and they say, "Yeah, this is the way it needs to be done." And your subcontractor who's doing all those different components install it that way, says he's going to install it that way, that's how it should be installed. I'm not sure that answers your question but ---

Q. Okay. Let me try to get to it a little bit different way. Are you familiar with the term "paper contractor"?

A. I'm not sure.

Q. Do you know if Marick actually drove any nails or constructed any part of Stoneledge?

A. I think my understanding is he did not self-perform any work.

Q. What in your opinion is the role of a general

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

A. No.

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

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

Q. Is that a "no"?

A. No.

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

A. No.

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

A. No.

Q. I don't think I have any more questions for you

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

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vs.

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

Defendants.

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DEPOSITION of CARL CATOE

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Pursuant to notice, a deposition was taken in the above case on the December 5, 2011, commencing at approximately 10:15 a.m. attended by counsel as follows:

A. I don't know.
Q. What did you do in connection with the roof? What did Carl Catoe do?
A. We installed the roof trusses.
Q. And sheeting?
A. Sheeting.
Q. How about the felt or paper?
A. I don't think that was in my scope of work.
Q. But you didn't install the shingles?
A. We did not install the shingles.
Q. But you set the windows and set the doors?
A. We set the windows and set the doors.
Q. And y'all did the rough opening flashing for the windows?
A. I don't understand the question.
Q. You framed the stud walls; correct?
A. Correct.
Q. And then y'all set the windows; correct?
A. Correct.
Q. And in setting the windows, was Carl Catoe responsible for flashing the rough opening that the windows were set in?
A. I wouldn't call it flashing. I would call it -- it's called wrap or -- is that what you're referring to?

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Q. Sure.
A. Yes, we were required to install the house wrap.
Q. How about flashing around windows?
A. Window tape.
Q. Y'all were required to do that?
A. Yes.
Q. And did Carl Catoe install the siding?
A. Yes.
Q. And did Carl Catoe install the sheathing? The exterior wall sheathing?
A. Yes.
Q. And did Carl Catoe install the building wrap?
A. Yes.
Q. And all that was the responsibility of Carl Catoe?
A. Yes.
Q. In Phase II?
A. That's correct.
Q. And in connection with the porches and the decks, Carl Catoe was responsible for framing those porches and decks; is that right?
A. That's correct.
Q. And flashing the components of the decks that needed to be flashed?
BY MR. ROOT:
Objection.

WITNESS ANSWERS:
A. No flashing at all.
Q. Carl Catoe didn't do the stone work?
A. No.
Q. And there was no flashing that was required between the heated walls and the decks?
A. That's correct.
Q. And that is there was no flashing required in the plans or that's just not something that would ever be flashed?
A. When the question come up in the beginning about any flashing behind the band, and I was told not to do any flashing.
Q. And who told you that?
A. I believe it was Nathan and Mike. They were not going to do anything. The waterproofer would install all the flashing on the deck.
Q. How does the waterproofer install flashing after the siding has gone up?
A. He doesn't.
Q. Did the waterproofer do his work after you did your work?
A. No.
Q. So the waterproofer was actually there before Carl Catoe finished its work?

A. There again, "Go look at Phase I."
Q. So you did ask and you were told to go look at Phase I?
A. "Go look at Phase I."
Q. Other than that, were the plans and specifications that you received satisfactory?
A. A lot to be desired.
Q. They left a lot -- what do you think that was missing in the plans? What would you have liked to have seen, I should say, in the plans?
A. A lot more details.
Q. Are there any conditions out there that you can specifically recall not having details that concerned you?
A. There was a question about the offsets, what happened there. Was this rated? Was this a two-hour wall? Was this a one-hour wall? Is this -- has it got to go horizontal? Does it continue? How far does it continue? Different things like that.
Q. And who provided you with the direction that you used to build those conditions?
A. Nathan.
Q. So that came directly from Marick?
A. Yes.

feet over. I don't believe it was required on that job.

Q. Who told you it wasn't required?

A. I think it was Nathan. I'm not sure.

Q. Do you know where Nathan was getting that information?

A. I don't know.

Q. And you didn't talk to the inspector about that?

A. There again, they get mad when I talk to the inspector. They don't want me talking to the inspector. They don't want me calling the architect.

Q. How many times did you meet or speak with Rick Thoennes?

A. The only time I met with him is in the beginning. I remember him coming to the jobsite a couple three times. There was never a conversation. "How you doing, Carl?" "How you doing, Mr. Rick?" That was pretty much it.

Q. Did you have a full set of plans onsite the entire time you were there?

A. I had a set of plans. It was -- I didn't have like Unit A, B and C in that building. I had A -- I'd get unit plans, but I didn't have something telling me that Building 20 was A, B and C.

Q. How did you determine that?
A. Sometimes I'd ask Nathan.
Q. And he had something that would tell him that
A. He had something that would tell me, Building 20 was, you know, A, B and a C or D. You know, whatever.
Q. Did you leave those plans onsite for your crews or did you take them with you?
A. I mean, not that master set, no. I mean, he had that set. All I had was what I had. That's all I ever had was a unit -- set of unit plans.
Q. But did you take them with you or did you leave them for your superintendents or ---
A. I believe I took them with me. I believe they're -- we actually have them.
Q. Did you have any issues with Nathan while you were onsite?
A. Would you be more specific, please?
Q. Well, did you ever have any issues with what he was telling you to do or not telling you to do?
A. I thought looking -- you know, going and looking at Phase I in the beginning was just, you know, kind of weird. But, you know, that was the answer every time, "Go look at Phase I."
Q. What did you do if you weren't able to determine

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 ***NATHAN HORNADAY***

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Pursuant to notice, a deposition was taken in the above case on the March 30, 2012 commencing at approximately 10:15 a.m. attended by counsel as follows:

A. Yes.
Q. --- generally?
A. Yes.
Q. Had you ever -- when you went to Stoneledge, had you ever been a supervisor or superintendent on a job?
A. No.
Q. When you went over there, did you think that you had the skills to be -- did you call yourself supervisor or superintendent first of all. Let me ask you that. Or what title did you use, if you used one?
A. Supervisor. I mean, I was mostly just supervising everything that was being done.
Q. Were you supervising subcontractors?
A. Yes.
Q. Or did Marick have any other employees doing such things as framing or other work of that type?
A. No.
Q. So it was all -- all the work was being done by subcontractors?
A. Yes.
Q. Prior to the time you went to Stoneledge, had you ever supervised subcontractors?
A. No.

Q. When you arrived at Stoneledge, did you feel like you were up to that job?

A. Yes.

Q. In other words, you felt like you had enough general experience to be able to monitor what the different subs were doing and to determine whether they were doing it correctly or not?

A. Yes.

Q. And were there times when you thought they were not doing something correctly?

A. No.

Q. So basically the subs you felt like were proceeding correctly?

A. I believe each sub, depending on what he did, I mean, obviously knew more than I did about it. That's why we hired them. And each sub, you know, was an expert in their field. So I was basically there to make sure -- schedule them to do their work, when to come in, and make sure they got it done.

Q. I understand that. 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.
Q. Do you remember specific instances, or are you just saying that from time to time ---
A. From time to time I would see something that they would cut a corner on, but I would talk to them and they would fix it. But it was nothing major. It was like nail guards on pipes, painting, you know, caulking, stuff like that, on the inside -- the interior unit.
Q. Did you do any work on Phase I?
A. I did a lot of repair work.
Q. On Phase I?
A. Yes. I ---
Q. And what -- I'm sorry.
A. --- supervised a lot of repair work.
Q. By the way, if I start to ask you a question before you finish -- I'll try not to do that, but sometimes you can't help it.
A. Okay.
Q. Just let me know there's more in your answer.
A. Okay.
Q. Did this supervising of repair work in Phase I, was that going on while ---
BY MR. GOLDSMITH:
Do we have someone on the line?

FILED OCONEE, S.C.
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 10 PM 12:52

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRCP and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Defendants Marick Home Builders, LLC and Rick Thoennes' Memorandum in Support of the SCRCP 59(e) Motion as to Carl Catoe and Affiliated Subcontractors hired by Carl Catoe** to the following counsel of record:

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
PO Box 773
Charleston, SC 29401
rtl@lylesfirm.com
chb@lylesfirm.com
*Attorney for Plaintiffs*

David Root, Esquire
Kernodle, Root & Coleman
Post Office Box 13897
Charleston, S.C. 29422
droot@kernodlelaw.com
*Attorney for Mike Green and Builders FirstSource Southeast Group*

Shelley Montague, Esquire
Gallivan, White & Boyd, PA
Post Office Box 7368
Columbia, S.C. 29202
smontague@gwblawfirm.com
*Attorney for Hutch N Son Construction*

K. Lindsay Terrell, Esquire
Chris Smith, Esquire
Clarkson Walsh Rheney & Terrell,PA
1164 Woodruff Road
Greenville, SC 29607
lterrell@clarksonwalsh.com
csmith@clarksonwalsh.com
*Attorney for T. G. Construction, LLC*

D. Andrew Williams, Esquire
Joshua D. Shaw, Esquire
Turner Padget Graham & Laney, PA
Post Office Box 1473
Columbia, SC 29202
Dwilliams@turnerpagdget.com
jshaw@turnerpadget.com
*Attorneys for Defendant Martin Hernandez-Aviles*

Erin Culbertson, Esquire
Kehl Culbertson, LLC
Post Office Box 1904
Greenville, SC 29602
erin@culbertsonalexander.com
*Attorneys for Medallion at Keowee,LLC and Bradford D. Seckinger*

Alan Belcher, Esquire
Hall, Booth, Smith & Slover, P.C.
2113 Middle Street, Suite 305
Sullivan's Island, S.C. 29482
abelcher@hbss.net
*Attorney for Bostic Brothers Construction, Inc.*

Lawrence B. Orr, Esquire
Ashley B. Nance, Esquire
Orr, Elmore & Ervin, LLC
Post Office Box 2527
Florence, S.C. 29503
lbo@orrfirm.com
abn@orrfirm.com
*Attorneys for Miller/Player & Associates*

Mason A. Goldsmith
Kenneth Jay Anthony
Elmore Goldsmith, PA
Post Office Box 1887
Greenville, SC 29602
mag@elmoregoldsmith.com;
janthony@elmoregoldsmith.com;
*Attorneys for Southern Concrete Specialties*

Charles G. Blackburn, Esquire
Ryan Oates, Esquire
Murphy & Grantland, PA
Post Office Box 6648
Columbia, S.C. 29260
cblackburn@murphygrantland.com
roates@murphygrantland.com
*Attorney for Tinsley Electrical, LLC*

James P. Walsh, Esquire
Clarkson Walsh Terrell & Coulter, PA
1164 A Woodruff Road
Greenville, S.C. 29607
jwalsh@clarksonwalsh.com
*-and-*
Shawn T. Pinkston, Esquire
Hall Booth Smith & Slover, P.C.
2113 Middle Street, Suite 305
Charleston, S.C. 29482
spinkston@hbss.net
*-and-*
Ken Jones, Esquire
Hall Booth Smith & Slover, PC
191 Peachtree Street NE, Suite 2900
Atlanta, GA 30303
kjones@hbss.net
*Attorneys for Heyward Electrical Services*

S. Markey Stubbs, Esquire
Baker Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
mstubbs@brblegal.com
*Attorney for Upstate Utilities, Inc*

Stephen P. Hughes, Esquire
William T. Young, Esquire
Howell Gibson & Hughes, PA
Post office Box 40
Beaufort, SC 29901
steve@hghpa.com
byoung@hghpa.com
*Attorney for Ester Moran Mentado*

Geoffrey Gibbon, Esquire
McAngus Goudelock & Courier
Post Office Box 2980
Greenville, SC 29602
ggibbon@mgclaw.com
*Attorney for Socorro Castillo Montel*

Elizabeth Martineau, Esquire
Eric W. Rowell, Esquire
Martineau King, PLLC
Post Office Box 31188
Charlotte, NC 28231
emartineau@martineauking.com
erowell@martineauking.com
*Attorneys for Herberto Acuna Hernandez*

David M. Yokel, Esquire
David M. Yokel, LLC
P.O. Box 10453, F.S.
Greenville, S.C. 29603
dyokel@yokellawfirm.com
-and-
William I. Bouton, Esquire
Robert Wilkins, Esquire
Wilkins & Bouton, LLC
15 Washington Park
Greenville, SC 29601
wbouton@wilkinsbouton.com
rwilkins@wilkinsbouton.com
*Attorney for KMAC, Inc., d/b/a KMAC North Carolina*

Christopher G. Lewis, Esquire
Teague Campbell Dennis & Gorham
22 South Park Square, Suite 800
Asheville, NC 28801
clweis@tcdg.com
*Attorney for Francisco Villalobos Lopez*

Chad E. Poteat, Esquire
Brown and Brehmer
PO Box 7966
Columbia, SC 29202
cep@brownandbrehmer.com
*Attorney for Eason Construction, Inc.*

Michael B. T. Wilkes, Esquire
Melissa M. Nichols, Esquire
Lindsay L. Builder, Esquire
Wilkes Law Firm, PA
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
mwilkes@wilkeslaw.com
mnichols@wilkeslaw.com
lbuilder@wilkeslaw.com
*Attorneys for Clear View Construction, LLC and Michael Franz*

Roy R. Hemphill, Esquire
McDonald Patrick Poston Hemphill & Roper, LLC
Post Office Box 1547
Greenwood, SC 29648
rhemphill@mcdonaldpatrick.com
*Attorney for Rick Thoennes, Rick Thoennes, III, and M Group Construction & Development, LLC*

Francis M. Mack, Esquire
Emily R. Gifford, Esquire
Richardson Plowden
1900 Barnwell Street
Columbia, SC 29201
fmack@richardsonplowden.com
egifford@richardsonplowden.com
*Attorneys for SDI Funding, LLC*

Frank Smith, Esquire
Jarred Garraux, Esquire
Richardson Plowden
1900 Barnwell Street
Columbia, SC 29201
fsmith@richardsonplowden.com
jgarraux@richardsonplowden.com
*Attorneys for Ludwig Corporation, LLC*

Cynthia Buck Brown, Esquire
Harper Lambert & Brown, PA
Post Office Box 908
Greenville, SC 29602
Cbrown@hlblegal.com
-and-
Wallace K. Lightsey
Wyche Burgess Freeman & Parham, PA
Post Office Box 728
Greenville, SC 29602
wlightsey@wyche.com
*Attorneys for IMK Development Co., LLC, Integrys Keowee Development, LLC, William C. Cox, and Larry D. Lollis*

Edward D. Buckley, Jr., Esquire
Nicholas J. Rivera, Esquire
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401
ebuckley@ycrlaw.com
nrivera@ycrlaw.com
*Attorneys for Everado Jarmamillo*

Paul E. Hammack, Esquire
Clawson & Staubes, LLC
223 W. Stone Avenue, Suite 100
Greenville, SC 29609

Ronald G. Tate, Jr., Esquire
Steven E. Buckingham, Esquire
Duffie Powers, Esquire
Batten Farrar, Esquire
Gallivan, White & Boyd, PA
Post Office Box 10589
Greenville, S.C. 29603
rtate@gwblawfirm.com
sbuckingham@gwblawfirm.com
dpowers@gwblawfirm.com
bfarrar@gwblaw.com
-and-
Dana W. Lang, Esquire
Greg Horton, Esquire
Womble Carlyle, PLLC
Post Office Box 999
Charleston, S.C. 29402
dlang@wcsr.com
ghorton@wcsr.com
*Attorneys for Carl Catoe Construction, Inc.*

J.J. Anderson, Esquire
Curtis Martin, Esquire
Anderson & Reynolds, LLC
37 Broad Street
Charleston, SC 29401
janderson@arlawsc.com
cmartin@arlawsc.com
-and-
William B. Woods, Esquire
Woods Law Firm, LLC
PO Box 2444
Lexington, SC 29071
Bwoods@woodslawsc.com
*Attorneys for Jose Nino*

Anne R. Culbreath, Esquire
Turner Padget Graham & Laney, PA
PO Box 22129
Charleston, SC 29413
jallen@turnerpadget.com
-and-
C. Clay Olson, Esquire
David D. Ashley, Esquire
Watson Law Group
180 Meeting Street, Suite 210
Charleston, SC 29401
colson@watsonlawgroup.com
dashley@watsonlawgroup.com
*Attorneys for Vincente Morales d/b/a Morales Masonry*

phammack@clawsonandstaubes.com
*Attorney for Alejandro Avalos Cruz*

This 9 day of April, 2014
Spartanburg, SC

By: Amanda D. Steward
Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA )
)
COUNTY OF OCONEE )

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

Plaintiffs, )

VS. )

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

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

**DEFENDANTS CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ'S BRIEF IN OPPOSITION TO MARICK HOME BUILDERS AND RICK THOENNES' S.C.R.C.P 59(e) MOTION TO RECONSIDER AND ALTER JUDGMENT**

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

Defendants,

Defendants Clear View Construction, LLC ("Clear View") and Michael Franz (collectively "Clear View Defendants") submit this Brief in Opposition to the Motion to Reconsider of Marick Homebuilders, LLC and Rick Thoennes (collectively hereinafter "Marick"). For the reasons set forth below, Marick's Motion to Reconsider and Alter Judgment should be denied in its entirety.

## PROCEDURAL BACKGROUND

On August 24, 2012, Clear View Defendants moved for summary judgment on Marick's claims. Clear View Defendants filed a Brief in support of its Motion on August 31, 2012. Marick filed a Memorandum in Opposition to Clear View's Motion, as well as numerous other parties motions, on September 4, 2012. The Court conducted a hearing on Clear View Defendants and the other parties' Motions on September 5, 2012. The Court requested that Clear View Defendants submit a proposed Order on Marick's Negligence and Equitable Indemnification claims and that Clear View Defendants, Builders FirstSource Southeast Group, LLC ("BFS"), and Southern Concrete Specialties, Inc. ("Southern Concrete") submit a proposed

Order on Marick's Breach of Contract and Breach of Warranty claims (collectively "Orders"). In Orders dated January 11, 2013, the Court granted summary judgment in favor of Clear View Defendants as to all of Marick's cross-claims.

**STANDARD OF REVIEW**

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172,420 S.E.2d 834, 842 (1992). When an argument is presented before the trial judge but is not addressed in the judge's final order, a Rule 59(e), SCRCP, motion is proper to preserve the issue for appellate review. *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003).

"A party cannot raise an issue for the first time in a Rule 59(e), SCRCP, motion which could have been at trial [or at the substantive hearing.]" *MailSource, LLC v. M.A. Bailey & Assocs, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). "Post-trial motions [and post-hearing motions] are not necessary to preserve issues that have been ruled upon at trial [/hearing]; they are used to preserve those that have been raised to the trial court but not ruled upon. *Bailey v. Segards*, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001).

"Under Rule 59 (f), SCRCP, a Rule 59 (e) motion may in the discretion of the court be determined on the briefs filed by the parties without oral argument." *Pollard v. City of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). The decision to grant or deny such motions will be reviewed for an abuse of discretion. *See id.*

## ARGUMENT

### I. The Court Has Fully Ruled on the Pending Motions; Therefore, the Motions to Reconsider Are Unnecessary and Without Merit.

Marick's Rule 59(e) Motion should be denied because the Court properly found in the Orders that Marick's equitable indemnity claims must fail and that all of Marick's claims were claims for equitable indemnification. As noted above, Rule 59(e) Motions are intended to address situations when a trial judge has not addressed in a final order arguments raised before him. Each argument presented in Marick's Rule 59(e) Motion was properly decided and addressed after careful consideration of the arguments from both parties in the Court's January 11, 2013 Orders; therefore, there is no need to reconsider and alter judgment, and Marick's Motion should be denied in full.

#### A. The Court Properly Found that Marick Cannot be Adjudged Without Fault

In the Orders, the Court expressly found that Clear View Defendants are entitled to summary judgment on Marick's equitable indemnity claims because Marick cannot be adjudged without fault. Marick's argument that this finding was improper because discovery is not complete does not change the fact that summary judgment was properly granted based on the testimony in the record of Marick's own witnesses regarding Marick's ultimate responsibility for construction and compliance with the building code. The Court properly found that testimony in the record established that if Plaintiffs' allegations regarding defective construction are proven, Marick cannot be found without fault due to its role as the permit holder for Phase II construction and party ultimately responsible for construction and compliance with the building code. Marick's reliance on *Field v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), for the its proposition that a general contractor is not automatically responsible for the work of its

subcontractors is misplaced and is not a proper basis for altering the Court's judgment. The basis for Court's finding that Marick cannot be adjudged without fault is not premised on the general contractor being automatically responsible for the alleged negligence of its subcontractors. The Court's Orders were properly decided on the finding that to the extent Plaintiffs' allegations of defective construction in violation of the building code are proven, Marick as the general contractor, cannot be adjudged without fault.

**B. The Court Properly Found that Marick's Argument for Contractual Indemnification Must Fail**

The Court's Orders correctly found that Marick has presented no evidence to support a potential claim for contractual indemnification. Marick's failures to allege an entitlement to contractual indemnification in its Cross-Claims and then to offer any evidence supporting the enforcement of a contract in this matter was specifically addressed in the Court's Orders. As this matter was specifically addressed in the Court's Orders and Marick presents no authority supporting reconsideration or alteration of the Court's finding, this matter is not the appropriate subject of a Rule 59(e) Motion.

**C. The Court Properly Determined that Marick's Negligence, Breach of Warranty, and Breach of Contract Claims were Claims for Equitable Indemnification**

Marick erroneously contends that the Court cited no proper authority in support of finding that Marick's cross-claims were claims for indemnity. Contrary to Marick's contention, the Court relied on well-established authority in specifically holding that each of Marick's claims were based on the same issues and sought the same relief as its equitable indemnification claim. This matter was specifically addressed in the Court's Orders and the findings were based on

proper authority; therefore, this matter merits no reconsideration or alteration under a Rule 59(e) Motion.

**CONCLUSION**

The Court's decisions granting Clear View Defendants summary judgment were complete and proper, and Marick's Motion to Reconsider and Alter Judgment should therefore be denied. In further opposition to Marick's arguments, Clear View Defendants incorporate their Brief in Support of Motion for Summary Judgment and the arguments of Builders FirstSource-Southeast Group, LLC ("BFS"), Carl Catoe Construction, Inc., and Southern Concrete Specialties, Inc., contained in briefs and memoranda previously filed with Court.

April 9, 2013

By: _____

Michael B.T. Wilkes (S.C. Bar #6107)
mwilkes@wilkeslaw.com
Lindsay Builder (S.C. Bar # 81764)
lbuilder@wilkeslaw.com

WILKES LAW FIRM, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
(864) 591-1113

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

## CERTIFICATE OF SERVICE

I hereby certify that I have this date, electronically mailed a true and correct copy of ***Defendants Clear View Construction LLC and Michael Franz's Brief in Opposition to Marick Home Builders and Rick Thoennes' Motion to Reconsider and Alter Judgment*** to the following counsel of record:

*Robert T. Lyles, Jr., Esquire*
*Lyles & Lyles, LLC*
*PO Box 773*
*Charleston, SC 29401*
*rtl@lylesfirm.com*
*Attorney for Plaintiffs*

*David Root, Esquire*
*Kernodle, Root & Coleman*
*Post Office Box 13897*
*Charleston, S.C. 29422*
*droot@kernodlelaw.com*
*Attorney for Mike Green and Builders FirstSource Southeast Group*

*Shelley Montague, Esquire*
*Gallivan, White & Boyd, PA*
*Post Office Box 7368*
*Columbia, S.C. 29202*
*smontague@gwblawfirm.com*
*Attorney for Hutch N Son Construction*

*K. Lindsay Terrell, Esquire*
*Chris Smith, Esquire*
*Clarkson Walsh Rheney & Terrell,PA*
*1164 Woodruff Road*
*Greenville, SC 29607*
*lterrell@clarksonwalsh.com*
*csmith@clarksonwalsh.com*
*Attorney for T. G. Construction, LLC*

*D. Andrew Williams, Esquire*
*Joshua D. Shaw, Esquire*
*Turner Padget Graham & Laney, PA*
*Post Office Box 1473*
*Columbia, SC 29202*
*Dwilliams@turnerpagdget.com*
*jshaw@turnerpadget.com*
*Attorneys for Defendant Martin Hernandez-Aviles*

*Tom W. Dunaway, III, Esquire*
*Dunaway Law Office*
*PO Box 1965*
*Anderson, SC 29622*
*Kathy@dunawayfirm.com*
*Attorney for Medallion at Keowee, LLC and Bradford D. Seckinger*

*Alan Belcher, Esquire*
*Hall, Booth, Smith & Slover, P.C.*
*2113 Middle Street, Suite 305*
*Sullivan's Island, S.C. 29482*
*abelcher@hbss.net*
*Attorney for Bostic Brothers Construction, Inc.*

*Lawrence B. Orr, Esquire*
*Ashley B. Nance, Esquire*
*Orr, Elmore & Ervin, LLC*
*Post Office Box 2527*
*Florence, S.C. 29503*
*lbo@orrfirm.com*
*abn@orrfirm.com*
*Attorneys for Miller/Player & Associates*

*Mason A. Goldsmith*
*Kenneth Jay Anthony*
*Elmore Goldsmith, PA*
*Post Office Box 1887*
*Greenville, SC 29602*
*mag@elmoregoldsmith.com*
*janthony@elmoregoldsmith.com*
*Attorneys for Southern Concrete Specialties and Southern Basements, Inc.*

*Ryan Oates, Esquire*
*Murphy & Grantland, PA*
*Post Office Box 6648*
*Columbia, S.C. 29260*
*roates@murphygrantland.com*
*Attorney for Tinsley Electrical, LLC*

James P. Walsh, Esquire
Clarkson Walsh Terrell & Coulter, PA
1164 A Woodruff Road
Greenville, S.C. 29607
jwalsh@clarksonwalsh.com
*-and-*
Shawn T. Pinkston, Esquire
Hall Booth Smith & Slover, P.C.
2113 Middle Street, Suite 305
Charleston, S.C. 29482
spinkston@hbss.net
*-and-*
Ken Jones, Esquire
Hall Booth Smith & Slover, PC
191 Peachtree Street NE, Suite 2900
Atlanta, GA 30303
kjones@hbss.net
*Attorneys for Heyward Electrical Services*

S. Markey Stubbs, Esquire
Baker Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
mstubbs@brblegal.com
*Attorney for Upstate Utilities, Inc*

Stephen P. Hughes, Esquire
William T. Young, Esquire
Howell Gibson & Hughes, PA
Post office Box 40
Beaufort, SC 29901
steve@hghpa.com
byoung@hghpa.com
*Attorney for Ester Moran Mentado*

Geoffrey Gibbon, Esquire
McAngus Goudelock & Courier

*Elizabeth Martineau, Esquire*
*Eric W. Rowell, Esquire*
*Martineau King, PLLC*
*Post Office Box 31188*
*Charlotte, NC 28231*
*emartineau@martineauking.com*
*erowell@martineauking.com*
*Attorneys for Herberto Acros Hernandez*

*David M. Yokel, Esquire*
*David M. Yokel, LLC*
*P.O. Box 10453, F.S.*
*Greenville, S.C. 29603*
*dyokel@yokellawfirm.com*
*-and-*
*William I. Bouton, Esquire*
*Robert Wilkins, Esquire*
*Wilkins & Bouton, LLC*
*15 Washington Park*
*Greenville, SC 29601*
*wbouton@wilkinsbouton.com*
*rwilkins@wilkinsbouton.com*
*Attorney for KMAC, Inc., d/b/a KMAC North Carolina*

*Christopher G. Lewis, Esquire*
*Teague Campbell Dennis & Gorham*
*22 South Park Square, Suite 800*
*Asheville, NC 28801*
*clweis@tcdg.com*
*Attorney for Francisco Villalobos Lopez*

*Chad E. Poteat, Esquire*
*Murphy & Grantland, PA*
*Post Office Box 6648*
*Columbia, S.C. 29260*
*cpoteat@murphygrantland.com*
*Attorney for Eason Construction, Inc.*

*Paul E. Hammack, Esquire*
*Clawson & Staubes, LLC*
*223 W. Stone Avenue, Suite 100*
*Greenville, SC 29609*
*phammack@clawsonandstaubes.com*
*Attorney for Alejandro Avalos Cruz*

*Roy R. Hemphill, Esquire*
*McDonald Patrick Poston Hemphill & Roper, LLC*
*Post Office Box 1547*
*Greenwood, SC 29648*
*rhemphill@mcdonaldpatrick.com*
*Attorney for Rick Thoennes, Rick Thoennes, III, and M Group Construction & Development, LLC*

*Francis M. Mack, Esquire*
*Emily R. Gifford, Esquire*
*Richardson Plowden*
*1900 Barnwell Street*
*Columbia, SC 29201*
*fmack@richardsonplowden.com*
*egifford@richardsonplowden.com*
*Attorneys for SDI Funding, LLC*

*Frank Smith, Esquire*
*Jarred Garraux, Esquire*
*Richardson Plowden*
*1900 Barnwell Street*
*Columbia, SC 29201*
*fsmith@richardsonplowden.com*
*jgarraux@richardsonplowden.com*
*Attorneys for Ludwig Corporation, LLC*

*Cynthia Buck Brown, Esquire*
*Harper Lambert & Brown, PA*
*Post Office Box 908*
*Greenville, SC 29602*
*Cbrown@hlblegal.com*
*-and-*
*Wallace K. Lightsey*
*Wyche Burgess Freeman & Parham, PA*
*Post Office Box 728*
*Greenville, SC 29602*
*wlightsey@wyche.com*
*Attorneys for IMK Development Co., LLC, Integrys Keowee Development, LLC, William C. Cox, and Larry D. Lollis*

*Edward D. Buckley, Jr., Esquire*
*Nicholas J. Rivera, Esquire*
*Young Clement Rivers, LLP*
*25 Calhoun Street, Suite 400*
*Charleston, SC 29401*
*ebuckley@ycrlaw.com*
*nrivera@ycrlaw.com*
*Attorneys for Everado Jarmamillo*

Post Office Box 2980
Greenville, SC 29602
ggibbon@mgclaw.com
*Attorney for Socorro Castillo Montel*

Ronald G. Tate, Jr., Esquire
Duffie Powers, Esquire
Batten Farrar, Esquire
Gallivan, White & Boyd, PA
Post Office Box 10589
Greenville, S.C. 29603
rtate@gwblawfirm.com
dpowers@gwblawfirm.com
bfarrar@gwblawfirm.com
*-and-*
Dana W. Lang, Esquire
Greg Horton, Esquire
Womble Carlyle, PLLC
Post Office Box 999
Charleston, S.C. 29402
dlang@wcsr.com
ghorton@wcsr.com
*Attorneys for Carl Catoe Construction, Inc.*

J.J. Anderson, Esquire
Curtis Martin, Esquire
Anderson & Reynolds, LLC
37 Broad Street
Charleston, SC 29401
janderson@arlawsc.com
cmartin@arlawsc.com
-and-
William B. Woods, Esquire
Woods Law Firm, LLC
PO Box 2444
Lexington, SC 29071
Bwoods@woodslawsc.com
*Attorneys for Jose Nino*

Anne R. Culbreath, Esquire
Turner Padget Graham & Laney, PA
PO Box 22129
Charleston, SC 29413
aculbreath@turnerpadget.com

-and-
C. Clay Olson, Esquire
David D. Ashley, Esquire
Watson Law Group
180 Meeting Street, Suite 210
Charleston, SC 29401
colson@watsonlawgroup.com

*Finley B. Clarke, Esquire*
*Clarke Johnson Peterson McLean, PA*
*Post Office Box 1865*
*Florence, SC 29503*
*fclarke@cjpmlaw.com*
*Attorneys for Francisvo Javier Zarate d/b/a Zarate Construction*

*Jason M. Imhoff, Esquire*
*The Ward Law Firm, P.A.*
*Post Office Box 5663*
*Spartanburg, S.C. 29304*
*jimhoff@wardfirm.com*
*Attorney for Marick Home Builders, LLC*

*Thomas F. Dougall, Esquire*
*Dougall & Collins*
*1700 Woodcreek Farms Road*
*Elgin, SC 29405*
*tdougall@dougallfirm.com*
*Attorney for Coleman Waterproofing*

dashley@watsonlawgroup.com
*Attorneys for Vincente Morales d/b/a Morales Masonry*

Bonham S. Wilson, III, Esquire
Wilson & Heyward, LLC
Post Office Box 13117
Charleston, SC 29422
bwilson@wilsonheyward.com
*Attorney for MHC Contractors*

April 9, 2013

Spartanburg, South Carolina

By: 
Lindsay L. Builder

MARICK
HOME BUILDERS

# 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 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

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

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: 10/25/07 DATE: 10/26/07

Rick Thoennes
NAME and TITLE

Deryl Ward
Senior Attorney
NAME and TITLE

Marick Home Builder, LLC.
COMPANY NAME

BuildersFirstSource-Southeast Group, LLC
COMPANY NAME

SE Binder
WITNESSED BY

**Subject To Written Changes**

MARICK
HOME BUILDERS

# 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

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marickhomebuilders.com

MARICK
HOME BUILDERS

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   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

Clemson Const. ★ — COMPANY NAME

WITNESSED BY

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

MARICK
HOME BUILDERS

# 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

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.

BY: _____ BY: Shannon Gowder ★
DATE: 10/1/07 DATE: 10/1/07 ★

Rick Thoennes
NAME and TITLE

Shannon Gowder ★
NAME and TITLE

Marick Home Builder, LLC.
COMPANY NAME

Southern Concrete Spec. Inc ★
COMPANY NAME

WITNESSED BY

Office (864) 232-5555 ~ Fax (864) 232-6504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-37-00652

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 NOV 8 PM 12 48

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC. ET AL

PLAINTIFF(S)

IMK DEVELOPMENT CO., LLC, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC; MARICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., RICK THONNES

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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(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 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: Jury found for the Plaintiff on the cause of action for negligence as to Defendants Bostic Brothers Construction, Inc., IMK Development Co., LLC, and Marick Home Builders, LLC in the amount of $3,000,000.00; Jury found for the Plaintiff on the cause of action for breach of warranty of workmanlike service as to Defendants Bostic Brothers Construction, Inc. and Marick Home Builders, LLC in the amount of $1,000,000.00. Jury found for the Plaintiff on the cause of action for breach of fiduciary duty as to Defendants IMK Development Co., LLC, Integrys Keowee Development, LLC, Rick Thoennes, William C. Cox and Larry D. Lollis in the amount of $1,000,000.00 (See Attached Verdit Form and Apportionment Form for more specific details.) All parties have 10 days to submit post-trial motions.

**ORDER INFORMATION**

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : This trial encompassed Phase 1 of Stoneledge only.

**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) |
|---|---|---|
| Stoneledge at Lake Keowee Owner's Assoc., 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. | IMK Development Cp., LLC | $1,150,000.00 |



Cert Copies Mailed To All Parties

| | | |
|---|---|---|
| Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White | | |
| Stoneledge at Lake Keowee Owners' Assoc., 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, Robert White | Larry D. Lollis | $ 200,000.00 |
| Stoneledge at Lake Keowee Owners' Assoc., 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. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White | William C. Cox | $ 200,000.00 |
| Stoneledge at Lake Keowee Owners' Assoc., 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. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White | Integrys Keowee Development, LLC | $ 200,000.00 |
| Stoneledge at Lake Keowee Owners' Assoc., 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. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White | Marick Home Builders, LLC | $ 950,000.00 |
| Stoneledge at Lake Keowee Owners' Assoc., 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. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White | Bostic Brothers Construction, Inc. | $2,100,000.00 |

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP- 37-00652

Stoneledge at Lake Keowee Owners' Assoc., Inc., et al
PLAINTIFF(S)

IMK Development Co., LLC, et al
DEFENDANT(S)

Submitted by:

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

**DISPOSITION TYPE (CHECK ONE)**

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(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 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: See Page 1

**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) |
|---|---|---|
| Stoneledge at Lake Keowee Owners' Assoc.,Inc.,C.Dan Carson,Jeffrey J.Dauler, Joan W. Davenport,Michael Furnari,Donna Furnari,Jessy B.Grasso,Robert P.Hayes, Lucy H.Hayes,Ty Hix,Jennifer D. Hix,Paul W. Hund,III,Ruth E. Isacc,Michael D. Plourde, MaryLou Plourde,Carol C.Pope, [illegible] Steven B. Taylor, Bette J. Taylor,Robert White ,Nancy E.Grasso | Rick Thoennes | $ 200,000.00 |

Complete property description 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

2063
Judge Code

11/08/13
Date

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 NOV 8 PM 12:48

SCRCP Form 4C (03/2013)

## For Clerk of Court Office Use Only

This judgment was entered on the 08th day of November, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 08th day of November, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Robert T. Lyles

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jason Imhoff, Alan Belcher, Cynthia Brown

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

**Court Reporter:** Renee Tollison

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF OCONEE | ) | 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 | ) | Civil Action No.: 2009-CP-37-0652 |
| | ) | |
| Plaintiffs, | ) | APPORTIONMENT FORM |
| vs. | ) | |
| IMK Development Co., LLC, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, | ) | |
| Defendants | ) | |

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 NOV 8 AM 9 09

Using the combined **negligence** that proximately caused the plaintiffs' injuries as one hundred percent (100%), what percentage of that negligence is attributable to each defendant? [The percentage must add up to 100%.]

| | |
|---|---|
| IMK Development Co., LLC/Marick Home Builders, LLC | 40 % |
| Bostic Brothers Construction, Inc. | 60 % |
| **Total** | **100%** |

Using the combined breach of **implied warranty of workmanlike service** that proximately caused the plaintiffs' injuries as one hundred percent (100%), what percentage is attributable to each defendant? [The percentage must add up to 100%.]

| | |
|---|---|
| IMK Development Co., LLC/Marick Home Builders, LLC | 70 % |
| Bostic Brothers Construction, Inc. | 30 % |
| **Total** | **100%** |

Morris R. Cobb

MORRIS R. COBB, Foreman

Walhalla, South Carolina
November 7, 2013

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE TENTH JUDICIAL CIRCUIT |
| COUNTY OF OCONEE | ) | CASE NUMBER: 2009-CP-37-0652 |
| STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., *ET AL* | ) | |
| Plaintiffs, | ) | **VERDICT FORM** |
| vs. | ) | |
| IMK DEVELOPMENT CO., LLC, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., RICK THOENNES, | ) | |
| Defendants, | ) | |

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 NOV 8 AM 9 09

1. On the cause of action for negligence as to the Defendant Bostic Brothers Construction, Inc., we, the jury, unanimously find for the:

   ✓ Plaintiff

   _____ Defendant

   On the cause of action for negligence as to the Defendants IMK Development Co., LLC, and Marick Homebuilders, LLC, we, the jury, unanimously find for the:

   ✓ Plaintiff

   _____ Defendants

   If you find for the Plaintiff on the negligence cause of action as to any of the above Defendants, please set forth the amount of actual damages resulting to the Plaintiff as a result of negligence.

   three million dollars ($ 3,000,000.00 )

   After you have completed the above, please respond to Number 2, below.

2. On the cause of action for breach of warranty of workmanlike service as to the Defendant Bostic Brothers Construction, Inc., we, the jury, unanimously find for the:

✓ Plaintiff

_____ Defendant

On the cause of action for breach of warranty of workmanlike service as to the Defendant Marick Homebuilders , LLC ,we, the jury, unanimously find for the:

✓ Plaintiff

_____ Defendant

If you find for the Plaintiff on the breach of warranty of workmanlike service cause of action as to any of the above Defendants, please set forth the amount of actual damages resulting to the Plaintiff as a result of the breach of warranty of workmanlike service.

one million dollars ($ 1,000,000.00 )

After you have completed the above, please respond to Number 3 below.

3. On the cause of action for breach of fiduciary duty as to the following Defendants we, the jury, unanimously find for the:

a. ✓ Plaintiff

_____ Defendant IMK Development Co., LLC

b. ✓ Plaintiff

_____ Defendant Integrys Keowee Development, LLC

c. ✓ Plaintiff

_____ Defendant Rick Thoennes

d. ✓ Plaintiff

_____ Defendant William C. Cox

e. ✓ Plaintiff

_____ Defendant Larry D. Lollis

If you find for the Plaintiff as to any of the of the above Defendants on the breach of fiduciary duty on this cause of action, please set forth the amount of actual damages resulting to the Plaintiff as a result of the breach of fiduciary cause of action.

one millim dillars ($1,000,000.00)

Morris R. Cobb

MORRIS R. COBB, Foreman

Walhalla, South Carolina
November 7, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

---

Appellate Case No. 2013-001404

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

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

---

CERTIFICATION OF COUNSEL

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

Jason M. Imhoff (SC Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
The Ward Law Firm, PA
PO Box 5663
Spartanburg, SC 29304
(864) 582-3075
(864) 585-3090
jimhoff@wardfirm.com
rteague@wardfirm.com

*Attorneys for Appellants Marick Home Builders, LLC and Rick Thoennes*

September 22, 2014