

21554

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. 2013-001401

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,

v.

IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrays 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 Construction, Inc., Carl Compton Construction, Inc., TG 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, Carl Catoe Construction, Inc., TG Construction, LLC, Martin Hernandez-Aviles, Ester Moran Mentado, Herberto Acros Hernandez, Francisco Javier Zarate d/b/a Zarate Construction ("Zarate Construction"), Alejandro Avalos Cruz, Francisco Villalobos Lopez, and Socorro Castillo Montel are the Respondents.

FILED
OCT 30 2014
8th Judicial Circuit
Court of Appeals

Bostic Construction, Inc., Third Party Plaintiffs,

v.

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

**Record on Appeal
Volume II of III**

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

APRIL 10, 2013
WALHALLA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.

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VIVIAN H. CROSS
OFFICIAL COURT REPORTER

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

ENTERED PG.

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

P R O C E E D I N G S

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

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

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

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

14 THE CLERK: Yes, sir.

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

16 THE CLERK: Yes, sir.

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

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

22 MR. LYLES: Yes, ma'am.

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

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

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

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

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

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

9 THE COURT: Uh-huh?

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

14 THE COURT: There you go.

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

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

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

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

25 MR. LYLES: Yes, sir.

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

2 MR. LYLES: Yes, sir.

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

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

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

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

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

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

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

25 THE COURT: And your represent?

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

3 THE COURT: You represent?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 THE COURT: I---

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

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

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

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

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

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

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

1 THE COURT: Well, it---

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

4 THE COURT: Is it your motion?

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

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

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

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

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

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

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

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

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

6 (WHEREUPON, PROCEEDINGS CONTINUED.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Uh -- now -- yes, sir?

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

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

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

17 THE COURT: All right.

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

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

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

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

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

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

11 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. TATE: Yes, sir.

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

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

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

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

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

1 either.

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

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

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

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

12 MR. HARJEHAUSEN: Okay.

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

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

21 MR. TATE: Yes, sir.

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

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

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

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

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

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

10 MR. BUILDER: Medallion and---

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

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

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

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

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

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

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

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

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

9 THE COURT: Well, he's not.

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

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

15 MR. BUILDER: So I should---

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

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

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

20 MR. BUILDER: All right.

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

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

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

3 MR. BUILDER: Yes, Your Honor.

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

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

12 THE COURT: I appoint counsel?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 morning? Thank you.

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

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

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

15 MR. HARJEHAUSEN: I understand.

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

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

1 pending.

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

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

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

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

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

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

18 MR. ALBERGOTTI: Yes, sir.

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

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

1 MR. ALBERGOTTI: Yes, sir.

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

4 MR. ALBERGOTTI: Yes, sir.

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

6 MR. ALBERGOTTI: Yes, sir.

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

9 MR. DUNAWAY: Thank you, Your Honor.

10 THE COURT: And---

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

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

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

14 THE COURT: ---are too.

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

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

23 MR. ALBERGOTTI: All right, sir.

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

1 resolved. I mean, except for a time.

2 MR. ALBERGOTTI: Yes, sir.

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

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

7 THE COURT: All right.

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

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

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

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

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

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

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

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

5 MR. IMHOFF: Yes, Judge.

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

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

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

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

13 (WHEREUPON, COURT STOOD AT EASE.)

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

16 THE COURT: Certainly.

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

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

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

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

25 (WHEREUPON, PROCEEDINGS CONTINUED.)

1 THE COURT: All right, are we ready?

2 THE CLERK: Yes.

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

4 COURT REPORTER: Yes, sir.

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

9 (NO RESPONSE.)

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

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

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

16 THE COURT: All right. Mr. Imhoff?

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

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

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

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

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

7 THE COURT: Right.

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

11 THE COURT: Right.

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

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

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

1 that one?

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

3 THE COURT: Does somebody know?

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

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

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

8 THE COURT: Your name?

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

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

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

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

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

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

1 five?

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: I understand.

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

9 THE COURT: I understand.

10 MR. IMHOFF: ---as possible.

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

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

24 THE COURT: All right.

25 MR. IMHOFF: Thank you, Your Honor.

1 THE COURT: Mr. Root?

2 MR. ROOT: (NO VERBAL RESPONSE.)

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

5 MR. LYLES: Whoa.

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

8 (WHEREUPON, PROCEEDINGS CONTINUED.)

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

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

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

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

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

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

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

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

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

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

1 good length of time.

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

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

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

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

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

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

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

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

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

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

1 issue.

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

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

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

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

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

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

23 MR. SMITH: And Clear View.

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

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

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

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

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

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

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

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

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

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

24 THE COURT: All right.

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

1 Construction, L-L-C.

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

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

4 THE COURT: Pardon?

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

6 Construction.

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

8 MR. SMITH: Yes, sir.

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

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

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

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

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

15 THE COURT: All right, who represents Alejandro?

16 (NO RESPONSE.)

17 THE COURT: He's not here?

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

19 THE COURT: Oh, okay.

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

21 Ester Moran---

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

24 MR. TATE: Yes, sir.

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

1 MR. TATE: Aviles is one party.

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

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

6 THE COURT: Okay.

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

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

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

11 THE COURT: Moore?

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

13 THE COURT: Ward---

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

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

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

17 THE COURT: All right.

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

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

21 MR. TATE: Montel.

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

24 (NO RESPONSE.)

25 THE COURT: All right.

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

4 THE COURT: Z-R-A?

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

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

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

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

13 MR. TATE: Thank you, Your Honor.

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

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

17 THE COURT: All right.

18 MR. SMITH: I do, Your Honor.

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

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

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

24 MR. BUILDER: Your Honor---

25 THE COURT: Yes, sir?

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

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

10 MR. BUILDER: Lindsay Builder.

11 THE COURT: Builder?

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

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

15 MR. BUILDER: Clear View Construction---

16 THE COURT: Clear View.

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

18 THE COURT: Individually?

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

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

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

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

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

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

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

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

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

12 THE COURT: B; Mebin (sic).

13 MR. MEBANE: Yes, sir.

14 THE COURT: I'm sorry?

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

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

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

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

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

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

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

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

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

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

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

6 MR. ROOT: Yes, sir.

7 THE COURT: Um...

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

10 (WHEREUPON, PROCEEDINGS CONTINUED.)

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

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

19 MR. ROOT: Thank you, Your Honor.

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

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

24 MS. MURPH: Yes.

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

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

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

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

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

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

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

1 cause of actions?

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

5 THE COURT: All right; Mr. Imhoff?

6 MR. IMHOFF: Um---

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

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

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

19 MS. MURPH: Right.

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

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

1 here to The Court.

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

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

6 MS. MURPH: Yes.

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

17 MS. MURPH: We were late.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MS. MURPH: Yes.

17 THE COURT: It was?

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

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

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

24 THE COURT: All right; Mr. Lyles?

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

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

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

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

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

14 MR. IMHOFF: The appeal?

15 THE COURT: Yeah.

16 MR. IMHOFF: Yes, Your Honor.

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

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

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

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

8 MR. IMHOFF: Thank you, Your Honor.

9 MR. LYLES: Thank you.

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

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

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

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

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

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

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

14 MS. MURPH: Never mind, go ahead.

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

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

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

25 MS. MURPH: Right.

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

8 MR. IMHOFF: Against myself, Your Honor?

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

11 MR. IMHOFF: Okay; thank you.

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

13 MR. IMHOFF: All right.

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

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

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

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

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

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

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

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

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

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

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

23 MS. MURPH: Okay.

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

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

5 MS. MURPH: Okay.

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

9 MS. MURPH: Thank you.

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

12 MR. IMHOFF: Yes, Your Honor.

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

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

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

20 (WHEREUPON, PROCEEDINGS CONTINUED.)

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

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

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

25 THE COURT: All right, next?

1 MS. MURPH: Um---

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

4 MS. MURPH: Okay,

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

6 MS. MURPH: All right.

7 THE COURT: Yeah.

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

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

11 MS. MURPH: Okay.

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

14 MS. MURPH: Thank you.

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

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

19 (WHEREUPON, PROCEEDINGS CONTINUED.)

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

24 MS. MURPH: Okay.

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

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

5 MS. MURPH: Okay.

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

9 MS. MURPH: Thank you.

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

12 MR. IMHOFF: Yes, Your Honor.

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

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

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19 CONFERENCE, OFF THE RECORD.)

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

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

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

25 THE COURT: All right, next?

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

5 MR. BELCHER: Jerry Miller.

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

11 THE COURT: All right.

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

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

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

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

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

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

1 THE COURT: And this is against Bostic?

2 MR. MARTIN: Yes, sir.

3 THE COURT: And you are for Jose Nino?

4 MR. MARTIN: Yes, sir.

5 THE COURT: And who represents Bostic?

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

8 THE COURT: All right, uh---

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

10 THE COURT: ---Mr. Martin.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: All right; Mr. Belcher?

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

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

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

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

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

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

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

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

1 special relationship and all those other arguments.

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

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

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

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

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

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

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

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

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

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

1 contracts between these parties before---

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

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

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

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

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

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

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

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

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

1 argument, fine. All right.

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

9 THE COURT: 324?

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

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

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

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

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

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

7 THE COURT: ---failure---

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

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

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

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

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

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

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

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

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

7 THE COURT: The, uh, fact finders.

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

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

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

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

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

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

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

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

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

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

21 THE COURT: All right.

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

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

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

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

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

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

25 THE COURT: Yes, sir.

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

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

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

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

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

20 THE COURT: Well, I'm serious.

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

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

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

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

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

5 THE COURT: I understand.

6 MR. BELCHER: Now you got---

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

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

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

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

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

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

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

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

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

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

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

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

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

19 THE COURT: Well, uh---

20 MR. BELCHER: And---

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

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

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

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

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

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

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

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

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

4 THE COURT: I understand.

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

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

8 (WHEREUPON, PROCEEDINGS CONTINUED.)

9 THE COURT: All right -- all right.

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

16 THE COURT: *Fields* versus what?

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

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

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

21 THE COURT: All right, 376 South Carolina?

22 MR. YOKEL: Five-forty-five.

23 THE COURT: Okay.

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

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

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

9 THE COURT: Certainly.

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

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

1 penetration.

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

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

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

17 MR. WOODS: Yes, sir?

18 THE COURT: Who---

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

21 THE COURT: Oh, all right.

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

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

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

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

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

4 THE COURT: Right.

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

7 THE COURT: All right.

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

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

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

13 THE COURT: Poteat?

14 MR. POTEAT: Yes, Your Honor.

15 THE COURT: Who is it?

16 MR. POTEAT: Uh -- Eason Construction.

17 THE COURT: Eason?

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

19 THE COURT: Very good; thank you.

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: Very good.

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

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

21 MR. RIVERA: Everado Jaramillo.

22 THE COURT: Spell the last---

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

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

25 MR. RIVERA: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 violations of the reasonable care?

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. BELCHER: Well---

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

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

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

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

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

1 responsibility---

2 MR. BELCHER: Well---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. BELCHER: He says I---

2 THE COURT: Or that he did everything reasonably?

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

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

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

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

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

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

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

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

1 whether the---

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

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

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

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

8 THE COURT: All right.

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

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

13 MR. BELCHER: Right.

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

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

24 THE COURT: Okay.

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

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

3 THE COURT: Well, again---

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

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

11 MR. BELCHER: Right, but---

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

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

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

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

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

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

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

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

2 THE COURT: He takes a test.

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

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

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

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

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

1 MR. BELCHER: All right.

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

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

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

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

6 THE COURT: All right.

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

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

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

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

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

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

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

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

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

13 THE COURT: Exactly.

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

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

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

18 THE COURT: All right; anything else?

19 (NO RESPONSE.)

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

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

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

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

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

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

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

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

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

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

10 THE COURT: Okay. All right.

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

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

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

19 MR. MARTIN: I think we can consolidate.

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

24 MR. MARTIN: Four subs I think moving.

25 THE COURT: Just four?

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

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

5 MR. POTEAT: Agreed.

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

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

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

9 MR. POTEAT: That's fine.

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

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

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

17 MR. BELCHER: Okay.

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

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

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

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

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

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

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

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

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

17 MR. MARTIN: Thank you, Judge.

18 MR. BELCHER: Thank you, Your Honor.

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

23 MR. BELCHER: Okay.

24 THE COURT: All right?

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

1 MR. MARTIN: Thank you, Judge.

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

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

6 COURT REPORTER: And twenty-two.

7 THE COURT: And twenty-two---

8 THE CLERK: And twenty-two, yes.

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

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

12 THE COURT: A motion to quash?

13 THE CLERK: Yes, and that is Marick.

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

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

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

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

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

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

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

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

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

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

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

5 MR. LYLES: That's right.

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

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

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

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

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

1 MR. LYLES: Yes, sir?

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

4 MR. LYLES: Yes, sir.

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

6 MR. LYLES: Those are.

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

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

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

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

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

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

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

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

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

19 MR. LYLES: Yes, sir---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. IMHOFF: Right.

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

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

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

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

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

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

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

23 MR. LYLES: 2014?

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

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

3 MR. IMHOFF: Yes, sir.

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

6 THE COURT: Well, the thing is, let -- well, I know all
7 of this. I -- what I'm trying to do is just to tell you,
8 let's -- let's move it. And then we'll find out, you know,
9 um -- uh, what happens.

10 Um -- you do this; you draw an order, uh, setting forth
11 all of your -- your -- what you have there. Um, also -- but
12 be sure that you understand that, um, anything that's on
13 appeal is gonna be stayed.

14 MR. LYLES: Yes, Your Honor.

15 THE COURT: Uh -- but, uh, there are certain things
16 that, uh, are not necessarily, uh, limited to just those
17 cases on appeal.

18 MR. LYLES: Yes, sir.

19 THE COURT: There are certain witnesses that would be,
20 um -- uh -- uh, still, um -- uh, available as well as, um --
21 uh -- uh, contributing to, um, the -- the preparation and
22 the -- and ultimate trial of the cases. That can be deposed
23 now so their testimony and, uh, evidence can be captured.

24 MR. LYLES: The -- the -- the -- the appeal in- --
25 involves claims and issues. It -- it doesn't necessarily

1 preclude action against parties.

2 THE COURT: Well, that's what I'm saying.

3 MR. LYLES: Yes, sir.

4 THE COURT: So all right; so you draw your order that
5 way and we'll see -- and, of course, what is it, allowed it
6 to be circulated. But particularly between, uh, you and
7 Mr. Imhoff and, uh, Mr. Belcher. Is that right, Mr. Belcher?
8 Is he still here?

9 MR. BELCHER: Yes, sir.

10 THE COURT: All right.

11 MR. BELCHER: I haven't decided to appeal anything yet.

12 THE COURT: Well I know, but I'm---

13 MR. BELCHER: That's---

14 THE COURT: ---you -- you two are the ones that have,
15 um, what is at stake here---

16 MR. BELCHER: Right.

17 THE COURT: ---um, these rulings that I made in the past
18 and, what is it, today. And that's -- I just want to be sure
19 that you circulate, even before, um -- uh, it's submitted to
20 me to see if they have any, uh, thing -- to make any
21 contribution.

22 If not, then -- or if they do, um -- uh, see if you can
23 incorporate it or, what is it, submit the whole thing to me.
24 And then, of course, anybody else, you know, affected, will
25 be able to, uh, review it too 'cause Rule 5 says you have to

1 circulate it.

2 MR. LYLES: You know, when we were here in October
3 everybody in this courtroom agreed that the case could be
4 tried on January the 22nd. And so I'm gonna be just trying
5 to give The Court some perspective on where I'm coming from.

6 THE COURT: January the 22nd 2014?

7 MR. LYLES: 2013.

8 THE COURT: '13?

9 MR. LYLES: And everybody in the courtroom agreed the
10 case was ready for trial---

11 THE COURT: Yeah, but there are a lot of people who got
12 sick or something; I don't remember. Anyway...

13 MR. LYLES: Well, it just, you know, I know The Court---

14 THE COURT: Wait a minute. No, there wasn't. Um -- no,
15 no, all right, not sick---

16 MR. LYLES: I know that---

17 THE COURT: ---what was it? Huh?

18 MR. LYLES: ---I know that to get a multi-week term
19 you need to work with Court Administration. And so, and I
20 will -- I will tell you, um, that since December, I don't
21 know that any party in this case has noticed a deposition,
22 except for me. So, you know, this -- this case has been
23 sitting here and the lawyers, I think candidly, have been
24 wondering when the case is going to be tried.

25 THE COURT: Well, let's do this. Why don't you do a

1 night before; (after pause) not a day certain but a night
2 before? I mean, just put it out there and then I'll -- I'll
3 deal with, uh, Court Administration.

4 MR. LYLES: Okay.

5 THE COURT: I mean, -- it -- it -- it's -- it's the
6 dickens to set a date because that's always something that's
7 gonna -- it's almost -- sometimes you'll have to get it, but
8 I guess I'm a little cynical. It's almost like a target
9 that nobody takes a vacation until they have a day certain.
10 Nobody learns that it has a -- a witness that's out-of-pocket
11 until they have a day certain.

12 I would suggest that you, you know, uh, attorneys would
13 be better served if they -- and their clients particularly --
14 if they, uh -- if they get a day certain they let the
15 vacations and they also put their witnesses on notice that
16 they are gonna be there that day, uh, when the case is going
17 to trial.

18 MR. LYLES: That's why I was hoping we could get -- work
19 with The Court to try to get a date certain from Court
20 Administration so that everybody can be---

21 THE COURT: Well -- well -- well, what we do first,
22 though, Mr. Lyles, is that we establish a limit. And that's
23 why I say that -- how -- you talk about, uh, discovery. How
24 much more time do you need in discovery in a four-year-old
25 case?

1 MR. LYLES: None -- none. I -- that---

2 THE COURT: All right, then set a day certain -- not --
3 or, not -- not a day certain, but, uh, not before July, if
4 you want to.

5 MR. LYLES: Okay.

6 THE COURT: I don't know, what is it, uh, I'll be out in
7 July. I mean, I've got four weeks of vacation; you ain't
8 gonna get my vacation.

9 MR. LYLES: And I don't want it, Your Honor, I---

10 THE COURT: I get my vacation; you don't, though. All
11 right; so I think the point is that -- go ahead and put it --
12 and try to work together because all of you, you've got a --
13 an interest in it. This case is gonna be tried when? So try
14 to get a date, uh, a closing date, in other words, as far as
15 discovery and everything so they can, uh -- the trial can be,
16 uh, after that time. And then I'll try to work with you as
17 best I can, uh, as far as, uh, get -- getting you a day
18 certain. All right?

19 MR. LYLES: Yes, sir.

20 THE COURT: And Mr. Imhoff and Mr. Belcher and everyone,
21 I hope you-all understand that I'd like to move this, uh,
22 better than you would. And I think we'll run out -- running
23 out of, uh, what is it, room now in the, uh, brand new
24 courthouse with, uh, this file. Is that right, Madam Clerk?

25 THE CLERK: That is correct; yes, sir.

1 THE COURT: All right. Next? Now, you will do that,
2 uh, Mr. Lyles?

3 MR. LYLES: Yes, sir; I'll be glad to do it.

4 THE COURT: All right.

5 MR. LYLES: I'll try to get it done by Friday and get it
6 around to everybody.

7 THE COURT: Well, start -- get it out there. And---

8 MR. LYLES: Yes, sir.

9 THE COURT: ---and, uh -- that's the only way that
10 the -- this thing's gonna be, uh---

11 MR. LYLES: This has been a -- a -- a good group to work
12 with. Everybody has generally cooperated with regard to
13 this -- all matters in this case. I -- I do anticipate this
14 issue about a potential appeal is gonna require another
15 ruling from The Court about severance just because I know
16 appeals take two to three years.

17 THE COURT: Well, let's just -- let's -- let's not
18 anticipate---

19 MR. LYLES: Yes, sir.

20 THE COURT: ---what is it, uh, bad things. All right;
21 anything, uh -- what's the next?

22 THE CLERK: Um -- the next one will be, um, number
23 thirteen; and it is Heyward Electrical Services' motion for
24 summary judgment as to cross-claims of Marick.

25 THE COURT: All right, uh, who do we have?

1 MR. HARJEHAUSEN: Uh -- John Harjehausen, Your Honor,
2 for Heyward Electrical Services.

3 Um -- Your Honor, we'd like to request that this be --
4 this motion be continued. Um -- Heyward has essentially
5 negotiated a settlement with the plaintiff and with Marick
6 and Rick Thoennes. The only thing left is unresolved
7 cross-claims with Medallion and Bradford Seckinger.

8 THE COURT: All right. Is Medallion involved?

9 MR. HARJEHAUSEN: Medallion, uh---

10 THE COURT: All right, so let's -- I've continued those,
11 so, uh---

12 MR. HARJEHAUSEN: Right.

13 THE COURT: ---let -- let it fall under that umbrella.

14 MR. HARJEHAUSEN: So, we'll just continue this one as
15 well?

16 THE COURT: Right.

17 MR. HARJEHAUSEN: Great; thank you, Your Honor.

18 THE COURT: (After pause.) But do, um -- uh, consult
19 with, um, the ones who are involved in the Medallion. I
20 guess, Mr., uh -- well, of course, that's not a part of this
21 action. Uh -- that isn't consolidated but, uh -- well you --
22 in other words, you just want a continuance to see if you
23 can't -- your -- your -- your, uh, matter could be resolved?

24 MR. HARJEHAUSEN: Yeah; I mean, that -- that's exactly
25 it.

1 THE COURT: All right, it---

2 MR. HARJEHAUSEN: We anticipate filing additional
3 motions in regard to Medallion. And, uh, we would just ask
4 that this motion against Marick---

5 THE COURT: It'll be continued.

6 MR. HARJEHAUSEN: ---go on that roster once those are
7 filed. Thank you, Your Honor.

8 THE COURT: Yes, sir. All right; next?

9 THE CLERK: Um -- the next one will be, um, number
10 fourteen, Carl Catoe Construction motion to dismiss and
11 summary judgment.

12 MR. TATE: Uh -- Your Honor, this is Ron Tate for Carl
13 Catoe. I believe, if I may ask, is that as to Medallion?

14 THE CLERK: Um -- I'd have to be honest and tell you
15 that I am unsure.

16 MR. TATE: Okay. Your Honor, I would just, uh, carry
17 the motion over. If I may suggest -- I don't know what that
18 motion is; it may, in fact, be the motion that we filed many
19 months ago relating to the, uh -- the claims of the
20 plaintiff. We had cross-motions with the plaintiff at some
21 point and I would ask for a continuance.

22 THE COURT: Mr. Lyles?

23 MR. LYLES: I'm told it's Medallion so that would be, I
24 think that---

25 THE COURT: All right, so that's to come under the

1 Medallion umbrella. Next?

2 THE CLERK: Um -- and the next one would be, um, number
3 fifteen, plaintiff's motion for judgment against defendants
4 Keowee Townhouses and others.

5 MR. LYLES: Your Honor, we have a number of defendants
6 originally served, named defendants in the case who are in
7 default and I have filed a motion, um, for a hearing for
8 damages in relation to those defendants. Um -- as I read the
9 rules, I'm required to get a date for a damages hearing,
10 um---

11 THE COURT: Put them on notice, yeah.

12 MR. LYLES: ---I'm to notify them of that date. Um -- I
13 only hope---

14 THE COURT: How long do you think it'll take?

15 MR. LYLES: A day.

16 THE COURT: Is that a full day?

17 MR. LYLES: I think a day would be plenty.

18 THE COURT: All right, um, how far out do you want it?

19 MR. LYLES: As soon as you can give it to me.

20 THE COURT: Well, I know, but how much time do you need
21 for your -- how many you got and how many---

22 MR. LYLES: How many defendants are there?

23 THE COURT: Right.

24 MR. LYLES: Probably six or eight. And I'm sorry
25 that I---

1 THE COURT: Well, I'm -- I'm just asking you---

2 MR. LYLES: There's probably six or eight.

3 THE COURT: ---because in other words, um -- uh, what's
4 the next term of, um, non-jury?

5 THE CLERK: Um -- it's going to be the week -- the week
6 of May, um, 28th.

7 THE COURT: Am I here?

8 THE CLERK: You are; yes, sir.

9 THE COURT: You want to do it then? That's a month.

10 MR. LYLES: Yes, sir. That'll be great.

11 THE COURT: All right, uh, set one day for a -- a
12 damages hearing in defaults. And has---

13 MR. LYLES: Preferably not the 28th because that's my
14 wife's birthday. The 29th?

15 THE CLERK: Yeah; normally, on the 28th we would do, um,
16 motions, so we'll keep you in the clear for that.

17 MR. LYLES: Okay; thank you.

18 THE COURT: All right, um---

19 THE CLERK: And, um, we'll probably -- what about
20 Thursday of that week? That would give us -- I mean, it's a
21 short week anyway because Monday is a holiday. We'll be
22 doing motions on, um, Tuesday. I think we already have a
23 full-day case on Wednesday that's already scheduled.

24 MR. LYLES: Thursday's great.

25 THE CLERK: So Thursday the 30th?

1 MR. LYLES: Thursday the 30th.

2 THE CLERK: Okay.

3 THE COURT: Now, you, uh -- have defaults, uh, been
4 entered on them?

5 MR. LYLES: Yes, sir.

6 THE COURT: All right; so on a default, uh, order?

7 MR. LYLES: Yes, sir.

8 THE COURT: Okay. Now we're looking for the damages
9 hearing. All right. All right; does that do it?

10 THE CLERK: Um -- I -- I have one more, um, and it is
11 M Group Construction. It's number sixteen, motion for
12 summary judgment.

13 THE COURT: All right; yes, sir?

14 MR. HEMPHILL: May it please the Court, Your Honor. Roy
15 Hemphill on behalf of, uh, M Group Construction and
16 Development.

17 COURT REPORTER: I'm sorry; your name again?

18 MR. HEMPHILL: Roy Hemphill. Uh -- Your Honor, uh,
19 defendant, M Group, has filed for summary judgment in this
20 case. Um -- uh, I would point out to The Court that, uh, I'm
21 not a cross-claim defendant. I've become a main defendant --
22 or, my client is a main defendant by virtue of an amended
23 complaint that Robert filed about fifteen months or so ago.

24 Uh -- my client, Your Honor, was an L-L-C that was not
25 formed until after all of this. M Group, uh, was an L-L-C

1 that was formed by two of the members of Marick. Uh -- Rick
2 Thoennes, Junior -- who I -- I refer to in my brief, which I
3 hope The Court, uh, received a copy of a couple of days ago,
4 or, my memo -- and Rick Thoennes, the third, who was the son.
5 Those were principals in Marick, and in March of 2009, uh,
6 formed a new company. We would contend formed a new company
7 to do something completely different, uh, than what they'd
8 been doing.

9 Marick was a corporation that was built -- that was
10 formed in 1998 to, um, to build custom homes anywhere from
11 half-a-million dollars to several million dollars. Uh -- I
12 think The Court is cognizant of what happened to the market
13 for the -- that type of housing. And what happened in March
14 of 2009 was two of the principals from Marick formed a new
15 company to build a -- a completely different product. And
16 that product was, um, a hundred to two-hundred-thousand-
17 dollar spec. houses in -- in -- in neighborhoods in the
18 Upstate.

19 Uh it -- when it formed in March of 2009, it picked up
20 two -- two -- two new owners. That was a Mark Thoennes, who
21 was a -- the other -- another son of one of the owners -- and
22 I also need to reference that I do represent Mr. Thoennes as
23 it relates to M Group as in -- in terms of his being a member
24 of that and him having any potential individual liability on
25 behalf of M Group in this litigation.

1 But, Your Honor, they also picked up a fourth principal
2 owner, that being a Mark Hutcherson. Mr. Hutcherson had been
3 an original, uh, member of Marick back in the '90's, but had
4 dissolved his membership after about a year, and had not had
5 any involvement in Marick in about, uh, '90.

6 Each of these owners, uh, put up additional capital
7 and -- and created their -- their own, uh, new company.
8 Uh -- Your Honor, there were no -- there were no -- what -- I
9 think what's key is when these principal owners were -- had
10 formed M Group, there's no evidence that they appeared at
11 Stoneledge, did any work. You raised -- may have raised
12 reference to a general contractor never driving a nail or --
13 or turning a screw. They didn't do that. Not because that's
14 not what a G-C does, they didn't do that because the work was
15 done at Stoneledge. They were on to other things. So this
16 is a totally separate, quote, company that plaintiffs have
17 sued.

18 Your Honor, um, this -- this action has been brought on
19 this notion of successor liability. And as His Honor knows,
20 that's a very limited right of recovery in South Carolina.
21 Uh -- it's based on a 1923 case, uh, known as, uh, *Brown*
22 *versus American Railway Express*, 1924. It set forth four --
23 four very narrow exceptions and, um, that was affirmed in the
24 *Simmons* case, which is cited in my memo, which is a 2005
25 Supreme Court case where there was a lengthy dissent, uh,

1 where some of the Justices were advocating ex- -- expounding
2 upon and allowing greater latitude. But the majority of The
3 Court said that these -- there were -- these four exceptions
4 were narrow and very limited.

5 Uh -- the first one is that there was an agreement to
6 assume the debts. Your Honor, I would contend that most
7 people would -- would know that would be sort of like a stock
8 sale versus an asset sale. Um -- the fact of the matter is,
9 there's -- there's no evidence in this case that there was
10 any kind of a formal sale. In fact, uh, I have included in
11 my material, uh, printouts from the Secretary of State's
12 Office that would -- that would show The Court that both
13 entities still exist. The market's dried up for both
14 entities, but the entities still exist. Neither one --
15 neither one was dissolved. Marick was not dissolved to allow
16 M -- M Group to go forward; they still exist. Uh -- M Group,
17 uh, in fact, Your Honor, um, there -- there's no merger.
18 Um -- there -- there's no -- there's no written document or
19 anything that the plaintiffs can point to to indicate that
20 there was any transfer of assets. My memorandum, um, I -- I
21 cited a North Carolina case that goes into a good bit of
22 detail.

23 And -- and it -- that North Carolina Court said that
24 North and South Carolina have very similar laws as relates
25 to, uh, the elements of -- of successor liability. And the

1 North Carolina court felt like there had to be, uh, some
2 agreement, some -- to -- to -- to allow the -- the liability
3 to flow through.

4 Uh -- going further, Your Honor, the, uh,
5 circumstances -- the second, uh, exception is the
6 circumstances surrounding the transactions warrants a
7 find- -- finding of a consolidation or a merger of the
8 two corporations.

9 As I argue in my brief, there -- there's absolutely --
10 as -- as His Honor is aware -- mergers of corporations are,
11 uh, dictated -- statutory mergers are dictated by what the
12 General Assembly has passed. And -- and there was no
13 paperwork filed or anything to indicate that, uh, one -- one
14 corporation -- the prior corporation -- was merged into the
15 second. As I said, uh, a merger would indicate that -- that
16 the new corporation assumes the -- the prior corporation.
17 Uh -- both corporations still exist, but there's not a --
18 certainly not a statutory, uh -- uh, merger. We would also
19 indicate, even though South Carolina's law in this area is
20 silent as to what a de facto or implied merger might would
21 be, uh, we would contend that that is not the case here
22 because this situation lacks common flow-through alone.

23 THE COURT: Let me ask you something, Mr. Hemphill. Now
24 it, uh -- you say Marick is still, um -- uh, in existence?

25 MR. HEMPHILL: Yes, Your Honor; it has not been

1 dissolved.

2 THE COURT: And, um -- but then the -- this -- you
3 contend that this is a separate, um -- uh, M Group is a
4 separate, um -- uh, entity it -- itself?

5 MR. HEMPHILL: Yes, Your Honor.

6 THE COURT: And are both, uh, in the action? Are they
7 both, uh, defendants?

8 MR. HEMPHILL: Yes, Your Honor. Uh -- the -- the
9 plaintiff amended to add M Group about -- a little better
10 than a year ago.

11 Uh -- the -- the third element set forth in that case,
12 Your Honor, is that there's -- that the -- the successor or
13 the second entity is a mere continuation of the -- of the
14 first. Uh -- there's not a great deal of elaboration in
15 either of those cases that I referenced about what a mere
16 continuation is.

17 But, whether you look at it from a merger standpoint or
18 a mere continuation argument, the owners are not the same.
19 Uh -- Mr. Lyles, uh, took -- Mr. Lyles took the deposition
20 of -- of the -- the principal owner, Mr. Rick Thoennes,
21 Junior, who I refer to as the father in my, uh, complaint.
22 He was the one that held the general contractor and he
23 indicated -- he was the 30(b)(6) witness for M Group and he
24 testified to, uh, basically a new operation.

25 If you looked at it, uh, there was -- the -- the

1 accounts receivables were not moved over. There wasn't a
2 great deal of assets. He's a general contractor; he's not a
3 sub-contractor. There wasn't a great deal of assets, but
4 what asset that -- what assets there were, they weren't moved
5 over. There was not a -- a physical location to speak of.
6 This was being operated out of a home. Well, one of them was
7 being operated out of a home and the other one had an
8 address. I get them mixed up as to which. But, uh, as it
9 relates to assets, you know, we produced as part of the
10 deposition a list of -- of vendors that they transacted with,
11 a list of subcontractors. And at one point during the
12 deposition -- I've cited it in my memo -- uh, he went down a
13 lengthy list of new subcontractors they were dealing with.
14 Why? Because it was a new product that they were -- they
15 were producing. It was -- it was something totally
16 different. It was a different market and it was something
17 that they were doing. Yes, it was a home building, but it
18 was spec. houses in a much, much lower-end market. And they
19 were trying to -- they created a company to produce a
20 different product. That would be our contention in this,
21 Your Honor.

22 Further, the fourth element is that it was done --
23 that -- that the new corporation was formed, or, the new
24 entity was formed to fraudulently dodge creditors. Um --
25 there just is no clear and convincing evidence that's been

1 produced that was -- that's been produced by the plaintiff,
2 or otherwise came out in the one deposition that was taken to
3 look into the inner workings of the M Group, that would rise
4 to the level that this -- this corporation was created to
5 fraudulently, um -- uh, escape any kind of creditor claims.

6 Your Honor, based upon that -- upon that, and in the
7 interest of trying to pear this case down for -- for the fact
8 finder, uh, we would, uh -- we would, uh, request that our
9 motion for summary be granted, uh, upon -- upon those---

10 THE COURT: All right. Mr. Lyles?

11 MR. HEMPHILL: ---grounds.

12 MR. LYLES: Yes, sir; thank you, Judge. Um -- first of
13 all, Judge, in our memorandum...

14 And did -- did you -- were you able to print a copy of
15 the memo so I've got a copy I can hand up to The Court? I
16 don't -- I know you've got a lot of memos. (After pause,
17 memo handed to The Court.) There you go.

18 First of all, Judge, in our memo, we, uh, oppose the
19 motion for summary judgment in part on something that is not
20 accurate. And that was, um, this morning, um, Mr. Hemphill
21 advised me that they did, in fact, respond to our discovery.
22 Uh -- we were not able to find that in our file, but that
23 doesn't mean anything. So, I'll withdraw that portion of our
24 objection to their motion for summary judgment.

25 But factually, I think that we have presented in our

1 memorandum more than the scintilla of evidence that is
2 required to support our successor liability claim with
3 respect to M Group.

4 Um -- everything that Mr. Hemphill said, for the most
5 part, um, at least in general terms, um, is accurate. Um --
6 but in our memorandum, starting on page four, I list a number
7 of facts that he didn't mention to you, which I think support
8 our successor liability claim.

9 The start-up capital for the M Group, which he mentioned
10 earlier, fourteen thousand dollars of that start-up capital
11 came from Rick, Junior, who he refers to as father, and Rick,
12 the third, who he refers to as son. They were the only
13 members of Marick at the time M Group was formed and they are
14 defendants in this lawsuit. So you have cash from Marick
15 principals who are defendants personally in this lawsuit that
16 was injected into the M Group.

17 Mr. Thoennes, the father, testified in the M Group
18 deposition that the reason M Group was formed, Your Honor, is
19 because Marick was insolvent. That will become important
20 later on. As noted by Mr. Hemphill, I think, um, M Group
21 utilized a number of the same vendors as Marick. M Group
22 utilized the same project manager and superintendent as
23 Marick. Mr. Thoennes, the father, was the license holder for
24 both Marick and the M Group.

25 THE COURT: Did they use the same license?

1 MR. LYLES: Yeah. The general contractor license?

2 THE COURT: That's what I'm saying.

3 MR. LYLES: Yes, sir; yes, sir. Importantly, at the
4 time M Group was formed, Marick was insured under a general
5 liability insurance policy listed, uh -- um, issued by
6 Simpson Addy Insurance. And I give you the policy
7 information.

8 When they formed M Group, they simply added M Group as
9 an insured on the Marick policy, which meant that Marick was
10 paying M Group's insurance. The document that we've
11 submitted to you indicates that that addition was done at no
12 additional premium. That insurance, by the way, continued in
13 effect through, I think, 2012, where they were jointly
14 insured on that policy.

15 As late as November the 12th of 2009, a proposal for work
16 at Stoneledge was submitted to M Group by Builder's First
17 Source. As of October the 5th 2011---

18 THE COURT: Well, let's see; what was the date on
19 M Group's, um -- uh, incorporation?

20 MR. LYLES: It was in the spring of 2009. And the
21 testimony was that Marick began its last construction project
22 in 2008 and finished it in 2009, and then M Group was formed
23 because Marick was insolvent.

24 As of October the 5th 2011 -- that's a significant (sic)
25 because it's a -- it's an exhibit in a deposition -- if you

1 went to Google or went to the internet and you typed in
2 Marick-dot-net, up popped the M Group website. So, there's a
3 direct marketing connection between Marick and the M Group.
4 We have attached copies of pages from the M Group website.
5 If you look at those pages from the M Group website, the
6 M Group markets itself as being a company with four years of
7 experience in the Upstate, building quality construction --
8 excuse me, quality custom homes. They actually list
9 Stoneledge as a project for reference on the M Group website.

10 And even though Mr. Thoennes did, in fact, testify in
11 his deposition that the M Group, um, home was gonna be, you
12 know, as -- as Mr. Hemphill said, a spec. home and whatnot,
13 if you look at those web pages on the main M Group website,
14 they have a fine homes division. And, again, market projects
15 such as Stoneledge as being qualifications of the M Group,
16 um, company itself.

17 Um -- just -- and -- and one last point. Again, if you
18 go through those website pages, they talk about -- the
19 M Group talks about different categories of classes of homes,
20 ranging from two-ninety-five, six hundred, nine-hundred
21 thousand, and even over a million dollars. Um -- but all of
22 that is included in my materials.

23 As Mr. Hemphill correctly points out, when you look at a
24 successor liability issue, you have to go back to this 1924
25 case of *Brown versus American Railway Express*, and it lists

1 the four exceptions to the general rule that a successor is
2 not liable for the debts and liabilities of the predecessor.

3 I agree with Roy that there was no agreement to assume
4 liability because the evidence in this case is very clear.
5 What the Thoenneses were trying to do is insulate themselves
6 from Marick liability. He testified that Marick was -- was
7 insolvent, so we opened up a new company. And that's what
8 they---

9 THE COURT: Now that's, um, Rick Marick -- um---

10 MR. LYLES: That's---

11 THE COURT: ---I mean, Rick Thoennes---

12 MR. LYLES: ---that's the father.

13 THE COURT: ---Junior?

14 MR. LYLES: That's the father. Now, what he said in his
15 deposition is, we were insolvent and we were trying to
16 attract new investors and so we needed to open up a new
17 company. That's what he said. But the critical thing is, he
18 opened it up because it was insolvent.

19 And what they did is, um -- they knew they couldn't
20 continue doing business as Marick because they were
21 insolvent. And so they had to have this new entity and this
22 new name.

23 And the new investors he was talking about, don't
24 forget, were his son, another son, and a former partner in
25 Marick itself.

1 I do think that if you look at the *Brown versus American*
2 *Railway* case, that the last three exceptions to the general
3 rule about successor liability do apply.

4 One is consolidation or merger. And there is case law
5 in our -- in our memorandum, which talks about merger. And
6 the factors that are looked at are the continuity of
7 management and personnel. Here we have that. Roy's right,
8 we do have two new owners -- minority owners -- of M Group,
9 but we have the two majority owners are the same guys that
10 were operating Marick. We have a continuity of personnel
11 through the Thoenneses and Mr. Gouch, their superintendent.
12 Continuity of ownership, which I just spoke to.

13 Cessation of the seller, um, activities. The testimony
14 here is that after the forming -- excuse me, formation of
15 M Group, Marick did no further work. They have not been
16 dissolved, but they don't do anything else either.

17 And then, assumption of liabilities. The most important
18 of those factors is continuity of ownership per the case law.
19 We think that we have produced evidence in response to this
20 motion for summary judgment that is at least a scintilla of
21 evidence supporting our claim, um, that that exception
22 applies.

23 The second one is mere continuation. And I think that
24 that is dead-on with regard to this case. I mean, what
25 happened here is the Thoenneses knew they couldn't continue

1 doing business as Marick because they were insolvent. And so
2 they simply put a new name on the company, used the same
3 marketing literature, the same construction license, so on
4 and so forth.

5 THE COURT: Did they use the same, uh, what is it,
6 they were operating as general contractors, so they operated
7 with the same, uh, general contractor's license? In other
8 words---

9 MR. LYLES: Mr.---

10 THE COURT: ---one of the principals was a, uh, licensed
11 general contractor?

12 MR. LYLES: ---Thoennes, Junior; yes, sir.

13 THE COURT: The same one?

14 MR. LYLES: Yes, sir. And then finally, interestingly
15 enough on this fraudulent transfer issue, I think -- I think
16 that the evidence in this case actually supports the
17 application of that exception to the general rule too.
18 And -- and the reason is, it -- it's very simple.
19 Mr. Thoennes testified that the reason they started a new
20 company was because the old one was insolvent. Obviously, a
21 company that's insolvent, once it stops doing operations, is
22 not gonna be able to repay all of those creditors. Simple as
23 that. They minimize the opportunity to repay those creditors
24 and instead decided to operate in a new company to try to
25 shield that new income from the former creditors.

1 THE COURT: All right, just a -- a little query here.

2 MR. LYLES: Yes, sir?

3 THE COURT: Um -- I notice this is a 2009 case.

4 MR. LYLES: Yes, sir.

5 THE COURT: When was it filed?

6 MR. LYLES: When was what filed?

7 THE COURT: The case.

8 MR. LYLES: This case?

9 THE COURT: Right.

10 MR. LYLES: Uh -- May of 2009.

11 THE COURT: And they incorporated when?

12 MR. LYLES: Um -- right about that time.

13 MR. HEMPHILL: March.

14 MR. LYLES: March? March, 2009. They had received
15 letters -- it isn't in the record -- but, they had received
16 letters and demands from the association and others about the
17 Stoneledge case prior to that incorporation. But, they had
18 other debts and obligations. I think the testimony in this
19 case would be that they were several million dollars in debt.

20 Um -- in any event, we think that the fact that they
21 admit that they created the M Group because of the insolvency
22 of Marick would support a claim of a fraudulent transfer as
23 well.

24 Um -- and for those reasons, we respectfully request
25 that this motion be denied.

1 THE COURT: Mr. Hemphill?

2 MR. HEMPHILL: May it please the Court. Your -- Your
3 Honor, uh, as it relates to, uh, the -- the more serious
4 allegation against my client, that being, uh, the allegation
5 of fraud, uh, I would contend that the -- that the -- the --
6 the burden of proof and the standard, even at this juncture,
7 would be, uh, clear and convincing evidence.

8 And as -- as Robert indicated, um, you know, my
9 client, in the deposition excerpts that are attached to my --
10 to my brief, said that yes, it was insolvent. Uh -- but, we
11 were very clear, when you read those excerpts, that they were
12 creating a new entity and they needed additional capital to
13 go after a different -- to -- to work on a different product.

14 And so it's -- it's as if -- the reason why they -- they
15 created this new organization was to create a new product,
16 just as if they were making widgets I would contend. And
17 it's just a -- it had a different character; it was not a --
18 a continuation of the old corporation. The common
19 denominator might well be that one of the principals who held
20 the G-C license from the predecessor became -- who held the
21 license for the successor. That's some commonality. But,
22 Your Honor---

23 THE COURT: Well, isn't that almost an asset for a
24 corporation? I mean for a general contractor?

25 MR. HEMPHILL: I -- I would -- I would agree that it is.

1 THE COURT: I mean, that's, uh -- uh, that's why we
2 permit, uh, corporations to, um -- uh, use a license of one
3 of their other, uh -- uh, either employees or incorporated.

4 MR. HEMPHILL: But -- but, Your Honor, the accounts
5 receivables didn't -- didn't transfer or---

6 THE COURT: Well, were there any accounts receivable?

7 MR. HEMPHILL: The question was asked, uh, were there?
8 That was not delved into in the deposition.

9 THE COURT: Well, I didn't ask that, I just -- all
10 right. And again now, please understand I, you know, I'm the
11 last one, and -- and it sort of concerned me earlier that,
12 what is it, uh, Mr. Imhoff I think said that, what is it,
13 that my, uh, rulings in some of these, um -- uh, summary
14 judgments are going to be, um -- uh, res judicata or
15 something like that, admissible as, uh -- as to the other
16 claims.

17 I, um -- uh, I -- I'm not sure about that and I don't
18 intend to. I'm just talking about the record that I have
19 before me at the time of the -- the cross-claims, uh, that,
20 uh, it was such that, uh, the record at that time reflected
21 that there was no, uh, sufficient evidence to grant the, uh,
22 summary judgments.

23 But, uh, here the same thing. I'm not questioning
24 anybody's motives as much as I think that there is sufficient
25 evidence to create a genuine issue as to a material fact of

1 whether or not it was to someone's advantage to, uh, maybe,
2 uh, change hats. And, uh, so I -- I'm going to leave that up
3 to the trier, uh, the trier of fact.

4 MR. HEMPHILL: Thank you, Your Honor.

5 MR. LYLES: Thank you, Your Honor.

6 THE COURT: All right. Uh -- and by the way, um -- uh,
7 since the, uh, motion is -- is, um -- uh, denied that's the
8 only thing that needs to be said.

9 MR. LYLES: Okay.

10 THE COURT: It will be a very short order. All right;
11 anything else?

12 MR. HEMPHILL: No, Your Honor.

13 THE COURT: All right, ladies and gentlemen, I do want
14 to thank you for your patience, as I said earlier, with The
15 Court. But also, um, your concentration on today. Um -- I
16 was not looking forward to it and, uh, particularly when, uh,
17 my, um -- uh, emails and attachments began to pile up.

18 I mean -- I mean, I -- I was gonna tell somebody
19 earlier -- you-all -- as you-all have found out, the ones
20 that have been here, uh, more than once, um, I am want to,
21 what is it, uh, bore people with my little, uh, observations.

22 But, a long time ago, uh, I was appointed to The State
23 Board of Education and I don't know why. My father said if
24 in the Parole and Pardon Board I might have known something
25 about it. But, uh, education never took with me, so

1 anyway...

2 But the point was, I learned how bureaucracies ran at
3 that time. Um -- the week before our monthly meeting they
4 would send me a package of what the agenda was going to be
5 and the supporting materials. I finally got to the point of
6 asking them did they want me to read it or weigh it? And,
7 um -- uh, a lot of times -- and the summary judgments is the
8 one I use -- is that if the memorandum is more than two
9 pages, it must be a genuine issue of material fact somewhere
10 in all of that. So anyway...

11 All right, gentlemen and ladies, I do appreciate your
12 patience, as I say. And those who I've asked to do
13 something, Mr. Lyles, and I -- and again, Mr., uh, Belcher
14 and, um, Mr. Imhoff, uh, you-all do try to work together so
15 we can -- see if we can't move this along.

16 MR. LYLES: Yes, Your Honor.

17 THE COURT: All right. Thank you.

18 JOINTLY FROM ALL: Thank you, Your Honor.

19 (WHEREUPON, HEARING ENDED AT 1:35 P.M.)

20 *****END OF REQUESTED TRANSCRIPT*****

21

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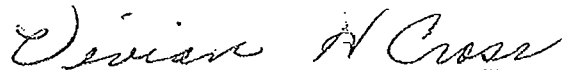
STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED VIVIAN H. CROSS, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THOSE PROCEEDINGS AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR OCONEE COUNTY, SOUTH CAROLINA, ON THE 10TH DAY OF APRIL 2013.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

SEPTEMBER 27, 2013



VIVIAN H. CROSS
CIRCUIT COURT REPORTER

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

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

Plaintiffs,

vs.

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

_____ Defendants, _____

Marick Home Builders, LLC,
Third-Party Plaintiff,

vs.

Michael Franz, Clearview
Construction, et. al.

_____ Third-Party Defendants,

Builders FirstSource-SE Group,
Fourth-Party Plaintiff,

vs.

Carl Catoe Construction, Inc.,

Fourth-Party Defendant. _____

DEPOSITION of FREDERICK (RICK) R. THOENNES

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

1 A. I don't know.

2 Q. How about this, at the height of Marick's existence
3 when it was at its busiest, how many employees did
4 it have?

5 A. Probably three or four.

6 Q. Describe the job duties or titles of those
7 employees.

8 A. Administrative Assistant in the office. Would have
9 had a superintendent, assistant superintendent and
10 probably a laborer.

11 Q. So when Marick was doing its construction it
12 subcontracted out its work?

13 A. Correct.

14 Q. And who at Marick was responsible for selecting and
15 contacting with subcontractors?

16 A. Me.

17 Q. And who at Marick was responsible for observing and
18 supervising the work of subcontractors?

19 A. Our superintendents.

20 Q. Can you name your superintendents at Marick, and
21 tell me the years that they were with Marick?

22 A. I don't know about that, but I can tell you some of
23 the superintendents.

24 Q. Okay.

25 A. Matthew Gooch ---

1 Q. Can you spell that last name?

2 A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday,
3 just like it sounds. There's a couple I can picture
4 but I can't name. There are probably two, maybe
5 three others.

6 Q. Who was the superintendent who was responsible for
7 observation and supervision of the subcontractors in
8 connection with what Marick did at the Stoneledge
9 project?

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

13 Q. Did Mr. Hornaday hold any sort of license,
14 contractor's license?

15 A. I don't know. Not that I know of.

16 Q. Who hired Mr. Hornaday?

17 A. I did.

18 Q. Are you the one that assigned him to the -- his
19 responsibilities in connection with the Stoneledge
20 project?

21 A. Yes.

22 Q. What were his qualifications such that you felt
23 comfortable he could supervise subcontractors' work
24 at the Stoneledge project?

25 A. He had worked as a subcontractor for us for years

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

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

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

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

10 A. Whatever Nathan needed.

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

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

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

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

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

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

8 Q. Did he have the authority to hire and fire
9 subcontractors?

10 A. No.

11 Q. That was your job?

12 A. That would've fallen to me.

13 Q. What role did Rick, your son, play in Marick
14 Construction?

15 A. Mostly the marketing. It's Marick Builders, but ---

16 Q. Marick Builders.

17 A. --- he handled mostly the marketing end of things,
18 whether it was sales of homes or sales of townhomes
19 or -- and he would also work on the financing
20 aspects of it for us. When we were building the
21 spec house, he would line up the financing.

22 Q. Who maintained the records of Marick Builders?

23 A. Well we had an administrative assistant that did
24 that.

25 Q. And who was that?

1 Q. Had you had any experience with Carl Catoe before?

2 A. No.

3 Q. Did you have occasion to talk with or observe the
4 work being done by Carl Catoe or his crews?

5 A. Some.

6 Q. Did you have any questions about the work they were
7 doing?

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

25 Larry, I'm sorry, I couldn't. Was that once a week

1 he was on site?

2 WITNESS ANSWERS:

3 A. A week to a week and a half.

4 Q. He was on site once a week or once every week and a
5 half. During the time that the framing work was
6 being done, did Nathan ever indicate to you that he
7 had any problems or had corrected any of the work
8 that Carl Catoe was doing?

9 A. I don't recall any workman type problems except for
10 one. We had a floor truss that was put in wrong and
11 we had to support it. That's the only thing that
12 jumps out at me. Of course, we always looked at
13 scheduling, and for the most part he manned the job
14 the way he was supposed to.

15 Q. Any problems associated with the installation of the
16 building wrap or the flashing?

17 A. Not that I know of. Nathan would've seen that.

18 Q. Pardon?

19 A. Nathan would've seen that and he didn't mention it
20 to me.

21 Q. If there had been a problem, would he have mentioned
22 it to you?

23 A. You have to ask him.

24 Q. Would you, I mean, based upon you working with him
25 over the time, would you have expected him to ---

1 A. No.

2 Q. You were on site approximately once a week?

3 A. Once to once, every week and a half.

4 Q. And your communications, though, with Nathan were
5 how consistent?

6 A. Daily.

7 Q. What kind of ---

8 A. Well, I say "daily," there may have been a day he
9 was gone or I was gone, but for the most part daily.

10 Q. As far as a quantity of time, how much time during a
11 typical week would you spend talking to Nathan?

12 A. No idea.

13 Q. Couldn't say?

14 A. Wouldn't even venture to guess. One week it could
15 be, you know, an hour, next week it could be five
16 minutes, next week it could be two hours.

17 Q. I understand. Was there any particular stage of
18 construction during which you were on the site more
19 frequently than another stage?

20 A. Probably during the layout, like when they were
21 staking or that kind of thing. If they were doing
22 any work on the lake itself, then I was there.

23 Q. As to Nathan's onsite time, you said essentially for
24 a vacation or something where you would expect
25 someone to be absent from the site, he was generally

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

5 Q. Ten to twelve. Did you have any, during the course
6 of the construction of Phase II, any interactions
7 with any employees or representatives of Builders
8 First Source, BFS?

9 A. Yes.

10 Q. Who?

11 A. Lots of people. Mike Green, Brock Bauknight,
12 Elaine, can't remember her last name, for the
13 windows ---

14 Q. And that's what I was going to get to next if you
15 want to say that while you go through their names,
16 you can tell me what you dealt with them about. You
17 said Elaine you dealt with windows?

18 A. Right. I think windows and doors.

19 Q. Mike Green?

20 A. Mike Green, I dealt with materials and labor.

21 Q. All right, go ahead.

22 A. And Brock Bauknight was my outside representative
23 that I dealt with on all of those things.

24 Q. General outside sales?

25 A. That's right. He handled my account.

1 Catoe? That is, who did monthly inspections for
2 subcontractor payment?

3 A. Nathan would inspect -- well, there was a draw
4 schedule that Mike Green and I worked out ---

5 Q. Okay.

6 A. --- for all aspects when we did the contract and
7 then all Nathan had to do was look and see what
8 portion of that schedule was done and then he'd sign
9 off on it and then we'd pay it. Not Carl, BFS.

10 Q. Yeah, right, because Carl was -- Carl Catoe was not
11 your subcontractor, correct?

12 A. That's correct.

13 Q. Only Builders First Source was?

14 A. Correct.

15 Q. But nonetheless you got to occasionally communicate
16 with Carl Catoe by virtue of being on the site?

17 A. Sure.

18 Q. Did anyone at Marick ever call or otherwise contact
19 Carl Catoe Construction regarding any warranty
20 issues?

21 A. I'm sure Nathan did.

22 Q. You say that you're sure he did. What do you know
23 that he did?

24 A. Siding that had warped and popped, a truss, the
25 truss that was over-spanned.

1 Q. Was Nathan calling Carl Catoe or Builders First
2 Source with these issues?

3 A. Both. I mean it would start with Carl to see if it
4 could be worked out in the field, I'm sure, but then
5 it would go -- if it couldn't be worked out in the
6 field with Carl then it would go to Builders First
7 Source.

8 Q. I had asked you about warranty issues, and to me
9 typically that means issues once you've left a
10 site ---

11 A. Oh, oh, I don't know of -- I don't know of any.

12 Q. But you were starting to tell me about some issues
13 while construction was ongoing ---

14 A. Right.

15 Q. --- and you mentioned some siding that was warping
16 and popping and then you mentioned the over-spanned
17 truss issue that you already talked about with
18 David. On the siding that was warping or popping,
19 was it an isolated board, was it widespread or was
20 it somewhere in between those two?

21 A. No, I mean, it was an isolated board according to
22 Nathan. He called and asked Carl to fix it.
23 Normally they were on site, but after they had left
24 site then he'd have to call Builders First Source.

25 Q. And was Builders First Source generally responsive?

1 A. Would ---

2 Q. I'm sorry, the finished floor, not the finished
3 grade.

4 A. No.

5 Q. Would you expect it to show the grade at the
6 building?

7 A. Yes, within plus or minus.

8 Q. Would you expect it to show the slope away from the
9 building?

10 A. Yes.

11 Q. If the Freeland drawings don't show or did not show
12 the grade at the building, how would the -- to your
13 knowledge, how would the grading subcontractor know
14 where to set the grade?

15 A. You're asking a hypothetical question there. It
16 should show it, period.

17 Q. I think you said that you assumed that Nathan
18 contacted Hutch N Son regarding some issues with the
19 grade, do you know that for sure or do you just
20 assume that?

21 A. No, I know that for sure.

22 Q. Okay. And that was relating to this standing water?

23 A. Standing water and the slope.

24 Q. And the slope?

25 A. Yes.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,

Plaintiffs,

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

DEPOSITION of CARL CATOE

Pursuant to notice, a deposition was taken in the
above case on the December 5, 2011, commencing at
approximately 10:15 a.m. attended by counsel as follows:

1 A. I don't know.

2 Q. What did you do in connection with the roof? What
3 did Carl Catoe do?

4 A. We installed the roof trusses.

5 Q. And sheeting?

6 A. Sheeting.

7 Q. How about the felt or paper?

8 A. I don't think that was in my scope of work.

9 Q. But you didn't install the shingles?

10 A. We did not install the shingles.

11 Q. But you set the windows and set the doors?

12 A. We set the windows and set the doors.

13 Q. And y'all did the rough opening flashing for the
14 windows?

15 A. I don't understand the question.

16 Q. You framed the stud walls; correct?

17 A. Correct.

18 Q. And then y'all set the windows; correct?

19 A. Correct.

20 Q. And in setting the windows, was Carl Catoe
21 responsible for flashing the rough opening that the
22 windows were set in?

23 A. I wouldn't call it flashing. I would call it --
24 it's called wrap or -- is that what you're
25 referring to?

1 Q. Sure.

2 A. Yes, we were required to install the house wrap.

3 Q. How about flashing around windows?

4 A. Window tape.

5 Q. Y'all were required to do that?

6 A. Yes.

7 Q. And did Carl Catoe install the siding?

8 A. Yes.

9 Q. And did Carl Catoe install the sheathing? The
10 exterior wall sheathing?

11 A. Yes.

12 Q. And did Carl Catoe install the building wrap?

13 A. Yes.

14 Q. And all that was the responsibility of Carl Catoe?

15 A. Yes.

16 Q. In Phase II?

17 A. That's correct.

18 Q. And in connection with the porches and the decks,
19 Carl Catoe was responsible for framing those
20 porches and decks; is that right?

21 A. That's correct.

22 Q. And flashing the components of the decks that
23 needed to be flashed?

24 BY MR. ROOT:

25 Objection.

1 WITNESS ANSWERS:

2 A. No flashing at all.

3 Q. Carl Catoe didn't do the stone work?

4 A. No.

5 Q. And there was no flashing that was required between
6 the heated walls and the decks?

7 A. That's correct.

8 Q. And that is there was no flashing required in the
9 plans or that's just not something that would ever
10 be flashed?

11 A. When the question come up in the beginning about
12 any flashing behind the band, and I was told not to
13 do any flashing.

14 Q. And who told you that?

15 A. I believe it was Nathan and Mike. They were not
16 going to do anything. The waterproofer would
17 install all the flashing on the deck.

18 Q. How does the waterproofer install flashing after
19 the siding has gone up?

20 A. He doesn't.

21 Q. Did the waterproofer do his work after you did your
22 work?

23 A. No.

24 Q. So the waterproofer was actually there before Carl
25 Catoe finished its work?

1 A. There again, "Go look at Phase I."

2 Q. So you did ask and you were told to go look at
3 Phase I?

4 A. "Go look at Phase I."

5 Q. Other than that, were the plans and specifications
6 that you received satisfactory?

7 A. A lot to be desired.

8 Q. They left a lot -- what do you think that was
9 missing in the plans? What would you have liked to
10 have seen, I should say, in the plans?

11 A. A lot more details.

12 Q. Are there any conditions out there that you can
13 specifically recall not having details that
14 concerned you?

15 A. There was a question about the offsets, what
16 happened there. Was this rated? Was this a two-
17 hour wall? Was this a one-hour wall? Is this --
18 has it got to go horizontal? Does it continue?
19 How far does it continue? Different things like
20 that.

21 Q. And who provided you with the direction that you
22 used to build those conditions?

23 A. Nathan.

24 Q. So that came directly from Marick?

25 A. Yes.

1 feet over. I don't believe it was required on that
2 job.

3 Q. Who told you it wasn't required?

4 A. I think it was Nathan. I'm not sure.

5 Q. Do you know where Nathan was getting that
6 information?

7 A. I don't know.

8 Q. And you didn't talk to the inspector about that?

9 A. There again, they get mad when I talk to the
10 inspector. They don't want me talking to the
11 inspector. They don't want me calling the
12 architect.

13 Q. How many times did you meet or speak with Rick
14 Thoennes?

15 A. The only time I met with him is in the beginning.
16 I remember him coming to the jobsite a couple three
17 times. There was never a conversation. "How you
18 doing, Carl?" "How you doing, Mr. Rick?" That was
19 pretty much it.

20 Q. Did you have a full set of plans onsite the entire
21 time you were there?

22 A. I had a set of plans. It was -- I didn't have like
23 Unit A, B and C in that building. I had A -- I'd
24 get unit plans, but I didn't have something telling
25 me that Building 20 was A, B and C.

1 Q. How did you determine that?

2 A. Sometimes I'd ask Nathan.

3 Q. And he had something that would tell him that ---

4 A. He had something that would tell me, Building 20
5 was, you know, A, B and a C or D. You know,
6 whatever.

7 Q. Did you leave those plans onsite for your crews or
8 did you take them with you?

9 A. I mean, not that master set, no. I mean, he had
10 that set. All I had was what I had. That's all I
11 ever had was a unit -- set of unit plans.

12 Q. But did you take them with you or did you leave
13 them for your superintendents or ---

14 A. I believe I took them with me. I believe
15 they're -- we actually have them.

16 Q. Did you have any issues with Nathan while you were
17 onsite?

18 A. Would you be more specific, please?

19 Q. Well, did you ever have any issues with what he was
20 telling you to do or not telling you to do?

21 A. I thought looking -- you know, going and looking at
22 Phase I in the beginning was just, you know, kind
23 of weird. But, you know, that was the answer every
24 time, "Go look at Phase I."

25 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.,
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vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrays
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

DEPOSITION of 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:

1 A. It's my understanding we had one subcontractor that
2 was supplying labor for us, and that was Carl Catoe
3 Construction.

4 Q. Are you the best person to testify on behalf of
5 Builders First Source about the subcontractors,
6 independent contractors that provided labor and/or
7 supplies on the project for Builders First Source?

8 A. I think myself and Mike could answer some more
9 details about the actual contract we had with Catoe.
10 But I have reviewed and I know he was the one
11 subcontractor that we had a contract with.

12 Q. So Mike Greene may be better ---

13 A. Maybe. Can get more details, yes, sir.

14 Q. Okay. Three, "Any contract(s) between you and any
15 person or entity relating in any way to the
16 project"?

17 A. My understanding, we had two contracts; one was Carl
18 Catoe, and the other one was with Marick Builders.
19 They were our only two contracts in the project.

20 Q. Are you or Mike Greene in the best position to
21 testify about those contracts?

22 A. I guess Mike since Mike wrote those contracts.

23 Q. Okay. "Any contract(s) between you and any person
24 or entity relating" -- well, it looks like I got --
25 3 and 4 looks like exactly the same question, so

1 he has several field guys and one of his field guys
2 was on site.

3 Q. Was Mike on site?

4 A. Yes, sir, from time to time. Not every day but he
5 was periodically out there, is my understanding.

6 Q. Is it accurate to say that when BFS signed a.
7 contract with Marick Home Builders to perform the
8 framing install at Stoneledge, that BFS itself had
9 no intention of actually performing that work, the
10 install work?

11 A. With in-house employees?

12 Q. Correct.

13 A. No, we don't do any work, self-performed, other than
14 supervisory work.

15 Q. So it was the intention of BFS, once it got that
16 install contract, to then sub that work out to
17 somebody else?

18 A. Yes, sir.

19 Q. Was it the intent of BFS that the entity who served
20 as its subcontractor would actually perform the
21 install services?

22 A. Correct.

23 Q. Do you know -- are you familiar with the Carl Catoe
24 Company?

25 A. Yes, sir.

1 A. I do not.

2 Q. You don't know?

3 A. I don't know.

4 Q. Who at BFS would know that?

5 A. I'm assuming that Mike Greene would be the best
6 since he was the one that had the most contacts with
7 Marick. That's normally the location wherever the
8 market's at, that the job is done, who they work
9 with would be who they would contact.

10 Q. Do you know when Marick was first contacted by me
11 and my client about alleged deficiencies in the work
12 performed by BFS?

13 A. I do not know exactly.

14 Q. But to your knowledge, Marick, other than through
15 the lawsuit, has never made a demand on BFS to go to
16 the Stoneledge Project and investigate alleged
17 deficiencies?

18 A. To my knowledge, there has not been any
19 communication like that.

20 Q. Would you or Mike be in the best position to testify
21 about how Marick staffed the Stoneledge Project?

22 A. Mike would be.

23 Q. As you're testifying, do you know whether or not
24 Marick performed any supervisory function with
25 regard to the work performed by BFS and its

1 subcontractor?

2 A. Mike could better testify, but I know that they did
3 have someone on site, because I've seen it in some
4 of the documents, that they had supervisory position
5 out there. Which it's common for general
6 contractors to always have their own people there.

7 Q. Mike may be better able to testify about this, but
8 did Marick have the ability to control the work of
9 BFS' subcontractors at the project? In other words,
10 could Marick stop that work? Could Marick make
11 demands that those subcontractors do the work
12 differently or in a different sequence, in a
13 different order or a different manner than they were
14 doing it?

15 A. Yes.

16 BY MR. IMHOFF:

17 Object to the form.

18 WITNESS CONTINUES:

19 A. A general contractor does have that authority.

20 Q. Do you intend to go back out to the Stoneledge
21 project and perform any further investigation?

22 A. If our experts deem that that is necessary, then I'm
23 sure I will be present when we go out to do some.

24 Q. Okay.

25 A. I would like to be.

1 A. I really don't. I mean this is legal language to me
2 and I don't understand exactly all of it.

3 Q. Well, if we step away from the Complaint just a
4 minute, and your familiarity with the Stoneledge
5 Project, do you know of any evidence that you have
6 either heard about from somebody other than your
7 lawyer or have observed yourself, that indicates
8 negligence or fault on the part of anybody else in
9 connection with the Stoneledge Project?

10 A. Not at this time, I don't.

11 Q. So you haven't formed any beliefs or opinions about
12 whether or not Marick Home Builders was negligent or
13 whether or not Carl Catoe was negligent or whether
14 or not the architects and engineers on this project
15 were negligent?

16 A. No, I haven't formed any opinions. I thought that's
17 what all these legal proceedings were for.

18 Q. Well, so with regard to Paragraph 37, you don't know
19 whether or not Plaintiffs' damages were caused by
20 the actual omissions of any other party over whom
21 BFS had any control or no control?

22 A. There again I don't know.

23 Q. Okay. Paragraph 38 says that my clients' claims are
24 "barred by the doctrines of comparative negligence
25 and/or assumption of the risk." Do you have any

1 been the one reviewing them.

2 Q. That's all I have. Thank you.

3 A. Okay.

4 BY MR. IMHOFF:

5 I don't have any questions for you, Mr. Rosamond.

6 Thank you.

7 EXAMINATION BY MR. ANTHONY:

8 Q. I have just a couple. I'll come down there. I
9 don't think I'll be very long. Mr. Rosamond, my
10 name is Jay Anthony, and we represent South Concrete
11 Specialties which did some concrete and
12 waterproofing work.

13 A. Okay.

14 Q. Can you tell me what the scope of your, if you know
15 it -- and I understand that some of these questions
16 are maybe better be put to Mr. Greene so just let me
17 know if that's the case. Can you tell me what the
18 scope of the contract with Marick was?

19 A. My understanding from the review of the documents,
20 our scope was to provide turnkey framing,
21 installation of exterior doors and windows and also
22 the exterior siding and trim work. And the framing
23 consisted of the walls, floor to roof systems,
24 anything to do with the framing.

25 Q. And I assume Builders First Source sold all of the

1 me if this is better put to Mr. Greene as well,
2 generally how do your supervisors interact with the
3 general contractors' supervisors?

4 A. I can tell you as a general rule of thumb, our
5 supervisory position works directly with the general
6 contractors' supervisory, working on schedules and
7 details of the plans, different products like that
8 or items like that. For this particular job, Mike
9 would be better to clarify what the relationship was
10 between Marick's supervisory role and our
11 supervisory role.

12 Q. In general, if there was a deviation from the
13 architectural drawings that was required, how would
14 you expect a BFS subcontractor to deal with that?

15 A. In general, the subcontractor should notify our
16 person on site if there's something different than
17 the plans or needs to be done. Then we normally
18 would take that to our contract -- contact for the
19 general contractor, in this case Marick's guy. We
20 would say something like, "This is not working in
21 the field. There needs to be a change. Tell us
22 what we would do from here." That's the general way
23 sequencing works.

24 Q. How about if the, again speaking generally, if the
25 change came from the general contractor, would he be

1 expected to communicate directly with the
2 subcontractor or would he go through BFS?

3 A. He's expected to go through BFS.

4 Q. In practice is that typically how it goes or not?

5 A. Most of the time.

6 Q. When you received the -- well, I'll save that
7 question for Mr. Greene. I think that's all I have.

8 Thank you.

9 A. Thank you.

10 EXAMINATION BY MR. POWERS:

11 Q. How are you doing?

12 A. Pretty good.

13 Q. My name's Duffie Powers. I'm here on behalf of Carl
14 Catoe Construction.

15 A. Okay.

16 Q. How is Builders First Source Southeast, BFS
17 Southeast set up in terms of operation, management
18 responsibility?

19 A. BFS Southeast Group is comprised of like 30
20 something operation, distribution and manufacturing
21 facilities; is that what you're asking me?

22 Q. Yes, sir.

23 A. Okay. It is part of a holding group which is BFS.
24 These are Delaware LLCs that are part of BFS holding
25 group. Each one is a separate entity, Greenville

1 handle it?

2 BY MR. ROOT:

3 Object to form.

4 WITNESS ANSWERS:

5 A. I don't know that you would ever have a situation
6 where you wouldn't get a resolution from somebody.
7 I mean, we've actually stopped work before until
8 somebody gives us an answer. I mean, you can't --
9 you can't just continue on if you don't know how to
10 frame it.

11 Q. And you'd stop work because you'd want to make
12 sure -- BFS would want to make sure it was done
13 right; correct?

14 A. Yeah. I mean, we have stopped projects until we get
15 some clarification from an architect or structural
16 engineer or somebody.

17 Q. Does BFS generally provide submittals for their
18 work, install services work?

19 A. Yes, and it's usually provided based on what the
20 general contractor's requirements are. Most of the
21 time they want roof trusses, floor trusses for
22 approvals. Sometimes they want to know the window
23 specs. They want to see what kind of windows we're
24 supplying, doors. So yes, we have to submit a lot
25 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.

DEPOSITION of DEREK HODGIN (DAY 1)

Pursuant to notice, a deposition was taken in the
above case on the January 23, 2012, commencing at
approximately 9:25 a.m. attended by counsel as follows:

1 side of the front porch. And I removed siding from
2 the top of a stone clad area, just above the water
3 table feature on the stone. And then at the rear
4 of the unit I removed some siding from above the
5 cantilevered window area that comes out over the
6 open balcony. And we may have -- I can't remember
7 if there were ceiling pieces removed from his
8 basement patio ceiling, or if we removed them and
9 then looked at the framing outboard of his patio
10 door.

11 Q. The cedar ceiling above the ground floor?

12 A. Correct.

13 Q. Why did you choose to remove siding at the front of
14 his unit?

15 A. It was easy to get to. It was an area that I was
16 concerned about the flashing detail between the
17 siding and the stone, and -- well, I think one of
18 the biggest reasons it was easy to get to.

19 Q. Well, did he have complaints about that particular
20 area or water damage that he identified there?

21 A. No, not at all.

22 Q. Was there damage you found behind the siding?

23 A. There was.

24 Q. Water damage?

25 A. Yes.

1 Q. And this is the connection between -- or the
2 intersection between the lap siding and the stone?

3 A. Yes.

4 Q. And you said you took siding off of, I think, a
5 cantilevered window area above the open second
6 floor patio?

7 A. That's correct.

8 Q. Below a window?

9 A. Well, it would be below a window, at the very base
10 of the wall. It would be probably two or more feet
11 below a window, just above -- I guess you would
12 call it a soffit. I don't know what you call it.
13 It's an overhanging, cantilevered window. And it
14 has -- so it has a very short, maybe foot or two
15 soffit or ceiling area that was stained. And so I
16 took siding off just above that -- the base of that
17 wall.

18 Q. Did you find damage there?

19 A. I did.

20 Q. Did you prepare any reports or anything in writing
21 about your findings at Dr. Hund's unit?

22 A. I don't think any of the work I did for Dr. Hund
23 ever made it into a written report. I think it was
24 visual only and then discussed verbally either with
25 him or then communicating that to the HOA later, as

1 A is "Roofing," B is "Attics," C is "Life Safety/
2 Fire Protection," D is "Exterior Walls." Okay. So
3 A "Roofing," I guess, let's do ---

4 A. Well ---

5 Q. Go ahead.

6 A. I was thinking it must follow -- it follows the
7 format of the written report.

8 Q. The 2010 report?

9 A. The November 1, 2010 report, yes.

10 Q. Great. What is the construction defect identified
11 in Number 1?

12 A. That the wood siding is what's referred to as a
13 drainage type cladding, that incidental moisture
14 will get behind the wood siding. And at a
15 roof/wall intersection effort needs to be made to
16 properly waterproof the intersection to preclude
17 water penetration at that point. And that would be
18 accomplished by the installation of a kickout
19 flashing.

20 Q. Is this a code compliance issue with damage, a life
21 safety issue, or a physical damage issue?

22 A. It's not a life safety issue. But I do think it
23 would represent the other two. There is physical
24 damage at roof/wall intersections. I would guess
25 at most if not all of the observations listed. And

1 from a code standpoint, I would say only -- there's
2 a couple of generic paragraphs that you could say
3 it would violate the code. One is the 703.1 which
4 says, "Exterior walls shall provide weather
5 protection." And then a flashing paragraph later
6 on, maybe 703.8 that says, "Flashing shall be
7 installed in a manner to preclude water intrusion,"
8 or something to that effect. So there's not
9 specific detail that says, install kickout
10 flashing, but there are two code paragraphs that I
11 would say have been violated by the as-built
12 conditions that have led to the damage.

13 Q. And you don't reference the code. You actually
14 reference an industry standard, NRCA Roofing and
15 Waterproofing Manual?

16 A. Yes, sir.

17 Q. That is an industry group? What did you call it
18 earlier?

19 A. I think we said industry group, yes.

20 Q. That publishes an industry standard?

21 A. Yes, sir.

22 Q. Is the NRCA Roofing and Waterproofing Manual
23 section that you've identified citing the code?

24 A. No. That's what makes it an industry standard.

25 Q. So this is an -- now, is there an alternate means

1 Q. Unit 32?

2 A. Yes, sir. While I'm looking for that one, this
3 last illustration is a great example of what I was
4 talking about earlier. You see the siding is taken
5 off and there is totally unprotected interior-grade
6 drywall with no weather barrier and no adequate
7 flashing. So that even though my damage might be
8 very localized, there is no possible way from an
9 engineering standpoint for me to fix that in a
10 localized way. I have to tear off all the siding
11 far back enough to either get to where there is
12 some weather barrier or take off all the siding to
13 install weather barrier. I have to see all the
14 extent of damage to the drywall sheathing so I make
15 sure I repair that during the process. So I know
16 that's kind of off the subject, but you asked me
17 earlier about the statistics and how do I pick how
18 many places. When you see that type of a defect,
19 it just causes you to have a more comprehensive
20 repair scope. I found some roof/wall intersection
21 photographs, but I -- I want to make sure I've
22 found all of them before we start talking about it.

23 Q. Are these all on discs?

24 A. I think so.

25 (OFF THE RECORD).

1 visible flashing.

2 BY MR. ROOT:

3 Thank you. Sorry.

4 BY THE WITNESS:

5 What was the next one?

6 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

7 Q. 89, I believe you have listed. 578 is the address.

8 And while you're looking, do you know why you chose
9 this unit?

10 A. No. 578 -- I'm sorry, was that the unit number?
11 578?

12 Q. According to your document, yeah. Yes.

13 A. 89. How about if we stick to the unit numbers.

14 Q. Okay.

15 A. Because that's the way the tabs are.

16 Q. Yeah, 89.

17 A. 89, 7/1/2010 is the date of the observations. And
18 there's a pretty clean looking intersection shown
19 in Image 4714. Actually, I don't know if that's
20 the -- yeah, that's shown close up in 4715. And
21 then we take the siding off and there's torn
22 weather barrier, no kickout flashing, water stained
23 siding and damage to the unprotected interior
24 gypsum wall sheathing below, shown in Image 4722
25 and 4725.

1 Q. Your testimony is that Photographs 4722 and 4725
2 show water damage?

3 A. You see the wrinkling of the paper facer at the top
4 of 4722 and kind of a moldy looking discoloration
5 on the drywall in both 4722 and 4725? Maybe they
6 don't copy well. Here's mine, if they're any
7 better. It doesn't look like clean gypsum
8 sheathing to me. It's discolored and has a
9 wrinkled paper facer, which means it has been
10 exposed to elevated moisture.

11 Q. Go ahead and take this back. 4722 that's showing
12 what type of material directly underneath that
13 gutter?

14 A. Directly underneath the gutter is unprotected
15 interior drywall.

16 Q. Is that more or less prone to water damage than an
17 OSB board?

18 A. I would say in terms of immediate consequence
19 probably more susceptible. They're both extremely
20 susceptible. I haven't made that comparison.

21 Q. And 4722 you say there is water damage underneath
22 that gutter where?

23 A. See how wrinkled the paper facer is right below the
24 gutter. And then what's below the gutter is just
25 discolored, showing the evidence of the elevated

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:

DEPOSITIONS AND _____, INC.
(864) 585-0642

000594

1 A. No, I don't know if this one was reported to have a
2 leak at that window or not.

3 Q. What would be an efficient remedy for this
4 particular issue on 63?

5 A. Whenever you can identify areas that are localized
6 in nature like that, you could just remove the
7 siding at the base of the wall and then what I
8 would probably do is maybe take a six-inch wide
9 piece of self-adhered flashing and slip it
10 underneath the weather barrier where it stops short
11 and over the top of that flashing and then put the
12 siding back.

13 Q. I'm sorry, I've asked you to go to 67.

14 A. That's okay. On 67 it looks like there's some trim
15 at the base of one of those cantilevered window
16 sections. And this is field notes dated June 30,
17 2010. Above the trim there's a reverse lap with
18 the metal flashing and the weather barrier. So the
19 weather barrier extends down behind the flashing
20 and behind some trim.

21 Q. What picture are you looking at?

22 A. Well, I'm going to tell you. And then stops short
23 behind the trim. The photo images would be 4622,
24 it's really through the rest of the page. But that
25 particular area 4623, 4624. I think that would be

1 it. The rest are photographs of the moisture meter
2 showing reasonable moisture levels, with the
3 exception of the adjacent trim piece, which is 4627
4 is the image number.

5 Q. You call it cantilevered, but this is an overhang
6 over the exterior doors onto the back or lakeside
7 patio porch?

8 A. Yes, sir.

9 Q. So the siding actually comes down -- I'm looking
10 back up at 4604. The siding actually comes down
11 and stops. And there is a piece of trim with a --
12 what did you call this piece of flashing?

13 A. Well, it's just metal flashing, but you could call
14 it "Z flashing" perhaps. That's a common term for
15 it.

16 Q. And was that Z flashing at about the same level as
17 the termination of the WRB?

18 A. No, I think it actually went a little bit further
19 down. If you look at the -- well, if you look at
20 4623 and 4624 you can see, you're looking at the
21 bottom of that flashing. So that WRB comes down
22 like maybe another inch or so below it.

23 Q. Can we assume that they were trying to flash or
24 incorporate the house wrap and the flashing at
25 about the level where the house wrap stopped? I

1 mean, was that the idea of why it stops there so
2 that they could flash it out and then put the trim
3 piece there?

4 A. I would think so. I mean, they're both right there
5 at the same level. It's just, if they're going to
6 do that then the weather barrier would need to go
7 over the vertical leg of the Z flashing to keep the
8 water from going behind the trim.

9 Q. Right. Do we know if it was done that way? Is
10 there a photograph that shows that it was not?

11 A. Yeah, the first -- let's see, look at 4604 with the
12 knife stuck in behind the vertical leg of the
13 flashing. So they just put the Z flashing over the
14 weather barrier. They didn't properly incorporate
15 it, like you were talking about. So now the water
16 is going to run behind the flashing and get the
17 trim and the OSB wet.

18 Q. Not having been there, it's a little difficult for
19 me to see this. I want to look at 4606.

20 A. Okay.

21 Q. Does the Z flashing change color?

22 A. It does. I mean, there's the outboard part of the
23 horizontal leg is painted brown. But I think when
24 they installed it, it's actually -- comes to the
25 site with a white painted finish.

1 A. Correct. I think this is pretty common in most
2 flashing integrations, that they put all the
3 flashing on the outboard side of the weather
4 barrier. So I agree with you. I mean, I think
5 that's probably the bigger problem is that
6 integration.

7 Q. Let's look at the next one which is 73. Did I ask
8 you why you chose Unit 67?

9 A. I believe so. And I believe I said, I don't know.
10 Which is the next one? 77?

11 Q. 73. And again, do you know why you chose this
12 unit?

13 A. No, sir.

14 Q. And I think we're looking for incomplete weather
15 barrier; is that right?

16 A. Yes, sir. I see a couple of images. I'm not
17 finished looking at all the images. But if we want
18 to -- I'm going backwards, if that's okay, in the
19 photos.

20 Q. Okay.

21 A. The first image numbers are behind the October 7
22 2009 tab. And they are images 4044 and 4045. And
23 it's just some trim that protrudes from the
24 exterior wall. The weather barrier came down to
25 the top of the trim and stopped. And then there

1 was flashing installed improperly over the outboard
2 side of the weather barrier. And there's just a
3 very narrow gap. That one looks like it would have
4 been really easy to properly integrate the
5 flashing, but was not properly integrated.

6 Q. Is this essentially the same issue as what we found
7 in 67?

8 A. It is. But instead of terminating behind the trim,
9 it terminates just above the trim.

10 Q. But could have been integrated with the flashing at
11 the length it is?

12 A. Correct. And this one, it's cut off, you know,
13 pretty cleanly above the trim. You could have just
14 lifted that weather barrier, put the vertical leg
15 of the flashing underneath and it actually have
16 been a functional detail.

17 Q. Is that the repair for these two items, you just
18 put the weather barrier over the flashing, put the
19 siding back on and you're done?

20 A. Sure. I think if that's the only issue that you
21 have to deal with, that would be a reasonable fix,
22 yes.

23 Q. Let's go to 76, please.

24 A. I'm sorry, there's more on this.

25 Q. Oh, I'm sorry.

1 Q. But when you walk down to this door, this wall
2 would be on your right side. Looking at
3 Photographs 3998 and on, you're lifting something
4 up. What is that?

5 A. That's the weather barrier that went behind the
6 metal flashing and then I'm looking at the damaged
7 drywall.

8 Q. Where does it show the weather barrier behind the
9 flashing?

10 A. That would be Photos 3960, 3961 I'll say through
11 about 3967 are probably good ones.

12 Q. And you found some damage from this condition at
13 the parking lot side of this unit?

14 A. Correct.

15 Q. And is the fix, again, to just lap the weather-
16 resistant barrier over the flashing?

17 A. I would say you've got some -- you have some
18 sheathing that you might need to replace. But,
19 yes, I mean, as far as what went wrong with that
20 particular location, the flashing would be --
21 should be properly integrated with the weather-
22 resistant barrier. I think also from a durability
23 standpoint, the Z flashing extends below the
24 vertical flashing at the corner. If you look at --
25 I think there's a better shot. But at least 3975

1 and 3976 -- oh, here's a close up, 3970. And then
2 at least a couple before that. The flashing goes
3 underneath that vertical trim. That's a bad detail
4 from a trim standpoint. You can see the close up
5 of how water is wicking up at the end of that trim.
6 Cedar is not as susceptible, but I get involved
7 with a lot of other trim products, in particular
8 engineered trim products like MDF and it just
9 disintegrates or gets really soft and swells at the
10 base. The better detail would be to have an end
11 dam on that flashing and then butt the two pieces
12 of trim tight together and have a caulk joint. If
13 you don't do that, you need to run the flashing
14 continuously around the corner and raise that trim
15 up, like a -- even just a quarter inch to get it
16 off of the flashing so water doesn't wick up the
17 end of it.

18 Q. We're sort of jumping back and forth. The missing
19 weather-resistant barrier house wrap is on that
20 one, I want to call it, side or patio side next to
21 the exterior doors on the patio. Did you find that
22 anywhere else on this unit?

23 A. No, I think it was just three destructive test
24 areas: above the cantilevered window, that adjacent
25 wall on the screened-in, closed porch and then that

1 front wall.

2 Q. And you found it on the front wall and on the
3 cantilevered window, you just didn't find it on
4 that side wall. Is that fair?

5 A. We found it to be incomplete on the two back patio.
6 I mean, that one -- the first one we looked at had
7 that -- just that little gap.

8 Q. Where are we looking? Give me the picture number,
9 please.

10 A. 4044 and 4045. Where it comes right down to the
11 trim but there's a gap and then the flashing was
12 put on the outboard side of it.

13 Q. Well, I understand that, but it's long enough to
14 lap over the trim?

15 A. Yes.

16 Q. Which it's your opinion should have been done;
17 right?

18 A. Yeah. In terms of it's there. It would just be
19 incomplete and not properly integrated. As far as
20 missing, it would just be that side wall of the
21 screened-in, closed porch.

22 Q. And I didn't see, Mr. Hodgin, any field notes for
23 all of these first sets of pictures. Am I wrong
24 about that? Are they missing?

25 A. I don't see them in mine either.

1 Q. It appears that there is some weather barrier there
2 in the corner with lettering on it.

3 A. I agree.

4 Q. Is there a bigger picture which would show how far
5 that extends or where it came from?

6 A. Let me look. I don't see it in these photographs,
7 no.

8 Q. How do you know that the weather barrier wasn't
9 removed to show the water damaged gypsum in 4722?

10 A. We would have indicated that in our field notes and
11 I don't think we would have photographed it and
12 included it as incomplete weather barrier if we
13 were the ones who removed the weather barrier.

14 Q. Again, this shows some incomplete weather barrier
15 here in Unit 89?

16 A. Yes, sir.

17 Q. And that ---

18 A. And ---

19 Q. Go ahead.

20 A. Well, I was just going to agree with you that, I
21 mean, the patterns that we came across are very
22 strange in terms of where the weather barrier is
23 included and where it is not. I mean, there's two
24 things on this unit, before we leave it. One is
25 you've got kind of a swath of missing weather

1 barrier at a very critical location directly below
2 the roof/wall intersection. And then you have kind
3 of a triangular missing section above the roof
4 line. It's in the same wall area, but completely
5 removed and separate from the area below. So we --
6 it's a very odd pattern where there's large areas
7 of weather barrier that are completely missing from
8 some locations.

9 Q. In regard only to the weather barrier and its
10 repair, how would you repair these two locations?

11 A. You'd have to remove the siding to the extent that
12 you could identify the areas of missing weather
13 barrier. And then you could -- if you were
14 satisfied that there's no damage below the areas
15 that do have weather barrier, you could try to
16 integrate new weather barrier with the laps that we
17 talked about and then tape joints and then put the
18 siding back.

19 Q. Okay. Were those all of the units that you
20 investigated in Phase II for this issue?

21 A. I don't know. I mean, I think Burgess' attempt was
22 to have each of the issues identified and then to
23 the extent possible show photographic examples of
24 each issue. But I don't know that there's been an
25 effort made to identify every single issue with all

1 exterior walls D3.

2 A. Okay.

3 Q. And tell us about, I guess just in general terms,
4 what this observed condition consists of?

5 A. I believe it would just be that in some locations
6 where we pulled off siding we also measured the
7 fasteners, and found the fasteners spacing to be
8 excessive.

9 Q. Let's go ahead and take a look at that. You've
10 identified Units 55 and 67?

11 A. Yes, sir.

12 Q. We already have 67 open. Let's look at that one
13 first.

14 A. Okay.

15 Q. Don't you? Don't you have that right in front of
16 you?

17 A. Yep.

18 Q. I'm getting familiar with these units looking back
19 at them. I recognize the Clemson paw every time we
20 come by this unit.

21 A. Yep. It looks like there's -- I guess there's only
22 one set of field notes, June 30, 2010. And if you
23 look at the siding that was removed -- and I would
24 say if it was documented by us it's probably --
25 hopefully I won't be taking us back later. But

1 it's usually pretty bad. You know, if it's close
2 to 16 inches or where it should be, I don't know
3 that we would make a big deal about it,
4 particularly in the Upstate. We don't have as
5 significant of a code prescribed wind load. But on
6 this one if you look at Image 4607 through 4610,
7 there are fasteners that were 46 inches, 41 inches,
8 47 1/2 inches. These are just the spacing of the
9 fasteners that are marked on the back of the siding
10 that we removed. In 4607 the spacings are 41
11 inches and 46 inches. In 4608 the spacings are 40
12 1/2 and 47 1/2 inches. In 4609 it might be the
13 same 40 1/2 inches. I can't be sure. And then 72
14 1/4 inches. And in the last image I see 28 inches.
15 So it was, I would say, excessive in terms of the
16 spacing of fasteners used to attach the siding.

17 Q. Let's look at 55 real quick also.

18 A. Okay. Are you ready?

19 Q. Yeah.

20 A. I don't see as many locations measured. But
21 there's some siding taken off adjacent to a window.
22 And all I can see is what's written on the weather
23 barrier, 25, 16 ---

24 Q. Where are you?

25 A. Oh, I'm sorry. The image number is 4667.

1 Q. I'll let somebody else do that, because we're
2 moving pretty slow.

3 A. All right.

4 Q. Let's move on to 8, and I guess 9 at the same time.
5 It looks like they're both talking about windows?

6 A. Yes.

7 Q. Well, back to Unit 55, I guess, since we're here.

8 A. 55 is not part of Issue Number 8.

9 Q. No, but it's part of Issue Number 9.

10 A. Okay.

11 Q. It looks like for both 8 and 9, again, you've cited
12 the general provision of 703.8. Well, no, you cite
13 Note 3 and Note 4 about "Under and at the ends of
14 masonry wood or metal copings and sills," and Note
15 4, continuously above all projecting wood trim,"
16 corrosion-resistant flashing needs to be installed.
17 All right. Let's look at that, and identify a
18 picture, if you would. Or a photo, I should say.

19 A. I don't know that that's an issue a whole lot
20 different than Number 6. I mean, I know it's in
21 that same area. So what this is saying is that
22 there should be flashing not only at the cedar to
23 stone intersection, but also the window stone
24 intersection. There should be flashing below
25 the -- between the window and that stone sill, I

1 guess it would be called at this location.

2 Q. Let me make sure that I understand. What is the
3 trim material?

4 A. Around the window?

5 Q. Well, around the window and above the stone water
6 table?

7 A. Cedar.

8 Q. That's a piece of cedar trim?

9 A. Yes, sir.

10 Q. So if we look at, I guess Photograph 4636 where you
11 can see the bottom of the trim piece around the
12 window right above the water table feature, the
13 stone water table feature?

14 A. Yes, sir.

15 Q. That's where you say a piece of flashing needs to
16 be put?

17 A. I believe it would be below the sill. Below the
18 window sill, which we have been calling a water
19 table at -- running away from the window we call it
20 a water table. Here it's a sill. And there should
21 be flashing that extends out below that location
22 based on that section of the code.

23 Q. Below the piece of stone?

24 A. Right.

25 Q. That creates the sill?

1 concrete taken up so the flashing details can be
2 reworked and make it a whole repair. I don't think
3 you're ever going to have it all fixed unless it's
4 taken down to that level. And I'm not sure -- I'm
5 not sure of the extent of the other repairs, if
6 that was addressed or not.

7 Q. And if it hasn't been, it needs to be done?

8 A. Correct.

9 Q. In your opinion?

10 A. Yes.

11 Q. You've testified, I guess, repeatedly that you
12 found consistent methods and manner of construction
13 between Phase I and Phase II?

14 A. I think I've testified about certain details. The
15 last one that we talked about was the stone veneer
16 details of flashing and so forth. And maybe about
17 the grading. But there are -- I mean, there are
18 some differences I would acknowledge. I said that
19 mostly because of the balconies. With the
20 balconies there is a significant difference in the
21 framing and the damage at the balconies.

22 Q. There's a framing structural issue in Phase I that
23 is not present in Phase II; is that fair?

24 A. Right. I've got water intrusion and staining on
25 pressure treated wood components, but they would be

1 Q. Let's look at Unit 81.

2 A. Okay.

3 Q. This talks about inadequate flashing of the
4 windows, sort of a -- it looks like sort of in a
5 general sense.

6 A. Yes.

7 Q. There is only one Phase II unit listed, that's this
8 Unit 81. Do you have an opinion, I like your word,
9 of whether the absence of adequate flashing on this
10 unit is an anomaly or is prevalent across Phase II?

11 A. I think our destructive tests -- we'll have to see
12 how many Phase II areas we've looked at around
13 windows. I have a hard time not lumping them
14 together. And I know Phase II is important to you,
15 or more important to you than Phase I. I think
16 that at least from a head flashing standpoint I
17 don't remember seeing anything different than what
18 we talked about earlier, always the flashing is
19 installed outboard of the weather-resistant barrier
20 and would not be weather lapped properly. But as
21 far as Phase II goes, I'm going to have to go
22 basically unit by unit from the table to remember
23 what conditions. I just don't have them that
24 cleanly segregated in my head as to what I saw
25 where without ---

1 A. Okay.

2 Q. Tell us what these ---

3 A. Wait a minute. Sorry.

4 Q. Yeah, it looks like we need a separation between 1
5 and 2; is that right?

6 A. No, I was going to circle the screw up on this.
7 These are actually not a problem. Where are we
8 going next?

9 Q. Exterior doors. Why don't you do ahead and tell us
10 what the issue is and then use a Phase II example,
11 if you wanted to show us.

12 A. So the first Phase II exterior door looks like Unit
13 43 on July 9, 2010. It looks like in the
14 photograph there's a balcony door where some trim
15 is removed. If you're standing looking out the
16 doors it would be the right side of the door and
17 then at the middle location. And it looks like if
18 you just go all the way from 7704 to 7783 that
19 should encompass all the door photographs. So the
20 trim's taken off the right side first, if you're
21 standing at the balcony looking at the rear wall.
22 And then you can see at the top of the door 7714,
23 which is the top right photograph on this index
24 sheet, the weather barrier comes over to the rough
25 opening and just simply folds in to the rough

1 opening. There's no additional protection at that
2 location. There's a close-up view of it in 7715.
3 And then the bottom of the door is observed in
4 7716.

5 Q. \ It looks like the house wrap is wrapped incorrectly
6 at the bottom, because it's closer, but much"
7 further away at the top. Is that a camera trick
8 or -- I mean, am I wrong about that? ✓

9 A. I don't think we can move the framing with the
10 camera. It's a wider gap for sure at the top of
11 the door; it looks like an inch or more. I
12 don't -- I can look and see if there's any comments
13 about it. I don't see anything about the framing.
14 It's all about the flashing and the weather barrier
15 details.

16 Q. Well, tell us about the weather barrier. What
17 should have happened or what should be there?

18 A. Well, it should be, you would think, some type of
19 termination detail at the base of the wall where
20 some flashing would extend to the -- well, I'm
21 sorry, this is the trim. There's stone above here.
22 The stone should have been raised up and have the
23 weep screed detail at the base. The trim is
24 probably fine to extend all the way down, but there
25 needed to be some type of flashing at the base of

1 the door to preclude water intrusion.

2 Q. At the base of the door or at the base of that
3 piece of trim?

4 A. I don't think the trim needs flashing. I think the
5 door should probably have sill pan flashing below
6 it. It does at least to be -- at least seem to be
7 a small step, like a piece of wood, below the
8 aluminum threshold of the door and the concrete
9 balcony surface.

10 Q. Right.

11 A. There's some minor staining at the base of the OSB
12 sheathing next to the door. And then it looks like
13 they took that wood block out. You can see in
14 7722?

15 Q. Yeah.

16 A. And so the concrete extends below the threshold.

17 Q. Do you mean it's lower than the threshold?

18 A. Yeah. I mean, the concrete goes between or goes
19 below where that brown aluminum threshold comes
20 out. That's 7723.

21 Q. Right.

22 A. And it looks like there's no flashing or
23 waterproofing that comes up from below the concrete
24 to integrate with the door opening flashing and
25 then no sill pan or effective flashing at the base

1 into it and see the success, you know, in
2 Charleston. If that works that could save some
3 labor costs.

4 Q. Let's talk about the balconies a little bit. I
5 think everybody wants to get out of here, so I'm
6 not going to -- I'm not going to try to belabor
7 this. Okay?

8 A. Okay.

9 Q. Can you give us sort of general overview of the
10 issues with the balconies?

11 A. Sure. If it's okay -- well, let me just first
12 discuss the differences between Phase I and Phase
13 II. Neither Phase I or Phase II, I believe,
14 followed the architects plans for CMU and concrete
15 construction. They both got switched to wood frame
16 balconies. Phase ---

17 Q. Let me stop you there a minute. You have not seen
18 the wood framed balcony plans?

19 A. No.

20 Q. You don't know if they exist or not?

21 A. I don't think I've seen them. I mean, if I've got
22 them, I don't recall seeing them. I just remember
23 seeing CMU and concrete.

24 Q. Okay.

25 A. Regardless, they're constructed with wood framing

1 on both Phase I and Phase II. Phase I is parallel
2 cord wood floor trusses. Phase II includes
3 pressure treated 2-by floor framing. Both exhibit
4 water intrusion, but because the Phase II buildings
5 were using the pressure treated wood, all you
6 really have, that I've seen, is water stained wood
7 framing. I don't know that the framing has been
8 damaged to the point that it needs to be repaired
9 or replaced.

10 Q. Are you talking about the wood framing that is
11 supporting the concrete deck?

12 A. Yes.

13 Q. Or also that is -- was used to create the
14 supporting columns?

15 A. I think and I hope, it would be both. Pressured
16 treated wood, I believe, was used in both vertical
17 and horizontal framing.

18 Q. Now, is the boxing of the columns a different story
19 or is that also pressure treated wood boxing? Do
20 you understand what I'm asking?

21 A. Yeah, I don't know. I don't know in Phase II. I
22 just know what I did with the borescope, looking at
23 the framing and the ceilings on Phase II and told
24 them everything is okay structurally. You know,
25 it's not an issue. But on Phase I had concerns

1 about the trusses -- the floor trusses being
2 damaged.

3 Q. So you've got a structural problem in Phase I that
4 you don't have in Phase II?

5 A. Right.

6 Q. We've talked a little bit about the integration of
7 the waterproofing under the cement deck with the
8 heated space; is that what you called it?

9 A. Yes.

10 Q. Where the slab meets the wall?

11 A. The rear wall, yes.

12 Q. The rear wall. Okay. You've also described some
13 slope issues on the deck?

14 A. Yes.

15 Q. Have you found any slope on any of the decks?

16 A. I don't think so.

17 Q. Do you know how many you've tested?

18 A. No.

19 Q. Have you read any testimony that the decks are
20 sloped?

21 A. No, I haven't.

22 Q. At this time can you disagree with that?

23 A. No. I mean, if there are some that sloped, I mean,
24 it could be that those are ones I didn't look at.

25 Q. And an additional problem with the rear patios and

1 decks, I guess, is that the water is getting into
2 the columns?

3 A. Yes.

4 Q. And rotting them?

5 A. Yes.

6 Q. Especially at the bottom?

7 A. Yes. Do you mind if I ask a question?

8 Q. No.

9 A. When you said "slope," can you clarify, did you
10 mean that there's testimony that the framing was
11 sloped or that the topping -- the concrete topping
12 was sloped?

13 Q. The concrete top.

14 A. Thanks.

15 Q. That still doesn't change your testimony?

16 A. No, I just wanted to be clear that -- what the
17 testimony was.

18 Q. I may be wrong about that. And people are welcome
19 to correct me, but -- all right, in your opinion,
20 what is the defect that is allowing water to get
21 into the columns?

22 A. Well, I can say it very generally and then you can
23 try to hone down on what the particulars are. But
24 there is just a terrible installation of
25 waterproofing details including weather-resistant

1 barriers, self-adhered flashing, lathe and stone.
2 I mean, that installation over the balconies, I
3 would say, did a very ineffective job of protecting
4 the underlying wood framing.

5 Q. All of those are just -- you're just talking about
6 columns? That they're self-adhesive flashing
7 weather barrier, you said some other things, stone,
8 lathe. That's all -- you're just talking about the
9 columns? We're not back at the heated space, we're
10 out ---

11 A. Well ---

12 Q. --- I think my observations will be primarily at
13 the columns?

14 A. Well, I think my observations may be primarily at
15 the columns. But I think you can see some of the
16 same defects on the arches between it. There's
17 really not a whole lot of stone to talk about at
18 the balcony. I mean, there's the columns and then
19 there's the arches between the columns.

20 Q. Yeah.

21 A. So when I've been up on a ladder looking at the
22 exterior of some of the columns, and you can see
23 bare OSB. I've seen rusty metal lathe. I've seen
24 incomplete weather barrier. It's just very poorly
25 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.

Deposition of NATHAN HORNADAY

Pursuant to notice, a deposition was taken in the
above case on the March 30, 2012 commencing at
approximately 10:15 a.m. attended by counsel as follows:

DEPOSITIONS AND _____, INC.
(864) 585-0642

000619

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

4 Q. Had you ever -- when you went to Stoneledge, had
5 you ever been a supervisor or superintendent on a
6 job?

7 A. No.

8 Q. When you went over there, did you think that you
9 had the skills to be -- did you call yourself
10 supervisor or superintendent first of all. Let me
11 ask you that. Or what title did you use, if you
12 used one?

13 A. Supervisor. I mean, I was mostly just supervising
14 everything that was being done.

15 Q. Were you supervising subcontractors?

16 A. Yes.

17 Q. Or did Marick have any other employees doing such
18 things as framing or other work of that type?

19 A. No.

20 Q. So it was all -- all the work was being done by
21 subcontractors?

22 A. Yes.

23 Q. Prior to the time you went to Stoneledge, had you
24 ever supervised subcontractors?

25 A. No.

1 Q. When you arrived at Stoneledge, did you feel like
2 you were up to that job?

3 A. Yes.

4 Q. In other words, you felt like you had enough
5 general experience to be able to monitor what the
6 different subs were doing and to determine whether
7 they were doing it correctly or not?

8 A. Yes.

9 Q. And were there times when you thought they were not
10 doing something correctly?

11 A. No.

12 Q. So basically the subs you felt like were proceeding
13 correctly?

14 A. I believe each sub, depending on what he did, I
15 mean, obviously knew more than I did about it.
16 That's why we hired them. And each sub, you know,
17 was an expert in their field. So I was basically
18 there to make sure -- schedule them to do their
19 work, when to come in, and make sure they got it
20 done.

21 Q. I understand that. Did you ever see something that
22 caused you to say to a sub, "Wait a minute, I don't
23 like the way you're doing that"?

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

2 Q. Do you remember specific instances, or are you just
3 saying that from time to time ---

4 A. From time to time I would see something that they
5 would cut a corner on, but I would talk to them and
6 they would fix it. But it was nothing major. It
7 was like nail guards on pipes, painting, you know,
8 caulking, stuff like that, on the inside -- the
9 interior unit.

10 Q. Did you do any work on Phase I?

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

14 Q. And what -- I'm sorry.

15 A. --- supervised a lot of repair work.

16 Q. By the way, if I start to ask you a question before
17 you finish -- I'll try not to do that, but
18 sometimes you can't help it.

19 A. Okay.

20 Q. Just let me know there's more in your answer;

21 A. Okay.

22 Q. Did this supervising of repair work in Phase I, was
23 that going on while ---

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
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SDI Funding, LLC, Medallion
At Keowee, LLC, Integrays
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

Deposition of WILLIAM CARY

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:

DEPOSITIONS AND __, INC.
(864) 585-0642

000623

1 A. They're all covered.

2 Q. Do you know why Carl Catoe and his subcontractors
3 would have installed WRB at some of these locations
4 and not others?

5 A. Well, it's kind of an odd -- an oddity on these
6 buildings. A lot of times when you're building a
7 building like this, you're moving pretty fast.
8 You're doing the big areas fast and moving pretty
9 fast on the large areas to try to cover as much
10 ground as possible. These smaller areas, like the
11 side of these screen porches may have been done
12 later. You know, they're susceptible to a little
13 bit more wind in a small area that may have had a
14 small triangle of WRB that blew off. I don't
15 know -- I don't know why it's not there. That's
16 why I assumed they're missing on all ten.

17 Q. The fastening of the cedar siding?

18 A. Yes.

19 Q. And you say, "Verify all siding is attached to the
20 structure at a maximum spacing of 18 inches." And
21 then you have suggested adding fasteners. And I
22 believe you said just a moment ago that only two or
23 three percent of the cedar siding is blind nailed?

24 A. Yes. Somewhere in there. There was some blind
25 nails that I saw. That may have been just to hold

1 the board in place until they got the nail guns out
2 to start nailing it. But it's almost all face
3 nailed.

4 Q. Have you observed in any of the CSE photographs
5 areas where the siding is blind nailed and there
6 are facing -- excuse me, there are fastener spacing
7 issues?

8 A. No, I haven't seen that.

9 Q. Let's go over and look, if we can, at Section A.
10 You have provided a detail for the repair of the
11 Parkside overhang condition; is that right?

12 A. Yes.

13 Q. And you've got a description of that which is Sheet
14 Number SK-3 of 4. And you indicate it was to
15 "Remove the bottom row of siding and the trim board
16 in the area designated by Section A. Remove the
17 base of wall Z-shaped metal flashing." And then
18 "Add new galvanized metal flashing per Section A
19 behind WRB; paint metal to match the trim board
20 color; replace the trim board and the removed
21 flashing. Replace the siding with salvaged or new
22 material and apply the exterior grade coating to
23 all affected areas." Is that right?

24 A. Yes.

25 Q. If we could flip over to SK 4 of 4, you are showing

1 EXAMINATION BY MR. ANTHONY:

2 Q. My name's Jay Anthony, and I represent Southern
3 Concrete Specialties.

4 A. Okay.

5 Q. They did work on Phase II only. You testified that
6 you omitted the decks from your repair scope. Can
7 you tell me why you did that?

8 A. Well, as I said earlier, it looked like Carl Catoe
9 Construction built them according to the drawings,
10 which is flat. And it looked like the work that he
11 performed matched the drawings, so I didn't go any
12 further than that. And I was only dealing with
13 what he was working on.

14 Q. You're aware of complaints of some water intrusion
15 into the cedar ceilings below the decks and into
16 some units?

17 A. Yes.

18 Q. Who do you hold responsible for those if not Carl
19 Catoe?

20 BY MR. TATE:

21 Object to form.

22 BY MS. LANG:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I don't know where the water's coming from, so I

1 based on Mr. Catoe saying that the decks were built
2 and framed level, and he did not do the
3 waterproofing or concrete work?

4 A. That's right.

5 Q. Any other reason you decided not to investigate the
6 decks?

7 A. Well, it looks like there were -- it seems like
8 everybody was assuming they're going to be torn
9 down or fixed or something done to them, so I
10 didn't investigate them. It looked like Carl Catoe
11 had done his work according to the drawings and the
12 direction he got from his general contractor.

13 Q. Did you ask Mr. Catoe any questions regarding his
14 work on the columns? And I guess by "columns" I
15 should define -- I think I was actually calling
16 them "piers" yesterday. But the -- basically the
17 column that comes up above the deck.

18 A. No. He said he built the wood columns, but I don't
19 know much more than that.

20 Q. Did you examine the plans to see how those were
21 supposed to be built?

22 A. Yes.

23 Q. And did it look like they were built in conformance
24 with the plans?

25 A. I haven't torn one apart. I've seen pictures that

1 show the plywood going across the top of the deck
2 level, and the drawings don't show that, but ---

3 Q. So that's a deviation from the plans?

4 A. Well, there's lots of deviations from the plans on
5 this job, yes.

6 Q. Are there any other ways that the decks weren't
7 built in accordance with the plans from a framing
8 standpoint?

9 A. I don't know of any. I mean, it's kind of hard to
10 tell. They don't match some details, but then they
11 match some other details. I mean, some of the
12 details on the drawings don't match another part of
13 the same drawing. I mean, they show beams with
14 stone all the way around them and then another part
15 of that same sheet shows framing coming out to that
16 beam, so depends on what part of the drawings
17 you're looking at. But it looks like from the
18 intent on the framing drawings that he built the
19 framing according to those.

20 Q. So you're aware that the plans did not show that
21 plywood bottom, I guess, of the piers?

22 A. Right. It looks like that they just call for
23 blocking at that level. Then the plywood stops and
24 it doesn't go into that pier.

25 Q. So this should be an opening essentially for water

1 Q. And I understood ---

2 A. On the outside edge, yes. The concrete is right
3 adjacent on the very outside edge. The stone is
4 adjacent to the concrete.

5 Q. And I understood your earlier testimony to be that
6 that is one condition that makes it difficult for
7 water to exit. Am I misunderstanding earlier
8 testimony?

9 A. No, that's correct.

10 Q. Have you reviewed the plans at all to determine
11 whether or not the stone in that location was built
12 in accordance with the plans?

13 A. I don't think that detail shows on the drawings
14 anywhere.

15 Q. If you were to design the decks, is there a way
16 that you would design the intersection of the
17 concrete and the stonework differently? Is there
18 any feature or detail that you would include at
19 that location that you don't believe is shown in
20 the as-built condition?

21 A. I would have the concrete -- I wouldn't have the
22 concrete butting into stone. I would have the
23 concrete or whatever that top surface is that's
24 draining overhang the stone. I would have a drip
25 edge to where that water could drip off the edge

1 BY MR. ORR:

2 Adequately before trial?

3 BY MR. TATE:

4 Yes, sir.

5 (OFF THE RECORD).

6 EXAMINATION RESUMED BY MR. ORR:

7 Q. Would you look at Exhibit Number 176, please, which
8 is your scope of repair?

9 A. Yes.

10 Q. On SK-2, which is the side of Unit 62, how was it
11 determined that there was no WRB behind that area?

12 A. I took a pry bar and pried up some of the siding
13 and looked under it.

14 Q. Okay. As you look at this, I assume we're looking
15 at the -- is that the parking lot side?

16 A. Yes.

17 Q. So on Unit 62, more towards the parking lot, there
18 was no WRB?

19 A. Yes.

20 Q. Did you look at the area below the intersection of
21 the roof of 63 with the wall of 62 to determine the
22 condition of the wall there?

23 A. Where? At the bottom of the hatch pattern?

24 Q. Yes.

25 A. Oh, no, I did not.

1 Q. Yeah, in the wall -- the wall area on the parking
2 lot side of the front wall of Unit 63.

3 A. I didn't look at the base of any wall there, no.
4 Just in the main field.

5 Q. Did you investigate any or look at any of the wall
6 areas that were adjacent to the step flashing where
7 the roof and the walls intersect?

8 A. Yes.

9 Q. Did you observe any deterioration of those walls?

10 A. No.

11 Q. Did you look at any roof sheathing to determine the
12 condition of that?

13 A. No, I couldn't see the roof sheathing from where I
14 was looking.

15 Q. As I understand it, the issue that you found with
16 the cantilevered sections on the Parkside units was
17 there was some discoloration of the cedar ceiling
18 board adjacent to this intersecting wall?

19 A. Yes.

20 Q. And that was due to the end of the cedar ceiling
21 board being more porous and so it absorbed some of
22 the moisture from the cedar trim board?

23 A. Yes.

24 Q. You indicated that it appeared to you that Mr.
25 Catoe or Catoe Construction Company or whoever

1 constructed the elevated decks according to the
2 plans?

3 A. According to most of the details on the plans, yes.

4 Q. Are there details on the plans he did not follow?

5 A. Yes.

6 Q. What were those?

7 A. I can show you on the drawings.

8 Q. May I come look over your shoulder?

9 A. Absolutely. We'll start with the framing plan
10 first, because that's where a framer, I think,
11 would start his particular looking at the drawings.
12 And this is sheet A-11. And it's the middle
13 detail -- the middle plan in here and it's the
14 ground floor framing plan. It shows treated 2x10's
15 at 12 inches on center. There's a cloud around it.
16 I think at one time it was 16 inches on center.
17 And it shows the perimeter boards at the lake side,
18 the lake edge of the decks and the screen porch.
19 And they have a little symbol and a triangle -- I
20 mean, a diamond shape. And the schedule calls for
21 that to be four 2x10's. And those four 2x10's are
22 drawn to be flush with the outside face of the
23 columns. If you look back at A-8 and you look at
24 column detail 15A-8, it shows those four 2x10's
25 coming into the middle of the column. So I'm not

1 take for it. I don't know.

2 Q. And you don't know what Carl Catoe Construction --
3 what issue, if any, Carl Catoe Construction raised
4 or with whom?

5 A. I do not.

6 Q. As I understood what you said when you were
7 deciding not to investigate the decks any further,
8 said it -- as I wrote down it looked like Catoe
9 constructed the deck in accordance with the plan
10 and as directed by the general contractor. Did he
11 tell you a specific direction he got from the
12 general contractor about constructing the decks?

13 A. I believe he told me he asked if he was supposed to
14 build them flat or not. And I think he was told to
15 build them according to the drawings as best he
16 could and to build them flat.

17 BY MR. ORR:

18 I think that's all I have. Thank you.

19 BY THE WITNESS:

20 Okay.

21 BY MS. LANG:

22 Anybody on the phone have any questions?

23 BY MR. BELCHER:

24 Alan Belcher. No questions.

25 BY MR. LYLES:

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

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vs.

IMK Development Company, Inc.

Keowee Townhouses, LLC,

Ludwig Corporation, LLC,

SDI Funding, LLC, Medallion

At Keowee, LLC, Integrays

Keowee Development, LLC,

Marick Home Builders, LLC,

Bostic Brothers Construction,

Miller/Player & Associates,

et. al.

Defendants.

Deposition of RANDY STILL

Pursuant to notice, a deposition was taken in the
above case on the August 15, 2012 commencing at
approximately 10:20 a.m. attended by counsel as follows:

DEPOSITIONS AND _____, INC.
(864) 585-0642

000634

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You
4 would expect they would but I don't know
5 contractually. I think it becomes a legal question
6 of duty.

7 Q. It is a duty, is it not, of the general contractor
8 to comply with the applicable building codes in the
9 performance of a project?

10 A. I would think so.

11 Q. Is it the duty of a general contractor to coordinate
12 the work of subcontractors?

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

16 A. I would think so to the extent he understands that
17 coordination effort.

18 Q. And if he doesn't understand the coordination effort
19 what should the general contractor do?

20 A. Ask questions.

21 Q. Of whom?

22 A. Subcontractors, make sure they're putting them
23 together correctly.

24 Q. Is it a duty of the general contractor on a project
25 like the Stoneledge Project to supervise the work of

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 Object to the form.

4 WITNESS ANSWERS:

5 A. I'm thinking about the word "supervise." You would
6 think that he would make sure they were doing what
7 entity they were supposed to be doing. In other
8 words, you would want a framing contractor doing
9 framing and you would rely upon them to perform
10 their craft appropriately. And the supervisory
11 condition would be, I would think, contractual.

12 Q. Between the general contractor and the
13 subcontractors?

14 A. I would think so.

15 Q. Do you think a general contractor has any obligation
16 to insure that his subcontractors(phone ringing) ---
17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

19 Q. Is it an obligation of a general contractor to
20 insure his subcontractor's in compliance with the
21 contract documents?

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I'm not sure I'd use the word "insure." I would

1 hope that he would do that.

2 Q. As a design professional in South Carolina would it
3 be your expectation that a general contractor would
4 at least confirm to his satisfaction that the
5 subcontractor's complying with the contract
6 documents?

7 A. I would think so.

8 Q. Is it your expectation as a licensed design
9 professional in South Carolina that a general
10 contractor would insure his subcontractor's
11 compliance with applicable manufacturer or industry
12 standards in the performance of his work?

13 A. I would think so but it would also be in compliance
14 with the design documents too because there may be
15 interpretations by the design professional that
16 would incorporate components differently.

17 Q. And where a general contractor is confronted with a
18 question about a conflict between manufacturer's
19 requirements and the contract documents or between
20 the contract documents and the code, is it the
21 general contractor's duty to get clarification of
22 that issue?

23 BY MR. IMHOFF:

24 Object to the form.

25 WITNESS ANSWERS:

1 A. I think it would be advisable for him to do that,
2 yes.

3 Q. Would you agree with me that the general
4 contractor's role on a construction project like
5 Stoneledge is the overall responsibility for the
6 construction of the entire project?

7 A. Yes.

8 Q. Since your last deposition have you reviewed or have
9 you developed any opinions about sufficiency of the
10 plans and specifications that were provided to
11 Marick Home Builders by Miller/Player?

12 A. I have looked at the plans. I haven't spent a lot
13 of time looking at them. They don't have an
14 enormous amount of detail to them.

15 Q. But do you have an opinion as to whether or not the
16 plans as provided by Miller/Player were sufficient?

17 BY MR. ORR:

18 Object to the form.

19 WITNESS ANSWERS:

20 A. I hesitate on that because you're asking me to opine
21 on the duty of an architect to prepare plans. As an
22 engineer I'm not sure I can do that. I can tell you
23 that there are details that I would've liked to have
24 seen in those plans that would've clarified areas.

25 Q. But you don't have any opinions about whether or not

1 conditions that you observed in Phase II among the
2 Marick Home Builders' subcontractors?

3 A. No.

4 Q. Do you acknowledge that at least in some respects
5 that we have discussed today as the general
6 contractor on the project, Marick Home Builders
7 violated the applicable building code?

8 A. I would agree with you that there are components
9 that have sustained damage at those isolated areas
10 we've talked about that now appear to be a code
11 violation because of failure.

12 Q. In other words, the fact that damage has occurred
13 indicates that the code has been violated?

14 A. At least in part. Some of it may be -- like we
15 talked about that stone that rolled out. You can't
16 isolate on the edge of the deck between the lack of
17 sealing that joint or maintaining that joint to the
18 contribution of what that would cause versus what
19 would come across the membrane, for example. We
20 haven't talked about those type issues. You can't
21 segregate that.

22 Q. What type issues haven't we talked about?

23 A. Maintenance. I mean, if the homeowner -- there is
24 some maintenance that's required and I have not
25 tried to go into that, but the issue we just talked

1 A. That is correct.

2 Q. Is there anything that suggests to you or anybody
3 else that owner maintenance had something to do with
4 that?

5 A. No.

6 Q. Is there anything that you believe owner
7 maintenance -- is there any relationship between any
8 owner maintenance and, for example the gaps and
9 openings you found in the waterproofing as it turned
10 up the columns?

11 A. No.

12 Q. Is there anything that you found related to owner
13 maintenance with regard to the improper termination
14 of waterproofing at the heated wall?

15 A. No.

16 Q. And all of those conditions allowed water
17 infiltration into the wall cavity?

18 A. Well, not wall cavity but those areas that we talked
19 about, the area behind the stone and the heated
20 wall.

21 Q. And that water infiltration caused damage?

22 A. Yes.

23 Q. Which is in violation of the code?

24 A. Yes.

25 Q. So you would acknowledge that as the general

1 contractor on the project Marick Home Builders
2 failed to comply with the building code?

3 A. At the time that we looked at it, yes.

4 Q. Okay.

5 A. At the time it was complete, nobody knew.

6 Q. Well, nobody knew but the conditions were there?

7 A. That's ---

8 Q. And what the code requires is that the building be
9 constructed in such a way as that water infiltration
10 and damage does not happen?

11 A. Right. In the areas we've talked about that's
12 correct.

13 Q. And that did not happen ---

14 A. That's correct.

15 Q. --- during construction? Okay. I probably have got
16 a few more questions for you but in the interest of
17 time I will pass the baton to somebody else.

18 A. Well, let's go to lunch then.

19 Q. Okay, that's fine with me if that's what you want to
20 do.

21 A. Yeah.

22 (OFF THE RECORD).

23 DIRECT EXAMINATION RESUMED BY MR. LYLES

24 Q. Let me ask you one just one thing before the lunch
25 brake.

1 obligation in the construction or installation of
2 the low slope roofs, whether it be code violation,
3 violation of the design documents or non-compliance
4 with the design documents or violation of
5 manufacturers' installation instructions or any
6 other obligation on the installation of the low
7 slope roofs?

8 A. I think the only place in the low slope roofs that
9 there is question is there's some very limited areas
10 where felts are missing, and that is an omission of
11 felts, a single layer of felts.

12 Q. Let's talk about that for just a minute. In your
13 experience and education and in your work, do you
14 hold the opinion that a general contractor is always
15 liable for all defects in construction which were
16 performed by subcontractors?

17 A. I think what I have found is the term "liable" is a
18 legal term and my belief is that the general
19 contractor can rely on the subcontractors who have
20 the specialty crafts and knowledge to perform their
21 work correctly.

22 Q. Is it fair to say that in many cases a subcontractor
23 is in fact more experienced and better qualified to
24 perform their particular trade than a general
25 contractor?

1 A. Yes.

2 Q. Is that because they have specialized over the years
3 in that particular area and have focused their
4 education and experience in that area?

5 A. Yes, and they've performed the work and they know
6 what works and what doesn't work.

7 Q. In your opinion is it fair -- is it acceptable for a
8 general contractor to rely on that experience and
9 education of a subcontractor in a particular trade?

10 A. I think in many cases he has to.

11 Q. Would you agree that obviously a general contractor
12 cannot see every nail which is driven or every board
13 which is installed?

14 A. Yes.

15 Q. Would you agree that he must, out of necessity, rely
16 on a subcontractor's experience and knowledge and
17 compliance with good building practice and the code?

18 A. Yes.

19 Q. Let me go back to my question then again. If based
20 upon that, if there are violations of code such as a
21 completely missing felt under a roof, do you hold
22 the opinion that the general contractor has violated
23 the code or some other obligation if the work was
24 done by a subcontractor?

25 A. No, but clearly when something like felt is missing

1 or a prototypical installation and that will serve
2 as the standard by which an installation is
3 accepted. For example, if you put a window in and
4 you've got a mock-up wall and you put in the rough
5 opening flashing and you put in the -- all the
6 flashings that would be there, all the peel-and-
7 stick and you've got all of the entities, for
8 example, the window manufacturer and the wrap
9 manufacturer and the peel-and-stick manufacturer and
10 the exterior cladding person there. And if they're
11 all there and they say, "Yeah, this is the way it
12 needs to be done." And your subcontractor who's
13 doing all those different components install it that
14 way, says he's going to install it that way, that's
15 how it should be installed. I'm not sure that
16 answers your question but ---

17 Q. Okay. Let me try to get to it a little bit
18 different way. Are you familiar with the term
19 "paper contractor"?

20 A. I'm not sure.

21 Q. Do you know if Marick actually drove any nails or
22 constructed any part of Stoneledge?

23 A. I think my understanding is he did not self-perform
24 any work.

25 Q. What in your opinion is the role of a general

1 Q. Do you believe or do you have an opinion that Marick
2 violated any code, manufacturers' instructions,
3 design drawings in the installation of the cedar
4 shake and plank siding in Phase II?

5 A. No.

6 Q. Do you have any opinion that Marick violated any
7 code, manufacturers' installation instructions,
8 design drawings or any other obligation in the
9 installation of the doors and windows in Phase II?

10 A. I am not aware that he installed any of those
11 components.

12 Q. Is that a "no"?

13 A. No.

14 Q. Do you believe Marick violated any code,
15 manufacturers' installation instructions, design
16 drawings or any other obligation in the stone
17 installation in Phase II?

18 A. No.

19 Q. Do you believe Marick violated any code,
20 manufacturers' installation instructions, design
21 drawings or any other obligation in the installation
22 of any of the waterproofing, framing, grading or
23 other construction components in Phase II?

24 A. No.

25 Q. I don't think I have any more questions for you

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS

)

) CASE NO. 09-CP-37-652

Stoneledge at Lake Keowee Owners' Association,)
Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W.)
Davenport, Michael Furnari, Donna Furnari, Jessy)
B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy)
H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund,)
III, Ruth E. Isaac, Michael D. Plourde, Mary Lou)
Plourde, Carol C. Pope, Steven B. Taylor, Bette J.)
Taylor, and Robert White, individually, and on)
behalf of all other similarly situated,)

Plaintiffs,)

v.)

IMK Development Co., LLC, Keowee Townhouses,)
LLC, Ludwig Corporation, LLC, SDI Funding,)
LLC, Medallion at Keowee, LLC, Integrys Keowee)
Development, LLC, Marick Home Builders, LLC,)
Bostic Brothers Construction, Inc., Miller/Player &)
Associates, John Ludwig, William Cox, Larry D.)
Lollis, Rick Thoenes, M Group Construction and)
Development, LLC, Mel Morris, Joe Bostic, Jeff)
Bostic, Clear View Construction, LLC, Michael)
Franz, MHC Contractors, Miguel Porras Choncoas,)
Builders FirstSource Southeast Group, Mike Green,)
Southern Concrete Specialities, Carl Compton d/b/a)
Compton Enterprize a/k/a Compton Enterprises,)
Gunter Heating & Air, All Pro Heating, A/C &)
Refrigeration, LLC, Coleman Waterproofing,)
Heyward Electrical Services, Inc., Tinsley)
Electrical, LLC, Hutch N Son Construction, Inc.,)
Upstate Utilities, Inc., Southern Basements, Inc.,)
Carl Catoe Construction, Inc., T.G. Construction,)
LLC, Delfino Construction, Francisco Javier Zarate)
d/b/a Zarate Construction, Alejandro Avalos Cruz,)
Herberto Acros Hernandez, Martin Hernandez-)
Aviles, Francisco Villalobos Lopez, Ambrosio)
Martinez-Ramirez, Ester Moran Mentado, Socorro)
Castillo Montel, MJG Construction and)
Homebuilders, Inc. d/b/a MJG Construction,)
KMAC of the Carolinas, Inc., Eufacio Garcia,)
Everado Jarmamillo, Garcia Parra Insulation, Inc.,)
J&J Construction, Jose Nino, Jose Manuel Garcia,)

**Defendant Builders FirstSource –
Southeast Group, LLC's Motion
for Judgment as a Matter of Law
as to the Cross-Claims of Marick
Home Builders, LLC and Rick
Thocnnes**

Eason Construction, Inc., Vincent Morales)
Masonry, and Miller/Player & Associates,)
)
Defendants.)
_____)

TO: ALL COUNSEL OF RECORD,

Please take notice that Defendant Builders FirstSource – Southeast Group, LLC, incorrectly identified in the Cross-Claims as “Builders FirstSource – Southeast Group” (“BFS”)¹, by and through its undersigned attorneys, will move before this Court for dismissal of all causes of action asserted against it by Marick Home Builders, LLC (“Marick”) and Rick Thoennes (“Thoennes”), in Oconee County, South Carolina, on the tenth day after service hereof or as soon thereafter as counsel may be heard, at such place, date, and time as the court may appoint, for an order pursuant to Rule 12(b) and/or Rule 56 of the South Carolina Rules of Civil Procedure, granting BFS judgment as a matter of law in this matter.

The grounds for this motion are as follows:

1. Marick’s and Thoennes claimed damages under its causes of action are directly related to funds it has or will expend in defending, settling, and/or satisfying a judgment related to Plaintiffs’ claims against them.
2. As Marick and Thoennes are seeking reimbursement for such damages, they are seeking to be indemnified. “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

¹Defendant Mike Greene is an employee of a local store of Builders FirstSource – Southeast Group, LLC, and has no individual legal liability or fault as relates to this matter. He has been named a party to Plaintiffs’ Third Amended Complaint but not Marick and Thoennes’s Cross-Claims, specifically. Nonetheless, to the extent it is necessary, this Motion shall be deemed a Motion for Mr. Greene, as well.

a third party.” 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).

3. Thus, regardless of how Marick and Thoennes name their causes of action, they are proceeding under indemnity.²
4. Any claims by Marick’s and Thoennes’ for contractual indemnity fail, for they have no contract with BFS that applies to the subject project which entitles them to indemnity.
5. Marick and Thoennes are barred from obtaining relief by way of equitable indemnity because they are not without fault as to the matters giving rise to this litigation.

Therefore, BFS asserts it is entitled to judgment as a matter of law as to Marick’s and Thoennes’ causes of action against it.

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GROUP, LLC AND MIKE GREENE

Charleston, South Carolina
August 23, 2012

²“ The character of an action is not to be determined by the terminology which the pleadings may chance to give to it. On the contrary, the character of an action is fixed by the events which the pleaders have recited . . .” Walsh v. Evans, 112 S.C. 131, 136, 99 S.E.2d 546 (1919)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, the attached *Builders FirstSource - Southeast Group, LLC's Motion for Judgment as a Matter of Law as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes* was served by Email and/or U.S. Mail, as indicated below, to the following:

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LLC**


David A. Root

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS

) CASE NO. 09-CP-37-652

Stoneledge at Lake Keowee Owners' Association,)
Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W.)
Davenport, Michael Furnari, Donna Furnari, Jessy)
B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy)
H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund,)
III, Ruth E. Isaac, Michael D. Plourde, Mary Lou)
Plourde, Carol C. Pope, Steven B. Taylor, Bette J.)
Taylor, and Robert White, individually, and on)
behalf of all other similarly situated,)

Plaintiffs,)

v.)

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LLC, Ludwig Corporation, LLC, SDI Funding,)
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Development, LLC, Marick Home Builders, LLC,)
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Associates, John Ludwig, William Cox, Larry D.)
Lollis, Rick Thoennes, M Group Construction and)
Development, LLC, Mel Morris, Joe Bostic, Jeff)
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Refrigeration, LLC, Coleman Waterproofing,)
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Carl Catoe Construction, Inc., T.G. Construction,)
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d/b/a Zarate Construction, Alejandro Avalos Cruz,)
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Martinez-Ramirez, Ester Moran Mentado, Socorro)
Castillo Montel, MJG Construction and)
Homebuilders, Inc. d/b/a MJG Construction,)
KMAC of the Carolinas, Inc., Eufacio Garcia,)
Everado Jarmamillo, Garcia Parra Insulation, Inc.,)

**Defendant Builders FirstSource –
Southeast Group, LLC's
Memorandum of Law in
Support of its Motion for
Judgment as a Matter of Law
as to the Cross-Claims of Marick
Home Builders, LLC and Rick
Thoennes**

J&J Construction, Jose Nino, Jose Manuel Garcia,)
 Eason Construction, Inc., Vincent Morales)
 Masonry, and Miller/Player & Associates,)
)
 Defendants.)
)

Defendant Builders FirstSource – Southeast Group, LLC¹ (“BFS”) submits this memorandum of law in support of its Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes (collectively referred to as “Marick”).

Background

This case arises out of the construction of the Stoneledge at Lake Keowee townhouse complex, located in West Union, South Carolina (the “Project”). The Project includes 80 townhouse units. There are three (3) to seven (7) individual townhouse units per building. The Project was constructed in two phases. Phase 1 consists of thirty-seven townhouse units. Phase 2 consists of forty-three townhouse units.

The Complaint was originally filed by Paul W. Hund, III, M.D. as an owner of one of the townhouse units. The Stoneledge at Lake Keowee Owners’ Association, Inc. (the “HOA”) joined as a Plaintiff. The HOA was allegedly created pursuant to the South Carolina Horizontal Property Regime Act, and it is asserting claims related to its purported obligations to maintain, repair, and replace components of the townhouses. (Third Amended Complaint ¶ 2.) In addition to Dr. Hund, the other named individual owners are allegedly bringing this action individually and on behalf of a class of individuals pursuant to Rule 23, SCRPC.

¹ Defendant, Mike Greene, is only an employee of BFS and is not a proper party to this action. Nonetheless, to the extent it is necessary, this memorandum shall be deemed a memorandum for Mr. Greene, as well.

Plaintiffs have named BFS to the suit, alleging that BFS “provided materials and labor for the Project, included but not limited to, framing work.” (Third Amended Complaint ¶¶ 29, 30.) Plaintiffs have alleged causes of action against BFS for Breach of Warranty and Negligence. (Third Amended Complaint ¶¶ 87 - 97.) BFS has denied all allegations of fault or liability as to it. In its Answer to Plaintiffs’ Third Amended Complaint, Marick has asserted cross-claims against BFS for Equitable Indemnity, Breach of Contract, Negligence, and Breach of Warranties.

Marick served as general contractor for Phase 2 of the Project. Marick contracted with BFS to provide materials and labor for framing, siding and related construction components. BFS, in turn, contracted with Carl Catoe Construction, Inc. (“Catoe”) to perform the labor associated with those tasks.

Argument

Marick’s claims against BFS for breach of contract, negligence and breach of warranty should be dismissed because they are disguised indemnity claims. The equitable indemnity claim should be dismissed because Marick is not without fault. Further, to the extent Marick alleges any contractual indemnity claims against BFS, which it expressly does not, those should be dismissed because Marick had no contract with BFS that applied to this work and that carried any indemnification language, or that was otherwise enforceable.

1. As to Marick’s disguised indemnity claims

Marick’s breach of contract, breach of warranty, and negligence claims against BFS should be dismissed because these claims are merely disguised claims for equitable indemnity and are not viable as alternative causes of action. “Indemnity is that form of compensation in which a first party [here allegedly BFS] is liable to pay a second party [here Marick] for a loss or damage the second

party incurs to a third party [Plaintiffs].” Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff’d*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005).

The character of an action is determined by the allegations contained in the complaint, specifically “the nature of the issues and the remedies which are sought.” State v. Yelsen Land Co., 257 S.C. 401, 403 (1972); Seebaldt v. First Fed. Sav. & Loan Ass’n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). “The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited.” Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 (“The character of an action is primarily determined by the allegations contained in the complaint.”).

Marick’s cross-claims in this case are all claims for indemnity. As clearly delineated in each of Marick’s cross-claims, Marick’s claimed damages are comprised of those sums it may have to pay Plaintiffs because of the allegations against it. (Marick’s Answer to the Third Amended Complaint ¶¶ 162, 170, and 174.) These cross-claims are thus clearly claims for indemnity. See Vermeer Carolina’s, Inc., 336 S.C. at 60, 518 S.E.2d at 305. Therefore, the Court can and should characterize the breach of contract, breach of warranty, and negligence claims as equitable indemnity claims.

As noted by South Carolina’s federal district court, “a rose by any other name is still a rose,” and legal claims, whether denominated as negligence or breach of warranty, which assert damages

arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

2. **As to Marick's claims for equitable indemnity**

Because Marick cannot be adjudged without fault, summary judgment on Marick's equitable indemnity claims is proper. Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Loggins Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Here, Marick's own expert admits that Marick is not without fault. Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." Still Dep. 87:3-7 (Aug. 15, 2012). Still further acknowledged that, in some instances, Marick violated the building code.^{1 2}

Because Marick is the permit holder for Stoneledge Phase 2, it cannot be adjudged without fault. The party pulling a permit is ultimately responsible for compliance with the building code. Marick, not BFS, was the entity that obtained the permits for construction of Phase 2 of the Project. Because Marick was the permit holder for Phase 2 and violated the building code according to its own expert, it cannot be adjudged without fault, and thus its claims for equitable indemnity fail.

¹
Q. Do you acknowledge that at least in some respects that we have discussed today as the general contractor on the project, Marick Home Builders violated the applicable building code?

A. I would agree with you that there are components we've talked about that now appear to be a code violation because of failure. Still 89:

²

Q. So you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?

A. At the time that we looked at it, yes. Still Dep. 92:25-93:5.

3. As to any claims by Marick for contractual indemnity

To the extent Marick argues that it is entitled to contractual indemnity (though it did not plead this) its claims fail, for it entered into no contract with BFS which applied to the Project and which carried indemnification language. Additionally, BFS is informed and believes that Marick had no contractor's license, and is thus prohibited from enforcing any contract as a matter of law. South Carolina Code § 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, it "may not bring an action either at law or in equity to enforce the provisions of a contract." South Carolina Code § 40-11-370(C). The same prohibition exists as to residential home builders. S.C. Code Ann. §40-59-30. The plainly worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

Conclusion

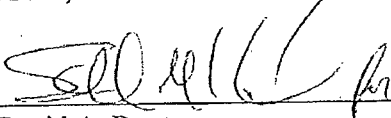
For the foregoing reasons, as well as any others as may be argued or presented at the hearing on the subject motion, BFS's Motion for Summary Judgment against Marick should be granted.

SIGNATURE ON FOLLOWING PAGE

Respectfully submitted,

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August 30, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, the attached *Builders FirstSource - Southeast Group, LLC's Memorandum of Law in Support of its Motion for Judgment as a Matter of Law as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class, to:

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Alison D. Sessoms

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners' Association,
Inc, et al.

Plaintiff,

vs.

IMK Development Co., LLC, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-37-0652

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Marick Home Builders, Inc. Attorney: Jason M. Imhoff, Esquire The Ward Law Firm, P.A. Phone: (864) 573-8500 Post Office Box 5663 Spartanburg, S.C. 29304 jimhoff@wardfirm.com		Defendant's Attorney: Greg Horton, Bar No. 11343; Dana W. Lang, Bar No. 77546 Address: Womble Carlyle Sandridge & Rice, LLP Post Office Box 999, Charleston, SC 2940 Phone: 843-722-3400 E-mail: ghorton@wcsr.com dlang@wcsr.com	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Dismiss or for Summary Judgment Estimated Time Needed: <u>30 minutes</u> Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant <u>Carl Catoe Construction, Inc.</u>		<u>August 23, 2012</u> Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT
) Civil Action No.: 2009-CP-37-0652

Defendants.

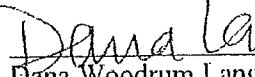
**CARL CATOE CONSTRUCTION, INC.'S
MOTION TO DISMISS OR FOR SUMMARY
JUDGMENT
AS TO MARICK HOME BUILDERS, LLC**

TO: JASON IMHOFF, ATTORNEY FOR MARICK HOME BUILDERS, LLC

YOU WILL PLEASE TAKE NOTICE that the Defendant Carl Catoe Construction, Inc., (“Catoe”), by and through its undersigned attorneys and pursuant to Rule 12(b) and/or Rule 56 of the South Carolina Rules of Civil Procedure, will move before this Court for dismissal of all causes of action asserted against it by Marick Home Builders, LLC (“Marick”) or for judgment as a matter of law as to all causes of action asserted against it by Marick. This motion shall be heard in ten (10) days time or as soon thereafter as the Court may allow.

The basis for this Motion is that Marick fails to state a claim upon which relief may be granted and that Catoe is entitled to judgment as a matter of law. Rule 12(b) S.C. Rule Civ. P. Further, there exists no genuine issue of material fact and Catoe is entitled to judgment as a matter of law. Rule 56, S.C. Rule Civ. P. Catoe will rely upon its memorandum of law to be filed, and the pleadings on file with the Court in support of this motion. If matters outside the pleadings are presented to and not excluded by the Court, this motion shall be treated as one for summary judgment and be considered under South Carolina Rule of Civil Procedure 56.

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STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., et al,
vs. IMK DEVELOPMENT CO., LLC, et al.
Case No.: 2009-CP-37-0652

CERTIFICATE OF SERVICE

I do hereby certify that on the 23rd day of August 2012, I served a copy of the foregoing *Carl Catoe Construction, Inc. Motion to Dismiss or for Summary Judgment as to Marick Home Builders, LLC* in the above-entitled matter by sending a copy via electronic mail and regular mail to counsel for Marick Home Builders, LLC; all other counsel were served via electronic mail only.

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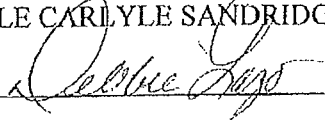
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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
Stoneledge at Lake Keowee Owners'	)	Civil Action No.: 2009-CP-37-0652
Association, Inc. <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT OF CARL CATOE
	)	CONSTRUCTION, INC.'S MOTION TO DISMISS
	)	AS TO MARICK HOME
IMK Development Co., LLC <i>et al.</i> ,	)	BUILDERS' CLAIMS
	)	
Defendants.	)	

TO: JASON IMHOFF, ATTORNEY FOR MARICK HOME BUILDERS, LLC

Defendant Carl Catoe Construction, Inc., ("Catoe"), by and through its undersigned attorneys and pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, has moved before this Court for dismissal of all causes of action asserted against it by Marick Home Builders, LLC and Rick Thoennes, Jr. (collectively, "Marick"). This memorandum of law is filed in support of that motion.

RELEVANT FACTS

Marick Home Builders, LLC served as General Contractor for Phase II of the townhome development known as Stoneledge. Marick entered into a subcontract with Builders First Source -Southeast, LLC ("BFS") to provide materials and labor to perform certain construction tasks, including framing, cladding, installation of windows and doors. BFS, in turn, contracted with Catoe to perform the labor associated with those tasks. Catoe has no contract, written or oral, with either Marick Home Builders or Rick Thoennes, Jr.

Stoneledge homeowners and Homeowners Association ("Plaintiffs") filed suit against a host of parties, including Marick and Catoe, for certain construction defects. Marick has filed cross-claims against Catoe for (1) negligence, (2) breach of warranty and (3) equitable indemnity.

ARGUMENT

Marick's claims against Catoe for negligence and breach of warranty should be dismissed because they are merely disguised indemnity claims. Other South Carolina circuit courts have so ruled in similar cases. (Orders attached as Exhibits A and B.) The indemnity claim should be dismissed because Marick and Catoe have no special relationship, and because Marick is not without fault. Finally, to the extent Marick alleges contractual claims against Catoe, those should be dismissed because no contract exists between Catoe and Marick, and because Marick is an unlicensed contractor, prohibited by law from access to the Courts in order to enforce contract claims.

I. Disguised indemnity claims should be dismissed.

Marick's breach of warranty and negligence claims against Catoe should be dismissed because these claims are merely disguised claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party [Catoe] is liable to pay a second party [Marick] for a loss or damage the second party [Marick] incurs to a third party [Plaintiffs]." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." State v. Yelsen Land Co., 257 S.C. 401, 403 (1972); Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the

pleaders have recited.” Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 (“The character of an action is primarily determined by the allegations contained in the complaint.”).

Marick’s claims in this case are all disguised indemnity claims. The cross-claim for breach of warranty against Catoe states:

Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of the above named parties breach of their express and/or implied warranties; as a result, Marick is informed and believes that it is entitled to recover from [Catoe] such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick’s Answer to Plaintiffs’ Third Amended Complaint & Cross-claims, ¶ 174.)

Similarly, Marick’s cross-claim for negligence states:

Should Plaintiff’s prevail on their claims, Marick will be damages as a direct and proximate result of [Catoe’s] negligence; as a result, Marick is informed and believe that it is entitled to recover from [Catoe] such as it may incur legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick’s Answer to Plaintiffs’ Third Amended Complaint & Cross-claims, ¶ 169.)

Marick’s cross-claims seek to recover the amount Marick will owe the Plaintiff after trial due ostensibly to the acts or omissions of others, plus attorney fees. The “damages” are contingent on the outcome of the trial. Marick does not seek damages from Catoe for personal injury, property damages, or other damages actually incurred by Marick. These cross-claims are textbook claims for indemnity. See Vermeer Carolina’s, Inc., 336 S.C. at 60, 518 S.E.2d at 305. Therefore, the Court can and should characterize the breach of warranty and negligence claims as equitable indemnity claims.

As noted by South Carolina’s federal district court, “a rose by any other name is still a rose,” and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one’s liability to a third party are “nothing more than claims for ...

indemnification with a slight change in wording.” SCNB v. Stone, 749 F.Supp. 1419, 1433 (D.S.C. 1990).

Trial courts in South Carolina have granted summary judgment in similar cases, concluding that claims couched in terms of indemnity fold into and are absorbed by overarching causes of action for indemnification. For example, in Nelson v. John Wieland Homes, 2009-CP-10-6573, the plaintiff homeowner sued her homebuilder, alleging construction defects. The homebuilder in turn filed third-party claims against its subcontractors for negligence, breach of warranty, breach of contract, and indemnity, alleging that if the homebuilder was liable to the plaintiff, it was due to the actions or omissions of the third-party subcontractors. Judge Roger M. Young granted summary judgment on claims of negligence, breach of warranty, and breach of contract, finding that these claims were disguised indemnity claims. (Order of Young, J., Exhibit A.)

Similarly, in Kirkland v. Cambridge Building Corp., 2005-CP-07-1312, plaintiffs brought an action alleging construction defects, and a defendant brought a third-party action against the manufacturers of the synthetic stucco applied to the residence, alleging negligence and breach of warranty. Judge Curtis L. Coltrane stated: “The Court concludes as a matter of law that [defendant’s] claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action.” Order of Coltrane, J., Exhibit B.

Appellate courts in other states, in similar cases, have also concluded that a cross-claim or third-party claim couched in terms of indemnity folds into and is absorbed by an overarching cause of action for indemnification. Dodge Trucks, Inc. v. Wilson, 231 S.E.2d 818, 821 (Ga. Ct. App. 1976) (stating “regardless of what [Plaintiff] may name [his claim], it is an action for contribution and indemnity”), aff’d, 235 S.E.2d 142, 144 (Ga. 1977); Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1258-59 (Ill. 1983) (observing that, although the claims

were “stated as counts for breach of implied warranty,” they could be regarded as claims for indemnity); Warner v. Reagan Buick, Inc., 483 N.W.2d 764, 770 (Neb. 1992) (noting that, although the third-party plaintiff made claims for breach of contract, “[t]he gravamen of the [buyer’s] third party petition is indemnification, and we shall treat it as such”); Adkinson v. Int’l Harvester Co., 975 F.2d 208, 216 (5th Cir. 1992) (treating third-party plaintiff’s claim for breach of warranty as one for indemnity) (internal citations omitted).

II. The claims for equitable indemnity should be dismissed.

I. No special relationship exists between Marick and Catoe.

Marick’s claims for equitable indemnity fail because Marick had no contractual or special relationship with Catoe, and, in fact, no such relationship has been alleged. (See Third-party Compl. ¶¶ 187-193.) “A right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.” Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). In order to maintain a claim for equitable indemnity, Marick must demonstrate that a special relationship existed between it and Catoe. Toomer v. Norfolk Southern Railway Company, 344 S.C. 486, 492–493, 544, S.E.2d 634, 637 (Ct. App. 2001); Scott v. Fruchauf Corp., 302 S.C. 364, 368, 396 S.E.2d 354, 358 (1990) (“[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them”).

The South Carolina Supreme Court’s most recent comprehensive analysis of equitable indemnity held that an attenuated relationship will not support an equitable indemnity claim. Rock Hill Tel. Co. v. Globe Comm’n, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005)(certified question). There, a utility company hired a contractor to perform certain construction work.

That contractor, in turn, hired a subcontractor. A third party was injured at the site. After settlement, the utility brought suit against the second-tier subcontractor for equitable indemnity. The court, answering a certified question, held that the “subcontractor is merely a remote or distant independent contractor, and therefore does not have a special relationship” with the utility, and an equitable indemnity claim is inappropriate. *Id.* at 390, 611 S.E.2d at 237.

Catoe and Marick, like the utility and the subcontractor in Rock Hill, have no contractual relationship between them. Thus, the relationship will not support an indemnity obligation. *Id.* Marick alleges that BFS directly hired Catoe to perform work at Stoneledge. South Carolina case law is devoid of any suggestion that a downstream contractor or supplier has any special relationship with the prime contractor. The lack of a special relationship between Marick and Catoe is fatal to Marick’s equitable indemnity claims as a matter of law.

2. *Marick cannot be adjudged without fault.*

Alternatively, because Marick cannot be adjudged without fault, summary judgment on Marick’s equitable indemnity claims is proper. Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. *Stuck*, 279 S.C. at 24, 301 S.E.2d at 553. Here, Marick’s own corporate witnesses and experts admit that Marick is not without fault.

Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has “overall responsibility for construction of the entire project.” Still Dep. 87:3-7 (Aug. 15, 2012).

Because Marick is the permit holder for Stoneledge Phase II, it cannot be adjudged without fault. The party pulling a permit is “solely responsible” for compliance with the building code. (Ex. C, Representative Building Permit and Application from Oconee County.) Marick—not Catoe—was the entity that obtained the permits for construction of Phase II of Stoneledge.

Marick's own expert Still further acknowledged that, in some instances, Marick violated the building code.^{1 2} Because Marick was the permit holder for Phase II and violated code according to its own expert, it cannot be adjudged without fault for building code violations.

III. Marick Has No Right to Enforce Contractual Claims in Law or Equity.

Marick alleges that "Catoe...expressly and/or impliedly warranted to Marick..." certain guarantees. (Marick's Answer and Crossclaim against Catoe). Express warranty claims are contractual. Marick had no contract with Catoe, so these claims should be dismissed as a matter of law.³

Even if some implied contract terms exist (which is denied), Marick had no contractor's license during construction and is therefore prohibited from enforcing any contract terms as a matter of law. South Carolina Code Section 40-11-30 provides that "[n]o entity . . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor does work without a license, South Carolina Code Section 40-11-370(C) it "may not bring an action either at law or in equity to enforce the provisions of a contract." The same prohibition exists as to residential home builders. S.C. Code Ann. §40-59-30. The plainly

1

Q. Do you acknowledge that at least in some respects that we have discussed today as the general contractor on the project, Marick Home Builders violated the applicable building code?

A. I would agree with you that there are components we've talked about that now appear to be a code violation because of failure. Still 89: 4:11.

2

Q. So you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?

A. At the time that we looked at it, yes. Still Dep. 92:25-93:5.

3

Q. Carl Catoe was not your subcontractor, correct?

A. That's correct.

Marick 30(b)(6) Dep 224:10-12.

worded statutes clearly state that an unlicensed contractor may not sue to enforce a contract in South Carolina.

Marick is not a licensed contractor. Although Mr. Thoennes, Marick's 30(b)(6) designee, testified he was personally licensed⁴ at the time Stoneledge was constructed, no public records for the State of South Carolina reflect that Marick Home Builders has ever had a contracting license. The attached exhibits are the results of searches performed on South Carolina's Labor, Licensing, and Regulation website. (Ex. D, Information from SC LLR). Those searches reflect that no commercial or residential builder's license has ever been issued to Marick at any time. Id. Because Marick was unlicensed, it cannot enforce any contractual obligations, including warranty claims.

CONCLUSION

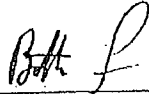
Marick's Cross-claims against Catoe consist solely of a single equitable indemnity claim. Marick improperly seeks recovery under tort, contract and warranty theories not for its own independent injury or property damage, but merely for the liability it might incur to Plaintiffs. Moreover, each of the claims explicitly seeks indemnification for any losses Marick might sustain regarding the Stoneledge development. Accordingly, each claim fails to state facts sufficient to constitute independent causes of action for negligence, breach of warranties or breach of contract. Marick's sole claim against Catoe is one for equitable indemnity.

That equitable indemnity claim must fail. No special relationship exists between Marick and Catoe. Further, Marick has not been—and, according to its own expert's testimony, cannot

⁴Mr. Thoennes is reflected as the qualifying party for a commercial contractors' license issued to "Rick Thoennes Builders." Rick Thoennes Builders, Inc., which is registered with the South Carolina Secretary of State, is (presumably) a separate entity from Marick Home Builders, LLC. Pursuant to statute, a person may serve as the qualifying party for only one entity, subject to certain exceptions. S.C. Code Ann. §40-11-230. Thus, Mr. Thoennes is not the license holder for Marick Home Builders, LLC.

be—adjudged without fault in this matter. Therefore, Marick and Catoe are, at best, joint tortfeasors, with no right of indemnity between them.

Finally, to the extent Marick alleges contractual claims against Catoe, those claims are unenforceable, because Marick has no contract with Catoe and it is an unlicensed contractor. Marick is thus precluded from bringing these claims even if they were properly pled.



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August 30, 2012

EXHIBIT A

(mcm)

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CASE NO. 05-CP-07-1312

Carl T. Kirkland, Mary Alice Kirkland,)
Carl T. Kirkland Qualified Personal)
Residence Trust and Mary Alice Kirkland)
Qualified Residence Trust,)

Plaintiffs,)

v.)

Cambridge Building Corporation, MAJ)
Enterprises, Southern Roof and Wood Care)
Corp., T.R. Johnson Builders, Inc.,)
Figueroa's Exterior Trim & Woodwork,)
William Vitto, Susanne T. Sheik,)
Lang's Heating & Air Conditioning,)
Andersen Windows, Inc., and)
Clarence R. Floyd d/b/a Wiggins Iron)
and Fence,)

Defendants.)

Cambridge Building Corp.)

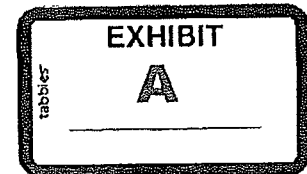
Third-Party Plaintiff,)

v.)

Sto Corp. and Acrocrete, Inc.,)

Third-Party Defendants.)

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT
OF STO CORP. AND
ACROCRETE, INC.**



This matter is before the Court on the motion of Third-Party Defendants Sto Corp. ("Sto") and Acrocrete, Inc. ("Acrocrete") for summary judgment as to the claims asserted by the Third-Party Plaintiff, Cambridge Building Corporation ("Cambridge"). The case involves the construction of a house on Hilton Head Island, South Carolina, now owned by the Plaintiffs, who bought it in 1997. Cambridge served as general contractor for the house, which was built in 1993 for a previous owner. As originally constructed, the exterior siding of the house was an Exterior Insulation and

cu # 1019

000682

Finish System ("EIFS"), sometimes referred to as synthetic stucco. It is undisputed that Cambridge's EIFS subcontractor mixed materials sold by two different manufacturers, Acrocrete and Sto, when installing the EIFS on this house.

Plaintiffs, in their Fourth Amended Complaint, assert claims against Cambridge for faulty construction resulting in water damage to the structure.¹ Cambridge's Third-Party Complaint against Sto and Acrocrete contains causes of action for indemnity, negligence and breach of warranty. For the reasons stated below, the Court concludes that summary judgment should be granted.

1. Summary judgment standard.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered forthwith when depositions and other evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a summary judgment motion, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. The non-moving party, however, can not rest on the mere allegations of its pleadings but must present specific, admissible facts which reasonably create a genuine issue for trial, and the Court need not consider unreasonable inferences from the proffered evidence. *Main v. Corley*, 281 S.C. 525, 526-527, 316 S.E.2d 406, 407 (1984); *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991); *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1992).

¹ As part of a settlement with Sto and Acrocrete, the Plaintiffs amended their Complaint to clarify that they do not allege the remaining defendants, including Cambridge, are liable in any way for supplying a defective product. It is clear that the Plaintiffs' claims against Cambridge relate solely to construction defects, including but not limited to the failure to properly supervise the installation of EIFS.

2. *The negligence and breach of warranty claims.*

The Court concludes as a matter of law that Cambridge's claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

Although Cambridge contends otherwise, a fair reading of the language of its third-party complaint reveals that the first and second causes of action for negligence and breach of warranty are, in reality, claims for indemnity. In stating both claims, Cambridge seeks recovery, not for its own independent personal injury or property damage, but merely for the liability it might incur to the Plaintiffs. In stating the negligence cause of action, paragraph 89 of the Third-Party Complaint reads as follows:

If Cambridge is liable to the Plaintiffs in any respect, which is denied, then such liability arose from [Sto and Acrocrete's] breach of the duties described above. Such breaches constitute negligence, and [Sto and Acrocrete] should **indemnify** Cambridge, in whole or in part, for any liability that may be adjudged against it in the Plaintiffs' favour. (emphasis added).

Likewise, the cause of action for breach of warranty contains virtually identical language seeking reimbursement of any amounts which Cambridge is found to owe to Plaintiffs. The causes of action for negligence and breach of warranty mimic that for

indemnity. These claims not only seek a form of relief that could only be defined as indemnity but also actually use the word "indemnify." Therefore, there can be no doubt that Cambridge's negligence and warranty claims are, essentially, indemnity claims in disguise.

Proof of a breach of warranty or negligence may be relevant for an indemnitee to establish the indemnitor's **fault** in causing a plaintiff's damages, which is an essential element of a claim for equitable indemnity. Such proof does not support stand-alone claims, however. Thus, to recover against Sto or Acrocrete, Cambridge must still establish the other elements of equitable indemnity. The Supreme Court of South Carolina recognized as much when it observed the following:

The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.

Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992). As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." *SCNB v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

The highest courts in other states have also concluded that a third-party plaintiff's claims for breach of warranty necessarily fold into and are absorbed by an overarching cause of action for indemnification. See *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 820 (Ga. Ct. App. 1976); *aff'd*, 235 S.E.2d 142, 144 (Ga. 1977) (claim couched as

breach of warranty was really one for indemnity); *Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (claims "stated as counts for breach of implied warranty" should be regarded as claims for indemnity); *Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) ("[t]he gravamen of the third party petition is indemnification, and we shall treat [claims titled breach of warranty] as such"); *Adkinson v. International Harvester Co.*, 975 F.2d 208 (5th Cir. 1992) (interpreting third-party claim for breach of warranty as one for indemnity).

Since Cambridge has not alleged or submitted evidence of any damages other than Plaintiffs' potential judgment against it and the costs incurred in defending Plaintiffs' claims, the only viable cause of action against Sto or Acrocrete is one for indemnity.² Therefore, the Court grants summary judgment on the causes of action for negligence and breach of warranty

3. *Equitable indemnity - lack of a special relationship.*

The Court also concludes as a matter of law that there is no special relationship between Cambridge and Sto or Acrocrete on which to base Cambridge's right to equitable indemnity.³ Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). In order to maintain a claim for equitable indemnity, Cambridge must demonstrate that a special relationship existed between it and Sto or Acrocrete. See *Toomer v. Norfolk Southern Railway Company*, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637, (Ct. App. 2001); see also, *Scott v. Fruehauf Corp.*, 302 S.C. 364, 368, 396 S.E.2d

² To the extent that Cambridge's request to be indemnified "in part" for any liability it incurs to Plaintiffs can be construed as a request for contribution, such request is meritless since any contribution claim was extinguished by Sto and Acrocrete's good faith settlements with the Plaintiffs. S.C. Code § 15-38-50.

³ There was no contract between Cambridge and Sto or Acrocrete so there can be no claim for contractual indemnity; the only applicable legal concept is that of equitable indemnity.

354, 358 (1990) (“[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them”).

The South Carolina Supreme Court recently clarified that this special relationship “must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another’s wrongdoing.” *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, fn. 3 (2005). The Court believes that *Rock Hill* is controlling precedent. Applying its principles to the instant case, it is clear that there is no special relationship between Cambridge and Sto or Acrocrete to support a claim for equitable indemnity. First, in its Third-Party Complaint, Cambridge fails to even allege that any such special relationship exists. Second, any relationship that did exist was even more attenuated than the relationship between the utility and subcontractor in *Rock Hill*, who were separated by just one level - the contractor. Here, Cambridge is separated from any dealings with Sto or Acrocrete by at least two levels - the EIFS subcontractor and the respective distributors of Sto and Acrocrete materials.

Furthermore, the undisputed facts of the case reveal that there was no relationship of any kind between Cambridge and Sto or Acrocrete at the time the house in question was built. The contract between Cambridge and the original owner of the house did not specify any particular manufacturer’s products or system and simply called for the use of synthetic stucco or “EIFS” generically. Sto and Acrocrete submitted uncontradicted testimony from Cambridge’s construction supervisor that Cambridge was not in the practice of specifying which manufacturer’s system to use and generally left it to the

discretion of the EIFS subcontractor. This was confirmed by the uncontradicted testimony of Cambridge's EIFS subcontractor that he had "free reign" to decide which manufacturer's EIFS materials to use on the job. Furthermore, there is no evidence in the record that Cambridge possessed or relied on any Sto or Acrocrete product literature at the time the house was built.

The EIFS subcontractor freely admitted in deposition testimony that he commonly mixed materials from various manufacturers on jobs and did just that in this case with Acrocrete and Sto materials. As pointed out by Sto and Acrocrete, no party or expert witness in the case has been able to determine where Acrocrete materials stop and Sto materials begin. The only evidence in the record on the issue is the uncontradicted testimony of Plaintiffs' expert that the EIFS materials were "hopelessly mixed" and that the EIFS system on the house was a "home-made" system and could not be said to be either an Acrocrete or a Sto system.

There is simply no evidence in the record that Cambridge had any sort of relationship with Sto or Acrocrete on which to base a right of indemnity. As such, Cambridge's claim fails to meet the standard set forth in the *Rock Hill* case, and the Court grants summary judgment on the cause of action for equitable indemnity.

4. *Equitable indemnity - alternative grounds.*

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second is not. [cites omitted]. If the second party is also at fault, he comes to court without equity and has no right to indemnity. [cites omitted]. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."

Vermeer v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). See *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). It is not enough for Cambridge to prove that the alleged defective design of EIFS contributed, in part, to the moisture damage on the house at issue. Under the established law of equitable indemnity, Cambridge must prove that it was **wholly** without fault in causing Plaintiffs' damages. See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, 237 fn. 2 (2005).

There is no evidence in the record that Cambridge was wholly without fault. In fact, the only evidence in the record is that Cambridge was at least partly at fault for the water intrusion damage to Plaintiffs' house. Sto and Acrocrete submitted the uncontradicted testimony of Plaintiffs' expert that many of the problems causing the water intrusion were the result of Cambridge's negligence in failing to properly sequence the work of its subcontractors on the project. The expert testified, without rebuttal, that there was no damage on the house caused solely by the alleged defective design of EIFS and that any damage to the house was caused, at least in part, by the improper workmanship of Cambridge and its subcontractors. Cambridge's inability to establish its own lack of fault bars any claim for equitable indemnity. Therefore, Acrocrete and Sto would be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

The Court concludes that there is yet another reason summary judgment is proper on the equitable indemnity claim. It is axiomatic that there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). The claims against Cambridge in the Fourth Amended

Complaint all relate to defective construction work, including but not limited to faulty EIFS installation. Plaintiffs do not allege in any way that Cambridge is responsible for supplying a defective product. As a result of the settlement with Acrocrete and Sto, Plaintiffs have removed the EIFS design issue from the case. Therefore, Cambridge can never be held liable to Plaintiffs for something Sto or Acrocrete did. As such, Cambridge is a mere joint tortfeasor with no right to indemnity.

The Court agrees with Sto and Acrocrete's argument that, while Cambridge may defend itself on the grounds that Plaintiffs' damages were caused by the alleged defective design of the EIFS product and not by improper construction work, the right to defend itself and establish its lack of liability does not establish a right to indemnity in favor of Cambridge. Therefore, Acrocrete and Sto would also be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

NOW, THEREFORE, IT IS ORDERED that summary judgment is granted to Sto Corp. and Acrocrete, Inc. on all causes of action in Cambridge's Third-Party Complaint, which is hereby dismissed with prejudice.

AND IT IS SO ORDERED.



Curtis L. Coltrane, Master-in-Equity
and Special Circuit Judge for Beaufort County,
South Carolina

BEAUFORT, SC
May 30, 2006

EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-6573

CHERYL H. NELSON

JOHN WIELAND HOMES AND
NEIGHBORHOODS OF SOUTH CAROLINA

ET AL

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 4 SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICATION):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE. ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

Order Granting In Part and Denying in Part Third-Party Defendant
ARS's Motion for Summary Judgment.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

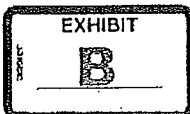
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

SCRPC Form 4C (10/2011)



2134

Judge Code

Date

Page 1 of 2

000692

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Cheryl H. Nelson,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods)
of South Carolina, f/k/a John Wieland)
Homes of South Carolina, Inc. and McGee)
Brothers Co., Inc.)

Defendants.)

John Wieland Homes and Neighborhoods)
of South Carolina, f/k/a John Wieland)
Homes of South Carolina, Inc.,)

Third-Party Plaintiff,

vs.

Benjamin Mora d/b/a Mora Construction,)
Sondles Builders, LLC, Carolina Custom)
Security & Sound, Inc., Barr Construction,)
Inc., Brancifort Concrete Industries, Inc.)
American Residential Services, LLC d/b/a)
American Residential Services of South)
Carolina, Inc. f/k/a Atlas Services, Inc. and)
Coastline Construction, Inc. f/k/a Coastline)
Construction,)

Third-Party Defendants)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2009-CP-10-6573

2011 OCT 26 PM 12:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

**ORDER GRANTING IN PART AND
DENYING IN PART THIRD-PARTY
DEFENDANT AMERICAN
RESIDENTIAL SERVICES OF SOUTH
CAROLINA, INC.'S MOTION FOR
SUMMARY JUDGMENT**

This matter came before the Court for a hearing on July 25, 2011, for consideration of Third-Party Defendant American Residential Services of South Carolina Inc's ("ARS") Motion for Summary Judgment. Counsel for the parties were present, and this Court entertained and

considered oral arguments as well as memorandums of law and affidavits submitted by the parties.

Facts

Plaintiff homeowner brings this suit, filed on October 19, 2009, to recover damages resulting from alleged faulty construction or repair of her home. Defendant Wieland Homes filed a third-party complaint against Third-Party Defendant ARS on December 2, 2010, alleging the work ARS did in installing the HVAC system in 1996 cause or contributed to the Plaintiff's damages. Defendant Wieland Homes brings four causes of action against ARS including 1) indemnity, 2) negligence, 3) breach of warranty, and 4) breach of contract.

ARS contends it is entitled to summary judgment as a matter of law to the claims of negligence, breach of warranty, and breach of contract, because these claims are disguised indemnity claims. It also argues that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes owes no liability to the Plaintiff as a result of ARS's work.

Standard of Review

Summary judgment is only appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 627, 541 S.E.2d 831, 833 (2001). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id.

Discussion

I. ARS's Motion for Summary Judgment as to the Claims of Negligence, Breach of Warranty and Breach of Contract.

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." Seebalt v. First Fed.

Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Courts may use the allegations in the complaint to determine the correct character of an action. Id. "Indemnity is that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (citations omitted).

In this case, Defendant Wieland Homes' Complaint requests the remedy of "any monies [Wieland Homes] is adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claims." Third-Party Complaint ¶ 160, 170, 164. Because these claims seek to recover the amount Wieland Homes paid to Plaintiffs, rather than personal injury or property damages, the claims are claims for indemnity. Vermeer Carolina's Inc., 336 S.C. at 60, 518 S.E.2d at 305.

This court finds that the causes of action for negligence, breach of warranty, and breach of contract are all disguised indemnity claims and Wieland Homes has failed to state facts sufficient to constitute independent causes of action and therefore Third-Party Defendant ARS is entitled to Summary Judgment as a matter of law.

II. ARS's Motion for Summary Judgment as to the Claim of Indemnity.

Third-Party Defendant ARS contends that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes has failed to present evidence that it is liable to the Plaintiff as a result of ARS's work and because all claims arising out of ARS's work are barred by the applicable three-year statute of limitations.

After thorough review, this Court finds that there is evidence in the record that Plaintiff has been damaged by excessive water and moisture damage in her home and there is a genuine issue of material fact regarding whether ARS's HVAC work contributed to Plaintiff's damage.

Additionally, the Plaintiff's Complaint alleges that the applicable statute of repose does not apply because the conduct is subject to the statutory exception for reckless conduct. S.C. Code Ann. §15-3-670. If the statutory exception applies, then the exception could apply to the work ARS did in installing the HVAC system in 1996.

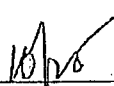
For these reasons, the Third-Party Defendant ARS's Motion for Summary Judgment as to the claim of indemnity is denied.

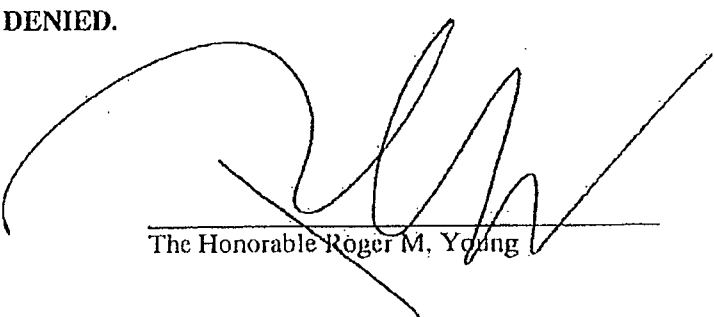
Conclusion

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

- 1) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Negligence, Breach of Warranty, and Breach of Contract is **GRANTED**.
- 2) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Indemnity is **DENIED**.

AND IT IS SO ORDERED.


_____, 2011
Charleston, South Carolina.



The Honorable Roger M. Young

EXHIBIT C

An exhibit label with a ruler scale at the top. The word "EXHIBIT" is printed in large, bold, capital letters. Below it, the letter "C" is printed in a large, bold, serif font. A horizontal line is drawn below the letter "C". The label is white with a black border.

Parkside

OCONEE COUNTY
BUILDING PERMIT APPLICATION

Permit Type: (Please circle the appropriate type) Commercial Industrial Residential Storage
Project Type: (Please circle the appropriate type) New Construction Modular Installation Renovation/Upgrade
Method of Payment (Please circle one): CASH OR CHECK, # _____

OWNER & PROPERTY INFORMATION

Project Address: 542 Sunset Point Drive
West Union, SC 29696 Tax Map #: 178-05-01-071
Subdivision & Lot #: Stoneledge Lot 71 Gate Code: * 3331
Owner Name: IMK Dev. Co., LLC Phone # w/area code: (864) 232-5555
(As shown on lot record) 501 Brixton Circle
Simpsonville, SC 29681

CONTRACTOR INFORMATION

Contractor Type: Residential General Specialty - list specialty _____ Owner/Builder
(Please circle appropriate type) 6/30/06 Marick Home Bldg
SC License #: C-14526 18936 Expiration Date: 10-31-06
Contractor Name: Rick Thoennes Company Name: Rick Thoennes Builder
Mailing Address: 414 Lodgewood Trail Phone # w/area code: (864) 444-3331
Greer, SC 29651

PROJECT INFORMATION

Power Company: Blue Ridge Duke Power Seneca L&W Other, please specify: _____
(Please circle the appropriate company)
Gas Company (if applicable): None Propane Gas Natural Gas
(Please circle type of gas)
General Description of Project: Single Family Townhouse
w/ Detached Garage
Proposed use of structure: Residence Occupancy Type: R Construction Type: _____
Value of Completed Project: \$ 236,600 (Based on typical replacement cost)
Please answer the following that apply: 3830
Total Square Footage of Structure: 3522 Heated 3380 Un-heated 142 449
Frame Type: Wood Foundation Type: Conc. Roof Type: Shingle Exterior Finish: Cedar & stone
Number of Stories: 1 1/2 Bathrooms: 3 1/2 Bedrooms: 3 Kitchens: 1
Septic Tank Permit #: Attached Water Source: Seneca Heat Source: Elect. 263,785.32
Central Air Conditioning: YES or NO Garage: Yes or No _____ Square feet 308
Basement Information: Square footage 1265 Finished SF 1265 Un-finished SF 0
(Please circle all that apply)

Notations of plans to Oconee County Building Code Department does not imply that any permit given review will be given. The applicant is solely responsible for compliance with any applicable codes. Oconee County Building Code Department is responsible for enforcement of Oconee County Ordinance 21-10. Value of completed project has a replacement cost listed but is based on a valuation shown provided by the International Code Council. If applicant wishes to lower this the unknown cost listed will apply. This preparation is subject to all zoning and competition (if installed) and subject to zoning and other approved code to the plan. Each listing is the responsibility of the contractor and/or property owner.

Rick Thoennes
Applicant Signature

01.05.06
Date

Rick Thoennes
Print Name of Applicant

EXHIBIT D

Professional Licensing Boards | Board Member Lookup

Main Menu : **Residential Builders** Note: All fields are not required for searching

Last Name:	First name:
License number:	City:
	Company name: marick
	License Type: All

To perform a lookup retype the characters in the box to the right

ETP  

Your search returned: 0 record(s).

Search Tip:

- IF YOUR SEARCH RETURNED 0 RECORDS, YOU MAY WANT TO TRY SEARCHING UNDER "CONTRACTORS - COMMERCIAL" LICENSING BOARD.
- When searching for a specific licensee, search the INDIVIDUALS NAME. Enter just a few letters to do a multiple search listing if you don't know the exact way a person or company is licensed.
- When SEARCHING by license number, ENTER NUMBERS ONLY.
- IF YOU ARE AN APPLICANT CHECKING THE STATUS OF YOUR APPLICATION AND THE SEARCH RETURNS "0 RECORDS", CHECK HERE FIRST TO SEE IF YOUR APPLICATION IS PENDING BEFORE CONTACTING THE LICENSING BOARD: **PENDING APPLICATION CHECK**. IF YOU ARE SHOWN TO BE PENDING, YOUR APPLICATION HAS BEEN RECEIVED AND IS BEING PROCESSED. YOU WILL BE CONTACTED BY MAIL OR FAX IF ITEMS ARE MISSING OR INCOMPLETE.

Status Clarification:

- **ACTIVE:** Licensee is current and properly licensed to work and pull permits in the state of SC.
- **APPROVED:** Applicant/Licensee is in final stages of becoming ACTIVE.
- **PENDING:** License has not been issued, cannot do work over \$200.00.
- **INACTIVE:** Licensee cannot work until license is in an active status.
- **LAPSED:** This license is lapsed/cancelled; the licensee cannot perform any work over \$200.00
- **SUSPENDED:** The license has been suspended by the board until further notice. No work or permits can be pulled during this time.

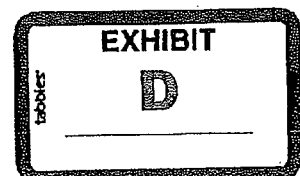
Notes:

The information on this page is a secure, primary source for license verification provided by South Carolina Department Labor, Licensing and Regulation. This website is maintained by LLR staff and is updated nightly reflecting changes to our licensing and enforcement database.

Janet Baumberger
Administrator

Phone: (803) 896-4696
Fax: (803) 896-4814
PO Box 11329
Columbia, S.C. 29211-1329

South Carolina Department of Labor, Licensing & Regulation



Professional Licensing Boards | Board Member Lookup

Main Menu : **Commercial Contractors** Note: All fields are not required for searching

Last Name: _____ First name: _____
 License number: _____ City: _____
 Company name: marick
 Classification: All

To perform a lookup retype the
 characters in the box to the right

PNK



Find

Your search returned: 0 record(s).

Search Tip:

- IF YOUR SEARCH RETURNED 0 RECORDS, YOU MAY WANT TO TRY SEARCHING UNDER "RESIDENTIAL BUILDERS" LICENSING BOARD.
- When searching for a specific licensee, search either the COMPANY NAME or the INDIVIDUALS NAME; you CANNOT search both together. Enter just a few letters to do a multiple search listing if you don't know the exact way a person or company is licensed.
- When SEARCHING by license number, ENTER NUMBERS ONLY. do not enter G or M.
- Do not use any punctuation marks when searching a "Company name"
- IF YOU ARE AN APPLICANT CHECKING THE STATUS OF YOUR APPLICATION AND THE SEARCH RETURNS "0 RECORDS", CHECK HERE FIRST TO SEE IF YOUR APPLICATION IS PENDING BEFORE CONTACTING THE LICENSING BOARD: [PENDING APPLICATION CHECK](#). IF YOU ARE SHOWN TO BE PENDING, YOUR APPLICATION HAS BEEN RECEIVED AND IS BEING PROCESSED. YOU WILL BE CONTACTED BY MAIL OR FAX IF ITEMS ARE MISSING OR INCOMPLETE.

Status Clarification:

- ACTIVE: Licensee is current and properly licensed to work and pull permits in the state of SC.
- APPROVED: Applicant/Licensee is in final stages of becoming ACTIVE.
- PENDING: before accepting any jobs FROM THIS ENTITY, you must first contact this board at (803) 896-4686 to see if the contractor is within a 90-day grace period and can still work; otherwise, they can only do work that is unregulated UNTIL THEY BECOME "ACTIVE": [No License Required by SC Contractor's Licensing Board \(pdf\)](#)
- INACTIVE: Contractor cannot bid, pull permits, or do any regulated contracting work above the \$5,000 contract limit. See work/jobs that are unregulated here: [No License Required by SC Contractor's Licensing Board \(pdf\)](#)
- LAPSED: This license is lapsed/cancelled; the contractor cannot bid, pull permits, or do any regulated contracting work above the \$5,000 contract limit. See work/jobs that are unregulated here: [No License Required by SC Contractor's Licensing Board \(pdf\)](#)
- SUSPENDED: The license has been suspended by the board until further notice. No work or permits can be pulled during this time.

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South Carolina Department of Labor, Licensing & Regulation

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., et al,
v. IMK DEVELOPMENT CO., LLC, et al.
Case No.: 2009-CP-37-0652

CERTIFICATE OF SERVICE

I do hereby certify that on the 30th day of August, 2012, I served a copy of the foregoing *Memorandum in Support of Carl Catoe Construction, Inc.'s Motion to Dismiss as to Marick Home Builders' Claims* in the above-entitled matter by sending a copy via electronic mail and regular mail to counsel for Marick Home Builders; all other counsel were served via electronic mail only.

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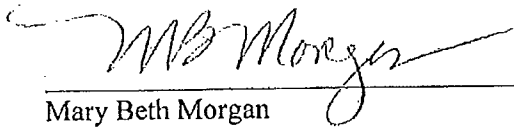
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Mary Beth Morgan