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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N 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.

Bostic Construction, Inc., Third Party Plaintiffs,

v.

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

**Record on Appeal
Volume III of III**

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiff(s)

vs.

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

Defendant(s)

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

C/A No: 2009-CP-37-0652^u

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

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: Court Reporter Needed: 15 mins. ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☐ Form Motion/Order

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

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

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

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

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

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC,
KEOWEE TOWNHOUSES, LLC,
LUDWIG CORPORATION, LLC, SDI
FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME
BUILDERS, LLC, BOSTIC BROTHERS
CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES,
BRADFORD D. SECKINGER, JOHN
LUDWIG, M GROUP CONSTRUCTION
AND DEVELOPMENT, LLC, CLEAR
VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC
CONTRACTORS, MIGUEL PORRAS
CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE
GREEN, SOUTHERN CONCRETE
SPECIALTIES, CARL COMPTON D/B/A
COMPTON ENTERPRISE A/K/A
COMPTON ENTERPRISES, GUNTER
HEATING & AIR, ALL PRO HEATING,
A/C & REFRIGERATION, LLC,

Civil Action No. 2009-CP-37-0652

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

COLEMAN WATERPROOFING,)
 HEYWARD ELECTRICAL SERVICES,)
 INC., TINSLEY ELECTRICAL, LLC,)
 HUTCHINSON CONSTRUCTION, INC.,)
 CARL CATO CONSTRUCTION, INC.)
 T.G. CONSTRUCTION, LLC, DELFINO)
 CONSTRUCTION, FRANCISCO JAVIER)
 ZARATE D/B/A ZARATE)
 CONSTRUCTION, ALEJANDRO)
 AVALOS CRUZ, HERBERTO ACROS)
 HERNANDEZ, MARTIN HERNANDEZ-)
 AVILES, FRANCISCO VILLALOBOS)
 LOPEZ, AMBROSIO MARTINEZ-)
 RAMIREZ, ESTER MORAN MENTADO,)
 SOCORRO CASTILLO MONTEL,)
 UPSTATE UTILITIES, INC., MJG)
 CONSTRUCTION AND)
 HOMEBUILDERS, INC. D/B/A MJG)
 CONSTRUCTION, KMAC INC. D/B/A)
 KMAC NORTH CAROLINA, EVERADO)
 JARMAMILLO, GARCIA PARRA)
 INSULATION, INC., J&J)
 CONSTRUCTION, JOSE NINO, JOSE)
 MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT)
 MORALES D/B/A MORALES)
 MASONRY,)

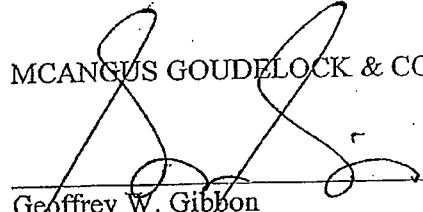
Defendants.)

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

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

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

MCANGUS GOUDELOCK & COURIE, L.L.C.



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ATTORNEYS FOR DEFENDANT,
SOCORRO CASTILLO MONTEL

August 23, 2012

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

CERTIFICATE OF SERVICE

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

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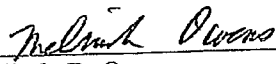
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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-37-0652

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

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC,
KEOWEE TOWNHOUSES, LLC,
LUDWIG CORPORATION, LLC, SDI
FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME
BUILDERS, LLC, BOSTIC BROTHERS
CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES,
BRADFORD D. SECKINGER, JOHN
LUDWIG, M GROUP CONSTRUCTION
AND DEVELOPMENT, LLC, CLEAR
VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC
CONTRACTORS, MIGUEL PORRAS
CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE
GREEN, SOUTHERN CONCRETE
SPECIALTIES, CARL COMPTON D/B/A
COMPTON ENTERPRISE A/K/A
COMPTON ENTERPRISES, GUNTER

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

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

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

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

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

Argument

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

I. Standard of Review

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

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

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

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

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

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

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

III. Marick's indemnity claims are barred.

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

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

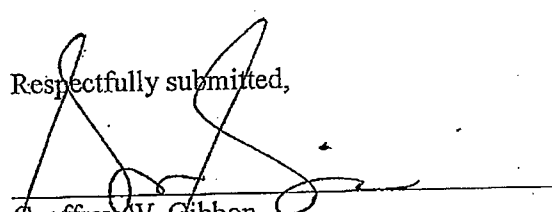
IV. No Relationship between Marick and Montel.

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

Conclusion

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

Respectfully submitted,


Geoffrey W. Gibbon
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ATTORNEYS FOR SOCORRO CASTILLO
MONTEL

August 30 2012

EXHIBIT A

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

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

FOR A FOURTEENTH DEFENSE

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

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

FOR A FIFTEENTH DEFENSE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

151. Upon information and belief, T.G Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, and Scocorro Castillo Montel are individuals or entities conducting business in Oconee County, South Carolina, which provided services, materials, or both including framing, installation of windows, doors, siding, trim, and other work at the project at issue in this case.

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

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

154. If Plaintiffs' allegations are true, which are specifically denied and admitted solely for this defense and Cross Claim and no other, in that the goods and services supplied by the design professionals, contractors, and subcontractors above are defective and failed and they were damaged by these goods and services, which has been denied by Marick, the conduct, acts and/or omissions of Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry have led to those damages and may lead to additional damages being asserted against Marick Home Builders without any fault by it.

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

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

156. Due to the potential of liability and damages being assessed against Marick Home Builders, without any fault by it, Marick Home Builders alleges that if Plaintiffs are awarded damages against Marick Home Builders for the defective or deficient work, services, and/or products provided by Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiello Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry it is entitled to equitable indemnity from said contractors, subcontractors, and design professionals.

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

158. Marick alleges that if Plaintiffs are entitled to recovery by judgment or otherwise against it, Marick is entitled to equitable indemnity against Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jaramamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry in the same amount. Marick further alleges that it should be reimbursed and indemnified for the cost of the action, including, but not limited to, attorney's fees and costs incurred in the defense.

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

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

160. Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton

Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, and Southern Basement entered into a legally binding contract whereby Marick agreed to pay each contractor and subcontractor for furnishing appropriate and non-defective materials and work in each contractor's and subcontractor's specialty for Plaintiffs.

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

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

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

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

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

165. As subcontractors, material men, or design professionals providing materials and work on the Property, Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders.d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry had a duty to perform their work in accordance with the plans and specifications, accepted building standards and practices, manufacturers instructions, or other direction and to provide materials and services conforming therewith.

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

- i. Improper installation of roof;

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

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

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

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

169. Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry negligence; as a result, Marick is informed and believes that it is entitled to recover from Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic

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

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

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

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

172. Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz,

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

173. If the Plaintiffs' allegations are true, which is denied by Marick and admitted solely for the purpose of this defense and Defendants, Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction,

Inc., and Vincent Morales d/b/a Morales Masonry breached their express and/or implied warranties.

174. Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of the above named parties' breach of their express and/or implied warranties; as a result, Marick is informed and believes that it is entitled to recover from Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiello Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jaramillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

WHEREFORE, Marick Home Builders having fully answered the Plaintiffs' Third Amended Complaint and Cross Claiming against Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates,

Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiello Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jaramillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, prays that this court:

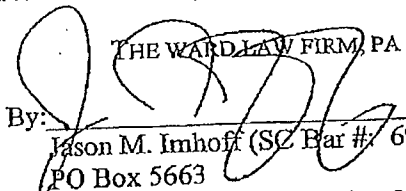
- a. Dismiss Plaintiffs' Third Amended Complaint with prejudice;
- b. In the alternative, that Mariok Home Builders be granted judgment against Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobos Lopez,

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

c. In the alternative, that Marick Home Builders be indemnified in whole or in part by Michael Franz, Clearview Construction, Miguel Porras Choncoas, MHC Contractors, Miller/Player and Associates, Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction, Southern Basement, Bostic Brothers Construction, Inc., Upstate Utilities, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acroz Hernandez, martin Hernandez-Aviles, Francisco Villalobes Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castiollo Montel, MJG Construction and Homebuilders d/b/a MJG Construction, KMAC of the Carolinas, Inc., Efacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry;

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

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

By: 

THE WARD LAW FIRM, PA

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*Attorneys for Marick Home Builders,
LLC*

April 5, 2012
Spartanburg, South Carolina

EXHIBIT B

41. Upon information and belief, Southern Basements, Inc. ("Southern Basements") is a corporation organized and existing under the laws of the State of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Based on discovery responses provided by Marick, Plaintiffs believe Southern Basements provided work for the Project, including but not limited to basement work.

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

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

44. Upon information and belief, Defendants T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, and Socorro Castillo Montel are individuals or entities which, at all times relevant herein, were conducting business in Oconee County by contracting to provide services, materials, or both for the Project, pursuant to subcontracts with Catoe, including framing, installation of windows, doors, siding, trim, and other work at the Project.

EXHIBIT C

FOR A NINETEENTH DEFENSE
(Offset)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

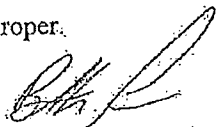
78. As a result of the allegations made by Medallion and Seckinger in the Cross-Claim, CCC has been forced to defend against the action and incur attorneys' fees, costs, and expenses, and faces an uncertain amount of liability exposure.

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

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

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

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



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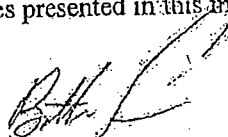
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July 9, 2012

*Attorneys for Cross-Claim Defendant and
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Construction, Inc.*

DEMAND FOR TRIAL BY JURY

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



R. Batten Farrar

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

CERTIFICATE OF SERVICE

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

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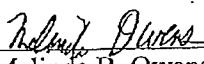
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Melinda B. Owens
Legal Assistant to Geoffrey W. Gibbon

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

STONELEDGE AT LAKE LEOWEE ET AL.)

Plaintiff,)

vs.)

IMK DEVELOPMENT CO. LLC ET AL)

Defendant.)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-37-0652

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

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

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

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

SECTION I: Hearing Information

Nature of Motion: Summary Judgment

Estimated Time Needed: 30 Min

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

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

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

8-23-12
Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$** _____

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

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

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

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

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

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

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

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, INTEGrys KEOWEE
DEVELOPMENT, LLC, MARICK HOME BUILDERS,
LLC, BOSTIC BROTHERS CONSTRUCTION, INC.,
MILLER/PLAYER & ASSOCIATES, JOHN
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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
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HUTCH N SON CONSTRUCTION, INC., CARL
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CASTILLO MONTEL, UPSTATE UTILITIES, INC.,
MJG CONSTRUCTION AND HOMEBUILDERS, INC.

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

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

D/B/A MJG CONSTRUCTION, KMAC OF THE)
CAROLINAS, INC., EUFACIO GARCIA, EVERADO)
JARMAMILLO, GARCIA PARRA INSULATION,)
INC., J&J CONSTRUCTION, JOSE NINO, JOSE)
MANUEL GARCIA, EASON CONSTRUCTION, INC.,)
AND VINCENT MORALES D/B/A MORALES)
MASONRY,)
)
)
)

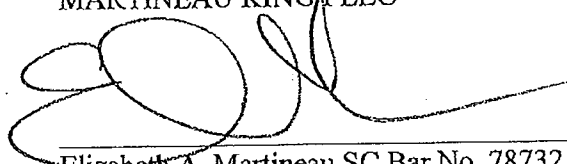
Defendants.)

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

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

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

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August 23rd, 2012

000752

CERTIFICATE OF SERVICE

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

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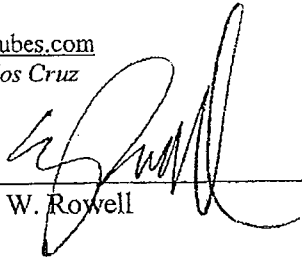
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Attorney for Alejandro Avalos Cruz

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

By:


Eric W. Rowell

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners' Association, et al.

☐ Plaintiff

v.

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

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009--CP-37-0652

MOTION INFORMATION FORM
AND COVER SHEET

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e-mail: other:

Defendant's Attorney:

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Address:

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e-mail: lterrell@clarksonwalsh.com other:

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

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

SECTION I: Hearing Information

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

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

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

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

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

August 23, 2012

Date submitted

SECTION III: Motion Fee

☒ PAID -- AMOUNT: \$25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

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

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

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

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

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

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

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

Plaintiffs,)

vs.)

IMK Development Co., LLC, Keowee)
Townhouses, LLC, Ludwig Corporation, LLC,)
SDI Funding, LLC, Medallion at Keowee,)
LLC, Integrys Keowee Development, LLC,)
Marick Home Builders, LLC, Bostic Brothers)
Construction, Inc., Miller/Player & Associates,)
John Ludwig, Clear View Construction, LLC,)
Michael Franz, MHC Contractors, Miguel)
Porras Choncoas, Builders First Source)
Southeast Group, Mike Green, Southern)
Concrete Specialties, Carl Compton d/b/a)
Compton Enterprize a/k/a Compton)
Enterprises, Gunter Heating & Air, All Pro)
Heating, A/C & Refrigeration, LLC, Coleman)
Waterproofing, Heyward Electrical Services,)
Inc., Tinsley Electrical, LLC, Hutch N Son)
Construction, Inc., Carl Catoe Construction,)
Inc., T.G. Construction, LLC, Delfino)
Construction, Francisco Javier Zarate d/b/a)
Zarate Construction, Alejandro Avalos Cruz,)
Herberto Acros Hernandez, Martin Hernandez-)
Aviles, Francisco Villalobos Lopez, Ambrosio)
Martinez-Ramirez, Ester Moran Mentado,)
Socorro Castillo Montel, Upstate Utilities, Inc.,)
MJG Construction and Homebuilders, Inc.)
d/b/a MJG Construction, KMAC of the)
Carolinas, Inc., Eufacio Garcia, Everado)

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

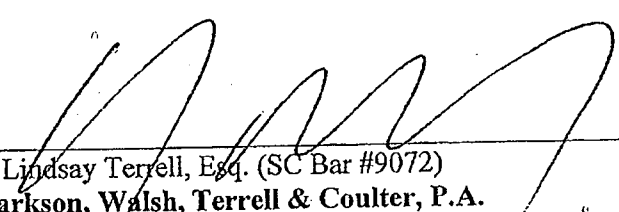
Jarmamillo, Garcia Parra Insulation, Inc., J&J)
Construction, Jose Nino, Jose Manuel Garcia,)
Eason Construction, Inc., and Vincent Morales)
d/b/a Morales Masonry,)
Defendants,)

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

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

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

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



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Greenville, SC

August 23, 2012

CERTIFICATE OF SERVICE

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

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*Attorneys for Clear View
Construction, LLC*

This 23rd day of August, 2012
Greenville, SC

By: Shannon Henderson
Shannon Henderson, Legal Assistant

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

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

CASE NO. 2009-CP-37-0652

Plaintiff(s))

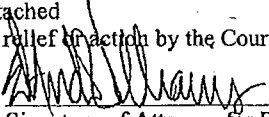
MOTION INFORMATION FORM
AND COVER SHEET

vs.)

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

Defendant(s))

check box above indicating submitting party

Name, SC Bar No. and address of Plaintiff's attorney		Name, SC Bar No. and address of UM carrier attorney	
Robert T. Lyles, Esquire Catherine H. Bryan, Esquire 342 East Bay Street Post Office Box 773 (29402) Charleston, SC 29401 rtl@lylesfirm.com chb@lylesfirm.com		D. Andrew Williams, Esquire Joshua D. Shaw, Esquire Turner, Padgett, Graham & Laney, P.A. P. O. Box 1473 Columbia, SC 29202 Phone: (803) 227-4212 Fax: (803) 400-1492 dwilliams@turnerpadgett.com jshaw@turnerpadgett.com	
☐ MOTION HEARING REQUESTED (Attach written motion and complete SECTIONS I & III) ☐ FORM ORDER, NO HEARING REQUESTED (Complete SECTIONS II & III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Summary Judgment			
Estimated Time Needed: _____ Court Reporter Needed: Yes No			
☒ Written Motion Attached I hereby move for relief by the Court as set forth in the attached proposed Motion.  Signature of Attorney for Defendant Martin Hernandez-Aviles August 24, 2012			
SECTION III: Motion Fee			
*PAID - AMOUNT: \$25.00			
EXEMPT: Rule to Show Cause in Child or Spousal Support			
(Check Reason) Domestic Abuse or Abuse and Neglect			
Indigent Status State Agency v. Indigent Party			
Sexually Violent Predator Act Post-Conviction Relief			
Motion for Stay in Bankruptcy			
Motion for Publication Motion for Execution (Rule 69, 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 Reporter: _____			
Other: _____			
JUDGE'S SECTION			
Motion fee to be paid upon filing of the attached Order.		JUDGE	
Other: _____		CODE: _____ DATE: _____	
CLERK'S VERIFICATION			
Collected by: _____ (Print Name)		Date Filed: _____	
MOTION FEE COLLECTED: _____			
CONTESTED - AMOUNT DUE: _____			
(SCCA/233 (1/2003))			

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-37-0652

Stoneledge at Lake Keowee Owners'
Association, Inc., C. Dan Carson,
Jeffrey J. Dauler, Joan W. Davenport, Michael
Furnari, Donna Furnari, Jessy B. Grasso,
Nancy E. Grasso, Robert P. Hayes,
Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul
W. Hend, Ruth E. Isaac, Michael D. Plourde,
Mary Lou Plourde, Carol C. Pope, Steven B.
Taylor, Bettie J. Taylor, Robert White,

Plaintiffs,

vs.

IMK Development Co., LLC, Keowee
Townhouses, LLC, Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion at Keowee, LLC,
Integrays Keowee Development, LLC, Marick
Home Builders, LLC, Bostic Brothers
Construction, Inc., Miller/Player & Associates,
John Ludwig, M Group Construction and
Development, LLC, Clear View Construction,
LLC, Michael Franz, MHC Contractors, Miguel
Porrás Choncoas, Builders First Source
Southeast Group, Mike Green, Southern
Concrete Specialties, Carl Compton D/B/A
Compton Enterprise A/K/A Compton
Enterprises, Gunter Heating & Air, All Pro
Heating , A/C & Refrigeration, LLC, Coleman
Waterproofing, Heyward Electrical Services,
Inc., Tinsley Electrical, LLC, Hutch N Son
Construction, Inc., Carl Catoe Construction,
Inc., T.G. Construction, LLC, Delfino
Construction, Francisco Javier Zarate D/B/A
Zarate Construction, Alejandro Avalos Cruz,
Herberto Acros Hernandez, Martin Hernandez-
Aviles, Francisco Villalobos Lopez , Ambrosio
Martinez-Ramirez, Ester Morran Mentado,
Socorro Castillo Montel, Upstate Utilities, Inc.,
MJG Construction and Homebuilders, Inc.
D/B/A MJG Construction, KMAC Of The
Carolinas, Inc., Eufacio Garcia, Everado
Jarniamillo, Garcia Parra Insulation, Inc., J&J
Construction, Jose Nino, Jose Manuel Garcia,
Eason Construction, Inc., Vincent Morales
D/B/A Morales Masonry, and Miller/Player &
Associates

Defendants.

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

TO: COUNSEL OF RECORD

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

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

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

By: 

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(803) 254-2200

Columbia, South Carolina
August 24, 2012

ATTORNEYS FOR DEFENDANT
MARTIN HERNANDEZ-AVILES

CERTIFICATE OF SERVICE

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

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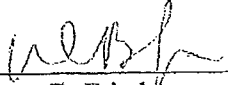
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Integrays Keowee Development and IMK Development

By:


Danya B. Friedman
Legal Secretary

This 24 day of August, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

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

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

Plaintiffs,

vs.

IMK Development Co., LLC, Keowee
Townhouses, LLC, Ludwig
Corporation, LLC, SDI Funding, LLC,
Medallion at Keowee, LLC, Integrays
Keowee Development, LLC, Marick
Home Builders, LLC, Bostic Brothers
Construction, Inc., Miller/Player &
Associates, John Ludwig, Clear View
Construction, LLC, Michael Franz,
MHC Contractors, Miguel Porras
Choncoas, Builders FirstSource
Southeast Group, Mike Green,
Southern Concrete Specialties, Carl
Compton d/b/a Compton Enterprize
a/k/a Compton Enterprises, Gunter
Heating & Air, All Pro Heating, A/C &
Refrigeration, LLC, Coleman
Waterproofing, Heyward Electrical
Services, Inc., Tinsley Electrical, LLC,
Hutch N Son Construction, Inc., Carl
Catoe Construction, Inc., T.G.
Construction, LLC, Delfino

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

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

Construction, Francisco Javier Zarate)
d/b/a Zarate Construction, Alejandro)
Avalos Cruz, Herberto Acros)
Hernandez, Martin Hernandez-Aviles,)
Francisco Villalobos Lopez, Ambrosio)
Martinez-Ramirez, Ester Moran)
Mentado, Socorro Castillo Montel,)
Upstate Utilities, Inc., MJG)
Construction and Homebuilders, Inc.)
d/b/a MJG Construction, KMAC of the)
Carolinas, Inc., Eufacio Garcia,)
Everado Jarmamillo, Garcia Parra)
Insulation, Inc., J&J Construction,)
Jose Nino, Jose Manuel Garcia,)
Eason Construction, Inc., and Vincent)
Morales d/b/a Morales Masonry,)
Defendants)

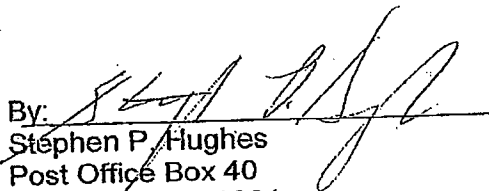
TO: JASON M. IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS LLC AND RICK THOENNES:

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

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

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

HOWELL, GIBSON & HUGHES, P.A.

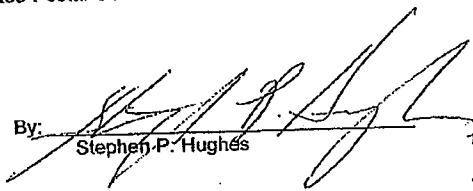
By: 
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorney for Defendant Ester Moran
Mentado

Beaufort, South Carolina

August 28, 2012

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion for Summary Judgment upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on 30th day of August, 2012.

By: 
Stephen P. Hughes

FILED O'CONNOR, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2012 AUG 31 PM 3 06

RULE 11 CERTIFICATION

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

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

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

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

CASE NUMBER: 2009-CP-37-0652

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

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

Defendants,)

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

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

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

August 23, 2012



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STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

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

Plaintiffs,)

vs.)

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

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

CERTIFICATE OF SERVICE

000773

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

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

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiffs,

vs.

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

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

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

RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
MJG CONSTRUCTION AND HOMEBUILDERS, INC.)
D/B/A MJG CONSTRUCTION, KMAC OF THE)
CAROLINAS, INC., EUFACIO GARCIA, EVERADO)
JARMAMILLO, GARCIA PARRA INSULATION,)
INC., J&J CONSTRUCTION, JOSE NINO, JOSE)
MANUEL GARCIA, EASON CONSTRUCTION, INC.,)
AND VINCENT MORALES D/B/A MORALES)
MASONRY,)
)
)
Defendants,)

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

FACTS/PROCEDURAL POSTURE

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

1. Motion to Dismiss

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

2. Motion for Summary Judgment

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

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

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

LAW & ANALYSIS

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

THE LAW

1. EQUITABLE INDEMNIFICATION

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

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

Deposition of Randy Still

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

A: I don't think so, no.

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

A: That is correct.

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

A: No.

(Still Dep. 163:19 – 164:6.)

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

A: That is correct.

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

A: That is correct.

(Still Dep. 164:9-18.)

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

A: No.

(Still Dep. 165:2-7.)

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

A: I think in many cases he has to.

(Still Dep. 170:7-10.)

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

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

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

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

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

(Still Dep. 173:11-25.)

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

A: No.

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

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

Q: Is that a "no"?

A: No.

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

A: No.

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

A: No.

(Still Dep. 174:1:24.)

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

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

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

Deposition of Jason Carlan

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

Q: What were you doing?

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

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

A: By what details we had on the plans.

Q: And where did those details come from?

A: From the plans.

Q: The Miller/Player plans?

A: The Miller/Player plans.

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

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

(Carlan Dep. 40:1-20.)

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

A: Yes.

Q: They came and looked at your installation?

A: On more than one occasion, yes.

(Carlan Dep. 46:22 - 47:1.)

Q: So did he ask you questions.

A: Yes.

Q: --- about how it was installed?

A: Oh, yeah.

(Carlan Dep. 47:15-18.)

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

A: Yes.

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

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

Q: And that Southern Concrete believed it was sufficient?

A: Yes.

(Carlan Dep. 79:25 - 80:5.)

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

A: Yes.

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

A: Yes.

(Carlan Dep. 84:1-5.)

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

a. Indirect subcontractors

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

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

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

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

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

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

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

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

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

b. Phase I subcontractors

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

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

2. CONTRACTUAL INDEMNIFICATION

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

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

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

Deposition of Jeffrey Gowder

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

A: I do not.

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

A: Yes.

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

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

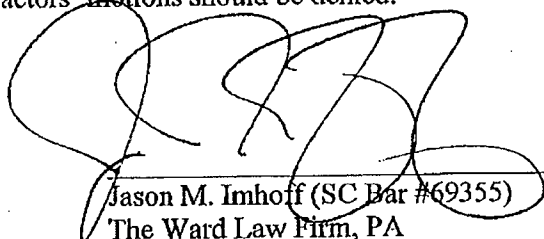
Based upon the above, the breach of contract and contractual indemnity causes of action should not be dismissed as there are issues of material fact to determine the timing and intent of the indemnity contract, which should be left for a jury.

Marick's licensure

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

Conclusion

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



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

September 4th, 2012

A



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

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

Project: on all projects for this subcontractor

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

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



8. Payment schedule:

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

9. Completion schedule:

As required per job

10. Documentation required for payment:

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

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

11. Warranty:

One year

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

BY:

BY:

DATE:

10/23/07

DATE:

10/23/07

Rick Thoennes

NAME and TITLE

Deryl Ward

Senior Attorney

Marick Home Builder, LLC.

COMPANY NAME

Builder's First Source - Southeast Group, LLC

COMPANY NAME

EE Briden

WITNESSED BY

Subject To Written Changes

3



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

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

Project: on all projects for this subcontractor

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

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



8. Payment schedule:

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

9. Completion schedule:

As required per job

10. Documentation required for payment:

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

11. Warranty:

One year

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

BY: _____

BY: _____

DATE: _____

10/1/07

DATE: _____

10-30-07

Rick Thoennes

NAME and TITLE

Mike Owen

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Clearview Const.

COMPANY NAME

Kim Weather

WITNESSED BY

2

10/31/2007 08:28 FAX

10/30/2007 11:00 FAX

0002
001/000



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

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

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

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

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

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

000800

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

003



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

BY: _____

DATE: _____

BY: Shannon Gaudin *

DATE: 10/1/07 *

Rick Thoennes

NAME and TITLE

Shannon Gaudin *

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Southern Concrete Spec. Inc. *

COMPANY NAME

Kim Weathers
WITNESSED BY

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marickhomebuilders.com

000801

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiff,

vs.

Marick Home Builders, LLC et al

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-37-652

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:
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Phone: 864-577-7730 Fax 843-577-7172
E-mail: _____ Other: _____

Defendant's Attorney:
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Address:
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Phone: 864-582-3075 Fax 864-585-3090
E-mail: jlmhoff@wardfirm.com Other: _____

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

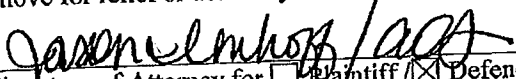
SECTION I: Hearing Information

Nature of Motion: Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for
Reconsideration and at Alter Judgment
Estimated Time Needed: 30 mins Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

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


Signature of Attorney for ☐ Plaintiff/☒ Defendant

January 23, 2013
Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION

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

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

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

Plaintiffs,

vs.

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

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

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

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

Defendants,)

BOSTIC CONSTRUCTION, INC.)

Third-Party Plaintiffs,)

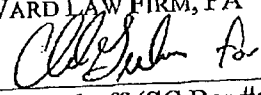
vs.)

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

Third-Party Defendants.)

COME NOW, Defendants Marick Home Builders, LLC and Rick Thoennes (collectively "Marick"), pursuant to Rule 59, S.C. R. Civ. P. through its undersigned attorney and respectfully request that this Honorable Court vacate and/or reconsider the Order dated January 11, 2013 granting Builders FirstSource—Southeast Group, LLC, Carl Catoe Construction, Inc., T.G. Construction, LLC, Alejandro Avalos Cruz, Herbert Acros Hernandez, Martin Hernandez Aviles, Ester Moran Mentado, Socorro Castillo Montel, and Zarate Construction's (collectively, "Catoe's Subcontractors") Motions to Dismiss and For Summary Judgment as to Cross-Claims of Marick Home Builders, LLC. The grounds for this Motion are that the Court's ruling is inconsistent with South Carolina law.

THE WARD LAW FIRM, PA

By: 

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

Janaury 23, 2013
Spartanburg, South Carolina

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

CERTIFICATE OF SERVICE

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

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This 23 day of January, 2013
Spartanburg, SC

By:

Amanda Steward
Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

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

~~STONELEDGE AT LAKE KEOWEE OWNERS~~)

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

Plaintiffs,)

vs.)

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

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

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 10 AM 10 44

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

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

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

FACTS

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

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

STANDARD OF REVIEW

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

opportunity.” *Home Med. Sys., Inc. v. S. Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

I. SUMMARY JUDGMENT WAS IMPROPER

Marick’s Third Amended Answer asserted cross-claims for (1) Equitable Indemnification; (2) Negligence; (3) Breach of Warranties and (4) Breach of Contract against BFS. In the January 11, 2013 Orders, the Court summarily dismissed all of Marick’s cross-claims pled against BFS (See: Exhibits “1” and “2”).

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

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

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

(I) INDEMNITY

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

A. A QUESTION OF FACT EXISTS AS TO FAULT/UNCLEAN HANDS

Based on the testimony presented in this case, Marick has presented evidence that it was not at fault for the alleged defective work performed by BFS and its subcontractors and that Marick provided the supervision and oversight required of a general contractor. Marick incorporates by reference its Memorandum to the Court addressing its Motion to Alter and/or Amend Judgment concerning Catoe and the Catoe Subcontractors.

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

The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor. The Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not

automatically liable for the work of its sub-contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight. *Id.*

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

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

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

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

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

Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I don't like the way you're doing that'?

A: I did.

Q: And was it corrected to your satisfaction?

A: Yes.

(Hornaday Dep. at 19:21 - 20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision and oversight was provided at the project. In addition to Marick's

representatives' testimony, Terry Rosamond (BFS 30(b)(6) designee) testified that Marick provided supervision and oversight at the project (see: Rosamond Dep. at 48:23 - 49:6).

Rosamond further testified that he had no evidence that Marick was negligent in its performance

of its duties at Stoneledge (see: Rosamond Dep. at 53:11-17). Rosamond also provided the

following testimony concerning BFS's supervision of the work performed by its subcontractors:

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

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

Q: How about if the, again speaking generally, if the change came from the general contractor, would he be expected to communicate directly with the subcontractor or would he go through BFS?

A: He's expected to go through BFS.

(Rosamond Dep. at 63:12 - 64:3.)

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

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

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

Marick's expert, Randy Still, testified that a general contractor can rely on a subcontractor's assurance that they will perform their craft appropriately (Still Dep. at 84 - 85).

Mr. Still stated further:

Q: In your experience and education and in your work, do you hold the opinion that a general contractor is always liable for all defects in construction which were performed by subcontractors?

A: I think what I have found is the term "liable" is a legal term and my belief is that the general contractor can rely on the subcontractors who have the specialty crafts and knowledge to perform their work correctly.

Q: Is it fair to say that in many cases a subcontractor is in fact more experienced and better qualified to perform their particular trade than a general contractor?

A: Yes.

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

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

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

A: I think in many cases he has to.

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

A: Yes.

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

A: Yes.

(Still Dep. at 169:12 - 170:18.)

Mr. Still further testified:

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

A: No.

(Still Dep. 174:18:24.)

Thus, in South Carolina, the non-moving party is merely required to present a mere scintilla of evidence to survive summary judgment, and certainly, the fact that Marick's representatives testified that supervision was provided at the project, that BFS 30(b)(6) designee testified that guidance and supervision was provided by Marick and that Marick's expert, Randy Still, testified that Marick had a right to rely on the expertise of the subcontractors, presents more than a scintilla of evidence that Marick supervised and was not at fault for the alleged damages associated with the work BFS contracted to perform at Stoneledge. Based upon these facts, a jury is required to determine fault.

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

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

failing to indemnify and hold Marick harmless for BFS's alleged deficient work in this action, BFS breached the Contract.

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

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Marick asserts cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n. 3. However, in this case, Plaintiffs continue to allege defective work, which BFS was responsible for performing, against Marick. Thus, Marick is required to continue litigating claims associated with BFS's defective work. Marick continues to incur attorney fees and costs associated with BFS's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

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

Marick may recover special damages at law under theories of negligence, breach of warranty, and breach of contract as to BFS. Marick's claims for breach of warranty, negligence and breach of contract are not disguised indemnity claims. South Carolina law is well settled

that special damages arising from another's wrongful conduct are recoverable at law. South

Carolina courts have held:

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

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1990) citing *Addy v. Bolton*, 257 S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from Plaintiffs' claims arising from the Defendant Subcontractor's tortious conduct (negligent performance of work), breach of warranty (failure to perform work in a workmanlike manner) and breach of contract (which includes an indemnification clause); thus, Marick properly filed claims for negligence, breach of warranty

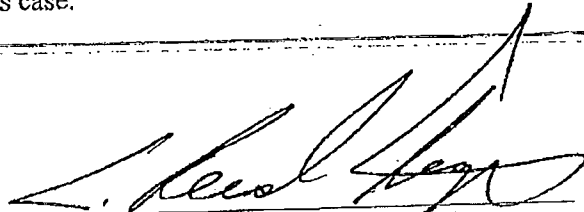
and breach of contract against BFS seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third

Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including a special damages claim against BFS as BFS was sued directly by Plaintiffs for its defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence, breach of contract and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

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

CONCLUSION

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



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April 9, 2013

*Attorney for Marick Home Builders,
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EXHIBIT 1

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

Circuit Court Judge

2063

Judge Code

01/11/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on the 14th day of January, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of January, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. Whitfield
CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON
PLEAS

THE TENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

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

CASE NUMBER: 2009-CP-37-0652

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

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

Defendants.)

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

Procedural Posture

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

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

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by separate orders, determined that BFS, Southern Concrete, and Clear View are entitled to judgment as a matter of law as to Marick's causes of action for negligence and equitable indemnity. Thus, this order addresses the remaining causes of action asserted by Marick in its

Cross-Claims, which are styled "Breach of Contract" and "Breach of Warranty." As Marick's claims for Breach of Contract and Breach of Warranty are merely reworded equitable indemnity claims, which are barred by Marick's unclean hands, and in that Marick has no viable claims for contractual indemnity, this Court finds that Defendants BFS, Southern Concrete, and Clear View are entitled to summary judgment on Marick's causes of action for Breach of Contract and Breach of Warranty.

Standard

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC. The movant must first demonstrate that there is no genuine dispute of material fact. See Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. See Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him, thereby

²While these defendants filed separate motions for summary judgment, they are being treated together in this order as they are similarly postured in relation to the claims of Marick.

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showing that there is a genuine issue for trial. See Miller, 365 S.C. at 220, 225, 616 S.E.2d at 730, 732.

~~When only one reasonable inference can be deduced from the evidence, it becomes a~~
question of law for the court, and not a question of fact for a jury. See National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581 (1934). Moreover, "a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be *reasonably* possible under the facts.'" Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)) (emphasis added). Based on the aforementioned considerations, summary judgment is appropriate in this case.

Discussion

This case arises out of the construction of the Stoneledge at Lake Keowee townhouse complex located in West Union, South Carolina (the "Project"). The Project includes 80 townhouse units. There are three (3) to seven (7) individual townhouse units per building. The Project was constructed in two phases. Phase 1 consists of thirty-seven townhouse units. Phase 2 consists of forty-three townhouse units.

Marick was the general contractor during original construction of Phase 2 of the Project. BFS, Southern Concrete, and Clear View served as subcontractors for construction of Phase 2. BFS provided materials and labor for framing, siding, and related construction components. Southern Concrete provided flat work and basement work. Clear View provided stone work.

**Marick's claims for Breach of Contract and Breach of Warranty
are claims for Equitable Indemnity and thus fail.**

BFS, Southern Concrete, and Clear View are entitled to summary judgment as to Marick's Breach of Contract and Breach of Warranty causes of action because these claims by Marick are merely disguised, or reworded, claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party [here allegedly BFS, Southern Concrete, or Clear View] is liable to pay a second party [here Marick] for a loss or damage the second party incurs to a third party [Plaintiffs]." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005); U.S. Fidelity & Guaranty Co. v. Patriot's Point Development Authority, 788 F. Supp. 880, 881 (D.S.C. 1992) (stating that the non-settling defendants did not have independent claims apart from indemnification and contribution because the claims were nothing more than claims for indemnity and because they would not exist without plaintiff suing the non-settling defendants); and S.C. National Bank v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990) (holding that the cross-claims against the settling defendants for breach of contract, negligence, and fraud were nothing more than claims for contribution or indemnification with a slight change in wording). The circuit courts in South Carolina have likewise found that claims for negligence, breach of warranty, and breach of contract are absorbed by the equitable indemnification claim. See Nelson v. John Weiland Homes, 2009-CP-10-6573 (unpublished order); Kirkland v. Cambridge Building Corp., 2006-CP-07-1312 (unpublished order).

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

Co., 257 S.C. 401, 403 (1972); Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239

S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Further, courts may use the allegations in the complaint to determine the correct character of an action. See Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

After thoroughly reviewing the allegations contained in Marick's cross-claims for Breach of Contract and Breach of Warranty, the Court finds that they are claims for indemnity, regardless of the phraseology employed by Marick. In Marick's cross-claim for Equitable Indemnity³ it alleges that if Plaintiffs are entitled to judgment against it, then it is entitled to recovery from BFS, Southern Concrete, and Clear View, among others. This is a typical indemnification framework. Vermeer Carolina's, Inc., supra. Likewise, Marick's claims for Breach of Contract and Breach of Warranty set forth the same indemnity framework. (Marick's Answer to the Third Amended Complaint ¶¶ 162 and 174.) Though Marick uses different wording, the gravamen of its claims are the same; i.e., if Plaintiffs are entitled to judgment against Marick, then it is entitled to corresponding recovery from BFS, Southern Concrete, and Clear View; Marick is not alleging personal injury or property damage as to it. As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal

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claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

As established by this Court's orders granting these Defendants summary judgment as to Marick's causes of action labelled Equitable Indemnity and Negligence, Marick is not without fault as to Plaintiffs' claimed damages, and thus, summary judgment on Marick's claims for equitable indemnity, termed "Breach of Contract" and "Breach of Warranty," is proper.⁴

Marick has no viable claims for contractual indemnity

To the extent Marick has argued that it is entitled to contractual indemnity, such claims also fail. As a preliminary matter, nowhere in its Answer and Cross-Claims does Marick allege an entitlement to contractual indemnity. Rather, Marick's Breach of Contract cause of action is premised on the notion that if Plaintiffs' allegations are proven true, then BFS, Southern Concrete, and Clear View provided defective materials or services in breach of their contract with Marick (Marick's Answer to the Third Amended Complaint ¶161), and such actions have

³As noted above, Marick's claim for Equitable Indemnity was disposed of by separate order, based primarily on Marick's inability to show that it was without fault as to the relevant construction deficiencies at the Project.

⁴Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Loggins Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Among other basis for ascribing fault to Marick is that Marick's own expert testified that Marick is not without fault; Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." Still Dep. 87:3-7 (Aug. 15, 2012). Still acknowledged that, in certain instances, Marick violated the building code.

Because Marick is the permit holder for Stoneledge Phase 2, it cannot be adjudged without fault. The party pulling a permit is ultimately responsible for compliance with the building code. Because Marick was the permit holder for Phase 2 and violated the building code according to its own expert, it cannot be adjudged without fault, and thus its claims for equitable indemnity fail.

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"resulted or could result in damage to Plaintiff, which could or will be assessed against Marick."

(Id. ¶ 162.) Marick's Breach of Contract causes of action makes no mention of a contract

~~between it and BFS, Clear View, or Southern Concrete which contains contractual~~
indemnification provisions which it is attempting to enforce. Further, to the extent Marick argues that it does have contracts with these parties that contain indemnification provisions, it has offered no evidence that the contracts applied to the Project or would otherwise be enforceable in this matter.⁵ Finally, Marick has presented no evidence to rebut evidence demonstrating that such contracts were not supported by consideration. The documents in question were signed after the subcontractors completed their work and Marick appears to have paid the subcontractors only for the work performed.⁶

Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds that no genuine issue of material fact exists and that BFS, Southern

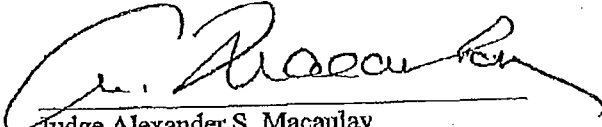
⁵The Court also takes notice that evidence was presented during its hearing on the various motions for summary judgment as to Marick's cross-claims that Marick had no contractor's license, and would thus be prohibited from enforcing a contract as a matter of law. (See Memorandum in Support of Carl Catoe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

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

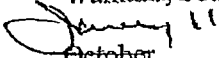
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Concrete, and Clear View are entitled to judgment as a matter of law as to the Cross-Claims of
Marick for Breach of Contract and Breach of Warranty.

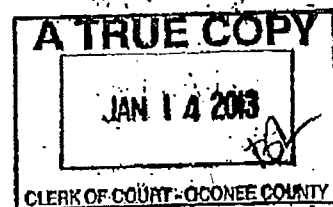
IT IS SO ORDERED.


Judge Alexander S. Macaulay

Walhalla, South Carolina


October __, 2013

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EXHIBIT 2

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

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01/11/2013

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (12/2011)

Page 1

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For Clerk of Court Office Use Only

This judgment was entered on the 14th day of January, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of January, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. Whitfield
CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

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

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

Plaintiffs,

vs.

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

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

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 JAN 14 PM 3 42

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

Defendants,)

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

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

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

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

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

STANDARD OF REVIEW

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

DISCUSSION

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

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

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

² Marick's cross-claim labeled as a claim for negligence states:
Should Plaintiff's prevail on their claims, Marick will be damaged as a direct and proximate result of [Clear View's] negligence; as a result, Marick is informed and believes that it is entitled to recover from [Clear View] such as it may incur legal fees and costs or is ordered to pay to the Plaintiffs for which they sue. (Marick's Answer to Plaintiffs' Third Amended Complaint & Cross-claims, ¶ 169.)

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defendants for breach of contract, negligence, and fraud were nothing more than claims for contribution or indemnification with a slight change in wording). The circuit courts in South

~~Carolina have likewise found that claims for negligence, breach of warranty, and breach of~~
contract are absorbed by the equitable indemnification claim. See *Nelson v. John Weiland Homes*, 2009-CP-10-6573 (unpublished order); *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (unpublished order).

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

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

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

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

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2.

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

A: Yes.

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

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

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

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

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

A: Yes.

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

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

A: That's my opinion.

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2

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

According to well established South Carolina case law, a party can only recover under equitable indemnity if the party is without fault, which is also known as the doctrine of unclean hands. The most important element of an equitable indemnity action is that the party seeking indemnification must be without fault. See *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 366 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992); *Stuck v. Pioneer Loggins Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (stating that right to equitable indemnification do not exist between joint tortfeasors). Marick was the general contractor and permit holder for Phase II construction at Stoneledge. The party pulling a permit is ultimately responsible for compliance with the building code. Marick's own expert Randy Still confirmed both that in some areas of construction Marick violated the building code and that Marick was responsible for Phase II construction. Because Marick was the permit holder for Phase II construction, it violated the building code, and is ultimately responsible for construction, it cannot be adjudged without fault, and thus its claims for equitable indemnity must fail.

C. No Special Relationship between the Individual Defendants

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

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D.

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

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

CONCLUSION

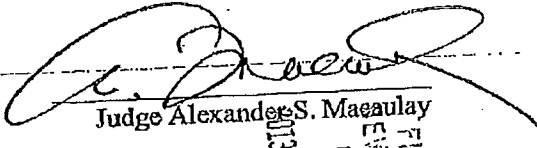
Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds there is no genuine issue of material fact that Marick's negligence cross-claim is subsumed by its equitable indemnification claim. This Court finds that Marick has at least some fault for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

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

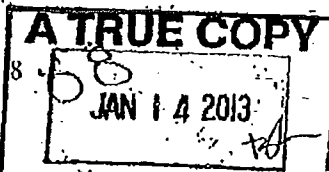
IT IS SO ORDERED.

Wallhalla, South Carolina

October 11, 2012


Judge Alexander S. Macaulay

FILED
EVERLY N. WHITEFIELD
CLERK OF COURT
JAN 14 PM 3 42



000846

EXHIBIT 3

10/25/2007 10:41 PM FAX



8. Payment schedule:

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

9. Completion schedule:

As required per job.

10. Documentation required for payment:

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

11. Warranty:

One year

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

BY:

DATE:

BY:

DATE:

Rick Thoennes
NAME and TITLE

Marick Home Builders, LLC.
COMPANY NAME

SE Binder
WITNESSED BY

Deryl Ward

Senior Attorney

Builder's First Source South East Group, LLC
COMPANY NAME

Subject to Written Changes

3

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20 DEPOSITION of DEREK HODGIN (DAY 1)
21

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the January 23, 2012, commencing at
25 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 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20 DEPOSITION of DEREK HODGIN (DAY 2)
21

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the January 24, 2012, commencing at
25 approximately 9:15 a.m. attended by counsel as follows:

1 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

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

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

7 vs.

8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.

18 Defendants.
19
20

21 Deposition of **RANDY STILL**
22

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

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

000882

1 Object to the form.

2 WITNESS ANSWERS:

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

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

10 A. I would think so.

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

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

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

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

20 A. Ask questions.

21 Q. Of whom?

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

24 Q. Is it a duty of the general contractor on a project
25 like the Stoneledge Project to supervise the work of

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 Object to the form.

4 WITNESS ANSWERS:

5 A. I'm thinking about the word "supervise." You would
6 think that he would make sure they were doing what
7 entity they were supposed to be doing. In other
8 words, you would want a framing contractor doing
9 framing and you would rely upon them to perform
10 their craft appropriately. And the supervisory
11 condition would be, I would think, contractual.

12 Q. Between the general contractor and the
13 subcontractors?

14 A. I would think so.

15 Q. Do you think a general contractor has any obligation
16 to insure that his subcontractors(phone ringing) ---

17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

19 Q. Is it an obligation of a general contractor to
20 insure his subcontractor's in compliance with the
21 contract documents?

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I'm not sure I'd use the word "insure." I would

1 obligation in the construction or installation of
2 the low slope roofs, whether it be code violation,
3 violation of the design documents or non-compliance

4 with the design documents or violation of
5 manufacturers' installation instructions or any
6 other obligation on the installation of the low
7 slope roofs?

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

12 Q. Let's talk about that for just a minute. In your
13 experience and education and in your work, do you
14 hold the opinion that a general contractor is always
15 liable for all defects in construction which were
16 performed by subcontractors?

17 A. I think what I have found is the term "liable" is a
18 legal term and my belief is that the general
19 contractor can rely on the subcontractors who have
20 the specialty crafts and knowledge to perform their
21 work correctly.

22 Q. Is it fair to say that in many cases a subcontractor
23 is in fact more experienced and better qualified to
24 perform their particular trade than a general
25 contractor?

1 A. Yes.

2 Q. Is that because they have specialized over the years
3 in that particular area and have focused their

4 education and experience in that area?

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

7 Q. In your opinion is it fair -- is it acceptable for a
8 general contractor to rely on that experience and
9 education of a subcontractor in a particular trade?

10 A. I think in many cases he has to.

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

14 A. Yes.

15 Q. Would you agree that he must, out of necessity, rely
16 on a subcontractor's experience and knowledge and
17 compliance with good building practice and the code?

18 A. Yes.

19 Q. Let me go back to my question then again. If based
20 upon that, if there are violations of code such as a
21 completely missing felt under a roof, do you hold
22 the opinion that the general contractor has violated
23 the code or some other obligation if the work was
24 done by a subcontractor?

25 A. No, but clearly when something like felt is missing

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

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

20 A. I'm not sure.

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

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

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

1 Q. Do you believe or do you have an opinion that Marick
2 violated any code, manufacturers' instructions,
3 design drawings in the installation of the cedar

4 shake and plank siding in Phase II?

5 A. No.

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

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

12 Q. Is that a "no"?

13 A. No.

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

18 A. No.

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

24 A. No.

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

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF OCONEE

C.A. NO. 2009-CP-37-0652

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

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, 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 A. Normally.

2 Q. Can BFS supplement plans, architectural plans? Can
3 their Install Services supplement architectural
4 plans if they feel something's missing?

5 BY MR. ROOT:

6 Object to form.

7 WITNESS ANSWERS:

8 A. I don't understand what you're -- we don't -- we
9 would not revise or draw up a plan or something to
10 change the architect's plan, no. We don't have any
11 architecturally -- architects in-house or -- I'm not
12 even sure what your question is.

13 Q. If there was a lack of detail, say if there was a
14 lack of framing detail on plans that you're working
15 on a project and you didn't feel they were
16 sufficient, could you supplement those plans?

17 A. When you say "supplement," how -- by verbally
18 telling the guy how to do something or ---

19 Q. How would you deal with that situation?

20 A. Normally if we needed some details, we'd try to go
21 back to, you know, the general contractor and say,
22 "The plans are not clear here. What do you want us
23 to do? How do we correct this?"

24 Q. If you couldn't find resolution that way, how else
25 would you handle it? How else would BFS normally

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.

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

3
4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrays
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20
21 Deposition of **NATHAN HORNADAY**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the March 30, 2012 commencing at
25 approximately 10:15 a.m. attended by counsel as follows:

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

4 Q. Had you ever -- when you went to Stoneledge, had
5 you ever been a supervisor or superintendent on a
6 job?

7 A. No.

8 Q. When you went over there, did you think that you
9 had the skills to be -- did you call yourself
10 supervisor or superintendent first of all. Let me
11 ask you that. Or what title did you use, if you
12 used one?

13 A. Supervisor. I mean, I was mostly just supervising
14 everything that was being done.

15 Q. Were you supervising subcontractors?

16 A. Yes.

17 Q. Or did Marick have any other employees doing such
18 things as framing or other work of that type?

19 A. No.

20 Q. So it was all -- all the work was being done by
21 subcontractors?

22 A. Yes.

23 Q. Prior to the time you went to Stoneledge, had you
24 ever supervised subcontractors?

25 A. No.

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

3 A. Yes.

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

8 A. Yes.

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

11 A. No.

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

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

21 Q. I understand that. Did you ever see something that
22 caused you to say to a sub, "Wait a minute, I don't
23 like the way you're doing that"?

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

2 Q. Do you remember specific instances, or are you just
3 saying that from time to time ---

4 A. From time to time I would see something that they
5 would cut a corner on, but I would talk to them and
6 they would fix it. But it was nothing major. It
7 was like nail guards on pipes, painting, you know,
8 caulking, stuff like that, on the inside -- the
9 interior unit.

10 Q. Did you do any work on Phase I?

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

14 Q. And what -- I'm sorry.

15 A. --- supervised a lot of repair work.

16 Q. By the way, if I start to ask you a question before
17 you finish -- I'll try not to do that, but
18 sometimes you can't help it.

19 A. Okay.

20 Q. Just let me know there's more in your answer.

21 A. Okay.

22 Q. Did this supervising of repair work in Phase I, was
23 that going on while ---

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

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

4 Owners' Association, et.al.,
5 Plaintiffs,

6 vs.

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

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

12 vs.

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

15 Third-Party Defendants,

16 Builders FirstSource-SE Group,
17 Fourth-Party Plaintiff,

18 vs.

19 Carl Catoe Construction, Inc.,

20 Fourth-Party Defendant.

21 DEPOSITION of **FREDERICK (RICK) R. THOENNES**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the November 21, 2011, commencing at
25 approximately 10:10 a.m. attended by counsel as follows:

1 A. I don't know.

2 Q. How about this, at the height of Marick's existence
3 when it was at its busiest, how many employees did
4 it have?

5 A. Probably three or four.

6 Q. Describe the job duties or titles of those
7 employees.

8 A. Administrative Assistant in the office. Would have
9 had a superintendent, assistant superintendent and
10 probably a laborer.

11 Q. So when Marick was doing its construction it
12 subcontracted out its work?

13 A. Correct.

14 Q. And who at Marick was responsible for selecting and
15 contacting with subcontractors?

16 A. Me.

17 Q. And who at Marick was responsible for observing and
18 supervising the work of subcontractors?

19 A. Our superintendents.

20 Q. Can you name your superintendents at Marick, and
21 tell me the years that they were with Marick?

22 A. I don't know about that, but I can tell you some of
23 the superintendents.

24 Q. Okay.

25 A. Matthew Gooch ---

1 Q. Can you spell that last name?

2 A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday,
3 just like it sounds. There's a couple I can picture

4 but I can't name. There are probably two, maybe
5 three others.

6 Q. Who was the superintendent who was responsible for
7 observation and supervision of the subcontractors in
8 connection with what Marick did at the Stoneledge
9 project?

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

13 Q. Did Mr. Hornaday hold any sort of license,
14 contractor's license?

15 A. I don't know. Not that I know of.

16 Q. Who hired Mr. Hornaday?

17 A. I did.

18 Q. Are you the one that assigned him to the -- his
19 responsibilities in connection with the Stoneledge
20 project?

21 A. Yes.

22 Q. What were his qualifications such that you felt
23 comfortable he could supervise subcontractors' work
24 at the Stoneledge project?

25 A. He had worked as a subcontractor for us for years

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

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

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

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

10 A. Whatever Nathan needed.

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

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

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

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

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

1 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 Gatoe 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:

CARL CATOE

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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?

CARL CATOE

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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.

CARL CATOE

Page 47

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?

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

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

2013 APR 10 AM 10 44

CERTIFICATE OF SERVICE

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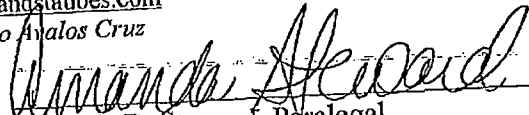
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Attorney for Alejandro Ayalos Cruz

This 9 day of April, 2014
Spartanburg, SC

By:


Amanda D. Steward, Paralegal

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

~~STONELEDGE AT LAKE KEOWEE OWNERS'~~

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

Plaintiffs,

vs.

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

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

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

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

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

Marick timely filed a Motion to Alter and/or Amend the Order pursuant to S.C.R.C.P.

59(e). Marick submits this Memorandum to the Court in support of its Motion.

FACTS

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

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

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

STANDARD OF REVIEW

"Although a Rule 59(e) motion may effectively seek a reconsideration of issues and
arguments, this type of motion is often required for issue preservation purposes. *See Elam v.*
South Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). We explained in *Elam* that
'there is nothing inherently unfair in allowing a party one final chance not only to call the court's
attention to a possible misapprehension of an earlier argument, but also to revisit a previously

raised argument.' *Id.* at 22, 602 S.E.2d at 779. Indeed, 'it is inherently unfair to disallow such an opportunity.'²² *Home Med. Sys., Inc. v. S. Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

~~I. SUMMARY JUDGMENT WAS IMPROPER~~

Marick's Third Amended Answer asserted cross-claims for (1) Equitable Indemnification; (2) Negligence; and (3) Breach of Warranties against Catoe and the Catoe Subcontractors. In its January 11, 2013 Order, the Court summarily dismissed all of Marick's cross-claims pled against Catoe and the Catoe Subcontractors (See: Exhibit "1", Order).

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

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

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

(1) INDEMNITY

The Court's Order held that Marick's equitable indemnity claims failed because Marick cannot be adjudged without fault and/or that Marick had unclean hands (see: Exhibit "1", Court's Order). The Court further ordered that Marick had no "special relationship" with Catoe or the Catoe Subcontractors. First, Marick will address the issue of fault and second, the "special relationship" between Marick, Catoe and the Catoe Subcontractors.

A. A QUESTION OF FACT EXISTS AS TO FAULT/UNCLEAN HANDS

Based on the testimony presented in this case, Marick has presented evidence that it was not at fault for the alleged defective work performed by the Catoe Subcontractors.

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

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

Plaintiffs' expert, Derrick Hodgin, testified that there are alleged defects associated with the wood-siding installation and failure to apply appropriate flashing and weather resistant barrier to the structures at Phase II of the project (see: Hodgin Dep. (Day 1) at 38:22-39:3, 97:1 - 98:12, 104:2-7, 113:16-25 and Hodgin Dep. (Day 2) at 16:14 - 18:25, 24:5-14, 25:18 - 26:12, 49:20 - 50:18). Hodgin also testified that the weather resistant barrier installed by the Catoe

Subcontractors did not integrate properly with the flashing (see: Hodgin Dep. (Day 2) at 20:21 – 21:5). Further, Hodgin testified that the siding fasteners installed by the Catoe Subcontractors were not spaced properly which could result in future damage (see: Hodgin Dep. (Day 2) at 63:5 64:16). Additionally, Hodgin opines the flashing applied between the windows and the stone

is inadequate and that flashing associated with windows throughout phase II is inadequate (see: Hodgin Dep. (Day 2) at 108:11 – 109:1, 195:1-6). Among other things, Hodgin located the following deficiencies which correlate with work performed by the Catoe Subcontractors: improper flashing of doors, improper construction of exterior balconies and damage to balconies (see: Hodgin Dep. (Day 2) at 151:14-21, 211:9 – 213:9, and 224:9 – 228:4).

In addition to Mr. Hodgin's testimony, Catoe's expert, William Cary, testified that he noticed work performed by the Catoe Subcontractors that was not proper and construction performed by the Catoe Subcontractors that deviated from the plans (see: William Cary Dep. at 127:13 – 128:2, 101:19 – 102:3, 113:14-17, 144:2-9, 146:7-19, and 147:24-148:5).

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

Rick Thoennes, one of the owners of Marick Home Builders, testified that Marick had a superintendent at the project supervising the subcontractors and scheduling construction (see: Thoennes Dep. at 30:17-19). Thoennes testified that Nathan Hornaday was employed by Marick to serve as the superintendent responsible for providing supervision of the project (see: Thoennes

Dep. at 31:6-12). In addition to Hornaday's supervision and oversight, Thoennes visited the project weekly to oversee construction (see: Thoennes Dep. at 131:8-132:3). Further, Thoennes had daily communications with Hornaday concerning construction of the project (see: Thoennes Dep. at 176:4-6). According to Thoennes, during construction, Nathan Hornaday provided

supervision on site at Stoneledge 10-12 hours per day. (Thoennes Dep. at 176:23 -177:4). According to Thoennes, on several occasions, Hornaday contacted separate subcontractors to discuss construction related issues noticed during Hornaday's inspections of work performed by subcontractors (Thoennes Dep. at 224:18 - 225:7, 244).

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

Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I don't like the way you're doing that'?

A: I did.

Q: And was it corrected to your satisfaction?

A: Yes.

(Hornaday Dep. at 19:21 - 20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision was provided at the project. In addition to Marick's representatives' testimony, Carl Catoe testified that Marick provided supervision and oversight at the project.

A: There was a question about the offsets, what happened there. Was this rated? Was this a two-hour wall? Was this a one-hour wall? Is this - - has it got to go horizontal? Does it continue? How far does it continue? Different things like that.

Q: And who provided you with the direction that you used to build those conditions?

A: Nathan.

Q: So that came directly from Marick?

A: Yes.

(Catoe Dep. at 90:21-25.)

~~Catoe further testified that when he needed additional plans to perform his work, he~~
would ask Nathan and Nathan would provide him with additional plans to follow (see: Catoe Dep. at 159:20 – 160:6). Thus, Carl Catoe testified that Marick provided supervision, oversight and guidance concerning construction of the project. Additionally, Catoe's expert, William Cary, testified that Marick provided supervision and guidance to Catoe when issues arose concerning the plans (see: Cary Dep. at 152:6-16.)

Marick's expert, Randy Still, testified that a general contractor can rely on a subcontractor's assurance that they will perform their craft appropriately (Still Dep. at 84 – 85).

Mr. Still stated further:

Q: In your experience and education and in your work, do you hold the opinion that a general contractor is always liable for all defects in construction which were performed by subcontractors?

A: I think what I have found is the term "liable" is a legal term and my belief is that the general contractor can rely on the subcontractors who have the specialty crafts and knowledge to perform their work correctly.

Q: Is it fair to say that in many cases a subcontractor is in fact more experienced and better qualified to perform their particular trade than a general contractor?

A: Yes.

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

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

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

A: I think in many cases he has to.

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

A: Yes.

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

A: Yes.

(Still Dep. at 169:12 – 170: 18.)

Mr. Still further testified:

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

A: No.

(Still Dep. 174:18:24.)

Thus, in South Carolina, the non-moving party is merely required to present a mere scintilla of evidence to survive summary judgment, and certainly, the fact that Marick's representatives testified that supervision was provided at the project, that Carl Catoe and Catoe's expert testified that guidance and supervision was provided by Marick and that Marick's expert, Randy Still, testified that Marick had a right to rely on the expertise of the subcontractors, presents more than a scintilla of evidence that Marick supervised and was not at fault for the alleged damages associated with the work performed by the Catoe Subcontractors at Stoneledge. Based upon these facts, a jury is required to determine fault.

B. SPECIAL RELATIONSHIP

BFS was Marick's direct subcontractor, BFS subcontracted with Catoe who in turn hired the Catoe Subcontractors to perform the construction labor. Due to the supervision which Marick was required to provide Catoe and the Catoe Subcontractors, Marick had a special relationship entitling it to equitable indemnification. *First Gen. Servs.*, 314 S.C. at 442, 445 S.E.2d at 448.

In the attached Order, the Court held that the relationship between Marick and Catoe/Catoe Subcontractors was too remote to establish the special relationship required to seek equitable indemnification under South Carolina law citing *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

The Court erred in finding that Marick had no special relationship with Catoe and the Catoe Subcontractors, as Marick was responsible for providing direct oversight and supervision to Catoe and the Catoe Subcontractors. Plaintiffs' Complaint alleges that Marick failed to provide proper supervision of the work performed at the property. The Catoe Subcontractors were performing the labor at the project under the direction of Catoe, BFS and Marick; thus, according to Plaintiffs, Marick was responsible for providing oversight of the work performed by Catoe and its subcontractors.

The Court's Order cites *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005), as precedence for its determination that the relationship between Catoe/Catoe Subcontractors and Marick was too remote to warrant Marick's request for equitable indemnity. Marick asserts that a determination concerning a general contractor's right to equitable indemnity from a subcontractor's subcontractor in a construction setting has not been decided by a court in South Carolina.

The facts in *Rock Hill Telephone Co.* involve a utility company that hired an independent contractor to perform installation work for the Utility Company. There are no allegations that the Utility was providing any oversight or guidance to the hired independent contractor. The independent contractor was overseeing the job, hired its own subcontractors to

perform the work and provided oversight for those subcontractors. There is nothing in the case indicating that the Utility was overseeing the independent contractor's or the subcontractor's work. *Id.*

However, in a construction related setting, as is at issue in the present case before the Court, the general contractor is responsible for providing oversight and supervision for the entire project. Thus, Marick's obligations are different from the obligations of the Utility in *Rock Hill Tele. Co.* If Marick was responsible for overseeing and supervising Catoe and its subcontractors, then a "special relationship" exists between those parties, thus warranting a right to equitable indemnity.

As stated above, "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994). Thus, if Marick is responsible for providing oversight and guidance on a daily basis for the work performed by Catoe and its subcontractors, then a sufficient relationship between the parties exists to obligate Catoe and the Catoe Subcontractors to indemnify Marick for exposing Marick to liability for the alleged deficient work performed. Marick has admitted no fault in this action; thus, if a jury determines that Marick has no fault associated with the alleged deficient work performed by Catoe and the Catoe Subcontractors, Marick should be entitled to indemnity. It would be inequitable to allow the subcontractors which were supervised and

overseen by Marick, and for which Marick is being sued, to escape liability to Marick while Marick suffers liability at the hands of those subcontractors deficient work. Where there is a wrong, there is a remedy; thus, if found without fault, Marick should be indemnified.

Thus, Marick respectfully requests that the Court hold that in a construction setting, a general contractor that oversees the project has a special relationship with all subcontractors for which it is required to oversee and supervise.

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

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

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Marick asserts cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n. 3. However, in this case, Plaintiffs continue to allege defective siding application, inadequate flashing, inadequate flashing around windows and exterior doors, defective construction of

balconies, inadequate or improper installation of weather resistant barrier (among other deficiencies)-against-Marick. Thus, Marick is required to continue litigating claims associated with Catoe and the Catoe Subcontractors' alleged defective work. Marick continues to incur attorney fees and costs associated with Catoe and the Catoe Subcontractors' failure to perform duties owed to Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

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

Marick's claims for breach of warranty and negligence are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

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

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1990) citing *Addy v. Bolton*, 257, S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the

tortious conduct of the contractor, or by his breach of contract.” *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

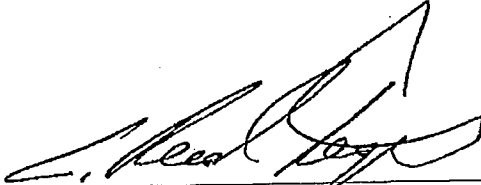
The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs’ claims arising from the Defendant Subcontractor’s tortious conduct (negligent performance of work) and breach of warranty (failure to perform work in a workmanlike manner); thus, Marick properly filed claims for negligence and breach of warranty against Catoe and the Catoe Subcontractors seeking not only “damages recovered by the Plaintiffs against Marick” but also “reasonable attorney fees and costs” associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes’ Answer and Cross-claims to Plaintiffs’ Third Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including special damages claims against the subcontractors as Catoe and the Catoe Subcontractors were sued directly by Plaintiffs for their defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The duties owed by Catoe and the Catoe Subcontractors to Marick constitute separate causes of action which did not arise through Plaintiffs’ relationship to the parties. The Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate obligations and duties from a party, a separate cause of action for negligence does not collapse into a single indemnity claim.

CONCLUSION

For the reasons stated hereinabove, Marick respectfully requests that this Court alter and/or amend its January 11, 2013 Order and deny summary judgment to Catoe and the Catoe

Subcontractors as clearly there are questions of fact for a jury to determine in this case.



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

April 9, 2013

EXHIBIT 1

FORM 4

JUDGMENT IN A CIVIL CASE

STATE OF SOUTH CAROLINA

COUNTY OF Oconee

IN THE COURT OF COMMON PLEAS

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit); ☐ Rule 43(k), SCRCF (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCF; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/Alexander S. Macaulay
Circuit Court Judge

2063
Judge Code

01/11/2013
Date

For Clerk of Court Office Use Only

This judgment was entered on the 14th day of January, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of January, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

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Beverly A. Whitfield
CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) THE TENTH JUDICIAL CIRCUIT

COUNTY OF OCONEE

CASE NUMBER: 2009-CP-37-0652

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

Plaintiffs,

vs.

IMK Development Co., LLC, Keowee
Townhouses, LLC, Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion at Keowee, LLC,
Integrus Keowee Development, LLC, Marick
Home Builders, LLC, Bostic Brothers Morales
d/b/a Morales Masonry, and Miller/Player &
Associates, et al.

Defendants.

ORDER GRANTING BFS', CATOE'S &
CATOE SUBCONTRACTORS'
MOTIONS TO DISMISS AND FOR
SUMMARY JUDGMENT AS TO CROSS
CLAIMS OF MARICK HOME
BUILDERS, LLC

FILED
OCCONEE, SC
BEVERLY H. WILSON
CLERK OF COURT
2013 JUN 14 PM 3:09

This matter came before the Court on September 5, 2012 by way of Motions to Dismiss and for Summary Judgment as to the cross claims asserted by Marick Home Builders, LLC ("Marick")¹ against Builders FirstSource - Southeast Group, LLC ("BFS"), Carl Catoe Construction, Inc. ("Catoe") and Catoe's subcontractors T.G. Construction LLC, Alejandro Avalos Cruz, Herbert Acros Hernandez, Martin Hernandez Aviles, Ester Moran Mentado, Socorro Castillo Montel, and Zarate Construction (collectively, "Catoe's Subcontractors"). For simplicity, BFS, Catoe and Catoe's Subcontractors are collectively referenced here as the Moving Defendants.

This litigation involves construction defect claims by owners at Stoneledge at Lake Keowee. Marick served as the General Contractor for Phase II of the townhome development. Marick subcontracted a portion of its work to BFS. BFS, in turn, subcontracted the labor portion

¹ The caption of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross Claims against the subcontractor defendants appears to indicate that the cross claims were being asserted by both Marick and Rick Thoennes. In the body of the cross claims, however, only Marick asserted the claims. Thus, there is not a cross claim by Defendant Rick Thoennes against the moving Defendants.

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of its work to Catoe, which hired the Catoe Subcontractors. Neither Catoe nor any of the Catoe Subcontractors had a direct contractual relationship with Marick.

~~Plaintiffs have brought suit for construction defects and related damages against all~~
defendants. Marick, asserted cross-claims against its subcontractors and other remote contractors alleging breach of warranty, negligence, and equitable indemnity.

STANDARD OF REVIEW

In ruling on a Rule 12(b)(6) motion, the Court will base its decision solely on the allegations contained in the Complaint. Baird v. Charleston Cty., 333 S.C. 519, 511 S.E.2d 69, 73 (1999). While viewing the allegations in the light most favorable to the non-moving party, the motion must be granted where, as here, the facts alleged in the Complaint and inferences reasonably deducible therefrom do not entitle the claimant to relief. Jarrell v. Petro Seed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered "when it is clear that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Toomer v. Norfolk S. Ry Co., 344 S.C. 486, 492-93, 544 S.E.2d 634, 637 (Ct. App. 2001) (affirming summary judgment award on equitable indemnity claim); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 518 S.E.2d 301, (Ct. App. 1999) (affirming summary judgment on equitable indemnity claim).

DISCUSSION

A. Negligence and Breach of Warranty Claims

1. As to claims against Catoe and Catoe's Subcontractors

At the September hearing, counsel for Marick conceded that the negligence and breach of warranty claims against Catoe and Catoe's Subcontractors should be dismissed, leaving equitable

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indemnity as the only remaining claim against those parties. Although the issue was conceded, the Court addresses the issue herein for the remaining parties.

~~Marick's breach of warranty and negligence claims against Catoe and Catoe's~~
Subcontractors are merely disguised, or mislabeled, claims for equitable indemnity and are not viable as alternative causes of action. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Vermeer Carolina's, 336 S.C. at 60, 518 S.E.2d at 305 (internal citations omitted).

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

The Court has reviewed Marick's pleadings and concludes that equitable indemnity is the only cause of action pled in fact against Catoe and Catoe's Subcontractors. For example, the cross-claim labeled as a breach of warranty claim against Catoe states:

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

Similarly, Marick's cross-claim labeled as a claim for negligence states:

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

The cross claims against Catoe's Subcontractors and BFS are identically worded. Marick seeks recovery of the amount Marick will owe Plaintiffs after trial due, ostensibly, to the acts or omissions of others. Marick does not seek damages from Moving Defendants for personal injury, property damages, or other damages actually incurred by Marick. Therefore, these cross-claims are textbook claims for indemnity and will be treated as such. See Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.

Legal claims, whether labeled as negligence or breach of warranty, asserting damages arising out of liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990). Put another way, Marick failed to state a claim for negligence or breach of warranty--Marick merely pled equitable indemnity against Catoe and Catoe's Subcontractors, and those claims are properly dismissed. See also J. Roger Young, Order Granting Partial Summary Judgment, Nelson v. John Wieland Homes, 2009-CP-10-6573 (Oct. 26, 2011) & J. Curtis Coltrane, Order Granting Summary Judgment, Kirkland v. Cambridge Building Corp., 2005-CP-07-1312 (May 30, 2006).

2. As to Claims Against Builder's FirstSource

For the reasons set forth above, Marick's claim against BFS for negligence is dismissed as a disguised indemnity claim. Marick's claims against its direct subcontractor, BFS, for breach of warranty and breach of contract are addressed in a separate order.

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B. Equitable Indemnity Claims

The Court grants the Moving Defendants summary judgment as to Marick's equitable indemnity claims. ~~Equitable indemnity claims are proper when a party is compelled to pay~~

damages because of another party's negligence, which has been imputed to him, "subject to the proviso that no personal negligence of his own has joined in causing the injury." Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.

Rights to equitable indemnity do not exist between joint tortfeasors; the party to be indemnified must not have joined in causing the damage. Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). "The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." Vermeer, 336 S.C. at 63, 518 S.C. at 307. The equitable maxim, "he who seeks equity must do equity," prevents Marick from recovering on these claims. Norton v. Matthews, 249 S.C. 71, 152 S.E.2d 680 (1967); Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287, 291 (2000).

Further, Marick must demonstrate that a special relationship existed between it and the alleged indemnitor, in this case, BFS, Catoe, and Catoe's subs. Toomer v. Norfolk Southern Railway Company, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637 (Ct. App. 2001); Scott v. Fruehauf Corp., 302 S.C. 364, 368, 396 S.E.2d 354, 358 (1990) ("[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them"). "A right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to

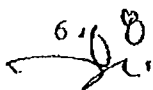
liability by the wrongful act of another in which he does not join." Stuck, 279 S.C. at 24, 301 S.E.2d at 553.

~~Under the undisputed facts of this case, Marick has unclean hands and cannot be~~
adjudged without fault. Additionally, no special relationship exists between Marick and Catoe or Catoe's Subcontractors.

1. Without Fault

Marick's own expert admits that Marick is not without fault. Marick engaged engineer Randy Still of H2L Consulting to assess construction issues at the property. Still testified that Marick, as general contractor, has "overall responsibility for construction of the entire project." (Still Dep. 87:3-7 (Aug. 15, 2012).) When asked, "So, you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?" Still answered, "At the time that we looked at it, yes." (Still Dep. 92:25-93:5.) Whether Plaintiffs should recover for the damages alleged is the purview of the jury. However, to the extent the jury finds for the Plaintiffs, Marick, as the party having "overall responsibility" for the project, cannot under these facts be adjudged without fault.

Marick points to Field v. J. Walters Builders, Inc. for the proposition that a general contractor is not "automatically responsible" for its subcontractor's work. 658 S.E.2d 80, 88 (S.C. 2008). While that is true, Fields also holds that "[a] builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code . . . and in a good and workmanlike manner." Id., at 88. Marick's own project supervisor Nathan Hornaday testified that Marick had no obligation to supervise the quality or code compliance of its subcontractors.

6.8


The following exchanges with Mr. Hornaday demonstrate Marick cannot be found to have discharged its duties of supervision:

~~Q. This question is, did Marick supervise the work of its subcontractors to ensure that that work was consistent with industry standards?~~

A. As far as I know, no. (Dep. Hornaday 113:9-12.)

Q. And would a supervisor on a construction project be responsible for ensuring that the subcontractor's work complies with the applicable building code?

A. No. That's what the inspections were for. The building code -- the building inspector would come out and they would inspect every part of everything. (Dep. Hornaday 61:2-8.)

Additionally, Marick is the permit holder for Stoneledge Phase II. The building code in effect at the time of construction states that it is "unlawful for any person, firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code." 2003 International Residential Code §R113.1. The permit application executed by Marick to obtain the necessary building permits states that Marick is "solely responsible" for compliance with the building code. Marick—not BFS, Catoe, or Catoe's subcontractors—was the entity that obtained the permits for construction of Phase II of Stoneledge.

Marick's own expert admits that construction of some parts of the Phase II project violates the building code in at least some aspects, and Plaintiffs sued Marick and others for these violations. Marick executed an application agreeing to be responsible for building code violations. Thus, Marick cannot be adjudged without fault for building code violations, to the extent the jury determines they exist. Marick and each of the Moving Defendants are at most joint tortfeasors, and consequently Marick has no right of indemnity against the Moving Defendants.

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S.B.

2. No Special Relationship

Alternatively, summary judgment as to the indemnity claims against the Catoe defendants is proper because Marick had no special relationship with Catoe or Catoe's Subcontractors. The

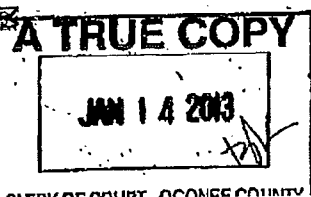
South Carolina Supreme Court comprehensively analyzed our state's equitable indemnity jurisprudence in Rock Hill Telephone, and held that an attenuated relationship will not support an equitable indemnity claim. Rock Hill Tel. Co. v. Globe Comm'n, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) (certified question). Specifically, the Court clarified that "a remote or distant independent contractor . . . does not have a special relationship" with an upstream party, so an equitable indemnity claim was inappropriate. Id. at 390, 611 S.E.2d at 237.

Here, neither Catoe nor Catoe's Subcontractors have any relationship, contractual or otherwise, with Marick. Marick hired BFS to perform and supply materials for a limited scope of work in Phase II. BFS subcontracted the labor to Catoe, who subcontracted portions of the labor to Catoe's subcontractors. These remote relationships will not support an indemnity obligation. Id. South Carolina case law is devoid of any suggestion that a downstream contractor or supplier has any special relationship with the prime contractor. The lack of a special relationship between Marick and Catoe, or Marick and Catoe's Subcontractors, is fatal to Marick's equitable indemnity claims.

In summary, all claims by Marick against Catoe and Catoe's Subcontractors are dismissed. Marick's claims for negligence and equitable indemnity against BFS are likewise dismissed.

IT IS SO ORDERED.

Walhalla, South Carolina
October 11, 2013



Judge Alexander S. Macaulay

FILED OCTOBER 30
BETHEL H. WHITEFIELD
CLERK OF COURT
2013 JAN 14 PM 3 39

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1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrays
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19

20 DEPOSITION OF **DEREK HODGIN (DAY 1)**
21

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the January 23, 2012, commencing at
25 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 "Attica," 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 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20 DEPOSITION of **DEREK HODGIN (DAY 2)**
21

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the January 24, 2012, commencing at
25 approximately 9:15 a.m. attended by counsel as follows:

1 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

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

3
4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20
21 Deposition of **WILLIAM CARY**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the April 27, 2012 commencing at
25 approximately 10:20 a.m. attended by counsel as follows:

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:

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3 ~~Stoneledge at Lake Keowee~~

4 Owners' Association, et.al.,
5 Plaintiffs,

6 vs.

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

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

12 vs.

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

15 Third-Party Defendants,

16 Builders FirstSource-SE Group,
17 Fourth-Party Plaintiff,

18 vs.

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

21 DEPOSITION of **FREDERICK (RICK) R. THOENNES**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the November 21, 2011, commencing at
25 approximately 10:10 a.m. attended by counsel as follows:

1 A. I don't know.

2 Q. How about this, at the height of Marick's existence
3 when it was at its busiest, how many employees did

4 it have?

5 A. Probably three or four.

6 Q. Describe the job duties or titles of those
7 employees.

8 A. Administrative Assistant in the office. Would have
9 had a superintendent, assistant superintendent and
10 probably a laborer.

11 Q. So when Marick was doing its construction it
12 subcontracted out its work?

13 A. Correct.

14 Q. And who at Marick was responsible for selecting and
15 contacting with subcontractors?

16 A. Me.

17 Q. And who at Marick was responsible for observing and
18 supervising the work of subcontractors?

19 A. Our superintendents.

20 Q. Can you name your superintendents at Marick, and
21 tell me the years that they were with Marick?

22 A. I don't know about that, but I can tell you some of
23 the superintendents.

24 Q. Okay.

25 A. Matthew Gooch ---

1 Q. ~~Can you spell that last name?~~

2 A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday,
3 just like it sounds. There's a couple I can picture

4 but I can't name. There are probably two, maybe
5 three others.

6 Q. Who was the superintendent who was responsible for
7 observation and supervision of the subcontractors in
8 connection with what Marick did at the Stoneledge
9 project?

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

13 Q. Did Mr. Hornaday hold any sort of license,
14 contractor's license?

15 A. I don't know. Not that I know of.

16 Q. Who hired Mr. Hornaday?

17 A. I did.

18 Q. Are you the one that assigned him to the -- his
19 responsibilities in connection with the Stoneledge
20 project?

21 A. Yes.

22 Q. What were his qualifications such that you felt
23 comfortable he could supervise subcontractors' work
24 at the Stoneledge project?

25 A. He had worked as a subcontractor for us for years

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

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

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

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

10 A. Whatever Nathan needed.

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

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

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

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

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

1 Q. Had you had any experience with Carl Catoe before?

2 A. No.

3 Q. Did you have occasion to talk with or observe the

4 work being done by Carl Catoe or his crews?

5 A. Some.

6 Q. Did you have any questions about the work they were
7 doing?

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

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

1 he was on site?

2 WITNESS ANSWERS:

3 A. A week to a week and a half.

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

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

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

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

18 Q. Pardon?

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

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

23 A. You have to ask him.

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

1 A. No.

2 Q. You were on site approximately once a week?

3 A. Once to once, every week and a half.

4 Q. And your communications, though, with Nathan were
5 how consistent?

6 A. Daily.

7 Q. What kind of ---

8 A. Well, I say "daily," there may have been a day he
9 was gone or I was gone, but for the most part daily.

10 Q. As far as a quantity of time, how much time during a
11 typical week would you spend talking to Nathan?

12 A. No idea.

13 Q. Couldn't say?

14 A. Wouldn't even venture to guess. One week it could
15 be, you know, an hour, next week it could be five
16 minutes, next week it could be two hours.

17 Q. I understand. Was there any particular stage of
18 construction during which you were on the site more
19 frequently than another stage?

20 A. Probably during the layout, like when they were
21 staking or that kind of thing. If they were doing
22 any work on the lake itself, then I was there.

23 Q. As to Nathan's onsite time, you said essentially for
24 a vacation or something where you would expect
25 someone to be absent from the site, he was generally

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

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

9 A. Yes.

10 Q. Who?

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

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

18 A. Right. I think windows and doors.

19 Q. Mike Green?

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

21 Q. All right, go ahead.

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

24 Q. General outside sales?

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

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

3 A. Nathan would inspect -- well, there was a draw

4 schedule that Mike Green and I worked out ---

5 Q. Okay.

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

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

12 A. That's correct. .

13 Q. Only Builders First Source was? .

14 A. Correct.

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

17 A. Sure.

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

21 A. I'm sure Nathan did.

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

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

1 Q. ~~Was Nathan calling Carl Gatee or Builders First~~

2 Source with these issues?

3 A. Both. I mean it would start with Carl to see if it

4 could be worked out in the field, I'm sure, but then

5 it would go -- if it couldn't be worked out in the

6 field with Carl then it would go to Builders First

7 Source.

8 Q. I had asked you about warranty issues, and to me

9 typically that means issues once you've left a

10 site ---

11 A. Oh, oh, I don't know of -- I don't know of any.

12 Q. But you were starting to tell me about some issues

13 while construction was ongoing ---

14 A. Right.

15 Q. --- and you mentioned some siding that was warping

16 and popping and then you mentioned the over-spanned

17 truss issue that you already talked about with

18 David. On the siding that was warping or popping,

19 was it an isolated board, was it widespread or was

20 it somewhere in between those two?

21 A. No, I mean, it was an isolated board according to

22 Nathan. He called and asked Carl to fix it.

23 Normally they were on site, but after they had left

24 site then he'd have to call Builders First Source.

25 Q. And was Builders First Source generally responsive?

1 A. Would ---

2 Q. I'm sorry, the finished floor, not the finished
3 grade.

4 A. No.

5 Q. Would you expect it to show the grade at the
6 building?

7 A. Yes, within plus or minus.

8 Q. Would you expect it to show the slope away from the
9 building?

10 A. Yes.

11 Q. If the Freeland drawings don't show or did not show
12 the grade at the building, how would the -- to your
13 knowledge, how would the grading subcontractor know
14 where to set the grade?

15 A. You're asking a hypothetical question there. It
16 should show it, period.

17 Q. I think you said that you assumed that Nathan
18 contacted Hutch N Son regarding some issues with the
19 grade, do you know that for sure or do you just
20 assume that?

21 A. No, I know that for sure.

22 Q. Okay. And that was relating to this standing water?

23 A. Standing water and the slope.

24 Q. And the slope?

25 A. Yes.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **RANDY STILL**
22

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

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You

4 would expect they would but I don't know
5 contractually. I think it becomes a legal question
6 of duty.

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

10 A. I would think so.

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

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

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

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

20 A. Ask questions.

21 Q. Of whom?

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

24 Q. Is it a duty of the general contractor on a project
25 like the Stoneledge Project to supervise the work of

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 Object to the form.

4 WITNESS ANSWERS:

5 A. I'm thinking about the word "supervise." You would
6 think that he would make sure they were doing what
7 entity they were supposed to be doing. In other
8 words, you would want a framing contractor doing
9 framing and you would rely upon them to perform
10 their craft appropriately. And the supervisory
11 condition would be, I would think, contractual.

12 Q. Between the general contractor and the
13 subcontractors?

14 A. I would think so.

15 Q. Do you think a general contractor has any obligation
16 to insure that his subcontractors(phone ringing) ---
17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

19 Q. Is it an obligation of a general contractor to
20 insure his subcontractor's in compliance with the
21 contract documents?

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I'm not sure I'd use the word "insure." I would

1 obligation in the construction or installation of
2 the low slope roofs, whether it be code violation,
3 violation of the design documents or non-compliance
4 with the design documents or violation of

5 manufacturers' installation instructions or any
6 other obligation on the installation of the low
7 slope roofs?

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

12 Q. Let's talk about that for just a minute. In your
13 experience and education and in your work, do you
14 hold the opinion that a general contractor is always
15 liable for all defects in construction which were
16 performed by subcontractors?

17 A. I think what I have found is the term "liable" is a
18 legal term and my belief is that the general
19 contractor can rely on the subcontractors who have
20 the specialty crafts and knowledge to perform their
21 work correctly.

22 Q. Is it fair to say that in many cases a subcontractor
23 is in fact more experienced and better qualified to
24 perform their particular trade than a general
25 contractor?

1 A. Yes.

2 Q. Is that because they have specialized over the years
3 in that particular area and have focused their
4 education and experience in that area?

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

7 Q. In your opinion is it fair -- is it acceptable for a
8 general contractor to rely on that experience and
9 education of a subcontractor in a particular trade?

10 A. I think in many cases he has to.

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

14 A. Yes.

15 Q. Would you agree that he must, out of necessity, rely
16 on a subcontractor's experience and knowledge and
17 compliance with good building practice and the code?

18 A. Yes.

19 Q. Let me go back to my question then again. If based
20 upon that, if there are violations of code such as a
21 completely missing felt under a roof, do you hold
22 the opinion that the general contractor has violated
23 the code or some other obligation if the work was
24 done by a subcontractor?

25 A. No, but clearly when something like felt is missing

1 ~~or a prototypical installation and that will serve~~
2 as the standard by which an installation is
3 accepted. For example, if you put a window in and

4 you've got a mock-up wall and you put in the rough
5 opening flashing and you put in the -- all the
6 flashings that would be there, all the peel-and-
7 stick and you've got all of the entities, for
8 example, the window manufacturer and the wrap
9 manufacturer and the peel-and-stick manufacturer and
10 the exterior cladding person there. And if they're
11 all there and they say, "Yeah, this is the way it
12 needs to be done." And your subcontractor who's
13 doing all those different components install it that
14 way, says he's going to install it that way, that's
15 how it should be installed. I'm not sure that
16 answers your question but ---

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

20 A. I'm not sure.

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

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

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

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

5 A. No.

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

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

12 Q. Is that a "no"?

13 A. No.

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

18 A. No.

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

24 A. No.

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

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

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

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrays
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:

CARL CATOE

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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?

CARL CATOE

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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.

CARL CATOE

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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?

CARL CATOE

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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.

CARL CATOE

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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.

CARL CATOE

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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

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **NATHAN HORNADAY**
22

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

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

4 Q. ~~Had you ever -- when you went to Stoneledge, had~~
5 you ever been a supervisor or superintendent on a
6 job?

7 A. No.

8 Q. When you went over there, did you think that you
9 had the skills to be -- did you call yourself
10 supervisor or superintendent first of all. Let me
11 ask you that. Or what title did you use, if you
12 used one?

13 A. Supervisor. I mean, I was mostly just supervising
14 everything that was being done.

15 Q. Were you supervising subcontractors?

16 A. Yes.

17 Q. Or did Marick have any other employees doing such
18 things as framing or other work of that type?

19 A. No.

20 Q. So it was all -- all the work was being done by
21 subcontractors?

22 A. Yes.

23 Q. Prior to the time you went to Stoneledge, had you
24 ever supervised subcontractors?

25 A. No.

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

3 A. Yes.

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

8 A. Yes.

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

11 A. No.

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

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

21 Q. I understand that. Did you ever see something that
22 caused you to say to a sub, "Wait a minute, I don't
23 like the way you're doing that"?

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

2 Q. Do you remember specific instances, or are you just
3 saying that from time to time ---

4 A. ~~From time to time I would see something that they~~
5 would cut a corner on, but I would talk to them and
6 they would fix it. But it was nothing major. It
7 was like nail guards on pipes, painting, you know,
8 caulking, stuff like that, on the inside -- the
9 interior unit.

10 Q. Did you do any work on Phase I?

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

14 Q. And what -- I'm sorry.

15 A. --- supervised a lot of repair work.

16 Q. By the way, if I start to ask you a question before
17 you finish -- I'll try not to do that, but
18 sometimes you can't help it.

19 A. Okay.

20 Q. Just let me know there's more in your answer.

21 A. Okay.

22 Q. Did this supervising of repair work in Phase I, was
23 that going on while ---

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

2010 APR 10 AM 10:52

CERTIFICATE OF SERVICE

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

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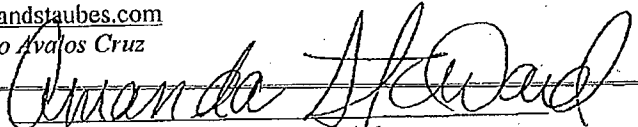
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Attorney for Alejandro Avalos Cruz

This 9 day of April, 2014
Spartanburg, SC

By:


Amanda D. Steward, Paralegal



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

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

Project: on all projects for this subcontractor

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

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



8. Payment schedule:

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

9. Completion schedule:

As required per job

10. Documentation required for payment:

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

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

11. Warranty:

One year

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

BY:

BY:

DATE:

10/27/07

DATE:

10/31/07

Rick Thoennes

NAME and TITLE

Deryl Ward
Senior Attorney

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

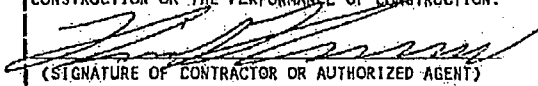
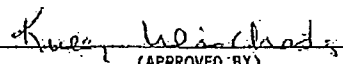
Builders First Source - Southeast Group, LLC

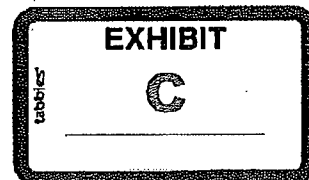
COMPANY NAME

SE Binder

WITNESSED BY

Subject To Written Changes

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



Parkside

OCONEE COUNTY
BUILDING PERMIT APPLICATION

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

OWNER & PROPERTY INFORMATION

Project Address: _____ Map #: 178-05-DL-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 U.S. records)

CONTRACTOR INFORMATION

Contractor Type: Residential General Specialty - list specialty _____ Owner/Builder
(Please circle appropriate type)
SC License #: C-14596 18936 Expiration Date: 6/30/06 Marick Home Bldr
Contractor Name: Rick Thoennes Company Name: Rick Thoennes Builder
Mailing Address: _____ Phone # w/area code: (864) 444-3831

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: 3523 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)

Information of plans in Oconee County Building Code Department does not imply that any final plan review will be done. The applicant is solely responsible for compliance with any applicable codes. Oconee County Building Code Department is responsible for enforcement of Oconee County Ordinance 98-10. Value of completed project has a minimum cost (per foot) based on a valuation shown provided by the International Code Council. If applicant wishes to have the valuation cost before the next trade will apply. The preparation of a project to all funding and occupation test if building rules are reduced in this stage and other covered loads in the site. Reasoning is the responsibility of the contractor and property owner.

Rick Thoennes
Contractor Signature

Rick Thoennes
New Print Name of Applicant

01.05.06
Date

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, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N 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.

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OCT 30 2014

Bostic Construction, Inc., Third Party Plaintiffs,

v.

SC Court of Appeals

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

Certificate of Counsel

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



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*Attorneys for Appellants Marick Home
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October 28, 2014

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OCT 30 2014

SC Court of Appeals

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

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

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Bostic Construction, Inc., Third Party Plaintiffs,

v.

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

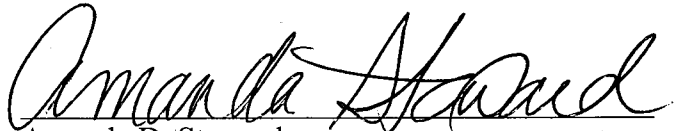
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OCT 30 2014

SC Court of Appeals

PROOF OF SERVICE

I, Amanda D. Steward, certify that I have served the Record on Appeal by depositing a copy of it in the United States Mail, First Class postage prepaid, on October 30, 2014, addressed to Respondents' attorneys of record, Ronald G. Tate, Jr., Esquire, PO Box 10589, Greenville, SC 29603 (attorney for Carl Catoe Construction, Inc.), Dana W. Lang, Esquire, PO Box 999, Charleston, SC, 29402 (attorney for Carl Catoe Construction, Inc.), K. Lindsay Terrell, Esquire, 1164 Woodruff Road, Greenville, SC, 29607 (attorneys for TG Construction, LLC), D. Andrew Williams, Esquire, PO Box 1473, Columbia, SC 29202 (attorneys for Martin Hernandez-Aviles), Steven P. Hughes, Esquire, PO Box 40, Beaufort, SC 29901 (attorneys for Ester Moran Mentado), Elizabeth Martineau, PO Box 31188, Charlotte, NC 28231 (attorneys for Herberto Acros Hernandez), Finley B. Clarke, Esquire, PO Box 1865, Florence, SC 29503 (attorneys for Francisco Javier Zarate d/b/a Zarate Construction, Paul E. Hammack, Esquire, 223 West Stone Avenue, Suite 100, Greenville, SC, 29609 (attorney for Alejandro Avalos Cruz), John L. Kubis, Jr., Esquire 22 South Park Square, Suite 800, Asheville, NC, 28801 (attorneys for Francisco Villalobos Lopez), Geoffrey Gibbon, Esquire, PO Box 2980, Greenville, SC, 29602 (attorneys for Socorro Castillo Montel), and Robert T. Lyles, Jr., Esquire PO Box 773, Charleston, SC, 29401 (attorneys for all Respondents).



Amanda D. Steward

Paralegal to Jason M. Imhoff

October 30, 2014

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