

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-296 (S.C. Ct. App. filed July 19, 2017)
Appellate Case No. 2017-002133

Rivergate Homeowners' Association, ... Petitioner,

v.

WW & LB Development Company, LLC, et al., ... Defendants,

Of Whom

Speedee Concrete, Inc., Chuck's Construction, Inc., and
AB Consulting Engineers, Inc. are the Respondents.

APPENDIX - Volume I

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PARTIES TO THE PROCEEDING

The complete caption for this appeal is below. The caption on the cover is abbreviated to fit on a single page.

Rivergate Homeowners' Association, ... Petitioner,

v.

WW & LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction, William C. DeSouza, individually, James Eason individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferinao, individually and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmerces d/b/a J.P. Construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc., Right Way Group, Inc., Stevens Construction Co., Inc., Geometrics, Inc., Eric Yazwinski, Law Engineering, Inc., D & M Builders, Inc., Hill Construction Company, Bonnie Stone a/k/a Bonny Stone, DJL Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey, ... Defendants,

Of Whom

Speedee Concrete, Inc., AB Consulting Engineers, Inc.,
and Chuck's Construction, Inc., are the Respondents.

Chuck's Construction Co., Inc. Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement
Maintenance of Myrtle Beach, Inc., ... Third-Party Defendants.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Clifton Newman, Circuit Court Judge

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v.

WW & LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction, William C. DeSouza, individually, James Eason individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferinao, individually and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmerces d/b/a J.P. Construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc., Right Way Group, Inc., Stevens Construction Co., Inc., Geometrics, Inc., Eric Yazwinski, Law Engineering, Inc., D & M Builders, Inc., Hill Construction Company, Bonnie Stone a/k/a Bonny Stone, DJL Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey, ... Defendants,

Of Whom

Speedee Concrete, Inc. and Chuck's Construction, Inc. are the. . . . Respondents.

Chuck's Construction Co., Inc.. Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach,
Inc.,. Third-Party Defendants.

Rivergate Homeowners' Association,. Petitioner,

v.

WW & LB Development Company, LLC, Speedy Concrete, AB Consulting
Engineers, Inc., and Chuck's Construction Co., Inc.,. Defendants,

Of Whom
AB Consulting Engineers, Inc. is the. Respondent.

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INDEX

Materials from the Record on Appeal

VOLUME I

Order of March 31, 2009.	1
Order of August 18, 2009.	4
Order to Restore Case April 28, 2010.	6
Order Granting SJ to Chuck’s March 13, 2014.	9
Order Granting SJ to Speedee May 12, 2014.	15
Order Granting SJ to AB May 19, 2014.	23
Order Denying Plaintiff’s Motion for Reconsideration of Order Granting SJ to AB December 10, 2014.	34
Order Denying Plaintiff’s Motion for Reconsideration of Order Granting SJ to Speedee December 10, 2014.	39
Order Denying Plaintiff’s Motion for Reconsideration of Order Granting SJ to Chuck’s December 10, 2014.	42
Order of Court of Appeals Granting Appellant’s Motion to Consolidate Appeals June 3, 2015.	45
Chuck’s Motion for Summary Judgment.	48
AB’s Motion for Summary Judgment.	52
Speedy’s Motion for Summary Judgment.	56
Plaintiff’s Memorandum of Law in Opposition to Speedy’s Motion for SJ.	60
Motion for Reconsideration on Order Granting Summary Judgment to AB.	75
Motion for Reconsideration on Order Granting Summary Judgment to Speedy.	84
Motion to Consolidate (Court of Appeals).	95

Sanger Complaint.....	97
Sanger Amended Complaint.	118
Rivergate Complaint.	142
Rivergate Amended Complaint.	167
Rivergate Second Amended Complaint.....	188
Chuck’s Answer to Second Amended Complaint.	210
Speedy’s Answer to Second Amended Complaint.	219
AB’s Answer to Second Amended Complaint.	229
Notice of Appeal dated March 2, 2015.	236
Transcript of Record on January 17, 2014.....	238
Transcript of Record on September 8, 2014.	363

VOLUME II

Excerpts from Deposition of Amie Drucker with Exhibits 3, 10, 11, and 12.	433
Excerpts from Deposition of James K. Dunn with Exhibits 2, 5, 6, 15, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 33, 34, 36, 37, 38, and 41.....	467
Excerpts from Deposition of Donna Dawson.	759
Excerpts from Deposition of Wayne Winderman.	777
Excerpts from Deposition of Luther Bellamy.	782
Excerpts from Deposition of Salvatrice Foran.....	787
Excerpts from Deposition of Christopher Sarratt with Exhibit 3.	807

VOLUME III

Excerpts from Deposition of Michael Gardner.	830
Deposition of J. Drew Wilkie Volume I with Exhibit 2.	838
Deposition of J. Drew Wilkie Volume II.	936
Affidavit of J. Drew Wilkie, P.E.	1062
Kimley-Horn and Associates, Inc. Report.	1065
Speedee's Invoice dated March 22, 2007.	1073
Agreement Between Owner and Engineer for Professional Services.	1074
Contract Agreement Between WW & LB and Chuck's Construction Company. . . .	1077
Letter from Winderman to Rivergate Homeowners dated September 12, 2007.	1085
Letter from Winderman to Atalaya dated September 16, 2007.	1088
Letter from Winderman to Santee Cooper dated September 16, 2007.	1089
Letter from Winderman to Little River Water and Sewer dated September 16, 2007..	1090
Letter from Winderman to Rivergate HOA Ad Hoc Committee dated July 6, 2005. . .	1091
Minutes of Rivergate Home Owners Meeting November 4, 2006.	1095
Horry County Land Records for WW & LB.	1099
Site Repair – Preliminary Budget.	1101
Rivergate Master Deed, Exhibits, and By-Laws.	1103

VOLUME IV

Materials from Supplemental Record on Appeal

Plat for the Master Deed and Amendments to Master Deed.	1161

Court of Appeals Materials

Decision of the Court of Appeals, Op. No. 2017-UP-296 (S.C. Ct. App. filed July 19, 2017).	1401
Petition for Rehearing.	1406
Order denying Rehearing.	1411
Brief of Appellant.	1414
Brief of Respondent Speedee Concrete, Inc..	1443
Brief of Respondent AB Consulting Engineers, Inc.....	1461
Brief of Respondent Chuck's Construction, Inc...	1496

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

vs.

WW & LB Development Company, LLC,
 Key Construction Company, Inc., Right Way
 Construction Company, Inc., RWG, Inc.,
 Russell Baltzer, Aiello Associates, Daniels
 Engineering, Inc., Rivergate Homeowners'
 Association, Rivergate Homeowners'
 Association Board of Directors, Wayne
 Winderman, Individually, Salvatrice Foran,
 Individually and Gerard Foran, Individually,
 Marcos Soares, Individually and d/b/a M.S.
 Construction, William C. DeSouza,
 individually, James Eason, Individually and
 d/b/a James Eason & Company, D&D
 Cleaning and Construction, Inc., Joel's
 Framing, Jo Freza, Arolo Garcia, Joaquin
 Geraldo Zeferino, Individually and d/b/a
 Zeferino Framing, Leo Trombley, Judy
 Schultz, J&D Interior Design, Jose Dasmerces
 d/b/a J.P. Construction, Scott Chandler, d/b/a
 Coastal Custom Windows & Doors, R&D
 Construction, Nicasio Ramirez Zuniga,
 Walchir Morais, and Marco Trebbi,

Defendants.

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT

CASE NOS.: 2008-CP-26-4690 and
 2007-CP-26-0228

HORRY COUNTY
 09 MAR 31 AM 10:15
 JILL HUGGINS
 CLERK OF COURT

ORDER

MyB 99720v1

aw
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Robert Sanger, representing a class of
similarly situated people,

Plaintiff,

vs.

WW & LB Development Company, LLC,
Keye Construction Co., Inc., Right Way
Construction Company, Inc., RWG, Inc.,
Russell Baltzer, Aiello Associates, Daniels
Engineering, Inc., Rivergate Homeowners'
Association, Rivergate Homeowners'
Association Board of Directors, Wayne
Winderman, individually, Salvatrice Foran
individually, Gerar Foran, individually,
Marcos Soares, individually, and d/b/a M. S.
Construcion, William C. DeSouza,
individually, James Eason, individually, and
d/b/a James Eason & Company, D & D
Cleaning and Construction, Inc., Joel's
Framing, Jo Fre3za, Arolo Garcia, Joaquin
Geraldo Zeferino, individually, and d/b/a
Zerefino Framing, Leo Trombley, Judy
Schultz, J & D Interior Design, Jose
Dasmerces d/b/a J/ P. Construction, Scott
Chandler d/b/a Coastal Custom Windows &
Doors, R & D Construction, Nicasio
Ramirez Zunigo, Walchir Morais, and
Marco Trebbi,

Defendants.

This matter came before me on February 24, 2009 upon motion of Defendant, Wayne Winderman, for More Definite Statement as to the claims for Civil Conspiracy and Breach of Fiduciary Duty raised against him in Plaintiffs' Amended Complaint; Rivergate Homeowners' Association Board of Directors and Rivergate Homeowners' Association Motion for More Definite Statement; and Plaintiff's Motion to Compel the deposition of Wayne Winderman and

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WW & LB Development Company, LLC.

THEREFORE, IT IS ORDERED, THAT:

1. To the extent these cases have not been formally joined, civil action number 2007-CP-26-0228 and styled as Robert Sanger, et al. v. WW & LB Development, LLC, et. al., and civil action number 2008-CP-26-4690 and styled as Rivergate Homeowners' Association v. WW & LB Development, LLC, et. al. be joined for discovery and trial under civil action number 2008-CP-26-4690.
2. Plaintiffs, in both cases, shall file and serve amended pleadings to assert a more definite statement as to any claims asserted against Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors and Wayne Winderman, individually, within fifteen (15) days from the entry of this Order. Only those parties affected by the amended pleadings are required to file responses thereto as per the agreement of the parties.
3. Wayne Winderman, individually, and in his capacity as a 30(b)(6) witness for WW & LB Development Company, LLC is hereby compelled by this Court to appear for a deposition in these matters within forty-five (45) days of the entry of this Order.

IT IS SO ORDERED.


THE HONORABLE CLIFTON NEWMAN
PRESIDING COURT JUDGE,
FIFTEENTH JUDICIAL CIRCUIT

March 20, 2009

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

CASE NUMBER: 2008-CP-26-4690

Robert Sanger, et al.,)

Plaintiffs,)

vs.)

WW&LB Development Co., LLC, et al.,)

Defendants.)

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Rivergate Homeowners Assn., Inc.,)

Plaintiff,)

vs.)

WW&LB Development Co., LLC, et al.,)

Defendants.)

09 AUG 18 PM 2:10
CLERK OF COURT

ORDER

THE PARTIES in the above-captioned cases appeared before this Court on July 20, 2009 pursuant to a request for a Status Conference. By and with the consent of all counsel during the Status Conference, it is hereby

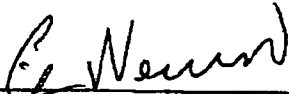
ORDERED, ADJUDGED AND DECREED that:

1. The Case Management and Scheduling Order currently governing the above-captioned cases is hereby vacated, and all deadlines contained therein are lifted; and
2. All Motions filed in these matters shall be withdrawn without prejudice except for the following, which shall be heard by the Court on August 11, 2009: (a) Motion to Dismiss by Wayne Winderman against Keye Construction; (b) Motion for Summary Judgment by Keye Construction against the Plaintiffs, WW&LB, Right Way, and RWG; and, (c) Motion to Add Parties by the Plaintiffs.

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3. After the Court rules upon the Motions to be heard on August 11, 2009, the above-captioned cases and all claims, counterclaims, cross-claims, and third-party claims asserted therein shall be stricken from the docket pursuant to Rule 40(j), SCRCP; and
4. Upon Motion by the Plaintiffs in accordance with the requirements of Rule 40(j), SCRCP, this Court will issue an Order to Restore the above-captioned cases and all claims, counterclaims, cross-claims, and third-party claims asserted therein under new case numbers; and
5. Written discovery and/or depositions may proceed while the above-captioned cases are stricken from the docket pursuant to Rule 40(j), SCRCP; and
6. After these cases are restored pursuant to the Plaintiffs' Motion, the parties shall submit to the Court for execution and filing a mutually agreeable Consent Scheduling Order with such deadlines as the parties and the Court deem appropriate.

IT IS SO ORDERED.



The Honorable Clifton Newman

Canwell, South Carolina
August 11, 2009

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiffs,

vs.

WW & LB Development Company, LLC,

RWG, Inc.,

Aiello Associates,

Daniels Engineering, Inc.,

Rivergate Homeowners' Association,

Rivergate Homeowners' Association Board of Directors,

Wayne Winderman, individually,

Salvatrice Foran, individually,

Gerard Foran, individually,

Marcos Soares, individually, and d/b/a M.S.

Construction,

William C. De Souza, individually,

James Eason, individually, and d/b/a James Eason &

Company,

D&D Cleaning and Construction, Inc.,

Joel's Framing,

Jo Freza,

Aroldo Garcia,

Joaquin Geraldo Zeferino, individually, and d/b/a

Zeferino Framing,

Leo Trombley,

Judy Schultz,

J&D Interior Design,

Jose Dasmerces d/b/a J.P. Construction,

Scott Chandler d/b/a Coastal Custom Windows & Doors,

R&D Construction,

Nicasio Ramirez Zunigo,

Walchir Morais,

Marco Trebbi,

Blakenship Roofing, Inc.,

DLJ Construction, L.L.C.,

Dewayne Bates,

The Bates Group, LLC,

Bridges Construction Co.,

Brewer Construction, Inc.,

Speedy Concrete,

REB-FEL, Inc.,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2010-CP-26-03901

(Case Nos. 2007-CP-26-0228 and 2008-CP-26-4690 were consolidated under 2008-CP-26-4690 by Order filed 3/31/09)

CONSENT ORDER TO RESTORE
CASE STRICKEN FROM DOCKET
IN ACCORDANCE WITH RULE
40(j)

FILED
HORRY COUNTY
2010 APR 28 PM 3:29
KELANIE HUGHES-WARD
CLERK OF COURT

Mark Mychajluk,	)
Eric Jazwinski,	)
Southern Framin Corporation,	)
AB Consulting Engineers, Inc.,	)
Geometrics Consulting, LLC,	)
WWI Development Company, LLC,	)
Michael Dawson Construction, Inc.,	)
Asphalt Paving & Maintenance Co., Inc., and	)
Chuck's Construction Co., Inc.,	)
	)
Defendants,	)
	)

BY ORDER of this Court filed herein on August 18, 2009, the above-captioned cases (which bear single case number 2008-CP-26-4690) and all claims, counterclaims, cross-claims, and third-party claims asserted therein were stricken from the docket pursuant to Rule 40(j), SCRCP; now, based upon the consent of all counsel appearing herein, it is hereby

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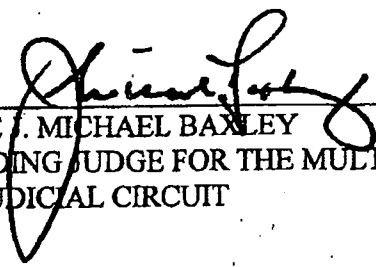
ORDERED, ADJUDGED AND DECREED that:

1. The above-captioned cases are hereby restored pursuant to Rule 40(j), SCRCP;
2. The Clerk of Court for Horry County, South Carolina shall assign these cases a new single case number and thereafter place them on the Multi-Week Roster; and
3. The Plaintiffs are hereby granted leave to file the Second Amended Complaint attached hereto after these matters receive a single new case number as ordered herein.

IT IS SO ORDERED.

[signature page to follow]

April 16, 2009
Conway South Carolina


JUDGE J. MICHAEL BAXLEY
PRESIDING JUDGE FOR THE MULTI-WEEK ROSTER
15TH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

RIVERGATE HOMEOWNERS'
ASSOCIATION,

Civil Action No. 2010-CP-26-03901

Plaintiff,

vs.

CHUCK'S CONSTRUCTION, INC.
(SEE FORM CAPTION IN PLEADINGS
FOR COMPLETE CAPTION),

ORDER GRANTING SUMMARY
JUDGMENT TO DEFENDANT
CHUCK'S CONSTRUCTION CO. INC.

Defendants.

HORRY COUNTY
14 MAR 13 AM 9:41
CLERK OF COURT
MELANIE COGINS-WARD

THIS MATTER came before me on January 17, 2014 pursuant to the Motion for Summary Judgment filed by Chuck's Construction, Inc. ("Chuck's") against Plaintiff, Rivergate Homeowners Association. Chuck's also joined in the contemporaneous motion for summary judgment filed by co-defendant AB Consulting Engineers and adopted the arguments presented by AB's counsel.

This case arises out of allegations by Rivergate Homeowners Association (collectively "Plaintiffs") that certain construction defects have caused them to suffer both actual and consequential damages. Specifically, Plaintiff alleges that Chuck's (along with various other parties) was negligent in the construction of the Rivergate development. In its Complaint against Chuck's, the Plaintiff asserts causes of action for Negligence, Breach of Express Warranties, Breach of Implied Warranties and Unfair Trade Practices.

Having carefully considered all of the arguments of counsel raised at the hearings on January 17, 2014, the various Memoranda of Law filed by the various parties, and all of the cases and other documents submitted in this matter, the Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW.

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FINDINGS OF FACT

A. Chuck's Scope of Work at Rivergate

Defendant WW&LB ("WW&LB") hired Chuck's to perform work at the Rivergate project as detailed in a contract dated February 24, 2000. Pursuant to the contract, Chuck's was to complete numerous tasks, including all demolition, road improvements, installation of storm water drainage and sanitary sewer, and driveway improvements. However, prior to completing its scope of work, Chuck's left the project in late 2000 due to a dispute with WW&LB. As a result, the work Chuck's actually performed was limited to the following: General site preparation (excavation and rough grading), road prep for the first 800 feet of Rivergate Lane and the first two streets, and installation of drainage components on streets G and H. Chuck's also subcontracted with Asphalt Pavement and Maintenance of Myrtle Beach to pave the roads Chuck's had prepped and with Steven's Construction to install the water and sewer system. There are no allegations of any construction defects with the water and sewer system. Plaintiff alleges deficiencies in Chuck's work arising from the rough grading, drainage and paving of the streets.

B. Plaintiff's Notice of Defective Conditions at Rivergate

The Rivergate project was developed in phases over a nearly five-year period (certificates of occupancy show dates from March 8, 2001 to December 5, 2005). Multiple Rivergate homeowners began noticing issues with the project as early as May of 2005. At that time, the issues included the following: standing water in the streets due to improper drainage, standing water in yards, cracking of driveways, and excessive erosion. Exhibit A at 19 – 20 (deposition of

CW
2 of 6

Jim Dunn describing first HOA meeting and complaints made by homeowners). As a result, the homeowners formed an HOA Ad Hoc Committee in May of 2005 to notify the HOA of these problems and to propose improvements. Id. at 187 - 89. Mr. Jim Dunn, Chairman of the Ad Hoc Committee, testified that the Ad Hoc Committee contemplated hiring an engineer in 2005 to investigate the drainage issues at Rivergate. Id. at 213. All of the Ad Hoc Committee's concerns about drainage were presented to the manager of the HOA, Wayne Windermann, in 2005. Id. at 228-229. In addition, the Ad Hoc Committee encouraged multiple homeowners to file complaints with the South Carolina Department of Labor, Licensing and Regulation in 2005 against the developer for issues involving drainage and roads. Exhibit B (Division of Legal Services Office of Investigation and Enforcement Complaint form of Ms. Susann Hutt and Mr. Eddie H. Medlin describing drainage and road issues). The HOA Ad Hoc Committee requested copies of these complaints. Exhibit A at 240 - 244 (deposition of Jim Dunn). Plaintiffs commenced this action on June 13, 2008. However, Plaintiffs did not assert any claim against Chuck's until April 28, 2010.

CONCLUSIONS OF LAW

A. Summary Judgment Standard

A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. An adverse party may not rest upon the mere allegations of his pleadings in opposing a motion for summary judgment. Instead, the party must set forth

specific facts, admissible in evidence, showing there is a genuine issue for trial. Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452-53 (Ct. App. 1988) (citing Rule 56(e), SCRCF).

"In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment." Bruce v. Durney, 341 S.C. 563, 566, 534 S.E.2d 720, 722 (Ct. App. 2000) (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). However, "[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651, 655 (Ct. App. 1994).

B. The Statute of Limitations

The statute of limitations applicable to this matter is three years. S.C. Code Ann. § 15-30530(5) (three year statute for negligence claims); S.C. Code Ann. § 15-3-530(1) (three year statute for express or implied warranty claims); S.C. Code Ann. § 39-5-150 (three year statute for Unfair Trade Practices Act claims). Thus, on their face, Plaintiff's claims against Chuck's appear to be untimely, as they were asserted nearly five years after alleged deficiencies in Chuck's work first appeared at Rivergate. However, Plaintiff relies on South Carolina's "discovery rule" to contend that the statute did not begin to run in 2005 because it did not know the scope of the deficiencies until it received a full report from its expert, Kimley-Horn, in June, 2010. The Court disagrees.

"Under the discovery rule, the three-year statute of limitations clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence

that a cause of action arises from the wrongful conduct.” Holly Woods Ass’n of Residence Owners v. Hiller, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (quoting Martin v. Companion Healthcare Corp. 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004)). Importantly, it is not necessary for a party to know the full extent of its alleged damages; it is sufficient for the party to be put on notice of such facts as would lead a person of common knowledge and experience to conclude that some claim may exist. Hedgepath v. AT&T, 348 S.C. 340, 355-356, 559 S.E.2d 327, 336 (S.C. Ct. App. 2001)(quoting Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996)).

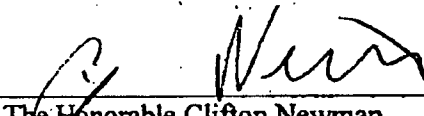
Here, Plaintiff knew of water and drainage problems at Rivergate nearly five years before suit was brought against Chuck’s. While Plaintiff may not have known the cause-in-fact of the problems, such as obstruction of drainage structures or improper elevation of outfall ditches and catch basins, the HOA was nonetheless on sufficient notice to conclude that its rights had been potentially infringed. A reasonable person of common experience would have little trouble concluding that conditions such as standing water, erosion, and cracking of pavement touch upon the scope of work undertaken by Chuck’s in 2000. Because Plaintiff was on notice of these facts in 2005, it was under a duty to act promptly in protecting its interests. “Statutes of limitations are not simply technicalities.” Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (quoting Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). Rather, they “embody important public policy considerations in that they stimulate activity, punish negligence and promote repose by giving security and stability to human affairs.” Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund, 389 S.C. 422, 428 699 S.E.2d 687, 690 (2010).

CONCLUSION

This Court concludes that there is no genuine issue of material fact regarding Plaintiff's notice of potential claims against Chuck's as early as May, 2005. Plaintiff failed to timely file this action until April 2010, rendering the claims time-barred by the applicable three-year statutes of limitation.

As a result, I HEREBY GRANT Defendant Chuck's Motion for Summary Judgment, and Chuck's is dismissed as a Defendant in this case, with prejudice.

IT IS SO ORDERED.



The Honorable Clifton Newman
Circuit Court Judge

March 10, 2014
Horry County, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners'
Association,

Plaintiff,

vs.

WW&LB Development Company, LLC,
RWG, Inc., Aiello Associates,
Daniels Engineering, Inc.,
Rivergate Homeowners'
Association, Rivergate
Homeowners' Association Board
of Directors, Wayne Winderman,
individually, Salvatrice Foran,
individually, Gerald Foran,
individually, Marcos Soares,
Construction, William C. DeSouza,
individually, James Eason,
individually and d/b/a James
Eason & Company, D&D Cleaning
and Construction, Inc., Joel's
Framing, Joe Freza, Aroldo
Garcia, Joaquin Geraldo Zeferino
individually and d/b/a Zeferino
Framing, Leo Trombley, Judy
Schultz, J&D Interior Design,
Jose Dasmerces d/b/a J.P.
Construction, Scott Chandler
d/b/a Coastal Custom Windows
& Doors, R&D Construction,
Nicasio Ramirez Zunigo, Walchir
Morais, Marco Trebbi,
Blankenship Roofing, Inc., DLJ
Construction, L.L.C., Dewayne
Bates, The Bates Group, LLC,
Bridges Construction Co.,
Brewer Construction, Inc.,
Speedy Concrete, REB-FEL, Inc.,
Mark Mychajluk, Eric Jazwinski,
Southern Framing Corporation,
AB Consulting Engineers, Inc.,
WWI Development Company, LLC,
Michael Dawson Construction,
Inc., Asphalt Paving &
Maintenance Co., Inc., and
Chuck's Construction Co., Inc.,
Right Way Group, Inc., Stevens

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-CP-26-03901

ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF SPEEDY CONCRETE
(SPEEDEE CONCRETE, INC.)

FILED
HORRY COUNTY
2011 MAY 12 PM 2:22
MELANIE HUGGINS-WARD
CLERK OF COURT

Construction Co., Inc.,)
Geometrics, Inc., Eric Yazwinski)
Law Engineering, Inc., D & M)
Builders, Inc., Hill)
Construction Company, Bonnie)
Stone a/k/a Bonny Stone, DJL)
Construction Co., LLP, Adrian)
Mondragon, individually and dba)
Mondragon Construction, Inc.,)
and Glen Causey,)

Defendants.)

Chuck's Construction Co., Inc.)

Third-Party Plaintiff)

v.)

Vereen Concrete Co., Inc. and)
Asphalt Pavement Maintenance of)
Myrtle Beach, Inc.)

Third-Party Defendants)

Date of hearing:
Hearing Judge:
Attorney for the Plaintiff:
Attorney for Speedee Concrete:

January 17, 2014
The Honorable Clifton Newman
Stacy Stanley
G. Michael Smith

THIS MATTER CAME BEFORE ME pursuant to the Defendant Speedee Concrete's Motion for Summary Judgment in the above-captioned matter. Based upon argument of counsel, evidence presented by counsel and a review of the applicable law in this case, I find and conclude that Speedee Concrete, Inc. is entitled to summary judgment in this case.

FINDINGS OF FACT

Speedee Concrete was one of the concrete subcontractors on this project. They were responsible for building pads, sidewalks

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and driveways. Work was performed at the project by Speedee from 2004 to 2007.

Based upon the argument of Plaintiff's counsel, the most significant issue pertaining to Speedee Concrete is the degree of slope of the driveways. Speedee's argument is uncontroverted that the slope of the driveways has been consistent since construction and that owners knew or should have known of the slope issue when they purchased their property. The scope of the slope issue is confirmed by testimony of Owner Representative Jim Dunn.

Counsel for Speedee contends that the grade level concrete driveways are limited common elements under the Master Deed. Limited common elements in the Master Deed are defined as follows:

Limited common elements as to the term is used herein shall mean and comprise the following: (A) attic space, if any, and grade level concrete driveways, patios, or stoops..

Section IV of the Master Deed, Page 4.

The Master Deed also provides that it is the responsibility of the owner to take care of the maintenance and repair of the limited common elements. The owner is also responsible for any damages caused by the limited common areas. Section XXII of the Master Deed declares as follows:

Every owner must perform promptly all maintenance and repair work within his unit and of all limited common elements to which such unit has exclusive use which, if omitted, would affect the condominium in its entirety or any part belonging to other owners, and shall be

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expressly responsible for the damages and liability which his failure to do so may engender (emphasis added).

Speedee Concrete advised the developer/general contractor of the project, WW&LB Development, Inc., through its representative Wayne Winderman, that the driveways were too steep. This conversation took place in the presence of owner representative Jim Dunn. The following excerpt is pertinent from Mr. Jim Dunn's deposition:

- Q. But there is no question but that Speedee's representative told Mr. Winderman in your presence that the driveways were too steep and that he had told Wayne Winderman that before construction?
- A. Yes. That kind of gets Speedee off the hook, but the truth is still the truth.
- Q. Yes sir. Do you recall when that conversation was?
- A. Probably 2004, 2005.

Because each individual unit owner is charged under the Master Deed with the responsibility for their own driveways, any litigation pertaining to damages caused by those driveways should have been commenced by or brought against the unit owners. To date, no individual owner has filed litigation against Speedee Concrete nor has the Homeowner's Association brought suit for damages caused by the slope of the graded driveways (as limited common areas) against any homeowner other than the developer. Speedee Concrete was not named in the Homeowners Association's lawsuit until the filing of the Second Amended Summons and Complaint on April 28, 2010. The filing of the Homeowner's Complaint was more than three years after the last work on the project by Speedee. However, as

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reflected in the Master Deed, the Homeowner's Association does not have the duty to repair or maintain the driveways.

In addition to the slope of the driveways, the Plaintiff has referenced the existence of some cracks in the concrete work performed by Speedee Concrete. However, there were no presentations of any expert testimony nor other evidence which indicates Speedee Concrete failed to conform to industry standards in the application of its concrete at the Rivergate project (other than the slope of the graded drives). When asked about concrete cracking, the Plaintiff's expert testified as follows:

- Q. Have you ever seen concrete that didn't crack over its lifetime?
- A. There's no such thing. There are cracks in concrete that you can see and there are cracks—there are cracks in concrete that you cannot see, but there's no such thing as concrete with no cracks.

(Wilkie Deposition, Page 252). (See Exhibit D).

Some of the potential cracking issues are in the concrete pads of the buildings. However, there is no evidence of concrete pad cracking that falls outside industry standards or tolerances. Mr. Wilkie had not even attempted to investigate the issue as of the date of his deposition in August, 2013. (Wilkie Deposition, Pages 250-252). (See Exhibit D). Conversely, Speedee's expert, Mike Parker, and Chuck's Construction's expert, James Michael Wooten, both testified there were no deficiencies in Speedee's concrete work. (Parker Deposition, Pages 48, 54-55 and 113-114).

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(See Exhibit F). (Wooten Deposition, Pages 144-146). (See Exhibit G).

Finally, based on the evidence presented by the Plaintiff at the hearing, the Plaintiff's experts assert 3,200 square yards of concrete will be needed for the repairs to the common areas. (See Exhibit D). When asked how much of the 3,200 square yards of concrete was to alleviate the slope issues, Mr. J. Drew Wilkie, Plaintiff's expert, indicated that none of that 3,200 square yards of concrete was allocated to alleviating the slope issue. (Wilkie Deposition, Page 291). (See Exhibit E). Mr. Wilkie further testified that the 3,200 square yards of concrete was to be used to repair consequential damages for work that would take place on the streets. (Wilkie Deposition, Pages 254, 255). (See Exhibit E). Accordingly, none of the Plaintiff's repair estimate has any funds designated for repair of any alleged deficient work of Speedee Concrete.

CONCLUSIONS OF LAW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009); Rule 56 (c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Id. It is undisputed

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that the individual unit owners had three years after discovery of the excessive slopes of the driveways within which to bring suit. SC Code Ann. §15-3-530 (1976, as amended).

The Master Deed confirms Rivergate Homeowner's Association does not have standing to bring a lawsuit on behalf of the individual unit owners for the limited common elements. A horizontal property regime has standing to bring an action for construction defects in common elements that it has the duty to maintain. See Queen's Grant Villas Horizontal Property Regime I-V v. Daniel International Corporation, et. al., 286 S.C. 555, 335 S.E.2d 365 (1985). Since it is the unit owners' responsibility to maintain the graded concrete driveways, they cannot avail themselves of the protections of equitable tolling and equitable estoppel because there was no evidence that the owners were precluded in some extraordinary way from exercising their own rights in regard to the graded drives as limited common areas. See Hooper v. Ebenezer Senior Services and Rehabilitation Center, 377 S.C. 217, 659 S.E.2d 213 (SC App. 2008).

In light of the foregoing, this Court concludes that no claim by the Plaintiff can stand against Speedee Concrete. The Plaintiff has not shown that Speedee performed any substandard work in any part of the common areas of the project maintained by the Homeowner's Association. Further, the Plaintiff has not shown any damages from any of the work performed by Speedee Concrete in any

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of the common areas that are not directly attributable to the slope issue (for which the Homeowner's Association has no standing to bring and for which the unit owners are responsible). Except for the slope issue, cracking of the concrete is the only other alleged deficiency that was referenced by the Plaintiff. However, as the Plaintiff's expert testified, and as our Supreme Court acknowledged in Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996), it is normal for concrete to crack. In all of the causes of action alleged against Speedee Concrete, damages is a fundamental element the Plaintiff must prove to prevail on those causes of action. Without proof of damages against Speedee Concrete, no cause of action against Speedee can survive.

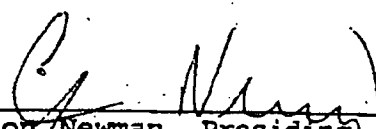
Based upon the findings of fact and conclusions of law in this case, it is

ORDERED that Speedee Concrete is entitled to summary judgment; and it is

FURTHER ORDERED that the Complaint against Speedee Concrete by Rivergate Homeowner's Association shall be dismissed with prejudice and forever ended; and it is

SO ORDERED.

Columbia
Conway, South Carolina
March 7, 2014
MAY 7


Clifton Newman, Presiding Judge of
the Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

v.

WW & LB Development Company, LLC,
Speedy Concrete, AB Consulting Engineers,
Inc., Chuck's Construction Co., Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

ORDER GRANTING AB
CONSULTING ENGINEERS, INC.'S
MOTION FOR SUMMARY
JUDGMENT AS TO PLAINTIFF

C.A. No. 2010-CP-26-03901

This matter came before the Court on Defendant AB Consulting Engineers, Inc.'s Motion for Summary Judgment. A hearing was held on January 17, 2014. Representing the parties at the hearing were Stacy L. Stanley, attorney for Plaintiff, G. Michael Smith, attorney for Defendant Speedee Concrete, Inc., Douglas C. Baxter, attorney for Defendant WW&LB Development Company, LLC, and Stephanie H. Burton attorney for Defendant AB Consulting Engineers, Inc.

FINDINGS OF FACT

This case involves claims by Plaintiff, a homeowner's association, against WW&LB (the developer), AB Consulting (a civil engineering firm), Chuck's Construction (a grading contractor), and Speedee Concrete (a concrete trade contractor). Plaintiff's claims relate to a housing development known as Rivergate located in Little River, South Carolina. Plaintiff's claims relate to complaints that certain design and construction work at Rivergate is defective. Specifically, Plaintiff contends that certain asphalt roads were not properly constructed and are deteriorating, that concrete driveways were constructed with too steep of a slope, and that the stormwater management system is insufficient causing ponding water and drainage issues.

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Wayne Winderman and Luther Bellamy formed WW&LB to develop the Rivergate project which is located off of Highway 17 in Little River, South Carolina. (Bellamy Dep. p. 28-29). It appears that on May 14, 1999, AB Consulting and Wayne Winderman entered into an Agreement between Owner and Engineer for Professional Services pursuant to which AB Consulting agreed to perform certain civil design services, including preparing grading and storm water management plans, for the Rivergate project and submitting such plans to governmental authorities to obtain appropriate permits. (Drucker Dep. Ex. 3). Pursuant to that Agreement, AB Consulting prepared engineering plans and specifications for the project in 1999 and 2000. Site work commenced at the Rivergate project in 2000.

On July 10, 2000, Braxton Lewis of AB Consulting wrote to WW&LB concerning deviations from AB Consulting's plans during construction, including, deviations from the stormwater system design and that modifications to the grading had created "severe driveway slopes on the south east side of the proposed buildings." (Drucker Dep. Ex. 11). AB Consulting and WW&LB entered into a Hold Harmless Agreement pursuant to which WW&LB agreed to defend and indemnify AB Consulting from and against any and all expenses and liabilities related to "installation of the stormwater management system and revisions to the proposed grades at the River Gate project." (Drucker Dep. Ex. 10).

AB Consulting completed its services when WW&LB received operational approval for the water and sewer in the beginning of 2001. (Drucker Dep. p. 140-141). According to records of the South Carolina Secretary of State, Plaintiff Rivergate Homeowners' Association (HOA) was incorporated on February 20, 2001. The Horry County Public records provided to the Court reveal that on March 16, 2001, a Master Deed for the Rivergate Horizontal Property Regime was filed with Horry County Register of Mesne Conveyances. That Master Deed created a

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Horizontal Property Regime called Rivergate. That deed also conveyed certain limited real property to the horizontal property regime. The property comprised 0.13 acre and 0.06 acre parcels designated as "Signage," 0.58 acres designated "Ingress & Egress," 0.30 acres for "Building '2'," and 0.29 acres for "Building '6'," for a total of approximately 1.37 acres. (Master Deed). The Master Deed allowed for the future addition of real property to Rivergate:

Article III

The GRANTOR hereby reserves unto itself, its successors and assigns, the right and option, to be exercised at its sole discretion, to submit the Phases II through XL property, or any one or more of such Phases, or to submit additional COMMON ELEMENTS consisting of, but not limited to roadways, clubhouses, pools, open areas, sidewalks, and parking areas, and to the provisions of this Master Deed, thereby causing such Phase(s) or COMMON ELEMENTS, to become and be a part of Rivergate Horizontal Property Regime . . .

The Master Deed states that each condominium owner owns an undivided interest in Common Elements of Rivergate and requires Plaintiff to maintain the Common Elements. In that regard, the Master Deed states in relevant part:

Article V

Each UNIT shall be conveyed and treated as an individual property capable of independent use and fee simple ownership and the Owner or Owners of each UNIT shall own, as an appurtenance to the ownership of each said UNIT, an undivided interest in the COMMON ELEMENTS, the undivided interest appurtenant to each said UNIT being that which is hereinafter specifically assigned thereto.

Article XXII

The ASSOCIATION, at its expense, shall be responsible for the maintenance, repair and replacement of all of the COMMON ELEMENTS, including those portions thereof which contribute to the support of the building . . .

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The Board of Directors of ASSOCIATION shall cause the COMMON ELEMENTS to be inspected and evaluated annually by a professional engineer, architect, qualified property inspector, or other qualified professional, who shall then render a maintenance recommendation report to the Board of Directors of the ASSOCIATION and to the Grantor as to the condition of the COMMON ELEMENTs as well as any recommendation for repairs and maintenance of the COMMON ELEMENTS.

On the other hand, certain property is not a Common Element and must be maintained by each individual home owner. To that end, the Master Deed provides:

Article IV

Limited Common Elements as the term is used herein shall mean and comprise the following: (a) attic space, if any, **grade level concrete driveways**, patios or stoops and porches accessible by normal means from the UNIT, immediately adjacent to or above the UNIT; . . . **LIMITED COMMON ELEMENTS** are intended for the exclusive use and benefit of the UNIT which it is associated with.

Article XXII

Every Owner must perform promptly all maintenance and repair work within his UNIT and of all LIMITED COMMON ELEMENTS to which such UNIT has exclusive use, which, if omitted, would affect the CONDOMINIUM in its entirety or any party belonging to other Owners, and shall be expressly responsible for the damages and liability which his failure to so do may engender . . .

Between June 5, 2001 and January 20, 2012, the Master Deed of Rivergate Horizontal Property Regime was amended thirty-four times and such amendments were filed with the Register of Deeds Office and are part of the public record. These amendments transferred additional parcels of land from WW&LB to the Rivergate Horizontal Property Regime. Notably, other than a portion of Rivergate Lane described as .58 acres for ingress and egress, the remaining roads were never conveyed by WW&LB to Rivergate.

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The stormwater drainage system designed by AB Consulting is an exfiltration system a substantial portion of which is located beneath the roads in Rivergate. (Wilkie Dep. p. 70). It appears that concerns about drainage were expressed by homeowners early in the development of Rivergate. For instance at the annual homeowners meeting on March 8, 2004, the meeting minutes note: "Mr. Winderman noted water drains down hill and he cannot do anything in the wetlands area, however he would address the drainage problems at Rivergate." (Dunn Dep. Ex. 15). For instance, on May 12, 2005, the Rivergate Homeowners' Association held an annual meeting. The minutes reveal that drainage issues were discussed in that meeting. (Dunn Dep. Ex. 21). On May 12, 2005, an Ad Hoc Committee of the Rivergate Homeowners' Association was formed to address various issues, including problems with drainage. Jim Dunn served as chairman of the committee. Much of the deposition testimony of Jim Dunn has been submitted to the Court in connection with this motion. Dunn contacted numerous governmental agencies on behalf of the ad hoc committee complaining about a wide variety of items, including drainage.

On May 20, 2005, Donald Miller, a Rivergate homeowner, sent a memorandum to the Ad Hoc Committee stating that "If some owners believe that areas of the Rivergate property has [sic] drainage issues and the committee believes that these issues may be credible, I believe we need to hire an Engineer familiar with such issues to evaluate our property and give the committee a hard report for possible discussion of these issues with Wayne [Winderman]." (Dunn Dep. Ex. 25).

On July 6, 2005, Winderman wrote to the Ad Hoc Committee on Rivergate Homeowners' Association letterhead and advised that "We have made inspections of drainage issues and will address the same as quickly as possible." (Dunn Dep.). On September 19, 2005,

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Dunn, as chair of the Ad Hoc Committee, filed a complaint with the South Carolina Department of Labor, Licensing and Regulation (SCLLR) that identified drainage as a complaint filed on behalf of the homeowners; "Nine pages of photography washed out parking pads, standing water, storm water, erosion." (Dunn Dep. Ex. 2).

In January 2006, Dunn contacted the Horry County Planning Department about issues with Rivergate, including "drainage issues." (Dunn Dep. Ex. 47). On page 86, Dunn testified that he attended a zoning ordinance meeting in January 2006:

Q: Was the zoning meeting that is referenced in your email something you had already been to or something you were getting ready to go to?

A: This is about the drainage issue and the culvert where the illegal street connects to Baker.

On November 4, 2006, a meeting of the Rivergate Homeowners took place. Various complaints were discussed, including drainage issues. (Dunn Dep. Ex. 31). Importantly, on January 12, 2007, Robert Sanger (Sanger), a Rivergate homeowner, filed a complaint in the Horry County Court of Common Pleas, C.A. No. C.A. No. 07-CP-26-0228). Sanger asserted various claims relating to defective design and construction at Rivergate. Specifically, in paragraph 47 of his complaint, he alleged defects relating to:

- k. Improper construction of sidewalks, driveways and asphalt roadway;
- l. Improper driveway slopes; and
- m. Defective storm water management drainage system.

AB Consulting was not a defendant in that action.

On April 20, 2008, Sanger filed an Amended Complaint in the Horry Court of Common Pleas. The factual allegations and legal claims in Sanger's Amended Complaint are very similar to those contained in his initial complaint. Sanger joined as defendants several additional parties,

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6 of 11

alleging that they were contractors, subcontractors, installers, or design professionals who performed defective work on the Rivergate project. Sanger's Amended Complaint did not join AB Consulting as a defendant.

On June 13, 2008, Plaintiff filed its initial Complaint in this Court, which is substantially similar to Sanger's Amended Complaint. Plaintiff did not join AB Consulting as a Defendant. On March 21, 2009, Plaintiff filed its First Amended Complaint, which likewise did not join AB Consulting as a defendant. On March 31, 2009, Plaintiff's case (C.A. No. 08-CP-26-4690) was consolidated with Sanger's case (C.A. No. 07-CP-26-0228). On August 18, 2009, the consolidated case was stricken by agreement of the parties pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. By Order dated April 16, 2010, the case was restored to the docket and Plaintiff was permitted to file a Second Amended Complaint. On April 28, 2010, Plaintiff filed its Second Amended Summons and Complaint, which joined AB Consulting as a defendant for the first time in this litigation.

CONCLUSIONS OF LAW

Pursuant to sections 15-3-510 and 15-3-530(1) of the South Carolina Code, Plaintiff's causes of action for negligence, breach of warranty and breach of contract must be commenced within three years after Plaintiff knew, or should have known by the exercise of reasonable diligence, that some claim might exist. See Dillon County Sch. Dist. Two v. Lewis Sheet Metal, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App. 1985). Section 39-5-150 provides that an action under the South Carolina Unfair Trade Practices Act must likewise be brought within three years.

Under the discovery rule, the statute of limitations "begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the

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exercise of reasonable diligence.” Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, ___, 597 S.E.2d 27, 29 (Ct. App. 2004). As the South Carolina Supreme Court recognized in Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 302, 278 S.E.2d 333, 334 (1981), it is not necessary that Plaintiff know the exact legal claim it might assert or the identity of all of the possible parties; instead “[t]he exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.” The test is objective and not subjective and the statute of limitations accrues regardless of whether the injured party comprehends the full extent of injury. See Republic Contracting Corp. v. S.C. Dep’t of Hwys & Public Transp., 332 S.C. 197, 503 S.e.2d 761 (Ct. App. 1998). Thus, if Plaintiff knew, or should have known through the exercise of reasonable diligence, that a claim against AB Consulting existed on or before April 28, 2007, Plaintiff’s claims against AB Consulting are barred by the applicable statute of limitations. The Court concludes that Plaintiff’s claims are so barred because, as discussed in detail above, the uncontroverted evidence establishes that Winderman, the HOA, and the homeowners were well aware of drainage issues long before April 28, 2007.

At the hearing, Plaintiff contended that Section 15-3-670 applies, and that if any defendant was guilty of fraud, gross negligence or recklessness, the statute of limitations does not apply. Section 15-3-660 states specifically that its provisions apply only to the limitations imposed under Sections 15-3-640 to 15-3-660 (the statute of repose). Section 15-3-670 does not apply to the statute of limitations set forth in 15-3-510 and 15-3-530 and it is not applicable here.

Plaintiff argues that even if its claims accrued prior to April 28, 2007, the statute of limitations should be equitably tolled until November 2007, when Winderman resigned as

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chairman of Plaintiff HOA. Equitable tolling was adopted by the South Carolina Supreme Court in Hooper v. Ebenezer Senior Serv. & Rehab. Center, 386 S.C. 108, 687 S.E.2d 29 (2009). That case involved a wrongful death and survival action against nursing home. Although the complaint was timely filed, it was not served upon Ebenezer in a timely manner because the plaintiff could not locate Ebenezer's registered agent identified on the Secretary of State's website. In that case, the Court held that the person asserting equitable tolling has the burden of establishing sufficient facts to support equitable tolling. The court also noted that "equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control". The Supreme Court cautioned that "[e]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." The court indicated that equitable tolling is available where:

- a. Extraordinary circumstances prevented the plaintiff from filing despite due diligence;
- b. The plaintiff actively pursued his remedies by filing a defective pleading during the statutory period or where the plaintiff was induced or tricked by the defendant into allowing the deadline to pass; and
- c. The plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim.

Id. at 231-232, 659 S.E.2d at 220-221.

Subsequent cases involving equitable tolling have generally found that the doctrine did not apply. See e.g. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008) ("Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to

human affairs. . . . Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations.”); American Legion Post 15 v. Horry County, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009)(“In this case, we find no extraordinary circumstances or active misleading by the County to warrant tolling the statutory period of limitations. Nothing prevented the posts from learning of the governing statutes, as we find is required for due diligence.”); Kimmer v. Wright, 396 S.C. 53, 62-63, 719 S.E.2d 265, 270 (Ct. App. 2011)(“Although we are sympathetic to Kimmer’s situation, we are mindful the supreme court cautioned the doctrine of equitable tolling to be used sparingly. We find application of the doctrine is not justified under the circumstance of this case.”).

Plaintiff relies upon Magnolia North Prop. Owners’ Ass’n, Inc. v. Heritage Cmities., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) in support of its argument. Magnolia North involved claims asserted by a property owners’ association against the developer of a condominium complex for construction defects. The developer contended that the claims against it accrued when the POA was formed in 2000. The Court of Appeals affirmed the trial court’s ruling holding that because the POA’s board consisted of the defendant developer’s officers until September 9, 2002, equitable tolling should apply. In that regard, the court stated: “We find unpersuasive Appellants’ claims that an organization they controlled would have initiated an action against itself during this period. Further after the property owners gained control over the POA, they exercised due diligence by filing this action on May 28, 2003, approximately eight months after assuming control.” Id. at 125, 397 S.C. at 372. Magnolia North does not apply with respect to Plaintiff’s claims against AB Consulting. AB Consulting did not ever control the HOA; in fact, AB Consulting’s work was largely complete before Plaintiff came into existence. No evidence was presented to this Court that while involved in the HOA, Wayne Winderman

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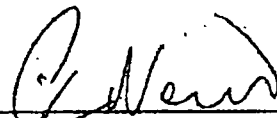
would not have asserted claims against parties involved in the design and construction of Rivergate. Unlike the plaintiff in Magnolia North, this Plaintiff did not timely initiate an action against AB Consulting. There is likewise no evidence that AB Consulting engaged in any conduct which misled Plaintiff from asserting its rights. Accordingly, no extraordinary circumstances exist warranting imposition of a doctrine which this Court has been directed by the South Carolina Supreme Court should be used sparingly.

CONCLUSION

Based upon the findings of fact and conclusions of law in this case, it is

ORDERED that AB Consulting is entitled to summary judgment against Plaintiff.

AND IT IS SO ORDERED.



Clinton Newman
Presiding Judge

April 4, 2014
Coleman 22, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

v.

WW & LB Development Company, LLC,
Speedy Concrete, AB Consulting Engineers,
Inc., Chuck's Construction Co., Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION
OF ORDER GRANTING AB
CONSULTING ENGINEERS, INC.'S
MOTION FOR SUMMARY
JUDGMENT**

C.A. No. 2010-CP-26-03901

14 DEC 10 PM 12:56
CLERK OF COURT

This matter came before the Court on Plaintiff's Motion for Reconsideration of the Court's April 4, 2014 Order granting Defendant AB Consulting Engineers, Inc.'s Motion for Summary Judgment. A hearing was held on September 8, 2014. Representing the parties at the hearing were Stacy L. Stanley, attorney for Plaintiff, G. Michael Smith, attorney for Defendant Speedee Concrete, Inc., Chris Clark, attorney for Defendant Chuck's Construction Co., Inc., and Stephanie H. Burton attorney for Defendant AB Consulting Engineers, Inc.

PROCEDURAL HISTORY

On April 4, 2014, this Court granted Defendant AB Consulting Engineers, Inc.'s Motion for Summary Judgment. This Court found that the evidence demonstrated that Plaintiff knew or should have known that a claim against AB Consulting existed before April 28, 2007. Thus, the Court concluded that Plaintiff's Complaint which was filed on April 28, 2010, was barred by the three year statute of limitations governing Plaintiff's claims. This Court also disagreed with Plaintiff's contention that the statute of limitations should be equitably tolled until November, 2007. On May 28, 2014, Plaintiff filed its motion for reconsideration.

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LEGAL ANALYSIS

In its motion for reconsideration, Plaintiff argues that the statute of limitations did not begin to run until June 18, 2010. Plaintiff admittedly bases its argument upon an affidavit submitted by Plaintiff's expert, J. Drew Wilkie, on January 9, 2014. In his affidavit, Mr. Wilkie suggests that although Plaintiff may have been aware of the "symptoms" of the drainage problems asserted in this lawsuit against AB Consulting, Plaintiff could not have known who was responsible for the problems until Mr. Wilkie issued his report on June 18, 2010.

The Court disagrees. First, Plaintiff filed its Complaint naming AB Consulting as a Defendant on April 28, 2010, two months before Mr. Wilkie issued his report. Clearly, Plaintiff not only could have known, but it actually knew who could have been responsible for drainage problems before June 18, 2010.

Second, and more importantly, Mr. Wilkie's affidavit fails to create an issue of material fact regarding the accrual of the statute of limitations. This Court's order granting summary judgment sets forth many facts which demonstrate Plaintiff's extensive knowledge regarding the drainage problems that Plaintiff attributes to AB Consulting's deficient design. After considering all of the facts, this Court held that the uncontroverted facts demonstrate that Plaintiff knew or should have known that a claim against AB Consulting existed prior to April 28, 2007. Mr. Wilkie's affidavit does not add any facts to the Court's analysis; Mr. Wilkie simply attempts to offer his legal conclusion from the same set of uncontroverted facts:

6. While the HOA may have been aware of undesirable symptoms at the HOA such as standing water, erosion, etc., it is my opinion that the HOA would not have been aware that these symptoms were associated with or caused by civil construction and design defects until the report that I issued on June 17, 2010.

7. After reviewing the allegations in this matter, it is my opinion that the HOA brought suit against the Defendants as soon as practicable in this case.

By submitting an affidavit which merely reaches contradictory legal conclusions than those of this Court, Plaintiff has failed to create an issue of material fact relating to the accrual of the statute of limitations. See Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (S.C., 1990) ("Once moving party carries its initial burden, opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a genuine issue for trial.'"" (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986))); See also Rule 56(e), SCRPC ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

In its motion for reconsideration, Plaintiff once again submits that the statute of limitations should be equitably tolled. Plaintiff argues that the statute of limitations should be tolled as long as the developer, WW & LB, maintained control of the HOA. Plaintiff reasons that the developer would not sue AB Consulting because the developer hired AB Consulting and thus AB Consulting is an agent of the developer. Plaintiff relies upon Magnolia North Prop Owners' Ass'n, Inc. v. Heritage Cmities., Inc., 397 S.C. 348, 725 S.E.2d112 (Ct. App. 2012) to support its argument.

The Court disagrees. As discussed in this Court's Order Granting AB Consulting's Motion for Summary Judgment, Magnolia North supports the proposition that the statute of limitations should be tolled as long as the potential claims would require a developer to sue itself. Id. Plaintiff argues that AB Consulting was an agent of WW & LB and thus WW & LB

would not assert claims against AB Consulting. Plaintiff fails to provide any facts or legal analysis demonstrating that AB Consulting was an agent of WW & LB or was under the control of WW & LB in performing its design services. To the contrary, the evidence in the record shows that WW & LB retained AB Consulting to perform professional engineering services by written contract. Plaintiff has not presented any evidence that WW & LB would not have asserted claims against parties involved in the design and construction of the Rivergate project. Furthermore, unlike the Plaintiff in Magnolia North, the HOA failed to assert their claims in a timely manner even after receiving full control of the association. Accordingly, no extraordinary circumstances exist warranting imposition of a doctrine which this Court has been directed by the South Carolina Supreme Court to use sparingly.

In its motion for reconsideration Plaintiff provides two additional arguments for avoiding application of the statute of limitations. First, Plaintiff argues that Defendant AB Consulting should be estopped from asserting the statute of limitations because AB Consulting's own conduct induced the Plaintiff's delay. Second, Plaintiff argues that equity and public policy provide that Plaintiff's claims should not be barred by the statute of limitations.

The Court disagrees with both of Plaintiff's arguments. First, Plaintiff fails to provide any facts which demonstrate that any action by Defendant AB Consulting induced Plaintiff's delay. There is no evidence in the record before this Court that AB Consulting had any contact with Plaintiff or engaged in any action which led Plaintiff astray in any way. As discussed above, Plaintiff fails to demonstrate that in performing civil engineering services AB Consulting was an agent of WW & LB. Defendant AB Consulting should not be estopped from asserting the statute of limitations because AB Consulting did not induce Plaintiff's delay.

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Second, Plaintiff fails to provide any authority for why this Court should not apply the statute of limitations based upon public policy. To the contrary, adjudication of claims in a timely manner and avoiding stale claims is the public policy reason behind application of statutes of limitation. Therefore, for the same reasons as discussed above, the Court finds the Plaintiff's argument unpersuasive.

Lastly, Plaintiff argues in its motion that it has standing to bring a lawsuit related to limited common elements. In its April 4, 2014 Order granting Defendant AB Consulting's Motion for Summary Judgment this Court did not rule regarding the standing issue. Because the Court still finds the statute of limitations to be dispositive in this case, the Court sees no need to reach the issue of standing as it relates to AB Consulting.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Reconsideration is DENIED.

AND IT IS SO ORDERED.



Clifton B. Newman,
Circuit Court Judge

December 5, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Rivergate Homeowners')
Association,)
Plaintiff,)

vs.)

WW&LB Development Company, LLC,)
RWG, Inc., Aiello Associates,)
Daniels Engineering, Inc.,)
Rivergate Homeowners')
Association, Rivergate)
Homeowners' Association Board)
of Directors, Wayne Winderman,)
individually, Salvatrice Foran,)
individually, Gerald Foran,)
individually, Marcos Soares,)
Construction, William C. DeSouza,)
individually, James Eason,)
individually and d/b/a James)
Eason & Company, D&D Cleaning)
and Construction, Inc., Joel's)
Framing, Joe Preza, Aroldo)
Garcia, Joaquin Geraldo Zeferino)
individually and d/b/a Zeferino)
Framing, Leo Trombley, Judy)
Schultz, J&D Interior Design,)
Jose Dasmerces d/b/a J.P.)
Construction, Scott Chandler)
d/b/a Coastal Custom Windows)
& Doors, R&D Construction,)
Nicasio Ramirez Zunigo, Walchir)
Morais, Marco Trebbi,)
Blankenship Roofing, Inc., DLJ)
Construction, L.L.C., Dewayne)
Bates, The Bates Group, LLC,)
Bridges Construction Co.,)
Brewer Construction, Inc.,)
Speedy Concrete, REB-FEL, Inc.,)
Mark Mychajluk, Eric Jazwinski,)
Southern Framing Corporation,)
AB Consulting Engineers, Inc.,)
WWI Development Company, LLC,)
Michael Dawson Construction,)
Inc., Asphalt Paving &)
Maintenance Co., Inc., and)
Chuck's Construction Co., Inc.,)
Right Way Group, Inc., Stevens)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-CP-26-03901

16 DEC 10 PM 12:56
ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION
(SPEEDY CONCRETE, INC.)

Construction Co., Inc.,)
Geometrics, Inc., Eric Yazwinski)
Law Engineering, Inc., D & M)
Builders, Inc., Hill)
Construction Company, Bonnie)
Stone a/k/a Bonny Stone, DJL)
Construction Co., LLP, Adrian)
Mondragon, individually and dba)
Mondragon Construction, Inc.,)
and Glen Causey,)

Defendants.)

Chuck's Construction Co., Inc.)

Third-Party Plaintiff)

v.)

Vereen Concrete Co., Inc. and)
Asphalt Pavement Maintenance of)
Myrtle Beach, Inc.)

Third-Party Defendants)

Date of hearing:

Hearing Judge:

Attorney for the Plaintiff:

Attorney for Speedee Concrete:

September 8, 2014

The Honorable Clifton Newman

Stacy Stanley

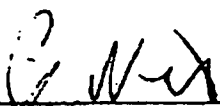
G. Michael Smith

THIS MATTER CAME BEFORE ME pursuant to the Plaintiff's Motion for Reconsideration regarding the Order Granting Summary Judgment in favor of Speedee Concrete in the above-captioned matter. Based upon argument of counsel, evidence and memorandum presented by counsel and a review of the applicable law in this case, I find and conclude that Speedee Concrete, Inc. is entitled to summary judgment and the Motion for Reconsideration should be denied.

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Based upon the foregoing, it is ORDERED that the Motion for Reconsideration of this Court's Order Granting Summary Judgment in favor of Speedee Concrete, Inc. is DENIED.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

Columbia, South Carolina
December 8, 2014

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

RIVERGATE HOMEOWNERS'
ASSOCIATION,

Civil Action No. 2010-CP-26-03901

Plaintiff,

vs.

CHUCK'S CONSTRUCTION, INC.
(SEE FORM CAPTION IN PLEADINGS
FOR COMPLETE CAPTION),

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION
OF ORDER GRANTING CHUCK'S
CONSTRUCTION, INC.'S MOTION
FOR SUMMARY JUDGMENT**

Defendants.

THIS MATTER came before me pursuant to the Motion for Reconsideration filed on April 4, 2014 by Plaintiff, Rivergate Homeowners Association. Plaintiff sought reconsideration of the Order Granting Summary Judgment on behalf of Chuck's Construction filed March 10, 2014. For the reasons set forth below, Plaintiff's request is denied.

A motion for reconsideration is appropriate when a party believes the court has misunderstood, failed to fully consider, or failed to rule on an argument or issue.

~~Blain v. S.C. DOT 361 S.C. 9, 24 (2004)~~

Here, the Plaintiffs have not raised any fact or presented any authority which suggests that this Court misapprehended the issues before it at the January 17, 2014 Motion for Summary Judgment. To the contrary, it remains clear that Plaintiffs claims are barred by the applicable statutes of limitation. A three-year statute of limitations applies to each of Plaintiffs' causes of action. S.C. Code Ann. § 15-3-530 (providing that a negligence cause of action, or one for "any injury to the person or rights of another" must be brought "[w]ithin three years."); S.C. Code Ann. § 15-3-530(1) (breach of an express or implied warranty or "an action upon contract,

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obligation, or liability, express or implied," must be brought within three years); S.C. Code Ann. § 39-5-150 (claim under the Unfair Trade Practices Act may not be brought "more than three years after discovery of the unlawful conduct.").

South Carolina courts "have adopted the 'discovery rule' in determining when a cause of action accrues." Dillon County School District Number Two vs. Lewis Sheet Metal Works, 286 S.C. 207, 215, 332 S.E.2d 555, 559 overruled on other grounds by Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 319 S.C. 556, 462 S.E.2d 858 (1995) (quoting Brown v. Sandwood Development Corp., 277 S.C. 581, 291 S.E.2d 375 (1982); Campus Sweater v. M.B. Kahn, 515 F.Supp. 64 (D.S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981); Gattis v. Chavez, 413 F.Supp. 33 (D.S.C. 1976).

"Under the discovery rule, the three-year statute of limitations clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (quoting Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004)).

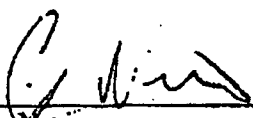
As set forth in more particularity in this Court's Order Granting Summary Judgment, Plaintiffs were aware of multiple alleged issues with the Project as early as May of 2005. It was at this time that Plaintiffs formed an Ad Hoc Committee to help the HOA address multiple issues with the project as evidenced by the sworn testimony of record. Several of those alleged issues included work performed or subcontracted by Chucks that dealt with the roads, grading and drainage. Plaintiffs did not bring suit against Chuck's until April 28, 2010, which is almost five years after they first discovered these issues. Plaintiffs should have brought suit against Chucks at the latest by May of 2008.

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CONCLUSION

For the foregoing reasons, the Motion to Reconsider of Plaintiff Rivergate Homeowner's Association is DENIED.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

December 8, 2014

Columbia, South Carolina

The South Carolina Court of Appeals

Rivergate Homeowners' Association, Appellant,

v.

WW & LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction, William C. DeSouza, individually, James Eason individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferinao, individually and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmerces d/b/a J.P. Construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc., Right Way Group, Inc., Stevens Construction Co., Inc., Geometrics, Inc., Eric Yazwinski, Law Engineering, Inc., D & M Builders, Inc., Hill Construction Company, Bonnie Stone a/k/a Bonny Stone, DJL Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey, Defendants,

Of Whom Speedee Concrete, Inc. and Chuck's Construction, Inc. are the Respondents.

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement
Maintenance of Myrtle Beach, Inc., Third-Party
Defendants,

Rivergate Homeowners' Association, Appellant,

v.

WW & LB Development Company, LLC, Speedy
Concrete, AB Consulting Engineers, Inc., and Chuck's
Construction Co., Inc., Defendants.

Of Whom AB Consulting Engineers, Inc. is the
Respondent.

Appellate Case No. 2015-000248

The Honorable Clifton Newman
Horry County
Trial Court Case No. 2010CP2603901

ORDER

With consent of respondents' counsel, appellant's motion to consolidate appeals case numbers 2015-000248, 2015-000249 and 2015-000594 is granted. These three appeals are now consolidated under case number 2015-000248. This case number must be included with all future filings.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Stacy L. Stanley, Esquire
Vonda Denise Hamilton, Esquire
G. Michael Smith, Sr., Esquire
Stephanie Holmes Burton, Esquire
Christina Agnes Bisset, Esquire
James Christopher Clark, Esquire

FILED

June 3, 2015 AD

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
Rivergate Homeowners' Association

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

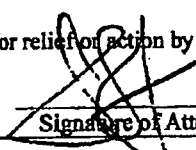
Plaintiff(s)

C/A No: 2010-CP-26-03901

vs.

WW & LB Development Company, et al.

Defendant(s)

Plaintiff's Attorney: Stacy L. Stanley, Esquire Bar No. Address: 3303 Highway 9 East Little River, South Carolina 29566 phone: (843) 390-9111 fax: (843) 390-9187 e-mail: stamelmatwildanstan@gmail.com other:		Defendant's Attorney: Joseph S. Sandefur Bar No. 75310 Address: McAngus, Goudelock & Courie, LLC Post Office Box 1349 Founders Centre, 2411 N. Oak Street, Suite 401 (29577) Myrtle Beach, South Carolina 29578 (843) 848-6000 Direct number: (843) 848-6003 Fax: (843) 449-2306 e-mail: joseph.sandefur@mgclaw.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: Chuck Construction's Motion for Summary Judgment Estimated Time Needed: 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		3-5-13 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____			
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

vs.

WW & LB Development Company, RWG,
Inc., Aiello Associates, Daniels
Engineering, Inc., Rivergate Homeowners'
Association, Rivergate Homeowners'
Association Board of Directors, Wayne
Winderman, individually, Salvatrice Foran,
individually, Gerard Foran, individually,
Marcos Soares, individually, and d/b/a M.S.
Construction, William C. DeSouza,
individually, James Eason, individually and
d/b/a James Eason & Company, D&D
Cleaning and Construction, Inc., Joel's
Framing, Jo Freza, Aroldo Garcia, Joaquin
Geraldo Zeferino, individually and d/b/a
Zeferino Framing, Leo Trombley, Judy
Schultz, J&D Interior Design, Jose
Dasmerces d/b/a J.P. Construction, Scott
Chandler d/b/a Coastal Custom Windows &
Doors, R&D Construction, Nicasio Ramirez
Zuniga, Walchir Morais, and Marco Trebbi,
Blakenship Roofing, Inc., DLJ
Construction, LLC, Dewayne Bates, The
Bates Group, LLC, Bridges Construction
Co., Brewer Construction, Inc., Speedy
Concrete, REB-FEL, Inc., Mark Mychajluk,
Eric Jazwinski, Southern Framing
Corporation, AB Consulting Engineers, Inc.
Geometrics Consulting, LLC, WWI
Development Company, LLC, Michael
Dawson Construction, Inc., Asphalt Paving
& Maintenance Co., Inc. and Chuck's
Construction Co., Inc., Right Way Group,
Inc., Stevens Construction Co., Inc.,
Geometrics, Inc., Erick Yazwinski, Law
Engineering, Inc., D&M Builders, Inc., Hill
Construction Company, Bonnie Stone a/k/a
Bonny Stone, DJL Construction Company,

IN THE COURT OF COMMON PLEAS

CA No. 2010-CP-26-03901

**DEFENDANT/THIRD-PARTY
PLAINTIFF CHUCK'S
CONSTRUCTION, INC.'S MOTION
FOR SUMMARY JUDGMENT AS TO
RIVERGATE HOMEOWNERS'
ASSOCIATION**

LLP, Adrian Mondragon, individually and
Mondragon Construction, Inc., and Glen
Causey,

Defendants.

Chuck's Construction Co., Inc.,
Third Party Plaintiff,

vs.

Vereen Concrete Co., Inc. and Asphalt
Pavement Maintenance of Myrtle Beach,
Inc.

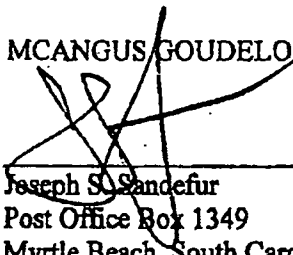
Third Party Defendant.

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service of this Notice upon you or as soon thereafter as counsel may be heard, the undersigned attorney for Defendant, Chuck's Construction, Inc. ("Defendant"), will move before the presiding Judge of the Horry County Court of Common Pleas for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting Defendant summary judgment as to all claims brought by Rivergate Homeowner's association against Defendant on the grounds that there is no genuine issue as to any material fact and Defendant is entitled to judgment as a matter of law. Specifically the Statute of Limitations bars all claims made by Rivergate Homeowners' Association against Defendant.

Defendant's Motion is based upon the pleadings, discovery, affidavits, exhibits, deposition transcripts, and other admissible evidence as well as the applicable common law and statutory law. A full memorandum of law will be submitted as support at a later date.

[Signature appears on the following page]

MCANGUS GOUDELOCK & COURIE, L.L.C.



Joseph S. Sandefur
Post Office Box 1349
Myrtle Beach, South Carolina 29578
(843) 848-6000

ATTORNEYS FOR DEFENDANT/THIRD-
PARTY DEFENDANT CHUCK'S
CONSTRUCTION

March 5, 2013

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

v.

WW & LB Development Company, LLC,

RWG, Inc.,

Aiello Associates,

Daniels Engineering, Inc.,

Rivergate Homeowners' Association,

Rivergate Homeowners' Association Board

of Directors,

Marcos Soares, individually, and d/b/a M.S.

Construction,

William C. De Souza, individually,

James Eason, individually, and d/b/a James

Eason & Company,

D&D Cleaning and Construction, Inc.,

Joel's Framing,

Jo Freza,

Aroldo Garcia,

Joaquin Geraldo Zeferino, individually, and

d/b/a Zeferino Framing,

Leo Trombley,

Judy Schultz,

J&D Interior Design,

Jose Dasmerces d/b/a J.P. Construction,

Scott Chandler d/b/a Coastal Custom

Windows & Doors,

R&D Construction,

Nicasio Ramirez Zunigo,

Walchir Morais,

Marco Trebbi,

Blankenship Roofing, Inc.,

DLJ Construction, L.L.C.,

Dewayne Bates,

The Bates Group, LLC,

Bridges Construction Co.,

Brewer Construction, Inc.,

Speedy Concrete,

REB-FEL, Inc.,

IN THE COURT OF COMMON PLEAS

**DEFENDANT AB CONSULTING
ENGINEERS, INC.'S MOTION FOR
SUMMARY JUDGMENT AS TO
PLAINTIFF RIVERGATE
HOMEOWNERS' ASSOCIATION**

C.A. No. 2010-CP-26-03901

SHB
#1

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#2

4. There is no evidence that AB Consulting Engineers owed Plaintiff any duty of care.
5. There is no evidence that any breach of any applicable standard of care by AB Consulting Engineers proximately caused Plaintiff's damages.
6. Plaintiff's claims sounding in contract are legally defective because there is no evidence of any contractual relationship between AB Consulting Engineers and Plaintiff. SHB
#3
7. There is no evidence that AB Consulting Engineers made any express warranty to Plaintiff.
8. There is no evidence that AB Consulting Engineers breached any express warranty.
9. There is no evidence that Plaintiff sustained any damages proximately caused by AB Consulting Engineer's alleged breach of any express warranty.
10. Plaintiff's claim for breach of implied warranties is legally deficient because there is no evidence that AB Consulting Engineers entered into any contract with Plaintiff.
11. Plaintiff's claims for breach of the implied warranties (1) that the project would be constructed in a careful, diligent and workmanlike manner in accordance with industry and construction standards, (2) of habitability, (3) of fitness for a particular purpose, and (4) of workmanship, are legally deficient.
12. There is no evidence that Plaintiff sustained any damages proximately caused by any alleged breach of any implied warranty by AB Consulting Engineers.
13. There is no evidence to support Plaintiff's claim for violation of the South Carolina Unfair Trade Practices Act.

14. Plaintiff's claim for violation of the South Carolina Unfair Trade Practices Act is legally deficient because there is no evidence that AB Consulting Engineers' actions impact the public interest or are capable of repetition.

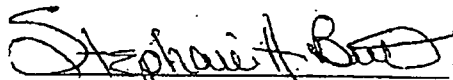
15. There is no evidence that AB Consulting Engineers willfully or knowingly violated Section 39-5-20 of the South Carolina Code.

16. There is no evidence that AB Consulting Engineers acted in a willful or wanton manner or in reckless disregard to Plaintiff's rights.

17. There is no evidence to support any claim for punitive damages against AB Consulting Engineers.

18. AB Consulting Engineers is entitled to an order granting summary judgment in its favor as a matter of law.

This motion is based upon the pleadings filed in this action, the excerpts of depositions attached hereto, and upon applicable common and statutory law.



Stephanie H. Burton (#13089)
GIBBES BURTON, LLC
308 East St. John Street
Spartanburg, South Carolina 29302
sburton@gibbesburton.com
Telephone: (864) 327-5000
Facsimile: (864) 327-5001

Attorneys for Defendant
AB Consulting Engineers, Inc.

April 11, 2013
Spartanburg, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

RIVERGATE HOMEOWNERS' ASSOCIATION, et al.,

☐ Plaintiff

v.

WW&LB DEVELOPMENT COMPANY, LLC, Et Al.,

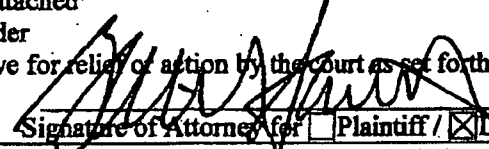
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-26-03901

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Stacy L. Stanley, Bar No. Address: 3303 Highway 9 East, Little River, SC 29566 phone: fax: e-mail: other:	Defendant's Attorney: G. Michael Smith, Bar No: 5255 Address: P. O. Box 1740, Conway, SC 29528 phone: 843-248-5741 fax: 843-248-5112 e-mail: msmith@thompsonlaw.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion for Summary Judgment Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant <u>July 15, 2013</u> Date submitted	
SECTION III: Motion Fee	
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners'
Association,

Plaintiff,

vs.

WW&LB Development Company, LLC,
RWG, Inc., Aiello Associates,
Daniels Engineering, Inc.,
Rivergate Homeowners'
Association, Rivergate
Homeowners' Association Board
of Directors, Wayne Winderman,
individually, Salvatrice Foran,
individually, Gerard Foran,
individually, Marcos Soares,
individually and d/b/a M.S.
Construction, William C. DeSouza,
individually, James Eason,
individually and d/b/a James
Eason & Company, D&D Cleaning
and Construction, Inc., Joel's
Framing, Joe Freza, Aroldo
Garcia, Joaquin Geraldo Zeferino
individually and d/b/a Zeferino
Framing, Leo Trombley, Judy
Schultz, J&D Interior Design,
Jose Dasmerces d/b/a J.P.
Construction, Scott Chandler
d/b/a Coastal Custom Windows
& Doors, R&D Construction,
Nicasio Ramirez Zunigo, Walchir
Morais, Marco Trebbi,
Blankenship Roofing, Inc., DLJ
Construction, L.L.C., Dewayne
Bates, The Bates Group, LLC,
Bridges Construction Co.,
Brewer Construction, Inc.,
Speedy Concrete, REB-FEL, Inc.,
Mark Mychajluk, Eric Jazwinski,
Southern Framing Corporation,
AB Consulting Engineers, Inc.,
WWI Development Company, LLC,
Michael Dawson Construction,
Inc., Asphalt Paving &
Maintenance Co., Inc., and
Chuck's Construction Co., Inc.,

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-CP-26-03901

**DEFENDANT SPEEDY CONCRETE'S
MOTION FOR SUMMARY JUDGMENT
AS TO RIVERGATE HOMEOWNERS'
ASSOCIATION**

Right Way Group, Inc., Stevens)
 Construction Co., Inc.,)
 Geometrics, Inc., Eric Yazwinski)
 Law Engineering, Inc., D & M)
 Builders, Inc., Hill)
 Construction Company, Bonnie)
 Stone a/k/a Bonny Stone, DJL)
 Construction Co., LLP, Adrian)
 Mondragon, individually and dba)
 Mondragon Construction, Inc.,)
 and Glen Causey,)

Defendants.)

Chuck's Construction Co., Inc.)

Third-Party Plaintiff)

v.)

Vereen Concrete Co., Inc. and)
 Asphalt Pavement Maintenance of)
 Myrtle Beach, Inc.)

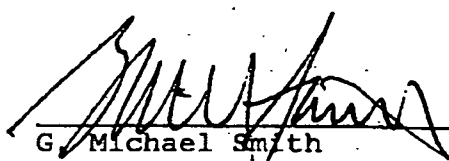
Third-Party Defendants)

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service of this Motion or as soon thereafter as counsel may be heard, the undersigned attorney for the Defendant Speedy Concrete (Speedee Concrete, Inc.), ("Defendant"), will move before the presiding Judge of the Horry County Court of Common Pleas for an Order granting the Defendant summary judgment as to all claims brought by the Plaintiff Rivergate Homeowner's Association against the Defendant. The Motion is based upon the ground that there is no genuine issue as to any material fact regarding the Plaintiff's knowledge of the condition of the concrete pads, driveways and sidewalks at the Plaintiff's

property more than three years prior to the filing of the complaint against the Defendant. Therefore, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, the Defendant is entitled to judgment as a matter of law based upon the affirmative defense that the Statute of Limitations is a bar to all claims made by Rivergate Homeowners' Association against the Defendant.

Defendant's Motion is based upon the pleadings, discovery, affidavits, exhibits, deposition transcripts, and other admissible evidence as well as the applicable common law and statutory law. A full memorandum of law will be submitted as support at a later date.

THOMPSON & HENRY, P.A.



G. Michael Smith
1300 Second Avenue
Third Floor (29526)
Post Office Box 1740
Conway, SC 29528
(843) 248-5741

ATTORNEY FOR DEFENDANT
SPEEDY (SPEEDEE) CONCRETE

Conway, South Carolina

July 13, 2013

STATE OF SOUTH CAROLINA
COUNTY OF HORRY.

Rivergate Homeowners' Association,
Plaintiff,

vs.

WW & LB Development Company, LLC,
Daniels Engineering, Inc., Walchir Morais,
DLJ Construction, LLC, Dewayne Bates,
The Bates Group, LLC, Bridges
Construction Co., Brewer Construction,
Inc., Speedy Concrete, Eric Jazwinski,
Southern Framing Corporation, AB
Consulting Engineers, Inc. WWI
Development Company, LLC, Michael
Dawson Construction, Inc., Asphalt Paving
& Maintenance Co., Inc. and Chuck's
Construction Co., Inc., Right Way Group,
Inc., Stevens Construction Co., Inc.,
Geometrics, Inc., Law Engineering, Inc.,
D & M Builders, Inc., Hill Construction
Company, Bonnie Stone a/k/a Bonny
Stone, DJL Construction Company, L.L.P.,
Adrian Mondragon, individually and d/b/a
Mondragon Construction, Inc., and Glen
Causey,

Defendants.

Chuck's Construction Co., Inc.,
Third Party Plaintiff,

vs.

Vereen Concrete Co., Inc. and Asphalt
Pavement Maintenance of Myrtle Beach,
Inc.

Third Party Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-26-3901

(Case No. 2007-CP-26-0228 and 2008-CP-26-4690 were
consolidated under 2008-CP-26-4690 by Order filed 3/31/09)

**PLAINTIFF'S MEMORANDUM OF
LAW IN OPPOSITION TO
DEFENDANT SPEEDY CONCRETE'S
MOTION FOR SUMMARY
JUDGMENT**

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CLERK OF COURT

Plaintiff submits this Memorandum of Law in Opposition to Defendant Speedy Concrete's (hereinafter Speedy) Motion for Summary Judgement. Specifically, this Memorandum addresses Speedy's allegation that the Master Deed provides that each owner is charged with the responsibility for their own driveways because the driveway is a limited common element and, therefore, the Rivergate Homeowners Association (hereinafter Association) does not have standing to bring suit on behalf of the individual unit owners. Although Speedy raised additional issues related to its motion for summary judgment at the hearing on January 17, 2014, those issues were addressed by the Association at the hearing and will not be addressed in this Memorandum.

FACTS

The Rivergate Homeowners Association alleges negligence, breach of warranties, and unfair trade practices against Speedy and the other remaining defendants related to deficient civil design and construction at the Rivergate project. As a sub-contractor at the project, Speedy was responsible for the building pads, sidewalks, and driveways.

According to the Association's civil expert, J. Drew Wilkie, P.E., Speedy deficiently constructed the sidewalks and driveways because of the slope of the sidewalks and driveways. The Association also alleges that Speedy was aware of its deficient work during the construction of the sidewalks and driveways, but continued to defectively construct the sidewalks and driveways.

In accordance with the Master Deed and Bylaws for the HOA, the HOA is the non-profit corporation whose responsibility includes, but is not limited to, the management, maintenance, repair, and replacement of the Association's common elements. According to the Master Deed, the sidewalks are a common element and the driveways are a limited common element. As to a

limited common element, the Master Deed further provides that the limited common elements shall be treated as and included within the definition of the term "common elements."

STANDARD OF REVIEW

"Summary judgment is appropriate when the pleadings, depositions, affidavits and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); see also Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt., Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Simmons v. Berkeley Elec. Co-op. Inc., 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, . . . the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id.

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient

manner.” David v. McLeod Reg’l Med. Ctr. 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact. Cunningham v. Anderson County, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013). Rather, “[t]he purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); Penza v. Pendleton Station, LLC, 404 S.C. 198, 203, 743 S.E.2d 850, 852 (Ct. App. 2013).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, “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 cases in order to withstand a motion for summary judgment.” Hancock v. Mid-South Mgmt., Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

ARGUMENT

The Association has standing to bring a lawsuit related to the limited common elements such as the grade-level concrete driveways because limited common elements are defined as common elements by the Master Deed and the Association is responsible for maintaining, managing, repairing, and replacing the common elements according to the Master Deed.

Speedy argues that the Master Deed confirms that the Rivergate Homeowner's Association does not have standing to bring a lawsuit on behalf of the individual unit owners for the limited common elements. We disagree with this contention.

The Association agrees with Speedy that the grade-level concrete driveways are limited common elements. According to Article IV of the Master Deed, limited common elements shall mean attic space, *grade-level concrete driveways*, patios or stoops, and porches accessible by normal means from the unit. Exhibit A, page 4-5. These limited common elements are intended for the exclusive use and benefit of the specific unit.

While Speedy points out to this Court that the grade-level driveways are limited common elements as defined in Article IV of the Master Deed, Speedy overlooks the final sentence in that paragraph that is contrary to its position. In the last sentence of Article IV, the Master Deed states, "In all other respects, and except as specifically provided in this Master Deed, **LIMITED COMMON ELEMENTS** shall be treated as, and included within the definition of the term 'Common Elements.'" (emphasis added). Exhibit A, page 5. This definition is reiterated in Article XXXVIII(J)(sic) wherein the Master Deed states that "'Limited Common Elements' shall have the meaning attributed thereto in Article IV of this Master Deed." Exhibit A, page 32.

In addition to a limited common element being treated as and included within the definition of a common element in the Rivergate Master Deed, Courts have ruled that although limited common elements are for the exclusive use and benefit of a specific unit, a limited common element is commonly owned and not a part of a unit. See Douglas Scott MacGregor, Condominium Law in South Carolina § 1.02 (S.C. Bar 2000). In the case of Blackwell v. Hanover Ins. Co., 551 So. 2d 47 (La. Ct. App. 1989), the court ruled that limited common elements are part of common elements and any liability arising from them should be insured risk under a statute requiring coverage of claims arising out of common elements. In another case that stands for the proposition that a limited common element is commonly owned by the

Association members, Gaffny v. Reid, 628 A.2d 155 (Me. 1993) held that building on limited common elements violated the rights of other unit owners.

As to who maintains, repairs, and replaces the common elements such as the grade-level driveways, the Master Deed definitively states that this is the responsibility of the Association and not an individual owner. Article XXIII of the Master Deed provides: "The ASSOCIATION, at its expense, SHALL be responsible for the maintenance, repair and replacement of all of the COMMON ELEMENTS." (Emphasis added). Exhibit A, page 15. Moreover, Article III(C), Section 18(c) of the By-Laws states:

The Board of Directors shall be responsible for the affairs of the Association and shall have all the powers and duties necessary for the administration of the Association's affairs . . . [The] Board of Directors shall have the power to and shall be responsible for the following . . . (c) providing for the operation, care, upkeep, and maintenance of all of the Common Areas. (Emphasis added).

Exhibit B, p. 8.

Based on the above, the grade-level driveways are limited common elements which are treated as and included within the definition of common elements and the Association is responsible for the maintenance, replacement, and repair of the common elements and not the individual homeowners. Therefore, Speedy's motion as to the Association's lack of standing should be dismissed.

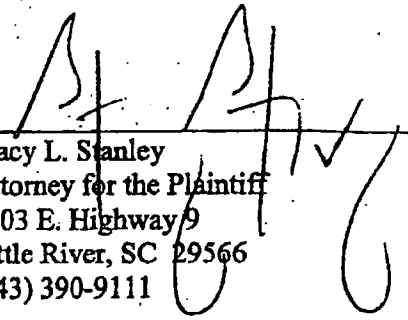
CONCLUSION

In conclusion, Speedy's motion for Summary Judgment as it relates to the lack of standing argument should be dismissed. Limited common elements are treated and defined as common elements and the responsibility to maintain, repair, and replace the common elements is

the sole responsibility of the Association. Therefore, there are genuine issues of material fact in the instant case.

Accordingly, Defendant Speedy's Motion for Summary Judgment as to lack of standing should be dismissed.

Respectfully submitted,



Stacy L. Stanley
Attorney for the Plaintiff
3303 E. Highway 9
Little River, SC 29566
(843) 390-9111

February 26, 2014

EXHIBIT A

upon which additional Phases may be added may be used for any lawful purpose by the Owner thereof.

ALTHOUGH PORTIONS OF THE RIVERGATE HORIZONTAL PROPERTY REGIME MAY BE LOCATED ADJACENT TO PROPERTY ON WHICH IS CURRENTLY LOCATED A GOLF COURSE AND RELATED FACILITIES, SUCH GOLF COURSE AND RELATED FACILITIES ARE OWNED BY AN UNRELATED THIRD PARTY AND ARE NOT OWNED OR CONTROLLED BY GRANTOR. NO OWNER SHALL ACQUIRE ANY RIGHTS IN SUCH GOLF COURSE AND RELATED FACILITIES BY VIRTUE OF HIS OWNERSHIP OF A UNIT(S) WITHIN THE RIVERGATE HORIZONTAL PROPERTY REGIME. FURTHER, GRANTOR MAKES NO REPRESENTATIONS REGARDING THE CONTINUED EXISTENCE OF SAID GOLF COURSE OR AS TO THE FUTURE USE OF THE PROPERTY ON WHICH SAID GOLF COURSE IS CURRENTLY LOCATED.

IV.

UNITS, COMMON ELEMENTS AND LIMITED COMMON ELEMENTS

THE CONDOMINIUM consists of UNITS, COMMON ELEMENTS, and LIMITED COMMON ELEMENTS as said terms are hereinafter defined.

UNITS, as the term is used herein, shall mean and comprise the four (4) separate and numbered UNITS within Building 2 and 6, which comprise Phase I and are described in Exhibit B to this Master Deed, including, however, all spaces and improvements lying beneath the undecorated and/or unfinished inner surfaces of the perimeter walls and floors, and above the undecorated and/or unfinished inner surfaces of the ceilings of each UNIT, and further including all spaces and improvements lying beneath the undecorated and/or unfinished inner surfaces of all interior loadbearing walls and/or unfinished bearing partitions, and further including all pipes, ducts, wires, conduits and other facilities running through any interior wall or partition for the furnishing of utility services to UNITS and COMMON ELEMENTS.

COMMON ELEMENTS, as the term is used herein, shall mean and comprise all of the real property, improvements and facilities of the CONDOMINIUM other than the UNITS, as same are hereinabove defined, and shall include easements through UNITS for conduits, pipes, ducts, plumbing, wiring and other facilities for the furnishing of utility service to UNITS and COMMON ELEMENTS, easements of support in every portion of a UNIT which contributes to the support of the improvements, and shall further include all personal property held and maintained for the joint use and enjoyment of all of the Owners of all such UNITS. The term "COMMON ELEMENTS" may be further defined in other provisions of this Master Deed and the exhibits and amendments hereto by specific designation of certain improvements and facilities as COMMON ELEMENTS. Such further designation of COMMON ELEMENTS shall not act to limit the definition of COMMON ELEMENTS as herein provided, but is intended to be in addition thereto.

LIMITED COMMON ELEMENTS as the term is used herein shall mean and comprise the following: (A) attic space, if any, and grade-level concrete driveways, patios or stoops and porches

accessible by normal means from the UNIT, immediately adjacent to or above the UNIT; and (B) All water, power, telephone, electricity, plumbing, gas and sewage lines located in the UNIT; provided, however, that the portion of said lines located in a common compartment fur, or installation of, such lines shall be COMMON ELEMENTS as described above. LIMITED COMMON ELEMENTS are intended for the exclusive use and benefit of the UNIT which it is associated with. In all other respects, and except as specifically provided in this Master Deed, LIMITED COMMON ELEMENTS shall be treated as, and included within the definition of the term "COMMON ELEMENTS".

V.

**OWNERSHIP OF UNITS AND APPURTENANT
INTEREST IN COMMON ELEMENTS**

Each UNIT shall be conveyed and treated as an individual property capable of independent use and fee simple ownership, and the Owner or Owners of each UNIT shall own, as an appurtenance to the ownership of each said UNIT, an undivided interest in the COMMON ELEMENTS, the undivided interest appurtenant to each said UNIT being that which is hereinafter specifically assigned therein. The percentage of undivided interest in the COMMON ELEMENTS assigned to each UNIT shall not be changed except with the unanimous consent of all of the Owners of all of the UNITS and except as provided in Article III with regard to the amendments of this Master Deed to add additional Phase(s) into this Horizontal Property Regime. There shall also be appurtenant to each UNIT the exclusive right to the use of the LIMITED COMMON ELEMENTS appurtenant to that UNIT in accordance with the provisions of this Master Deed.

VI.

**RESTRICTION AGAINST FURTHER SUBDIVIDING
OF UNITS AND SEPARATE CONVEYANCE
OF APPURTENANT COMMON ELEMENTS, ETC.**

No UNIT may be divided or subdivided into a smaller UNIT than as shown on Exhibit B attached hereto, nor shall any UNIT, or portion thereof, be added to or incorporated into any other UNIT, except as provided in Exhibit B hereto. The undivided interest in the COMMON ELEMENTS declared to be an appurtenance to each UNIT shall not be conveyed, devised, encumbered or otherwise dealt with separately from said UNIT, and the undivided interest in COMMON ELEMENTS and the right as to the LIMITED COMMON ELEMENTS appurtenant to each UNIT shall be deemed conveyed, devised, encumbered, or otherwise included with the UNIT even though such undivided interest is not expressly mentioned or described in the instrument conveying, devising, encumbering, or otherwise dealing with such UNIT. Any conveyance, mortgage, or other instrument which purports to affect the conveyance, devise or encumbrance, or which purports to grant any right, interest or lien in, to, or upon, a UNIT, shall be null, void and of no effect insofar as the same purports to affect any interest in a UNIT and its appurtenant undivided interest in COMMON ELEMENTS, unless the same purports to convey, devise, encumber or otherwise trade or deal with the entire UNIT. Any instrument conveying, devising, encumbering or otherwise

XXIII.

**MAINTENANCE AND REPAIR OF COMMON ELEMENTS
BY ASSOCIATION & COMMON EXPENSES**

The ASSOCIATION, at its expense, shall be responsible for the maintenance, repair and replacement of all of the COMMON ELEMENTS, including those portions thereof which contribute to the support of the building, and all conduits, plumbing, wiring and other facilities located in the COMMON ELEMENTS for the furnishing of utility services to the UNITS and said COMMON ELEMENTS, and should any incidental damage be caused to any UNIT by virtue of any work which may be done or caused to be done by the ASSOCIATION in the maintenance, repair, or replacement of any COMMON ELEMENTS, the ASSOCIATION shall, at its expense, repair such incidental damage.

The Board of Directors of ASSOCIATION shall cause the COMMON ELEMENTS to be inspected and evaluated annually by a professional engineer, architect, qualified property inspector, or other qualified professional, who shall then render a maintenance recommendation report to the Board of Directors of the ASSOCIATION and to the Grantor as to the condition of the COMMON ELEMENTS, as well as any recommendations for repairs and maintenance of the COMMON ELEMENTS. Such report shall be used by ASSOCIATION to advise it in the performance of the maintenance of the COMMON ELEMENTS. All of such reports shall be maintained in the files of ASSOCIATION and may be reviewed by any Owner, upon reasonable request. The first such inspection shall occur not later than one (1) year from the date of the filing of this Master Deed. Each subsequent inspection shall occur annually between January 1 and July 1 of each year. The cost of such inspection and report shall be a common expense. The term "Qualified Professional" as used herein shall mean a person whose education, training and work experience, as well as licenses and other professional qualifications, qualifies such person to perform the services provided for herein, in the reasonable discretion of the Board of Directors, after review of such qualifications. The Board of Directors shall report to the Association and the Grantor that any repair or maintenance suggested by such maintenance recommendation report has been corrected within sixty (60) days of receipt of such report.

In addition to the foregoing, the Board of Directors of the ASSOCIATION shall cause to be maintained a termite bond covering the buildings comprising the CONDOMINIUM which will provide coverage for the repair, replacement and retreatment of any portion of the buildings which are damaged or destroyed by infestation of termites or other wood-boring organisms. Such bond shall be maintained in full force and effect at all times and the cost thereof shall be a common expense of the ASSOCIATION.

The provisions of this Section XXIII may not be amended without the express written consent of the GRANTOR.

3. Expenses through the UNITS and general COMMON ELEMENTS for maintenance, repair and replacement of the UNITS and general COMMON ELEMENTS.

4. Installations for the furnishing of utility services to more than one UNIT or to the general COMMON ELEMENTS or to a UNIT other than the one containing the installation, which installation shall include ducts, plumbing, wiring and other facilities for the rendering of such services.

5. The tangible personal property required for the maintenance and operation of the CONDOMINIUM, even though owned by the ASSOCIATION.

A. "Limited Common Elements" shall have the meaning attributed thereto in Article IV of this Master Deed.

ARBITRATION

IN THE EVENT THAT A DISPUTE OR CLAIM SHALL ARISE WITH RESPECT TO ANY OF THE TERMS OR PROVISIONS OF THIS MASTER DEED, OR A DISPUTE BETWEEN THE GRANTOR OR ANY CONTRACTORS EMPLOYED BY THE GRANTOR AND ANY ONE OR MORE UNIT OWNERS, SUCH CLAIMS TO INCLUDE BUT NOT BE LIMITED TO CLAIMS FOR NEGLIGENCE OR IMPROPER CONSTRUCTION, FAILURE TO MEET SPECIFICATIONS, AND OTHER CLAIMS RELATED TO STRUCTURAL IMPROVEMENTS, ALL DISPUTES OR CLAIMS SHALL BE RESOLVED BY BINDING ARBITRATION PURSUANT TO TITLE 15, CHAPTER 48 (UNIFORM ARBITRATION ACT) OF THE CODE OF LAWS OF SOUTH CAROLINA. ALL RESULTING AWARDS AND DETERMINATIONS MADE BY THE ARBITRATORS PURSUANT TO THE PROVISIONS OF THIS SECTION SHALL BE CONCLUSIVELY BINDING UPON ALL PARTIES HERETO AND JUDGEMENT MAY BE RENDERED THEREON.

IN WITNESS WHEREOF, WW & LB Development Company, LLC, a South Carolina Corporation, has caused these presents to be executed this 14th day of March, 2001.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

WW & LB DEVELOPMENT COMPANY, LLC

[Signature]
[Signature]

By: Wynne Winderman
Its: Manager

EXHIBIT B

requested on his or her behalf by a Director. In such case, the President may limit the time any Voting Member may speak.

Section 17. Action Without a Formal Meeting. Any action to be taken at a meeting of the Directors or any action that may be taken at a meeting of the Directors may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the Directors, and such consent shall have the same force and effect as a unanimous vote.

C. Powers and Duties.

Section 18. Powers. The Board of Directors shall be responsible for the affairs of the Association and shall have all of the powers and duties necessary for the administration of the Association's affairs and, as provided by law, may do all acts and things as are not by the Master Deed, Articles, or these By-Laws directed to be done and exercised exclusively by the Voting Members or the membership generally.

The Board of Directors shall delegate to one of its members the authority to act on behalf of the Board of Directors on all matters relating to the duties of the managing agent or manager, if any, which might arise between meetings of the Board of Directors.

In addition to the duties imposed by these By-Laws or by any resolution of the Association that may be hereafter adopted, the Board of Directors shall have the power to and shall be responsible for the following, in way of explanation, but not limitation:

(a) preparation and adoption of an annual budget in which there shall be established the contribution of each Owner to the Common Expenses;

(b) making assessments to defray the Common Expenses, establishing the means and methods of collecting such assessments, and establishing the period of the installment payments of the annual assessment; provided, unless otherwise determined by the Board of Directors, the annual assessment for each UNIT'S proportionate share of the Common Expenses shall be payable in equal monthly installments, or as determined by the Board of Directors;

(c) providing for the operation, care, upkeep, and maintenance of all of the Common Areas;

(d) designating, hiring, and dismissing the personnel necessary for the maintenance, operation, repair, and replacement of the Association, its property, and the Common Areas and, where appropriate, providing for the compensation of such personnel and for the purchase of equipment, supplies, and materials to be used by such personnel in the performance of their duties;

(e) collecting the assessments, depositing the proceeds thereof in a bank depository which it shall approve, and using the proceeds to administer the Association; provided, any reserve fund may be deposited, in the Directors' best business judgment, in depositories other than banks;

(f) making and amending rules and regulations;

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association, et al.,

X Plaintiff,

vs.

WW&LB Development Company, LLC, et al.,

□ Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-26-3901

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's attorney:

Stacy L. Stanley, Bar No. 13410

3303 East Highway 9, Little River, SC 29566

Phone: (843) 390-9111 Fax: (843) 390-9187

E-mail: sstanley@stanleylawfirm.com other:

Defendant's attorney:

All counsel of record

Phone:

Fax:

E-mail:

other:

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

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

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

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration on Order Granting Summary Judgment

Estimated Time Needed: 1 hour

Court Reporter Needed: YES / NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion/Order -

Signature of Attorney for Plaintiff/Defendant

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$25.00**

☐ **EXEMPT:**

Rule to Show Cause in Child or Spousal Support

Domestic Abuse or Abuse and Neglect

Indigent Status

State Agency v. Indigent Party

Sexually Violent Predator Act

Post-Conviction Relief

Motion for Stay in Bankruptcy

Motion for Publication

Motion for Execution (Rule 69, SCRPC)

Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

Other:

JUDGE'S SECTION

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

☐ Other:

JUDGE CODE

Date:

CLERK'S VERIFICATION

Collected by:

(print name)

DATE FILED:

☐ **MOTION FEE COLLECTED: \$**

☐ **CONTESTED - AMOUNT DUE: \$**

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

vs.

WW & LB Development Company, LLC,
Daniels Engineering, Inc., Walchir Morais,
DLJ Construction, LLC, Dewayne Bates,
The Bates Group, LLC, Bridges
Construction Co., Brewer Construction,
Inc., Speedy Concrete, Eric Jazwinski,
Southern Framing Corporation, AB
Consulting Engineers, Inc. WWI
Development Company, LLC, Michael
Dawson Construction, Inc., Asphalt Paving
& Maintenance Co., Inc. and Chuck's
Construction Co., Inc., Right Way Group,
Inc., Stevens Construction Co., Inc.,
Geometrics, Inc., Law Engineering, Inc.,
D & M Builders, Inc., Hill Construction
Company, Bonnie Stone a/k/a Bonny
Stone, DJL Construction Company, L.L.P.,
Adrian Mondragon, individually and d/b/a
Mondragon Construction, Inc., and Glen
Causey,

Defendants.

Chuck's Construction Co., Inc.,

Third Party Plaintiff,

vs.

Vereen Concrete Co., Inc. and Asphalt
Pavement Maintenance of Myrtle Beach,
Inc.

Third Party Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-26-3901

(Case No. 2007-CP-26-0228 and 2008-CP-26-4690 were
consolidated under 2008-CP-26-4690 by Order filed 3/31/09)

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION ON
ORDER GRANTING SUMMARY
JUDGMENT AS TO AB CONSULTING
ENGINEERS, INC.**

FILED
HORRY COUNTY
2014 MAY 28 PM 2:01
JELANIE HUGGINS-WARD
CLERK OF COURT

TO: AB CONSULTING ENGINEERS, INC., DEFENDANT, AND ITS ATTORNEY,
STEPHANIE BURTON, ESQUIRE:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Rivergate Homeowners' Association (hereinafter the HOA), by and through its undersigned attorney, has filed this motion pursuant to Rule 59(e), SCRCP, requesting that the Court reconsider, alter, or amend its April 4, 2014 order granting the Defendant AB Consulting Engineers, Inc.'s (hereinafter AB Consulting) motion for summary judgment.

MOTION FOR RECONSIDERATION

The general grounds of this Motion are set forth below, although Plaintiff reserves the right to supplement this Motion at the hearing. The undersigned requests a full hearing so that detailed arguments can be made on the record.

Principal Issues

- I. Whether the Court erred in granting summary judgment to AB Consulting based on the statute of limitations?
- II. Whether the doctrine of equitable tolling applies?
- III. Whether the doctrine of equitable estoppel applies?
- IV. Whether public policy dictates that the statute of limitations not begin to run until on or after June 18, 2010?
- V. Whether the HOA has standing to bring a lawsuit related to limited common elements?

Applicable Law

Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (2010); Cherry v. Myers Timber Co., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013); see Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 178 (2013); Graham v. Welch, Roberts and Amburn, LLP, 404 S.C. 235, 743 S.E.2d 860 (Ct. App. 2013). All ambiguities, conclusions, and inferences arising from the

evidence must be construed most strongly against the movant. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Argoe v. Three Rivers Behavioral Health, LLC, 392 S.C. 462, 710 S.E.2d 67 (2011); Simmons v. Berkeley Elec. Co-op, Inc., 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013); see also Weston v. Kim's Dollar Store, 399 S.C. 303, 731 S.E.2d 864 (2012) (declaring that summary judgment should be granted only where it is perfectly clear no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of law). Even when there is no dispute as to evidentiary facts, summary judgment is not appropriate if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Bank of America, N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (2011); Major v. City of Hartsville, 398 S.C. 257, 728 S.E.2d 52 (Ct. App. 2012).

"To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013) (internal quotations omitted).

Argument

The trial judge erred in granting summary judgment to the Defendant AB Consulting based on the statute of limitations.

I. The Statute of Limitations began to run on June 18, 2010.

In South Carolina, a party must commence an action within three years of the date the cause of action arises. S.C. Code Ann. § 15-3-530 (2005). Rivergate's claims are governed by a three-year statute of limitations. The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered. Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011). The discovery rule applies to the instant case.

According to the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause

of action exists for the wrongful conduct. Graham v. Welch, Roberts and Amburn, LLP, 404 S.C. 235, 743 S.E.2d 860 (Ct. App. 2013). South Carolina courts have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996).

In Bayle v. South Carolina Department of Transportation, the Court of Appeals articulated:

The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001) (internal citations omitted).

However, when conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a jury to decide. See Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000) (noting determination of date statute of limitations began to run in particular case is question of fact for jury when parties present conflicting evidence); Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) (stating jury must resolve conflicting evidence as to whether claimant knew or should have known he had cause of action).

The limitations period is triggered by knowledge of facts, diligently acquired, sufficient to put an injured person on notice that a cause of action may exist against another. True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (1997).

In this case, the resolution hinges on when the three-year statute of limitations began to run. The evidence, viewed in a light most favorable to the Plaintiff, shows a genuine issue of material fact exists as to whether a reasonable person would have known the existence of their claims against the Defendant AB Consulting prior to, on or about June 18, 2010.

In his affidavit, Mr. Drew Wilkie, the Plaintiff's forensic expert, concluded: "While the HOA may have been aware of undesirable symptoms at the HOA such as standing water, erosion, etc., it is my opinion that the HOA would not have been aware that these symptoms were associated with or caused by civil construction and design defects until the report that I issued on June 18, 2010." However, he obviously advised Plaintiff's counsel of an action against the Defendants prior to the issuance of the final written report. (Exhibit A).

Based on the above, there is a genuine issue of material fact as to whether the statute of limitations began to run on or about June 18, 2010.

II. Equitable Tolling Applies

Alternatively, equitable tolling applies even if the Court determines that the Plaintiff could reasonably have concluded that a claim against AB Consulting existed as of April 28, 2007.

Equitable tolling is a doctrine that is applied on rare occasions in South Carolina to stop the running of statutes of limitations. Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008). Equitable tolling is reserved for extraordinary circumstances. Id.; see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."). The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. Pelzer, 378 S.C. at 521, 662 S.E.2d at 620. Equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine. Id. Equitable tolling has been deemed available where:

- (1) extraordinary circumstances prevented the plaintiff from filing despite his or her diligence;
- (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and
- (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

In Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), the Court of Appeals stated:

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.

The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.

It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Id. at 371-72, 725 S.E.2d at 125 (quoting Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115-17, 687 S.E.2d 29, 32-33 (2009)) (citations and quotation marks omitted).

In this case, the evidence reveals that the Plaintiff's causes of action could not have started to run until after October 31, 2007 because the homeowners did not have control of the Rivergate Homeowners Association until after October 31, 2007. In a Rivergate HOA letter dated September 12, 2007 to the homeowners, the managing member of the developer/general contractor WW & LB, Wayne Winderman (hereinafter Winderman), stated that "[t]he time is long overdue to turn the HOA over to an elected Board of Directors . . . The resignation is effective October 31, 2007." (Exhibit B)(emphasis added). Additionally, Mr. Winderman sent a letter to the management company Atalaya Management, Santee Cooper, and Little River Water & Sewer stating that WW & LB "will be vacating this facility and this will be turned over to the [HOA]." (Exhibit C).

Prior to these letters dated on or about September 12, 2007, the HOA and its Board of Directors were controlled by the developer/general contractor Wayne Winderman. The Board of Directors was the decision making body that would have decided whether to file a construction defect suit or not. Obviously, the developer-controlled HOA and its Board of Directors would not have sued itself, the developer/general contractor WW & LB, or its agents including, but not limited to, AB Consulting.

Additionally, despite all due diligence, the HOA was powerless to bring suit until the date of the transfer from the developer/general contractor to the homeowners on October 31, 2007. In fact, the homeowners were very aware that they did not have the authority to bring suit when the HOA was developer-controlled. In homeowner meeting minutes dated November 4, 2006, a member of the ad hoc committee, Sylvia Lindsay, stated that "these are the issues we are addressing for the whole group, not personal punch list, and nothing can be done until we have an attorney, which we can't get until we are a HOA." (Exhibit D). As such, Ms. Lindsay and the ad hoc committee were acknowledging their lack of authority to bring suit on behalf of the HOA until the developer transferred the HOA to the homeowners.

On the other hand, AB Consulting argues that the HOA should have known of the construction defects and taken action on or before April 28, 2007. AB Consulting cites the activities of the ad hoc committee to address various issues at the development. While AB Consulting is correct that the committee attempted to address homeowners concerns, the committee was never formed or endorsed by the developer-controlled HOA and, therefore, lacked the authority to address HOA issues.

The ad hoc committee's lack of authority was emphasized by the developer-controlled HOA in a letter dated July 6, 2005 to the ad hoc committee. In that Rivergate HOA letter, Winderman stated, "Please note that your committee will not be recognized for any other purpose [than] to address legitimate concerns of the HOA." (Exhibit E). In other words, the HOA is controlled by the developer and only the developer will determine what does and does not happen at the HOA.

Additionally, AB Consulting implies that the ad hoc committee should have contemplated hiring an engineer in 2005 to investigate the drainage issues at Rivergate based on a memorandum from Mr. Donald Miller and the testimony of Mr. Jim Dunn. With this position, AB Consulting is implying that the committee was investigating defects to bring suit. However, this is an incorrect assertion. Instead, the committee was working with the developer-controlled HOA to address problems and propose improvements especially since the ad hoc committee lacked the authority to correct the defects or bring suit on behalf of the HOA.

In addressing the Miller memorandum, Mr. Dunn stated that the ad hoc committee discussed a recommendation by a homeowner to "hire an engineer familiar with such issues to evaluate [the homeowners'] property and give the committee a hard report *for possible discussion of any of these issues with Wayne [Winderman, the managing member of the development company WW & LB].*" (emphasis added) (Exhibit F). Therefore, the ad hoc committee was not hiring an engineer to develop a case against the developer/general contractor and other sub-contractors/agents, such as AB Consulting, but instead the ad hoc committee was working with the developer, WW & LB, in an attempt to resolve any issues.

Based on the above, the statute of limitations was tolled until after October 31, 2007 because the developer/general contractor WW & LB did not transfer control to the homeowners until after October 31, 2007. Thus, by filing their cause of action on April 28, 2010, the Plaintiff commenced this action well within the three-year statute of limitations period. Therefore, the court erred in granting summary judgment in favor of AB Consulting.

III. AB Consulting should be Estopped from Asserting the Statute of Limitations

In South Carolina, "[a] defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct." Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (citations and quotation marks omitted). "The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue." Id. at 373, 725 S.E.2d at 125.

Here, it is evident that the developer/general contractor and its agents including, but not limited to, AB Consulting should be estopped from asserting the statute of limitations against the homeowner-controlled HOA. Specifically, the developer and developer-controlled HOA

induced the homeowners to believe that there would be future inspections and repairs to address construction issues.

As pointed out by AB Consulting, the developer Winderman stated in a letter on Rivergate HOA letterhead dated July 6, 2005 that the HOA "made inspections of drainage issues and will address the same as quickly as possible." Obviously, no end date was given. Moreover, the developer-controlled HOA stated that "[c]oncerning issues of maintenance they will be fairly addressed." (Exhibit E).

Additionally, the developer and developer-controlled HOA even stated that an engineer would inspect the site for road repairs that included AB Consulting's scope of work "[u]pon conclusion of construction." As of today, WW & LB owns at least one lot at the Rivergate development with tax map number 131-02-01-013. (Exhibit G). Whether construction was considered complete at the date of transfer from the developer to the homeowners after October 31, 2007 or construction is on-going because there is at least one undeveloped lot at the Rivergate development is a question of fact for a jury. Regardless, the Plaintiff homeowner-controlled HOA could have believed that repairs involving the construction defects were possible by the developer and developer-controlled HOA after October 31, 2007.

Based on the above, AB Consulting should be equitably estopped from asserting the statute of limitations as a bar to Plaintiff's claims.

IV. Equity and Public Policy Dictate that Plaintiff's Claims Should Not Be Barred by the Statute of Limitations

In addition to the above, equity and public policy dictate that the Plaintiff's claims should not be barred by the statute of limitations. The Plaintiffs did not sit on their rights, but acted with due diligence in determining whether a claim existed against AB Consulting.

In this case, within three years from the transfer of the HOA to the homeowners from developer/general contractor, the homeowner-controlled HOA hired a forensic engineer, investigated the civil construction and design issues, and brought suit against the appropriate sub-contractors and design professional AB Consulting. The HOA was transferred to the homeowners after October 31, 2007 and the report from the HOA's forensic engineer is dated June 18, 2010.

Additionally, Plaintiff's actions were in-line with the law of South Carolina. In this type of action, South Carolina requires the issuance of an affidavit by a professional prior to bringing a construction defect suit or the Plaintiff may be subject to allegations that the Plaintiff filed a frivolous or meritless lawsuit. See S.C. Code Ann. § 15-36-100 (2005).

Based on the above, the Plaintiff took due care to find an expert to investigate and determine the existence of and extent of any construction defects prior to filing their cause of action. As such, a reasonable person could have determined that the statute of limitations began to run, at the earliest, on or about the date of the final report dated June 18, 2010. Therefore,

equity and public policy dictate that Plaintiff's claims against AB Consulting should not be barred by the statute of limitations.

V. The HOA has standing to bring a lawsuit related to limited common elements

In the Order Granting AB Consulting Engineers, Inc.'s Motion for Summary Judgment as to Plaintiff, AB Consulting asserts that "certain property is not a Common Element and must be maintained by each individual home owner." Apparently, AB Consulting is referring to limited common elements. However, this argument is misplaced.

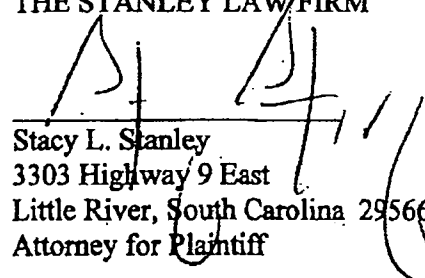
Instead of repeating previous arguments made by the Plaintiff regarding this issue, Plaintiff incorporates Plaintiff's Memorandum of Law in Opposition to Defendant Speedy Concrete's Motion for Summary Judgment (hereinafter Memorandum) that was clocked and filed on February 27, 2014 (Exhibit H).

Based on the Memorandum, the HOA has standing to bring a lawsuit related to limited common elements.

Conclusion

For the reasons argued above, the Plaintiff respectfully submits that the court erred in granting summary judgment in favor of the Defendant. Utilizing the mere scintilla of evidence burden, genuine issues of material fact exist that preclude summary judgment. Accordingly, the Court, pursuant to Rule 59(e), SCRPC, should alter or amend its Order Granting Summary Judgment to the Defendant by vacating the order and/or denying summary judgment to the Defendant.

THE STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, South Carolina 29566
Attorney for Plaintiff

May 28, 2014

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association, et al.,

X Plaintiff,

vs.

WW&LB Development Company, LLC, et al.,

☐ Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-26-3901

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's attorney:

Stacy L. Stanley, Bar No. 13410
3303 East Highway 9, Little River, SC 29566
Phone: (843) 390-9111 Fax: (843) 390-9187
E-mail: sstanley@stanleylawfirm.com other:

Defendant's attorney:

All counsel of record

Phone:

Fax:

E-mail:

other:

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

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

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

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration on Order Granting Summary Judgment

Estimated Time Needed: 1 hour

Court Reporter Needed: YES / NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion/Order -

Signature of Attorney for Plaintiff / Defendant

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$25.00**

☐ **EXEMPT:**

Rule to Show Cause in Child or Spousal Support
Domestic Abuse or Abuse and Neglect

Indigent Status

State Agency v. Indigent Party

Sexually Violent Predator Act

Post-Conviction Relief

Motion for Stay in Bankruptcy

Motion for Publication

Motion for Execution (Rule 69, SCRPC)

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

Name of Court Reporter:

Other:

JUDGE'S SECTION

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

☐ Other:

JUDGE CODE

Date:

CLERK'S VERIFICATION

Collected by: _____
(print name)

DATE FILED: _____

☐ **MOTION FEE COLLECTED: \$**

☐ **CONTESTED - AMOUNT DUE: \$**

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

vs.

WW & LB Development Company, LLC,
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DLJ Construction, LLC, Dewayne Bates,
The Bates Group, LLC, Bridges
Construction Co., Brewer Construction,
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Southern Framing Corporation, AB
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Stone, DJL Construction Company, L.L.P.,
Adrian Mondragon, individually and d/b/a
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Causey,

Defendants.

Chuck's Construction Co., Inc.,

Third Party Plaintiff,

vs.

Vereen Concrete Co., Inc. and Asphalt
Pavement Maintenance of Myrtle Beach,
Inc.

Third Party Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-26-3901

(Case No. 2007-CP-26-0228 and 2008-CP-26-4690 were
consolidated under 2008-CP-26-4690 by Order filed 3/31/09)

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION ON
ORDER GRANTING SUMMARY
JUDGMENT AS TO SPEEDY
CONCRETE**

CLERK OF COURT
14 JUN 11 PM 4:26

TO: SPEEDY CONCRETE, DEFENDANT, AND ITS ATTORNEY, MIKE SMITH, ESQUIRE:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Rivergate Homeowners' Association (hereinafter the HOA), by and through its undersigned attorney, has filed this motion pursuant to Rule 59(e), SCRCF, requesting that the Court reconsider, alter, or amend its May 7, 2014 order granting the Defendant Speedy Concrete's (hereinafter Speedy) motion for summary judgment.

MOTION FOR RECONSIDERATION

The general grounds of this Motion are set forth below, although Plaintiff reserves the right to supplement this Motion at the hearing. The undersigned requests a full hearing so that detailed arguments can be made on the record.

Principal Issues

- I. Whether the Court erred in granting summary judgment to Speedy based on the statute of limitations?
- II. Whether the doctrine of equitable tolling applies?
- III. Whether the doctrine of equitable estoppel applies?
- IV. Whether public policy dictates that the statute of limitations not begin to run until on or after June 18, 2010?
- V. Whether the HOA has standing to bring a lawsuit related to limited common elements?
- VI. Whether there is evidence of construction defects or substandard work as it relates to Speedy's scope of work at the Rivergate project?
- VII. Whether there is evidence of damages as a result of Speedy's scope of work at the Rivergate project?

Applicable Law

Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (2010); Cherry v. Myers Timber Co., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013); see Rule 56(c), SCRCF ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law.”). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 178 (2013); Graham v. Welch, Roberts and Amburn, LLP, 404 S.C. 235, 743 S.E.2d 860 (Ct. App. 2013). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

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The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Bank of America, N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (2011); Major v. City of Hartsville, 398 S.C. 257, 728 S.E.2d 52 (Ct. App. 2012).

“To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.” Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013) (internal quotations omitted).

ARGUMENTS

I. The Statute of Limitations began to run on or about June 18, 2010.

In South Carolina, a party must commence an action within three years of the date the cause of action arises. S.C. Code Ann. § 15-3-530 (2005). Rivergate’s claims are governed by a three-year statute of limitations. The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered. Holly Woods Ass’n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011). The discovery rule applies to the instant case.

According to the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. Graham v. Welch, Roberts and Amburn, LLP, 404 S.C. 235, 743 S.E.2d 860 (Ct. App. 2013). South Carolina courts have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996).

In Bayle v. South Carolina Department of Transportation, the Court of Appeals articulated:

The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001) (internal citations omitted).

However, when conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a jury to decide. See Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000) (noting determination of date statute of limitations began to run in particular case is question of fact for jury when parties present conflicting evidence); Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) (stating jury must resolve conflicting evidence as to whether claimant knew or should have known he had cause of action).

The limitations period is triggered by knowledge of facts, diligently acquired, sufficient to put an injured person on notice that a cause of action may exist against another. True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (1997).

In this case, the resolution hinges on when the three-year statute of limitations began to run. The evidence, viewed in a light most favorable to the Plaintiff, shows a genuine issue of material fact exists as to whether a reasonable person would have known the existence of their claims against the Defendant Speedy prior to June 18, 2010.

In his affidavit, Mr. Drew Wilkie, the Plaintiff's forensic engineer, concluded: "While the HOA may have been aware of undesirable symptoms at the HOA such as standing water, erosion, etc., it is my opinion that the HOA would not have been aware that these symptoms were associated with or caused by civil construction and design defects until the report that I issued on June 18, 2010." However, he obviously advised Plaintiff's counsel of an action against the Defendants prior to the issuance of the final written report. (Exhibit A).

Based on the above, there is a genuine issue of material fact as to whether the statute of limitations began to run prior to June 18, 2010.

II. Equitable Tolling Applies

Alternatively, equitable tolling applies even if the Court determines that the Plaintiff could reasonably have concluded that a claim existed against Speedy prior to June 18, 2010.

Equitable tolling is a doctrine that is applied on rare occasions in South Carolina to stop the running of statutes of limitations. Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008). Equitable tolling is reserved for extraordinary circumstances. Id.; see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."). The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. Pelzer, 378 S.C. at 521, 662 S.E.2d at 620. Equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine. Id. Equitable tolling has been deemed available where:

- (1) extraordinary circumstances prevented the plaintiff from filing despite his or her diligence;
- (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and
- (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

In Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), the Court of Appeals stated:

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.

The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.

It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.

....

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Id. at 371-72, 725 S.E.2d at 125 (quoting Hooper v. Ebenezer Senior Servs. & Rehab. Ctr. 386 S.C. 108, 115-17, 687 S.E.2d 29, 32-33 (2009)) (citations and quotation marks omitted).

In this case, the evidence reveals that the Plaintiff's causes of action could not have started to run until after October 31, 2007 because the homeowners did not have control of the Rivergate Homeowners Association until after October 31, 2007. In a Rivergate HOA letter dated September 12, 2007 to the homeowners, the managing member of the developer/general contractor WW & LB, Wayne Winderman (hereinafter Winderman), stated that "[t]he time is long overdue to turn the HOA over to an elected Board of Directors . . . The resignation is effective October 31, 2007." (Exhibit B)(emphasis added). Additionally, Mr. Winderman sent a letter to the management company Atalaya Management, Santee Cooper, and Little River Water & Sewer stating that WW & LB "will be vacating this facility and this will be turned over to the [HOA]." (Exhibit C).

Prior to these letters dated on or about September 12, 2007, the HOA and its Board of Directors were controlled by the developer/general contractor Wayne Winderman. The Board of Directors was the decision making body that would have decided whether to file a construction defect suit or not. Obviously, the developer-controlled HOA and its Board of Directors would not have sued itself, the developer/general contractor WW & LB, or its agents including, but not limited to, Speedy.

Additionally, despite all due diligence, the HOA was powerless to bring suit until the date of the transfer from the developer/general contractor to the homeowners on October 31, 2007. In fact, the homeowners were very aware that they did not have the authority to bring suit when the HOA was developer-controlled. In homeowner meeting minutes dated November 4, 2006, a member of the ad hoc committee, Sylvia Lindsay, stated that "these are the issues we are addressing for the whole group, not personal punch list, and nothing can be done until we have an attorney, which we can't get until we are a HOA." (Exhibit D). As such, Ms. Lindsay and the ad hoc committee were acknowledging their lack of authority to bring suit on behalf of the HOA until the developer transferred the HOA to the homeowners.

The homeowners' lack of authority was also emphasized by the developer-controlled HOA in a letter dated July 6, 2005 to the ad hoc committee. In that Rivergate HOA letter, Winderman stated, "Please note that your committee will not be recognized for any other purpose [than] to address legitimate concerns of the HOA." (Exhibit E). In other words, the

HOA is controlled by the developer and only the developer will determine what does and does not happen at the HOA.

Additionally, Speedy implies that the homeowners should have known of construction defects and brought suit based on the testimony of Mr. Jim Dunn. However, this is an incorrect assertion. Instead, Mr. Dunn and the ad hoc committee were working with the developer-controlled HOA to address problems and propose improvements especially since the ad hoc committee lacked the authority to correct the defects or bring suit on behalf of the HOA.

Based on the above, the statute of limitations was tolled until after October 31, 2007 because the developer/general contractor WW & LB did not transfer control to the homeowners until after October 31, 2007. Thus, by filing their cause of action on April 28, 2010, the Plaintiff commenced this action well within the three-year statute of limitations period. Therefore, the court erred in granting summary judgment in favor of Speedy.

III. Speedy should be estopped from asserting the Statute of Limitations

In South Carolina, "[a] defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct." Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (citations and quotation marks omitted). "The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue." Id. at 373, 725 S.E.2d at 125.

Here, it is evident that the developer/general contractor and its agents including, but not limited to, Speedy should be estopped from asserting the statute of limitations against the homeowner-controlled HOA. Specifically, the developer and developer-controlled HOA induced the homeowners to believe that there would be future inspections and repairs to address construction issues.

The developer Winderman stated in a letter on Rivergate HOA letterhead dated July 6, 2005 that the HOA "made inspections of drainage issues and will address the same as quickly as possible." Obviously, no end date was given. Moreover, the developer-controlled HOA stated that "[c]oncerning issues of maintenance they will be fairly addressed." (Exhibit F).

Additionally, the developer and developer-controlled HOA even stated that an engineer would inspect the site for road repairs that included Speedy's scope of work "[u]pon conclusion of construction." As of today, WW & LB owns at least one lot at the Rivergate development with tax map number 131-02-01-013. (Exhibit G). Whether construction was considered complete at the date of transfer from the developer to the homeowners after October 31, 2007 or construction is on-going because there is at least one undeveloped lot at the Rivergate development is a question of fact for a jury. Regardless, the Plaintiff homeowner-controlled HOA could have believed that repairs involving the construction defects were possible by the developer and developer-controlled HOA up to or after October 31, 2007.

Based on the above, Speedy should be equitably estopped from asserting the statute of limitations as a bar to Plaintiff's claims.

IV. Equity and public policy dictate that the Plaintiff's claims should not be barred by the Statute of Limitations

In addition to the above, equity and public policy dictate that the Plaintiff's claims should not be barred by the statute of limitations. The Plaintiffs did not sit on their rights, but acted with due diligence in determining whether a claim existed against AB Consulting.

In this case, within three years from the transfer of the HOA to the homeowners from developer/general contractor, the homeowner-controlled HOA hired a forensic engineer, investigated the civil construction and design issues, and brought suit against the appropriate sub-contractors and design professional AB Consulting. The HOA was transferred to the homeowners after October 31, 2007 and the final report from the HOA's forensic engineer is dated June 18, 2010.

Additionally, Plaintiff's actions were in-line with the law of South Carolina. In this type of action, South Carolina requires the issuance of an affidavit by a professional prior to bringing a construction defect suit or the Plaintiff may be subject to allegations that the Plaintiff filed a frivolous or meritless lawsuit. See S.C. Code Ann. § 15-36-100 (2005).

Based on the above, the Plaintiff took due care to find an expert to investigate and determine the existence of and extent of any construction defects prior to filing their cause of action. As such, a reasonable person could have determined that the statute of limitations began to run, at the earliest, on or about the date of the final report dated June 18, 2010. Therefore, equity and public policy dictate that Plaintiff's claims against Speedy should not be barred by the statute of limitations.

V. The HOA has standing to bring a lawsuit related to limited common elements

In the Order Granting Speedy's Motion for Summary Judgment as to Plaintiff, Speedy asserts that the HOA does not have standing to bring a lawsuit for the limited common elements. However, this argument is misplaced.

Instead of repeating previous arguments made by the Plaintiff regarding this issue, Plaintiff incorporates Plaintiff's Memorandum of Law in Opposition to Defendant Speedy Concrete's Motion for Summary Judgment (hereinafter Memorandum) that was clocked and filed on February 27, 2014 (Exhibit H).

Based on the Memorandum, the HOA has standing to bring a lawsuit related to limited common elements.

VI. There is evidence that Speedy's scope of work failed to conform to industry standards at the Rivergate project

In its argument, Speedy states that "there were no presentations of any expert testimony nor other evidence which indicates Speedee Concrete failed to conform to industry standards in the application of its concrete at the Rivergate project (other than the slope of the graded drives)." This contention, however, is incorrect.

According to the Plaintiff's forensic engineer Drew Wilkie, Speedy and the other defendants were responsible for construction and design defects at the Rivergate project. In his affidavit, Mr. Wilkie references his report and states that "it is my opinion that the Defendants were aware or should have been aware of the civil construction and design deficiencies at the time of construction and thereafter . . ." This statement provides that all the named defendants including, but not limited to, Speedy were responsible for one or more of the defects at the Rivergate project.

Moreover, Mr. Wilkie testified to the failure of the defendants to conform to industry standards at his depositions taken on January 19, 2012 and August 16, 2013. (Wilkie Depositions, Volumes I and II; See Exhibits I and J). Specifically as to Speedy, Mr. Wilkie testified that Speedy failed to conform to industry standards because Speedy poured concrete driveways on improper grade. (Wilkie Deposition, Volume II, p. 136-137).

Additionally, and most importantly, Speedy even admitted that its work was defective. As stated in Speedy's Order Granting Summary Judgment, "Speedee Concrete advised the developer/general contractor of the project, WW & LB Development, Inc., through its representative Wayne Winderman, that the driveways were too steep." Speedy cannot have it both ways. It cannot state that it knew of its defective work and also state that there is no evidence of defective work.

Based on the above, there are genuine issues of material fact and Speedy's motion for summary judgment should be denied.

VII. There is evidence that Speedy's work caused damages at the Rivergate project

Speedy argues that "the Plaintiff has not shown any damages from any of the work performed by Speedee Concrete in any of the common areas that are not directly attributable to the slope issue." However, the fact that Speedy poured the concrete driveway on an improper grade (and even admitted to this defect as stated above) actually contributed to damages at the Rivergate project.

According to the HOA's forensic engineer, the construction of the driveways on improper grade has caused a condition called soil piping. Mr. Wilkie testified that soil piping is "the force of the water is pushing sand and sediment under the slab and underneath the asphalt pavement . . ." (Wilkie Deposition, Volume II, p. 137). The soil piping causes the asphalt roads

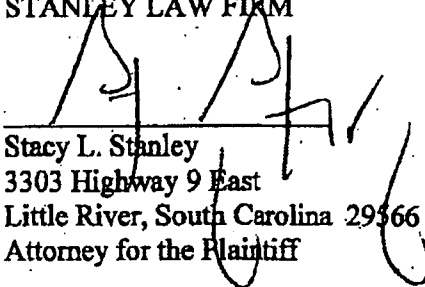
are heave especially at areas adjacent to the improperly constructed driveways. (Wilkie Deposition, Volume II, p. 282-283). The Plaintiff's estimator A.O. Hardee determined the cost of repairing the roadways due to the soil piping and resulting damages. (Exhibit K). Therefore, contrary to Speedy's assertion, there are damages as a result of Speedy's defective work.

Based on the above, there are genuine issues of material fact and Speedy's motion for summary judgment should be denied.

Conclusion

For the reasons argued above, the Plaintiff respectfully submits that the court erred in granting summary judgment in favor of the Defendant Speedy Concrete. Utilizing the mere scintilla of evidence burden, genuine issues of material fact exist that preclude summary judgment. Accordingly, the Court, pursuant to Rule 59(e), SCRCP, should alter or amend its Order Granting Summary Judgment to the Defendant by vacating the order and/or denying summary judgment to the Defendant.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, South Carolina 29566
Attorney for the Plaintiff

6-11, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

RECEIVED

APR 23 2015

Court of Appeals

Case No. 2010-CP-26-03901

Rivergate Homeowners' Association, ... Appellant,

v.

WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers,
Inc., and Chuck's Construction Co., Inc., ... Defendants.

Of Whom Speedy Concrete, AB Consulting Engineers, Inc., and Chuck's Construction
Co., Inc are Respondents.

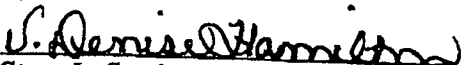
MOTION TO CONSOLIDATE

Pursuant to Rule 240(a), SCACR, the undersigned attorney, Counsel for Appellant, Rivergate Homeowners' Association, files this motion respectfully asking the Court of Appeals to consolidate the following cases: *Rivergate Homeowners' v. WW & LB (Speedee Concrete, Inc.)*, Appellate Case No. 2015-000248, *Rivergate Homeowners' v. WW & LB (AB Consulting)*, Appellate Case No. 2015-000594, and *Rivergate v. WW & LB (Chuck's Construction, Inc.)*, Appellate Case No. 2015-000249.

Speedee Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc. are Defendants/Respondents in the above-captioned action. Additionally, the transcript, which we received on April 14, 2015, is the same for the three cases.

Moreover, the cases share the same and/or similar issues on appeal. Finally, Stephanie Burton, attorney for AB Consulting Engineers, primarily argued the Motion for Summary Judgment.

Dated: April 21, 2015


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V. Denise Hamilton
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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Robert Sanger, et al.

vs.

WW & LB Development Co., LLC, et al.,

Defendant(s)

IN THE COURT OF COMMON PLEAS

FILED
HORRY COUNTY

CIVIL ACTION COVERSHEET

Plaintiff(s) JAN 12 PM 12:56

07 - CP - 26 - 0228

CLERK OF COURT

(Please Print)

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☒ Other (699) <u>Construction Negligence</u>		

Submitting Party Signature: [Signature]

Date: 1-11-07

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR UNDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 07-CP-26-

FILED
HORRY COUNTY
07 JAN 12 PM 12:55
CLERK OF COURT

ROBERT SANGER, representing a class
composed of each and every person who
purchased property in the Rivergate Horizontal
Property Regime,

PLAINTIFF,

vs.

WW & LB Development Company., LLC,
WWI Development Company, LLC,
Pine Bluff Construction Company, Inc.,
Keye Construction Co., Inc.,
Right Way Construction Company, Inc.,
RWG, Inc.,
RWGR, Inc.
Russell Baltzer,
Aiello Associates,
Daniels Engineering, Inc.
Rivergate Homeowners' Association,
Rivergate Homeowners' Association Board of
Directors,
Wayne Winderman, individually,
Salvatrice Foran, individually, and
Gerard Foran, individually,

DEFENDANTS.

SUMMONS

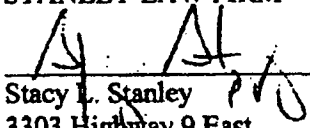
(NEGLIGENCE
 BREACH OF WARRANTIES,
 UNFAIR TRADE PRACTICES,
 BREACH OF CONTRACT,
 CIVIL CONSPIRACY, BREACH
 OF FIDUCIARY DUTY)
(JURY TRIAL REQUESTED)

TO: THE DEFENDANTS, ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this
action, a copy of which is herewith served upon you, and to serve a copy of your Answer
on the subscriber at his office at 3303 East Highway 9, Little River, South Carolina
29566, within THIRTY (30) DAYS after the service hereof, exclusive of the day of such

service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiffs

1-11, 2007.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 07-CP-26-

VS.

DEFENDANTS.

(JURY TRIAL REQUESTED)

101

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Robert Sanger (hereinafter Sanger) is a resident of South Carolina and is a property owner in the Rivergate Horizontal Property Regime in Horry County, South Carolina and brings this action in his name and pursuant to Rule 23, SCRCPP, as representing a class composed of each and every person who has purchased property in the Rivergate Horizontal Property Regime. The Plaintiff would further allege and show: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the amount in controversy exceeds One Hundred and No/100 (\$100.00) Dollars for each member of the class.

2. WW & LB Development Company, LLC (hereinafter WW & LB) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

3. WWI Development Company, LLC (hereinafter WWI) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

4. Pine Bluff Construction Co., Inc., (hereinafter Pine Bluff) is a corporation

organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

5. Keye Construction Co., Inc., (hereinafter Keye Construction) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

6. Defendant Right Way Construction Company, Inc. (hereinafter Right Way) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

7. Defendant RWG, Inc. (hereinafter RWG) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

8. Defendant RWGR, Inc. (hereinafter RWGR) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

9. Defendant Russell Baltzer (hereinafter Baltzer) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

10. Defendant Aiello Associates (hereinafter Aiello) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

11. Defendant Daniels Engineering, Inc. (hereinafter Daniels) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

12. Rivergate Homeowners' Association, Inc. (hereinafter HOA) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. The Rivergate Homeowners' Association, Inc. was formed pursuant to the Master Deed for the Rivergate Horizontal Property Regime whose responsibilities include, but are not limited to, maintenance and repair of the property.

13. Rivergate Homeowners' Association, Inc. Board of Directors (hereinafter Board of Directors) is the entity that is responsible for the affairs of the HOA and has the powers and duties for the administration of the HOA's affairs.

14. Wayne Winderman (hereinafter Winderman) is a Board member and president of the HOA.

15. Salvatrice Foran is a Board member and vice-president, secretary, and treasurer of the HOA.

16. Gerard Foran is a Board member of the HOA.

17. The HOA owns property in Horry County, South Carolina.

18. Defendants WW & LB or WWI own property that consists of the Rivergate Horizontal Property Regime.

19. Jurisdiction is proper in Horry County, South Carolina.

20. Venue is proper in Horry County, South Carolina.

FACTS COMMON TO ALL CAUSES OF ACTION

21. Defendants hold or have held certain real estate in Horry County, South Carolina that was developed into the Rivergate Horizontal Property Regime project (hereinafter Rivergate project).

22. Defendants developed the Rivergate project.

23. Defendants built individual condominium units in the Rivergate project.

24. Defendants sold individual condominium units in the Rivergate project.

25. Defendants marketed individual condominium units in the Rivergate project.

26. Defendants used in-house construction managers for the construction of the Rivergate project.

27. Defendants used architects for the construction of the Rivergate project.

28. Defendants used in-house purchasing agents for the construction of the Rivergate project.

29. Defendants used in-house, on-site construction superintendents for the construction of the Rivergate project.

30. Defendant Pine Bluff was the General Contractor of the Rivergate project.

31. Defendant Keye Construction was the General Contractor of the Rivergate project.

32. Defendant Right Way was the General Contractor of the Rivergate project.

33. Defendant RWG, Inc. was the General Contractor of the Rivergate project.

34. Defendant RWGR, Inc. was the General Contractor of the Rivergate project.

35. Defendants built the Rivergate project.
36. Defendants' architect prepared plans and specifications for the Rivergate project.
37. Defendants' architect was responsible for design of work performed on the Rivergate project.
38. Defendants' architect was responsible for construction on the Rivergate project.
39. Defendants' architect was responsible for design development on the Rivergate project.
40. Defendants' architect was responsible for the construction documents on the Rivergate project.
41. Defendants' architect was responsible for the supervision on the Rivergate project.
42. Defendants' architect was responsible for the acceptance of work on the Rivergate project.
43. Since the completion of construction, the Plaintiff has discovered structural and safety defects.
44. Since the completion of construction, the Plaintiff has discovered continuous and repeated damages.
45. The structural and safety defects and the continuous and repeated damages are the result of defective design.
46. The structural and safety defects and continuous and repeated damages are the result of defective construction.

47. The structural and safety defects include, but are not limited to, the following:

- a. inadequate attachment of metal fascia;
- b. improper and incomplete flashing details;
- c. improper application of the building wrap;
- d. improper or absence of protection at wall openings;
- e. improper installation or absence of flashing;
- f. marginal attachment of vinyl siding and vinyl siding accessories;
- g. improper vinyl siding installation details;
- h. improper window installation;
- i. improper waterproofing details;
- j. marginal framing of the gable end walls;
- k. improper construction of sidewalks, driveways, and asphalt roadway;
- l. improper driveway slopes; and
- m. defective storm water management drainage system.

FIRST CAUSE OF ACTION

(NEGLIGENCE: WW & LB, WWI, PINE BLUFF, KEYE CONSTRUCTION, RIGHT WAY, RWG, RWGR, BALTZER, AIELLO, AND DANIELS)

48. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

49. Defendants owed a duty to Plaintiff to exercise the degree of skill necessary to construct, supervise, inspect, and review the design and construction of the Rivergate project.

50. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with the customary and ordinary standards of the building and construction industry.

51. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with manufacturer's specifications.

52. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with applicable building codes including, but not limited to, the Standard Building Code.

53. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants that constitute negligence and/or gross negligence in one or more of the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction industry;
- c. in failing to properly install standard materials and products;
- d. in failing to properly install materials and products that are in accordance with the project's plans and specifications;
- e. in failing to properly install material and products in accordance with the instructions of product and material manufacturers;
- f. in failing to perform work in accordance with applicable building codes including, but not limited to, the Standard Building Code;

- g. in failing to properly supervise or provide supervision and oversight for employees, agents, and subcontractors to ensure that all work proceeded in accordance with the plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in failing to accept conforming materials and labor;
- i. in failing to provide sufficient workmanship and/or materials in the project with proper supervision and inspections in accordance with plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- j. in failing to inform the in-house architect of the defects in plans and specifications.

54. As a direct and proximate result of the negligence and/or gross negligence by Defendants, Plaintiff have suffered injuries and actual damages in the amount equal to the repair, maintenance, and reconstruction costs required and to be expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, continuous and repeated damages, and punitive damages.

SECOND CAUSE OF ACTION
(BREACH OF EXPRESS WARRANTIES: WW & LB, WWI, PINE BLUFF, KEYE CONSTRUCTION, RIGHT WAY, RWG, RWGR, BALTZER, AJELLO, AND DANIELS)

55. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

56. Defendants asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies.

57. Defendants impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner in accordance with accepted industry and construction standards.

58. Defendants impliedly warranted that the project would be free of construction defects.

59. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants and constitute negligence and/or gross negligence including, but not limited to, the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications as designed;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- c. in using and/or supplying substandard materials and products;
- d. in installing or allowing the installation of materials and products not in accordance with the project's plans and specifications;
- e. in installing or allowing the installation of materials and products in violation of instructions and directions provided by the material and product manufacturers;

- f. in allowing, accepting, or performing the project work in violation of the applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in accepting and allowing the installation of defective, substandard, or non-conforming materials and labor;
- i. in accepting and performing deficient, substandard, or defective workmanship or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, plans and specifications, Standard Building Code requirements, and customary and ordinary construction practices; and
- j. in failing to inform the architect of the defects in the plans and specifications.

60. As a direct and proximate result of Defendants'

breach of its express and implied warranties, Plaintiff suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be required and expended in the future over the expect life of the structure, loss of use, diminution in value, and continuous and repeated damages.

THIRD CAUSE OF ACTION

(BREACH OF IMPLIED WARRANTIES FOR HABITABILITY AND FITNESS FOR A PARTICULAR PURPOSE: WW & LB, WWI, PINE BLUFF, KEYE CONSTRUCTION, RIGHT WAY, RWG, RWGR, BALTZER, AIELLO, AND DANIELS)

61. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.
62. Defendants sold condominiums along with their proportionate share of the common elements.
63. Defendants made implied warranties of habitability and fitness for a particular purpose.
64. Defendants breached their implied warranties of habitability and fitness for a particular purpose by selling the condominiums along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the buildings and common elements containing the defects and deficiencies as set forth above.
65. As a direct and proximate result of Defendants' breach of its implied warranties, Plaintiff have suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, and continuous and repeated damages.

FOURTH CAUSE OF ACTION
**(UNFAIR TRADE PRACTICES: WW & LB, WWI, PINE BLUFF, KEYE
CONSTRUCTION, RIGHT WAY, RWG, RWGR, BALTZER, AIELLO, AND
DANIELS)**

66. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

67. Defendants design, develop, and construct buildings that are defective and deficient.

68. Defendants have been aware of these defects and deficiencies, but continue to build the buildings without any concern for the public interest.

69. Defendants' actions impact the public interest.

70. Defendants' actions have been repeated or have the potential for repetition in the future.

71. As a direct result and proximate cause of Defendants' actions, Plaintiff incurred actual damages including, but not limited to, the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value, and continuous and repeated damages.

72. Defendants' actions were willful or Defendants could have ascertained that the above-mentioned conduct violated the Unfair Trade Practices Act and, therefore, Plaintiff is entitled to treble damages.

FIFTH CAUSE OF ACTION
(NEGLIGENCE: WW & LB, WWI, AND HOA)

73. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

74. Defendants owed a duty to Plaintiff to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.

75. Defendants owed a duty to Plaintiff to ensure that the HOA and Rivergate project was operated in an efficient and business-like manner.

76. Defendants were, individually, jointly, or in combination, negligent, grossly negligent, wanton, willful, and careless in one or more of the following:

- a. In failing to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.
- b. In failing to operate the HOA and Rivergate project in an efficient and business-like manner;
- c. In failing to use good business practices for the supervision, operation, maintenance, or repair of the HOA and Rivergate project;

77. Defendants failed to use the degree of skill, professionalism, and good business practices that an ordinarily prudent company would have used to supervise, operate, maintain, or repair the HOA and Rivergate project, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

78. Based on the above, Plaintiff are entitled to actual damages, punitive damages, continuous and repeated damages, attorney's fees, and costs of this action.

SIXTH CAUSE OF ACTION
(BREACH OF CONTRACT: WW & LB and WWI)

79. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

80. Plaintiff entered into a Purchase Agreement with WW & LB or WWI.

81. WW & LB or WWI breached these agreements or unjustifiably failed to perform the agreements.

82. Plaintiff has suffered damages as a direct and proximate result of the breach.

83. Based on the above, Plaintiff is entitled to actual damages, attorney's fees, and costs.

SEVENTH CAUSE OF ACTION
(BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT: WW & LB and WWI)

84. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

85. Plaintiff entered into a Purchase Agreement with WW & LB or WWI.

86. WW & LB or WWI have breached these agreements or unjustifiably failed to perform the agreements.

87. Defendants fraudulently intended to breach the agreements.

88. Defendants committed a fraudulent act that accompanied the breach of

agreements.

89. Based on the above, Plaintiff are entitled to actual damages, punitive damages, attorney's fees, and costs.

EIGHTH CAUSE OF ACTION
(CIVIL CONSPIRACY: WW & LB, WWL HOA, BOARD OF DIRECTORS,
WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

90. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

91. Two or more of the Defendants combined their actions.

92. Defendants combined their actions for the purpose of injuring the Plaintiff.

93. Defendants' actions caused special damages.

94. Based on the above, Plaintiff is entitled to actual damages including, but not limited to, loss of profits, diminution in value, continuous and repeated damages, and punitive damages.

NINTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY: BOARD OF DIRECTORS, WAYNE
WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

95. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

96. Defendants failed to act in good faith as corporate officers.

97. Defendants failed to act with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

98. Defendants failed to act in a manner that they reasonably believed to be in the

best interests of the HOA.

99. Plaintiff has suffered damages as a result of Defendants' actions, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

100. Based on the above, Plaintiff is entitled to damages for harm caused by the breach of fiduciary duty owed to Plaintiff.

WHEREFORE, the Plaintiff prays as follows:

A. For the amount equal to actual damages that includes, but is not limited to, the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value of the Rivergate project;

B. For punitive damages;

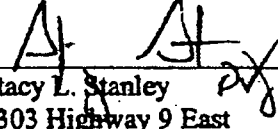
C. For treble damages;

D. For continuous and repeated damages;

E. For the costs and disbursements of this action; and

F. For such other and further relief as this Court may deem just and proper.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiff

1-11, 2007.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 07-CP-26-0228

ROBERT SANGER, representing a class of
similarly situated people,

PLAINTIFF,

vs.

WW & LB Development Company., LLC,
Keye Construction Co., Inc.,
Right Way Construction Company, Inc.,
RWG, Inc.,
Russell Baltzer,
Aiello Associates,
Daniels Engineering, Inc.
Rivergate Homeowners' Association,
Rivergate Homeowners' Association Board of
Directors,
Wayne Winderman, individually,
Salvatrice Foran, individually, and
Gerard Foran, individually,
Marcos Soares, individually, and d/b/a M.S.
Construction,
William C. De Souza, individually,
James Eason, individually, and d/b/a James Eason
& Company,
D&D Cleaning and Construction, Inc.,
Joel's Framing,
Jo Freza,
Arolo Garcia,
Joaquin Geraldo Zeferino, individually, and
d/b/a Zeferino Framing,
Leo Trombley,
Judy Schultz,
J&D Interior Design,
Jose Dasmerces d/b/a J.P. Construction,
Scott Chandler d/b/a Coastal Custom Windows &
Doors,
R & D Construction,
Nicasio Ramirez Zunigo,
Walchir Morais, and
Marco Trebbi,

AMENDED SUMMONS

(JURY TRIAL REQUESTED)

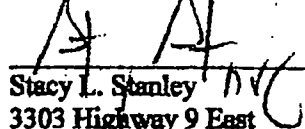
HORRY COUNTY
08 APR 20 AM 8:03
MELANIE HUGGINS
CLERK OF COURT

DEFENDANTS.)
)
)

TO: THE DEFENDANTS, ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscriber at his office at 3303 East Highway 9, Little River, South Carolina 29566, within THIRTY (30) DAYS after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiffs

4-29, 2008.

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 07-CP-26-0228

ROBERT SANGER, representing a class of
similarly situated people,

PLAINTIFF,

vs.

WW & LB Development Company., LLC,
Keye Construction Co., Inc.,
Right Way Construction Company, Inc.,
RWG, Inc.,
Russell Baltzer,
Aiello Associates,
Daniels Engineering, Inc.
Rivergate Homeowners' Association,
Rivergate Homeowners' Association Board of
Directors,
Wayne Winderman, individually,
Salvatrice Foran, individually, and
Gerard Foran, individually,
Marcos Soares, individually, and d/b/a M.S.
Construction,
William C. De Souza, individually,
James Eason, individually, and d/b/a James Eason
& Company,
D&D Cleaning and Construction, Inc.,
Joel's Framing,
Jo Freza,
Arolo Garcia,
Joaquin Geraldo Zeferino, individually, and
d/b/a Zeferino Framing,
Leo Trombley,
Judy Schultz,
J&D Interior Design,
Jose Dasmerces d/b/a J.P. Construction,
Scott Chandler d/b/a Coastal Custom Windows &
Doors,
R & D Construction,
Nicasio Ramirez Zunigo,
Walchir Morais, and
Marco Trebbi,

AMENDED COMPLAINT

(JURY TRIAL REQUESTED)

HORRY COUNTY
08 APR 20 AM 8:03
MELAHIE HUGGINS
CLERK OF COURT

DEFENDANTS.

TO: THE DEFENDANTS ABOVE NAMED

The Plaintiff, above named, complaining of the Defendants herein, respectfully alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Robert Sanger (hereinafter Sanger) is a resident of South Carolina and is a property owner in the Rivergate Horizontal Property Regime in Horry County, South Carolina and brings this action in his name and pursuant to Rule 23, SCRC, as representing a class of similarly situated people who have purchased property in the Rivergate Horizontal Property Regime. The Plaintiff would further allege and show: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the amount in controversy exceeds One Hundred and No/100 (\$100.00) Dollars for each member of the class.

2. WW & LB Development Company, LLC (hereinafter WW & LB) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

3. Keye Construction Co., Inc., (hereinafter Keye Construction and formerly known as Pine Bluff Construction) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

4. Defendant Right Way Construction Company, Inc. (hereinafter Right Way) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

5. Defendant RWG, Inc. (hereinafter RWG) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

6. Defendant Russell Baltzer (hereinafter Baltzer) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

7. Defendant Aiello Associates (hereinafter Aiello) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

8. Defendant Daniels Engineering, Inc. (hereinafter Daniels) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

9. Rivergate Homeowners' Association, Inc. (hereinafter HOA) is a non-

profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. The Rivergate Homeowners' Association, Inc. was formed pursuant to the Master Deed for the Rivergate Horizontal Property Regime whose responsibilities include, but are not limited to, maintenance and repair of the property. This lawsuit is specific as to the HOA from the inception of the Rivergate project to October 31, 2007.

10. Rivergate Homeowners' Association, Inc. Board of Directors (hereinafter Board of Directors) is the entity that was responsible for the administration of the HOA. This lawsuit is specific as to the Board of Directors from the inception of the Rivergate project to October 31, 2007.

11. Wayne Winderman (hereinafter Winderman) was a Board member and president of the HOA from the inception of the Rivergate project to October 31, 2007.

12. Salvatrice Foran was a Board member and vice-president, secretary, and treasurer of the HOA from the inception of the Rivergate project to October 31, 2007.

13. Gerard Foran was a Board member of the HOA from the inception of the Rivergate project to October 31, 2007.

14. Marcos Soares, individually, and d/b/a M.S. Construction Defendant (hereinafter Soares) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

15. William C. De Souza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

16. James Eason, individually, and d/b/a James Eason & Company is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
17. D & D Cleaning and Construction, Inc. is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
18. Joel's Framing is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
19. Jo Freza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
20. Arolo Garcia is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
21. Joaquin Geraldo Zeferino, individually, and d/b/a Zeferino Framing is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
22. Leo Trombley is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
23. Judy Schultz is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

24. J & D Interior Design is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

25. Jose Dasmerces d/b/a J. P. Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

26. Scott Chandler d/b/a Coastal Custom Windows & Doors is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

27. R & D Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

28. Nicasion Ramirez Zunigo is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

29. Walchir Morais is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

30. Marco Trebbi is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

31. The HOA owns property in Horry County, South Carolina.

32. Defendant WW & LB owns property that consists of the Rivergate Horizontal Property Regime.

33. Jurisdiction is proper in Horry County, South Carolina.

34. Venue is proper in Horry County, South Carolina.

FACTS COMMON TO ALL CAUSES OF ACTION

35. WW & LB holds or has held certain real estate in Horry County, South Carolina that was developed into the Rivergate Horizontal Property Regime project (hereinafter Rivergate project).

36. WW & LB developed the Rivergate project.

37. WW & LB built individual townhome units in the Rivergate project.

38. WW & LB marketed individual condominium units in the Rivergate project.

39. WW & LB used in-house construction managers for the construction of the Rivergate project.

40. WW & LB used in-house architects for the construction of the Rivergate project.

41. WW & LB used in-house purchasing agents for the construction of the Rivergate project.

42. WW & LB used in-house, on-site construction superintendents for the construction of the Rivergate project.

43. Defendant WW & LB was the General Contractor for the Rivergate project.

44. Defendant Keye performed supervisory services and inspections of the foundation, slab, and rough plumbing on Building 3 at the Rivergate project.

45. Defendant Right Way was the General Contractor for the Rivergate

project.

46. Defendant RWG was the General Contractor for the Rivergate project.

47. Defendants Right Way and RWG provided labor to install the framing, sheathing, Tyvek, roof felt, doors, windows, and siding at the Rivergate project.

48. Defendants Right Way and RWG provided labor and material to install the soffit/fascia and vinyl handrails at the Rivergate project.

49. Defendant Baltzer designed Building 25 (units 4235, 4237, 4243, and 4245) at the Rivergate project.

50. Defendant Aiello designed Building 25 (units 4235, 4237, 4243, and 4245) at the Rivergate project.

51. Defendant Daniels engineered the buildings that were constructed at the Rivergate project.

52. Defendants Rivergate HOA and Board of Directors failed to maintain or repair the common elements of the HOA.

53. Defendant Soares provided labor for all the framing, sheathing, Tyvek, and roof felt as a subcontractor to Right Way and RWG on Buildings 3 and 25, a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to Right Way and RWG on Buildings 2 and 15 at the Rivergate project, and installed the windows and doors as a subcontractor to Right Way and RWG on Buildings 3 and 15, and a portion of the windows and doors on Building 25 at the Rivergate project.

54. Defendant Desouza installed a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

55. Defendant Eason installed all of the windows, doors, framing, sheathing, Tyvek, and roof felt on the Clubhouse and a portion of the windows, doors, framing, sheathing, Tyvek, and roof felts as a subcontractor to RWG on Building 23 at the Rivergate project.

56. Defendant D & D installed all the windows and doors as a subcontractor to RWG on Building 5 at the Rivergate project.

57. Defendant Joel's Framing installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 18 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWB on Building 16 at the Rivergate project.

58. Defendant Freza installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 20 and all of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 1 and 3 and all fo the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 14 at the Rivergate project.

59. Defendant Garcia installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 15 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 13 at the Rivergate project.

60. Defendant Zeferino installed among other items the windows and doors as a subcontractor to RWG on Buildings 2 and 4 at the Rivergate project.

61. Defendant Trombley installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 18, and 19

and on all of the windows and doors as a subcontractor to RWG on Building 14 at the Rivergate project.

62. Defendant Schultz installed a portion of the windows and doors as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

63. Defendant J & D installed a portion of the windows and doors as a subcontractor to RWG on Building 22 at the Rivergate project.

64. Defendant J. P. Construction installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 21 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 22 at the Rivergate project.

65. Defendant Coastal Custom installed among other items a portion of the windows and doors as a subcontractor to RWG on Buildings 12, 13, and 16 at the Rivergate project.

66. Defendant Zunigo installed among other items all of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 2, 4, and 5 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 12 at the Rivergate project.

67. Defendant Morais installed all the siding and trim as a subcontractor to RWG on Buildings 1, 9, 12-16, 18, 20, 22, and 28 and the clubhouse and installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 18, 19, and 21 at the Rivergate project.

68. Defendant Trebbi installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 21, and 23 at the Rivergate project.

69. Since the completion of the Rivergate project, the Plaintiff has discovered structural and safety defects that relate back to the beginning of construction of the Rivergate project.

70. Since the completion of construction, the Plaintiff has discovered continuous and repeated damages.

71. The structural and safety defects and the continuous and repeated damages are the result of defective design.

72. The structural and safety defects and continuous and repeated damages are the result of defective construction.

73. The structural and safety defects include, but are not limited to, the following:

- a. inadequate attachment of metal fascia;
- b. improper and incomplete flashing details;
- c. improper application of the building wrap;
- d. improper or absence of protection at wall openings;
- e. improper installation or absence of flashing;
- f. marginal attachment of vinyl siding and vinyl siding accessories;
- g. improper vinyl siding installation details;
- h. improper window installation;
- i. improper waterproofing details;
- j. marginal framing of the gable end walls;
- k. improper construction of sidewalks, driveways, and asphalt roadway;
- l. improper driveway slopes; and

m. defective storm water management drainage system.

FIRST CAUSE OF ACTION

(NEGLIGENCE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMANN, SALVATRICE FORAN, AND GERARD FORAN)

74. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

75. Defendants owed a duty to Plaintiff to exercise the degree of skill necessary to construct, supervise, inspect, and review the design and construction of the Rivergate project.

76. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with the customary and ordinary standards of the building and construction industry.

77. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with manufacturer's specifications.

78. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with applicable building codes including, but not limited to, the Standard Building Code.

79. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants that constitute negligence and/or gross negligence in one or more of the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications;

- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction industry;
- c. in failing to properly install standard materials and products;
- d. in failing to properly install materials and products that are in accordance with the project's plans and specifications;
- e. in failing to properly install material and products in accordance with the instructions of product and material manufacturers;
- f. in failing to perform work in accordance with applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide supervision and oversight for employees, agents, and subcontractors to ensure that all work proceeded in accordance with the plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in failing to accept conforming materials and labor;
- i. in failing to provide sufficient workmanship and/or materials in the project with proper supervision and inspections in accordance with plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- j. in failing to inform the architect of the defects in plans and specifications.

80. As a direct and proximate result of the negligence and/or gross negligence by Defendants, Plaintiff has suffered injuries and actual damages in the amount equal to the repair, maintenance, and reconstruction costs required and to be expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, continuous and repeated damages, and punitive damages.

SECOND CAUSE OF ACTION
(BREACH OF EXPRESS WARRANTIES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMANN, SALVATRICE FORAN, AND GERARD FORAN)

81. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

82. Defendants asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies.

83. Defendants impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner in accordance with accepted industry and construction standards.

84. Defendants impliedly warranted that the project would be free of construction defects.

85. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants and constitute negligence and/or gross negligence including, but not limited to, the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications as designed;

- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- c. in using and/or supplying substandard materials and products;
- d. in installing or allowing the installation of materials and products not in accordance with the project's plans and specifications;
- e. in installing or allowing the installation of materials and products in violation of instructions and directions provided by the material and product manufacturers;
- f. in allowing, accepting, or performing the project work in violation of the applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in accepting and allowing the installation of defective, substandard, or non-conforming materials and labor;
- i. in accepting and performing deficient, substandard, or defective workmanship or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, plans and

specifications, Standard Building Code requirements, and customary and ordinary construction practices; and

j. in failing to inform the architect of the defects in the plans and specifications.

86. As a direct and proximate result of Defendants'

breach of its express and implied warranties, Plaintiff suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be required and expended in the future over the expect life of the structure, loss of use, diminution in value, and continuous and repeated damages.

THIRD CAUSE OF ACTION

(BREACH OF IMPLIED WARRANTIES FOR HABITABILITY AND FITNESS FOR A PARTICULAR PURPOSE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

87. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

88. Defendants sold condominiums along with their proportionate share of the common elements.

89. Defendants made implied warranties of habitability and fitness for a particular purpose.

90. Defendants breached their implied warranties of habitability and fitness for a particular purpose by selling the condominiums along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the

buildings and common elements containing the defects and deficiencies as set forth above.

91. As a direct and proximate result of Defendants' breach of its implied warranties, Plaintiff have suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, and continuous and repeated damages.

FOURTH CAUSE OF ACTION

(UNFAIR TRADE PRACTICES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

92. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

93. Defendants design, develop, and construct buildings that are defective and deficient.

94. Defendants have been aware of these defects and deficiencies, but continue to build the buildings without any concern for the public interest.

95. Defendants' actions impact the public interest.

96. Defendants' actions have been repeated or have the potential for repetition in the future.

97. As a direct result and proximate cause of Defendants' actions, Plaintiff incurred actual damages including, but not limited to, the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to

be expended in the future over the expected life of the structure, loss of use, and diminution in value, and continuous and repeated damages.

98. Defendants' actions were willful or Defendants could have ascertained that the above-mentioned conduct violated the Unfair Trade Practices Act and, therefore, Plaintiff is entitled to treble damages.

FIFTH CAUSE OF ACTION
(NEGLIGENCE: WW & LB, HOA, AND BOARD OF DIRECTORS)

99. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

100. Defendants owed a duty to Plaintiff to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.

101. Defendants owed a duty to Plaintiff to ensure that the HOA and Rivergate project was operated in an efficient and business-like manner.

102. Defendants were, individually, jointly, or in combination, negligent, grossly negligent, wanton, willful, and careless in one or more of the following:

- a. In failing to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.
- b. In failing to operate the HOA and Rivergate project in an efficient and business-like manner;

- c. In failing to use good business practices for the supervision, operation, maintenance, or repair of the HOA and Rivergate project;

103. Defendants failed to use the degree of skill, professionalism, and good business practices that an ordinarily prudent company would have used to supervise, operate, maintain, or repair the HOA and Rivergate project, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

104. Based on the above, Plaintiff are entitled to actual damages, punitive damages, continuous and repeated damages, attorney's fees, and costs of this action.

SIXTH CAUSE OF ACTION
(BREACH OF CONTRACT: WW & LB)

105. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

106. Plaintiff entered into a Purchase Agreement with WW & LB.

107. WW & LB breached these agreements or unjustifiably failed to perform the agreements.

108. Plaintiff has suffered damages as a direct and proximate result of the breach.

109. Based on the above, Plaintiff is entitled to actual damages, attorney's fees, and costs.

SEVENTH CAUSE OF ACTION
(BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT: WW & LB)

110. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

111. Plaintiff entered into a Purchase Agreement with WW & LB.

112. WW & LB has breached these agreements or unjustifiably failed to perform the agreements.

113. Defendant fraudulently intended to breach the agreements.

114. Defendant committed a fraudulent act that accompanied the breach of agreements.

115. Based on the above, Plaintiff is entitled to actual damages, punitive damages, attorney's fees, and costs.

EIGHTH CAUSE OF ACTION
(CIVIL CONSPIRACY: WW & LB, WWL HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

116. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

117. Two or more of the Defendants combined their actions.

118. Defendants combined their actions for the purpose of injuring the Plaintiff.

119. Defendants' actions caused special damages.

120. Based on the above, Plaintiff is entitled to actual damages

including, but not limited to, loss of profits, diminution in value, continuous and repeated damages, and punitive damages.

NINTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY: BOARD OF DIRECTORS, WAYNE
WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

121. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

122. Defendants failed to act in good faith as corporate officers.

123. Defendants failed to act with the care an ordinarily prudent person in a Like position would exercise under similar circumstances.

124. Defendants failed to act in a manner that they reasonably believed to be in the best interests of the HOA.

125. Plaintiff has suffered damages as a result of Defendants' actions, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

126. Based on the above, Plaintiff is entitled to damages for harm caused by the breach of fiduciary duty owed to Plaintiff.

WHEREFORE, the Plaintiff prays as follows:

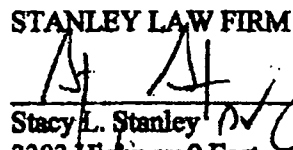
A. For the amount equal to actual damages that includes, but is not limited to, the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value of the Rivergate project;

B. For punitive damages;

C. For treble damages;

- D. For continuous and repeated damages;
- E. For the costs and disbursements of this action; and
- F. For such other and further relief as this Court may deem just and proper.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiff

4-29, 2008

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff(s)

vs.

WW & LB Development Co., LLC, et al.,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

08 - CP - 26 - 4690

(Please Print)

Submitted By: Stacy L. Stanley

Address: 3303 East Highway 9
Little River, SC 29566

SC Bar #: 13410

Telephone #: 843-390-9111

Fax #: 843-390-9187

Other:

E-mail: sstanley@stanleylawfirm.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☒ Other (699)
Construction Negligence

Submitting Party Signature: Stacy L. Stanley

Date: 6-12-08

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FROM MANDATED ADR COUNTIES OF

Florence, Holmes, Lexington, Richland, Greenville, and Anderson****

**** Contact Respective County Clerk of Court for modified ADR Program Rules**

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 08-CP-26-_____

Rivergate Homeowners' Association,)

PLAINTIFF,)

vs.)

WW & LB Development Company., LLC,)
Keye Construction Co., Inc.,)
Right Way Construction Company, Inc.,)
RWG, Inc.,)
Russell Baltzer,)
Aiello Associates,)
Daniels Engineering, Inc.)
Rivergate Homeowners' Association,)
Rivergate Homeowners' Association Board of)
Directors,)
Wayne Winderman, individually,)
Salvatrice Foran, individually, and)
Gerard Foran, individually,)
Marcos Soares, individually, and d/b/a M.S.)
Construction,)
William C. De Souza, individually,)
James Eason, individually, and d/b/a James Eason)
& Company,)
D&D Cleaning and Construction, Inc.,)
Joel's Framing,)
Jo Freza,)
Arolo Garcia,)
Joaquin Geraldo Zeferino, individually, and)
d/b/a Zeferino Framing,)
Leo Trombley,)
Judy Schultz,)
J&D Interior Design,)
Jose Dasmerces d/b/a J.P. Construction,)
Scott Chandler d/b/a Coastal Custom Windows &)
Doors,)
R & D Construction,)
Nicasio Ramirez Zunigo,)
Walchir Morais, and)
Marco Trebbi,)
DEFENDANTS.)

SUMMONS

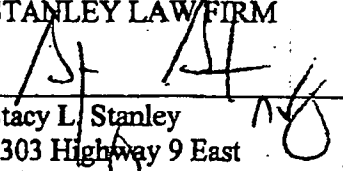
(JURY TRIAL REQUESTED)

HORRY COUNTY
08 JUN 13 PM 1:18
MELANIE HUGGINS
CLERK OF COURT

TO: THE DEFENDANTS, ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscriber at his office at 3303 East Highway 9, Little River, South Carolina 29566, within THIRTY (30) DAYS after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiffs

6-12, 2008.

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 08-CP-26-_____

Rivergate Homeowners' Association,

PLAINTIFF,

vs.

WW & LB Development Company., LLC,
Keye Construction Co., Inc.,
Right Way Construction Company, Inc.,
RWG, Inc.,
Russell Baltzer,
Aiello Associates,
Daniels Engineering, Inc.
Rivergate Homeowners' Association,
Rivergate Homeowners' Association Board of
Directors,
Wayne Winderman, individually,
Salvatrice Foran, individually, and
Gerard Foran, individually,
Marcos Soares, individually, and d/b/a M.S.
Construction,
William C. De Souza, individually,
James Eason, individually, and d/b/a James Eason
& Company,
D&D Cleaning and Construction, Inc.,
Joel's Framing,
Jo Freza,
Arolo Garcia,
Joaquin Geraldo Zeferino, individually, and
d/b/a Zeferino Framing,
Leo Trombley,
Judy Schultz,
J&D Interior Design,
Jose Dasmerces d/b/a J.P. Construction,
Scott Chandler d/b/a Coastal Custom Windows &
Doors,
R & D Construction,
Nicasio Ramirez Zunigo,
Walchir Morais, and
Marco Trebbi,

DEFENDANTS.

COMPLAINT

(JURY TRIAL REQUESTED)

HORRY COUNTY
08 JUN 13 PM 1:18
HELANE JUGGINS
CLERK OF COURT

TO: THE DEFENDANTS ABOVE NAMED

The Plaintiff, above named, complaining of the Defendants herein, respectfully alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. The Plaintiff Rivergate Homeowners' Association, Inc. (hereinafter Plaintiff) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. Plaintiff Rivergate Homeowners' Association, Inc. has individual homeowners on the Board of Directors and has controlled the homeowners association and the Board of Directors since November 1, 2007.

2. WW & LB Development Company, LLC (hereinafter WW & LB) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

3. Keye Construction Co., Inc., (hereinafter Keye Construction and formerly known as Pine Bluff Construction) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

4. Defendant Right Way Construction Company, Inc. (hereinafter Right Way) is a corporation organized and existing pursuant to the laws of South Carolina and

conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

5. Defendant RWG, Inc. (hereinafter RWG) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

6. Defendant Russell Baltzer (hereinafter Baltzer) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

7. Defendant Aiello Associates (hereinafter Aiello) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

8. Defendant Daniels Engineering, Inc. (hereinafter Daniels) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

9. Defendant Rivergate Homeowners' Association, Inc. (hereinafter HOA) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. The Rivergate Homeowners' Association, Inc. was formed pursuant to the Master Deed for the Rivergate Horizontal Property Regime whose responsibilities include, but are not limited to, maintenance and repair of the property. The Defendant Rivergate Homeowners' Association, Inc. was controlled by the developer Wayne Winderman from the inception of the HOA until October 31, 2007.

10. Rivergate Homeowners' Association, Inc. Board of Directors (hereinafter Board of Directors) is the entity that was responsible for the administration of the HOA. This lawsuit is specific as to the Board of Directors from the inception of the Rivergate project to October 31, 2007.

11. Wayne Winderman (hereinafter Winderman) was a Board member and president of the HOA from the inception of the Rivergate project to October 31, 2007.

12. Salvatrice Foran was a Board member and vice-president, secretary, and treasurer of the HOA from the inception of the Rivergate project to October 31, 2007.

13. Gerard Foran was a Board member of the HOA from the inception of the Rivergate project to October 31, 2007.

14. Marcos Soares, individually, and d/b/a M.S. Construction Defendant (hereinafter Soares) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

15. William C. De Souza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

16. James Eason, individually, and d/b/a James Eason & Company is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

17. D & D Cleaning and Construction, Inc. is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

18. Joel's Framing is an individual or company that conducts business

by and through its officers, agents, servants, and employees in Horry County, South Carolina.

19. Jo Freza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

20. Arolo Garcia is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

21. Joaquin Geraldo Zeferino, individually, and d/b/a Zeferino Framing is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

22. Leo Trombley is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

23. Judy Schultz is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

24. J & D Interior Design is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

25. Jose Dasmerces d/b/a J. P. Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

26. Scott Chandler d/b/a Coastal Custom Windows & Doors is an

individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

27. R & D Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

28. Nicasion Ramirez Zunigo is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

29. Walchir Morais is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

30. Marco Trebbi is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

31. The HOA owns property in Horry County, South Carolina.

32. Defendant WW & LB owns property that consists of the Rivergate Horizontal Property Regime.

33. Jurisdiction is proper in Horry County, South Carolina.

34. Venue is proper in Horry County, South Carolina.

FACTS COMMON TO ALL CAUSES OF ACTION

35. Defendant WW & LB holds or has held certain real estate in Horry County, South Carolina that was developed into the Rivergate Horizontal Property Regime project (hereinafter Rivergate project).

36. Defendant WW & LB developed the Rivergate project.

37. Defendant WW & LB built individual townhome units in the Rivergate project.
38. Defendant WW & LB marketed individual condominium units in the Rivergate project.
39. Defendant WW & LB used in-house construction managers for the construction of the Rivergate project.
40. Defendant WW & LB used in-house architects for the construction of the Rivergate project.
41. Defendant WW & LB used in-house purchasing agents for the construction of the Rivergate project.
42. Defendant WW & LB used in-house, on-site construction superintendents for the construction of the Rivergate project.
43. Defendant WW & LB was the General Contractor for the Rivergate project.
44. Defendant Keye performed supervisory services and inspections of the foundation, slab, and rough plumbing on Building 3 at the Rivergate project.
45. Defendant Right Way was the General Contractor for the Rivergate project.
46. Defendant RWG was the General Contractor for the Rivergate project.
47. Defendants Right Way and RWG provided labor to install the framing, sheathing, Tyvek, roof felt, doors, windows, and siding at the Rivergate project.
48. Defendants Right Way and RWG provided labor and material to install the soffit/fascia and vinyl handrails at the Rivergate project.

49. Defendant Baltzer designed Building 25 (units 4235, 4237, 4243, and 4245) at the Rivergate project.

50. Defendant Aiello designed Building 25 (units 4235, 4237, 4243, and 4245) at the Rivergate project.

51. Defendant Daniels engineered the buildings that were constructed at the Rivergate project.

52. Defendants Rivergate HOA and Board of Directors failed to maintain or repair the common elements of the HOA.

53. Defendant Soares provided labor for all the framing, sheathing, Tyvek, and roof felt as a subcontractor to Right Way and RWG on Buildings 3 and 25, a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to Right Way and RWG on Buildings 2 and 15 at the Rivergate project, and installed the windows and doors as a subcontractor to Right Way and RWG on Buildings 3 and 15, and a portion of the windows and doors on Building 25 at the Rivergate project.

54. Defendant Desouza installed a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

55. Defendant Eason installed all of the windows, doors, framing, sheathing, Tyvek, and roof felt on the Clubhouse and a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 23 at the Rivergate project.

56. Defendant D & D installed all the windows and doors as a subcontractor to RWG on Building 5 at the Rivergate project.

57. Defendant Joel's Framing installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 18 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWB on Building 16 at the Rivergate project.

58. Defendant Freza installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 20 and all of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 1 and 3 and all of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 14 at the Rivergate project.

59. Defendant Garcia installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 15 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 13 at the Rivergate project.

60. Defendant Zeferino installed among other items the windows and doors as a subcontractor to RWG on Buildings 2 and 4 at the Rivergate project.

61. Defendant Trombley installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 18, and 19 and on all of the windows and doors as a subcontractor to RWG on Building 14 at the Rivergate project.

62. Defendant Schultz installed a portion of the windows and doors as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

63. Defendant J & D installed a portion of the windows and doors as a subcontractor to RWG on Building 22 at the Rivergate project.

64. Defendant J. P. Construction installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 21 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 22 at the Rivergate project.

65. Defendant Coastal Custom installed among other items a portion of the windows and doors as a subcontractor to RWG on Buildings 12, 13, and 16 at the Rivergate project.

66. Defendant Zunigo installed among other items all of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 2, 4, and 5 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 12 at the Rivergate project.

67. Defendant Morais installed all the siding and trim as a subcontractor to RWG on Buildings 1, 9, 12-16, 18, 20, 22, and 28 and the clubhouse and installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 18, 19, and 21 at the Rivergate project.

68. Defendant Trebbi installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 21, and 23 at the Rivergate project.

69. Since the completion of the Rivergate project, the Plaintiff has discovered structural and safety defects that relate back to the beginning of construction of the Rivergate project.

70. Since the completion of construction, the Plaintiff has discovered continuous and repeated damages.

71. The structural and safety defects and the continuous and repeated damages are the result of defective design.

72. The structural and safety defects and continuous and repeated damages are the result of defective construction.

73. The structural and safety defects include, but are not limited to, the following:

- a. inadequate attachment of metal fascia;
- b. improper and incomplete flashing details;
- c. improper application of the building wrap;
- d. improper or absence of protection at wall openings;
- e. improper installation or absence of flashing;
- f. marginal attachment of vinyl siding and vinyl siding accessories;
- g. improper vinyl siding installation details;
- h. improper window installation;
- i. improper waterproofing details;
- j. marginal framing of the gable end walls;
- k. improper construction of sidewalks, driveways, and asphalt roadway;
- l. improper driveway slopes; and
- m. defective storm water management drainage system.

FIRST CAUSE OF ACTION

(NEGLIGENCE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

74. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

75. Defendants owed a duty to Plaintiff to exercise the degree of skill necessary to construct, supervise, inspect, and review the design and construction of the Rivergate project.

76. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with the customary and ordinary standards of the building and construction industry.

77. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with manufacturer's specifications.

78. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with applicable building codes including, but not limited to, the Standard Building Code.

79. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants that constitute negligence and/or gross negligence in one or more of the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications;

- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction industry;
- c. in failing to properly install standard materials and products;
- d. in failing to properly install materials and products that are in accordance with the project's plans and specifications;
- e. in failing to properly install material and products in accordance with the instructions of product and material manufacturers;
- f. in failing to perform work in accordance with applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide supervision and oversight for employees, agents, and subcontractors to ensure that all work proceeded in accordance with the plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in failing to accept conforming materials and labor;
- i. in failing to provide sufficient workmanship and/or materials in the project with proper supervision and inspections in accordance with plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- j. in failing to inform the architect of the defects in plans and specifications.

80. As a direct and proximate result of the negligence and/or gross negligence by Defendants, Plaintiff has suffered injuries and actual damages in the amount equal to the repair, maintenance, and reconstruction costs required and to be expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, continuous and repeated damages, and punitive damages.

SECOND CAUSE OF ACTION
(BREACH OF EXPRESS WARRANTIES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

81. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

82. Defendants asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies.

83. Defendants impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner in accordance with accepted industry and construction standards.

84. Defendants impliedly warranted that the project would be free of construction defects.

85. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants and constitute negligence and/or gross negligence including, but not limited to, the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications as designed;

- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- c. in using and/or supplying substandard materials and products;
- d. in installing or allowing the installation of materials and products not in accordance with the project's plans and specifications;
- e. in installing or allowing the installation of materials and products in violation of instructions and directions provided by the material and product manufacturers;
- f. in allowing, accepting, or performing the project work in violation of the applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in accepting and allowing the installation of defective, substandard, or non-conforming materials and labor;
- i. in accepting and performing deficient, substandard, or defective workmanship or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, plans and

specifications, Standard Building Code requirements, and customary and ordinary construction practices; and

j. in failing to inform the architect of the defects in the plans and specifications.

86. As a direct and proximate result of Defendants' breach of its express and implied warranties, Plaintiff suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be required and expended in the future over the expect life of the structure, loss of use, diminution in value, and continuous and repeated damages.

THIRD CAUSE OF ACTION

(BREACH OF IMPLIED WARRANTIES FOR HABITABILITY AND FITNESS FOR A PARTICULAR PURPOSE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

87. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

88. Defendants sold units along with their proportionate share of the common elements.

89. Defendants made implied warranties of habitability and fitness for a particular purpose.

90. Defendants breached their implied warranties of habitability and fitness for a particular purpose by selling the units along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the buildings and common elements containing the defects and deficiencies as set forth above.

91. As a direct and proximate result of Defendants' breach of its implied warranties, Plaintiff have suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, and continuous and repeated damages.

FOURTH CAUSE OF ACTION
(UNFAIR TRADE PRACTICES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

92. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

93. Defendants design, develop, and construct buildings that are defective and deficient.

94. Defendants have been aware of these defects and deficiencies, but continue to build the buildings without any concern for the public interest.

95. Defendants' actions impact the public interest.

96. Defendants' actions have been repeated or have the potential for repetition in the future.

97. As a direct result and proximate cause of Defendants' actions, Plaintiff incurred actual damages including, but not limited to, the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value, and continuous and repeated damages.

98. Defendants' actions were willful or Defendants could have ascertained that the above-mentioned conduct violated the Unfair Trade Practices Act and, therefore, Plaintiff is entitled to treble damages.

FIFTH CAUSE OF ACTION
(NEGLIGENCE: WW & LB, HOA, AND BOARD OF DIRECTORS)

99. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

100. Defendants owed a duty to Plaintiff to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.

101. Defendants owed a duty to Plaintiff to ensure that the HOA and Rivergate project was operated in an efficient and business-like manner.

102. Defendants were, individually, jointly, or in combination, negligent, grossly negligent, wanton, willful, and careless in one or more of the following:

- a. In failing to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.
- b. In failing to operate the HOA and Rivergate project in an efficient and business-like manner;
- c. In failing to use good business practices for the supervision, operation, maintenance, or repair of the HOA and Rivergate project;

103. Defendants failed to use the degree of skill, professionalism, and good business practices that an ordinarily prudent person or entity would have used to supervise, operate, maintain, or repair the HOA and Rivergate project, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

104. Based on the above, Plaintiff are entitled to actual damages, punitive damages, continuous and repeated damages, attorney's fees, and costs of this action.

SIXTH CAUSE OF ACTION
(CIVIL CONSPIRACY: WW & LB, WWI, HOA, BOARD OF DIRECTORS,
WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

105. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

106. Two or more of the Defendants combined their actions.

107. Defendants combined their actions for the purpose of injuring the Plaintiff.

108. Defendants' actions caused special damages.

109. Based on the above, Plaintiff is entitled to actual damages including, but not limited to, loss of profits, diminution in value, continuous and repeated damages, and punitive damages.

SEVENTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY: BOARD OF DIRECTORS, WAYNE
WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

110. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

111. Defendants failed to act in good faith as corporate officers.
112. Defendants failed to act with the care an ordinarily prudent person in a Like position would exercise under similar circumstances.
113. Defendants failed to act in a manner that they reasonably believed to be in the best interests of the HOA.
114. Plaintiff has suffered damages as a result of Defendants' actions, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.
115. Based on the above, Plaintiff is entitled to damages for harm caused by the breach of fiduciary duty owed to Plaintiff.

WHEREFORE, the Plaintiff prays as follows:

- A. For the amount equal to actual damages that includes, but is not limited to, the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value of the Rivergate project;
- B. For punitive damages;
- C. For treble damages;
- D. For continuous and repeated damages;
- E. For the costs and disbursements of this action; and
- F. For such other and further relief as this Court may deem just and proper.

STANLEY LAW FIRM

Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiff

6-12, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 08-CP-26-4690

Rivergate Homeowners' Association,

PLAINTIFF,

vs.

WW & LB Development Company, LLC,
Keye Construction Co., Inc.,
Right Way Construction Company, Inc.,
RWG, Inc.,
Aiello Associates,
Daniels Engineering, Inc.,
Rivergate Homeowners' Association,
Rivergate Homeowners' Association Board of
Directors,
Wayne Winderman, individually,
Salvatrice Foran, individually, and
Gerard Foran, individually,
Marcos Soares, individually, and d/b/a M.S.
Construction,
William C. De Souza, individually,
James Eason, individually, and d/b/a James Eason
& Company,
D&D Cleaning and Construction, Inc.,
Joel's Framing,
Jo Freza,
Arolo Garcia,
Joaquin Geraldo Zeferino, individually, and
d/b/a Zeferino Framing,
Leo Trombley,
Judy Schultz,
J&D Interior Design,
Jose Dasmerces d/b/a J.P. Construction,
Scott Chandler d/b/a Coastal Custom Windows &
Doors,
R & D Construction,
Nicasio Ramirez Zunigo,
Walchir Morais, and
Marco Trebbi,
DEFENDANTS.

AMENDED SUMMONS

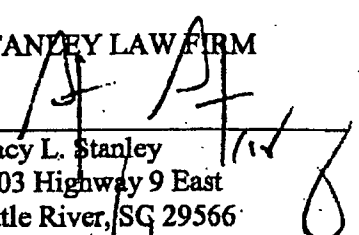
(JURY TRIAL REQUESTED)

FILED
HORRY COUNTY
2008 MAR 21 PM 1:02
MELANIE HUGGINS
CLERK OF COURT

TO: THE DEFENDANTS, ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscriber at his office at 3303 East Highway 9, Little River, South Carolina 29566, within THIRTY (30) DAYS after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9441
Attorney for the Plaintiffs

4-21, 2009.

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 08-CP-26-4690

Rivergate Homeowners' Association,)

PLAINTIFF,)

vs.)

WW & LB Development Company, LLC,)
Keye Construction Co., Inc.,)
Right Way Construction Company, Inc.,)
RWG, Inc.,)
Aiello Associates,)
Daniels Engineering, Inc.)
Rivergate Homeowners' Association,)
Rivergate Homeowners' Association Board of)
Directors,)
Wayne Winderman, individually,)
Salvatrice Foran, individually, and)
Gerard Foran, individually,)
Marcos Soares, individually, and d/b/a M.S.)
Construction,)
William C. De Souza, individually,)
James Eason, individually, and d/b/a James Eason)
& Company,)
D&D Cleaning and Construction, Inc.,)
Joel's Framing,)
Jo Freza,)
Arolo Garcia,)
Joaquin Geraldo Zeferino, individually, and)
d/b/a Zeferino Framing,)
Leo Trombley,)
Judy Schultz,)
J&D Interior Design,)
Jose Dasmerces d/b/a J.P. Construction,)
Scott Chandler d/b/a Coastal Custom Windows &)
Doors,)
R & D Construction,)
Nicasio Ramirez Zunigo,)
Walchir Morais, and)
Marco Trebbi,)
DEFENDANTS.)

AMENDED COMPLAINT

(JURY TRIAL REQUESTED)

FILED
HORRY COUNTY
2009 MAR 21 PM 1:02
MELANIE HUGGINS
CLERK OF COURT

TO: THE DEFENDANTS ABOVE NAMED

The Plaintiff, above named, complaining of the Defendants herein, respectfully alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. The Plaintiff Rivergate Homeowners' Association, Inc.

(hereinafter Plaintiff) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. Plaintiff Rivergate Homeowners' Association, Inc. has individual homeowners on the Board of Directors and has controlled the homeowners association and the Board of Directors since November 1, 2007.

2. WW & LB Development Company, LLC (hereinafter WW & LB) is a

corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

3. Keye Construction Co., Inc., (hereinafter Keye Construction and formerly known

as Pine Bluff Construction) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

4. Defendant Right Way Construction Company, Inc. (hereinafter Right Way) is a

corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

5. Defendant RWG, Inc. (hereinafter RWG) is a corporation organized and existing

pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

6. Defendant Russell Baltzer (hereinafter Baltzer) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

7. Defendant Aiello Associates (hereinafter Aiello) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

8. Defendant Daniels Engineering, Inc. (hereinafter Daniels) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

9. Defendant Rivergate Homeowners' Association, Inc. (hereinafter HOA) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. The Rivergate Homeowners' Association, Inc. was formed pursuant to the Master Deed for the Rivergate Horizontal Property Regime whose responsibilities include, but are not limited to, maintenance and repair of the property. The Defendant Rivergate Homeowners' Association, Inc. was controlled by the developer Wayne Winderman from the inception of the HOA until October 31, 2007.

10. Rivergate Homeowners' Association, Inc. Board of Directors (hereinafter Board of Directors) is the entity that was responsible for the administration of the HOA. This lawsuit is specific as to the Board of Directors from the inception of the Rivergate project to October 31, 2007.

11. Wayne Winderman (hereinafter Winderman) was a Board member and president of the HOA from the inception of the Rivergate project to October 31, 2007.

12. Salvatrice Foran was a Board member and vice-president, secretary, and treasurer of the HOA from the inception of the Rivergate project to October 31, 2007.

13. Gerard Foran was a Board member of the HOA from the inception of the Rivergate project to October 31, 2007.

14. Marcos Soares, individually, and d/b/a M.S. Construction Defendant (hereinafter Soares) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

15. William C. De Souza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

16. James Eason, individually, and d/b/a James Eason & Company is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

17. D & D Cleaning and Construction, Inc. is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

18. Joel's Framing is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

19. Jo Freza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

20. Arolo Garcia is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

21. Joaquin Geraldo Zeferino, individually, and d/b/a Zeferino

Framing is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

22. Leo Trombley is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

23. Judy Schultz is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

24. J & D Interior Design is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

25. Jose Dasmerces d/b/a J. P. Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

26. Scott Chandler d/b/a Coastal Custom Windows & Doors is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

27. R & D Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

28. Nicasion Ramirez Zunigo is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

29. Walchir Morais is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

30. Marco Trebbi is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

31. The HOA owns property in Horry County, South Carolina.

32. Defendant WW & LB owns property that consists of the Rivergate Horizontal Property Regime.

33. Jurisdiction is proper in Horry County, South Carolina.

34. Venue is proper in Horry County, South Carolina.

FACTS COMMON TO ALL CAUSES OF ACTION

35. Defendant WW & LB holds or has held certain real estate in Horry County, South Carolina that was developed into the Rivergate Horizontal Property Regime project (hereinafter Rivergate project).

36. Defendant WW & LB developed the Rivergate project.

37. Defendant WW & LB built individual townhome units in the Rivergate project.

38. Defendant WW & LB marketed individual condominium units in the Rivergate project.

39. Defendant WW & LB used in-house construction managers for the construction of the Rivergate project.

40. Defendant WW & LB used in-house architects for the construction of the Rivergate project.

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42. Defendant WW & LB used in-house, on-site construction superintendents

for the construction of the Rivergate project.

43. Defendant WW & LB was the General Contractor for the Rivergate project.

44. Defendant Keye performed supervisory services and inspections of the foundation, slab, and rough plumbing on Building 3 at the Rivergate project.

45. Defendant Right Way was the General Contractor for the Rivergate project.

46. Defendant RWG was the General Contractor for the Rivergate project.

47. Defendants Right Way and RWG provided labor to install the framing, sheathing, Tyvek, roof felt, doors, windows, and siding at the Rivergate project.

48. Defendants Right Way and RWG provided labor and material to install the soffit/fascia and vinyl handrails at the Rivergate project.

49. Defendant Baltzer designed Building 25 (units 4235, 4237, 4243, and 4245) at the Rivergate project.

50. Defendant Aiello designed Building 25 (units 4235, 4237, 4243, and 4245) at the Rivergate project.

51. Defendant Daniels engineered the buildings that were constructed at the Rivergate project.

52. Defendants Rivergate HOA and Board of Directors failed to maintain or repair the common elements of the HOA.

53. Defendant Soares provided labor for all the framing, sheathing, Tyvek, and roof felt as a subcontractor to Right Way and RWG on Buildings 3 and 25, a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to Right Way and RWG on Buildings 2 and 15 at the Rivergate project, and installed the windows and doors as a subcontractor to Right Way

and RWG on Buildings 3 and 15, and a portion of the windows and doors on Building 25 at the Rivergate project.

54. Defendant Desouza installed a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

55. Defendant Eason installed all of the windows, doors, framing, sheathing, Tyvek, and roof felt on the Clubhouse and a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 23 at the Rivergate project.

56. Defendant D & D installed all the windows and doors as a subcontractor to RWG on Building 5 at the Rivergate project.

57. Defendant Joel's Framing installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 18 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWB on Building 16 at the Rivergate project.

58. Defendant Freza installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 20 and all of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 1 and 3 and all of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 14 at the Rivergate project.

59. Defendant Garcia installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 15 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 13 at the Rivergate project.

60. Defendant Zeferino installed among other items the windows and doors as a subcontractor to RWG on Buildings 2 and 4 at the Rivergate project.

61. Defendant Trombley installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 18, and 19 and on all of the windows and doors as a subcontractor to RWG on Building 14 at the Rivergate project.

62. Defendant Schultz installed a portion of the windows and doors as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

63. Defendant J & D installed a portion of the windows and doors as a subcontractor to RWG on Building 22 at the Rivergate project.

64. Defendant J. P. Construction installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 21 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 22 at the Rivergate project.

65. Defendant Coastal Custom installed among other items a portion of the windows and doors as a subcontractor to RWG on Buildings 12, 13, and 16 at the Rivergate project.

66. Defendant Zunigo installed among other items all of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 2, 4, and 5 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 12 at the Rivergate project.

67. Defendant Morais installed all the siding and trim as a subcontractor to RWG on Buildings 1, 9, 12-16, 18, 20, 22, and 28 and the clubhouse and installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 18, 19, and 21 at the Rivergate project.

68. Defendant Trebbi installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 21, and 23 at the Rivergate project.

69. Since the completion of the Rivergate project, the Plaintiff has discovered structural and safety defects that relate back to the beginning of construction of the Rivergate project.

70. Since the completion of construction, the Plaintiff has discovered continuous and repeated damages.

71. The structural and safety defects and the continuous and repeated damages are the result of defective design.

72. The structural and safety defects and continuous and repeated damages are the result of defective construction.

73. The structural and safety defects include, but are not limited to, the following:

- a. inadequate attachment of metal fascia;
- b. improper and incomplete flashing details;
- c. improper application of the building wrap;
- d. improper or absence of protection at wall openings;
- e. improper installation or absence of flashing;
- f. marginal attachment of vinyl siding and vinyl siding accessories;
- g. improper vinyl siding installation details;
- h. improper window installation;
- i. improper waterproofing details;
- j. marginal framing of the gable end walls;
- k. improper construction of sidewalks, driveways, and asphalt roadway;

- l. improper driveway slopes; and
- m. defective storm water management drainage system.

FIRST CAUSE OF ACTION

(NEGLIGENCE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

74. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

75. Defendants owed a duty to Plaintiff to exercise the degree of skill necessary to construct, supervise, inspect, and review the design and construction of the Rivergate project.

76. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with the customary and ordinary standards of the building and construction industry.

77. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with manufacturer's specifications.

78. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with applicable building codes including, but not limited to, the Standard Building Code.

79. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants that constitute negligence and/or gross negligence in one or more of the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications;

- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction industry;
- c. in failing to properly install standard materials and products;
- d. in failing to properly install materials and products that are in accordance with the project's plans and specifications;
- e. in failing to properly install material and products in accordance with the instructions of product and material manufacturers;
- f. in failing to perform work in accordance with applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide supervision and oversight for employees, agents, and subcontractors to ensure that all work proceeded in accordance with the plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in failing to accept conforming materials and labor;
- i. in failing to provide sufficient workmanship and/or materials in the project with proper supervision and inspections in accordance with plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- j. in failing to inform the architect of the defects in plans and specifications.

80. As a direct and proximate result of the negligence and/or gross negligence by Defendants, Plaintiff has suffered injuries and actual damages in the amount equal to the repair,

maintenance, and reconstruction costs required and to be expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, continuous and repeated damages, and punitive damages.

SECOND CAUSE OF ACTION

(BREACH OF EXPRESS WARRANTIES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

81. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

82. Defendants asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies.

83. Defendants impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner in accordance with accepted industry and construction standards.

84. Defendants impliedly warranted that the project would be free of construction defects.

85. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants and constitute negligence and/or gross negligence including, but not limited to, the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications as designed;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;

- c. in using and/or supplying substandard materials and products;
- d. in installing or allowing the installation of materials and products not in accordance with the project's plans and specifications;
- e. in installing or allowing the installation of materials and products in violation of instructions and directions provided by the material and product manufacturers;
- f. in allowing, accepting, or performing the project work in violation of the applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in accepting and allowing the installation of defective, substandard, or non-conforming materials and labor;
- i. in accepting and performing deficient, substandard, or defective workmanship or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, plans and specifications, Standard Building Code requirements, and customary and ordinary construction practices; and
- j. in failing to inform the architect of the defects in the plans and specifications.

86. As a direct and proximate result of Defendants' breach of its express and implied warranties, Plaintiff suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be

required and expended in the future over the expected life of the structure, loss of use, diminution in value, and continuous and repeated damages.

THIRD CAUSE OF ACTION

(BREACH OF IMPLIED WARRANTIES FOR HABITABILITY AND FITNESS FOR A PARTICULAR PURPOSE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

87. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

88. Defendants sold units along with their proportionate share of the common elements.

89. Defendants made implied warranties of habitability and fitness for a particular purpose.

90. Defendants breached their implied warranties of habitability and fitness for a particular purpose by selling the units along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the buildings and common elements containing the defects and deficiencies as set forth above.

91. As a direct and proximate result of Defendants' breach of its implied warranties, Plaintiff have suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, and continuous and repeated damages.

FOURTH CAUSE OF ACTION

(UNFAIR TRADE PRACTICES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

92. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

93. Defendants design, develop, and construct buildings that are defective and deficient.

94. Defendants have been aware of these defects and deficiencies, but continue to build the buildings without any concern for the public interest.

95. Defendants' actions impact the public interest.

96. Defendants' actions have been repeated or have the potential for repetition in the future.

97. As a direct result and proximate cause of Defendants' actions, Plaintiff incurred actual damages including, but not limited to, the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value, and continuous and repeated damages.

98. Defendants' actions were willful or Defendants could have ascertained that the above-mentioned conduct violated the Unfair Trade Practices Act and, therefore, Plaintiff is entitled to treble damages.

FIFTH CAUSE OF ACTION
(NEGLIGENCE: WW & LB, HOA, AND BOARD OF DIRECTORS)

99. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

100. Defendants owed a duty to Plaintiff to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.

101. Defendants owed a duty to Plaintiff to ensure that the HOA and Rivergate project was operated in an efficient and business-like manner.

102. Defendants were, individually, jointly, or in combination, negligent, grossly negligent, wanton, willful, and careless in one or more of the following:

- a. In failing to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.
- b. In failing to operate the HOA and Rivergate project in an efficient and business-like manner;
- c. In failing to use good business practices for the supervision, operation, maintenance, or repair of the HOA and Rivergate project;

103. Defendants failed to use the degree of skill, professionalism, and good business practices that an ordinarily prudent person or entity would have used to supervise, operate, maintain, or repair the HOA and Rivergate project, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

104. Based on the above, Plaintiff are entitled to actual damages, punitive damages, continuous and repeated damages, attorney's fees, and costs of this action.

SIXTH CAUSE OF ACTION
(CIVIL CONSPIRACY: WW & LB, HOA, BOARD OF DIRECTORS, WINDERMAN,
SALVATRICE FORAN, AND GERARD FORAN)

105. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

106. Defendants combined their actions at the Rivergate project. Defendants' combined actions include, but are not limited to, refusing to repair construction defects, refusing to respond to homeowner complaints, and obstructing the repair of the Rivergate project.

107. Defendants purposefully combined their actions to injure Plaintiff as necessary repairs were not initiated or completed at the project.

108. As a result of Defendants' actions, Defendants caused the Rivergate project to go without necessary repairs and sustain continuous and repeated damages.

109. Based on the above, Plaintiff is entitled to actual damages including, but not limited to, repair costs, loss of profits, diminution in value, continuous and repeated damages, and punitive damages.

SEVENTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY: BOARD OF DIRECTORS, WAYNE
WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

110. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

111. Defendants refused to repair construction defects, refused to respond to homeowner complaints, and obstructed the repair of the Rivergate project.

112. Defendants failed to act with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

113. Defendants failed to act in a manner that they reasonably believed to be in the best interests of the HOA.

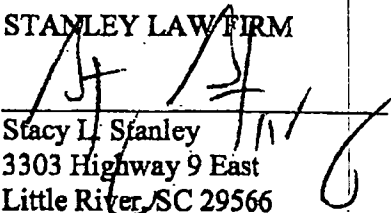
114. Plaintiff has suffered damages as a result of Defendants' actions, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

115. Based on the above, Plaintiff is entitled to actual and punitive damages for harm caused by the breach of fiduciary duty owed to Plaintiff.

WHEREFORE, the Plaintiff prays as follows:

- A. For the amount equal to actual damages that includes, but is not limited to, the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value of the Rivergate project;
- B. For punitive damages;
- C. For treble damages;
- D. For continuous and repeated damages;
- E. For the costs and disbursements of this action; and
- F. For such other and further relief as this Court may deem just and proper.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiff

4-21, 2009

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiffs,

vs.

WW & LB Development Company, LLC,

RWG, Inc.,

Aiello Associates,

Daniels Engineering, Inc.,

Rivergate Homeowners' Association,

Rivergate Homeowners' Association Board of
Directors,

Wayne Winderman, individually,

Salvatrice Foran, individually,

Gerard Foran, individually,

Marcos Soares, individually, and d/b/a M.S.
Construction,

William C. De Souza, individually,

James Eason, individually, and d/b/a James Eason &
Company,

D&D Cleaning and Construction, Inc.,

Joel's Framing,

Jo Freza,

Aroldo Garcia,

Joaquin Geraldo Zeferino, individually, and d/b/a
Zeferino Framing,

Leo Trombley,

Judy Schultz,

J&D Interior Design,

Jose Dasmerces d/b/a J.P. Construction,

Scott Chandler d/b/a Coastal Custom Windows &
Doors,

R&D Construction,

Nicasio Ramirez Zunigo,

Walchir Morais,

Marco Trebbi,

Blankenship Roofing, Inc.,

DLJ Construction, L.L.C.,

Dewayne Bates,

The Bates Group, LLC,

Bridges Construction Co.,

Brewer Construction, Inc.,

Speedy Concrete,

REB-FEL, Inc.,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2010-CP-26- 03901

(Case Nos. 2007-CP-26-0228 and 2008-CP-26-4690 were
consolidated under 2008-CP-26-4690 by Order filed
3/31/09)

SECOND AMENDED COMPLAINT

FILED
HORRY COUNTY
2010 APR 28 PM 3:29
MELANIE HUGGINS-WARD
CLERK OF COURT

Mark Mychajluk,	)
Eric Jazwinski,	)
Southern Framing Corporation,	)
AB Consulting Engineers, Inc.,	)
Geometrics Consulting, LLC,	)
WWI Development Company, LLC,	)
Michael Dawson Construction, Inc.,	)
Asphalt Paving & Maintenance Co., Inc., and	)
Chuck's Construction Co., Inc.,	)
	)
Defendants,	)

TO: THE DEFENDANTS ABOVE NAMED:

The Plaintiff, above named, complaining of the Defendants herein, respectfully alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. The Plaintiff Rivergate Homeowners' Association, Inc. (hereinafter Plaintiff) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. Plaintiff Rivergate Homeowners' Association, Inc. has individual homeowners on the Board of Directors and has controlled the homeowners association and the Board of Directors since November 1, 2007.

2. WW & LB Development Company, LLC (hereinafter WW & LB) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

3. Defendant RWG, Inc. (hereinafter RWG) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

4. Defendant Aiello Associates (hereinafter Aiello) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

5. Defendant Daniels Engineering, Inc. (hereinafter Daniels) is a corporation organized and existing pursuant to the laws of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

6. Defendant Rivergate Homeowners' Association, Inc. (hereinafter HOA) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. The Rivergate Homeowners' Association, Inc. was formed pursuant to the Master Deed for the Rivergate Horizontal Property Regime whose responsibilities include, but are not limited to, maintenance and repair of the property. The Defendant Rivergate Homeowners' Association, Inc. was controlled by the developer Wayne Winderman from the inception of the HOA until October 31, 2007.

7. Rivergate Homeowners' Association, Inc. Board of Directors (hereinafter Board of Directors) is the entity that was responsible for the administration of the HOA. This lawsuit is specific as to the Board of Directors from the inception of the Rivergate project to October 31, 2007.

8. Wayne Winderman (hereinafter Winderman) was a Board member and president of the HOA from the inception of the Rivergate project to October 31, 2007.

9. Salvatrice Foran was a Board member and vice-president, secretary, and treasurer of the HOA from the inception of the Rivergate project to October 31, 2007.

10. Gerard Foran was a Board member of the HOA from the inception of the Rivergate project to October 31, 2007.

11. Marcos Soares, individually, and d/b/a M.S. Construction Defendant (hereinafter Soares) is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

12. William C. De Souza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

13. James Eason, individually, and d/b/a James Eason & Company is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

14. D & D Cleaning and Construction, Inc. is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

15. Joel's Framing is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

16. Jo Freza is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

17. Aroldo Garcia is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

18. Joaquin Geraldo Zeferino, individually, and d/b/a Zeferino Framing is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

19. Leo Trombley is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

20. Judy Schultz is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
21. J & D Interior Design is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
22. Jose Dasmerces d/b/a J. P. Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
23. Scott Chandler d/b/a Coastal Custom Windows & Doors is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
24. R & D Construction is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
25. Nicasio Ramirez Zunigo is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
26. Walchir Morais is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
27. Marco Trebbi is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
28. Blakenship Roofing, Inc. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
29. DLJ Construction, L.L. C. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

30. Dewayne Bates is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
31. The Bates Group, LLC is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
32. Bridges Construction Co. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
33. Brewer Construction, Inc. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
34. Speedy Concrete is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
35. REB-FEL, Inc. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
36. Mark Mychajluk is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
37. Eric Jazwinski is an individual or company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
38. Southern Framing Corporation is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
39. AB Consulting Engineers, Inc. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.
40. Geometrics Consulting, LLC is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

41. WWI Development Company, LLC is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

42. Michael Dawson Construction, Inc. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

43. Asphalt Paving & Maintenance Co., Inc. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

44. Chuck's Construction Co., Inc. is a company that conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

45. The HOA owns property in Horry County, South Carolina.

46. Defendant WW & LB owns property that consists of the Rivergate Horizontal Property Regime.

47. Jurisdiction is proper in Horry County, South Carolina.

48. Venue is proper in Horry County, South Carolina.

FACTS COMMON TO ALL CAUSES OF ACTION

49. Defendant WW & LB holds or has held certain real estate in Horry County, South Carolina that was developed into the Rivergate Horizontal Property Regime project (hereinafter Rivergate project).

50. Defendant WW & LB developed the Rivergate project.

51. Defendant WW & LB built individual townhome units in the Rivergate project.

52. Defendant WW & LB marketed individual townhome units in the Rivergate project.

53. Defendant WW & LB used in-house construction managers for the construction of the Rivergate project.
54. Defendant WW & LB used in-house architects for the construction of the Rivergate project.
55. Defendant WW & LB used in-house purchasing agents for the construction of the Rivergate project.
56. Defendant WW & LB used in-house, on-site construction superintendents for the construction of the Rivergate project.
57. Defendant WW & LB was the General Contractor for the Rivergate project.
58. Defendant RWG was the General Contractor for the Rivergate project.
59. Defendant RWG provided labor to install the framing, sheathing, Tyvek, roof felt, doors, windows, and siding at the Rivergate project.
60. Defendant RWG provided labor and material to install the soffit/fascia and vinyl handrails at the Rivergate project.
61. Defendant Aiello designed Building 25 (units 4235, 4237, 4243, and 4245) at the Rivergate project.
62. Defendant Daniels engineered the buildings that were constructed at the Rivergate project.
63. Defendants Rivergate HOA and Board of Directors was responsible for maintaining and repairing the common elements of the HOA. This applies to the developer-controlled HOA and Board of Directors.
64. Defendant Soares provided labor for all the framing, sheathing, Tyvek, and roof felt as a subcontractor to Right Way and RWG on Buildings 3 and 25, a portion of the framing,

sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 2 and 15 at the Rivergate project, and installed the windows and doors as a subcontractor to RWG on Buildings 3 and 15, and a portion of the windows and doors on Building 25 at the Rivergate project.

65. Defendant Desouza installed a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

66. Defendant Eason installed all of the windows, doors, framing, sheathing, Tyvek, and roof felt on the Clubhouse and a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 23 at the Rivergate project.

67. Defendant D & D installed all the windows and doors as a subcontractor to RWG on Building 5 at the Rivergate project.

68. Defendant Joel's Framing installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 18 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWB on Building 16 at the Rivergate project.

69. Defendant Freza installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 20 and all of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 1 and 3 and all of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 14 at the Rivergate project.

70. Defendant Garcia installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 15 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 13 at the Rivergate project.

71. Defendant Zeferino installed among other items the windows and doors as a subcontractor to RWG on Buildings 2 and 4 at the Rivergate project.

72. Defendant Trombley installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 17, 18, and 19 and on all of the windows and doors as a subcontractor to RWG on Building 14 at the Rivergate project.

73. Defendant Schultz installed a portion of the windows and doors as a subcontractor to RWG on Buildings 17, 19, 20, and 21 at the Rivergate project.

74. Defendant J & D installed a portion of the windows and doors as a subcontractor to RWG on Building 22 at the Rivergate project.

75. Defendant J. P. Construction installed a portion of the windows, doors, framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 21 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 22 at the Rivergate project.

76. Defendant Coastal Custom installed among other items a portion of the windows and doors as a subcontractor to RWG on Buildings 12, 13, and 16 at the Rivergate project.

77. Defendant R&D Construction installed the framing at the Rivergate project.

78. Defendant Zunigo installed among other items all of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Buildings 2, 4, and 5 and a portion of the framing, sheathing, Tyvek, and roof felt as a subcontractor to RWG on Building 12 at the Rivergate project.

79. Defendant Morais installed all the siding and trim as a subcontractor to RWG on Buildings 1, 9, 12-16, 18, 20, 22, and 28 and the clubhouse and installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 18, 19, and 21 at the Rivergate project.

80. Defendant Trebbi installed a portion of the siding and trim as a subcontractor to RWG on Buildings 17, 21, and 23 at the Rivergate project.

81. Upon information and belief, Defendant Blankenship Roofing installed roofs at the Rivergate project.

82. Upon information and belief, Defendant DLJ Construction, LLC was a general contractor for the Rivergate project.

83. Upon information and belief, Defendant Dewayne Bates was an architect for the Rivergate project.

84. Upon information and belief, Defendant The Bates Group, LLC was an architect for the Rivergate project.

85. Upon information and belief, Defendant Bridges Construction was a general contractor for the Rivergate project.

86. Upon information and belief, Defendant Brewer Construction was a general contractor for the Rivergate project.

87. Upon information and belief, Defendant Speedy Concrete installed the asphalt and concrete for the Rivergate project.

88. Upon information and belief, Defendant REB-FEL, Inc. installed the framing at the Rivergate project.

89. Upon information and belief, Defendant Marck Mychajluk was a subcontractor for RWG, Inc. for the Rivergate project.

90. Upon information and belief, Defendant Eric Jazwinski was a subcontractor for RWG, Inc. for the Rivergate project.

91. Upon information and belief, Defendant Southern Framing Corporation installed the framing for the Rivergate project.

92. Upon information and belief, Defendant AB Consulting Engineers, Inc. was the civil engineer for the Rivergate project.

93. Upon information and belief, Defendant Geometrics Consulting, LLC was a consultant for the civil site work at the Rivergate project.

94. Upon information and belief, Defendant WWI Development Company, LLC was a developer for the Rivergate project.

95. Upon information and belief, Defendant Michael Dawson Construction, Inc. installed the concrete at the Rivergate project.

96. Upon information and belief, Defendant Asphalt Paving & Maintenance Co., Inc. installed the asphalt and concrete at the Rivergate project.

97. Upon information and belief, Defendant Chuck's Construction Co., Inc. was a general contractor for the Rivergate project.

98. Since the completion of the Rivergate project, the Plaintiff has discovered structural and safety defects that relate back to the beginning of construction of the Rivergate project.

99. Since the completion of construction, the Plaintiff has discovered continuous and repeated damages.

100. The structural and safety defects and the continuous and repeated damages are the result of defective design.

101. The structural and safety defects and continuous and repeated damages are the result of defective construction.

102. The structural and safety defects include, but are not limited to, the following:

- a. inadequate attachment of metal fascia;
- b. improper and incomplete flashing details;
- c. improper application of the building wrap;
- d. improper or absence of protection at wall openings;
- e. improper installation or absence of flashing;
- f. marginal attachment of vinyl siding and vinyl siding accessories;
- g. improper vinyl siding installation details;
- h. improper window installation;
- i. improper waterproofing details;
- j. marginal framing of the gable end walls;
- k. improper construction of sidewalks, driveways, and asphalt roadway;
- l. improper driveway slopes; and
- m. defective storm water management drainage system.

FIRST CAUSE OF ACTION

(NEGLIGENCE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

103. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

104. Defendants owed a duty to Plaintiff to exercise the degree of skill necessary to construct, supervise, inspect, and review the design and construction of the Rivergate project.

105. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with the customary and ordinary standards of the building and construction industry.

106. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with manufacturer's specifications.

107. Defendants owed a duty to Plaintiff to ensure that the Rivergate project was built and designed in conformity with applicable building codes including, but not limited to, the Standard Building Code.

108. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants that constitute negligence and/or gross negligence in one or more of the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction industry;
- c. in failing to properly install standard materials and products;
- d. in failing to properly install materials and products that are in accordance with the project's plans and specifications;
- e. in failing to properly install material and products in accordance with the instructions of product and material manufacturers;
- f. in failing to perform work in accordance with applicable building codes including, but not limited to, the Standard Building Code;

- g. in failing to properly supervise or provide supervision and oversight for employees, agents, and subcontractors to ensure that all work proceeded in accordance with the plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in failing to accept conforming materials and labor;
- i. in failing to provide sufficient workmanship and/or materials in the project with proper supervision and inspections in accordance with plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- j. in failing to inform the architect of the defects in plans and specifications.

109. As a direct and proximate result of the negligence and/or gross negligence by Defendants, Plaintiff has suffered injuries and actual damages in the amount equal to the repair, maintenance, and reconstruction costs required and to be expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, continuous and repeated damages, and punitive damages.

SECOND CAUSE OF ACTION
(BREACH OF EXPRESS WARRANTIES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

110. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

111. Defendants asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies.

112. Defendants impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner in accordance with accepted industry and construction standards.

113. Defendants impliedly warranted that the project would be free of construction defects.

114. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Defendants and constitute negligence and/or gross negligence including, but not limited to, the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications as designed;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- c. in using and/or supplying substandard materials and products;
- d. in installing or allowing the installation of materials and products not in accordance with the project's plans and specifications;
- e. in installing or allowing the installation of materials and products in violation of instructions and directions provided by the material and product manufacturers;

- f. in allowing, accepting, or performing the project work in violation of the applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in accepting and allowing the installation of defective, substandard, or non-conforming materials and labor;
- i. in accepting and performing deficient, substandard, or defective workmanship or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, plans and specifications, Standard Building Code requirements, and customary and ordinary construction practices; and
- j. in failing to inform the architect of the defects in the plans and specifications.

115. As a direct and proximate result of Defendants' breach of its express and implied warranties, Plaintiff suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be required and expended in the future over the expect life of the structure, loss of use, diminution in value, and continuous and repeated damages.

THIRD CAUSE OF ACTION
(BREACH OF IMPLIED WARRANTIES FOR HABITABILITY AND FITNESS FOR A PARTICULAR PURPOSE: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

116. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

117. Defendants sold units along with their proportionate share of the common elements.

118. Defendants made implied warranties of habitability and fitness for a particular purpose.

119. Defendants breached their implied warranties of habitability and fitness for a particular purpose by selling the units along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the buildings and common elements containing the defects and deficiencies as set forth above.

120. As a direct and proximate result of Defendants' breach of its implied warranties, Plaintiff have suffered injuries and actual damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, and continuous and repeated damages.

FOURTH CAUSE OF ACTION

(UNFAIR TRADE PRACTICES: ALL DEFENDANTS (REFERS TO ABOVE STATED DEFENDANTS AND THEIR SPECIFIC SCOPE OF WORK) EXCEPT HOA, BOARD OF DIRECTORS, WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)

121. Plaintiff reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

122. Defendants design, develop, and construct buildings that are defective and deficient.

123. Defendants have been aware of these defects and deficiencies, but continue to build the buildings without any concern for the public interest.

124. Defendants' actions impact the public interest.

125. Defendants' actions have been repeated or have the potential for repetition in the future.

126. As a direct result and proximate cause of Defendants' actions, Plaintiff incurred actual damages including, but not limited to, the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value, and continuous and repeated damages.

127. Defendants' actions were willful or Defendants could have ascertained that the above-mentioned conduct violated the Unfair Trade Practices Act and, therefore, Plaintiff is entitled to treble damages.

FIFTH CAUSE OF ACTION

(NEGLIGENCE: WW & LB, HOA, AND BOARD OF DIRECTORS)

128. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

129. Defendants owed a duty to Plaintiff to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.

130. Defendants owed a duty to Plaintiff to ensure that the HOA and Rivergate project was operated in an efficient and business-like manner.

131. Defendants were, individually, jointly, or in combination, negligent, grossly negligent, wanton, willful, and careless in one or more of the following:

- a. In failing to exercise the degree of skill and professionalism necessary to supervise, operate, maintain, or repair the HOA and Rivergate project.
- b. In failing to operate the HOA and Rivergate project in an efficient and business-like manner;
- c. In failing to use good business practices for the supervision, operation, maintenance, or repair of the HOA and Rivergate project;

132. Defendants failed to use the degree of skill, professionalism, and good business practices that an ordinarily prudent person or entity would have used to supervise, operate, maintain, or repair the HOA and Rivergate project, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

133. Based on the above, Plaintiff are entitled to actual damages, punitive damages, continuous and repeated damages, attorney's fees, and costs of this action.

SIXTH CAUSE OF ACTION
**(CIVIL CONSPIRACY: WW & LB, HOA, BOARD OF DIRECTORS, WINDERMAN,
SALVATRICE FORAN, AND GERARD FORAN)**

134. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

135. Defendants combined their actions at the Rivergate project. Defendants' combined actions include, but are not limited to, refusing to repair construction defects, refusing to respond to homeowner complaints, and obstructing the repair of the Rivergate project.

136. Defendants purposefully combined their actions to injure Plaintiff as necessary repairs were not initiated or completed at the project.

137. As a result of Defendants' actions, Defendants caused the Rivergate project to go without necessary repairs and sustain continuous and repeated damages.

138. Based on the above, Plaintiff is entitled to actual damages including, but not limited to, repair costs, loss of profits, diminution in value, continuous and repeated damages, and punitive damages.

SEVENTH CAUSE OF ACTION
**(BREACH OF FIDUCIARY DUTY: BOARD OF DIRECTORS, WAYNE
WINDERMAN, SALVATRICE FORAN, AND GERARD FORAN)**

139. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

140. Defendants refused to repair construction defects, refused to respond to homeowner complaints, and obstructed the repair of the Rivergate project.

141. Defendants failed to act with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

142. Defendants failed to act in a manner that they reasonably believed to be in the best interests of the HOA.

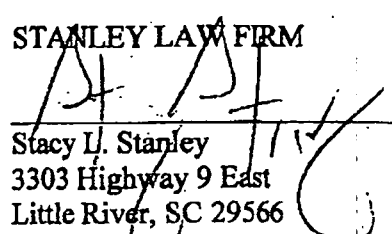
143. Plaintiff has suffered damages as a result of Defendants' actions, all of which were the direct and proximate cause of the damages suffered by the Plaintiff.

144. Based on the above, Plaintiff is entitled to actual and punitive damages for harm caused by the breach of fiduciary duty owed to Plaintiff.

WHEREFORE, the Plaintiff prays as follows:

- A. For the amount equal to actual damages that includes, but is not limited to, the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value of the Rivergate project;
- B. For punitive damages;
- C. For treble damages;
- D. For continuous and repeated damages;
- E. For the costs and disbursements of this action; and
- F. For such other and further relief as this Court may deem just and proper.

STANLEY LAW FIRM


Stacy L. Stanley
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111
Attorney for the Plaintiffs

4-6, 2010.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

vs.

WW & LB Development Company, RWG,
Inc., Aiello Associates, Daniels
Engineering, Inc., Rivergate Homeowners'
Association, Rivergate Homeowners'
Association Board of Directors, Wayne
Winderman, individually, Salvatrice Foran,
individually, Gerard Foran, individually,
Marcos Soares, individually, and d/b/a M.S.
Construction, William C. DeSouza,
individually, James Eason, individually and
d/b/a James Eason & Company, D&D
Cleaning and Construction, Inc., Joel's
Framing, Jo Freza, Aroldo Garcia, Joaquin
Geraldo Zeferino, individually and d/b/a
Zeferino Framing, Leo Trombley, Judy
Schultz, J&D Interior Design, Jose
Dasmerces d/b/a J.P. Construction, Scott
Chandler d/b/a Coastal Custom Windows &
Doors, R&D Construction, Nicasio Ramirez
Zuniga, Walchir Morais, and Marco Trebbi,
Blakenship Roofing, Inc., DLJ
Construction, LLC, Dewayne Bates, The
Bates Group, LLC, Bridges Construction
Co., Brewer Construction, Inc., Speedy
Concrete, REB-FEL, Inc., Mark Mychajluk,
Eric Jazwinski, Southern Framing
Corporation, AB Consulting Engineers, Inc.
Geometrics Consulting, LLC, WWI
Development Company, LLC, Michael
Dawson Construction, Inc., Asphalt Paving
& Maintenance Co., Inc. and Chuck's
Construction Co., Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
(Case Nos. 2007-CP-26-0228 and 2008-CP-26-4690
were consolidated with this case by Order
filed 3/31/09)

Civil Action No. 2010-CP-26-03901

**ANSWER OF CHUCK'S
CONSTRUCTION TO PLAINTIFF'S
SECOND AMENDED COMPLAINT**

Defendant, Chuck's Construction, Inc., answers the Second Amended Complaint and respectfully asserts the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted herein is denied.

FOR A SECOND DEFENSE AND BY WAY OF ANSWER

2. Defendant admits Paragraph 1, upon information and belief.

3. Defendant is without sufficient knowledge to form a belief as to the allegations of Paragraphs 2 through 43 and, therefore, denies the same and demands strict proof thereof.

4. Admits Paragraph 44.

5. Defendant is without sufficient knowledge to form a belief as to the allegations of Paragraph 45 and, therefore, denies the same and demands strict proof thereof.

6. Defendant is without sufficient knowledge to form a belief as to the allegations of Paragraph 46 and, therefore, denies the same and demands strict proof thereof.

7. Defendant admits Paragraph 47.

8. Defendant admits Paragraph 48.

FOR A THIRD DEFENSE

9. The allegations contained in Paragraphs 49 through 96 are not directed at this Defendant and, therefore, no response is necessary. To the extent that an answer is deemed necessary, this Defendant denies all allegations of wrong doing and demands strict proof thereof.

10. Denies Paragraph 97.

11. Denies Paragraph 98.

12. Denies Paragraph 99.

13. Denies Paragraph 100.
14. Denies Paragraph 101.
15. Denies Paragraph 102, including all subparts.

FOR A FOURTH DEFENSE AND BY WAY OF ANSWER
TO PLAINTIFF'S FIRST CAUSE OF ACTION
(Negligence)

16. Answering Paragraph 103, Defendant reasserts all previous defenses set forth herein verbatim.

17. Denies Paragraph 104.
18. Denies Paragraph 105.
19. Denies Paragraph 106.
20. Denies Paragraph 107.
21. Denies Paragraph 108, including all subparts.
22. Denies Paragraph 109.

FOR A FIFTH DEFENSE AND BY WAY OF ANSWER
TO PLAINTIFF'S SECOND CAUSE OF ACTION
(Breach of Express Warranties)

23. Answering Paragraph 110, Defendant reasserts all previous defenses set forth herein verbatim.

24. Denies Paragraph 111.
25. Denies Paragraph 112.
26. Denies Paragraph 113.
27. Denies Paragraph 114, including all subparts.
28. Denies Paragraph 115.

FOR A SIXTH DEFENSE AND BY WAY OF ANSWER
TO PLAINTIFF'S THIRD CAUSE OF ACTION
(Breach of Express Warranties)

29. Answering Paragraph 116, Defendant reasserts all previous defenses set forth herein verbatim.

30. Denies Paragraph 117.

31. Denies Paragraph 118.

32. Denies Paragraph 119.

33. Denies Paragraph 120.

FOR A SEVENTH DEFENSE AND BY WAY OF ANSWER
TO PLAINTIFF'S FOURTH CAUSE OF ACTION
(Unfair Trade Practices)

34. Answering Paragraph 121, Defendant reasserts all previous defenses set forth herein verbatim.

35. Denies Paragraph 122.

36. Denies Paragraph 123.

37. Denies Paragraph 124.

38. Denies Paragraph 125.

39. Denies Paragraph 126.

40. Denies Paragraph 127.

FOR AN EIGHTH DEFENSE AND BY WAY OF ANSWER
TO PLAINTIFF'S FIFTH CAUSE OF ACTION
(Negligence)

41. Answering Paragraph 128, Defendant reasserts all previous defenses set forth herein verbatim.

42. The allegations set forth in Paragraphs 129 through 133 are not directed at this Defendant and, therefore, no response is necessary. To the extent that an answer is deemed necessary, Defendant denies all allegations of wrong doing.

FOR A NINTH DEFENSE AND BY WAY OF ANSWER
TO PLAINTIFF'S SIXTH CAUSE OF ACTION
(Civil Conspiracy)

43. Answering Paragraph 134, Defendant reasserts all previous defenses set forth herein verbatim

44. The allegations set forth in Paragraphs 135 through 138 are not directed at this Defendant and, therefore, no response is necessary. To the extent that an answer is deemed necessary, Defendant denies all allegations of wrong doing.

FOR A TENTH DEFENSE AND BY WAY OF ANSWER
TO PLAINTIFF'S SEVENTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

45. Answering Paragraph 139, Defendant reasserts all previous defenses set forth herein verbatim.

46. The allegations set forth in Paragraphs 139 through 144 are not directed at this Defendant and, therefore, no response is necessary. To the extent that an answer is deemed necessary, Defendant denies all allegations of wrong doing.

FOR AN ELEVENTH DEFENSE

47. Defendant pleads the law and doctrine of comparative negligence. Accordingly, Defendant alleges the negligence and recklessness of Plaintiff was greater than the negligence, if any, which might be established against Defendant, and therefore Plaintiff is barred from any recovery in this action. Defendant further alleges any injury and damage sustained by Plaintiff was due to and caused by the negligence and/or wilfulness of Plaintiff combining, concurring,

and contributing with the negligence and/or wilfulness, if any, on the part of Defendant and, therefore, any amount of recovery awarded to Plaintiff for the injuries and damages alleged in the Complaint shall be reduced by the Court by the percentage of negligence and/or wilfulness attributed to Plaintiff.

FOR A TWELFTH DEFENSE

48. Defendant asserts the doctrine of completion and acceptance as a complete bar to Plaintiff's claim.

FOR A THIRTEENTH DEFENSE

49. If Defendant violated any alleged warranty, both the existence of which and violation of which are hereby denied, those claims alleging breach of warranty are barred due to various exclusions, disclaimers and modifications of the alleged warranties.

FOR A FOURTEENTH DEFENSE

50. Plaintiff claims are, upon information and belief, barred as it has failed to make a claim against Defendant within the applicable warranty period.

FOR A FIFTEENTH DEFENSE

51. Defendant alleges that any injuries sustained by Plaintiff were caused by the misuse, misapplication, or abuse of the product and said misuse, misapplication, or abuse of the product is a complete bar to recovery against Defendant.

FOR A SIXTEENTH DEFENSE

52. Plaintiff has failed to mitigate their damages and has incurred damages that were unnecessary or unreasonable in amount. Plaintiff is, therefore, barred in whole or part from recovery in this case.

FOR A SEVENTEENTH DEFENSE

53. Defendant would show the claim of Plaintiff for punitive damages cannot be had because any award of punitive damages under South Carolina law without bifurcation of the trial so that any punitive damage issues are tried only after and if liability on the merits of this action has been found will violate Defendant's due process rights guaranteed by the United States Constitution and the South Carolina Constitution, and would violate the common law and public policy of the State of South Carolina.

54. Defendant would show the claim of Plaintiff for punitive damages cannot be had because an award of punitive damages under South Carolina law without being subject to a predetermined limit on the amount of punitive damages that a jury might impose would violate Defendant's due process rights guaranteed by United States Constitution and the South Carolina Constitution, and would violate the common law of the State of South Carolina.

55. Defendant alleges the claim of Plaintiff for punitive damages cannot be had because an award of punitive damages under South Carolina law by a jury that is not:

- (a) Provided with sufficiently clear standards for determining the appropriateness of a punitive damage award or the size of such award;
- (b) Provided with adequate instructions as to the limits of punitive damage awards as determined by the principles underlying such an award;
- (c) Instructed that awarding punitive damages on individually discriminatory characteristics of Defendant is improper;
- (d) Instructed to consider punitive damages under a standard for determining the amount that is neither vague, arbitrary, nor capricious and that defines

with reasonable clarity the actions of Defendant upon which an award of punitive damages may be based; and

- (e) Subjected to judicial review at both the trial and appellate court level under objective standards for determining appropriateness and reasonableness;

would violate Defendant's equal protection and due process rights as guaranteed by the United States Constitution and the South Carolina Constitution and would also violate the laws of the State of South Carolina.

FOR AN EIGHTEENTH DEFENSE

56. Defendant alleges any injury and damage sustained by Plaintiff were due to and caused by the sole negligence and/or wilfulness of Plaintiff and, therefore, Defendant is not liable to Plaintiff for any sum whatsoever.

FOR A NINETEENTH DEFENSE

57. Defendant alleges, upon information and belief, that any injury and damage sustained by Plaintiff were due to and caused by the sole and negligent acts or omissions of some other person or persons other than Defendant over whom Defendant neither had nor exercised any authority or control, and, therefore, Defendant is not liable to Plaintiff for any sum whatsoever.

FOR A TWENTIETH DEFENSE

58. Defendant alleges that Plaintiff's claims are barred by the defense of waiver.

FOR A TWENTY-FIRST DEFENSE

59. Defendant alleges that Plaintiff's claims are barred by the defense of estoppel.

FOR A TWENTY-SECOND DEFENSE

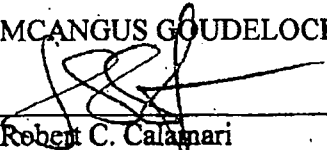
60. Defendant alleges that Plaintiff's claims are barred by the Statute of Limitation and/or the Statute of Repose.

FOR A TWENTIETH DEFENSE

61. Defendant reserves the right to amend this answer to assert such additional defenses as may be appropriate based on further investigation and discovery conducted during the time this case is pending

WHEREFORE, having fully answered, Defendant prays that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari

Joseph S. Sandefur

Post Office Box 1349

1107 48th Avenue North, Suite 210 (29577)

Myrtle Beach, South Carolina 29578

(843) 848-6000

ATTORNEYS FOR DEFENDANT, CHUCK'S
CONSTRUCTION, INC.

May 27, 2010

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY.)

Rivergate Homeowners'
Association,)

Plaintiff,)

VS.)

WW&LB Development Company, LLC,)
RWG, Inc., Aiello Associates,)
Daniels Engineering, Inc.,)
Rivergate Homeowners')
Association, Rivergate)
Homeowners' Association Board)
of Directors, Wayne Winderman,)
individually, Salvatrice Foran,)
individually, Gerard Foran,)
individually, Marcos Soares,)
individually and d/b/a M.S.)
Construction, William C. DeSouza,)
individually, James Eason,)
individually and d/b/a James)
Eason & Company, D&D Cleaning)
and Construction, Inc., Joel's)
Framing, Joe Freza, Aroldo)
Garcia, Joaquin Geraldo Zeferino,)
individually and d/b/a Zeferino)
Framing, Leo Trombley, Judy)
Schultz, J&D Interior Design,)
Jose Dasmerces d/b/a J.P.)
Construction, Scott Chandler)
d/b/a Coastal Custom Windows)
& Doors, R&D Construction,)
Nicasio Ramirez Zunigo, Walchir)
Morais, Marco Trebbi,)
Blankenship Roofing, Inc., DLJ)
Construction, L.L.C., Dewayne)
Bates, The Bates Group, LLC,)
Bridges Construction Co.,)
Brewer Construction, Inc.,)
Speedy Concrete, REB-FEL, Inc.,)
Mark Mychajluk, Eric Jazwinski,)
Southern Framing Corporation,)
AB Consulting Engineers, Inc.,)
Geometrics Consulting, LLC,)
WWI Development Company, LLC,)
Michael Dawson Construction,)
Inc., Asphalt Paving &)
Maintenance Co., Inc., and)
Chuck's Construction Co., Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-CP-26-3901

**ANSWER TO SECOND AMENDED
COMPLAINT ON BEHALF OF THE
DEFENDANT, SPEEDY CONCRETE**

TO THE PLAINTIFF AND ITS ATTORNEY, STACY L. STANLEY, ESQUIRE:

The Defendant Speedy Concrete, answering the Second Amended Complaint of the Plaintiff herein, alleges as follows:

FOR A FIRST DEFENSE

1. Denies each and every allegation of the Second Amended Complaint not hereinafter specifically admitted, qualified or explained.

2. As to paragraph nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 102 (sub-paragraphs a - j and m), 104, 105, 106, 107, 111, 112, 113, 117, 118, 129, 130, 131, 132, 133, 135, 136, 137, 138, 140, 141, 142, 143 and 144 of the Second Amended Complaint, the Defendant does not have information sufficient to form a belief as to the truth of the allegations and therefore denies the same and demands strict proof thereof.

3. Admits the allegations contained in paragraph nos. 34, 47, 48 and 87 of the Second Amended Complaint.

4. Denies the allegations contained in paragraph nos. 99, 101, 108, 114, 119, 120, 122, 123, 124, 125, 126 and 127 of the Second Amended Complaint as to Speedy Concrete; but this Defendant does not have information sufficient to form a belief as to the

truth of the remaining allegations of said paragraphs and therefore denies the same and demands strict proof thereof.

5. Denies the allegations contained in paragraph nos. 102 (sub-paragraphs k and l), 103, 109, 110, 115, 116, 121, 128, 134 and 139 of the Second Amended Complaint and demands strict proof thereof.

AS A SECOND AND AFFIRMATIVE DEFENSE

6. Realleges each and every allegation of the First Defense as if set forth herein verbatim.

7. The Defendant asserts all affirmative defenses under and pursuant to Rules 8 and 12 of the South Carolina Rules of Civil Procedure, including the defense of failure to state a cause of action for which relief can be granted pursuant to Rule 12 (b) (6) of the South Carolina Rules of Civil Procedure.

AS A THIRD AND AFFIRMATIVE DEFENSE

8. Realleges each and every allegation of the First and Second Defenses as if set forth herein verbatim.

9. The Defendant would allege that the Plaintiff's claims are barred by the doctrines of waiver and estoppel and would assert the same as an affirmative defense.

AS A FOURTH AND AFFIRMATIVE DEFENSE

10. Realleges each and every allegation of the First, Second and Third Defenses as if set forth herein verbatim.

11. The Defendant pleads Plaintiff's negligence as an affirmative defense to this action.

AS A FIFTH AND AFFIRMATIVE DEFENSE

12. Realleges each and every allegation of the First, Second, Third and Fourth Defenses as if set forth herein verbatim.

13. The Defendant pleads "unclean hands" as a complete affirmative defense and bar to the Plaintiff's claims.

AS A SIXTH AND AFFIRMATIVE DEFENSE

14. Realleges each and every allegation of the First, Second, Third, Fourth and Fifth Defenses as if set forth herein verbatim.

15. If the Plaintiff suffered any damage or deficiencies to the project as alleged in this action, which is denied and strict proof thereof demanded, said damages are as a result of the negligence, breaches of contract or intentional acts of others, such as contractors, subcontractors, suppliers and/or services and maintenance personnel, for which the Defendant has no liability.

16. The Defendant pleads the negligence or intentional acts of others as a complete and affirmative defense.

AS A SEVENTH AND AFFIRMATIVE DEFENSE

17. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth and Sixth Defenses as if set forth herein verbatim.

18. If the Plaintiff suffered any damage or deficiencies to the project as alleged in this action, which is denied and strict proof thereof demanded, said damages are as a result of forces of nature, storms, hurricanes, tidal variances, and other acts of God.

19. The Defendant pleads Act of God as a complete and

affirmative defense.

AS AN EIGHTH AND AFFIRMATIVE DEFENSE

20. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses as if set forth herein verbatim.

21. The Defendant reserves the right to amend the pleadings and assert all additional defenses, including affirmative defenses, which the discovery process indicates may be applicable to this matter and they reserve the right to assert all such defenses and do not waive any additional or further defenses including affirmative defenses.

AS A NINTH AND AFFIRMATIVE DEFENSE

22. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defenses as if set forth herein verbatim.

23. To the extent that the same are not inconsistent and to the extent that the same are applicable, the Defendant incorporates by reference herein all pleadings and/or motions that they have filed or will file in this action.

AS A TENTH AND AFFIRMATIVE DEFENSE

24. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defenses as if set forth herein verbatim.

25. To the extent that the same are not inconsistent and to the extent that the same are applicable, the Defendant incorporates

by reference herein all defenses pled in this matter now or subsequently, including but not limited to, all affirmative defenses.

AS AN ELEVENTH AND AFFIRMATIVE DEFENSE

26. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Defenses as if set forth herein verbatim.

27. The Defendant pleads statute of limitations, statute of repose and/or laches as a complete and affirmative defense.

AS A TWELFTH AND AFFIRMATIVE DEFENSE

28. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses as if set forth herein verbatim.

29. The claims against the Defendant are barred as a result of the Plaintiff's or other Defendants' negligence and their failure to maintain their property and/or their failure to mitigate the damages alleged in the matter.

AS A THIRTEENTH AND AFFIRMATIVE DEFENSE

30. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Defenses as if set forth herein verbatim.

31. The claims against the Defendant are barred because the damages alleged, which are specifically denied, are the result of the superseding and/or intervening acts and/or omissions of persons or entities other than this Defendant.

AS A FOURTEENTH AND AFFIRMATIVE DEFENSE

32. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defenses as if set forth herein verbatim.

33. The Plaintiff's claim for negligence is barred because the Plaintiff cannot seek damages in tort for what is merely an alleged breach of contract, which is denied.

AS A FIFTEENTH AND AFFIRMATIVE DEFENSE

34. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Defenses as if set forth herein verbatim.

35. The Plaintiff's damages, if any, must be reduced by the proportionate value of the beneficial use which the Plaintiff has received from the project.

AS A SIXTEENTH AND AFFIRMATIVE DEFENSE

36. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Defenses as if set forth herein verbatim.

37. An award of punitive damages against the Defendant, directly or by indemnification, under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §3 of the South Carolina Constitution

in that:

- a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;
- b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. Any award of punitive damages based upon the wealth of the Defendant violates due process guarantees;
- d. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. Even if it would be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and
- f. The Plaintiff/Third Party Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, §3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant.

AS A SEVENTEENTH AND AFFIRMATIVE DEFENSE

38. Reallege each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Defenses as if set forth herein verbatim.

39. If the Plaintiff has suffered any damages, which is denied, the risk of damages have been assumed by the Plaintiff and the Defendant pleads assumption of the risk as a complete and affirmative defense.

AS AN EIGHTEENTH AND AFFIRMATIVE DEFENSE

40. Realleges each and every allegation of the First, Second,

Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth Defenses as if set forth herein verbatim.

41. Plaintiff's claims are barred in whole or in part by Plaintiff's and/or third parties' failure to abide by the terms of the applicable warranty/warranties, if any, which are denied, and/or by Plaintiff's and/or third parties' failure to timely and reasonably notify the answering Defendant of any allegedly defective products or alleged damages.

AS A NINETEENTH AND AFFIRMATIVE DEFENSE

42. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth and Eighteenth Defenses as if set forth herein verbatim.

43. If the Defendant violated any alleged warranty, which is denied, claims arising from such alleged warranty breaches are barred by various exclusions, disclaimers, and modifications of any such alleged applicable warranties. Alternatively, if liability under such alleged warranties is found, Plaintiff's recovery is limited to such recovery and/or remedies stated in such warranties.

AS A TWENTIETH AND AFFIRMATIVE DEFENSE

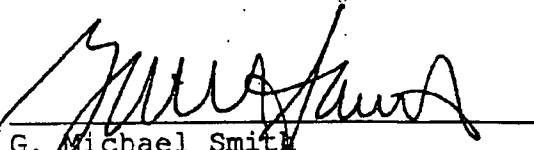
44. Realleges each and every allegation of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth,

Seventeenth, Eighteenth and Nineteenth Defenses as if set forth herein verbatim.

45. If the Plaintiff suffered any alleged damages, which is denied, such were caused in whole or in part by alternations or modifications made to the project at a time when the same was not in Defendant's control, thereby relieving Defendant in whole or in part, of any alleged liability.

WHEREFORE, having fully answered the Second Amended Complaint of the Plaintiff herein, the Defendant prays that the Second Amended Complaint be dismissed, for costs assessed against the Plaintiff and for such other and further relief as this Court may deem necessary, just and proper.

THOMPSON & HENRY, P.A.



G. Michael Smith
1300 Second Avenue
Third Floor (29526)
Post Office Box 1740
Conway, SC 29528
(843) 248-5741

ATTORNEY FOR DEFENDANT,
SPEEDY CONCRETE

Conway, South Carolina

June 9, 2010

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Rivergate Homeowners' Association,

Plaintiff,

v.

WW & LB Development Company, LLC,

RWG, Inc.,

Aiello Associates,

Daniels Engineering, Inc.,

Rivergate Homeowners' Association,

Rivergate Homeowners' Association Board
of Directors,

Wayne Winderman, individually,

Salvatrice Foran, individually,

Gerard Foran, individually,

Marcos Soares, individually, and d/b/a M.S.
Construction,

William C. De Souza, individually,

James Eason, individually, and d/b/a James
Eason & Company,

D&D Cleaning and Construction, Inc.,

Joel's Framing,

Jo Freza,

Aroldo Garcia,

Joaquin Geraldo Zeferino, individually, and
d/b/a Zeferino Framing,

Leo Trombley,

Judy Schultz,

J&D Interior Design,

Jose Dasmerces d/b/a J.P. Construction,

Scott Chandler d/b/a Coastal Custom
Windows & Doors,

R&D Construction,

Nicasio Ramirez Zunigo,

Walchir Morais,

Marco Trebbi,

Blankenship Roofing, Inc.,

DLJ Construction, L.L.C.,

Dewayne Bates,

The Bates Group, LLC,

Bridges Construction Co.,

IN THE COURT OF COMMON PLEAS

**ANSWER OF DEFENDANT AB
CONSULTING ENGINEERS, INC.**

C.A. No. 2010-CP-26-03901

Jury Trial Demanded

SIB
#1

Brewer Construction, Inc.,	)
Speedy Concrete,	)
REB-FEL, Inc.,	)
Mark Mychajluk,	)
Eric Jazwinski,	)
Southern Framing Corporation,	)
AB Consulting Engineers, Inc.,	)
Geometrics Consulting, LLC,	)
WWI Development Company, LLC,	)
Michael Dawson Construction, Inc.,	)
Asphalt Paving & Maintenance Co., Inc., and	)
Chuck's Construction Co., Inc.,	)
	)
Defendants.	)

SAB
#2

Defendant AB Consulting Engineers, Inc., answering the Second Amended Complaint of Plaintiff, would respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

1. This Defendant lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 1-38 of the Complaint and therefore denies same.
2. In response to the allegations of paragraph 39 of the Complaint, this Defendant admits that AB Consulting Engineers, Inc. was a South Carolina corporation which formerly conducted business in Horry County, South Carolina. This Defendant denies the remaining allegations of paragraph 39 of the Complaint.
3. This Defendant lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 40-46 of the Complaint and therefore denies same.
4. This Defendant admits the allegations of paragraphs 47-48 of the Complaint, but denies that Plaintiff is entitled to any relief against this Defendant.
5. This Defendant lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 49-91 of the Complaint and therefore denies same.

6. In response to the allegations of paragraph 92 of the Complaint, this Defendant admits that it provided certain civil engineering services for the project that is the subject of this action. This Defendant denies the remaining allegations of paragraph 92 of the Complaint.

7. This Defendant lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 93-99 of the Complaint and therefore denies same.

8. In response to the allegations of paragraph 100 of the Complaint, this Defendant denies that any damages incurred by Plaintiff were the result of any defect in this Defendant's services. This Defendant lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraph 100 of the Complaint and therefore denies same.

SUB
#3

9. This Defendant lacks sufficient information to form a belief as to the truth of the allegations of paragraph 101 of the Complaint and therefore denies same.

10. This Defendant lacks sufficient information to form a belief as to the truth of the allegations of paragraph 102 of the Complaint and therefore denies same.

11. To the extent that paragraph 103 of the Complaint requires a response from this Defendant, it is denied.

12. This Defendant denies the allegations of paragraphs 104-109 of the Complaint.

13. To the extent that paragraph 110 of the Complaint requires a response from this Defendant, it is denied.

14. This Defendant denies the allegations of paragraphs 111-115 of the Complaint.

15. To the extent that paragraph 116 of the Complaint requires a response from this Defendant, it is denied.

16. This Defendant denies the allegations of paragraphs 117-120 of the Complaint.

17. To the extent that paragraph 121 of the Complaint requires a response from this Defendant, it is denied.

18. This Defendant denies the allegations of paragraphs 122-127 of the Complaint.

19. The allegations of paragraphs 128-144 of the Complaint are not directed to this Defendant and require no response. To the extent a response is required from this Defendant, those allegations are denied.

20. Except as specifically admitted hereinabove, this Defendant denies each and every allegation of Plaintiff's Second Amended Complaint.

FOR A SECOND DEFENSE

21. This Defendant incorporates herein the allegations of its first defense which are consistent with this defense.

22. Plaintiff's Second Amended Complaint fails to state facts sufficient to constitute a cause of action against this Defendant and must be dismissed.

FOR A THIRD DEFENSE

23. This Defendant alleges that any damages sustained by Plaintiff were the direct and proximate result of careless, negligent, grossly negligent, reckless, willful and wanton conduct or other fault on the part of Plaintiff in failing to exercise a degree of care and caution to be used by a reasonable and prudent entity under the circumstances then and there existing.

24. Even assuming that this Defendant was determined to have been careless, negligent, grossly negligent, reckless, willful or wanton or otherwise at fault in any respect, and that any such conduct operated as a proximate cause of any of the damages allegedly suffered by Plaintiff (all of which this Defendant denies), the careless, negligent, grossly negligent, reckless, willful and wanton conduct and other fault of Plaintiff contributed more than fifty percent (50%)

SUB
#4

to the cause of the damages allegedly sustained by Plaintiff and Plaintiff's claims are accordingly barred.

FOR A FOURTH DEFENSE

25. This Defendant incorporates herein the allegations of its first defense which are consistent with this defense.

26. Even assuming that this Defendant was determined to have been careless, negligent, grossly negligent, reckless, willful or wanton in any respect, and even if such conduct operated as equal to or greater than fifty percent (50%) of the cause of any injuries or damages allegedly sustained by Plaintiff (all of which this Defendant denies), this Defendant is entitled to a determination as to the percentage of careless, negligent, grossly negligent, reckless, willful or wanton conduct or other fault of Plaintiff that contributed to Plaintiff's alleged damages and to a reduction of any amount awarded to Plaintiff by an amount equal to such percentage which the careless, negligent, grossly negligent, reckless, willful or wanton conduct or other fault of Plaintiff contributed to Plaintiff's alleged injuries and damages.

SUB
#5

FOR A FIFTH DEFENSE

27. This Defendant incorporates herein the allegations of its first defense which are consistent with this defense.

28. The injuries and damages sustained by Plaintiff, if any, were due to and proximately caused by the intervening and superseding negligence, gross negligence, recklessness, willful and wanton conduct or other fault of persons or entities over whom this Defendant exercised no authority, responsibility, or control.

29. As a result of these intervening and/or superseding causes, Plaintiff may not recover damages from this Defendant.

FOR A SIXTH DEFENSE

30. This Defendant incorporates herein the allegations of its first defense which are consistent with this defense.

31. In this action, Plaintiff has asserted claims of professional negligence against this Defendant. Plaintiff has failed to file as part of its Second Amended Complaint an affidavit of a qualified expert witness as required pursuant to section 15-36-100 of the South Carolina Code.

32. Accordingly, Plaintiff's Second Amended Complaint must be dismissed for failure to state a claim.

SHB
#6

FOR A SEVENTH DEFENSE

33. This Defendant incorporates herein the allegations of its first defense which are consistent with this defense.

34. This Defendant alleges, upon information and belief, that Plaintiff has failed to mitigate its damages and it pleads failure to mitigate as a defense to Plaintiff's claims.

FOR AN EIGHTH DEFENSE

35. This Defendant incorporates herein the allegations of its first defense which are consistent with this defense.

36. Plaintiff's claims against this Defendant are barred by the applicable statute of limitations and must be dismissed.

FOR A NINTH DEFENSE

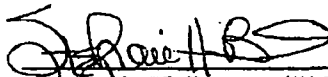
37. This Defendant incorporates herein the allegations of its first defense which are consistent with this defense.

38. The contract between this Defendant and Wayne Winderman, pursuant to which this Defendant provided services, includes a limitation of liability as follows:

The Owner agrees to limit the liability of the Engineer to \$100,000.00, or 50% of the value of the proposed improvements, whichever is less.

39. Accordingly, this Defendant's liability in this case is limited.

WHEREFORE, having fully answered the Second Amended Complaint of Plaintiff, Defendant AB Consulting Engineers, Inc. prays that the same be dismissed with costs and for such further and other relief as this Court shall deem just and proper.



Stephanie H. Burton (#13089)
GIBBES BURTON, LLC
308 East St. John Street
Spartanburg, South Carolina 29302
sburton@gibbesburton.com
Telephone: (864) 327-5000
Facsimile: (864) 327-5001

Attorneys for Defendant
AB Consulting Engineers, Inc.

September 7, 2010
Spartanburg, South Carolina

DEFENDANT AB CONSULTING ENGINEERS, INC. DEMANDS A TRIAL BY JURY.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2010-CP-26-03901

Rivergate Homeowners' Association, ... Appellant,

v.

WW & LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction, William C. DeSouza, individually, James Eason, individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferino individually and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmerces d/b/a J.P. Construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc., Right Way Group, Inc., Stevens Construction Co., Inc., Geometrics, Inc., Eric Yazwinski, Law Engineering, Inc., D & M Builders, Inc., Hill Construction Company, Bonnie Stone a/k/a Bonny Stone, DJL Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey Defendants.

Of Whom AB Consulting Engineers, Inc. is Respondent.

Chuck's Construction Co., Inc. Third-Party Plaintiff,

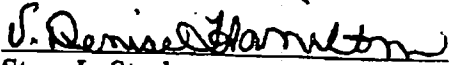
v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc. Third-Party Defendants.

NOTICE OF APPEAL

Appellant Rivergate Homeowners' Association appeals from Judge Clifton Newman's Order Granting Summary Judgment as to the Defendant AB Consulting Engineers, Inc. dated April 4, 2014 and Judge Newman's Order Denying Plaintiff's Motion for Reconsideration as to the Defendant AB Consulting Engineers, Inc. dated December 5, 2014. Appellant received written notice of entry of the Order Granting Summary Judgment dated April 4, 2014 on May 21, 2014 and written notice of entry of the Order Denying Plaintiff's Motion for Reconsideration as to the Defendant AB Consulting Engineers, Inc. dated December 5, 2014 on February 19, 2015.

Dated: March 2, 2015


Stacy L. Stanley
V. Denise Hamilton
STANLEY LAW FIRM
3303 Highway 9 East
Little River, SC 29566
(843) 390-9111 - Tel.
(843) 390-9187 - Fax
Attorney for Appellant

Other Counsel of Record:

Stephanie Burton, Esquire
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, South Carolina 29302
Attorney for AB Consulting Engineers

STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

COUNTY OF HORRY) CASE NO: 2010-CP-26-03901

B E F O R E: The Honorable Clifton Newman
January 17, 2014

RIVERGATE HOMEOWNERS' ASSOCIATION,
Plaintiff,

 **ORIGINAL**

vs.

WW&LB DEVELOPMENT COMPANY, LLC; RWG, INC.; AIELLO
ASSOCIATES; DANIELS ENGINEERING, INC.; RIVERGATE
HOMEOWNERS' ASSOCIATION, et al.,

Defendants.

APPEARANCES:

Stacy L. Stanley, Esq.
For the Plaintiffs.

J. Christopher Clark, Esq.
Douglas Baxter, Esq.
Mike Smith, Esq.
Stephanie Burton, Esq.
For the Defendants.

Court Reporter:
Natalie Dahl, RPR

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: All right. Mr. Stanley and company,
3 tell us who you are here on behalf of.

4 MR. STANLEY: Stacey Stanley, I represent the
5 plaintiff, the Rivergate Homeowners' Association.

6 MS. BURTON: I'm Stephanie Burton, I represent AB
7 Consulting Engineers.

8 MR. SMITH: Mike Smith with Speedy Concrete.

9 MR. BAXTER: Doug Baxter, WW&LB.

10 MR. CLARK: Chris Clark, Chuck's Construction.

11 THE COURT: Do we have a file somewhere?

12 MR. STANLEY: Your Honor, may it please the
13 Court. I believe the earliest motions were filed by
14 Ms. Burton and Mr. Clark. We have numerous motions to
15 be heard this morning. I don't have the whole list,
16 but I think they are motions for summary judgment,
17 motion in limine, motion to strike.

18 The one that pertains to my client, specifically
19 the earliest, which was filed March 5, 2013, was filed
20 by Mr. Clark or someone at his firm representing
21 Chuck's Construction, and that is a motion for summary
22 judgment. There was also a motion from Ms. Burton,
23 who represents AB Consulting, that was filed April 11,
24 2013, and that is a motion for summary judgment. And
25 then there was another motion for summary motion by

1 Speedy Concrete, Mr. Smith, filed July 15, 2013.
2 Relating to my client, I have a motion for a
3 scheduling order that I filed. Then Ms. Burton filed
4 a motion in limine, and she also filed a motion to
5 strike portions of an affidavit. I'm just talking
6 about the motions that I believe pertain to my client.
7 I know there are other motions than that.

8 THE COURT: All right. Ms. Burton.

9 MS. BURTON: May it please the Court. We have a
10 number of motions for summary judgment that was filed
11 in April of last year on behalf of AB Consulting
12 Engineers. One of those motions was resolved this
13 morning, that being a motion for summary judgment
14 relating to crossclaims that was asserted against my
15 client by Speedy Concrete. Mr. Smith has brought an
16 order related to the dismissal of those crossclaims,
17 so that motion has been resolved. With respect to --

18 THE COURT: Let's put that on the record.

19 MR. SMITH: That is correct. Speedy Concrete
20 filed crossclaims against Chuck's Construction and AB
21 Consulting, and we are dismissing those without
22 prejudice. At this time, the stipulation of dismissal
23 was signed by all parties, and I'll file it with the
24 court as soon as I leave here.

25 THE COURT: All right. Mr. Clark.

1 MR. CLARK: That is correct.

2 MS. BURTON: So if it suits the Court, I would
3 like to address the motion for summary judgment with
4 respect to the plaintiff's claims, and I think there
5 is some overlap, which probably is why I got nominated
6 to go first. There is some overlap between AB
7 Consulting Engineers and some of the other
8 codefendants' motion for summary judgment.

9 THE COURT: Okay.

10 MS. BURTON: I've got two notebooks for the Court
11 that relate to the motions.

12 THE COURT: All right.

13 MS. BURTON: If Your Honor looks at the notebook
14 that is labeled the "Motion for Summary Judgment," one
15 of them is just the master deed and the 34 or so
16 amendments to that.

17 THE COURT: Before we start with this, if I could
18 get oriented once again to this case. This is day
19 number four or five -- were we here Monday -- yes, Day
20 No. 5 of hearing construction motions and various
21 other types here in Conway, and we've worn out the
22 court reporter. I don't know if she'll work with me
23 anymore. We were here until 7:00 a few of those days.
24 At some point for break -- we have to take a break for
25 Patterson vs. Edwards. So I'm trying to at least get

1 the Anderson Brothers case out of my mind from last
2 night. If you all can give me a speech as to what
3 this case is all about first, and then we'll jump into
4 the motions.

5 MS. BURTON: Yes, sir. If the Court turns in the
6 notebook at the beginning, I know --

7 THE COURT: Mr. Stanley usually likes to give
8 that speech as to what it is all about, and then you
9 can tell me what it is all about as well.

10 MS. BURTON: Sure.

11 MR. STANLEY: This is a construction defect case
12 for a project called the Rivergate project. It is in
13 Little River, South Carolina. We have alleged -- the
14 plaintiff brought suit and alleged numerous
15 construction deficiencies. The first part of this
16 case, and I know Your Honor sees a lot of different
17 cases, but you may recall in this case it had two
18 aspects, it had the building aspect of the
19 construction defects, which we refer to as a vertical
20 construction, and it had the horizontal aspect of
21 construction which was the site work, roads and
22 drainage. We have resolved the first part of that
23 case, which was the building and structural components
24 of the buildings. That was settled May or so of last
25 year. So we are not dealing today in any more of this

1 case in regards to any of the vertical construction.
2 We are just dealing now with the site work, the
3 grading, the roads and driveways and drainage in this
4 case.

5 Your Honor, this is about a 5-acre property. It
6 has about 82 units. Most of these units -- just for
7 orientation, they are duplexes and quadplexes. The
8 project has one main road going into it, and then
9 several off-shoots of -- from that road, which have
10 been called numerous different things, everything from
11 roadlets to driveways to other things, but that will
12 come into play in this case.

13 The original lawsuit, Your Honor, was filed --
14 and I'm sure Ms. Burton will get into that -- in 2007
15 by Mr. Robert Sanger. Mr. Sanger has passed away
16 since the filing of that lawsuit. It was a class
17 action lawsuit. The homeowners could not get the
18 developer or any of the other defendants to repair
19 what problems they saw out there. So subsequent to
20 that, and it's going to come into play again in this
21 case in arguments this morning. Mr. Winderman, after
22 that lawsuit, turned over the HOA to the homeowners,
23 and that was on or about October 31, 2007.

24 So that was the first time the homeowners
25 controlled the board, and then they had a homeowners

1 meeting on November 1st of 2007, or there about.
2 Subsequent to that, they then brought the HOA lawsuit,
3 which is what we're here about today, Rivergate
4 Homeowners' Association versus WW&LB, et. al.

5 Now, Your Honor, the remaining defendants,
6 obviously the plaintiff, the HOA -- sorry, the
7 parties, the plaintiff, HOA, WW&LB, which is the
8 developer and we would assert general contractor for
9 this project, AB Consulting, represented by
10 Ms. Burton, who is the site engineer for the project,
11 chuck's Construction which did site work and also
12 several roads in the project, and then Speedy
13 Concrete, which did the driveways and the pads.

14 I think, Your Honor, that kind of gives you,
15 hopefully, a little bit of orientation in regards to
16 this construction defect lawsuit.

17 THE COURT: All right. Thank you. Ms. Burton.

18 MS. BURTON: As Mr. Stanley mentioned, I
19 represent AB Consulting Engineers, which was a civil
20 engineering firm in the Myrtle Beach area. I brought
21 with me Amy Drucker, who was the engineer at AB
22 Consulting Engineers, and she owned 50 percent of the
23 company.

24 THE COURT: I see you throughout the State, and
25 it is always on behalf of engineers.

1 MS. BURTON: Mostly, yes, sir.

2 THE COURT: You're an engineering defense
3 specialist?

4 MS. BURTON: Architects and engineers, yes, sir.

5 THE COURT: Among other things. Very good.

6 MS. BURTON: If the Court looks briefly at the
7 notebook I handed up, just to follow up on what Mr.
8 Stanley said, we've included just an aerial picture of
9 the development. It is off of Highway 17 in Little
10 River, and as the Court can see, there's a road that
11 runs through the development that is called Rivergate
12 Lane, and so on one side of Rivergate Lane are
13 duplexes that back up to the East Port Golf Club, and
14 then on the other side there are these small roads or
15 streets which are labeled on Picture B through I, and
16 as Mr. Stanley indicated, those have been called in
17 the lawsuit anything from driveways to roadways to
18 streetlets, and down each street there are units on
19 either side of the street.

20 I've also included, just for the Court's benefit,
21 some pictures from the subdivision as you ride down,
22 and each picture is labeled as you ride down Rivergate
23 Lane looking down each driveway or streetlet in the
24 neighborhood, so the Court could get a feel for what
25 we're talking about.

1 My client -- let me back up. The testimony and
2 evidence in the case is that a gentleman named Wayne
3 Winderman was an accountant in Pennsylvania, and he
4 did some development work, CVSS and the like. He met
5 a gentleman from Horry County named Luther Bellamy,
6 and Mr. Bellamy and his family, the Bellamys and the
7 Stanleys, owned this land off of Highway 17.

8 THE COURT: Not Mr. Stanley, Stanley?

9 MS. BURTON: Not this Mr. Stanley.

10 MR. STANLEY: Not related that I know of.

11 MS. BURTON: Yes, sir. They decided they would
12 develop this project, and so the Stanley and Bellamy
13 families actually, ultimately, conveyed the land;
14 hence, the name WW&LB, Wayne Winderman and Luther
15 Bellamy, that is the how they got the name of the
16 developer.

17 My client was actually originally hired by Wayne
18 Winderman, and included in the materials before the
19 tab about the statute of limitations, I've included
20 the agreement between Mr. Winderman, who is referred
21 to as the owner in the contract, and my client AB
22 Consulting Engineers, who is referred to as the
23 engineer in the contract. Mr. Winderman hired AB
24 Consulting Engineers to do, basically, a site civil
25 design, that included water, sewer, grading plan and

1 storm water management designs. The main issue, at
2 least with respect to my client, has to do with
3 drainage. The plaintiff contends that there are
4 drainage problems on the site, and that water ponds on
5 the streetlets and on certain parts of the grass.

6 The plaintiff also alleges that some of the
7 concrete driveways, little driveway pads next to the
8 units you can see in the pictures, so you drive down
9 the streetlet and turn onto a little concrete
10 driveway, and that goes up to someone's unit. The
11 plaintiff contends that some of the driveways, little
12 concrete driveways, are too steeply sloped, and that
13 allegation is primarily directed to maybe WW&LB and
14 Speedy Concrete, and then the plaintiff also contends
15 that some of the asphalt in the streets is degrading,
16 washboarding, we've heard all sorts of terms,
17 potholing and degrading in the streetlets.

18 So the main claims in this horizontal litigation
19 relate to drainage, steepness of the driveways and the
20 quality of the asphalt in the streetlets. The
21 plaintiff asserted four claims against my client, AB
22 Consulting, they are negligence, breach of express
23 warranty, breach of implied warranty and violation of
24 the South Carolina Unfair Trade Practices Act.

25 The first issue with respect to the motion for

1 summary judgment relates to the statute of
2 limitations. The plaintiff, homeowners' association,
3 was actually formed on February 20th of 2001, and
4 initially the members on the board of that was Wayne
5 Winderman and two homeowners. At some point,
6 according to Mr. Winderman's testimony, a lady named
7 Donna Dawson was added to the board of directors for
8 the homeowners' association.

9 What we know -- and if the Court turns to the tab
10 that I labeled "Statute of Limitations," I actually
11 included a small chart, because I know the facts, but
12 it took me a long time remembering them, and it took a
13 long time to get it back in my head. We know that
14 right off the bat the folks that lived out there were
15 not very happy with the quality of construction. They
16 weren't happy with the quality of construction of the
17 units, they weren't happy with the quality of
18 construction of parts of the infrastructure, so they
19 had annual HOA meetings. We know they had one in
20 2004, because we have the minutes from the meeting,
21 and drainage concerns were discussed in the minutes at
22 the meeting of the plaintiff, homeowners' association.

23 In 2005, they had their annual meeting of the
24 homeowners' association, again complaining of various
25 issues, including drainage. The homeowners weren't

1 happy with the response from the developer, so they
2 decided they would form an ad hoc committee.

3 THE COURT: That ad hoc committee, which was
4 formed in -- Jim Dunn named the chairman, is that the
5 famous Jim Dunn?

6 MS. BURTON: No, sir, I don't think so.

7 MR. SMITH: He is not.

8 THE COURT: Is he still living?

9 MR. SMITH: I don't think he is.

10 THE COURT: He's dead -- deceased? She said he's
11 deceased; otherwise, he would be here in a black suit
12 and walking on stilts and all of that.

13 MS. BURTON: The ad hoc committee was formed, and
14 they appointed a gentleman, Jim Dunn, who I don't
15 think is the famous gentleman, to be the chairman.

16 THE COURT: He was the solicitor of Horry County
17 and notorious in this region.

18 MS. BURTON: Oh, okay. The folks got together
19 and they decided they were going to complain pretty
20 much to every governmental entity or person that might
21 listen, that included filing complaints with the
22 Labor, Licensing and Regulation. And so the ad hoc
23 committee handed out the complaint forms to everyone
24 that lived out there, they wrote about their many
25 complaints and turned them back into Mr. Dunn, who

1 turned around and sent them to LLR, and we know that
2 LLR made visits out to the site back in 2005.

3 They also complained to the Horry County Planning
4 Commission. They complained to DHEC. They pretty
5 much made complaints to anybody who would listen, and
6 various -- I think minor things were done,
7 particularly with respect to the houses. They had
8 complaints about water intrusion in the houses.

9 While the ad hoc committee was operating, one of
10 the folks that lived out there suggested that perhaps
11 they hire an engineer to look at the issues.
12 According to Mr. Dunn's testimony, they didn't hire an
13 engineer because they didn't have any money to hire an
14 engineer, didn't want to gather up the money, so they
15 don't do that. They corresponded with some frequency
16 with Mr. Winderman about the various complaints that
17 they had and, in fact, Mr. Winderman would respond
18 periodically, and I've included a 2005 response from
19 Mr. Winderman writing on behalf of plaintiff,
20 homeowners' association, saying, you know, we're going
21 to address these various issues you've complained
22 about, and included in those was issues related to
23 drainage.

24 As I mentioned, they filed in 2005 complaints
25 with LLR, various complaints, including that filed on

1 behalf of the ad hoc committee, included complaints
2 about storm water management and drainage. They
3 talked with Horry County about drainage issues.

4 When they had the next homeowners' association
5 meeting in 2006, they talked about drainage issues.
6 So discussions regarding drainage and storm water
7 management occurred in 2004 and continued thereafter,
8 and included those discussions at the homeowners'
9 association meetings.

10 In 2007, one homeowner filed a lawsuit, that is
11 Mr. Sanger. He filed a lawsuit and he alleged a wide
12 variety of complaints, but those included allegations
13 with respect to construction of sidewalks, driveways
14 and the asphalt roadways, improper driveway slopes and
15 defective storm water management drainage system. The
16 Sanger lawsuit was suspended for quite some time. It
17 was 40(j) at one point, and then in April of 2010 was
18 the first time that my client, AB Consulting
19 Engineers, was added as a party in this case.

20 So the question becomes, Your Honor, whether the
21 plaintiff knew or should have known through the
22 exercise of reasonable diligence whether a claim
23 relating to storm water management existed prior to
24 April 28, 2007, because, of course, we have a
25 three-year statute of limitations in 15-3-530.

1 THE COURT: You say the plaintiffs, whether the
2 plaintiffs knew or should have known?

3 MS. BURTON: Yes, sir.

4 THE COURT: In April 28, 2007. Plaintiff being?

5 MS. BURTON: Rivergate Homeowners' Association,
6 which is the plaintiff who sued my client in 2010.

7 I would submit to the Court, based upon the
8 evidence in the record, it is apparent that Rivergate
9 Homeowners' Association, the plaintiff, which was an
10 entity created in 2001, was aware that there were
11 drainage issues at the property going back as far as
12 documented in 2004, and at every annual homeowners
13 meeting thereafter.

14 I included in the materials what I think are the
15 primary cases with respect to the statute of
16 limitations. Of course, you start out, I guess, with
17 Snell versus Columbia Gun Exchange, which is one of
18 the older cases where the discovery rule is set forth.

19 THE COURT: Let me catch up with you.

20 MS. BURTON: It is the first case.

21 THE COURT: I got you.

22 MS. BURTON: The Columbia Gun Exchange case.

23 When the Court set forth the discovery rule, the Court
24 said that, one, an injured party must act with
25 promptness when the facts and circumstances of an

1 injury would put a person of common knowledge on
2 notice that some right of his had been invaded, or
3 that some claim against another party may exist.

4 I included some other construction statute of
5 limitation cases, which I think is relevant. In the
6 Dillon County School District case, that case involved
7 a roof leak at a school that had been constructed by
8 the district. The issue there was initially they were
9 having minor roof leaks at the school, and they had
10 various people look at the roof leak. They eventually
11 got a letter from an expert who said, look, you have a
12 major problem with the roof, and the school district
13 subsequently brought an action with respect to the
14 roof. The defendants brought up the statute of
15 limitations, because the action had been commenced
16 after the statute, and the district argued, well, it
17 wasn't until we were told by our expert we had this
18 major roof leak that the claim accrued, and the Court
19 rejected that argument. The Court said you knew that
20 you were having issues with the roof, and it was at
21 that point that you should have -- through the
22 exercise of reasonable diligence -- known that a right
23 of yours had been invaded, and that the statute of
24 limitations accrued at that time, not when your expert
25 said, oh, you have a major roof problem on this site.

1 In the Dean versus Ruscon, Ms. Dean owned a
2 building in Charleston at the time that the Omni Hotel
3 was being constructed. When they built that hotel,
4 they obviously had to drive piles for the land. She
5 had some cracking in her building when they started
6 driving piles for the Omni, and she actually was
7 monitoring -- had been told that she needed to monitor
8 the cracks. The pile driving continued thereafter,
9 and she had major structural damage to her building as
10 a result of this pile driving.

11 When she brought her action, the defendants
12 contended that the statute of limitations expired, and
13 she argued, well, it wasn't when the little cracks
14 appeared, it was when these major cracks appeared that
15 my claim accrued, and the Court rejected that argument
16 as well and said, essentially, when you first noticed
17 cracking at your building, you knew that some right of
18 yours had been invaded and your claim accrued.

19 THE COURT: Let me ask you on that, I noticed
20 that there is a reversal of a summary judgment -- in
21 the middle it says, Does a jury question exist as to
22 whether the case is barred by the statute of
23 limitations. So sequentially how did this --

24 MS. BURTON: Are you asking me about Dean?

25 THE COURT: Yes.

1 MS. BURTON: It appears, Your Honor, that they
2 went to trial, because they say in the paragraph
3 above, that the circuit court directed a verdict in
4 favor of Ruscon based on the statute of limitations,
5 and so that, I guess, is why the question came up in
6 the fashion that it did to the supreme court about
7 whether there really had been a factual issue that
8 should have been submitted to the jury.

9 THE COURT: Let me catch up with you, because it
10 was awhile since I looked at this particular case.

11 (A brief pause in the proceedings.)

12 THE COURT: So the circuit court determined that
13 the case was barred, court of appeals reversed, and
14 the supreme court reversed the court of appeals
15 agreeing with the circuit court on the issue that it
16 had been barred by the statute. Okay. I'm with you,
17 again.

18 MS. BURTON: Yes, sir. I've also included the
19 Republic Contracting case, a court of appeals case.
20 The facts related to the construction deficiencies are
21 very complex. They have to do with rebar that was
22 being used. The case came up on a motion for summary
23 judgment, the Court granted partial summary judgment
24 based upon the statute of limitations with respect to
25 some of the defendants. The issue in that case was

1 whether there was a design defect in the manner in
2 which the rebar had been designed, and the argument
3 the contractor made was that it didn't have the
4 expertise to assess the design deficiency and,
5 therefore, the statute of limitations didn't accrue
6 until the designer acknowledged that there was a
7 design deficiency, which they did in a meeting.

8 The Court rejected that argument, and it is on
9 the fourth page of the opinion where the discussion is
10 regarding the statute of limitations. It said that it
11 wasn't -- you can't just wait until you get an expert
12 report, you were on the site, you had sufficient
13 observations, sufficient evidence that there was some
14 problem and a claim might exist, and that is when the
15 statute of limitations accrued with respect to your
16 claim.

17 THE COURT: I see Mr. Baxter's firm was in on
18 that one. Did you all agree with -- were you on the
19 winning side or losing side?

20 MR. BAXTER: We're typically on the losing side
21 -- actually, we were.

22 THE COURT: Yeah, Charles Carpenter.

23 MR. BAXTER: Yes.

24 MS. BURTON: I think the reason I included these
25 cases, Your Honor, is they stand for the proposition

1 that the statute of limitations accrues when one knows
2 that their rights have been invaded, and some claim
3 might exist. You don't have to wait, and you don't
4 wait under the statute until you get an expert report,
5 until someone specifically says to you, oh, that claim
6 might be against A, B or C; it is when you know there
7 is a problem or a concern, you then have the
8 obligation to exercise reasonable diligence and bring
9 your claim within three years. That certainly is
10 ample time and opportunity to investigate your claim
11 and commence a lawsuit.

12 In this particular case, it is absolutely clear
13 that the Rivergate Homeowners' Association knew that
14 there were concerns about drainage, that there were
15 concerns about driveway steepness, that there were
16 concerns about the asphalt paving as early as 2004,
17 and those are well documented concerns and they
18 complained about those particular items to anybody
19 that would listen. So it is absolutely apparent that
20 the homeowners' association knew or should have known
21 through the exercise of reasonable diligence that some
22 claim related to those items existed.

23 THE COURT: But what? There has to be a "but"
24 someplace.

25 MS. BURTON: There is two "buts." But number

1 one, the plaintiff might argue that -- well, they
2 didn't know that AB Consulting Engineers could be a
3 defendant. The problem with that "but" is that if the
4 plaintiff has concerns about storm water management
5 and infrastructure work, the plaintiff has an
6 obligation to figure out who participated in storm
7 water management and design construction, and that we
8 know is a matter of public record, because my client's
9 drawings and documentation, all which was submitted
10 and approved by the county and DHEC, are matters of
11 public record. In fact, Mr. Dunn went and got the
12 drawings back when he was the ad hoc chairman. So we
13 know that it was no big secret as to who was engaged
14 in the site civil design on this project. But that is
15 the first issue.

16 The second issue gets to my second tab, because I
17 was anticipating an argument that Mr. Stanley might
18 make, and that relates to some theory of tolling. The
19 cases that talk about the statute --

20 THE COURT: You must have one of Mr. Smith's
21 firm's cases in here on equitable tolling.

22 MS. BURTON: I don't know if I do or not. I
23 didn't study who all the lawyers were.

24 MR. SMITH: The equitable estoppel issue.

25 THE COURT: Is that a claim of equitable tolling?

1 MS. BURTON: No, sir. There is a different --
2 some of them talk about equitable tolling and
3 equitable estoppel. The equitable estoppel cases,
4 which I don't think the plaintiff can make with
5 respect to AB Consulting, is in a situation where the
6 defendant engages in a conduct that leads the person
7 astray.

8 THE COURT: I didn't mean to push you ahead.
9 We'll end up there, then. Go ahead -- we may.

10 MS. BURTON: I don't know that Mr. Stanley can
11 make an argument that Ms. Drucker led his folks
12 astray, because she wasn't aware there was a lawsuit
13 or a claim. I think the argument would be an
14 equitable tolling argument, which the Court looks at a
15 little differently. It really -- the first main case
16 I found that everybody talks about, and in subsequent
17 cases, is this Florence Hooper versus Ebenezer case by
18 the supreme court. That is a medical malpractice case
19 where the gentleman got decubitus ulcers.

20 THE COURT: What keeps me interested when lawyers
21 argue is the lawyers and firms who have been involved
22 in them, and just in this particular one I see you
23 have John Nickels, who I see quite a bit, and Gerald
24 Chambers on the other side, who just tried a case
25 before me last week in Columbia, a medical mal case

1 where they got a defense verdict.

2 MS. BURTON: Unfortunately, Mr. Chambers did not
3 win this particular opinion.

4 THE COURT: He wins some and loses some. He
5 happened to win one last week, a verdict in a medical
6 mal. His best feature is that he doesn't drag a case
7 out. He doesn't wear the jury out with long speeches.
8 He gets to the point, and after each trial they seem
9 to -- he's a military guy, ex-military, and they
10 comment that they like the fact that he gets to the
11 point. That is not to say anything to force you to
12 shorten your argument, because it is a different
13 setting, and I'm not the jury, I just made that
14 comment. Go ahead.

15 MS. BURTON: Yes, sir (laughing). The Hooper
16 case, the issue there, and the reason the statute
17 expired, was because the plaintiff could not find the
18 defendant to serve. They hadn't kept their records
19 updated on the Secretary's Website, and this goes to
20 the older rules of civil procedure when to commence an
21 action to file and serve.

22 THE COURT: Couldn't find what?

23 MS. BURTON: They couldn't find the defendant.
24 The defendant sold out and they couldn't find him, so
25 they argued that there should be equitable tolling,

1 and the Court agreed that in that circumstance there
2 should be equitable tolling, but said two things.
3 One, that if you want to argue equitable tolling, the
4 burden is upon the person making the arguments to just
5 -- prove facts to justify the use; and, two, the
6 supreme court cautioned that the doctrine of equitable
7 tolling should be used very sparingly.

8 Subsequent cases that I've included, all of
9 those, the Court basically reiterates that concept,
10 and the majority of those they do not apply equitable
11 tolling because they note that it should be rarely
12 applied, and that it should only be applied when there
13 are extraordinary circumstances that would justify the
14 application of the theory.

15 THE COURT: And the rule was amended at well.

16 MS. BURTON: The rule now allows you to commence
17 just by filing, which helped out the lawyers
18 substantially.

19 I don't want to belabor the Court, but I included
20 the equitable tolling case in South Carolina that talk
21 about when equitable tolling should be used. They
22 talk about when there is mistakes in the pleading, and
23 we don't have that issue here. So the issue is
24 whether there are extraordinary circumstances that
25 would warrant the spare use of equitable tolling.

1 THE COURT: The PCR case, how does that fit in?

2 MS. BURTON: He didn't meet a one-year statute of
3 limitations in that case, and he made the argument --
4 I believe he filed his PCR petition in the wrong
5 court, and he made the argument that he should be
6 relieved from the statute of limitations, and they
7 rejected that argument in that Pelzer case.

8 The American Legion case, which is actually a
9 case involving Horry County, is somewhat analogous,
10 they made an equitable tolling argument based on a
11 memorandum, and the Court talks at great length in
12 that opinion about when equitable tolling should be
13 used, does give guidance in a list format about
14 extraordinary circumstances that would warrant
15 equitable tolling.

16 THE COURT: Such as what?

17 MS. BURTON: They never really say such as what.
18 We have the one case with Ebenezer where they couldn't
19 find him. They didn't keep their data up to date on
20 the Secretary of State's site. The only other case
21 that I have -- two other cases I have where they have
22 equitable tolling, because most of them reject it, is
23 the Magnolia case and the Orlando case.

24 THE COURT: So you have a reappearance with the
25 Ebenezer case, you have it here twice; once in the

1 court of appeals and then in the supreme court?

2 MS. BURTON: Yes. Yes. The two cases that might
3 give the Court some guidance with respect to
4 extraordinary circumstances, because those are the two
5 that they granted equitable tolling on, is the
6 Magnolia case, which is a construction case where the
7 -- let me find....

8 THE COURT: I figured you would get there at some
9 point, Magnolia North.

10 MS. BURTON: The second one from the end.

11 THE COURT: All right.

12 MS. BURTON: That case --

13 THE COURT: That is an appeal from the Honorable
14 Clifton Newman.

15 MS. BURTON: As I'm sure you remember then, in
16 that case they argued equitable tolling, because the
17 developer, against whom they wanted to assert the
18 claims, was also controlling the homeowners'
19 association. So you have the developer sitting on
20 both sides and, thus, the Court concludes that the
21 developer was probably not going to sue itself and,
22 therefore, the doctrine of equitable tolling should be
23 applied, and it was an extraordinary circumstance for
24 that application. That makes sense because one
25 probably is not going to bring a claim against the

1 same entity.

2 THE COURT: How does that not apply here?

3 MS. BURTON: Because -- I'll tell you why.

4 Because the claims that Rivergate is asserting are
5 against my client, AB Consulting Engineers, which was
6 not in any way a participant in the homeowners'
7 association, and there was absolutely nothing on earth
8 that would have kept the homeowners' association --
9 even when Wayne Winderman was involved -- from
10 bringing any claim it wanted to against any of the
11 parties. I mean, they are not on both sides of the
12 transaction.

13 These folks had nothing to do with the
14 homeowners' association. That argument would only
15 work if WW&LB was trying to make the argument, because
16 then Mr. Stanley could say, well, Mr. Winderman is
17 hardly going to sue WW&LB and, therefore, equitable
18 tolling would apply. It wouldn't apply for the other
19 defendants who had absolutely no participation, and
20 there is no evidence in the record that Wayne
21 Winderman had any particular love lost for any of the
22 folks that performed services on that project, and
23 there was any reason why the homeowners' association
24 wouldn't have commenced an action when it knew or
25 should have known that it had the right to do so.

1 THE COURT: Let me ask you. Is that case over?
2 Is it finally over? This is heard December 2011,
3 rehearing denied April 20 -- decided February 2012,
4 rehearing denied, April 2012. Some effort to have the
5 supreme court hear it. Is it over?

6 MS. BURTON: I don't know if they filed a
7 petition for writ of cert, whether that has been
8 issued.

9 THE COURT: Do you know if it is over, Mr. Smith?

10 MR. SMITH: I can step outside and ask Phil real
11 quick. I don't mind.

12 THE COURT: Whether it is still percolating or
13 over.

14 MR. SMITH: I know there was multiple briefs
15 filed, but I was under the impression that those were
16 the briefs in the DJ action on the coverage issues,
17 but let me step outside and ask Phil real quick.

18 THE COURT: All right.

19 MS. BURTON: The last case I included is a
20 district court case from Judge Norton. He discusses
21 equitable tolling and, frankly, cites I believe to the
22 Magnolia case. That is a little different
23 circumstance because, as he recounts in the first
24 paragraph, the case has been around for a million
25 years. It was a case that involved the settlement,

1 and there was a confession of judgment that had been
2 executed, and the issue was whether they had tried to
3 enroll the child, the confession of judgment, in a
4 timely manner.

5 THE COURT: Do you think a federal district court
6 opinion has precedential value to the state circuit
7 court?

8 MS. BURTON: I don't think it is a binding
9 precedent on the court. I think it an example of
10 where the Court applied South Carolina law and applied
11 the cases and explained the application to that and is
12 just illuminating to the Court, if nothing else.

13 I think what this case says following the
14 Magnolia case, in this case the confession of judgment
15 wasn't filed because the guy who confessed judgment
16 had taken possession of it through various companies.
17 There had been a lot of assignments through the
18 confession, and it was actually assigned to some
19 companies that the confessor controlled, and so Judge
20 Norton concluded that while he was controlling filing
21 of the confession of judgment, that the statute of
22 limitations was tolled because, of course, he wasn't
23 going to file it against himself any more than the
24 developer in the Magnolia Manor case was going to file
25 a lawsuit against itself.

1 So I think to answer the Court's question about
2 extraordinary circumstances, because they never laid
3 out specifically by the supreme court, I think we have
4 examples of that in these cases, and that is where --
5 if you would have to basically sue yourself and there
6 would be that tension, that there would be equitable
7 tolling, because no one wants to sue themselves. But
8 the other cases show that the doctrine of equitable
9 tolling has otherwise not been used and hasn't been
10 used when there is an arm's length relationship
11 between the parties. When you have a plaintiff and
12 defendant and they are unrelated, they have not
13 applied equitable tolling.

14 Here, as I mentioned earlier, there is no reason
15 to believe the homeowners' association, whether Wayne
16 Winderman is on the board or not on the board, it
17 wouldn't be perfectly content to sue AB Consulting
18 Engineers or Chuck's Construction or Speedy Concrete,
19 or any other folk that worked on the project. I would
20 submit to the Court that the doctrine of equitable
21 tolling as an exception to the application of the
22 statute of limitations, which ran a long time ago,
23 does not apply, and that the statute of limitations
24 bars any claim by the Rivergate Homeowners'
25 Association against my client.

1 MR. SMITH: Mr. Thompson advises me that the case
2 is still pending before the supreme court. They have
3 not decided that yet.

4 THE COURT: Of course that is one of multiple
5 issues --

6 MS. BURTON: Yes, sir.

7 THE COURT: -- in that particular matter. All
8 right.

9 MS. BURTON: The next issue, and I guess I have
10 my tabs, and I apologize to the Court, it is out of
11 order, but it is really a standing issue.

12 THE COURT: Standing?

13 MS. BURTON: Yes, sir.

14 THE COURT: Is it titled "standing"?

15 MS. BURTON: It has a tab that says "Standing."

16 THE COURT: I see it.

17 MS. BURTON: Luckily, the materials are fairly
18 simple. There is a master deed for the Rivergate
19 Homeowners' Association, a horizontal property regime
20 that I included in a whole separate notebook, because
21 this all relates to the standing issue.

22 In the master deed, the horizontal property
23 regime was established and certain property was
24 conveyed from the developer, WW&LB, to the property
25 regime. I had to type a chart, which I put in the

1 front of that notebook, because it is very difficult.

2 THE COURT: Tell me that again. You say certain
3 property was conveyed -- say it again.

4 MS. BURTON: When they filed the master deed,
5 they created the Rivergate Horizontal Property Regime,
6 and certain land that WW&LB owned was conveyed to the
7 property regime.

8 THE COURT: Which they controlled?

9 MS. BURTON: Yes. And then the homeowners'
10 association would have responsibility for maintaining
11 the common elements of the property and all of the
12 homeowners have an undivided interest in the common
13 elements, which is why -- because I can't remember
14 this well -- I typed up portions of the master deed.

15 Basically, it says in Article 5 that homeowners
16 have an undivided interest in the common elements,
17 that the homeowners' association in Article 12 is
18 responsible for maintenance and repair of the common
19 elements, and that the homeowners' association has an
20 annual obligation to have the common elements
21 inspected by an engineer or other professionals.

22 So in the master deed, WW&LB conveyed certain
23 land to the property regime, which was now part of
24 this development. The land that was initially
25 conveyed was 1.37 acres. It included -- part of it

1 was signage at the front, ingress and egress, which
2 was .85 acres, and two buildings, Building No. 2 and
3 Building No. 6. The master deed specifically says
4 that in the future the developer reserves the right to
5 convey additional land to the horizontal property
6 regime and then it would become part of the Rivergate
7 development.

8 What the developer did was as buildings were
9 constructed, as the Court can see, they would then
10 amend the master deed to convey additional property to
11 this horizontal property regime and would actually
12 record the amendment. They have a plat drawn for each
13 of the amendments, and all of that would be filed in
14 Horry County. The problem with standing in this case
15 is that WW&LB never conveyed the roads and streetlets
16 to the horizontal property regime. If you look --
17 which is why I had the descriptions typed up and why I
18 included this, because the plats are all here, if you
19 look at this, as a building was constructed, the
20 building would be conveyed to the horizontal property
21 regime. They go into great detail in the descriptions
22 about how many square feet each building is. They'll
23 convey a building consisting of 39, 40 square feet,
24 and this is all on these individual plats, but the
25 developer never conveyed most of Rivergate Lane and

1 the streetlets to the homeowners. So, as of today,
2 WW&LB is the owner of those properties. They never
3 became elements, common elements or limited elements
4 with respect to the development. In fact, the last
5 amendment to the property, which was 34, simply
6 changes some of the bylaws, for lack of a better word,
7 of the association.

8 All of the drawings are attached, and every
9 single description, when they talk about anything
10 other than the buildings, always talks about that same
11 language about I'm conveying up front the signage,
12 ingress and egress to the land, and it is always the
13 same number of acres. So if you look at the original
14 master deed it shows just like the front entrance off
15 of 17 and a little bit of the road, because he started
16 at the front and went towards the back, the rest never
17 got conveyed. The homeowners' association doesn't
18 have any control over the streetlets or over the rest
19 of Rivergate Lane.

20 THE COURT: And therefore?

21 MS. BURTON: And therefore doesn't have standing
22 to bring a claim for damages related to any of those,
23 because they don't own them. They don't have a
24 maintenance obligation. They have nothing, no
25 interest in them. On the limited common elements --

1 that is common elements. Had it been conveyed, a
2 street, it would be a common element. The homeowners'
3 association wouldn't own it, but it would have a
4 maintenance obligation, which the cases say if you
5 have a maintenance obligation, you would have standing
6 to bring the claim.

7 On the limited common elements, which is a
8 defined term in the code and in the master deed, and
9 probably this is more of a WW&LB and Speedy argument
10 than one for my client, but I'll bring it up. The
11 limited common elements includes the concrete
12 driveways, the driveways, they have complained about
13 the steepness, those are part of the limited common
14 elements, and the homeowners' association has no
15 either ownership nor maintenance responsibility with
16 respect to those elements, and thus no standing to be
17 fussing about concrete driveways. In fact, the deed
18 says in Article 22 that it is each homeowner's
19 obligation to maintain and repair the limited common
20 elements to which the unit has exclusive use. So
21 these little driveways when you drive up to your unit
22 and walk over to your front door, those are limited
23 common elements and to be maintained by each
24 homeowners, and the homeowners' association doesn't
25 have standing to bring any claim related to those.

1 The drainage issue, the pipes that my client
2 denies is an exfiltration system, so it is a
3 perforated pipe under the streets, and I know the
4 Court has seen this because down in this part of the
5 state they are everywhere, the roads have an inverted
6 crown so it goes to a slope in the middle, and then
7 there is a grate in the roadway and it drains into the
8 grate, goes into these perforated pipes in the
9 streets.

10 The plaintiff proposed, as part of their
11 conceptual designs, to rip all of the streets out and
12 change those pipes and put in concrete piping under
13 the roads. The problem is they don't own the roads
14 and, therefore, they don't have the right to do any of
15 that work, and they don't have the standing to bring
16 the claims related to the work. I would submit to the
17 Court that the Rivergate Homeowners' Association does
18 not have standing to bring any claims related to
19 property that has never been conveyed by master deed
20 to the homeowners' association or to the horizontal
21 property regime.

22 I would submit to the Court that the homeowners'
23 association does not have any standing to bring claims
24 related to limited common elements, because it neither
25 owns those, nor has the obligation to maintain or

1 repair those, and under the cases, it would not have
2 standing then to bring a claim with respect to those.

3 The next issue I have is substantive legal claims
4 that have been asserted against my client. The first
5 is negligence. I have a tab related to the --

6 THE COURT: Let's see, I needed to find a good
7 breaking point so we can deal with those folks.

8 MS. BURTON: That's fine.

9 THE COURT: Your matter will take how long --
10 that will give you a chance to get a drink, and we'll
11 take a couple of minutes and we'll deal with his
12 situation there, and come back.

13 (A recess was taken.)

14 THE COURT: Do we need to wait on Mr. Smith?

15 MS. BURTON: After the brief break, I know that
16 the other counsel for some of the other defendants was
17 somewhat interested in arguing the statute of
18 limitations and standing issue before we got into the
19 substantive claims against each of the defendants, and
20 so I think that is what they were wanting to do, and I
21 know we're waiting for Mr. Smith.

22 THE COURT: All right.

23 MR. STANLEY: Are we waiting for him?

24 MR. CLARK: Yeah. He wanted to argue the statute
25 of limitations.

1 MR. STANLEY: I know he had a mediation 11:00.

2 MR. CLARK: They changed that. May it please the
3 Court.

4 THE COURT: Yes, sir.

5 MR. CLARK: I'm Chris Clark for Chuck's
6 Construction, once again. We have, likewise, filed a
7 motion for summary judgment on the same ground as AB
8 Consulting, and I would simply join in the motion that
9 has been made regarding the statute of limitations. I
10 believe that you have voluminous documents and have
11 heard lengthy argument on the statute of limitations,
12 so I don't intend to repeat those arguments or
13 duplicate those efforts.

14 As far as the work that Chuck's performed,
15 Chuck's Construction just did a few things to this
16 project. Chuck's did the rough grading, which
17 essentially destroyed the old items there on the
18 property, and making the grade suitable for further
19 work. We did the main road, Rivergate Drive, and two
20 of the small side roads; that is it. After that, we
21 left the project.

22 From the time we left the project, we didn't hear
23 anything regarding some controversy with the work we
24 did until we were sued in 2010, same time that AB
25 Consulting was sued. So for the same grounds that

1 have been argued, we believe that the statute of
2 limitations has long since passed.

3 THE COURT: You have a motion for summary motion
4 filed somewhere? Did you send it to me?

5 MR. CLARK: We do. We filed -- I have a copy of
6 it. We filed ours against the plaintiff and also
7 against the same codefendants, Speedy Concrete and
8 against WW&LB.

9 THE COURT: Let's see, Defendant Chuck
10 Construction Motion for Summary Judgment against
11 Speedy Concrete, and you said you filed one against?

12 MR. CLARK: The plaintiff and WW&LB. The one
13 against Speedy Concrete was resolved this morning.

14 THE COURT: So do you have a copy of that motion?

15 MR. CLARK: I do.

16 THE COURT: I don't generally see the file until
17 I get here, so if I could have a copy of yours.

18 (A brief pause in the proceedings.)

19 THE COURT: All right.

20 MR. CLARK: No more to say, in essence, regarding
21 the summary judgment against the plaintiff. We have a
22 summary judgment against WW&LB on their crossclaims.

23 Briefly, Your Honor -- well, that hasn't been
24 addressed at this time, so I'll reserve that until we
25 finish with this.

1 THE COURT: All right. Very good. Give me one
2 second here.

3 (A brief pause in the proceedings.)

4 THE COURT: Mr. Smith.

5 MR. SMITH: I represent Speedy Concrete, and what
6 I would like to do is address the estoppel issues, and
7 the biggest thing I can say on the fact issue is that
8 in 2003/2004 when these sloped driveways were being
9 built, Jim Dunn and the rest of the homeowners'
10 association obviously knew the degree of slope they
11 had in the driveways because there is testimony from
12 both the expert and from the homeowners that the slope
13 of the driveways have not changed since the initial
14 construction.

15 So what we're dealing with and what you see in
16 those photographs is exactly what was constructed.
17 The construction was in 2003 to 2005 time frame. We
18 were brought into a lawsuit in 2010 as well, along
19 with AB Consulting and some others.

20 The biggest issue, Your Honor, on the equitable
21 tolling and the equitable estoppel issues are my
22 client was overheard by Jim Dunn, who is the -- was
23 the representative of the ad hoc committee, when they
24 were out on-site, a representative of my company said
25 we can't build these driveways this way because the

1 slope is going to be too steep, to which Wayne
2 Winderman told him, I don't care how steep it is, you
3 build them anyway. So there was notice to the ad hoc
4 committee chairman person as far back as 2004 as to
5 the slope of the driveways that the slope was an
6 issue. That is when they first knew about it
7 2003/2004.

8 Mr. Dunn said in his deposition that, you know,
9 it was out there from the very beginning, everybody
10 knew it. It was open and obvious. Nobody has been
11 injured, no kind of consequential damages from
12 personal injury or property damage from the driveways.
13 That was testified to by the plaintiff's
14 representative.

15 THE COURT: Why would there be sloped driveways
16 in a place like Little River?

17 MR. SMITH: Good question. We think it was Peter
18 robbing from Paul to try to get enough dirt to build
19 the pads and things of that nature. Instead of
20 bringing new dirt in, they took dirt from -- as it was
21 heading from 17 down towards the waterway, they were
22 pulling dirt from lower and putting it up top, and as
23 it gets lower, the project, the slopes get steeper.

24 The key, though, I think is the master deed. In
25 the master deed specifically it says, and I'll hand up

1 the version that was actually in Ms. Burton's brief,
2 but as you can see, the highlighted area in Article 5
3 in the master deed specifically addresses that each
4 owner is responsible for the sloped driveways, and
5 she's highlighted the sloped driveways there for you
6 in that section.

7 The limited common elements are basically to be
8 taken care of by each individual unit owner. The unit
9 owners had not noticed and knowledge of the slope
10 issue in 2004, according to Jim Dunn, who was the ad
11 hoc president. So we think it is a simple issue that
12 falls outside the equitable argument on both equitable
13 tolling and equitable estoppel, and it is clearly,
14 because it is the responsibility of each unit owner,
15 and no unit owner has sued regarding the slope of the
16 driveways, that we get summary judgment in this case.
17 Thank you, Your Honor.

18 THE COURT: All right.

19 MS. BURTON: It's me again. To go to -- past the
20 procedural hurdles with respect to the plaintiff's
21 claims, and to go directly to the causes of action
22 asserted against my client, one of those is a claim
23 for negligence. I wanted to address that first.

24 As the Court knows, the issue of whether AB
25 Consulting Engineers owed a duty to the plaintiff,

1 homeowners' association, is a question of law for the
2 Court; it is not a factual question.

3 THE COURT: Whether they owe a duty to --

4 MS. BURTON: To the homeowners' association, the
5 plaintiff in the case.

6 THE COURT: Whether?

7 MS. BURTON: Whether my client owed a legal duty
8 to the plaintiff is a question for the Court and the
9 initial hurdle in bringing the negligence action,
10 there as to be a duty owed by AB Consulting to the
11 Rivergate Homeowners' Association. To remind the
12 Court, my client entered into an agreement to perform
13 services with Wayne Winderman, individually, on May 14
14 of 1999, which is two years before the plaintiff
15 existed on this earth, because it was a legal entity
16 formed on February 20, 2001.

17 So at the time my client was engaged to provide
18 professional services by Wayne Winderman, the
19 Rivergate Homeowners' Association did not exist, and
20 it did not exist for two subsequent years.

21 THE COURT: The type of professional services
22 that was engaged was what?

23 MS. BURTON: Site civil engineering. So it was
24 sewer, water, grading plan, storm water management,
25 which is the issue here. We have no issue about the

1 sewer system or the water system or anything like
2 that. The issue against AB Consulting Engineers is a
3 complaint that the storm water management system is
4 not accurately or adequately designed which is --
5 which causes puddling in the streetlets and puddling
6 in other areas of the subdivision. Primarily, the
7 complaints relate to water in the streetlets, not so
8 much on Rivergate Lane, which, as the Court surmised,
9 is sloped from the top of the subdivision at 17 down
10 towards the waterway.

11 The property did have some natural slope, and
12 then, as Mr. Smith suggested, there was -- instead of
13 importing filling material, they did excavate dirt
14 from lower parts of the subdivision and brought it up
15 probably in an effort to save money, and that led to
16 some of the issues relating to the finish floor
17 elevation, but those are not issues related to my
18 client, who didn't design the finish floor or those
19 aspects of the project.

20 The question is: Does a civil engineer, who is
21 hired by an individual, who subsequently forms a
22 company to become a developer, does that engineer owe
23 a duty to a subsequently formed homeowners'
24 association? I would submit to the Court that the
25 answer to that legal question is no.

1 THE COURT: The work would have been completed
2 when?

3 MS. BURTON: My client did the designs in 1999
4 and 2000. The drawings were permitted in May of 2000,
5 and the grading work commenced in the summer of 2000.
6 The first phase of the infrastructure work was
7 completed in November of 2000. So this goes back a
8 long way to designs that were performed and permitted
9 in 2000, before the homeowners' association existed
10 and, frankly, before WW&LB existed either, which I
11 guess is why Mr. Winderman contracted in his name
12 individually with my folks.

13 As the Court knows, the McCollum case and the
14 Hendrix versus Clemson case says that a legal duty
15 exists in certain circumstances, and one of those is
16 if it is created by a statute, created by a contract,
17 created, created because of somebody's status,
18 property interest or under other special
19 circumstances.

20 To address each of those briefly, on the
21 statutory duty issue, if you want to argue that a
22 statute creates a legal duty, it has to imply a civil
23 right of action, and I've included the cases. I
24 included two cases that I think are particularly
25 relevant, the Hurst case, which is a case involving

1 the civil engineering regulations where somebody tried
2 to argue that those regulations created a duty, and
3 the Court rejected that. More recently in the Jade
4 Street case, which I frankly had other interest in at
5 the time, but having re-read it now, in the Jade
6 Street case they made the argument that the
7 Residential Builders Code and Regulations implied a
8 duty, and the Court in Jade Street, among other
9 rulings in that case which were of significance,
10 rejected that argument and said that the residential
11 portions of the residential building code did not
12 include any civil liability and did not create a legal
13 duty in tort.

14 So I don't know that Mr. Stanley wants to argue
15 that there is some statute that creates a duty, but I
16 know that the engineering statute regulations do not
17 create any duty, and there is no other statute that
18 I'm aware of that creates some duties with respect to
19 my client to the Rivergate Homeowners' Association.

20 The second question is whether the contract
21 between Wayne Winderman and AB Consulting Engineers
22 creates a duty in tort to the Rivergate Homeowners'
23 Association, and that is why I included the contract
24 at the book that I handed up to the Court. Of course,
25 there would have to be language in the contract that

1 indicates that somehow the parties intended to benefit
2 the plaintiff as a beneficiary. The contract is quite
3 short and contains no language which indicates that
4 there is some intention by Wayne Winderman and AB
5 Consulting Engineers to create a duty from AB
6 Consulting to an entity homeowners' association, which
7 does not yet exist.

8 The next category is special status. There are
9 some cases that talk about special status. Those do
10 not apply here. They are limited to premises
11 liability claims and the volunteer type of claims.

12 Property interest, there are a few cases where a
13 mortgage holder or somebody has a property interest,
14 and the Court has ruled that in those special
15 circumstances that a duty, a legal duty, is created.
16 I think we get to special circumstances cases as to
17 whether there was any special relationship created
18 that means that there is a duty between AB Consulting
19 Engineers in 1999 and 2000 when it did its design
20 work, to the Rivergate Homeowners' Association, which
21 was not yet in existence.

22 I've included the key cases. I think the Tommy
23 L. Griffith case, which I know Mr. Stanley had a pack
24 of cases that he provided to me, is probably one of
25 the leading cases in the construction field on this.

1 notion of special relationship.

2 THE COURT: Which one?

3 MS. BURTON: Tommy L. Griffith Plumbing. It is
4 in my materials. It is kind of towards the back,
5 versus Jordan Jones and Golding. The Court talks in
6 that case about whether the engineer owed a duty to a
7 contractor and decided that under the circumstances in
8 that case, which were laid out, and as I recall it was
9 an AIA form of contract that allowed the engineer to
10 stop the work and supervise construction. It said
11 that under those circumstances where the engineer had,
12 in fact, stopped the work, that the engineer owed a
13 duty to the contractor who was engaged in the work on
14 the project under the facts of that case. Of course
15 that is not exactly the situation we have here because
16 those are project participants engaged in the project.
17 Here, we don't have that.

18 What we essentially have is a subsequent entity
19 that has some maintenance responsibilities over a
20 portion of the project that it received by master deed
21 periodically. I would submit to the Court that the
22 cases that talk about the special relationship,
23 starting with Tommy L. Griffith, and I've cited other
24 cases including Judge Curry's opinion in the Raw
25 Stress for Less, and Judge Lewis' opinion in the Long

1 versus O'Reilly Store case, that indicate that when
2 there is not basically a close-working relationship,
3 that there is not a duty of care.

4 If you look at the cases where you have folks
5 that work on a project, an architect and engineer,
6 contractor and the subs, something like that where
7 there is a close relationship between the parties, the
8 courts found that there is this special relationship,
9 and those are the words that are always used in this
10 context, special relationship such that a duty of care
11 is created. Here, we don't have any relationship
12 because, of course, the entity that is bringing the
13 lawsuit against my client didn't even exist at the
14 time my client did the work; thus, there could be no
15 relationship as a matter of law.

16 So I would submit to the Court as an initial
17 matter that there is no duty owed by AB Consulting
18 Engineers with respect to the design they did to the
19 plaintiff in this case.

20 The second issue, and it is an issue both with
21 respect to the motion for summary judgment and with
22 respect to a motion in limine, relates to the evidence
23 that has to be entered in a professional negligence
24 action. I included the old Gillien (phonetic) case
25 that basically says in a professional negligence

1 action you have to have expert testimony both on the
2 standard of care in effect, and with respect to a
3 deviation from the standard of care.

4 The plaintiff has an expert, one, named J. Drew
5 Wilkey, who is the only person who purports to render
6 any opinion with respect to negligence against AB
7 Consulting Engineers. The problem with Mr. Wilkey is
8 that he cannot and does not establish the standard of
9 care applicable to a civil engineer in the State of
10 South Carolina performing work in Horry County in 1999
11 to 2000. The reason Mr. Wilkey cannot and does not do
12 that is because he was not qualified.

13 Mr. Wilkey graduated from college -- and I handed
14 up excerpts from his deposition -- he graduated from
15 college in 1997, two years before my client was doing
16 design work. He was not a licensed professional
17 engineer until 2003, which is after the drawings had
18 been permitted, by three years, and when Mr. Wilkey
19 graduated from college, he went to work for S&ME in
20 Spartanburg, South Carolina, and as the Court knows --

21 THE COURT: Some of your folks, aren't they?

22 MS. BURTON: Yes, sir. As he testified, when he
23 went to work for S&ME, he was an engineer in training,
24 which is his designation, and his job there, because
25 that is a geotechnical engineering firm, not a site

1 civil firm, he said his job was to do construction and
2 materials testing. He went on-site and did soil
3 testing and concrete testing, and the like.

4 In addition to the fact that he doesn't have just
5 the education and qualifications to talk about civil
6 engineering in 1999, he does not -- he testified that
7 he doesn't have the experience. He's never done site
8 civil design. He's never sealed a set of drawings for
9 site civil design. He never submitted drawings in
10 Horry County to the Horry County Codes folks, to the
11 DHEC, OCRM, never done site civil design on a green
12 field site like this one where there is no work done.
13 He basically said that he worked for S&ME for five
14 years, and then he went to work for Kimley-Horn up in
15 Charlotte, who does forensic engineering, and he was
16 working in their forensic engineering department until
17 recently when he went out on his own. What he does in
18 that capacity is look at defects and come up with
19 scopes of repair for those, but he doesn't do the same
20 kind of work that Ms. Drucker does.

21 THE COURT: Is the test that rigid for
22 determining the qualifications of an expert?

23 MS. BURTON: Yes, sir, I think it is that rigid.

24 THE COURT: Let me ask you -- you can answer
25 about theory rigidity of the test, but on your first

1 point, in 1999 he was a baby or high school or?

2 MS. BURTON: Two years out of college.

3 THE COURT: If I were to decide to retire as a
4 judge and become an expert in the field of legal
5 malpractice, and someone would bring me a case from
6 1950 or '60 -- two years outside of college, so 1975,
7 I couldn't be qualified because in 1975 I wasn't a
8 lawyer?

9 MS. BURTON: I think the answer is you would have
10 to demonstrate that you had -- to the Court -- that
11 you were knowledgeable about the standard of care to
12 be used by a lawyer in that year in that area of
13 practice. So I think there is two issues. One, can
14 you demonstrate you are knowledgeable about the
15 standard of care to be used by a lawyer at the time?
16 Two, let's say, for example, I wanted to go out and be
17 an expert witness and I was going to testify in a
18 family court matter, and I'll tell the Court I know
19 zero about family court, is my area of practice
20 sufficient to demonstrate that I know what the
21 standard of care is to be used by a practitioner of
22 family law during a given time period?

23 THE COURT: You think the test is that rigid?

24 MS. BURTON: I do, and there is medical
25 malpractice cases that relate to this. There are

1 cases that talk about whether an orthopedist could
2 testify against a podiatrist, and the court has looked
3 at whether the doctor can testify about what the
4 standard was by that particular discipline and if they
5 can demonstrate that they have knowledge about that
6 discipline at that time, they can be qualified.

7 In addition to the fact that Mr. Wilkey was two
8 years out of college, that is one of the problems.
9 The other problem is that he can't demonstrate he has
10 qualifications in the discipline. Because you are an
11 engineer -- my husband is an engineer, but he doesn't
12 know anything about site civil design, and because I'm
13 a lawyer doesn't mean I know anything about practicing
14 family law, which I submit to the Court I don't know
15 anything about family law.

16 So the problem we have in this case, because the
17 case mandates that when you are suing someone in a
18 malpractice action, that you have to have expert
19 testimony to establish the standard of care in effect
20 at the time the work was done, and you have to have
21 expert testimony about deviation from the standard of
22 care that the plaintiff simply does not have it in
23 this case. Mr. Wilkey is hardly in a position to
24 testify about somebody in Horry County when he's
25 sitting in Spartanburg doing concrete testing, what

1 someone in Horry County is supposed to be doing --

2 THE COURT: Where did he go to school?

3 MS. BURTON: I don't remember. I don't remember
4 if it was Clemson -- I mean, it was one of the
5 engineering schools.

6 THE COURT: So this a motion to strike because
7 they don't have expert testimony?

8 MS. BURTON: Not a motion to strike. Right now
9 it is a motion for summary judgment because they have
10 to establish as part of the case, by expert testimony,
11 the standard of care and the deviation therefrom.
12 They don't have that evidence in the record, because
13 the person they proffered to do that is not an expert
14 witness qualified to establish what was the standard
15 of care, if I'm the site civil designer, in 1999
16 working on an undeveloped site for a developer.

17 THE COURT: So they have to search high and low
18 to have someone meet that test, wouldn't they?

19 MS. BURTON: Not very high and low. There is
20 plenty of folks that work in civil engineering firms
21 that work on the coast in South Carolina. That is not
22 a tiny group of individuals. There are a lot of
23 people that do civil site.

24 THE COURT: Is he a licensed engineer in the
25 State of South Carolina?

1 MS. BURTON: He became licensed in '03. So he
2 was not a licensed engineer, as Ms. Drucker was, in
3 1999 and 2000 when the work was done.

4 THE COURT: You have compelling arguments, but I
5 don't get the sense that this is one of the most
6 compelling ones, but I still have to read your -- what
7 you handed me. By the way, everything that you are
8 arguing as far as your summary judgment, is it in your
9 motion somewhere?

10 MS. BURTON: Yes, sir.

11 THE COURT: Because I didn't get an opportunity
12 to review it.

13 MS. BURTON: Yes, sir.

14 THE COURT: Do you have another copy of it, by
15 chance?

16 MS. BURTON: I do. I'll find it in a second. I
17 found the service form, but I didn't --

18 THE COURT: I have the experts and what is
19 necessary to be qualified, I have to go through that
20 every time in every case seemingly, criminal or civil.
21 The case from, I guess, Hampton County, or
22 somewhere. -- I guess it is the case against Ford -- is
23 it Ford, the case where the expert was allowed to
24 testify as to the speed, the accelerant -- one of
25 those Ford roll-over cases where the supreme court

1 reversed.

2 MS. BURTON: The one with Mr. Bell, Ed Bell?

3 THE COURT: Took away the -- supreme court took
4 away that multi-million verdict, where the expert
5 professed to be an expert by his own training, and the
6 Court didn't -- the Court should not have qualified
7 him. You know, there is special circumstances where
8 one cannot get qualified as an expert, but I don't
9 know whether the test is as rigid as you are
10 professing it to be. Again, I don't know if others
11 are going to argue the same point or not. I haven't
12 read what you have submitted. I have a daughter who
13 is a civil engineer as well, and I would love for her
14 to be an expert one day, so maybe that reduces my
15 threshold of what one needs to be to be an expert. Go
16 ahead.

17 MS. BURTON: The next issue on the negligence
18 case, because we have the issue about duty and breach
19 of duty with respect to the expert, is proximately
20 caused damages. The problem plaintiff has in this
21 case on the damages side, and this assumes that the
22 plaintiff even owns the roads and the drainage systems
23 and can get past the standing issue, on the damages
24 side Mr. Wilkey testified that he prepared a -- what
25 he calls -- conceptual repair. He testified it was a

1 conceptual repair, and he worked with this other guy
2 at Kimley-Horn on it, but that it wasn't sufficiently
3 detailed -- it was not sufficiently detailed to apply
4 for a permit. They gave the conceptual repair to AO
5 Hardee to provide a price, and Mr. Ray from AO Hardee
6 said -- they gave a price, but he said in the
7 deposition they wouldn't do the work without detailed
8 drawings, and that it was just an all-conceptual.

9 So what we have in the case is the plaintiff's
10 claims based on a conceptual design done by Mr.
11 Wilkey, and a conceptual estimate prepared by Hardee,
12 and I would submit to the Court the plaintiff's
13 evidence with respect to damages are unduly
14 speculative.

15 THE COURT: So, therefore, as it relates to their
16 claim to damages, I should do what?

17 MS. BURTON: We have a motion in limine with
18 respect to that as well. It couldn't be submitted to
19 the jury if it is unduly speculative and subject to
20 conjecture. I think that is what the language of the
21 cases say.

22 THE COURT: Regarding a claim for damages, but
23 the extent as to what the damages are, we're not going
24 to get into -- that deep into the weeds at this point,
25 are we?

1 MS. BURTON: I hope not.

2 Plaintiff asserted a claim for breach of
3 expressed warranty. I'm not sure what the basis of
4 the claim is, because in the answers of
5 interrogatories, when we asked the plaintiff to
6 identify the expressed warranty, they responded they
7 did not contract with AB Consulting Engineers. So, of
8 course, there would have to be some kind of warranty
9 made by AB Consulting Engineers to Rivergate
10 Homeowners' Association. There is no contract.
11 There's no testimony about -- once Rivergate was
12 formed that there was any contact related to any
13 warranty. There is no evidence of an expressed
14 warranty at all, and if so, what the terms of said
15 warranty might even be. So I would submit to the
16 Court that -- I'm not sure they intend to pursue that
17 claim given the answer to interrogatory, but there is
18 no evidence to support such a claim.

19 In the third cause of action, Rivergate
20 Homeowners' Association sued my client for breach of
21 the implied warranty of habitability and, of course,
22 my client is not a residential homebuilder and there
23 is no implied warranty of habitability for engineering
24 services.

25 There is a claim for breach of the implied

1 warranty of fitness for a particular purpose. I
2 pulled the third cause of action and put it behind the
3 tab under "implied warranties" to see what that was
4 all about. The allegations are that the defendants,
5 my clients, sold the units along with proportionate
6 shares of the common elements, which of course AB
7 Consulting Engineers didn't own anything, nor is there
8 evidence that it sold anything, and that AB Consulting
9 Engineers made an implied warranty of habitability and
10 fitness for a particular purpose, in Paragraph 118.

11 In Paragraph 119 talks about how AB breached
12 those implied warranties by selling the units. So I'm
13 thinking to myself that this must be because of all of
14 the sales language of UCC implied warranty of fitness
15 for a particular purpose, which of course does not
16 apply to service contractors, and AB Consulting
17 Engineers did not sell anything to anybody. They
18 provided services to Wayne Winderman pursuant to a
19 written agreement. So I'm not sure how that cause of
20 action applies.

21 The last legal claim that was asserted against my
22 client, Your Honor, is a claim for violation of the
23 South Carolina Unfair Trade Practices Act, which is in
24 the fourth cause of action. I included the cause of
25 action, because it is only one page, under the tab for

1 the South Carolina Unfair Trade Practices Act. The
2 allegation is that the defendants designed, developed
3 and constructed buildings that are defective or
4 deficient, which of course my client didn't do
5 buildings, and that the defendant should have been
6 aware of the deficiencies, and that has an impact on
7 the public interest and is capable of repetition.

8 There is no --

9 THE COURT: How do you distinguish that from the
10 folks in here during the break testifying about her
11 complaint for Unfair Trade Practices because she
12 bought a car that stopped on her the next day and she
13 had to pay \$300 to get it fixed?

14 MS. BURTON: Well, I think the cases actually
15 talk more in terms of consumer transactions, frankly,
16 and whether there is an improper act under the Unfair
17 Trade Practices Act. I think you would have to prove
18 this capability of repetition so you could prove the
19 impact on public interest. You would have to have
20 some demonstration that that act occurred, or because
21 of procedures that the defendant would likely to occur
22 again.

23 Frankly, I've never seen an unfair practices
24 claim in what is really a professional negligence
25 lawsuit, which is really what this is. There is

1 certainly no evidence in this case that my client
2 engaged in a deceptive or unlawful act in performing
3 civil design and there is some capability of
4 repetition, other than the fact that AB Consulting
5 Engineers was an engineering firm at the time. It is
6 now no longer in operation. It ceased operation in
7 2006.

8 THE COURT: It did?

9 MS. BURTON: My client doesn't exist anymore.
10 Ms. Drucker and Mr. Lewis were 50/50 members in the
11 company. Mr. Lewis left the company, and Ms. Drucker
12 dissolved it, so it doesn't exist anymore and hasn't
13 since 2006.

14 There certainly is no evidence -- I mean, they
15 can argue all they want that there is something the
16 matter with the design, but that is not Unfair Trade
17 Practices Acts. That is not something -- an unfair
18 deceptive act or practice affecting trade or commerce,
19 and there is no evidence in the record that somehow
20 they engaged repetitively in defective design, that
21 these guys were out in the business to sell design
22 services to do it wrong every time. There is no
23 evidence of that. There is no evidence really about
24 any work they did on other developments. They haven't
25 gone out and figure out if there is any drainage

1 problems on every development Ms. Drucker sealed the
2 drawings on.

3 In the course of recent depositions, "recent"
4 being last summer I think is about the last time we've
5 taken depositions, Mr. Stanley asked a lot of
6 questions about Braxton Lewis, and I included the
7 documents related to that after the law under the
8 Unfair Trade Practices Act thinking that perhaps --
9 although it is not pled -- that maybe this was what
10 this claim was based on, because professional
11 negligence, I don't think it could be based on.

12 There were a lot of questions about Mr. Lewis
13 signing documents on behalf of the company AB
14 Consulting Engineers and suggestions -- certainly in
15 the questions -- that Mr. Lewis, who is not a PE, he
16 graduated from Francis Marion with an engineering
17 degree, but Francis Marion was not accredited, so they
18 wouldn't let him take the PE damage. Now they would,
19 but back in the day they would not.

20 There was a suggestion that somehow he was not
21 permitted to sign the documents, and I've included
22 them in the notebook, the ones I think Mr. Stanley has
23 used, where he signs on behalf of the company. He was
24 a 50 percent owner of the company, and I'm not sure if
25 this is the basis for the Unfair Trade Practices Act

1 claim; that Mr. Lewis, by signing on behalf of AB
2 Consulting, is saying he's an engineering and somehow
3 that is unfair and deceptive, but even if you are not
4 allowed to do that, which the registration rules say
5 you can, but even if you aren't allowed to do that, it
6 doesn't have anything to do with anything in this
7 lawsuit. None of the documents signed by Mr. Lewis
8 are addressed to Rivergate homeowners' association.
9 Clearly Rivergate Homeowners' Association didn't rely
10 on anything by Braxton Louis. They didn't exist when
11 he wrote it and signed it. It has nothing to do with
12 drainage problems, which is really what the claim is
13 against AB Consulting Engineers. It is really, I
14 guess, if that is the claim, it is a red herring
15 issue. It doesn't matter when he signed. What
16 matters is whether the design comported with the
17 standard of care when they did it. It is certainly
18 not an unfair trade practices claim.

19 I did include, if that is the issue, part of the
20 code section, 40-22-250, that says that an engineering
21 firm has to have one licensed engineer as an officer,
22 principal or owner or full-time employee, but an
23 engineering firm, unlike law practices, can have
24 owners that are not PEs. Lawyers can't right now,
25 but --

1 THE COURT: Law firms are the same in some
2 states.

3 MS. BURTON: Other places, and certainly in
4 Europe that is the trend with the accounting firms and
5 the like, but engineering firms, that is not an issue.
6 You can be an owner as long as you have an engineer
7 somewhere involved in the company, even if it's just
8 as an employee. I included that, if that is the
9 claim.

10 Lastly, we move for summary judgment on punitive
11 damages. They don't have any evidence of willful or
12 reckless conduct on behalf of Ms. Drucker or AB
13 Consulting Engineers, and that is what is required to
14 submit that question. I mean, Mr. Wilkey, at best,
15 says that he doesn't like the calculations for sizing
16 the pipe, or he doesn't like how long the pipes are,
17 or doesn't like where the clean-outs are in the pipes,
18 but certainly there is no evidence of some kind of
19 willful or reckless conduct.

20 As I mentioned earlier, there is no evidence
21 about other projects AB Consulting have performed or
22 did perform back in this time period that somehow
23 there is a trend that they always were doing a sorry
24 job on engineering. So I would submit to the Court we
25 are entitled to summary judgment on the punitive

1 damages as well. Thank you.

2 THE COURT: And when I called you Ms. McDonald, I
3 took your first name and added Judge Stephanie
4 McDonald's last name to your name. Back in the day,
5 she used to argue for the defense as well, so when I
6 said McDonald, I meant Ms. Burton.

7 Anything else from the defense, or should I go to
8 Mr. Stanley?

9 MR. SMITH: I think go to Mr. Stanley.

10 THE COURT: Mr. Stanley, we have a whole lot here
11 for you to respond to.

12 MR. STANLEY: Yes, sir. I'll do my best to
13 address those issues, and I'll try to be as quick and
14 as efficient as possible.

15 As you are aware, in a motion for summary
16 judgment, the standard is whether there are genuine
17 issues of material fact. In this case, there are
18 numerous genuine issues of material fact, and the jury
19 needs to hear these issues and make those
20 determinations.

21 As you are aware, Your Honor, when there is a
22 preponderance of evidence standard, the plaintiff only
23 needs to provide a mere scintilla of evidence to
24 overcome summary judgment, and that is the case of
25 Hancock versus Midsouth Management Company, 381 S.C.

1 326. There is a plethora of evidence in this case to
2 contradict everything Ms. Burton has said. I can't
3 try this case today, obviously, but there is six
4 years' worth of information. My office alone has 88
5 notebooks like this with information from this case.
6 It is a massive case, and to try to put this in all
7 about a 30-minute, 45-minute presentation would be
8 impossible. So what I've tried to do, Your Honor, is
9 take some excerpt -- deposition excerpts and show Your
10 Honor what is going on in this case, what has been
11 going on for some time that will contradict everything
12 that Ms. Burton presented and the other attorneys
13 presented in regards to their arguments.

14 I have a notebook, like Ms. Burton, and if I
15 could present that to Your Honor.

16 THE COURT: Yes, sir.

17 MR. STANLEY: Before I forget, I would like the
18 court reporter to mark one of these as an exhibit.

19 (Court's Exhibit 1 marked.)

20 MR. STANLEY: This case is massive, and what I
21 tried to do is pull some of these deposition excerpts
22 in regards to the testimony of some of the defendants
23 or witnesses in this case.

24 The first -- in that first section, and I went
25 ahead and put all of the depositions in the first

1 section, but if you'll look at the deposition of Chuck
2 Bellamy, and I provided all of this information to
3 opposing counsel, he was, again, the grading
4 contractor. He did some of the roads at Rivergate,
5 Your Honor.

6 THE COURT: Chuck Bellamy?

7 MR. STANLEY: Yes, sir.

8 THE COURT: Was he one of the developers or --

9 MR. STANLEY: Just a lot of Bellamys in that part
10 of South Carolina. There is a Luther Bellamy, who was
11 one of the partners of WW&LB, which is the
12 developer/general contractor. And this is -- Chuck
13 Bellamy is unrelated to Luther Bellamy. There are a
14 lot of Bellamys in Horry County, especially in that
15 particular area.

16 Mr. Bellamy was a very good witness for the
17 plaintiff. He is very honest. He's very forthcoming.
18 He makes a great impression. He has a lot of
19 pertinent knowledge of what was going on at Rivergate
20 during these early stages in 1999 and 2000. His
21 testimony, Your Honor, that we are going to briefly
22 touch on will show that the defendants, especially
23 WW&LB, and even Chuck's and AB Consulting, had
24 knowledge of these construction defects as they were
25 going on during the construction at Rivergate. There

1 will be other people that will testify to that also.

2 His testimony will show you that AB Consulting
3 held itself out -- specifically Braxton Lewis, who was
4 part owner of AB Consulting -- held himself out as a
5 licensed engineer, which he was not. People relied on
6 that expertise at Rivergate. His testimony will show
7 that there was incompetence of Wayne Winderman, which
8 is WW&LB, as a general contractor at the project of
9 Rivergate.

10 If you'll turn to Page 56 -- excuse me, my voice,
11 I had a cold over Christmas, and even though I'm fine,
12 my voice is not recovered from that, so excuse me for
13 that.

14 THE COURT: It's all right.

15 MR. STANLEY: Line 18. It says, Do you remember
16 any other construction problems while you were doing
17 the scope of work at the Rivergate project. He
18 responds, There was some erosion problems that we had
19 to keep doing. That project was on a steep incline,
20 and those hard rains you get in the summertime would
21 washout different silt fences, areas that we would
22 have to redo.

23 Your Honor, this is the same complaint of the
24 homeowners today. It is the fact that you can get a
25 rain out there and water is rushing down this project

1 because of improper drainage and improper grading, and
2 just all of the problems that came with the site work
3 at Rivergate. This problem that Mr. Bellamy said was
4 ongoing, while he's doing his work and having to
5 continue go and redo the grading at Rivergate, and
6 eventually he quit the job, by the way, or was fired,
7 whatever you want to call it, because he had enough of
8 the work out there. This problem was ongoing, and it
9 is the same problem that we've identified by our
10 expert and his findings, and it is the same problem
11 that the homeowners have been complaining about, and
12 they continue to complain about today.

13 If you'll go to Page 93, Your Honor, this goes to
14 the AB Consulting holding itself out as an engineer --
15 sorry, it is specifically Braxton Lewis, who was a
16 50 percent owner of AB Consulting, holding himself out
17 as a licensed engineer when he was not. I asked Mr.
18 Bellamy, who was very forthright and honest, I said,
19 Back on the record -- sorry, Line 4: Is there any
20 reason for you to believe based on your work with AB
21 Consulting that Ms. Drucker was not an engineer --
22 that was one of the partners -- and he said, No. Is
23 there any reason for you to believe that Mr. Lewis was
24 not an engineer, and there was an objection, and his
25 answer was, No.

1 So Mr. Bellamy, along with other people, relied
2 on the AB Consulting, specifically Braxton Lewis, to
3 give them engineering direction and supervision, and
4 Mr. Braxton Lewis, who we'll see his testimony, he
5 contradicts himself. He was holding himself out as an
6 engineer at the Rivergate project, and he was not an
7 engineer.

8 If you'll go to Page 97, Line 7: All right. The
9 last thing I'm going to ask you about this document,
10 if you will go to the very last page. It says, I
11 understand that you don't know me, and that me is a
12 letter from Wayne Winderman, the developer and general
13 contractor, and that I'm from another state and this
14 is my first project in this area; is that what you
15 understood about Mr. Winderman and his company? He
16 answers, I knew he was from another state.

17 Question: Did you know it was his first
18 project in the area?

19 He says, No.

20 Question: Did you know whether he did any
21 other projects like the Rivergate project in South
22 Carolina?

23 And he says, yes, sir -- he said, In South
24 Carolina, and I said, Yes, sir. He answers, No.

25 My question is: How about anywhere? And he

1 goes, No.

2 Page 98, I start to ask a little bit about his
3 competence. Did it seem like he had done a project
4 like Rivergate? He said, No. I said, Why is that?
5 He had just no background or anything of site work.
6 Just by talking, you know, he would tell him how the
7 procedure to do it, and it was just like Greek.

8 He seemed inexperienced in this type of work,
9 I asked. He said, Yes, he and his -- Luther Bellamy
10 -- that's his partner -- Luther was good in brick
11 work, you could say that. His brick work that I saw
12 was good.

13 Question: But other than brick work, it
14 didn't appear that Mr. Bellamy had any other
15 experience?

16 And the answer is, No.

17 Your Honor, I should have stated this earlier,
18 but this testimony that you are hearing now -- and
19 I'll continue to go through the deposition excerpts --
20 will show you that there was considerable gross
21 negligence at this project. There was willful,
22 wanton, reckless activity at the project, and this is
23 going to go to argument in a little while about not
24 just the statute of limitations and the fact that they
25 can't argue statute of limitations when it is willful,

1 wanton and reckless, and I'll refer to a statute in a
2 minute, but it also goes to the fact that they can't
3 say that there shouldn't be any punitive damages in
4 this case.

5 When you see the reckless nature of these
6 defendants and their testimony, they can't go back and
7 say, you know, you have to get this dismissed under
8 the statute of limitations or you can't present this
9 to a jury for punitive damages.

10 If you'll go to the next page, Mr. Chuck
11 Bellamy, the honest Chuck Bellamy says on Line 8 -- my
12 question was: What made it unhappy, unhappy, unhappy
13 for you? Because he testified earlier that he was
14 unhappy, unhappy, unhappy at Rivergate.

15 His answer: What made it unhappy, unhappy for
16 me?

17 I said, Yes.

18 His answer -- and, again, this goes to the
19 fact that they knew that the construction at Rivergate
20 was improper and deficient. He says, It is when you
21 see work being done that is not up to your -- that
22 should be up to your standards, that your name is on
23 the contract out there that's being done, and you see
24 corners being cut, that shouldn't be cut, that is
25 going to come back and haunt you.

1 I said, Like what?

2 He says, Like cutting too much dirt down --
3 which is the site work problem, the grading problem
4 that is pervasive at Rivergate. Any time you would
5 lower, you would run into grade problems and getting
6 into different problems, it creates problems.

7 Do what?

8 He says, It just creates a number of problems.

9 I say, Do you think those problems were
10 created by AB Consulting and/or WW&LB?

11 He said, I would put more blame on WW&LB.

12 I said, Why is that?

13 He says, Because they were the ones who wanted
14 to cut it down to get more of the field, that was the
15 problem.

16 And I said, So it was just a cost issue?

17 He said, Cost, the cost problem.

18 Again, knowledge of the people that were out
19 at Rivergate of these problems as to the grading
20 issues.

21 The next deposition, Your Honor, is of
22 Ms. Savatrese Foran (phonetic). This is all going to
23 go to my arguments against Ms. Burton and the other
24 counsel. Ms. Foran was one of the first homeowners at
25 Rivergate, Your Honor. Interesting enough, Ms. Foran

1 was also an employee of WW&LB, the developer and
2 general contractor. She was another one of those
3 witnesses that was extremely honest, and she will be a
4 very good witness for the plaintiff. She's going to
5 show there was gross negligence, willful, wanton and
6 reckless behavior at Rivergate by the defendants, and
7 I think she will -- her statements, Your Honor, will
8 go to the equitable tolling argument that Ms. Burton
9 touched on earlier.

10 If you would start on Page 65, Line 9. I
11 asked her, Does this give you an impression as to
12 whether it was an organized construction or a
13 disorganized construction, and there was objections.
14 Then I asked her again, I said, They are just
15 objecting to the way I am asking the question. She
16 said, Yeah. And I said, But you can go ahead and
17 answer. She responds on Line 19, It was somewhat
18 organized, but a lot disorganized I think. I'm not a
19 hundred percent sure, so I can't really say it was
20 professionally done or how they do things.

21 This is where we go to how the project was
22 done at Rivergate. She said, I just felt like every
23 time I saw somebody new, there was a corner being cut,
24 that's what my impression was. I felt like he --
25 being Wayne Winderman, the developer -- was always

1 trying to find the cheapest way out, that is what I
2 thought.

3 Again, that goes to the willful, wanton,
4 reckless nature. If you go to Page 138, Your Honor,
5 this goes to the equitable tolling argument. The fact
6 that the homeowners are doing everything they can to
7 get this project fixed, to get the repairs, and they
8 are doing everything they can to go to the developer
9 and general contractor and anybody else out there to
10 try to get this property fixed, and here is what the
11 general contractor and developer does with their
12 complaints.

13 Beginning on Line 10, the question is: Do you
14 remember if there were any occasions where you would
15 pass along the homeowner's complaint to Mr. Winderman
16 and he did not do anything to follow up on it, and she
17 says, Yes. I say, Can you give an example of that?
18 Line 16 she says, Well, like I said before, people
19 would bring complaints in, and I would have a box on
20 the desk with the complaints, and I would say, you
21 know, Wayne, here are the complaints people have, he
22 would say, I'm not going to be bothered with them. He
23 would just take them and throw them away, and I
24 thought that wasn't right. You know, if you are
25 running a business, and there is people complaining,

1 and they are being honest people, he would do that;
2 that hurt me.

3 The next deposition is the deposition of Jim
4 Dunn, not to be confused with the Solicitor -- former
5 Solicitor Jim Dunn, Mr. Dunn has told me he gets some
6 pretty good reaction at the Horry County Courthouse
7 when he says his name is Jim Dunn, and he thinks they
8 are under the impression that it is the old Jim Dunn,
9 and he said people hop and move quick when he comes to
10 the courthouse. His deposition will show, Your Honor,
11 that there was gross negligence, again, willful,
12 wanton, reckless activity during this. It also shows,
13 again, that the defendants themselves, who are willing
14 to get this case dismissed today, knew when they did
15 the construction that there were problems at the time,
16 or very near the time, that they did the construction
17 at Rivergate.

18 If you will look on Page 68 of Mr. Dunn's
19 deposition, Line 5, he's going to talk about the
20 actions of Speedy Concrete, who is represented by
21 Mr. Smith. It says, Well, you know what it looks like
22 out there in the way it is built and the sequencing of
23 the construction, what would you have done differently
24 if you were the concrete subcontractor other than
25 doing what you were told in connecting the dots, if

1 you will? Line 11, There was one in particular, and I
2 know that it's because I was there, the one that is so
3 steep and the lady could not park there, she was
4 allowed to park on the streetlet, which had to be very
5 careful trying to get around her car when it was there
6 because they are so narrow, more like a driveway than
7 a street, that Wayne, in one of the times I was able
8 to get him to stand still long enough committed to fix
9 it, and he calls Speedy Concrete to come out there,
10 and they came. And he -- being Wayne Winderman --
11 proceeds to tell him how to fix this driveway and to
12 make it a little lower and put some steps in and all,
13 to level out the sidewalk going up to the door. The
14 sidewalk was actually at an angle, as well as in
15 addition to going up hill.

16 Page 69, again, this is going to the fact that
17 the willful, wanton, reckless conduct of the
18 defendants because they are knowledgeable of the
19 problems, on Line 2 Mr. Dunn says, And Speedy told him
20 in front of me, he said -- this is the guy from
21 Speedy, Mr. Hernandez -- he says, Wayne, we told you
22 to begin with this was too steep. Well, he went beat
23 red and blew up, and at the end -- and that was the
24 end of the story, and it never got fixed.

25 So here you have, again, time and time again

1 the knowledge of these defendants on the work they are
2 doing out there is wrong, but they continue to do it
3 in spite of the warnings and knowledge that their work
4 was improper at Rivergate.

5 If you go to the next deposition testimony,
6 the last one, because I want to move forward as
7 quickly as possible. This is the deposition of
8 Braxton Lewis. Braxton Lewis has become a centerpiece
9 in this case because of his actions at Rivergate. His
10 deposition will show that there was not just a breach
11 of duty by AB Consulting, but it will show that there
12 was gross negligence; willful, wanton and reckless
13 activity by AB Consulting because he held himself out
14 as an engineer, and he was not an engineer. You will
15 see that in his own testimony on Page 12, Your Honor,
16 and beginning at Line 2 I asked him, And let me ask
17 you a little bit about your engineering background.
18 Are you an engineer? He says, I am. I have a BS in
19 civil engineering technology. So he's states there
20 I'm an engineer. Where is that from? Francis Marion.
21 And what year was that that you received that degree?
22 1985. Have you been licensed as a civil engineer?
23 No, sir.

24 So right in his own testimony contradicts
25 himself. He says I'm an engineer, but then he says

1 I'm not licensed as an engineer.

2 So tell me the steps that are necessary? He
3 goes on and tells me the steps. I asked him on Line
4 24, so you do the training exam, and then the license?
5 He says, Right. And I said, Exam, and did you attempt
6 to do that? He said, I investigated it, but was
7 unable to have the proper credentials. What do you
8 mean by that? The school I graduated from was not
9 accredited. And that is Francis Marion? Yes. Did
10 you know that at the time that you graduated? He
11 said, I did not know. But when you entered Frances
12 Marion, did you know? He said, I did not at that
13 time. So if you are not an engineer, what would you
14 have been when you worked with AB Consulting? He then
15 says he's a designer.

16 So he says I'm an engineer, I am not an
17 engineer and now a designer. The people at Rivergate
18 doing the work were under the impression that he was
19 an engineer, that is how he held himself out at the
20 Rivergate project for AB Consulting just the next
21 document is one of the many documents in this case.
22 It is an application and certificate for payment. If
23 you look at the bottom, I think it is just going to
24 continue to confirm he's holding himself out as an
25 engineer. He signed numerous of these, and it says

1 "engineer certification," and then he signs his name
2 and gives some directions on how things are supposed
3 to be done.

4 Your Honor, when Ms. Burton was talking about
5 Drew Wilkey, who is our forensic civil engineer in
6 this case, Mr. Wilkey issued an affidavit, and that is
7 in Section 2. This goes to the statute of limitations
8 argument that they have made. Mr. Wilkey has been an
9 engineer for 11 years. He owns his own business, used
10 to work for Kimley-Horn, hired by the Rivergate
11 Homeowners' Association. He said as a result -- if
12 you'll look at Paragraph 4, As a result of my
13 investigations, I issued a report on June 18, 2010
14 that outlines civil construction and design
15 deficiencies and resulting damages observed up to that
16 date.

17 We attached the text portion. This is where
18 he says that as an expert at the Rivergate project,
19 that the homeowners could not have known of the
20 problems or the cause of the problems. They knew
21 there were problems, they tried to get everyone to
22 come and fix the problems, Wayne Winderman and Donna
23 Dawson out there, whoever they could talk to, Your
24 Honor, governmental entities or whoever to get the
25 place fixed. They knew there was a problem, but

1 according to Mr. Wilkey, they didn't know that -- what
2 caused the problem. They are not engineers. They are
3 not engineers like AB. They are not professionals
4 like some of the people who did the work at Rivergate.

5 So Paragraph 5 Mr. Wilkey says, While the HOA
6 may have been aware of undesirable symptoms at the
7 HOA, such as standing water, erosion, et cetera, it is
8 my opinion that the HOA would not have been aware that
9 these symptoms were associated with or caused by civil
10 construction and design defects until the report that
11 I issued on June 18, 2010. Moreover -- and this goes
12 to some of the testimony about the reckless conduct of
13 the defendants -- it is my opinion that the defendants
14 were aware or should have been aware of the civil
15 construction and design deficiencies at the time of
16 construction and thereafter, but failed to repair or
17 correct these deficiencies, even with this information
18 and knowledge.

19 So they are asking today for the case to be
20 dismissed based on the statute of limitations, and
21 other reasons, and yet they knew at the time of
22 construction by some of their own testimony and the
23 affidavit of Mr. Wilkey that there were problems
24 during construction. There were deficiencies at the
25 time of construction, and they were aware of it.

1 He goes on to talk about there is a breach of
2 duty, breach of care by AB Consulting. Paragraph 8 he
3 says that Braxton Lewis was holding himself out as a
4 licensed engineer, but was not licensed by the State
5 of South Carolina at the time of AB Consulting's
6 design, inspection and certification at the Rivergate
7 project.

8 One of the significant things about the
9 testimony and affidavit of Mr. Wilkey is the statute,
10 because the defendants are arguing that we knew or
11 should have known that there was construction defects
12 and we have three years to bring that to suit. Well,
13 one of the problems that they have based on their
14 actions is the Civil Code Section 15-3-670. I can
15 hand that up to Your Honor.

16 This is problematic for the defendants because
17 they are arguing about the three-year statute of
18 limitations, but 15-3-670 says -- if you go to the
19 middle portion of that statute, it says, The
20 limitations provided by Sections 15-3-640 through
21 660 -- talking about the three-year statute of
22 limitations -- are not available as a defense to a
23 person guilty of fraud, gross negligence or
24 recklessness in providing components of furnishing
25 materials and developing real property and performing

1 or furnishing the design, plans, specifications,
2 surveying, planning, supervision, testing or
3 observation of construction, construction of or land
4 surveying in connection with such an improvement are
5 to a person who conceals -- and I think we have this
6 at Rivergate based on the testimony that I've
7 mentioned to Your Honor -- or to a person who conceals
8 any such cause of action.

9 Ms. Foran herself, an employee of WW&LB,
10 stated that the complaints were given to her, and that
11 Mr. Winderman threw them away. There is also
12 testimony, as we stated earlier, that these defendants
13 knew that there were problems out there, and they did
14 not bring that to the attention of anybody, or if they
15 did, they continued to do what they weren't supposed
16 to do. So there is the fact that there is gross
17 negligence out there, which makes the statute of
18 limitations not applicable as a defense to the
19 defendant, there's recklessness and concealment at
20 Rivergate just in the little bit of testimony that I
21 mentioned to Your Honor. That is one of the defenses
22 as to the statute of limitations.

23 The other defense in regards to statute of
24 limitations, Ms. Burton goes through a time line in
25 this case, and one of those is a statute of

1 limitations time line that she has presented to Your
2 Honor here. One of the things that Ms. Burton forgets
3 to put in this time line is the fact that the HOA was
4 not turned over to the homeowners until October 31st
5 of 2007. So prior to this, this was a developer
6 controlled project, from 1999 when the site work and
7 everything began at Rivergate, until October 31, 2007.
8 As a side to that, Your Honor, the only way the
9 homeowners could get the developer to convey
10 everything to the homeowners was for me to make a
11 motion and to get them to convey that to the
12 homeowners. Mr. Winderman finally did that, and I'll
13 hand you, Your Honor -- can I approach?

14 THE COURT: Sure.

15 MR. STANLEY: This is a document dated
16 September 12th of 2007 from the Rivergate HOA. It is
17 signed by Mr. Winderman, the developer. What he says
18 is that he's going to turn over this project at this
19 point. If you'll go to second paragraph,
20 Mr. Winderman, the Rivergate HOA developer, The time
21 is long overdue to turn the HOA over to an elected
22 board of directors. We will not oppose the motion,
23 and thereby advise each neighborhood they consider
24 carefully who they might want to serve on the board.
25 The resignation is effective October 31, 2007.

1 So before that time, Your Honor, the people that
2 were supposed to bring or should have brought a
3 lawsuit, which they are not going to sue themselves,
4 but it should have been Mr. Winderman and the
5 Rivergate HOA. It was not controlled by the
6 homeowners, it was controlled by the developer and
7 general contractor at that time. Very similar, which
8 is what I will point to in a minute, is that Magnolia
9 North case that Your Honor is so familiar with. Very
10 similar to these circumstances here.

11 Ms. Burton wants to argue that we should go back
12 before 2007 in regards to their knowledge of these
13 problems, but the party that should have brought the
14 lawsuit is Mr. Winderman. The homeowners -- when she
15 talks about standing, they did not own or control the
16 HOA until November 1, 2007. Your Honor, very soon
17 thereafter the homeowners did what they were supposed
18 to do, similar to the Magnolia North case. I think in
19 that case, once it was transferred to the homeowner
20 controlled HOA, within eight months in the Magnolia
21 North case, the homeowners brought suit almost
22 identical to this case, Your Honor. The HOA was
23 turned over October 31, 2007, homeowners filed suit
24 June 13, 2008, almost eight months after it was
25 conveyed to them.

1 Touching on just a couple other things --

2 THE COURT: It was turned over and they filed
3 suit against the developer?

4 MR. STANLEY: Yes, sir.

5 THE COURT: In Magnolia?

6 MR. STANLEY: I'm sorry, in Rivergate. I was
7 saying -- I didn't do a good job at stating it. This
8 case, in my opinion, is very similar to the Magnolia
9 North case. It is my understanding from reading
10 Magnolia North, and it's been awhile since I read it,
11 but in that case the developer/general contractor
12 tried to say that the actual statute of limitations
13 should have run from the time that the HOA was
14 incorporated and the judge, Your Honor, in that case
15 said that is not the case, you can't go back to that
16 point, what you need to use as the point where the
17 statute of limitations will run is when the actual
18 homeowners took over, and they took over in like 2003
19 or something in the Magnolia North case, and then
20 eight months later they filed suit against that
21 developer and general contractor. I was saying that
22 is very similar to this case, Your Honor. The
23 turnover of the HOA was October 31, 2007, eight months
24 later, similar to Magnolia North, they filed suit on
25 June 13, 2008.

1 So Ms. Burton is trying to argue that you should
2 go back to whatever point before 2007. They could not
3 have filed suit. That was the HOA's responsibility to
4 file suit, and as soon as they took over, they filed
5 suit within eight months of that. I would also argue
6 that -- those are the main arguments, the fact it was
7 reckless, wanton and willful conduct. In accordance
8 with 15-3-670, the defendants cannot argue that there
9 is a statute of limitations defense in this case. The
10 fact is they also concealed the problems at the
11 Rivergate project, and because of that, they can't
12 argue, based on that statute -- it is not a defense,
13 the three-year statute of limitations.

14 THE COURT: How about the provision of that
15 statute that you handed up to me, 15-3-670, that says
16 this act takes effect January 1, 2012 and applies to
17 all actions that accrue on or after the effective
18 date, except for the provisions of Section 3 do not
19 apply to any matters pending on the effective date of
20 this act?

21 MR. STANLEY: Page 2, Section 7?

22 THE COURT: Section 7, yeah. I was looking to
23 find 3 when they referred to provisions of Section 3.
24 This is not the complete statute.

25 MR. STANLEY: Right. Right.

1 THE COURT: Anyway, this is a lawsuit you filed
2 in what year? 2010?

3 MR. STANLEY: Yes, sir.

4 THE COURT: And this says it takes effect and
5 applies to all actions that accrue on or after, except
6 for the provision of Section 3 does not apply -- how
7 does that affect the applicability of this statute to
8 this case?

9 (A pause in the proceedings.)

10 THE COURT: If you hesitate too long --

11 MR. STANLEY: You'll give me an answer
12 (laughing)?

13 THE COURT: No. I have anxious lawyers on the
14 other side.

15 MR. STANLEY: It doesn't look like....

16 MS. BURTON: It doesn't apply, because that is
17 not the statute of limitations code section. That is
18 the statute of repose. Statute is 15-3-530. This is
19 talking about the eight-year -- formerly 13-year --
20 statute of repose. So this statute and its exception,
21 they don't apply the three-year statute of
22 limitations, which is not found in 640 through 660
23 anyway.

24 THE COURT: I knew someone -- all right.

25 What is the difference between a statute of

1 limitations and repose?

2 MS. BURTON: The statute of repose, which I would
3 love to have the opportunity to assert, but
4 unfortunately the years didn't work, it was 13 years,
5 and when we did tort reform in 2005 it was reduced to
6 eight, so it is the outside limit. Let's say the
7 eight-year statute applied, and the work was
8 substantially completed in 2000, it is eight years
9 would be the outside limit to bring the claim
10 regardless of when you know or should have known.

11 So if you bring it in 2009, even if you just
12 learned about it, you couldn't bring the claim under
13 the statute of repose subject to these exceptions,
14 which whenever I write the statute of repose defense,
15 I get this willful, reckless argument.

16 The statute of limitations runs in the time
17 frame. So, again, say substantial completion was in
18 2000, and you knew or should have known of a problem
19 in 2001, you still have to bring it within the three
20 years. The statute of repose was designed to give
21 folks involved in construction kind of an outside
22 window for liability saying if there is an improvement
23 to real property, your liability, regardless of when
24 an incident occurs, is limited to an outside window
25 now of eight years. So people have some confidence

1 they are not going to get sued forever over an
2 improvement to real property.

3 In this case, because substantial completion of
4 at least the interior improvements occurred for the
5 first phase in 2000. The statute of repose was 13
6 years, and so we don't have a statute of repose
7 defense; we have a statute of limitations defense, and
8 they are a little bit different. These exceptions
9 don't apply under 15-3-530, it is still a three-year
10 statute of limitation with no exception for willful or
11 reckless, concealments or any of those things. There
12 are no exceptions under the statute for those for a
13 three-year statute of limitations.

14 MR. STANLEY: I agree in regards to that. I
15 still go back to my argument of the fact that the HOA
16 was turned over in 2007, and so the soonest that they
17 could have brought suit for that, unless they were to
18 sue themselves, the developer was to sue himself,
19 which he won't do, the soonest they could have done
20 that was in October of 2010. They filed suit on
21 June 13, 2008.

22 THE COURT: These folks are not -- the folks here
23 today are not developers, are they?

24 MR. STANLEY: No, sir, they are not.

25 THE COURT: They could have sued the engineer,

1 architect, site developers, site work people and all
2 of those, couldn't they?

3 MR. STANLEY: But that is himself. That is the
4 developer. That is -- he is contracting with them.
5 That is part of his construction. I mean, he's suing
6 himself if he has to sue his own engineer or
7 subcontractors. They are doing work for him. You'll
8 be hard pressed to find a general contractor, a
9 developer, that is going to do that because they know
10 what will happen, there will be crossclaims and other
11 things.

12 I'm saying in this case, for the HOA to have
13 brought suit for the homeowners, not the developer,
14 because we're arguing about the homeowners here, for
15 the homeowners to have made that decision to bring
16 suit, they could not have done it before October 31,
17 2007 when it was turned over to them. They had a
18 meeting on November 1, 2007 with the -- for the board
19 of directors, and they brought suit within eight
20 months after that.

21 Now, AB Consulting is going to say -- and maybe
22 Speedy or someone else -- will say we weren't added
23 until April 2010. Even with that argument, we're
24 still within the three-year statute of limitations.

25 THE COURT: Mr. Smith.

1 MR. SMITH: The problem I have with the current
2 argument about the statute of limitations and turning
3 over to the board is under the limited common elements
4 definition that you have, that I handed up to you,
5 that portion, the owner has the responsibility of the
6 driveways, not the homeowners' association. The owner
7 is responsible for the maintenance and upkeep of the
8 driveways as a limited common area under the master
9 deed.

10 The owner, through Jim Dunn's testimony, they
11 knew about the problem. What Mr. Stanley did not
12 provide you was Page 70 of Mr. Dunn's deposition where
13 he says there is no question, but that Speedy's
14 representative told Mr. Winderman, who was the
15 developer, in your presence that the driveways were
16 too steep and that he had told Mr. Winderman that
17 before construction. Answer: Yes, that kind of gets
18 Speedy off the hook, but the truth is still the truth.
19 That is from Jim Dunn.

20 I asked him, Do you recall when the conversation
21 took place? His answer was, 2004/2005. We weren't
22 brought into the lawsuit until 2010, so five to six
23 years after the owners knew of the steepness of the
24 slope of the driveways were we ever brought into the
25 lawsuit. Three-year of statute limitation clearly ran

1 as to the owners by 2007/2008. We were not a party
2 then.

3 I just wanted to differentiate that particular
4 argument on the equitable estoppel, equitable tolling
5 as to Speedy. Speedy deals with the slope, and that
6 is the highlighted portion of the master deed that I
7 handed up to you. The slope grade of the driveways is
8 specifically set forth in the master deed as being the
9 owner's problem to maintain and repair, not the
10 homeowners' association.

11 THE COURT: So the owners then would have had to
12 sue Speedy individually?

13 MR. SMITH: Yes, sir, absolutely. And one of the
14 owners that wanted to fix their driveway -- and you
15 have a photograph of a car sitting in the driveway,
16 you can see where that testimony came out where she
17 lowered her drive at her expense, that was not a
18 homeowners' association expense, that was the
19 individual owner's expense. She did that. She did
20 not like the slope; she fixed it. Every owner had
21 that opportunity, and as Mr. Dunn said, there's
22 driveways that never changed, that slope and angle has
23 always been the same since the initiation of the
24 construction in 2003 through 2005, and that is why
25 we're on a little bit different page than the other

1 defendants.

2 MR. STANLEY: If that is the case, that he's on a
3 different page than the other defendants, the fact is
4 that the homeowners -- they went through this ad hoc
5 trying to get the developer/general contractor and
6 others to do something at the project. They didn't do
7 anything, so they go through this ad hoc committee
8 saying what can we do. Eventually, the only choice
9 they have, because the developer is not bringing suit,
10 they do bring suit for their damages.

11 In the Sanger lawsuit, it is a class action
12 lawsuit. It was joined with this lawsuit, the
13 Rivergate HOA lawsuit. So if Mr. Smith wants to say,
14 well, the individual homeowners -- this is an HOA
15 case, and the individual homeowners should bring suit.
16 They did, and it has been joined with this lawsuit.

17 THE COURT: They brought suit against?

18 MR. SMITH: Not against Speedy.

19 THE COURT: All right.

20 MR. STANLEY: The problem, too, with Mr. Smith's
21 argument about we just put the pads down and we don't
22 have anything else is that they put the pads down
23 knowing that the slope was deficient, knowing that the
24 grade was deficient. So they bought what they put
25 down. They bought that problem when they put it down.

1 there, and they should have never done it. What he's
2 going to say is, well, we brought it to the attention
3 of the developer/general contractor, what else could
4 we have done.

5 MR. SMITH: To the owner at the time of the
6 property. Brought it to the attention of the owner.

7 MR. STANLEY: I think the discussion was they
8 brought it to the attention of Wayne Winderman during
9 construction saying, Wayne, you know I told you this
10 was too steep, and the problem with that is the fact
11 that he -- even when he knew it was too steep, he went
12 ahead and built an improper driveway.

13 MR. SMITH: In 2004 and 2005, and we're sued
14 2010.

15 MR. STANLEY: Well, again, Your Honor, the
16 earliest that the HOA homeowners could have brought
17 suit would have been in the year of 2007. Other than
18 that, there is an equitable tolling argument that they
19 could not have brought suit for the deficiencies of
20 the grading, which is what Speedy put the pad on.
21 He's going to say, well, I brought it to the attention
22 of the general contractor and the developer. Yeah,
23 you did that. And he's going to say, That is all I
24 could have done, and I did what he told me.

25 The other alternative that nobody ever talks

1 about at Rivergate is that you can walk off the
2 project. You can say, I'm not doing this work. AB
3 Consulting, they could have walked off the project.
4 None of them did that. They -- except for Chuck's
5 Construction, they finally said we've had enough and
6 we're walking. I'm not sure if he can have his cake
7 and eat it too. It seems like he knew there was a
8 problem, he put the pad on the problem, he bought the
9 problem or he could not have installed it.

10 Your Honor, in regards to -- I did want to go
11 back to the case of Magnolia North, and in that case
12 at 372, it says, In the present case, the POA board
13 consisted of appellant officers until the date of
14 turnover, September 9, 2002. We find unpersuasive
15 appellant's argument or claim that an organization
16 they control would have initiated an action against
17 itself during this period. Further, after the
18 property owners gained control over the POA, they
19 exercised due diligence by filing this action on
20 May 28, 2003, approximately eight months after
21 assuming control; therefore, we affirm the trial
22 court's ruling.

23 Similar to here. These homeowners exercised due
24 diligence in bringing any claims against the
25 defendants for the common elements in regards to the

1 work at Rivergate. They brought suit within eight
2 months after taking control.

3 THE COURT: I'll hear Ms. Burton's response to
4 that particular argument.

5 MS. BURTON: I think that the issues about
6 willfulness and concealment and knowledge, and all of
7 those must have been related to the statute that
8 doesn't apply, because certainly those aren't statute
9 of limitations arguments. You can't argue that the
10 statute of limitations doesn't accrue because the
11 tort-feasor knew they committed a tort. That is not
12 the law in South Carolina.

13 So, really, it gets down to the equitable tolling
14 argument, I think, and this statement by Mr. Stanley
15 that the HOA couldn't bring suit until the homeowners
16 took it over in 2007. I mean, that is the argument,
17 couldn't bring suit. Of course, the HOA is a legal
18 entity. It existed in 2001. It is the same legal
19 entity that brought a suit against my client in 2010,
20 so it isn't like there is a sudden creation in 2007 of
21 an entity.

22 So the argument is that the HOA couldn't sue AB
23 Consulting, can't sue Chuck's Construction, couldn't
24 sue Speedy Concrete because Wayne Winderman was on the
25 board. That is the essence of the argument. There is

1 no proof of couldn't, wouldn't, didn't. They deposed
2 Wayne Winderman before I was involved in the lawsuit,
3 and Wayne didn't say anything about how he couldn't
4 sue Amy Drucker, Chuck Bellamy, any of those folks in
5 his deposition testimony.

6 There is no -- the burden of proof on equitable
7 tolling is on the plaintiff. They have to prove facts
8 to the Court that there are extraordinary
9 circumstances that warrant the Court disregarding the
10 three-year statute of limitations and saying it is
11 tolled for some period of time, and the proof is just
12 not there.

13 The fact that Wayne Winderman is on the board of
14 the HOA doesn't mean he couldn't sue Amy Drucker.
15 There is no proof that he didn't want to, couldn't,
16 anything about Amy and Wayne Winderman, and that is
17 the essence of the argument.

18 THE COURT: As distinguished by Magnolia case in
19 what way?

20 MS. BURTON: Magnolia, the developer and the POA
21 are essentially the same. I mean, you had folks that
22 worked for the developer controlling the POA, and the
23 claim was sued against the developer. So the issue
24 was, Why would I sue myself. That is not the issue
25 here. It might be if WW&LB was raising the concern

1 and saying, hey, look, the statute of limitations ran,
2 and Mr. Stanley could say, Come on, Wayne, you weren't
3 going to sue yourself. That is what that case says,
4 and that makes sense.

5 But here, my client is not controlling the board
6 of directors or on the board or anything to do with
7 the board of directors. There is no proof that Wayne
8 Winderman wouldn't have been perfectly happy to sue
9 anybody he wanted to at any time he wanted to sue
10 them. The fact he didn't doesn't equal proof about
11 why he didn't or there was a special reason he didn't.
12 That is their argument.

13 In the Magnolia case it talks about being
14 motivated not to sue myself. So it is a matter of
15 equity. The Court tolled the period of time that the
16 owner controlled the POA saying you weren't going to
17 sue yourself. Here those principles are not there.
18 There is no equitable reason to toll the statute of
19 limitations against Ms. Drucker and her company simply
20 because Wayne Winderman was on the board of the
21 directors.

22 MR. SMITH: I think in the Magnolia North case,
23 the developer and the builders were so tied together
24 that they were sort of considered one in the same, as
25 they are in this case. That suit didn't involve the

1 subcontractors; they already settled out. I don't
2 think that the Court addressed the issue as it
3 pertained to the subcontractors. Again, I would go on
4 to say that they have no standing to sue me because it
5 is the owner's responsibility to sue me.

6 MR. STANLEY: Back to that Magnolia North case.
7 I know you are very aware of this being you presided
8 over this, but the opinion from the Court was -- it
9 talks about the equitable tolling and why it is
10 created. It stems from the judiciary's inherent power
11 to formulate rules of procedure where justice demands
12 it, where statutes set the limitation period for
13 action -- invoke the equitable tolling doctrine, to
14 suspend or extend the statutory period to ensure
15 fundamental practicality and fairness.

16 That goes back to the testimony I cited earlier.
17 It is fairness. How can you know that there are
18 problems out there and build it anyway, violate code,
19 violate standards, and then you are expected for there
20 not to be argument that you should be included in this
21 lawsuit? Moreover, it was reckless. The fact that
22 you were concealing problems out there, the fact that
23 you were doing work when you weren't authorized or
24 licensed to do the work out there, and then you're
25 going to argue that we don't need to be sued because

1 supposedly you knew about it at an early stage?

2 The party claiming the statute of limitations
3 should be tolled, carries the burden of establishing
4 sufficient facts to justify its use. It has been
5 observed that if equitable tolling typically applies
6 in cases where a litigant was prevented from filing
7 suit because of an extraordinary event beyond his or
8 her control.

9 Interestingly enough, it says "filing suit," it
10 doesn't say filing suit against the developer or
11 filing suit against the engineer. It says filing
12 suit. The fact is for the common elements, the party
13 that should have brought the lawsuit was the HOA, and
14 the homeowners did not have control of the HOA until
15 the October 31, 2007 time frame. So they were
16 prevented from bringing suit until October 31, 2007 in
17 that case for the common elements.

18 THE COURT: All right. That is the last word on
19 that issue. What else do we have?

20 MR. STANLEY: There were a number of things that
21 Ms. Burton brought up in her argument for motion of
22 summary judgment. There was no evidence that AB
23 Consulting Engineers owed plaintiff any duty of care,
24 and I would point Your Honor to the Griffin case, and
25 that case stands for -- hopefully I'll do a better job

1 with this than --

2 THE COURT: What I'm trying to figure out is
3 whether based on what we have to discuss, whether we
4 should break for lunch and come back, or whether or
5 not we are going to be through and break for the day?
6 That is what I'm trying to gauge. How much do you all
7 have to present?

8 MR. STANLEY: Well, I think I'm going to be brief
9 in regards to points she made in regards to the
10 statute of limitation argument.

11 THE COURT: We talked about the statute of
12 limitations.

13 MR. STANLEY: Sorry, in regards to her cause of
14 action which she was wanting to dismiss the expressed
15 warranty and all of that. I think I'll be brief with
16 those. There were some motions in limine arguments.
17 I think she touched on some of those. But in regards
18 to her motion for summary judgment, she says there is
19 no evidence that AB Consulting Engineers owed
20 plaintiff any duty of care. I refer Your Honor to the
21 Griffin Plumbing versus Jordan case, and the Court
22 held in that -- that was a 1995 case that the
23 contractor could maintain suit and tort for purely
24 economic loss, because an engineer owed a contractor
25 duty to not negligently design or negligently

1 supervise a project.

2 It goes on to say -- because you are going to ask
3 how did the HOA get through this. It says that the
4 contractor should maintain action for breach of
5 implied warranty against an engineer despite lack of
6 privity. In regards to there being any -- in
7 Paragraph 5, There is no evidence that any breach of
8 any applicable standard of care that AB Consulting
9 Engineering proximately caused plaintiff's damages.

10 I refer Your Honor to the affidavit of Drew
11 Wilkey where he says there was a breach of the
12 standard of care. In the notebooks that I handed Your
13 Honor, there is -- on Section 5 there is an estimate
14 from our contractor, and he's estimated about
15 \$1.4 million in damages as a result of the breach of
16 standard of care. So there were damages proximately
17 caused by the breach of care.

18 I would agree with Ms. Burton in regards to AB
19 Consulting didn't make any expressed warranties, so I
20 would agree to dismiss our claims against AB
21 Consulting regarding the expressed warranty cause of
22 action. That is her 7, 8 and 9 paragraphs.

23 She states in 10, Plaintiff's claim for breach of
24 implied warranties is legally deficient because there
25 is no evidence that AB Consulting entered into a

1 contract with the plaintiff.

2 Again I reference the Griffin case that says
3 there doesn't have to be privity of contract for there
4 to be an implied warranty.

5 She states that plaintiff's claims for breached
6 of implied warranties, that the project would be
7 constructed in a careful, diligent and workmanlike
8 manner in accordance with the industry and
9 construction standards -- again, I refer to the
10 Griffin case saying there can be an implied warranty,
11 and we can rely on that implied warranty without
12 privity of contract.

13 She states in Paragraph 12, There is no evidence
14 that Plaintiff sustained any damages proximately
15 caused by any alleged breach of any implied warranty
16 by AB Consulting.

17 Again, we've got a report saying there are
18 damages. We have an estimate from Thompson
19 Waterproofing of about 1.4 million of damages.

20 She states, There is no evidence to support
21 Plaintiff's claim for violation of the South Carolina
22 UTPA. Your Honor, these actions were repetitive in
23 nature at the project as referenced in Drew Wilkey's
24 report. When you talk about repetitive, we have 82
25 unit owners affected by this project and by the

1 deficient work. Interesting enough, each of these
2 unit owners were affected separately because the
3 developer happened to do amendments to his master
4 deed, so he would say I'm going to do Building 1 and
5 I'm going to do an amendment; Building 2, an
6 amendment, and so on. That is in Section 6 of this.
7 I had 32 -- yeah, 32 amendments to the master deed in
8 this.

9 So again and again and again the developer is
10 having this repetition of these unfair trade practices
11 against the homeowners, so I believe there it is
12 repetition in this case. It does affect the public
13 interest because you have 82 homeowners in this case
14 that are affected by these deficiencies.

15 14, I've addressed that.

16 15, I've addressed that. She says there is no
17 evidence that AB Consulting Engineers acted in a
18 willful or wanton manner or in a reckless disregard of
19 Plaintiff's rights. I've addressed that in the
20 testimony of Braxton Lewis, the fact that he held
21 himself out as an engineer, he is not a licensed
22 engineer here, and that is willful, reckless, wanton
23 conduct.

24 There is no evidence to support claims for
25 damages against AB Consulting Engineers. I believe

1 that because of the reckless conduct of the defendants
2 that there should be punitive damages, and I would
3 reference the Wise v. Broadway case, 315 S.C. 273.
4 The holding of that case is that the because of the
5 violation of the statute, constitutes negligence, per
6 se, and evidence of recklessness and wilfulness
7 requiring the submission of the issue of punitive
8 damages to a jury.

9 Again, I think case law is that because of the
10 reckless nature, willful, wanton actions of the
11 defendant that the punitive damages should be
12 submitted to the jury. Other than going into the
13 motion in limine, Your Honor, that is all I have in
14 regards to the statute of limitations argument.

15 THE COURT: All right. Any further response by
16 anyone or anything?

17 MS. BURTON: Briefly, because we didn't hear any
18 issue on the standing, but I know Mr. Smith has
19 brought it up several times with the Court. I don't
20 think the plaintiff's claims related to the driveway
21 are asserted against my client, but to the extent
22 there is some driveway grade issue, it is clearly a
23 limited common element and Rivergate Homeowners'
24 Association flat doesn't have standing related to
25 that.

1 Secondly, to the extent the Rivergate Homeowners'
2 Association is trying to bring claims related to
3 common elements, it must actually own the common
4 elements. It has to be part of the horizontal
5 property regime. Other than this much of Rivergate
6 Lane on the drawing attached to the master deed by the
7 surveyor, they don't own it. They don't own the
8 common elements. The streets they are complaining
9 about, they don't own those.

10 THE COURT: How about that, Mr. Stanley?

11 MR. STANLEY: I mean, that is a pretty good
12 argument, but the problem is, first of all, the
13 reality of it is the fact that I'm not aware in all of
14 the cases I dealt with where a developer has had a
15 certain document and said I'm going to convey all this
16 to you. Here is my written deed, or whatever he is
17 supposed to sign, saying it is all going to the HOA.
18 Normally this is done -- and you see HOA's all over
19 this county that you can make that same argument, the
20 fact that the developer doesn't have anything in
21 writing conveying the roads or common elements or
22 whatever to them. The problem is for Ms. Burton and
23 the defendants is that Mr. Winderman, WW&LB, the
24 developer said in this letter September 12, 2007 that
25 he is turning over the HOA, and that creates a genuine

1 issue of material fact, the fact he didn't say I'm
2 turning it over, but I'm keeping the roads; he said
3 I'm turning it over.

4 THE COURT: Can you convey an interest in real
5 estate by a letter?

6 MR. STANLEY: I think it is implied. You know,
7 they also managed the property during this time. I
8 doubt seriously that Mr. Winderman expected this
9 argument to be made that he didn't convey the roads to
10 the HOA. It is his duty to continue to maintain and
11 pave them. The HOA is the one responsible for
12 maintaining the common elements. That is a common
13 element, the road is a common element. They have
14 standing for that action.

15 Now, whether you say they own it or don't, again,
16 make the argument they own it for the fact that he's
17 turned it over. Whether he's gone through and signed
18 a deed for that or not, but the fact is they have been
19 maintaining the common elements out there.

20 THE COURT: In response to Mr. Smith's argument
21 that the -- it is individual property owner's
22 responsibility regarding the driveways.

23 MR. STANLEY: Mr. Smith is talking about the
24 driveway pad, right?

25 MR. SMITH: The slope of the driveways, the

1 grade.

2 MR. STANLEY: He's talking about the driveway
3 pad. Again, I would go back to Mr. Sanger's case
4 where he alleged it. Now, whether Speedy has been
5 added as a defendant in that case, I would have to
6 look at the complaint, but he's telling me they have
7 not.

8 MR. SMITH: It was 2010 when we were brought in.
9 Again, it is the president of the ad hoc committee,
10 who is an individual owner, that overheard the
11 conversation with my client talking about the slope
12 and that was -- he said by his own testimony it was
13 2004 or 2005, so it clearly outside the limitations.

14 THE COURT: Is the Sanger case over?

15 MR. STANLEY: It was joined with this case.

16 THE COURT: And renamed Rivergate?

17 MR. STANLEY: It was joined with this case,
18 maintained as a class action lawsuit.

19 MR. SMITH: It's never been certified.

20 MR. STANLEY: No, it hasn't, but this case hasn't
21 had any direction, I mean, for that matter. I mean,
22 it's been wandering through the court system for six
23 years. That is why we -- that is one of the things
24 that needs to be included in the scheduling order.

25 MR. SMITH: There is no unit owner that brought

1 suit against Speedy Concrete as they are obligated to
2 do under the master deed.

3 MS. BURTON: I can address the joinder issue,
4 because it is not crystal clear. In fact, Your Honor
5 signed -- this is all before my time so I can only
6 rely on the documents. In the Rivergate case in 2009,
7 Mr. Stanley filed this motion for joinder, and then
8 Your Honor, I believe it was, signed an order in 2009,
9 but it doesn't appear that the Court joined the cases
10 in the order. It has two case numbers, and Your Honor
11 says that the cases are joined for discovery and trial
12 which, frankly, sounds more like consolidated than
13 joined because they couldn't be just joined for those
14 purposes. And then Your Honor ruled that the
15 plaintiff in both cases had to file and serve an
16 amended pleading making a more definite statement, and
17 ordered Wayne Winderman to appear for the deposition.

18 Then there is a subsequent order signed by Judge
19 Baxley when the case was 40(j) to restore it showing
20 the case numbers, and in that order Judge Baxley
21 refers to them as being cases, not case, directs the
22 clerk to assign a single case number to the cases, and
23 then directs -- allows the plaintiff leave to file a
24 second amended pleading. I noticed in the caption the
25 cases are noticed as having been consolidated as

1 opposed to joined. It appeared, at least based on my
2 review of the orders, and I wasn't involved in the
3 case at the time, that the cases were really
4 consolidated for discovery and trial, because the
5 Court, in the order, both Your Honor and Judge Baxley
6 refer to them as being two cases, and the caption has
7 been running as consolidated cases consolidated for
8 discovery and trial, for whatever that is worth.

9 I don't think that the Sanger plaintiff -- and
10 there never has been a class certified in that
11 matter -- has ever asserted claims directly against
12 Chuck's Construction, AB Consulting or Speedy
13 directly. The only entity that had a captioned
14 pleading and filed against our clients was the entity
15 Rivergate Homeowners' Association.

16 THE COURT: With regard to the scheduling order
17 issues, I think the Court needed to rule on what is
18 pending before considered scheduling orders issues, I
19 would think. Are there any other parties not affected
20 that a scheduling order would pertain to? For
21 example, if I were to grant the summary judgment
22 motion, would there be a need for a scheduling order?

23 MS. BURTON: There would be. WW&LB would still
24 be in the case.

25 MR. BAXTER: We're actually in agreement as to

1 the scheduling order. I mean, I don't have a problem.
2 I think some of the other parties may be, but I --
3 regardless how you rule with regards to the summary
4 judgment, we may need to revisit.

5 THE COURT: All right.

6 MS. BURTON: Your Honor, I hate to bring this up,
7 because I got the impression you were winding up, and
8 I know you raised the question earlier, but I do have
9 a pending motion for summary judgment against WW&LB,
10 because it asserted a crossclaim when plaintiff filed
11 the third amended complaint, so I don't know how you
12 want to handle that particular issue, take a break or.

13 THE COURT: We've got to get lunch.

14 MR. BAXTER: Your Honor, with regards to the
15 crossclaims of WW&LB, WW&LB has declared bankruptcy,
16 and the stay with regards to the bankruptcy was lifted
17 to allow them to proceed against WW&LB to the extent
18 that there is insurance available. Under that
19 scenario -- and I've talked with Chris and Mike as
20 well, and I have not talked to Stephanie, because I'm
21 not entirely clear how that affects those claims or
22 doesn't. What I'm -- what I told them is I don't
23 think, until such time as any money would be paid by
24 an insurance company, I'm not sure any crossclaim or
25 indemnification claim would be right.

1 THE COURT: The crossclaim would still be stayed
2 in relation to seeking relief against a third party.

3 MR. BAXTER: And, technically, the crossclaims
4 that exist currently would belong to the bankruptcy
5 court, and until such time -- the only thing we're
6 doing right now is getting a verdict, and then there
7 will be a determination is there coverage for this,
8 you, insurance company, have to pay money, and at that
9 point there might be an indemnification claim. I'm
10 not sure it is appropriate to address that motion,
11 because I think that -- I don't think we have a claim
12 at this point in time with regards to what is
13 currently in circuit court. Those claims would be
14 based upon breach of contract, et cetera, et cetera.
15 That is not before your court. The only thing left is
16 to get a verdict to determine whether there is
17 coverage and have that paid. We wouldn't have any
18 claims for breach of contract, because that belongs to
19 the bankruptcy court.

20 THE COURT: Right. If they are in bankruptcy,
21 that claim would be stayed. The crossclaim would be
22 stayed as it relates to your claim.

23 MR. BAXTER: Right.

24 THE COURT: So I couldn't hear that.

25 MR. BAXTER: And for what it is worth, I have no

1 intent to pursue those during the course of litigation
2 because of that reason.

3 MS. BURTON: Your Honor, I would like -- my
4 concern is we have Rivergate's claims, but I don't
5 want to be left hanging out with WW&LB, because I know
6 the automatic stay precludes claims against the
7 bankrupt debtor, but I don't think it automatically
8 stays claims by the bankrupt debtor --

9 THE COURT: It does, absolutely -- well, he's not
10 the bankruptcy trustee.

11 MS. BURTON: No. All I would look for is some
12 sort of order saying that they are stayed or will be
13 handled in bankruptcy court or something so that I'm
14 not hanging out on the crossclaims, because they are
15 asserted.

16 THE COURT: Well, we can issue an order that
17 reflects what Mr. Baxter said, I'll issue an order.
18 You can file something alternatively in bankruptcy
19 court seeking to have more of it be released than they
20 released.

21 MS. BURTON: I don't want them to pursue any
22 claims against me.

23 THE COURT: The Court cannot entertain litigation
24 against one in bankruptcy unless it is authorized by
25 the bankruptcy. This aspect has not been authorized

1 by the bankruptcy court.

2 MS. BURTON: That's true.

3 THE COURT: So we can't hear that today.

4 MS. BURTON: I had filed, because there was a
5 scheduling order that the Court issued in this case
6 some long time ago, which had all kinds of trial
7 deadlines, including exchange of exhibits, which we
8 all did, and exchange of witness lists, and so I filed
9 a motion in limine with respect to certain evidence or
10 testimony. I would respectfully suggest that perhaps
11 we get closer to trial to take up that type of
12 evidentiary matter, just as a practical matter, but I
13 did file stuff because we had the order that
14 required --

15 THE COURT: It sounds like you all are ready for
16 trial.

17 MS. BURTON: I think we all could be.

18 THE COURT: As far as the volume of material
19 you've handed up.

20 MR. BAXTER: Along those lines, if you are not
21 going to hear that, we talked with you a couple months
22 ago, I had an issue with an expert I needed to
23 substitute; everyone agreed to that. We also agreed
24 that the motions -- the pretrial motions, motion in
25 limine, things like that, we would wait until we had a

1 known trial date and we would get those to you in
2 advance of the trial date, rather than here it is and
3 you try it six months later.

4 I submitted an order, and we couldn't agree on
5 the order, but those were a couple of things I think
6 we were able to agree on. One, again, being the
7 pretrial motion, because I think it would be silly
8 until, A, we have a trial or, B, we know who is going
9 to be in trial to do that. I think we can agree on
10 that.

11 The other terms we may have problems with, but --
12 in fact, other than Stephanie, the rest of us
13 refrained from filing any pretrial motions, and
14 technically the existing scheduling order requires
15 those to have been submitted like back in November, or
16 something like that. But verbally we've agreed to
17 that, and there is a couple other things we have
18 agreed to, but I want to make sure there is no problem
19 that we are now precluded from filing those, even
20 though we agreed to them.

21 THE COURT: Whatever the parties agree to, I will
22 not have a problem with.

23 Mr. Stanley, you acknowledge there is an
24 agreement regarding relaxing those dates for filing of
25 various pretrial things?

1 MR. STANLEY: Yes, sir. Yeah.

2 THE COURT: All right. That is a matter of
3 record. I don't know what more we need to do about
4 that.

5 With regard to the issue of the bankruptcy stay
6 as it applies to the crossclaim, you'll submit a
7 proposed order?

8 MR. BAXTER: Yes. I'll say we do not have -- the
9 party -- or what is before the Court on that does not
10 have those in that it is stayed, to the extent that
11 the bankruptcy court -- I mean bankruptcy court, they
12 are not going to pursue that, and it wouldn't be an
13 issue until the insurance company were to pay money.
14 And, again, that may depend on who is in and out.

15 THE COURT: Very good. Where does that leave us?
16 Anything else today?

17 MS. BURTON: The only other motion was a motion
18 related to the affidavit of Drew Wilkey I got last
19 Friday. We filed a motion to strike certain
20 paragraphs of the affidavit where Mr. Wilkey offered
21 his opinions about -- and I'm not sure it is relevant
22 no, but he offers opinions about people -- whether the
23 homeowners could have been aware that the drainage
24 problems that they saw were related to design, because
25 he doesn't have personal knowledge about what

1 homeowners knew or didn't know, and it isn't relevant.

2 He offered an opinion about the defendants -- and
3 that word is used in the plural to try to rub WW&LB
4 off on everyone else -- that the defendants should
5 have known that there was problems out there. Again,
6 not the proper basis for expert testimony, nor
7 relevant.

8 He offered a legal conclusion about damages to
9 the common elements, and I'm not sure what the purpose
10 of that was, but to the extent he was trying to opine
11 about what common elements are or aren't, that is
12 defined by the master deed, and he couldn't offer an
13 opinion about that.

14 And then he tried to offer an opinion that
15 Braxton Lewis was holding himself out as a licensed
16 professional engineer. Again, something he doesn't
17 have any personal knowledge about since he wasn't
18 involved at the time. So we move to strike those
19 speculative opinions of Mr. Wilkey in the affidavit.

20 THE COURT: All right.

21 MR. STANLEY: Your Honor, you know, I know why
22 Ms. Burton would like to exclude, because it is very
23 damaging for her client, but this goes to Mr. Wilkey.
24 He has education, training, the knowledge and
25 experience, and this goes to the weight of the

1 evidence at trial.

2 When you look at -- and I believe Ms. Burton
3 referenced some rules in her motion, rules of
4 evidence, but Rule 702 says, The testimony of experts,
5 if scientific, technical or other specialized
6 knowledge will assist the trier of fact to understand
7 the evidence or determine a fact in issue, a witness
8 qualified as an expert by knowledge, skill,
9 experience, training or education. No matter how much
10 Ms. Burton wants to say he's not qualified because of
11 when he was born or when he graduated from high
12 school, when he graduated from college or when he was
13 licensed, he's still able to have the knowledge, skill
14 and experience and training or education to give an
15 opinion in this case. This rule says that an expert
16 may testify thereto in the form of an opinion or
17 otherwise. I mean, that is what the rule says. It is
18 up to the trier of fact to determine whether Mr.
19 Wilkey is valid, is he a quack, is he a weirdo,
20 qualified. What is the problem with Mr. Wilkey? It
21 is up to the trier of fact to weigh the evidence,
22 weigh his testimony versus the testimony of other
23 experts or other people.

24 THE COURT: Do you think you need an expert to
25 create an issue of fact as to whether the homeowners

1 were aware of drainage problems? I know you had an
2 affidavit that he knew that there were symptoms, but
3 didn't know the source. That is a matter that the
4 Court is to judge based on the expert's affidavit, or
5 is that a commonsense thing whether they knew or
6 should have known that they had a problem with the
7 drainage, and the like? Do you think expert testimony
8 is needed to determine that?

9 MR. STANLEY: To say what caused it, yes, sir, I
10 do. I do not think that the homeowners knew what was
11 causing the problems at the Rivergate project. They
12 knew there was problems and ponding water. They knew
13 something was going on at the project, but they don't
14 know what is causing it. Is it coming from an
15 adjacent property, coming from Highway 17, which is
16 adjacent to the project? Is it the irrigation system?
17 I mean, there are a lot of variables in this, and they
18 definitely saw problems and definitely were trying for
19 somebody to address their problems.

20 As far as having knowledge of what was causing
21 those problems, I do think it takes a professional to
22 make that determination, and he's created a genuine
23 issue of material fact..

24 THE COURT: Have you briefed that limited issue
25 Ms. -- the need for an expert?

1 MS. BURTON: I got the affidavit by E-mail on
2 Friday. Obviously, the affidavit is not being -- I
3 mean, this doesn't have anything to do with juries or
4 anything. This is an affidavit that the plaintiff
5 purported to submit in opposition to my motion for
6 summary judgment on the statute of limitations. I
7 mean, that is what the guy is trying to offer an
8 opinion about, statute of limitations, not engineering
9 or whether the infiltration calculations are right or
10 anything. He's trying to offer an opinion to say I
11 don't think those people could have known, and I
12 submit to the Court that is not a proper basis for
13 expert testimony.

14 THE COURT: So you haven't had an opportunity to
15 brief that limited issue?

16 MS. BURTON: No, but I would be happy to do so.

17 THE COURT: So I'll take that issue under
18 advisement and have you brief it and Mr. Stanley to
19 respond.

20 MR. STANLEY: Thank you. You moved to strike
21 more paragraphs.

22 MS. BURTON: Oh, I thought is what we were
23 talking about?

24 MR. STANLEY: As to Paragraph 7, it says, I am of
25 the opinion the civil engineer in this case breached

1 his duty of care.

2 Again, that goes to the weight of the evidence.
3 If she wants to discredit Mr. Wilkey at trial and say
4 he was born at a certain time, went to college at a
5 certain time, licensed at a certain time and,
6 therefore, not a valid witness for this case, then
7 that should go to the trier of fact to weigh that
8 evidence, but he should be able to opine as a forensic
9 engineer, civil engineer, as to whether another civil
10 engineer violated the standard of care.

11 THE COURT: I agree with you that that is one of
12 the weaker of her arguments.

13 MS. BURTON: That wasn't the basis of my motion
14 to strike. We deposed the guy for two entire days, is
15 my recollection. I know what his opinions are about
16 the design work. It was -- the issue there was the
17 common elements issue, to the extent -- and I didn't
18 know what the purpose of submitting this was; we
19 already deposed the guy. I thought what they were
20 trying to say is that the items that he proposes to
21 repair are, in fact, common elements, which of course
22 he is not qualified. I mean, that is a pure legal
23 issue as to what is or isn't a common element, and
24 that was the basis for that paragraph, his attempt to
25 try to tie things to equaling a common element, which

1 he's not qualified to do.

2 MR. STANLEY: Which paragraph?

3 MS. BURTON: 7. I mean, that is the issue I saw
4 in the affidavit. I didn't see why you would submit
5 an affidavit to say that in my opinion AB Consulting
6 breached the standard of care --

7 THE COURT: Well, you'll be able to brief
8 everything.

9 MS. BURTON: I'll put everything in the paper.

10 THE COURT: Since you just got it on Friday.

11 MS. BURTON: Be glad to. That is all of them.

12 THE COURT: Good. So we'll take all of these
13 matters under advisement, and I would like to have
14 proposed orders submitted, issues raised by
15 Ms. Burton, and separately the one by Mr. Smith. Of
16 course the denial of the summary judgment doesn't
17 require an extensive proposed order since it is not
18 appealable. Mr. Stanley, you then would only need to
19 respond to their proposed orders.

20 MR. STANLEY: Yes, sir.

21 THE COURT: So Mr. Smith and Ms. Burton will
22 submit it. Mr. Clark, do you need -- well, you have a
23 separate one to pursue as well.

24 MR. CLARK: We join in the arguments that
25 Ms. Burton made.

1 THE COURT: Do you want to submit a separate
2 proposed order?

3 MR. CLARK: We would be happy to.

4 THE COURT: All right. We're through.

5 (Whereupon the proceedings concluded.)
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1 CERTIFICATE OF REPORTER
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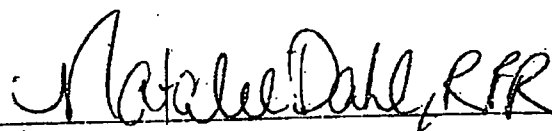
3 State of South Carolina)

4 County of Horry)
5

6 I, Natalie Dahl, Official Court Reporter for the
7 State of South Carolina, do hereby certify that the
8 foregoing is a true, accurate and complete Transcript
9 of Record of the proceedings had and evidence
10 introduced in the matter of the captioned case,
11 relative to appeal, in the Court of Common Pleas for
12 Horry County, South Carolina, on the 17 day of
13 January, 2014.

14 I do further certify that I am neither of kin,
15 counsel, nor interest to any party hereto.
16

17 March 15, 2015
18

19 
20

21 Natalie Dahl, RPR

22 Court Reporter
23
24
25

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**
2 COUNTY OF HORRY) CASE NO: 2010-CP-26-03901
3 -----
4

5 **B E F O R E:** The Honorable Clifton Newman
6 September 8, 2014
7 -----

8 RIVERGATE HOMEOWNERS' ASSOCIATION,

9 Plaintiff,

10 vs.

11 WW&LB DEVELOPMENT COMPANY, LLC; RWG, INC.; AIELLO
12 ASSOCIATES; DANIELS ENGINEERING, INC.; RIVERGATE
13 HOMEOWNERS' ASSOCIATION, et al.,
14

15 Defendants.
16 -----
17

18 **APPEARANCES:**

19 Stacy L. Stanley, Esq.
20 For the Plaintiffs.
21

22 J. Christopher Clark, Esq.
23 Mike Smith, Esq.
24 Stephanie Burton, Esq.
25 For the Defendants.

Court Reporter:
Natalie Dahl, RPR

P-R-O-C-E-E-D-I-N-G-S

1
2 MR. STANLEY: Good morning, Your Honor. We have
3 several motions in front of Your Honor. Primarily
4 we're going to be dealing with the motions for
5 reconsideration that I filed; we have three of those.
6 We have one involving Chuck's Construction, we have one
7 involving AB Consulting, and the motion for
8 reconsideration involving Speedy Concrete.

9 In addition, Your Honor, we have -- there is a
10 motion to strike that was filed by AB Consulting; it
11 was filed January 21st of this year.

12 THE COURT: Who represents AB Consulting?

13 MS. BURTON: I do, Your Honor.

14 MR. STANLEY: I'll try to be brief, your honor.
15 First of all, let me reference the motion for
16 reconsideration dated June 11, 2014; that is the
17 motion for reconsideration involving Speedy Concrete.
18 What I would like to do, if I could, is go ahead and
19 reference just that, the motion for reconsideration,
20 because it covers all the issues that I believe were
21 argued when the defendants argued their motion for
22 summary judgment.

23 THE COURT: And that is Mr. Smith?

24 MR. STANLEY: Yes, sir. All of those arguments
25 that we make in that brief apply to all the

1 defendants, because at one time or another the
2 defendants were arguing through Ms. Burton, and I
3 believe that all of those would apply to all of the
4 defendants. In one way or another I believe they were
5 all arguing those particular issues. Your honor, in
6 regards to the --

7 THE COURT: I thought this stack was your
8 supplements to the one on Speedy, but I have a total
9 different file.

10 MR. STANLEY: That was filed June 11th.

11 THE CLERK: I think that is it.

12 THE COURT: All right. I had it yesterday and
13 brought something called Energy Solutions versus
14 Curien, Inc.

15 MR. STANLEY: That would not be mine.

16 THE COURT: Go ahead.

17 MR. STANLEY: Just referencing the arguments in
18 the June 11, 2014 motion for reconsideration involving
19 Speedy, which I, again, would argue that those
20 arguments apply to all of the defendants, the
21 plaintiff would argue that the Court erred in granting
22 summary judgment against the Rivergate HOA, and that
23 is based on the fact that we would argue that the
24 plaintiff could not have known or should have known
25 that there was a cause of action against these

1 defendants until on or about June the 18th of 2010.

2 As Your Honor is very aware, the standard for
3 summary judgment is whether there was a genuine issue
4 of material fact. Granting summary judgment is a
5 drastic measure --

6 THE COURT: Excuse me one more second. Do you
7 have an order granting summary judgment as well?

8 THE CLERK: Do you know what date it was filed?
9 I have all of the files, I would have to go through
10 them.

11 MR. STANLEY: You want to write these down?

12 MR. SMITH: Speedy was filed May 12th of 2014,
13 but I think it was the last of the three.

14 MS. BURTON: AB Consulting was May 19th.

15 THE COURT: If I could see the orders. As I'm
16 hearing the argument, I would like to see the order.

17 MR. SMITH: Mine has my notes on it. Let me see
18 if I can find a clean copy.

19 THE COURT: Sandra can find them.

20 THE CLERK: I have 14 files here, Judge..

21 THE COURT: If you find it, fine; if not, fine.
22 All right. If you can find the others while we're
23 talking. Yours, Ms. Burton was filed?

24 MS. BURTON: 5/19.

25 MR. CLARK: Chuck's Construction was filed on the

1 14th of March.

2 MR. STANLEY: Your Honor, I was just talking
3 about the standards of summary judgment.

4 THE COURT: This is AB Consulting?

5 MR. SMITH: Yes, and I'll find the other one.

6 THE COURT: Let's have Mike Smith find all of
7 them, then.

8 THE CLERK: All right, sir.

9 THE COURT: Before we proceed.

10 MR. SMITH: This is Chuck's.

11 THE CLERK: So you have all of them?

12 MR. SMITH: Yes, ma'am. He has all of them now.

13 THE COURT: I appreciate it.

14 MR. STANLEY: So we're talking about the
15 standards for summary judgment and, again, all of this
16 is referenced in the motion for reconsideration and
17 the brief that is attached to that, but I would again
18 bring to the Court's attention -- and I'm sure you are
19 aware of this -- the Hancock case, Hancock versus
20 Midsouth case, that states that a non-moving party is
21 only required to submit a mere scintilla of evidence
22 in cases applying to preponderance of the evidence
23 burden of proof.

24 Then, again, all of this was referenced in the
25 plaintiff's brief as to the statute of limitations

1 law. It is the Moriarty versus Garden Sanctuary
2 Church of God case. It states, When conflicting
3 evidence exists of when a claimant knew or should have
4 known that a cause of remedy existed, the issue
5 becomes one for a jury to decide.

6 Plaintiff would argue that there is no question
7 about there is conflicting evidence in this case.
8 We've presented that at the initial hearing in regards
9 to summary judgment --

10 THE COURT: Excuse me one last time. What is
11 this courtroom number?

12 MR. STANLEY: 2E.

13 THE COURT: Thank you.

14 MR. STANLEY: And in regards to the conflicting
15 evidence, we submitted an affidavit of Drew Wilkey.
16 He is our forensic engineer. In his affidavit, which
17 is Exhibit A on the Speedy motion for reconsideration,
18 he stated in Paragraph 6 that while the HOA may have
19 been aware of undesirable symptoms of the HOA, such as
20 standing water, erosion, et cetera, it is my opinion
21 that the HOA would not have been aware that these
22 symptoms were associated with or caused by civil
23 construction and design defects until the report that
24 I issued on June 18, 2010. I think that establishes
25 that there is conflicting evidence. The defendants

1 are arguing that the homeowners should have known as
2 early as 2005 that there were construction and design
3 issues.

4 THE COURT: Is that based on the fact that that
5 is his opinion, or is he -- is he interpreting the law
6 in his statement saying that? How does that -- is
7 that a conclusion that he's making that an expert
8 can't make, or how do you explain that? Because if
9 that is the question for me to decide, then listening
10 to the expert says -- while they may have been aware
11 of undesirable symptoms, such as problems, road
12 erosion, et cetera, in my opinion they would not be
13 aware that there associated or caused by civil
14 construction and design defects until he told them.
15 So how does that really -- how can I rely on that as a
16 basis for ruling, that there is a material issue
17 versus saying that it is a conclusion that an expert
18 can't draw? I'm sure I'll hear the other side, but I
19 want your explanation of it.

20 MR. STANLEY: Well, I think he is entitled under
21 the rules of evidence to state an opinion about an
22 area that he is very familiar with and trained in.
23 The homeowners couldn't make this decision about what
24 was going on with the drainage system, which is under
25 the property. The homeowners couldn't decide what was

1 going on when it came to the sole erosion because of
2 improper grading. Only a professional could make that
3 determination. They knew --

4 THE COURT: As to the cause of the erosion?

5 MR. STANLEY: Yes, sir. Yes, sir. I think there
6 is so many other factors, Your Honor, that can go into
7 a situation like this. You can have just -- you can
8 have a lot of rain, you can say that might be the
9 cause. I think at some point you have to have an
10 expert to make that determination about what is
11 causing the erosion, and I don't think there was
12 anybody qualified or trained to make that decision for
13 the homeowners. It had to be Wilkey or another expert
14 come in and make that determination. So I believe
15 that creates an issue of conflicting evidence.

16 You've got the Rivergate homeowners that
17 allegedly know about this, according to the
18 defendants, and then you've got an expert that would
19 know this area and its expertise better than anybody
20 else that says they could not have known about it,
21 only an expert could determine the causes of the
22 erosion at Rivergate, and because there is conflicting
23 evidence, this is an issue for the jury.

24 We believe we satisfied the -- we've gotten over
25 their motion for summary judgment and we're able to

1 put this to a jury. If the jury wants to decide that
2 this not a credible argument by the plaintiff, then
3 the jury can make that decision when the defendants
4 put up the fact that the homeowners may have been
5 aware, we put up evidence that they could not have
6 been aware, and we've got an expert saying that and,
7 of course, Ms. Burton and Mr. Smith and Mr. Clark
8 could have the opportunity to cross-examine Mr. Wilkey
9 as to his opinion.

10 In the alternative, if you do not believe there
11 is conflicting evidence, we haven't met that burden,
12 we also would argue that equitable tolling would apply
13 in this case. The law -- again, this is referenced in
14 the brief --

15 THE COURT: Before you get to the equitable
16 tolling part, looking at the order that says -- on
17 Page 2, Braxton Lewis wrote WW&LB concerning
18 deviations from their plans, including deviations from
19 storm water system design and modifications that
20 create severe driveway slopes -- so is that relevant
21 to what you are discussing, or not relevant?

22 MR. STANLEY: I do not think it is relevant, Your
23 Honor. If we're talking about the homeowners bringing
24 suit, at that point in time, whenever that letter was
25 written to WW&LB, the homeowners were not in control

1 of the HOA at that point. They could not have brought
2 suit until the property was turned over, the
3 homeowners' association was turned over to them on or
4 about October 31, 2007. I was going to get to that,
5 but that is the earliest date that the homeowners
6 could bring suit. I'm not aware that the homeowners
7 had this information prior to October 31, 2007.

8 So, again, even if they had the information,
9 which I do not think they did for Mr. Lewis, they
10 could not have brought suit anyway. I mean, as the
11 Court knows, a developer and general contractor is
12 probably not going to sue themselves, and that was the
13 case for WW&LB. Even though this information had been
14 brought to their attention, they were not going to
15 bring suit against themselves and probably the people
16 that they had hired.

17 THE COURT: All right. I was just forwarding on
18 to the other part of the order.

19 MR. STANLEY: Can I mention one other thing, if
20 you don't mind, before we leave Mr. Lewis? I think --
21 and this goes to the jury issues involving this
22 case -- Mr. Lewis represented himself as a licensed
23 engineer. It was found during discovery that he was
24 never licensed by the State of South Carolina to be an
25 engineer. So when he writes that letter, I think

1 there are numerous issues that need to be addressed at
2 trial about the validity of his opinions that he's
3 making, because he was the overseeing engineer --
4 supposed engineer -- for AB Consulting that was hired
5 by the developer, and then during discovery it was
6 determined that he is not even licensed to do that.
7 He is misrepresenting his responsibility and position
8 at Rivergate.

9 THE COURT: Yes, sir. All right. And then
10 jumping to another part of the order, Page 6,
11 November 4th, 2006, this meeting of the homeowners and
12 various complaints, including drainage issues, were
13 discussed, and Robert Sanger then filed a complaint in
14 2007 asserting defective construction design, slopes,
15 et cetera; is that relevant to what you are
16 discussing, or not relevant?

17 MR. STANLEY: No, sir, I do not think it is
18 relevant. That was a case that was filed by the
19 homeowners because they could not bring it to the HOA
20 at that time. Most of the issues were water intrusion
21 and damages to their actual units, and once suit was
22 filed by Mr. Sanger, we had to make a motion to compel
23 Mr. Winderman, who is WW&LB, to transfer the HOA per
24 the master deed from the homeowners -- excuse me, from
25 the developer to the homeowners.

1 A hearing was set, Mr. Winderman decided that
2 things weren't looking too good for him, so he wrote a
3 letter, and that is part of the documents that I
4 presented to the Court in our brief, and it stated
5 that he was going to turn over the HOA because of the
6 motion on October 31, 2007. So, yes, sir.

7 THE COURT: The other issue -- and I'm trying to
8 ask these questions and get the essence of what we're
9 -- I'm supposed to be reviewing. Then the portion of
10 it that talks about who would have a right to bring
11 the action involving these issues in dispute, the
12 homeowners versus the homeowners' association, all of
13 that is relevant to this as well, common areas,
14 driveways, or things that is clearly not common areas?

15 THE WITNESS: Yes, sir. We're dealing with
16 common areas, and that is the responsibility of the
17 HOA to maintain, replace and repair according to the
18 master deed.

19 THE COURT: "Common areas" being?

20 MR. STANLEY: We're talking about driveways.
21 We're talking about roads. We're talking about areas
22 where there is grass, ditches, those kinds of common
23 areas is what we're litigating in this case. I
24 believe, Your Honor, Speedy Concrete brought that
25 issue up at the hearing, and before then, stating that

1 in that -- in their particular case we were dealing
2 with the concrete driveways that Speedy installed, and
3 their argument was that this was not a common element.
4 Well, that is contrary to the documents, master deed
5 and bylaws. They state that a driveway is a limited
6 common element, and according to the master deed, a
7 limited common element is considered a common element,
8 which is to be maintained, repaired and replaced by
9 the HOA. So the HOA -- if there is a defect on that
10 driveway, the HOA is the most -- not responsible, but
11 the one that has the authority, if you will.

12 THE COURT: The driveway leading up to the
13 private home?

14 MR. STANLEY: Yes, sir. That was the question I
15 think about whether it was common elements or not. I
16 don't think there was any discussion about the other
17 areas. The drainage, the site work, I don't think
18 that was at issue. I think in Speedy's case, I think
19 they were talking about the concrete driveways that go
20 from the road to each individual house. I submitted a
21 brief on that issue, and that is also part of this
22 motion for reconsideration that I have in the
23 documents.

24 THE COURT: All right. And you are to talk about
25 equitable tolling?

1 MR. STANLEY: Yes, sir. The law is that
2 equitable tolling has been deemed available where
3 extraordinary circumstances prevented plaintiff from
4 filing upon his or her diligence. We have that in
5 this case. Even with the homeowners that are meeting
6 in this ad hoc community, because the developer is not
7 addressing these concerns, and they are given the
8 concerns of the drainage issues, flooding, other
9 issues that are going on at the property, they are
10 passing these issues on to the developer, WW&LB, and
11 that is all they can do at that point.

12 They can't bring suit until the HOA is
13 transferred to them and it is a homeowner controlled
14 HOA, and that took place of October 31, 2007. So
15 prior to October 31, 2007, they were prevented from
16 taking that action of bringing suit for the common
17 elements as an HOA. So I believe --

18 THE COURT: Even though the HOA may have been
19 aware of the problem before then?

20 MR. STANLEY: Yes, sir. I don't think it's that
21 different --

22 THE COURT: You mean the statute starts when the
23 -- when it is turned over -- when the developer is no
24 longer involved in the management of the HOA?

25 MR. STANLEY: When it is a homeowner controlled

1 HOA.

2 THE COURT: All right.

3 MR. STANLEY: No longer a developer.

4 THE COURT: That is when the statute of
5 limitations begin?

6 MR. STANLEY: I believe that would be the case,
7 Your Honor. I think it is very similar to the
8 Magnolia North versus Heritage Community case. In
9 that case they were arguing -- as Your Honor is very
10 aware -- the defense was arguing that there were board
11 meeting minutes, and the board was meeting; therefore,
12 the homeowners should have been aware of those issues,
13 construction defects, at Magnolia North. But it is my
14 understanding from the opinion that the Court
15 determined that it did not run -- the statute did not
16 begin to run until the HOA had control, which was
17 turned over in about 2002, to the homeowners. I think
18 that is a similar situation here.

19 I mean, you can't expect the developer, slash,
20 general contractor to bring suit against themselves
21 and take action on these complaints. It has to be
22 left up to a homeowner controlled HOA to do that;
23 otherwise, Your Honor, we get in a situation, just as
24 a matter of public policy and equity, that the
25 developer will say that you knew about something in

1 2005, and they continue to hold the property until
2 supposedly that three years has run, and they continue
3 to -- I thought I turned it off, Your Honor, I
4 apologize.

5 THE COURT: It's all right.

6 MR. STANLEY: They continue to hold the property,
7 which in this situation I don't know if Mr. Winderman,
8 the developer, was trying to do that or not, and keep
9 control of the property, but we had to force him to
10 transfer the property to the homeowners. We had to
11 make a motion to compel the transfer from the
12 developer controlled HOA to the homeowner controlled
13 HOA.

14 If this ruling stands, I believe it sends a
15 message that developers can say you knew about it, you
16 brought it up in a meeting, you didn't do anything
17 about it, but I'm going to continue to hold the
18 property for another four, five, six, ten years and
19 then at that point I'll transfer it over to the
20 homeowners, and then the homeowners bring suit, but
21 then the developer makes the argument, look, you knew
22 about it in 2005 and didn't file suit until 2015 or
23 2012, whatever the date may be, and your three years
24 has run. To me, that is the argument that the
25 developer is making in this case, and the other

1 defendants are making, that you knew about it as early
2 as 2005. Well, let's assume that that is correct,
3 that they knew about it. Let's take their argument
4 that they knew about it in 2005. What could they have
5 done at that point to correct it? They can't bring
6 suit as an HOA because they don't control the HOA.
7 They can only bring these issues to the attention of
8 the developer, general contractor and subcontractors.
9 That is all they could do at that point. So their
10 hands are -- they are handcuffed at that point.

11 Now, when it was transferred over to them on
12 October 31st, 2007, I think within about eight months
13 they filed suit as an HOA. So they did not wait to
14 file suit. Now, as additional information became
15 available, they realized that there were significant
16 issues with the grading and other issues they had to
17 address, and they hired an expert fairly soon after
18 that to research and investigate that issue, and still
19 brought suit within the -- within three years that the
20 property had been conveyed to them as an HOA.

21 THE COURT: Property was conveyed to the HOA in
22 October of 2007?

23 MR. STANLEY: Homeowner controlled, yes.

24 THE COURT: And the lawsuit was filed?

25 MR. STANLEY: Initial lawsuit was filed I think

1 about April/May of 2008.

2 THE COURT: Of 2008?

3 MR. STANLEY: Yes, sir. Now, the defendants, in
4 regards to most of the site work, were added on or
5 about April 28th of 2010 in a second amended
6 complaint.

7 THE COURT: So the defendants who were sued in
8 2008, they are not the subject of this motion argument
9 or any rulings that I make?

10 MR. STANLEY: I don't think so, Your Honor. I
11 think all of these defendants here today were added
12 subsequent to the June 13 -- it was June 13th of 2008
13 that was the initial complaint. I think most, if not
14 all, were added with the second amended complaint that
15 was filed on April 28, 2010. Again, that is well
16 within the three years that the HOA had been conveyed
17 the property to the homeowner controlled HOA.

18 Just referencing some of the documents we have in
19 regard to the equitable tolling issue, Exhibit B is a
20 letter from Wayne Winderman. He is one of the owners
21 of WW&LB. He also had another partner that is the L B
22 portion. "WW" is Wayne Winderman, and "LB" is Larry
23 Bellamy. Mr. Winderman wrote the homeowners on
24 September 12, 2007 and stated in the second paragraph,
25 The time is long overdue to turn the HOA over to an

1 elected board of directors. We will not oppose the
2 motion, and thereby advise each member they consider
3 carefully who they might want to serve on the board.
4 The resignation is effective October 31, 2007.

5 If you look at Document E, that is another letter
6 from Mr. Winderman, and it is on Rivergate's HOA
7 letterhead dated July 6, 2005, and this goes back to
8 my argument that even if the homeowners knew as early
9 as 2005, as the defendants argue, they were handcuffed
10 and prevented from doing anything to correct these
11 defects until they received control of the homeowners'
12 association in 2007.

13 The first paragraph of that letter from Wayne
14 Winderman, on behalf of the Rivergate HOA at that
15 time, because he still controlled it, he states in the
16 very first paragraph, last sentence, Please note that
17 your committee will not be recognized for any other
18 purpose than to address legitimate concerns of the
19 HOA. So even if the defendants are arguing that the
20 homeowners knew it and established an ad hoc
21 community, brought it to the attention of the
22 developer, general contractor and subcontractors,
23 there was nothing that they could do other than to
24 pass that onto him, and he pretty much establishes
25 that he is the one in control and he will determine

1 what is legitimate and not legitimate concerns.

2 In addition to those two arguments, Your Honor,
3 the defendants should be estopped from asserting the
4 statute of limitations because the developer and the
5 developer controlled HOA induced the homeowners to
6 believe that, number one, there would be future
7 inspections and, number two, there would be future
8 repairs to address the issues at Rivergate.

9 Again, I just reference the Magnolia North case.
10 It says that the defendant will be estopped to assert
11 the statute of limitations in bar of a plaintiff's
12 claim when the delay that otherwise would give
13 operation to the statute has been induced by the
14 defendant's conduct. And then it goes on to say, The
15 conduct may involve either inducing the plaintiff to
16 believe that an amicable adjustment of the claim will
17 be made without suit, or inducing the plaintiff in
18 some other way to forbear exercising his right to sue.

19 In this case, Your Honor, there were numerous
20 actions on behalf of the developer and general
21 contractor, and I think this would go to the
22 subcontractors to induce the plaintiffs not to take
23 any action. I would reference --

24 THE COURT: I guess that would go to the
25 subcontractors -- what do you mean?

1 MR. STANLEY: Yes, sir. I think it goes to the
2 subcontractors also.

3 THE COURT: How? You said actions by the
4 developers would be imputed to the subcontractors?

5 MR. STANLEY: This was the developer and on
6 behalf of the HOA.

7 THE COURT: Was that the main issue here that --
8 not that the equitable tolling might not apply as to a
9 lawsuit against the developers, but the question as to
10 whether or not this tolling would apply as to
11 subcontractors who may not have done anything to cause
12 the homeowners to forego filing a complaint against
13 them? I mean, is that part of what we have to deal
14 with here, or not?

15 MR. STANLEY: I do not distinguish between the
16 developer and general contractor and the
17 subcontractors.

18 THE COURT: You don't want the motion to be
19 granted, I understand that, so you may not agree on
20 anything, but I'm just trying to get clear on whether
21 or not this is one of the things that we have to deal
22 with. Is that one of the issues that was before me,
23 whether or not any type of estoppel would apply, would
24 extend to the subcontractors?

25 MR. STANLEY: I don't know if that argument was

1 made by the defense.

2 THE COURT: Okay. All right.

3 MR. STANLEY: I remember Your Honor bringing that
4 up at the initial summary judgment hearing, and I
5 don't think it was distinguished between the
6 subcontractors and the general contractor or
7 developer.

8 I also think, Your Honor, that that is a matter
9 of public policy. Let me tell you why I think that is
10 the case that that should not apply, distinguishing
11 between a subcontractor and a general contractor or a
12 developer, and that is because the general contractor
13 or developer who hired the subcontractors, let's say
14 they are his friends and work on a lot of different
15 projects, say that they have deficient work. Let's
16 say that Speedy Concrete improperly installed these
17 concrete driveways, but WW&LB is a friend of Speedy
18 Concrete, and WW&LB wants to protect Speedy Concrete.
19 So WW&LB, even though it has information from the
20 homeowners, it either never passes this on to the
21 subcontractor, which they would make the argument that
22 is some sort of defense, or in addition to that, he
23 may continue to hold the HOA as long as possible to
24 protect his subcontractors. So I think it is a matter
25 of public policy and equity, you do not distinguish

1 between a subcontractor, a general contractor and a
2 developer.

3 The HOA itself that was developer controlled,
4 under Mr. Winderman, induced these homeowners to not
5 bring suit or take any additional action. That is
6 referenced in, again, Exhibit E, the letter July 6th
7 of 2005 from the Rivergate HOA to the homeowners. It
8 states we have made inspections of drainage issues --
9 the second paragraph, we have made inspections of
10 drainage issues and we will address the same as
11 quickly as possible.

12 Again, based on these representations by the HOA
13 here, on HOA letterhead, by the developer, general
14 contractor and as a result I believe that would extend
15 to the subcontractors, there is a representation being
16 made that this is going to be taken care of, these
17 drainage issues are going to be addressed, you don't
18 have to do anything right now, I'll take care of it.

19 He goes on to say -- there is a document in there
20 that shouldn't be in there, but it is on the third
21 page of Exhibit E. He goes on to say that upon
22 conclusion -- this is the first paragraph of the third
23 page on Exhibit E. It says, Upon conclusion of
24 construction, we will have an engineer inspect the
25 site for any repairs needed on the roadways.

1 This, to me, induced the plaintiff not to bring
2 suit, because he is saying he's going to address any
3 issues, they are going to have an engineer come and
4 inspect the property for any repairs. It says, Upon
5 the conclusion of construction, well, I don't know
6 what Mr. Winderman means, whether he means the
7 conclusion of each phase, because there are 34 phases
8 of construction out there. Is he talking about each
9 phase? Is he talking about when the property is
10 actually built out?

11 I think it was represented to the Court earlier
12 that WW&LB did not own anything out there, or if they
13 did, they might have owned the roads. I did a search,
14 and the only thing I could find that WW&LB still owned
15 is a lot out there, and I have that as an exhibit in
16 this memorandum. So does WW&LB, are they saying upon
17 completion of construction of the entire property that
18 we're going to do the inspection? I mean, at what
19 point do the homeowners should they understand the
20 completion or the conclusion of construction? When is
21 that? So I think it is open-ended. It induced them
22 to continue to wait for WW&LB or the subcontractors to
23 do something to correct these problems.

24 Again, I made this argument earlier, that just
25 for equity and public policy it dictates that the

1 plaintiff's claims should not be barred by the statute
2 of limitations because the plaintiff didn't even
3 receive this property as a homeowner controlled HOA
4 until October 31, 2007. I referenced in documents
5 earlier where Mr. Winderman is transferring because of
6 a motion to compel, he's transferring his interest in
7 the HOA to the homeowners at that time.

8 There are a number of other arguments, Your
9 Honor, in the brief. Again, I think these all apply
10 to the subcontractors. The one that Your Honor has
11 already touched on was the argument about the common
12 elements. I think we've already addressed that. The
13 fact that we are dealing with common elements here,
14 and the HOA is the most proper party to bring suit for
15 common elements, because they are responsible for the
16 maintenance, repair and replacement of the HOA common
17 elements. That applied to specifically to Speedy's
18 concrete talking about the driveways, because that is
19 a limited common element, and the master deed defines
20 a limited common element as a common element that is
21 to be maintained by the HOA.

22 There was an argument by Speedy specifically
23 about their work conforming to industry standards, and
24 I addressed that in the brief. Our expert, and the
25 reports by the expert are attached -- or the final

1 report is attached to the affidavit of Drew Wilkey,
2 and we've only given you the text portion for
3 simplicity, but it points out that all of the
4 defendants are responsible for these issues out there.
5 It is very hard sometimes to distinguish what is
6 causing problems and what is not causing problems, but
7 our expert in the affidavit states that Speedy, just
8 like the other subcontractors, violated industry
9 standards at Rivergate as a --

10 THE COURT: Is that part of Drew Wilkey's
11 affidavit?

12 MR. STANLEY: Yes..

13 THE COURT: What paragraph?

14 MR. STANLEY: Paragraph 8, It is my opinion that
15 the defendants were aware or should have been aware of
16 the civil construction and design deficiencies at the
17 time of construction and thereafter, but failed to
18 repair or correct these deficiencies even with this
19 information and knowledge.

20 He did not distinguish between Speedy and AB and
21 Chuck's; it was all the defendants. I believe Speedy
22 made the argument that there were no resulting
23 damages. Again, we have the report of Drew Wilkey
24 saying there were damages as a result of this
25 defective work, and we have an expert contractor who

1 has determined that there are damages in about a
2 \$1.5 million range for these civil site construction
3 deficiencies.

4 Your Honor, I believe that is all I have at this
5 time. Again, we ask the Court to grant our motion for
6 reconsideration at this point, and I believe Ms.
7 Burton has another motion to strike that is going to
8 be heard, and I'll respond to her after that. Thank
9 you.

10 THE COURT: All right. Before we hear from you,
11 Mr. Smith, anyone else going to show, do you think, on
12 the Edgewater? Anyone else -- any other lawyers
13 coming that you can think of? We're going to -- I
14 scheduled a status conference on that case, and it
15 won't take nearly the length of time that this one is
16 going to, so rather than hear from you, I'll deal with
17 them in the status conference, and then come back on
18 this case. We'll take a break on this one.

19 (A recess was taken.)

20 MR. SMITH: Yes, sir, Your Honor. I'll address
21 the limited common elements issue as it pertains to
22 the driveways that Speedy produced, and focus on that
23 primarily, and then turn over the remaining of the
24 argument.

25 First of all, Your Honor, let me draw the Court's

1 attention to the master deed, which I believe controls
2 this issue. It defines limited common elements as the
3 term is used herein shall remain and comprise the
4 following, and grade level concrete driveways is
5 included in that definition.

6 THE COURT: As a limited common element?

7 MR. SMITH: Yes, sir. And then it goes on to say
8 in Section 22 of the master deed, Every owner must
9 perform promptly all maintenance and repair work
10 within his unit and all the limited common elements,
11 and it says -- my page is stuck together -- expressly
12 responsible for the damages and liability which is
13 failure to do so may engender. So the owner is
14 responsible for the maintenance of the limited common
15 element, and for any damages caused by the limited
16 common element.

17 And then what we see is Mr. Stanley is arguing
18 is, wait a minute, limited common elements are the
19 same as common elements under the master deed. Let me
20 draw your attention to Article 4 of the master deed
21 that states, Except as specifically provided in this
22 master deed. And then it goes on to say, Limited
23 common elements are to be considered common elements.
24 That is where Mr. Stanley and I disagree. I think
25 that limiting language, which specifically points out

1 the fact that except as set forth herein is applicable
2 in my case because we are an exception to the rule.
3 We are specifically listed as a limited common element
4 that is to be held different than the other limited
5 common elements. Because of that, Your Honor, it is
6 the owner's responsibility to take care and bring
7 lawsuits for anything that is problematic with those
8 sloped driveways.

9 Here is where the statute of limitations comes
10 in. First of all, the homeowners' association never
11 sued an individual owner for any damages caused by
12 their driveway, so I don't have a statute of
13 limitation position because I have not been sued for
14 it. Each individual owner has not brought suit.

15 The second thing is even if we look at the
16 statute of limitations and the slope issue, I want to
17 draw Your Honor's attention to Mr. Jim Dunn who was
18 part of this ad hoc committee back in 2005 who
19 overheard Speedy Concrete telling the developer the
20 slopes are too steep on these driveways. So you have
21 a representative member of the board, if you will, of
22 all of the homeowners that heard the slope is too
23 great. There is testimony that those slopes never
24 changed. Every owner that walked in those units saw
25 exactly what it was when they purchased the unit.

1 There is testimony and argument that, well, what
2 was any individual owner to do. Well, the example is
3 clear, it is set forth in the record. There is one
4 owner that actually chose to drop the slope of their
5 driveway so it would not be too steep. So they had
6 the opportunity to make those changes if they chose to
7 do so because they have control over their driveways
8 under the master deed. Because of that limited
9 language that Mr. Stacey did not reference, I think it
10 is clear that when the homeowners' association is
11 governed by a master deed that specifically sets forth
12 that the limited common elements are the driveways,
13 and that the driveways are the responsibility of the
14 owner, and any damages flowing from the driveways are
15 the responsibility for the owner, we are within the
16 exception; because of that, statute of limitations
17 does not apply to us, equitable tolling does not apply
18 to us, and we feel Your Honor is correct in his
19 ruling.

20 THE COURT: Do you want to respond to that point?

21 MR. STANLEY: Yes, sir. I tried to address it a
22 little bit earlier. I think my friend is a little
23 confused by limited common elements, and I think it is
24 a very confusing issue. The last sentence of
25 Article 5 states that in all other respects, and

1 except as specifically provided in this master deed,
2 limited common elements shall be treated as and
3 included within the definition of the term common
4 elements.

5 I don't know how much clearer you can get than
6 that. The master deed is saying that limited common
7 elements are included within the definition of common
8 elements. This also goes in line with case law. If
9 you look at the case of Blackwell versus Hanover, the
10 court ruled that limited common elements are a part of
11 common elements, and any liability arising from them
12 should be insured risk under a statute required
13 covered of claims arising out of common elements.

14 I dealt with this before in the case of porches.
15 Porches are limited common elements, just like these
16 driveways are limited common elements. The owner has
17 the exclusive use of an egress and ingress to those
18 porches, just like the owner has exclusive use of
19 these driveways, ingress and egress. Ingress and
20 egress to the driveways, but it doesn't mean that the
21 owner owns the porches. The porches are maintained,
22 repaired and replaced by the HOA. You do not have
23 individual owners bringing lawsuits just for the
24 porches; you don't have that happening. I've
25 litigated that for years now. We never have a

1 distinction about the porches. This is no different
2 than the porches. The driveways are for the exclusive
3 use, just like porches, for the owners. Only the
4 owners should be coming in and out of the driveways of
5 that particular unit, but the HOA is responsible for
6 maintaining, repairing and replacing. If there is a
7 lawsuit, the HOA has to bring that.

8 THE COURT: The porches on a house?

9 MR. STANLEY: Porch on a condominium, sorry.

10 THE COURT: Porch on a condominium. But these
11 are houses or condominiums?

12 MR. STANLEY: It is a condominium. This project
13 is considered a condominium complex. It is not a
14 townhome. It is set up as a condominium.

15 THE COURT: These are single family homes?

16 MR. STANLEY: Quadplexes and duplexes. If there
17 is some confusion in the wording of the master deed,
18 then that could be totally possible, but I don't see
19 where there is any question based on the case law.

20 I'll also reference the book that the South
21 Carolina Bar publishes, Condominium Law in South
22 Carolina. It says the same things, courts have ruled
23 that although limited common elements for the
24 exclusive use and benefit of a specific unit, a
25 limited common element is commonly owned and not a

1 part of a unit.

2 I just don't think that there is any question
3 about this, and as many cases as I've litigated, it
4 has never come up where somebody is trying to get out
5 of a case because it is a limited common element. I
6 would just reference also Article 23. It says, The
7 association at its expense shall be responsible for
8 the maintenance, repair and replacement of all of the
9 common elements. Again, this driveway is defined as a
10 common element.

11 THE COURT: You talked about that in what part of
12 your motion?

13 MR. STANLEY: Well, I filed this earlier. I
14 think Mr. --

15 MR. SMITH: It was filed as a subsequent
16 submittal to my proposed order. It was not part of
17 the motion for reconsideration.

18 MR. STANLEY: I believe it came up during the
19 motion for summary judgment.

20 MR. SMITH: Yeah. The motion for reconsideration
21 addresses the issue on Page 8 of his motion.

22 MR. STANLEY: Because I believe that was in the
23 order also. I believe that was a basis for granting
24 summary judgment; it was a limited common element.

25 MR. SMITH: Right. And, Your Honor, it just --

1 you still have to look at the documents on the four
2 corners of the document, and Mr. Stanley is still not
3 addressing this language, Except as specifically
4 provided in this master deed. That exception deals
5 with what is specifically listed in the master deed,
6 and the master deed specifically lists the driveways
7 as a limited common area for which each owner has the
8 responsibility to maintain and to pay damages for in
9 case it caused any damage.

10 You can't ignore the plain meaning of the
11 language because it doesn't suit you. In this case it
12 says, Except as specifically referenced herein. We
13 will call limited common elements, common elements.
14 But in regard to the sloped driveways, there is an
15 exception, and that exception says you are responsible
16 for the maintenance, you are responsible for the
17 damages.

18 THE COURT: How about that?

19 MR. STANLEY: He keeps saying it is the plain
20 meaning. I'm saying it is the plain meaning also, and
21 in addition to the plain meaning, which he has not
22 said, it is case law that limited common elements are
23 considered common elements.

24 THE COURT: In that you cannot agree otherwise?

25 MR. STANLEY: I can't agree with Mr. Smith --

1 THE COURT: No, the parties can't agree
2 otherwise.

3 MR. STANLEY: I would say that would be the case.

4 THE COURT: I mean, I guess among these papers
5 somewhere this master deed exists, but I can't put my
6 finger on it. I'm thumbing through these massive
7 papers.

8 MR. STANLEY: I think I get caught trying to
9 eliminate documents, because like Sandra says, you
10 have boxes and boxes of documents, but I did attach
11 the reference articles that I referenced in my brief
12 that are Exhibit H for this motion for
13 reconsideration.

14 THE COURT: I see in the file here it goes from
15 Exhibit No. B to -- the next one in the file is
16 Exhibit I.

17 MR. STANLEY: These are the exhibits (indicates).

18 THE COURT: It jumps to Exhibit I, which is the
19 deposition -- Exhibit B is Page 8 of something, Powers
20 and Duties, Areas. The board of directors is
21 responsible for, and then it goes to the next thing,
22 which is Exhibit I, which is a deposition of Wilkey.
23 So there the exhibits not in here, not in the file.

24 MR. SMITH: I have the language that is
25 specifically referenced here. This is the sentence,

1 And except as specifically provided in this master
2 deed limited and common elements. So the exception
3 provided in the master deed is the one I referred to
4 that specifically references the driveways. So I
5 understand about every other limited common element
6 out there, but there is two specifically that were
7 exhibited, attics and sloped driveway.

8 THE COURT: And, Mr. Stanley, you are saying that
9 is meaningless, the except attics and the driveways,
10 as you mentioned, that that does not take it out of
11 the arena?

12 MR. STANLEY: Correct, Your Honor. If there is a
13 scrivener's error --

14 MR. SMITH: Article 22 talks about the duties
15 that every owner has the responsibility.

16 THE COURT: All right. Sandra, these two pages,
17 if you would copy them, please. We have the other
18 thing.

19 MR. STANLEY: I don't know if you want a copy of
20 our memorandum. This was filed February 27 of this
21 year, Plaintiff's Memorandum of Law in Opposition to
22 Defendant Speedy's Motion for Summary Judgment. In
23 their motion, if I recall correctly, was based
24 primarily on the common or non-common element.

25 THE COURT: We'll need that, too.

1 THE CLERK: One copy of each?

2 THE COURT: Yes. All right. So we've exhausted
3 that.

4 MR. SMITH: Yes, it is dead.

5 THE COURT: Ms. Burton.

6 MS. BURTON: I'll address the statute of
7 limitations argument that Mr. Stanley raised. First,
8 while I've heard --

9 THE COURT: Let me say this, by the way, a lot of
10 judges hate motions for reconsideration because
11 they've listened to it once. I have no problem
12 reconsidering anything that I've decided, because the
13 more information, the better in the end. So I have no
14 problem with the motions for reconsideration. Go
15 ahead.

16 MS. BURTON: I don't know that there is any new
17 information, frankly, submitted to the Court.

18 THE COURT: Sometimes you don't get a -- you come
19 in the mist and have 10, 15 motions and rule on every
20 one, and then, you know, sometimes you don't get it
21 right, so I don't mind -- I want to correct myself if
22 I'm wrong in any respect. I know many judges say I've
23 listened to it, I don't want to hear it anymore,
24 motion denied. I'm just stating I have no objection
25 at all to hearing something again to make certain that

1 whatever the ruling is, it is a correct ruling.

2 MS. BURTON: I appreciate that, but I submit to
3 the Court that the rulings you issued regarding
4 statute of limitations were correct.

5 First, with respect to this issue -- that you
6 asked Mr. Stanley about, of course, the rules of civil
7 procedure require a couple of things for summary
8 judgment, that there be a genuine issue as to a
9 material fact, not as to an opinion proffered by a
10 geotechnical engineer who was not licensed until seven
11 years ago. You asked Mr. Stanley about the affidavit
12 of Mr. Wilkey and, of course, that is the subject of
13 our motion to strike, because Wilkey and the plaintiff
14 purport to create a genuine issue of material fact by
15 someone who has no personal knowledge of any facts.

16 Mr. Wilkey is a retained expert, and the
17 plaintiff attempted to create an issue of fact by
18 having Mr. Wilkey offer an inappropriate expert
19 opinion in Paragraph 6 of his affidavit where he has
20 an opinion about when the HOA might have known or
21 should have known of a particular issue. I submit to
22 the Court that does not create an issue of fact
23 because, of course, Mr. Wilkey has no facts which he
24 has personal knowledge of and, two, that is not an
25 appropriate expert opinion.

1 THE COURT: I generally sustain those objections
2 during trials on those type of questions, that is why
3 I raised the question with Mr. Stanley.

4 MS. BURTON: Yes, Your Honor. But leave aside
5 that issue, Mr. Stanley argues, and I find it a most
6 particular argument, he argued that the statute of
7 limitations accrued on April 28, 2010. So the
8 argument is that the homeowners' association neither
9 knew nor through the exercise of reasonable diligence
10 could have known that there were design or
11 construction issues with respect to the drainage until
12 April of 2010.

13 The reason I find this complexing is that
14 Mr. Stanley on behalf of Mr. Sanger brought a lawsuit
15 alleging that there were drainage issues in 2007. I'm
16 perplexed how Mr. Sanger could have known or through
17 the exercise of reasonable diligence should have known
18 that he had a lawsuit and filed it in 2007, and yet
19 Mr. Stanley argues that nobody on earth could have
20 known about these things until April of 2010.

21 To make it even more perplexing, the plaintiff
22 sued my client alleging design deficiencies with
23 respect to the drainage system before Mr. Stanley says
24 that his client either knew or could through the
25 exercise of reasonable diligence have known that there

1 was as defect, and I don't think that that is a
2 practical argument. Either they knew or should have
3 known and brought a lawsuit, or they did not act in
4 good faith when the lawsuit was filed prior to this
5 new date that has been selected of June.

6 I would submit to the Court that that argument
7 just doesn't make a bit of logical sentence.

8 THE COURT: He's saying when an individual knew,
9 but the homeowners' association could not have known.

10 MS. BURTON: Yet, they sued my client months
11 earlier.

12 THE COURT: The homeowners' association?

13 MS. BURTON: Yes. They sued my client in April
14 of 2010, yet Mr. Stanley is now arguing that the date,
15 the magic date, is in June of 2010, thereafter. So
16 presumably the homeowners' association does not act in
17 good faith when they sued my client, because they
18 neither knew nor could have known that they had a
19 legal cause of action against them.

20 THE COURT: Let me get the dates again, the
21 sequence of dates. Who did what, when?

22 MS. BURTON: Mr. Sanger brought a lawsuit on
23 January 12, 2007. It was purported to be a class
24 action, although no motion to certify class was ever
25 filed in that lawsuit, but it was I'm bringing this

1 lawsuit. I'll bring it on behalf of everybody else.

2 In April -- April 28th of 2010, the Rivergate
3 Homeowners' Association sued AB Consulting Engineers,
4 Speedy Concrete and Chuck's Construction. They had
5 not previously been sued in any action either by
6 Mr. Sanger or the HOA, who already filed their
7 lawsuit. So they were joined in a second amended
8 complaint.

9 Mr. Stanley argues, based upon this opinion
10 testimony of Drew Wilkey, that the statute of
11 limitations didn't run until June 18th of 2010, after
12 all the lawsuits had been brought and all the parties
13 had been jointed. That is a theoretical
14 impossibility. Obviously, the causes of action long
15 since accrued, or you can't bring a lawsuit in good
16 faith. If you don't know about something, there is no
17 way you could possibly sue these people.

18 Mr. Sanger in January of 2007 alleged that there
19 was improper construction of sidewalks, driveways and
20 asphalt roadways. He alleged that there was improper
21 driveway slopes in January of 2007, and he alleged
22 that there was a defective storm water management
23 drainage system back in 2007, long before Mr. Stanley
24 wants to argue that anybody knew or could have known
25 through the exercise of reasonable diligence, yet

1 somehow Mr. Sanger brought a lawsuit against a variety
2 of defendants alleging exactly the same thing that are
3 alleged in this lawsuit against my client, Chuck's
4 Construction and Speedy Concrete. In fact, the
5 allegations are virtually identical as from the Sanger
6 lawsuit.

7 The fact is -- an undisputed fact because Mr.
8 Wilkey has no knowledge about this, and he tries to
9 dance around -- is that all the way back in 2004 there
10 are -- there is evidence undisputed that there were
11 meetings of the HOA with Mr. Winderman that drainage
12 issues were discussed, that in 2005 an ad hoc
13 community was formed and Mr. Jim Dunn, who we deposed
14 for two days, was appointed the chair, and that in
15 2005 Mr. Dunn contacted various governmental entities
16 to complain about drainage issues, including Horry
17 County, Labor, Licensing and Regulation. He filed a
18 complaint on behalf of the ad hoc committee in 2005
19 with LLR saying there was storm water drainage issues,
20 and he talked to Horry County about drainage issue in
21 2006. I mean, these are undisputed facts that for
22 years and years the various folks, including this ad
23 hoc committee, knew there was drainage issues at
24 Rivergate and complaining about them, which ultimately
25 led to Mr. Sanger filing what was purported to be a

1 class action in January of 2007, although no class was
2 ever certified, and that the statute of limitations
3 ran a long time before April 28, 2010, which is when
4 my client was sued.

5 THE COURT: Has this case been on appeal, or some
6 of the parties --

7 MS. BURTON: No, sir, not to my knowledge.

8 THE COURT: Okay. Maybe I'm thinking of a
9 different case.

10 MS. BURTON: So with respect to the issue about
11 when the homeowners' association knew or should have
12 known, it is clear. It's clear that the homeowners'
13 association knew back in '04 and '05 and '06 that
14 there were drainage issues out at Rivergate. There is
15 an argument that Mr. Stanley made that is contrary to
16 the case law, that until they got Drew Wilkey's expert
17 report, the statute didn't accrue, but that is not the
18 law in the State of South Carolina. The cases say
19 directly that it is not when you get an expert report,
20 it is when you know there is a problem. You have an
21 obligation to go out and investigate the problem. You
22 don't have to know the cause, all you have to know is
23 that there is an issue.

24 THE COURT: Public policy says that since you
25 have to get an expert report to sue a professional,

1 that the public policy should be that until you get an
2 opinion from an expert, the public policy says it
3 should not run or anything?

4 MS. BURTON: There is absolutely no case law in
5 South Carolina that supports that legal argument. In
6 fact, the cases say the opposite. If you look at Dean
7 versus Ruscon case, which is a Charleston case
8 involving the pile driving for the Omni Hotel where
9 the lady had cracking --

10 THE COURT: Crack in the wall.

11 MS. BURTON: And the Court said it doesn't matter
12 when Ms. Dean found out that that was related to the
13 pile driving down the street, it is when she saw the
14 crack in the wall. Or you can take the Dillon County
15 School District with the roof leak. The school
16 district argued that the statute didn't accrue until
17 somebody told them it was a real bad leak, and the
18 Court said, no, that is not the answer. When you knew
19 that the roof was leaking, you are under an obligation
20 to go out and investigate the cause of the leaking,
21 and that is when the statute of limitations accrues.

22 In this case, Rivergate Homeowners' Association,
23 there is no question on earth that Rivergate
24 Homeowners' Association knew that there were drainage
25 issues out at Rivergate. There is no question. There

1 is no evidence that Rivergate didn't know about it.
2 The undisputed facts are that Rivergate knew about
3 that issue.

4 Mr. Stanley's argument is that somehow that
5 doesn't apply because of the equitable tolling
6 doctrine. He says, well, even if everybody out there
7 knew that there were draining problems in '04, '05,
8 '06, which is uncontroverted, that equitable tolling
9 should apply. If you listen to his argument and read
10 his paperwork, the only entity that Mr. Stanley has an
11 argument about equitable tolling is WW&LB, the
12 developer, because you didn't hear anything from Mr.
13 Stanley, and there is no evidence, that somehow
14 Chuck's led the HOA astray or that Speedy did some bad
15 act and led the HOA a stray, and certainly no evidence
16 that my civil engineering firm had some interaction
17 with the Rivergate Homeowners' Association?

18 THE COURT: He said there may be friends who is
19 covering for other friends.

20 MS. BURTON: That was a theoretical argument,
21 because there is no evidence in the record that Wayne
22 Winderman was friends with pretty much anybody, that I
23 heard of. There is no evidence that he was friends
24 with my client, and you never heard he was friends
25 with anybody. In fact, most of the evidence is that

1 he not a real pleasant fellow, and he is not even
2 local; he's an out-of-state accountant.

3 So there it is no evidence. Mr. Stanley was just
4 talking hypothetically, because there is no evidence
5 in this case that Mr. Winderman had any particular
6 love loss for any of the defendants.

7 THE COURT: He says save all of that, Magnolia
8 North gives him a life line.

9 MS. BURTON: If you are suing the developer, that
10 is true. Magnolia North says that the developer is
11 not going to sue themselves and, in fact, if you look
12 at the subsequent opinions when Magnolia North is
13 discussed, that is what the cases say, you are not
14 going to sue yourself, but it is a limited opinion
15 with respect to that.

16 Mr. Stanley's argument is, I guess, that all
17 design professionals and subcontractors that work on
18 developer projects are somehow -- every bad act in the
19 developer is somehow imputed to them, because that is
20 the only way you can rule to equitable tolling applies
21 to folks that had nothing to do with the HOA. There
22 is no evidence that my client or Speedy or Chuck's had
23 any communication to mislead anybody or said, oh,
24 we're over here, so that they couldn't get served,
25 which is, of course, the Ebenezer case.

1 There is no evidence in the record that any of
2 these defendants did any act that caused the HOA not
3 to sue them. There is no evidence in the record that
4 Wayne Winderman and Luther Bellamy, the two folks
5 involved in WW&LB, had no reason on the planet not to
6 sue them if they wanted to.

7 Mr. Stanley's argument takes it way out. In all
8 cases involving developers, general contractors,
9 equitable tolling always applies, and it is not the
10 law or a reasonable extension of the law for that to
11 apply. Mr. Stanley argues that a claim -- so if you
12 are a design professional, heaven forbid, or a
13 subcontractor, his argument is that no claim arises or
14 accrues against you until the HOA is turned over to
15 the homeowners; that is the essence of his argument.

16 So if you do work in 2014 and you design
17 something on a condo project, and the condominiums
18 aren't turned over to the association to the developer
19 for ten years, that doesn't matter what everybody
20 knows, doesn't matter that everybody knows there is
21 something matter with the project, that that cause of
22 action doesn't accrue for ten years. That cannot be a
23 public policy or practical argument. It certainly
24 would preclude most design professionals and
25 contractors from ever working on a condo project if

1 they are hung out to dry beyond statute of repose,
2 beyond the statute of limitations because it is a HOA
3 or condominium association.

4 I submit to the Court that that is not a public
5 policy argument and makes no sense in this particular
6 case. There is no evidence that any of these folks
7 had anything to do with the HOA not bringing a
8 lawsuit. I don't know why the HOA didn't bring a
9 lawsuit earlier. Certainly my client's drawings were
10 matter of record because they were permitted. There
11 was no secret where they were or who did the design,
12 all of that was a matter of public record.

13 Mr. Dunn testified that he went down to the
14 county and got a copy of the drawings. So the
15 identity of the civil engineering firm was no secret
16 to anyone and no secret to anyone that they were
17 complaining about drainage at the Rivergate
18 Homeowners' Association. The cause of action accrued
19 long before my client was joined in this lawsuit and
20 correctly, Your Honor, you ruled.

21 THE COURT: When did the statute accrue under
22 your view of the evidence?

23 MS. BURTON: The statute accrued on March 8, 2004
24 when at the annual homeowners' association -- the
25 drainage issues were discussed by the homeowners with

1 Wayne Winderman and all of the folks part of that
2 group.

3 THE COURT: And if it didn't accrue then, then
4 what is the next date?

5 MS. BURTON: There are many dates.

6 THE COURT: Okay.

7 MS. BURTON: There are many, but in the record
8 May 20, 2005, one of the folks that lives out there
9 wrote to the committee and recommended that they hire
10 an engineer to look at the issues on the project. In
11 May of 2005, Mr. Dunn called Horry County to complain
12 about drainage issues, asked them to come out and look
13 at it.

14 In July of 2005, Mr. Winderman on Rivergate
15 Homeowners' Association stationary said we made
16 inspections of the drainage issues and we will address
17 the same as quickly as possible. In 2005, all of
18 these homeowners were given complaints to file with
19 LLR, so all of them were passing them out to everyone
20 in the neighborhood, and all of these were submitting
21 complaints in 2005 to LLR complaining about everything
22 under the sun, including drainage issues. Mr. Dunn
23 filed one in 2005 on behalf of the whole ad hoc
24 committee complaining about storm water issues. My
25 client did their design in 1999. This goes back

1 years.. They were complaining about drainage issues
2 for years and years and years and tried to get every
3 governmental entity under the sun involved in the
4 issues.

5 THE COURT: Why weren't they sued until 2010?

6 MS. BURTON: You have to ask Mr. Stanley. I
7 mean, the Sanger case was 2007 and named certain
8 parties. My client and these other folks were not
9 named. This lawsuit was filed in 2008, I believe --

10 THE COURT: I asked the question generally, not
11 really directed towards the person I was asking, but
12 go ahead. You are the one speaking.

13 MS. BURTON: I don't know. There were a number
14 of parties. There were a lot of parties that settled
15 out in the litigation. There was Vertical
16 Construction party for all of the different buildings,
17 all of those were sued. Obviously WW&LB and
18 Mr. Winderman was sued, but I don't know why it was so
19 late in joining our defendants. There were subsequent
20 attempts to join them after this, geotechnical
21 engineers and the like. So this wasn't even the end
22 of the road. Those folks, I don't think, ever got
23 served.

24 THE COURT: Yes, sir.

25 MR. STANLEY: Just to address some of those

1 points, if you don't mind, because I think they need
2 to be addressed immediately.

3 THE COURT: Sure.

4 MR. STANLEY: I'll be happy to explain how this
5 progressed.

6 THE COURT: Don't you wish Ms. Burton would stay
7 up towards Greenville?

8 MR. STANLEY: (Laughing) No, sir, I would not say
9 that.

10 THE COURT: She's a fierce arguer.

11 MR. SMITH: She does a very good job, that is why
12 we defer to her.

13 MR. STANLEY: She is, and she does a very good
14 job. She and I have gone to battle and will continue
15 to go to battle as long as we need to on this case,
16 but you do need to watch your blind spots. A blind
17 spot I think in her arguments are, There is no
18 question on earth, or, It's uncontroverted. As I was
19 writing these things down, I didn't get all of her
20 statements like that, but she wants to be the fact
21 finder. She is to argue your client's case and the
22 facts. I'm to argue my client's case and the facts.
23 There is conflicting evidence in this case. It is not
24 up to Ms. Burton to make a determination, a verdict,
25 here today about who is responsible, who is guilty,

1 who is not guilty; that is not her responsibility.
2 She wants to be the fact finder, and I think that is
3 her blind spot.

4 I would like her to have the opportunity, and me
5 have an opportunity, to explain some of these, why
6 certain things happen like they did. I think my
7 clients need to have that opportunity to go in front
8 of these 12 people and to explain why it took the
9 amount of time or why things happened like they did.
10 You can't do that in a setting like this. You can't
11 do it, and you are not supposed to.

12 I thought that the law was set up where you are
13 not trying the case on motions, you are addressing
14 certain issues, but to try the case, try the facts
15 when there is complicating evidence is before a jury
16 of your peers, and I feel like Ms. Burton wants to try
17 it today and she wants to make sure it is
18 uncontroverted, no question on earth. Well, there is
19 a question on earth about this. I would like for a
20 jury to hear the conflicting evidence.

21 Let me just tell you, Your Honor, this is coming
22 from somebody who has a client who is misrepresented
23 during this whole project, since 1999, that he is an
24 engineer, and he's not. I mean, what kind of
25 credibility does that give that person? A jury needs

1 to hear that.

2 Also, Your Honor, she's not talking about the
3 fact that the documents in this case -- I never had a
4 case like this where the documents, eight or so boxes,
5 according to the developer, they've been lost. They
6 don't exist. They just, poof, up and gone. It
7 reminds me of a line I won't repeat, but in the wind,
8 just gone. Then, you can stand over here in theory, I
9 like that, theoretical implications, you can try this
10 case in theory today, but life doesn't work like that.

11 In theory, I would have every single box that the
12 developer had, and I would know what every single
13 person did out there. You know what, in theory that
14 would be the case, but I didn't have that. So I had
15 to piecemeal this case, Judge, as much as I could. It
16 is like a puzzle. I have to take this and take this.
17 Matter of fact, most of the defendants that were sued,
18 they came from another subcontractor on this project.
19 That is how I got these defendants. They don't even
20 know -- some of the defendants don't even know if they
21 did work at the project.

22 So to say in theory I should have sued somebody
23 at a certain time, there is a lot more to that story,
24 and a jury needs to hear that. A fact finder needs to
25 hear the fact that there is misrepresentation of a

1 license, the fact that documents are lost and we can't
2 find them.

3 THE COURT: Someone from AB Consulting had a
4 license. You mean the person -- none of them had a
5 license, or was this a one-man company?

6 MR. STANLEY: It is my understanding, and I'm
7 sure Ms. Burton will correct me, there was two owners,
8 and one of them was Lewis and he is a partner in this.
9 One of the partners has a license; the other does not.
10 He was representing to everybody, and it was their --
11 even the subcontractor testified that he thought that
12 the guy out there representing who works for AB
13 Consulting, he thought he was an engineer, and he's
14 not.

15 Again, this -- we can argue and try this case if
16 we want to right here, but I thought my burden was
17 only to -- I thought the burden was to have the fact
18 that there is a genuine issue of material fact, which
19 there is in this case. If I sat here and said, Judge,
20 I don't have anything in response, you know, then,
21 yes, there is no genuine issue of material fact. But
22 it is not my responsibility, which is what I feel
23 like -- like I'm trying the case today or trying the
24 case at motions for summary judgment; that is not my
25 burden. My burden is to only show that there is

1 conflicting evidence in this case, and I believe we've
2 shown that.

3 Now, if a jury -- if it goes before a jury and
4 they say, you know what, we don't like that attorney,
5 he doesn't have enough hair on his head, we don't like
6 that expert, that is up to the jury to make that
7 determination. And then, also, to decide -- when did
8 this accrue? Did it accrue in 2004? Is that what --
9 March of 2004? Let a jury decide that. Let them hear
10 the fact that my clients were constantly sending
11 documents to the developer and general contractor
12 saying we need this fixed, we need this fixed and his
13 employee said that he took it and shredded or trashed
14 those documents. That is her testimony of his own
15 employee. Let's get to hear those kinds of things,
16 then make that argument that my people knew as early
17 as 2004 what was going on. I would love to have that
18 opportunity.

19 I should not have to have the burden of trying
20 this case today. When they talk about late in
21 joining, again, there is a story and we need that
22 opportunity to explain that story. When you start
23 talking about the fact that, you know, the developer
24 is dragging his feet, not transferring the HOA over to
25 the homeowners, even though the master deed says that

1 he should, and he continues to hold this HOA under his
2 control -- why did he do that? Did he do that to
3 protect himself? Did he do that to protect Ms. Burton
4 and her client? Why are those things happening? A
5 jury needs to hear that. Why is he not transferring
6 the HOA over to the homeowners? Because he knows
7 he'll get sued, that is why. He knows he hadn't
8 addressed the problems out at Rivergate, that is why
9 we have a trial. That is why we have a fact finder.
10 That is why we don't say there is no question on
11 earth, when there is.

12 You are not the fact finder; you are an attorney.
13 You argue your client's side. You don't make the
14 determination. Those people in that box make that
15 determination on the facts. That is what we have
16 before Your Honor. It is not a matter of law, it is a
17 matter of facts.

18 THE COURT: All right. Ms. Burton.

19 MS. BURTON: The statute of limitations is a
20 question of law, and the statute of limitations cases
21 or motions to dismiss cases or motions for summary
22 judgment cases, that is a question of law for the
23 Court to decide based upon the facts.

24 Did you hear any facts from Mr. Stanley? He says
25 we have factual issues. What factual issue was

1 fact issue that my client, Amy Drucker, who is a civil
2 engineer, sealed the drawings, that somehow she misled
3 somebody? Did you hear anything -- he deposed Amy
4 Drucker. Did you hear anything from him? Did he show
5 you deposition testimony that Amy Drucker told
6 somebody this, and they were misled? Amy Drucker did
7 this, and they were misled about drainage issues?
8 Drainage issues, we're talking about drainage issues.
9 Is there a design defect the way the drainage system
10 is laid out. Did he present an issue of fact to the
11 Court that somehow somebody at AB Consulting kept
12 Wayne Winderman and the HOA from bringing a lawsuit
13 against him? Did he present any evidence that they
14 are buddies or friends? There is no evidence. There
15 is no issue of fact.

16 They tried to create an issue of fact recognizing
17 that by Paragraph 6 of the Drew Wilkey affidavit,
18 except Mr. Wilkey doesn't have personal knowledge of
19 the facts. The facts are in the record. We deposed
20 Jim Dunn for at least two days. Mr. Stanley deposed
21 Amy Drucker, Mr. Bellamy with Chuck's, Mr. Hernandez
22 with Speedy, and if there were issues of fact, that
23 would be in the depositions. They would be presented
24 to the Court. Mr. Hernandez testified that he did
25 something wrong and misled somebody or led them

1 astray, or Mr. Bellamy did something wrong. There is
2 no evidence that has been presented to create an issue
3 of fact.

4 It is not enough to stand up and say, There is an
5 issue of fact, Your Honor. That is not enough. It is
6 a statute of limitations issue. It is a question of
7 law for Your Honor. It is not an issue of fact for a
8 jury. It is a question of law, should the HOA know or
9 should have known through the exercise of reasonable
10 diligence using an objective standard that when people
11 are complaining about drainage issues out there to the
12 county, to on the State of South Carolina, to
13 Mr. Winderman, did the statute of limitations accrue?
14 That is a question of law for the Court, and Your
15 Honor correctly decided previously and should deny the
16 motion for reconsideration accordingly.

17 MR. STANLEY: I thought, Your Honor, the issue
18 was whether a reasonable person knew or should have
19 known of these defects. To me, how can you make that
20 determination if it is not a factual determination? A
21 reasonable person knew or should have known, that is a
22 factual question. That is not a matter of law. I
23 thought that the standard for summary judgment was the
24 fact that there was a-- whether there is a genuine
25 issue of material fact, and that if there is a

1 scintilla -- I was looking that up, and a scintilla is
2 a tad, just minuscule of the burden of the plaintiff
3 for this to go forward. We have an affidavit from an
4 expert that has not been excluded, that I know of, in
5 this case that has said they could not have known.
6 That is a genuine issue of material fact. He is
7 addressing that a reason person could not have known
8 about those defects.

9 So I'm not sure what Ms. Burton is talking about,
10 that I didn't present anything. I guess I didn't do a
11 good job in her eyes of presenting anything, but you
12 have to watch your blind spots. You know, when you
13 start saying there is no questions, it is
14 uncontroverted, I mean, you don't have a construction
15 case that lasts this long with this many documents and
16 just say it is uncontroverted, no facts.

17 If you want me to try this case and say here's
18 Hernandez' deposition and so-and-so, but I didn't
19 think that was my burden. I thought my burden was to
20 show that there was issues of fact in this case, and
21 it should go before a jury, and that my clients
22 deserve an opportunity to explain that.

23 Now, if a jury says you don't have any facts, my
24 client has to accept that, but they should have the
25 opportunity to get before a jury and show those facts

1 and not have to try the case today.

2 THE COURT: All right.

3 MR. SMITH: Briefly, Your Honor. This goes to is
4 there a question of fact or not. This is what
5 Mr. Dunn testified to regarding the slope of the
6 driveways.

7 Question: But there is no question but that
8 Speedy's representative told Mr. Winderman in your
9 presence -- again he's the ad hoc committee member --
10 that the driveways were too steep and that he had told
11 Wayne Winderman that before construction?

12 So that addresses the areas that there is not a
13 question of fact as to the steepness of the fact.

14 The answer is from Mr. Dunn: Yes, that kind of
15 gets Speedy off the hook, but the truth is still the
16 truth.

17 Question: Do you recall when that
18 conversation was?

19 Answer: Probably 2004, 2005.

20 That is the evidence in the record as to the
21 slope of the driveways. We are not sued until 2010.
22 So, clearly, on the driveway issue, we're outside the
23 statute of limitations. If the limited common
24 elements doesn't get us off in the first place.

25 THE COURT: Any final words on this issue?

1 MR. CLARK: Chris Clark for Chuck's Construction.
2 I'm not one to belabor the point, but Mr. Stanley
3 would like to rely on his pleadings and an affidavit
4 of his expert which contains incompetent testimony
5 regarding the state of mind of various homeowners, and
6 on that basis alone, the motion for reconsideration
7 should be denied;

8 MR. STANLEY: Can I?

9 THE COURT: Sure.

10 MR. STANLEY: He calls it "incompetent." Again,
11 that is a determination to be made by, you know, a
12 jury. Is he competent? Does he know what he's
13 talking about? I mean, he's a forensic engineer that
14 has more experience than anyone in here about
15 determining what caused and who -- how you could have
16 even known about that particular issue, and according
17 to Rule 702, if scientific or specialized knowledge
18 will assist the trier of fact to understand the
19 evidence or determine a fact at issue, a witness
20 qualified by knowledge, skill, experience, training or
21 education may testify thereto in the form of an
22 opinion or otherwise.

23 Now, if Your Honor, is determining that he's not
24 qualified, you know, then we have a different matter,
25 but I don't think Your Honor is making that

1 determination today, and don't think you know -- I'm
2 not sure that the Court can make that determination
3 without hearing his background, his experience, his
4 knowledge. So as far as I can tell, he's not
5 incompetent, and he is an expert that has not been
6 excluded, unless we get to trial and you think he
7 can't testify; otherwise, his affidavit should stand.
8 It is a conflicting opinion and conflicting evidence.

9 MR. CLARK: I'll be very brief. Of course, as
10 the Court knows, an expert must testify within its
11 area of expertise, and without examining or voir
12 diring this expert, we know an engineer is not trained
13 by education or experience in discerning the state of
14 mind of homeowners, and that is the gravity of the
15 affidavit that Mr. Stanley wants to rely upon. They
16 could not have known until this time. The expert can
17 testify, and certainly competent, as to what he knows
18 and what his opinions are regarding engineering
19 matters, but whether they knew or were on constructive
20 notice that their rights had been invaded, that is a
21 different question. That is a question for the Court.
22 That is not a question for engineers. They are not
23 trained in determining whether homeowners know that
24 their rights were potentially invaded. That is the
25 question, and that is why it is incompetent and that

1 is why I cannot support a motion in opposition to
2 summary judgment.

3 THE COURT: All right.

4 MS. BURTON: To the extent we're talking about
5 Mr. Wilkey's affidavit, I think that is the motion to
6 strike that I had filed. In addition to the fact that
7 the rules of civil procedure require affidavits to be
8 made on personal knowledge, and Mr. Wilkey is not
9 opining about what happened in 2008 in Rivergate,
10 because he didn't live there and isn't a homeowner, it
11 is contrary to the deposition testimony. The case law
12 in South Carolina is that you cannot create a genuine
13 issue of material fact by providing affidavit contrary
14 to your deposition testimony. We deposed Mr. Wilkey
15 for three days, and everybody that was involved in the
16 deposition asked Mr. Wilkey to offer every single
17 opinion he might render in connection with this
18 lawsuit, and I represent to the Court that the
19 opinions that are expressed in Paragraph 6, 7 and 8 of
20 his affidavit were not expressed in his three days of
21 depositions and are contrary to his deposition
22 testimony, which is not appropriate under the rules of
23 civil procedure and cannot create a genuine issue of
24 fact in that fashion.

25 You cannot create a genuine issue of fact by

1 having an engineer, geotechnical engineer by training,
2 offer an opinion and suggest that that is somehow a
3 genuine issue of material fact. He would have to have
4 some sort of fact. I was out at Rivergate and heard
5 the homeowner say this, that and the other in the
6 2005, that might create an issue of fact. When I ran
7 through the intersection the light was red, and you
8 say it is green, that is an issue of fact. An opinion
9 by an engineer of, I think somebody couldn't have
10 known something until three months after these -- all
11 these defendants were sued, that is not a proper
12 opinion, and the Court should strike the affidavit.

13 In addition, in submitting papers for the motion
14 for reconsideration, I would move to strike Exhibits
15 B&C attached to the papers filed, at least with
16 respect to plaintiff's paperwork against my client, AB
17 Consulting Engineers, because those documents are not
18 contained properly in the record before the Court.

19 Rule 56 requires that information to be submitted
20 to the court has to be submitted by way of deposition
21 testimony so that it is properly authenticated in
22 accordance with the rules or by way of affidavit, and
23 those documents were neither exhibits to a deposition,
24 nor were they attached properly and authenticated and,
25 thus, in accordance with the rules, the Court should

1 not consider Attachments B or C to Mr. Stanley's,
2 paperwork, because they are not properly made part of
3 the record in accordance with Rule 56.

4 For those reasons, I move to strike Attachments
5 B&C and move to strike Paragraphs 6, 7 and 8 and
6 second Paragraph 8 from the affidavit of Mr. Wilkey.

7 THE COURT: All right. Mr. Stanley, response?

8 MR. STANLEY: First of all, I would object to
9 this motion being heard at all. I mean, when this
10 came up on the roster I wondered why Ms. Burton didn't
11 bring this up at the motion for summary judgment that
12 we took almost the whole day for. If this is such an
13 important issue about this expert and his affidavit,
14 then why didn't Ms. Burton bring that up at that time?
15 This was filed -- this is the oldest of all of the
16 motions that we have before Your Honor. This was
17 filed in January of this year. So if it is such an
18 important issue, that Mr. Wilkey's testimony should be
19 excluded, that he's not competent and all of that
20 stuff, why did she not bring it up at that point? It
21 should have been the first motion that was heard, and
22 she should have made sure of that. So I think she
23 waived her right to bring up this motion at this
24 point.

25 Now, with that said, if Mr. Wilkey's testimony is

1 not fact, then why does she want to exclude it? If it
2 is not fact, then why does she want to have it
3 stricken? To me, it means that either it is fact and
4 the fact hurts her client that she doesn't want to get
5 before a jury -- again, we're trying the case today,
6 is what we're doing, which I did not think was the
7 purpose of these hearings for summary judgment and
8 motion for reconsideration, but we're trying this
9 case. We're not giving the fact finder an opportunity
10 to hear this evidence.

11 She talks about striking Paragraph 6 of Mr.
12 Wilkey's affidavit because it is speculative opinion.
13 Again, there is no question on earth it is a
14 speculative opinion. Give him an opportunity to give
15 his opinion and then see if it is speculative. She
16 wants to make that determination today. She is the
17 trier of fact and the judge and the jury and the
18 attorney in all of that.

19 She talks about such opinion is not within
20 Wilkey's personal knowledge. I didn't know that was
21 the standard, that it had to be in his personal
22 knowledge. I think in his professional knowledge he
23 can say they could not have known about these in my
24 professional knowledge. Based on my training,
25 experience and education, they could not have known

1 what was causing these problems.

2 It is not a proper basis for expert testimony,
3 she says in her motion. Well, again, I don't think
4 that was being determined today. I thought that was a
5 trial issue, whether it is a proper basis for expert
6 testimony.

7 She says it is speculative. Well, that is her
8 opinion, but she's not the trier of fact. He bases
9 everything he has on a huge report and many, many
10 photos and, again, I just put the text portion in
11 there because of brevity, thinking that would be
12 sufficient.

13 She goes on to strike 6, 7, 8 with the same
14 objections, there is no personal knowledge, not a
15 proper basis for expert knowledge, speculative.
16 Again, all arguments I just made apply to all of those
17 paragraphs. I go back to the question when she was
18 talking, if it is not fact, why do you want it
19 stricken? It doesn't matter. If it is not fact, you
20 don't need to worry about it. Why did you not bring
21 this up at the hearing for the motion for summary
22 judgment? It is the oldest, and it was filed the
23 furthest back, and evidently it is the most important
24 issue, according to her. So why wasn't it heard at
25 that point?

1 THE COURT: You have the final word, and we're
2 out of here.

3 MS. BURTON: I don't have anything further.
4 Thank you.

5 THE COURT: Good. Thank you. I'll take this
6 under advisement to the extent I'll review again the
7 -- what was submitted today. The issue of striking or
8 not striking the pleadings and whether it should be
9 heard today, Mr. Stanley, are you saying it wasn't --
10 the motion wasn't filed and you weren't served a copy
11 of the motion?

12 MR. STANLEY: No, sir. I'm sure I was served a
13 copy. It was filed January 21st of 2014, and
14 according to Ms. Burton this is a very important issue
15 of my expert, so why was this not heard first to go
16 ahead and strike his affidavit? I mean, that is what
17 the plaintiff is relying on, his affidavit. If you
18 strike the paragraphs that she's saying to be
19 stricken, then we have lost that part of our evidence
20 in this case for the statute of limitations.

21 I still think there is equitable tolling and
22 other arguments that we've made, but that would have
23 taken care of that very first argument that we had
24 before Your Honor. So why didn't she push that? Why
25 didn't she have that addressed? We could have avoided

1 the first part of Mr. Wilkey's affidavit that we're
2 talking about today.

3 I could have gone into the equitable tolling,
4 equitable estoppel, into those arguments, but instead
5 we continue to argue about whether there is a genuine
6 issue of material fact based on his affidavit.

7 THE COURT: All right. Okay. Well, I'll be in
8 touch with everyone soon on these issues.

9 MS. BURTON: Thank you, Your Honor.

10 THE COURT: I do have a question for Mr. Stanley
11 on the Hyperian (phonetic) case. Did we have the
12 telephone conference?

13 MR. STANLEY: No, sir.

14 THE COURT: So we needed to do that -- off.

15 (The proceedings were concluded.)
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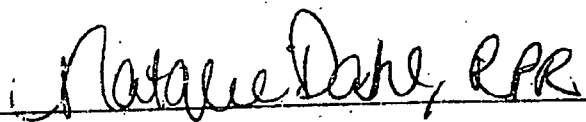
State of South Carolina)

County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the matter of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 8th day of September, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 15, 2015



Natalie Dahl, RPR

Court Reporter