

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**SC Court of Appeals**

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No. 2013-001404

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

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

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

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

Bostic Construction, Inc., Third Party Plaintiffs,

v.

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RECORD ON APPEAL  
Volume I of IV

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## INDEX

### Volume I

|                                                                                                                                                                                                                                                                                     |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Order Granting Summary Judgment to Defendants Builders FirstSource—Southeast Group, LLC, Southern Concrete Specialties, Inc., Clear View Construction, LLC, and Michael Franz as to the Cross-Claims of Marick Homebuilders, LLC for Breach of Contract and Breach of Warranty..... | 1   |
| Order Granting BFS', Catoe's & Catoe Subcontractors' Motions to Dismiss and For Summary Judgment as to Cross-Claims of Marick Home Builders, LLC.....                                                                                                                               | 12  |
| Order Denying Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for Reconsideration and to Alter Judgment.....                                                                                                                                                         | 23  |
| Summons and Complaint .....                                                                                                                                                                                                                                                         | 28  |
| Summons and Third Amended Complaint.....                                                                                                                                                                                                                                            | 41  |
| Summons as to the Cross Claim of Marick Home Builders, LLC and Rick Thoennes and Answer to Plaintiffs' Third Amended Complaint and Cross Claim.....                                                                                                                                 | 69  |
| Answer of Southern Concrete Specialties, Inc. to Answer of Marick Home Builders, LLC, to Plaintiffs' Third Amended Complaint and Cross-Claims.....                                                                                                                                  | 108 |
| Defendant Builders FirstSource—Southeast Group, LLC's Answer to Marick Home Builders, LLC and Rick Thoennes's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims and Cross-Claims against Defendant Carl Catoe Construction, Inc.....                                   | 127 |
| Defendants Clear View Construction, LLC and Michael Franz's Answer to Plaintiffs' Third Amended Complaint.....                                                                                                                                                                      | 145 |
| Transcript of Record for Hearings on September 5, 2012.....                                                                                                                                                                                                                         | 159 |

### Volume II

|                                                                                                                                                 |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Transcript of Proceedings for Hearing dated April 10, 2013.....                                                                                 | 377 |
| Deposition Transcript of Frederick (Rick) R. Thoennes dated November 21, 2011 (pages 30-31, 36-37, 80, 131-132, 176-177, 224-225, and 244)..... | 514 |
| Deposition Transcript of Carl Catoe dated December 5, 2011 (pages 45-47).....                                                                   | 572 |

|                                                                                                                                                                                                                                |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Deposition Transcript of Terry Rosamond dated January 16, 2012 (pages 15, 37, 48-49, 53, 61, 63-64, and 85).....                                                                                                               | 531 |
| Deposition Transcript of Derek Hodgins (Day 1) dated January 23, 2012 (pages 38-39, 97-98, 104, and 113-114).....                                                                                                              | 541 |
| Deposition Transcript of Derek Hodgins (Day 2) dated January 24, 2012 (pages 16-18, 20-21, 24-26, 49-50, 63-64, 81-83, 87-89, 91-92, 96-97, 105-109, 123-124, 126-127, 133, 151, 153, 165-167, 195, 211-213, and 224-228)..... | 549 |
| Deposition Transcript of Nathan Hornaday dated March 30, 2013 (pages 18-20).....                                                                                                                                               | 596 |
| Deposition Transcript of Jason Carlan dated July 9, 2012 (pages 40, 46-47, 56, 79-84, and 151-152).....                                                                                                                        | 600 |
| Deposition Transcript of Randy Still dated August 15, 2012 (pages 84-85, 87, 89, 169-170, 172, and 174-176).....                                                                                                               | 613 |
| Deposition Transcript of J. Drew Wilkie dated August 16, 2012 (pages 20, 153, 165-168, and 205-206).....                                                                                                                       | 624 |
| Defendant Builders FirstSource—Southeast Group, LLC’s Motion for Judgment as a Matter of Law as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                                                        | 633 |
| Defendant Builders FirstSource—Southeast Group, LLC’s Memorandum of Law in Support of its Motion for Judgment as a Matter of Law as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                    | 641 |

### Volume III

|                                                                                                                                                                                        |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Defendants Clear View Construction, LLC and Michael Franz’s Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                     | 653 |
| Defendants Clear View Construction, LLC and Michael Franz’s Brief in Support of Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes..... | 661 |
| Southern Concrete Specialties, Inc’s Notice of Motion for Partial Summary Judgment.....                                                                                                | 714 |
| Memorandum in Opposition to Marick Home Builders, LLC’s Motion for Summary Judgment and in Further Support of Builders First Source Southeast Group, Southern Concrete Specialties,    |     |



|                                                                                                                                                                                                                                                                                                                                                                                                                                                            |     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Inc., and Clear View Construction, LLC's Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC for Breach of Contract.....                                                                                                                                                                                                                                                                                                       | 721 |
| Carl Catoe Construction, Inc's Motion to Dismiss or for Summary Judgment as to Marick Home Builders, LLC.....                                                                                                                                                                                                                                                                                                                                              | 740 |
| Memorandum in Support of Carl Catoe Construction, Inc's Motion to Dismiss as to Marick Home Builders' Claims.....                                                                                                                                                                                                                                                                                                                                          | 746 |
| Defendant Martin Hernandez-Aviles' Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                                                                                                                                                                                                                                                                                                                  | 783 |
| Ester Moran Mentado's Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                                                                                                                                                                                                                                                                                                                               | 788 |
| Herberto Arcos Hernandez's Motion for Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                                                                                                                                                                                                                                                                                                                              | 791 |
| Defendant Alejandro Cruz's Notice of Motion and Motion for Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                                                                                                                                                                                                                                                                                                         | 797 |
| Socorro Castillo Montel's Motion for Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                                                                                                                                                                                                                                                                                                                               | 803 |
| Memorandum in Support of Socorro Castillo Montel's Motion for Summary Judgment as to Marick Home Builders, LLC.....                                                                                                                                                                                                                                                                                                                                        | 809 |
| Defendant TG Construction, LLC's Motion For Summary Judgment as to Cross-Claims of Marick Home Builders, LLC and Rick Thoennes.....                                                                                                                                                                                                                                                                                                                        | 844 |
| Marick Home Builders, LLC and Rick Thoennes' Memorandum in Opposition to Upstate Utilities, Hutch N Son Construction, Miller/Player & Associates, Clear View Construction, Builders FirstSource—Southeast Group, Carl Catoe Construction, TG Construction, Alejandro Cruz, Herberto Arcos Hernandez, Martin Hernandez-Aviles, Socorro Castillo Montel, KMAC, Inc., Jose Nino, and Vincent Morales d/b/a Morales Masonry's Motion for Summary Judgment..... | 851 |
| Supplemental Memorandum in Opposition to Defendants, Builders FirstSource, Southern Concrete Specialties, Clearview Construction, LLC and Michael Franz's Motion for Summary Judgment.....                                                                                                                                                                                                                                                                 | 876 |
| Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for Reconsideration and to Alter Judgment.....                                                                                                                                                                                                                                                                                                                                              | 894 |

|                                                                                                                           |     |
|---------------------------------------------------------------------------------------------------------------------------|-----|
| Marick Home Builders and Rick Thoennes' Memorandum in Support of The SCRCP 59(e) Motion Concerning Southern Concrete..... | 902 |
|---------------------------------------------------------------------------------------------------------------------------|-----|

#### Volume IV

|                                                                                                                                              |     |
|----------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Marick Home Builders and Rick Thoennes' Memorandum in Support of the SCRCP 59(e) Motion as to Clear View Construction and Michael Franz..... | 968 |
|----------------------------------------------------------------------------------------------------------------------------------------------|-----|

|                                                                                                                         |      |
|-------------------------------------------------------------------------------------------------------------------------|------|
| Marick Home Builders and Rick Thoennes' Memorandum in Support of the SCRCP 59(e) Motion as to Builders FirstSource..... | 1063 |
|-------------------------------------------------------------------------------------------------------------------------|------|

|                                                                                                                                                                 |      |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Marick Home Builders and Rick Thoennes' Memorandum in Support of The SCRCP 59(e) Motion as to Carl Catoe and Affiliated Subcontractors Hired by Carl Catoe..... | 1176 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|------|

|                                                                                                                                                                                     |      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Defendants Clear View Construction, LLC and Michael Franz's Brief in Opposition to Marick Home Builders and Rick Thoennes' SCRCP 59(e) Motion to Reconsider and Alter Judgment..... | 1278 |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|

|                                                                     |      |
|---------------------------------------------------------------------|------|
| Contract between Marick Home Builders and Builders FirstSource..... | 1287 |
|---------------------------------------------------------------------|------|

|                                                                        |      |
|------------------------------------------------------------------------|------|
| Contract between Marick Home Builders and Clear View Construction..... | 1289 |
|------------------------------------------------------------------------|------|

|                                                                                   |      |
|-----------------------------------------------------------------------------------|------|
| Contract between Marick Home Builders and Southern Concrete Specialties, Inc..... | 1291 |
|-----------------------------------------------------------------------------------|------|

|                                      |      |
|--------------------------------------|------|
| Verdict Form from Phase I Trial..... | 1293 |
|--------------------------------------|------|

|                             |      |
|-----------------------------|------|
| Certificate of Counsel..... | 1301 |
|-----------------------------|------|

## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

## DISPOSITION TYPE (CHECK ONE)

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

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

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

## ORDER INFORMATION

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

## INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

Circuit Court Judge

2063

Judge Code

01/11/2013

Date

**For Clerk of Court Office Use Only**

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

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

Court Reporter: N/A

---

STATE OF SOUTH CAROLINA )

COUNTY OF OCONEE )

IN THE COURT OF COMMON  
PLEAS

THE TENTH JUDICIAL CIRCUIT

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

Plaintiffs, )

vs. )

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

CASE NUMBER: 2009-CP-37-0652

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

FILED OCONEE, SC  
BERNARD H. WHITEFIELD  
CLERK OF COURT  
2013 JUN 14 PM 3 44

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

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

#### **Procedural Posture**

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

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

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by separate orders, determined that BFS, Southern Concrete, and Clear View are entitled to judgment as a matter of law as to Marick's causes of action for negligence and equitable indemnity. Thus, this order addresses the remaining causes of action asserted by Marick in its Cross-Claims, which are styled "Breach of Contract" and "Breach of Warranty." As Marick's claims for Breach of Contract and Breach of Warranty are merely reworded equitable indemnity claims, which are barred by Marick's unclean hands, and in that Marick has no viable claims for contractual indemnity, this Court finds that Defendants BFS, Southern Concrete, and Clear View are entitled to summary judgment on Marick's causes of action for Breach of Contract and Breach of Warranty.

#### Standard

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

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

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

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

#### Discussion

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

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

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Southern Concrete provided flat work and basement work. Clear View provided stone work.

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

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

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

After thoroughly reviewing the allegations contained in Marick's cross-claims for Breach of Contract and Breach of Warranty, the Court finds that they are claims for indemnity, regardless of the phraseology employed by Marick. In Marick's cross-claim for Equitable Indemnity<sup>3</sup> it alleges that if Plaintiffs are entitled to judgment against it, then it is entitled to recovery from BFS, Southern Concrete, and Clear View, among others. This is a typical indemnification framework. Vermeer Carolina's, Inc., supra. Likewise, Marick's claims for Breach of Contract and Breach of Warranty set forth the same indemnity framework. (Marick's Answer to the Third Amended Complaint ¶¶ 162 and 174.) Though Marick uses different wording, the gravamen of its claims are the same; i.e., if Plaintiffs are entitled to judgment against Marick, then it is entitled to corresponding recovery from BFS, Southern Concrete, and Clear View; Marick is not alleging personal injury or property damage as to it. As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal

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

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

**Marick has no viable claims for contractual indemnity**

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

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

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

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

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

(Id. ¶ 162.) Marick's Breach of Contract causes of action makes no mention of a contract between it and BFS, Clear View, or Southern Concrete which contains contractual indemnification provisions which it is attempting to enforce. Further, to the extent Marick argues that it does have contracts with these parties that contain indemnification provisions, it has offered no evidence that the contracts applied to the Project or would otherwise be enforceable in this matter.<sup>5</sup> Finally, Marick has presented no evidence to rebut evidence demonstrating that such contracts were not supported by consideration. The documents in question were signed after the subcontractors completed their work and Marick appears to have paid the subcontractors only for the work performed.<sup>6</sup>

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

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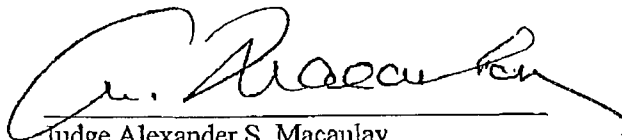
<sup>5</sup>The Court also takes notice that evidence was presented during its hearing on the various motions for summary judgment as to Marick's cross-claims that Marick had no contractor's license, and would thus be prohibited from enforcing a contract as a matter of law. (See Memorandum in Support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

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

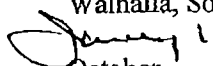
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Concrete, and Clear View are entitled to judgment as a matter of law as to the Cross-Claims of Marick for Breach of Contract and Breach of Warranty.

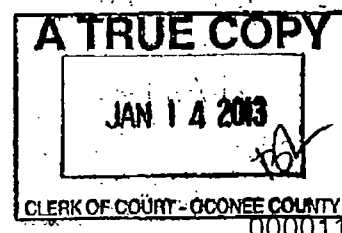
**IT IS SO ORDERED.**

  
Judge Alexander S. Macaulay

Walhalla, South Carolina

  
October 11, 2013

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



## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

## DISPOSITION TYPE (CHECK ONE)

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

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

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

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

## INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/Alexander S. Macaulay

Circuit Court Judge

2063

Judge Code

01/11/2013

Date

**For Clerk of Court Office Use Only**

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

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

---

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Beaufort, SC 29901

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

**Court Reporter: N/A**

\_\_\_\_\_  
G. Thomas Chase  
P O Box 2980  
Greenville, SC 29602

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)  
*Beverly A. Whitfield*  
CLERK OF COURT



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiffs,

vs.

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

Defendants.

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

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

FILED OCONEE, SC  
BEVERLY A. WRIGHT  
CLERK OF COURT  
2013 JAN 14 PM 3:09

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

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

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

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

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

### STANDARD OF REVIEW

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

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

### DISCUSSION

#### *A. Negligence and Breach of Warranty Claims*

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

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

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

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

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

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

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

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

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

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

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

## *2. As to Claims Against Builder's FirstSource*

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

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***B. Equitable Indemnity Claims***

The Court grants the Moving Defendants summary judgment as to Marick's equitable indemnity claims. Equitable indemnity claims are proper when a party is compelled to pay damages because of another party's negligence, which has been imputed to him, "subject to the proviso that no personal negligence of his own has joined in causing the injury." Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.

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

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

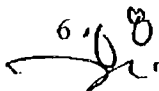
liability by the wrongful act of another in which he does not join." Stuck, 279 S.C. at 24, 301 S.E.2d at 553.

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

*1. Without Fault*

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

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

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

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

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

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

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

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

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

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## 2. No Special Relationship

Alternatively, summary judgment as to the indemnity claims against the Catoe defendants is proper because Marick had no special relationship with Catoe or Catoe's Subcontractors. The South Carolina Supreme Court comprehensively analyzed our state's equitable indemnity jurisprudence in Rock Hill Telephone, and held that an attenuated relationship will not support an equitable indemnity claim. Rock Hill Tel. Co. v. Globe Comm'n, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) (certified question). Specifically, the Court clarified that "a remote or distant independent contractor . . . does not have a special relationship" with an upstream party, so an equitable indemnity claim was inappropriate. Id. at 390, 611 S.E.2d at 237.

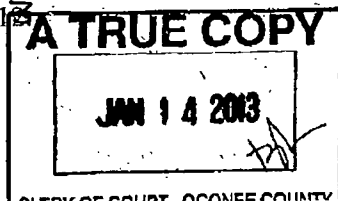
Here, neither Catoe nor Catoe's Subcontractors have any relationship, contractual or otherwise, with Marick. Marick hired BFS to perform and supply materials for a limited scope of work in Phase II. BFS subcontracted the labor to Catoe, who subcontracted portions of the labor to Catoe's subcontractors.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

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

IT IS SO ORDERED.

Walhalla, South Carolina  
October 11, 2012

*[Signature]*



*[Signature]*  
Judge Alexander S. Macaulay

FILED OCONEE, SC  
RECEIVED BY H. WHITEFIELD  
CLERK OF COURT  
2013 JAN 14 PM 3 39

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## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-37-00652

Stoneledge at Lake Keowee Owners Association,

IMK Development Co., LLC, et al

Inc., et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

## ORDER INFORMATION

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

## INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/Alexander S. Macaulay

Circuit Court Judge

2063

Judge Code

05/21/2013

Date

**For Clerk of Court Office Use Only**

This judgment was entered on the 22<sup>nd</sup> day of May, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 22<sup>nd</sup> day of May, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Robert T. Lyles, Jr.

Lindsay L. Builder; Jason Imhoff; David Root;

Robert L. Mebane

ATTORNEY(S) FOR THE PLAINTIFF(S)

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Beverly H. Whitfield

**CLERK OF COURT**

**Court Reporter: Vivian Cross**

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON  
PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiffs,

vs.

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

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

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

FILED OCONEE, SC  
BEVERLY H. WHITEFIELD  
CLERK OF COURT  
2013 MAY 22. AM 9 55

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

Defendants, )

Bostic Construction, Inc., )

Third-Party Plaintiffs, )

vs. )

Southern Stone, Inc. and Buck Smith  
Construction, )

Third-Party Defendants, )

This matter came before the Court on the Motion for Reconsideration and to Alter Judgment filed by Defendants Marick Home Builders, LLC and Rick Thoennes (collectively "Marick"), seeking to "vacate and/or reconsider" this Court's Order, dated January 11, 2013 and filed January 14, 2013 (the "Order"). The Order granted Defendants Builders FirstSource—Southeast Group, LLC ("BFS"), Southern Concrete Specialties, Inc. ("Southern Concrete"), and Clear View Construction, LLC and Michael Franz (collectively "Clear View Defendants") summary judgment as to Marick's cross-claims for breach of contract and breach of warranty.

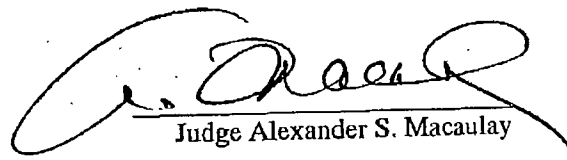
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Marick's cross-claims against BFS and Clear View Defendants for negligence and equitable indemnification were disposed of by separate orders.

The Court conducted a hearing on this Motion on April 10, 2013. David A. Root appeared on behalf of BFS, Robert L. Mebane appeared on behalf of Southern Concrete, Lindsay L. Builder appeared on behalf Clear View Defendants, and Jason M. Imhoff appeared on behalf of Marick.

After careful consideration and review, the Court finds there was no error of law or misconstruction of fact. The Court, therefore, DENIES Defendants Marick Home Builders, LLC and Rick Thoennes' Motion for Reconsideration and to Alter Judgment.

IT IS SO ORDERED.

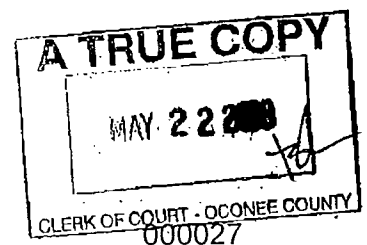
  
Judge Alexander S. Macaulay

Walhalla, South Carolina

*May 21*  
~~April~~, 2013

FILED OCONEE, SC  
BEVERLY H. WHITFIELD  
CLERK OF COURT  
2013 MAY 22 AM 9 55

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

PAUL W. HUND, III, M.D., et al.,

vs.

IMK DEVELOPMENT CO., LLC, et al.,

FILED OCONEE, SC  
BEVERLY H. WHITFIELD  
CLERK OF COURT

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009 MAY 29 P 4: 29

2009-CP - 37 - 652

Defendant(s)

(Please Print)

Submitted By: Robert T. Lyles, Jr. / William G. Lyles, III

Address: LYLES & LYLES, LLC, P.O. BOX 773,  
CHARLESTON, SC 29402

SC Bar #: 10299 / 84922

Telephone #: 843-577-7730

Fax #: 843-577-7172

Other: wgl@lylesfirm.com

E-mail: rtl@lylesfirm.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 Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is exempt from ADR (Proof of ADR/Exemption Attached)

**NATURE OF ACTION (Check One Box Below)**

- |                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> Contracts<br><input type="checkbox"/> Constructions (100)<br><input type="checkbox"/> Debt Collection (110)<br><input type="checkbox"/> Employment (120)<br><input type="checkbox"/> General (130)<br><input type="checkbox"/> Breach of Contract (140)<br><input type="checkbox"/> Other (199) | <input type="checkbox"/> Torts - Professional Malpractice<br><input type="checkbox"/> Dental Malpractice (200)<br><input type="checkbox"/> Legal Malpractice (210)<br><input type="checkbox"/> Medical Malpractice (220)<br><input type="checkbox"/> Notice/ File Med Mal (230)<br><input type="checkbox"/> Other (299)                                                                                                                                                                                    | <input type="checkbox"/> Torts - Personal Injury<br><input type="checkbox"/> Assault/Slander/Libel (300)<br><input type="checkbox"/> Conversion (310)<br><input type="checkbox"/> Motor Vehicle Accident (320)<br><input type="checkbox"/> Premises Liability (330)<br><input type="checkbox"/> Products Liability (340)<br><input type="checkbox"/> Personal Injury (350)<br><input type="checkbox"/> Wrongful Death (360)<br><input checked="" type="checkbox"/> Other (399) | <input type="checkbox"/> Real Property<br><input type="checkbox"/> Claim & Delivery (400)<br><input type="checkbox"/> Condemnation (410)<br><input type="checkbox"/> Foreclosure (420)<br><input type="checkbox"/> Mechanic's Lien (430)<br><input type="checkbox"/> Partition (440)<br><input type="checkbox"/> Possession (450)<br><input type="checkbox"/> Building Code Violation (460)<br><input type="checkbox"/> Other (499)                                                                                                                                                                                                                  |
| <input type="checkbox"/> Inmate Petitions<br><input type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599)                                                                                                       | <input type="checkbox"/> Judgments/Settlements<br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)<br><input type="checkbox"/> Other (799) | <input type="checkbox"/> Administrative Law/Relief<br><input type="checkbox"/> Reinstate Driver's License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899)                                                     | <input type="checkbox"/> Appeals<br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Administrative Law Judge (980)<br><input type="checkbox"/> Public Service Commission (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Special/Complex /Other<br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input type="checkbox"/> Other (699)                                                                                      | <input type="checkbox"/> Pharmaceuticals (630)<br><input type="checkbox"/> Unfair Trade Practices (640)<br><input type="checkbox"/> Out-of State Depositions (650)<br><input type="checkbox"/> Sexual Predator (510)                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

Submitting Party Signature: \_\_\_\_\_

Date: May 29, 2009

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 MANDATED ADR COUNTIES ONLY**  
Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,  
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

**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 and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases 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. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. 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 has 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 OCONEE )

IN THE CIRCUIT COURT

CASE NUMBER: 2009-C.P.-37-652

PAUL W. HUND, III, M.D., individually,  
and on behalf of all others similarly  
situated,

Plaintiff,

vs.

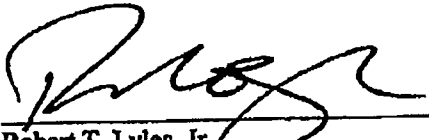
IMK DEVELOPMENT CO., LLC., and  
MARICK HOME BUILDERS, LLC.,

Defendants.

**SUMMONS**  
(Jury Trial Demanded)

FILED OCONEE SC  
CLERK OF COURT  
2009 MAY 29 P 4:29

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 to said Complaint  
on the subscribers at their offices, Lyles & Lyles, LLC, 342 East Bay Street, Post Office Box 773,  
Charleston, South Carolina 29402, 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, the Plaintiff  
in this action will apply to the Court for the relief demanded in the Complaint and will seek a default  
judgment against you.

  
Robert T. Lyles, Jr.  
William G. Lyles, III  
Lyles & Lyles, LLC  
342 East Bay Street  
Post Office Box 773 (29402)  
Charleston, South Carolina 29401  
(843) 577-7730  
rtl@lylesfirm.com / wgl@lylesfirm.com  
ATTORNEYS FOR PLAINTIFFS

Charleston, South Carolina

May 29, 2009

STATE OF SOUTH CAROLINA )

IN THE CIRCUIT COURT

COUNTY OF OCONEE )

CASE NUMBER: 2009-CP-37-652

PAUL W. HUND, III, M.D., individually,  
and on behalf of all others similarly  
situated,

Plaintiff,

vs.

IMK DEVELOPMENT CO., LLC., and  
MARICK HOME BUILDERS, LLC.,

Defendants.

CLASS ACTION COMPLAINT  
(Jury Trial Demanded)

FILED OCONEE, SC  
BEVERLY H. WHITEFIELD  
CLERK OF COURT  
2009 MAY 29 P 4:29

NOW COMES, the Plaintiff, PAUL W. HUND, III, individually, and on behalf of all others similarly situated, complaining against the above-named Defendants, as follows:

**CLASS ALLEGATIONS**

1. The named-Plaintiff, PAUL W. HUND, III, is the owner of a townhome located on lot 73 at the townhome community known as Stoneledge at Lake Keowee (hereinafter "the Project").
2. The Project is located in Oconee Country, South Carolina.
3. Dr. Hund brings this action in his name, individually, and pursuant to Rule 23 of the *South Carolina Rules of Civil Procedure*, he brings the action on behalf of a class of individuals and/or entities composed of each and every other owner at the Project (hereinafter the other owners at the Project sometimes shall be referred to collectively as "Class Plaintiffs").
4. For class action purposes, Dr. Hund alleges that:
  - a. The class is sufficiently numerous that joinder of all members is impracticable;
  - b. There are questions of law and fact common to the class;

- c. The claims of Dr. Hund are typical of the claims of the class;
  - d. Dr. Hund will fairly and adequately protect the interest of the class; and
  - e. The amount in controversy exceeds One Hundred and No/100 Dollars (\$100.00) for each member of the class.
5. Venue is proper in this Court because the principal place of business of one or more of the Defendants is in Oconee County, the property at issue is located in Oconee County, and the actions and/or inaction of the Defendants resulting in this lawsuit occurred in Oconee County.

#### **FACTUAL ALLEGATIONS**

6. The Defendant, IMK Development Co., LLC ("IMK"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County.
7. IMK acted as the developer of the Project and placed the individual townhome units into the stream of commerce.
8. Defendant Marick Home Builders, LLC. ("Marick"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was licensed as a South Carolina residential builder, and was engaged in the business of residential home building in Oconee County, South Carolina.
9. Marick acted as the builder for the Project.
10. The Project consists of multiple buildings, containing numerous townhomes.

11. After purchasing at the Project, Dr. Hund became aware of certain problems with his unit, including, but not limited to, water intrusion through the exterior of his unit into the heated space of his unit.
12. Dr. Hund retained the services of a qualified contractor to investigate, preliminarily, the problems at the unit.
13. The repair contractor hired by Dr. Hund communicated to Dr. Hund a non-exhaustive list of problems observed at Dr. Hund's unit specifically, and within the Project, generally:
  - a. Inadequate and/or improper flashing at numerous locations;
  - b. Inadequate and/or improper use of building paper;
  - c. Inadequate and/or improper use of building components; and
  - d. Inadequate and/or improper attachment of building components.
14. The problems identified in the preceding Paragraph have resulted in water intrusion and have caused physical injury to the tangible property of others. Upon information and belief, the exposure to the same or general harmful conditions has resulted in mold, mildew, rot and other physical damage at Dr. Hund's unit and at the Project.
15. Dr. Hund reported the problems with his unit to IMK and Marick.
16. IMK and Marick have refused to address the problems reported by Dr. Hund.
17. To date, Dr. Hund has expended in excess of \$30,000, attempting to repair his unit, and the repairs remain incomplete.
18. Upon information and belief, the problems known to date at Dr. Hund's unit are prevalent at all of the units at the Project.

19. Upon information and belief, there are other latent defects at the Project that have yet to be uncovered and can only be uncovered through additional investigation and testing at the Project.
20. As a result of the above-referenced problems, and those yet to be discovered, Dr. Hund and the Class Plaintiffs have or will suffer the following damages:
- a. Cost to investigate the problems at the Project, and the individual units within the Project;
  - b. The cost to develop a comprehensive repair for the Project, including the individual units at the Project;
  - c. The cost of replacing all defective and/or unsuitable components at the Project and the individual units within the Project;
  - d. The diminished market value of the units at the Project;
  - e. Damages associated with the loss of use of the units at the Project while repairs are undertaken; and
  - f. Such other damages as may be uncovered as a result of additional investigations at the Project and the units within the Project.
21. The damages outlined in the preceding paragraph are common to all class members.

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Warranty: IMK)**

22. Dr. Hund and Class Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

23. In acting as the developer of the Project and placing the individual units into the stream of commerce, IMK provided an implied warranty of habitability to each owner at the Project.
24. The above-referenced problems (and any subsequently-discovered problems) with the Project and the units within the Project indicate that this warranty has been breached by IMK.
25. As a direct and proximate cause of IMK's breach of the warranty of habitability, Dr. Hund and Class Plaintiffs have been and will continue to be damaged.
26. Dr. Hund and Class Plaintiffs are entitled to a judgment against IMK because of its breach of warranty of habitability in such amount as will be proved at trial.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence: IMK)**

27. Dr. Hund and Class Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.
28. As the developer of the Project, IMK owed a duty to Dr. Hund and the Class Plaintiffs to ensure that the Project was designed and constructed, using a qualified architect and builder.
29. The problems uncovered to date at Dr. Hund's unit, which, upon information and belief also exist at the units of the Class Plaintiffs (and those problems yet to be uncovered), establish that the developer breached its duty to Dr. Hund and Class Plaintiffs.
30. As a direct and proximate cause of IMK's negligence and gross negligence, Dr. Hund has suffered damages and he and the Class Plaintiffs will suffer additional damages.
31. Dr. Hund and Class Plaintiffs are entitled to a judgment against IMK because of its negligence and gross negligence in such amount as will be proved at trial, including punitive damages.

**FOR A THIRD CAUSE OF ACTION**  
**(Breach of Fiduciary Duty: IMK)**

32. Dr. Hund and Class Plaintiffs reassert and reallege the above allegations.
33. A special relationship exists between IMK and Dr. Hund and IMK and the Class Plaintiffs based on the following:
- a. IMK developed the project;
  - b. IMK funded the design and construction of the Project;
  - c. IMK selected the builder and designer and others for the Project; and
  - d. IMK marketed and sold the units at the Project and placed them into the stream of commerce.
34. Dr. Hund and Class Plaintiffs reposed special confidence in the IMK resulting in IMK owing to Dr. Hund and Class Plaintiffs a fiduciary duty to accomplish the following non-exhaustive list of particulars:
- a. To fund adequately the design, construction, and upkeep of the Project;
  - b. To select a qualified designer and builder for the Project;
  - c. To ensure that the builder and designer produced a quality product free from the types of defects that currently exist at the Project;
  - d. To establish sufficient capital reserves for the Association at its inception to address the maintenance and repairs at the Project; and
  - e. To maintain and upkeep all unsold units at the Project and the common areas of the Project.

35. The problems uncovered to date at Dr. Hund's unit, which, upon information and belief also exist at the units of the Class Plaintiffs (and those problems yet to be uncovered), establish that the developer breached its fiduciary duty to Dr. Hund and Class Plaintiffs.
36. As a direct and proximate cause of IMK's breach of fiduciary duty, Dr. Hund has suffered damages and he and the Class Plaintiffs will suffer additional damages.
37. Dr. Hund and Class Plaintiffs are entitled to a judgment against IMK because of its breach of fiduciary duty in such amount as will be proved at trial, including punitive damages.

**FOR A FOURTH CAUSE OF ACTION**  
**(Breach of Warranty: Marick)**

38. Plaintiff reasserts and realleges the allegations contained in the above Paragraphs.
39. Marick, by virtue of its role in the construction of the Project, extended to Dr. Hund and Class Plaintiffs a warranty of workmanlike service in regard to the construction of the units within the Project.
40. The above-referenced problems (and any subsequently-discovered problems) with Dr. Hund's unit and those expected at the other units within the Project indicate that this warranty has been breached by Marick.
41. As a direct and proximate cause of Marick's breach of the warranty of workmanlike service, Dr. Hund and Class Plaintiffs have been and will continue to be damaged.
42. Dr. Hund and Class Plaintiffs are entitled to a judgment against Marick because of its breach of warranty of workmanlike service in such amount as will be proved at trial.

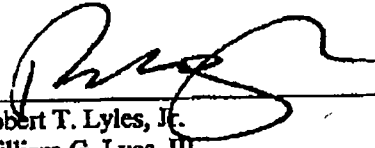


**FOR A FIFTH CAUSE OF ACTION**  
**(Negligence: Marick)**

43. Dr. Hund and Class Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.
44. Marick, by virtue of its role in the construction of the Project, owed a duty to Dr. Hund and Class Plaintiffs to accomplish such construction in accordance with all applicable codes, applicable industry standards, and any and all manufacturer literature/instructions, and, when applicable, to conform such construction to whatever design documents existed at the time of constructing the Project and the units within the Project.
45. The above-referenced problems (and any subsequently-discovered problems) with the Project indicate that Marick breached its duty in regard to these responsibilities in that its failure to adhere to code and industry standards has caused or contributed to problems with the Project.
46. The violation of applicable building codes amounts to gross negligence on the part of Marick.
47. As a direct and proximate cause of Marick's negligence and gross negligence, Dr. Hund and Class Plaintiffs have been and will continue to be damaged.
48. Dr. Hund and Class Plaintiffs are entitled to a judgment against Marick based on its negligence and gross negligence in such amount as will be proved at trial, including punitive damages.

WHEREFORE, Dr. Hund in his behalf, and on behalf of the Class Plaintiffs prays for a judgment against the Defendants on the above causes of action in such amounts as may be proven

at trial, including consequential and punitive damages, the costs of this action, and for such other relief as the court deems just and proper.

  
Robert T. Lyles, Jr.  
William G. Lyles, III  
Lyles & Lyles, LLC  
342 East Bay Street  
Post Office Box 773 (29402)  
Charleston, South Carolina 29401  
(843) 577-7730  
Rtl@lylesfirm.com  
Wgl@lylesfirm.com

Attorneys for Plaintiffs

Charleston, South Carolina

May 29, 2009

STATE OF SOUTH CAROLINA )

COUNTY OF OCONEE )

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

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

Plaintiffs, )

vs. )

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

SUMMONS  
Third-Amended Complaint

FRANCISO VILLALOBOS LOPEZ, AMBROSIO )  
MARTINEZ-RAMIREZ, ESTER MORAN )  
MENTADO, SOCORRO CASTILLO MONTEL, MJG )  
CONSTRUCTION AND HOMEBUILDERS, INC., )  
D/B/A MJG CONSTRUCTION, KMAC OF THE )  
CAROLINAS, INC., EUFACIO GARCIA, EVERADO )  
JARMAMILLO, GARCIA PARRA INSULATION, )  
INC., J&J CONSTRUCTION, JOSE NINO, JOSE )  
MANUEL GARCIA, EASON CONSTRUCTION, INC., )  
VINCENT MORALES MASONRY, AND )  
MILLER/PLAYER & ASSOCIATES, )  
Defendants, )

TO: ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to Answer the Third Amended Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, Lyles & Lyles, LLC, 342 East Bay Street, Post Office Box 773, Charleston, South Carolina 29402, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Third Amended Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for the relief demanded in the Third Amended Complaint and will seek a default judgment against you.

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*Attorneys for Plaintiffs*

April 3, 2012  
Charleston, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF OCONEE )

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2009-CP-37-652

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

Plaintiffs, )

vs. )

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

**THIRD AMENDED  
COMPLAINT**  
(Jury Trial Demanded)

Construction; Alejandro Avalos Cruz; )  
Herberto Acros Hernandez; Martin )  
Hernandez-Aviles; Francisco Villalobos )  
Lopez; Ambrosio Martinez-Ramirez; Ester )  
Moran Mentado; Socorro Castiollo Montel; )  
MJG Construction and Homebuilders, Inc. )  
d/b/a MJG Construction; KMAC of the )  
Carolinas, Inc.; Eufacio Garcia; Everado )  
Jaramillo; Garcia Parra Insulation, Inc.; )  
J & J Construction; Jose Nino; Jose Manuel )  
Garcia; Eason Construction, Inc.; Vincent )  
Morales d/b/a Morales Masonry; and )  
Miller/Player & Associates )

Defendants, )

NOW COME, the Plaintiffs above-named, individually, and on behalf of all others similarly situated, complaining against the above-named Defendants, as follows:

**CLASS ALLEGATIONS**

1. Plaintiff Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge HOA") is a corporation organized and existing pursuant to the laws of the State of South Carolina and conducts business in Oconee County, South Carolina. The Stoneledge HOA was created on May 24, 2005, pursuant to the South Carolina Horizontal Property Regime Act.

2. The Amended and Restated By-Laws and Declaration of Covenants, Conditions and Resolutions for Stoneledge at Keowee, dated November 1, 2005, recorded on November 30, 2005 at Book 1464, Page 33-65, and the Resolution dated March 3, 2010, recorded on November 24, 2010 at Book 1805, Page 241-243 (which are incorporated herein by reference) impose upon the Stoneledge HOA an obligation to maintain, repair, and replace components of the townhomes at Stoneledge.

3. Plaintiffs C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou K. Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White (hereinafter the "Individual Owners"), are owners of townhomes located in Phase I and/or II of the townhome community known as Stoneledge at Lake Keowee (hereinafter "the Project"), and have all suffered injury and damage, or will suffer injury or damage, as a direct and proximate result of the acts of the above-named Defendants.

4. The Project is located in Oconee County, South Carolina.

5. The Individual Owners bring this action individually and pursuant to Rule 23 of the *South Carolina Rules of Civil Procedure*, on behalf of a class of individuals and/or entities composed of each and every other owner at the Project (hereinafter the other owners at the Project sometimes shall be referred to collectively as "Class Plaintiffs"). Excluded from the Class are Defendants, members of their immediate families and their legal representatives, heirs, successors, assigns and any entity in which Defendants have or had a controlling interest. Also excluded from the Class are claims determined to belong exclusively to Stoneledge HOA.

6. For class action purposes, the Individual Owners allege that:

- a. The class is sufficiently numerous that joinder of all members is impracticable;
- b. There are questions of law and fact common to the class;
- c. The claims of the Individual Owners are typical of the claims of the class;

- d. The Individual Owners will fairly and adequately protect the interest of the class; and
- e. The amount in controversy exceeds One Hundred and No/100 Dollars (\$100.00) for each member of the class.

7. Venue is proper in this Court because the principal place of business of one or more of the Defendants is in Oconee County, the property at issue is located in Oconee County, and the actions and/or inaction of the Defendants resulting in this lawsuit occurred in Oconee County.

#### **FACTUAL ALLEGATIONS**

8. The Defendant, IMK Development Co., LLC ("IMK"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. IMK developed and put certain of the Stoneledge townhomes into the stream of commerce.

9. Defendant Keowee Townhouses, LLC ("Keowee"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. Keowee developed and put certain of the Stoneledge townhomes into the stream of commerce.

10. Defendant Ludwig Corporation, LLC ("Ludwig"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee



County. Ludwig developed and put certain of the Stoneledge townhomes into the stream of commerce.

11. Defendant SDI Funding, LLC ("SDI"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in business in Oconee County, South Carolina.

12. Defendant Medallion at Keowee, LLC ("Medallion"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. Medallion was a developer of the Project and has or will put certain of the Stoneledge townhomes into the stream of commerce.

13. Plaintiffs are informed and believe that Medallion is the successor to SDI, Ludwig, or both of them, that it acquired the assets and liabilities of SDI, Ludwig, or both of them, through a merger, consolidation or equivalent transaction, that there exists a common identity of the officers, directors, and/or stockholders between Medallion and SDI, Ludwig, or both of them, that Medallion is a mere continuation of SDI, Ludwig, or both of them, and/or that the assets of SDI, Ludwig, or both of them, were transferred to Medallion in an effort to avoid or defeat claims of creditors or potential creditors.

14. Upon information and belief, Defendant Bradford D. Seckinger ("Seckinger") was a member, manager, owner and/or principal of Medallion, Ludwig and/or SDI at the time of development and construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Medallion, Ludwig and/or SDI and is personally liable for the

liabilities of Medallion, Ludwig, and/or SDI. Unless specifically stated otherwise, references to Medallion, Ludwig, SDI and/or Developers when used herein are defined to include Seckinger.

15. Upon information and belief, Defendant John Ludwig was a member, manager, owner and/or principal of Ludwig, SDI, or both of them at the time of development and construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Ludwig, SDI, or both of them, and is personally liable for the liabilities of same. Unless specifically stated otherwise, references to Ludwig, SDI and/or Developers when used herein are defined to include John Ludwig.

16. Defendant Integrys Keowee Development, LLC ("Integrys"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of property development in Oconee County. Integrys a developer of the Project and placed certain of the Stoneledge townhomes into the stream of commerce.

17. Upon information and belief, Defendants Larry D. Lollis ("Lollis") and William Cox ("Cox") were members, managers, owners, and/or principals of IMK, Integrys, or both of them at the time of development and construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts of IMK, Integrys, or both of them and are personally liable for the liabilities of IMK and/or Integrys. Unless specifically stated otherwise, references to IMK, Integrys, and/or Developers when used herein are defined to include Lollis and Cox.

18. Upon information and belief, Defendant Rick Thoennes, ("Thoennes") is or was a member, manager, owner and/or principal of IMK at the time of development and construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts

of IMK and is personally liable for the liabilities of IMK. Unless specifically stated otherwise, references to IMK and/or Developers when used herein are defined to include Thoennes.

19. Defendant Marick Home Builders, LLC ("Marick"), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was licensed as a South Carolina residential builder, and was engaged in the business of residential home building in Oconee County, South Carolina. Marick acted as the general contractor for certain of the townhomes at the Project. Marick, acting in concert with IMK, placed certain of the Stoneledge townhomes into the stream of commerce.

20. Upon information and belief, M Group Construction and Development, LLC ("M Group") is a limited liability company organized and existing under the laws of the State of South Carolina that conducts business in Oconee County, South Carolina. Plaintiffs are informed and believe that M Group is the successor to Marick, that it acquired the assets and liabilities of Marick through a merger, consolidation or equivalent transaction, that there exists a common identity of the officers, directors, and/or stockholders between M Group and Marick, that M Group is a mere continuation of Marick, and/or that the assets of Marick were transferred to M Group in an effort to avoid or defeat claims of creditors or potential creditors. Unless specifically stated otherwise, references to Marick and/or Contractors herein are defined to include M Group.

21. Defendant Bostic Brothers Construction, Inc. ("Bostic"), upon information and belief, is a corporation organized and existing pursuant to the laws of a state other than South Carolina which was, at all times referred to herein, doing business in Oconee County, South Carolina as a general contractor. Bostic acted as the general contractor for certain of the townhomes at the

Project. Bostic, acting in concert with Keowee, put certain of the Stoneledge townhomes into the stream of commerce.

22. Upon information and belief, Defendant Thoennes was a license holder, member, manager, owner, and/or principal of Marick at the time of construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Marick and is personally liable for the liabilities of Marick. Unless specifically stated otherwise, references to Marick and Contractors herein are defined to include Thoennes.

23. Upon information and belief, defendant Mel Morris ("Morris") was President of Bostic at the time construction of the Project began and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Bostic. Morris is personally liable for the liabilities of Bostic. Unless specifically stated otherwise, references to Bostic and/or Contractors herein are defined to include Morris.

24. Upon information and belief, defendants Joe Bostic and Jeff Bostic were owners, officers, directors, and/or principals of Bostic at the time of construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Bostic and are personally liable for the liabilities of Bostic. Unless specifically stated otherwise, references to Bostic and/or Contractors herein are defined to include Joe Bostic and Jeff Bostic.

25. Upon information and belief, Defendant Clear View Construction, LLC ("Clear View") is a limited liability company organized and existing under the laws of the State of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Upon information and belief, Clear View provided stone work for the Project.

26. Upon information and belief, Defendant Michael W. Franz is the owner and operator of Clear View and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Clear View and is personally liable for the liabilities of Clear View.

27. Upon information and belief, Defendant MHC Contractors, LLC ("MHC Contractors") is a limited liability company organized and existing under the laws of the State of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that MHC Contractors provided work for the Project, including but not limited to stone work.

28. Upon information and belief, Defendant Miguel Porras Choncoa is the owner and operator of MHC Contractors and a resident of Greenville County, South Carolina, and authorized, participated in and/or directed the tortious or otherwise wrongful acts of MHC Contractors and is personally liable for the liabilities of MHC Contractors.

29. Upon information and belief, Defendant Builders FirstSource - Southeast Group, LLC ("Builders FirstSource") is an entity organized under the laws of a state other than South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Builders FirstSource provided materials and labor for the Project, including but not limited to, framing work.

30. Upon information and belief, Defendant Mike Green is the principal of Builders FirstSource, and authorized, participated in and/or directed the tortious or otherwise wrongful acts of Builders FirstSource and is personally liable for the liabilities of Builders FirstSource.

31. Upon information and belief, Defendant Southern Concrete Specialties, Inc. ("Southern Concrete") is a corporation organized and existing under the laws of the State of South

Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Southern Concrete provided work for the Project including but not limited to flatwork and basement work.

32. Upon information and belief, Defendant Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises ("Compton") was, at all times relevant herein, conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that Compton provided work for the Project, including but not limited to, roofing work.

33. Upon information and belief, Defendant Gunter Heating and Air ("Gunter") is a South Carolina corporation which, at all times relevant to this action, was conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that Gunter provided work for the Project, including but not limited to HVAC work.

34. Upon information and belief, All Pro Heating, A/C and Refrigeration, LLC ("All Pro") is a limited liability company organized and existing under the laws of the state of South Carolina which, at all times relevant to this action, was conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that All Pro provided work for the Project, including but not limited to, HVAC work.

35. Upon information and belief, Coleman Waterproofing was, at all times relevant herein, conducting business in Oconee County, South Carolina. Plaintiffs are informed and believe that Coleman Waterproofing provided work for the Project, including but not limited to, waterproofing work.

36. Upon information and belief, Heyward Electrical Services, Inc. ("Heyward Electrical") is a corporation organized and existing under the laws of the state of South Carolina

which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Heyward Electrical provided work for the Project, including but not limited to, electrical work.

37. Upon information and belief, Tinsley Electrical, LLC ("Tinsley") is a limited liability company organized and existing under the laws of the state of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Tinsley provided work for the Project, including but not limited to, electrical work.

38. Upon information and belief, Hutch N Son Construction, Inc. ("Hutch N Son") is a corporation organized and existing under the laws of the state of South Carolina which, at times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and believe that Hutch N Son provided work for the Project, including but not limited to, grading work.

39. Upon information and belief, Upstate Utilities, Inc. ("Upstate") is a corporation organized and existing under the laws of the state of South Carolina which, at all times relevant to this action, was conducting business in Oconee County. Plaintiffs are informed and belief that Upstate provided work for the Project, including but not limited to grading work, pursuant to a subcontract with Hutch N Son.

40. In its Third-Party Complaint, Marick identified Clear View, Michael W. Franz, MHC Contractors, Miguel Porras Choncoa, Builders FirstSource, Mike Green, Southern Concrete, Compton, Gunter, All Pro, Coleman Waterproofing, Heyward Electrical, Tinsley, and Hutch N Son as subcontractors or principals of same and alleged that they are among the at-fault parties by virtue of their provision of the above-described services and/or products for this Project.

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

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

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

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



45. Upon information and belief, Defendants MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillo; Garcia Parra Insulation, Inc.; J & J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; and Vincent Morales d/b/a Morales Masonry are individuals or entities which, at all times relevant to this action, conducted business in Oconee County by contracting to provide and providing materials, services, or both, for the Project.

46. In its discovery responses and through correspondence from counsel, Bostic identified MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillo; Garcia Parra Insulation, Inc.; J & J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; and Vincent Morales d/b/a Morales Masonry as subcontractors who provided services, materials or both for the Project, including but not limited to, framing, masonry, roofing, siding, insulation, concrete form work, waterproofing and patio installation.

47. The defendants identified in Paragraphs 39, 42, 43, 44, and 45 above, are hereinafter collectively referred to as "Subcontractors."

48. Defendant Miller/Player & Associates ("MPA"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant to this action, was engaged in the business of architecture in Oconee County. MPA acted as the architect for certain of the townhomes at the Project.

49. The Plaintiffs are informed and believe that IMK was the alter ego of Defendant Marick, M Group, Integrays, Lollis, Cox, and/or Thoennes in that Marick, M Group, Integrays, Lollis, Cox, and/or Thoennes totally dominated and controlled IMK and IMK manifested no separate

interest of its own and functioned solely to achieve the goals of Marick, M Group, Integrys, the principals of same, as well as Lollis, Cox and Thoennes.

50. Because IMK was the alter ego of Marick, M Group, Integrys, Lollis, Cox, and Thoennes, to recognize the corporate distinction promotes wrong and injustice and would contravene the public policy of South Carolina.

51. Additionally or alternatively, IMK, Marick, M Group and/or Integrys are corporate relatives whose interests and activities are so amalgamated as to blur the distinction between the entities. Because of this amalgamation of interests and activities, IMK, Marick, M Group and/or Integrys should be treated as one and the same and be held jointly liable on all theories of liability asserted herein, including Breach of the Implied Warranty of Habitability, Breach of the Implied Warranty of Workmanlike Service, Negligence, and Breach of Fiduciary Duty. Unless specifically stated otherwise, references to IMK, Marick, M Group, and/or Integrys when used herein, mean each and all of those entities.

52. Additionally, because IMK and Integrys failed to observe corporate formalities and because fundamental unfairness would result if the corporate entities are recognized, Lollis, Cox and Thoennes should be held personally responsible for the liabilities of IMK, Integrys, or both.

53. The Plaintiffs are informed and believe that Marick and/or M Group was the alter ego of Thoennes in that Thoennes totally dominated and controlled Marick and/or M Group and Marick and/or M Group manifested no separate interest of its own and functioned solely to achieve the goals of Thoennes. Because Marick and/or M Group was the alter ego of Thoennes, to recognize the corporate distinction promotes wrong and injustice and would contravene the public policy of South Carolina.

54. Additionally, because Marick and/or M Group failed to observe corporate formalities and because fundamental unfairness would result if the corporate entities are recognized, Thoennes should be held personally responsible for the liabilities of Marick, M Group or both.

55. The Plaintiffs are informed and believe that Ludwig was the alter ego of Defendants SDI, John Ludwig, and/or Seckinger in that SDI, John Ludwig, and/or Seckinger totally dominated and controlled Ludwig and Ludwig manifested no separate interest of its own and functioned solely to achieve the goals of SDI, John Ludwig and Seckinger.

56. Because Ludwig was the alter ego of SDI, John Ludwig and/or Seckinger, to recognize the corporate distinction promotes wrong and injustice and would contravene the public policy of South Carolina.

57. Additionally or alternatively, SDI, Ludwig and Medallion are entities whose interests and activities are so amalgamated as to blur the distinction between the entities. Because of this amalgamation of interests and activities, SDI, Ludwig and Medallion should be treated as one and the same and be held jointly liable on all theories of liability asserted herein, including Breach of the Implied Warranty of Habitability, Breach of the Implied Warranty of Workmanlike Service, Negligence, and Breach of Fiduciary Duty. Unless specifically stated otherwise, references to SDI, Ludwig and Medallion when used herein, mean each and all of those entities.

58. Additionally, because Ludwig and/or SDI have failed to observe corporate formalities, and because fundamental unfairness would result if the corporate entities are recognized, John Ludwig and/or Seckinger should be held personally responsible for the liabilities of Ludwig and SDI.

59. Additionally, because Medallion failed to observe corporate formalities, and because fundamental unfairness would result if the corporate distinction is recognized, Seckinger should be held personally responsible for the liabilities of Medallion.

60. "Contractors," when used herein, shall refer to Marick, M Group, Thoennes, Bostic, Morris, Jeff Bostic, Joe Bostic, and IMK, both collectively and individually.

61. "Developers," when used herein, shall refer to IMK, Keowee, Ludwig, SDI, Medallion, Integrys, Marick, Bostic, Lollis, Cox, Seckinger, John Ludwig, and Thoennes, both collectively and individually.

62. The Plaintiffs have become aware of certain problems at the townhomes at the Project, including, but not limited to, water intrusion through the exterior cladding of the townhomes which has resulted in severe rot and deteriorated components of the Project.

63. Repairs and investigation to date at the Project have revealed problems within the Project as outlined and identified in the Scope of Repair by Construction Science & Engineering, dated January 24, 2011, which is incorporated herein by reference.

64. The problems at the Project, including those identified in the preceding Paragraph, and those described in the remaining paragraphs, have resulted in water intrusion and have caused physical injury to the tangible property of others. Upon information and belief, the continuous and/or repeated exposure to substantially the same general harmful conditions has resulted in rot and other physical damage to the components of the townhomes at the Project.

65. Plaintiffs reported the problems at the Project to some or all of the Defendants who have failed and/or refused to investigate the problems or to repair them.

66. Upon information and belief, there are other latent defects at the Project that have yet to be uncovered and can only be uncovered through additional investigation and testing at the Project.

67. To date, Plaintiffs have expended significant sums in attempting to repair certain townhomes, and will continue to incur costs and expenses to investigate the pervasive deficiencies and to correct them. The repair of the deficiencies will also deprive the owners of the townhomes at the Project, including the Class Plaintiffs, of the use and enjoyment of their townhomes and will also result in the diminution in value of their townhomes because of the stigma associated with the deficiencies.

68. As a result of the above-referenced problems, and those yet to be discovered, Plaintiffs have or will suffer the following damages:

- a. Cost to investigate the problems at the Project, and the individual townhomes within the Project;
- b. The cost to develop a comprehensive repair for the Project, including the individual townhomes at the Project;
- c. The cost of accessing, repairing, and replacing all defective and/or unsuitable and damaged components at the Project and the individual townhomes within the Project;
- d. The diminished market value of the townhomes at the Project;
- e. Damages associated with the loss of use of the townhomes at the Project while repairs are undertaken; and
- f. Such other damages as may result from the conduct of the Defendants.

69. Some or all of the damages outlined in the preceding paragraph are common to all Class Plaintiffs and, in whole or in part, the Stoneledge HOA.

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Warranty: Developers)**

70. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

71. In acting as the developers of the Project and placing the individual townhomes into the stream of commerce, Developers provided an implied warranty of habitability to each owner at the Project and for the benefit of the HOA.

72. The above-referenced problems (and any subsequently-discovered problems) with the Project, and the townhomes within the Project, establish that this warranty has been breached by the Developers.

73. As a direct and proximate cause of the Developers' breach of the warranty of habitability, the Plaintiffs have been and will continue to be damaged as set forth herein.

74. Plaintiffs are entitled to a judgment against the Developers (including SDI) because of their breach of warranty of habitability in such amount as will be proven at trial.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence: Developers)**

75. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

76. The Developers owed a duty to the Plaintiffs to ensure that the Project was designed and constructed using a qualified architect and builder.

77. Additionally, the Developers retained control over the Board of the Stoneledge HOA up and until September, 2008, during such time Developers had a duty to inspect, repair, and

maintain components of the Project and to access funding needs and to make provisions for adequate funding.

78. The conditions uncovered to date at the Project establish that the Developers breached their duties to the Plaintiffs in that the defective conditions were not investigated or repaired and insufficient funds existed to effect such repairs at the time control of the Stoneledge HOA was transferred to the owners.

79. As a direct and proximate cause of the Developers' negligence and gross negligence, the Plaintiffs have suffered damages and the Plaintiffs will continue to suffer additional damages.

80. Plaintiffs are entitled to a judgment against the Developers because of their negligence and gross negligence in such amount as will be proven at trial, including punitive damages.

**FOR A THIRD CAUSE OF ACTION**  
**(Breach of Fiduciary Duty: Developers)**

81. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

82. A special relationship exists between the Developers and the Plaintiffs based on the following:

- a. The Developers developed the project;
- b. The Developers funded the design and construction of the Project;
- c. The Developers selected the builder and designer and others for the Project;
- d. The Developers marketed and sold the units at the Project and placed them into the stream of commerce; and,
- e. The Developers controlled the Stoneledge HOA until September, 2008.

83. Plaintiffs reposed special confidence in the Developers resulting in their owing to the Plaintiffs a fiduciary duty to accomplish the following non-exhaustive list of particulars:

- a. To fund adequately the design, construction, and upkeep of the Project;
- b. To select a qualified designer and builder for the Project;
- c. To ensure that the builder and designer produced a quality product free from the types of defects that currently exist at the Project;
- d. To establish sufficient capital reserves for the Association at its inception to address the maintenance and repairs at the Project;
- e. To maintain and upkeep all unsold units at the Project and the common areas of the Project; and,
- f. To ensure that at the time control of the Board of Directors of the Stoneledge HOA was turned over to the owners, in September 2008, that the components of the townhomes which the Stoneledge HOA is obligated to repair, maintain, and replace, were in reasonable condition, free of defects.

84. The deficiencies uncovered to date, which all existed on or before September 2008, establish that the Developers breached their fiduciary duty to the Plaintiffs.

85. As a direct and proximate cause of the Developers' breaches of fiduciary duties, the Plaintiffs have suffered damages and will continue to suffer additional damages.

86. Plaintiffs are entitled to a judgment against the Developers (including SDI) because of their breach of fiduciary duty in such amount as will be proved at trial, including punitive damages.



**FOR A FOURTH CAUSE OF ACTION**  
**(Breach of Warranty: Contractors and Subcontractors)**

87. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

88. The Contractors and Subcontractors, by virtue of their role in the construction of the Project, extended to the Plaintiffs a warranty of workmanlike service in regard to the construction of the townhomes within the Project.

89. The above-referenced problems (and any subsequently-discovered problems) at the Project establish that this warranty has been breached by the Contractors and Subcontractors.

90. As a direct and proximate result of such breach(es) of the warranty of workmanlike service, the Plaintiffs have been and will continue to be damaged as described herein.

91. Plaintiffs are entitled to a judgment against the Contractors and Subcontractors because of their breach of warranty of workmanlike service in such amount as will be proved at trial.

**FOR A FIFTH CAUSE OF ACTION**  
**(Negligence: Contractors and Subcontractors)**

92. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

93. The Contractors and Subcontractors, by virtue of their role in the construction of the Project, owed a duty to the Plaintiffs to retain, coordinate, and supervise competent subcontractors, and to accomplish such construction and/or repairs in accordance with all applicable codes, applicable industry standards, and any and all manufacturers' literature/instructions, and, when applicable, to conform such construction to whatever design documents existed at the time of constructing the Project and the townhomes within the Project.

94. The above-referenced problems (and any subsequently-discovered problems) with the Project establish that the Contractors and Subcontractors breached their duty in regard to these responsibilities which has proximately caused the deficiencies at the Project.

95. The violation of applicable building codes and the willful, reckless, and wanton failure to comply with the applicable standards establishes gross negligence on the part of the Contractors and Subcontractors.

96. As a direct and proximate result of the negligence or gross negligence of Contractors and Subcontractors, the Plaintiffs have been and will continue to be damaged as described herein.

97. Plaintiffs are entitled to a judgment against the Contractors and Subcontractors based on their negligence and gross negligence in such amount as will be proved at trial, including punitive damages.

**FOR A SIXTH CAUSE OF ACTION**  
**(Negligence: MPA- Architect)**

98. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

99. Defendant MPA was negligent, and/or grossly negligent in the design and inspection of the Project in one or more of the following particulars:

- a. failure to adequately design a waterproofing system so as to prevent water infiltration into the interior portions of the building;
- b. improper design of waterproofing of the exterior of the building and non-existent or improper design of flashing;
- c. inadequate inspection and acceptance of defective or non-conforming construction work;

- d. failure to design and insure construction in compliance with applicable building codes State and Federal laws and regulations and acceptable building practices; and,
- e. failure to properly specify appropriate materials to be used in the construction of the Project.

100. As a direct and proximate result and consequence of the negligence and gross negligence of Defendant MPA, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use, depreciation in value and such punitive damages as may be appropriate.

**FOR A SEVENTH CAUSE OF ACTION**  
**(Breach of Express and Implied Warranty: MPA - Architects)**

101. Plaintiffs reassert and reallege the allegations contained in the above Paragraphs.

102. Defendant MPA expressly and impliedly warranted that its design of the Project would be of the highest quality and in conformance with the generally accepted standards of the architectural and construction industry, and further, that the specifications of materials and procedures would comply with the generally accepted principals in the industry.

103. Defendant MPA further expressly and impliedly warranted that the plans and specifications prepared for the Project were suitable and fit for use in constructing the Project, and that the building, when complete, would be free of design defects.

104. The plans and specifications as provided by MPA were not suitable or appropriate for their intended purpose, and as a result of MPA's breach of warranties by designing the Project

with severe structural and water intrusion problems, Plaintiffs are entitled to such actual damages as this Court may deem appropriate.

WHEREFORE, the Plaintiffs pray for a judgment against the Defendants on the above causes of action in such amounts as may be proven at trial, including consequential and punitive damages, the costs of this action, including attorney's fees, and for such other relief as the court deems just and proper.

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**ATTORNEYS FOR PLAINTIFFS**

Charleston, South Carolina

April 3, 2012

CERTIFICATE OF SERVICE

I, Ashley E. Poulnot, an employee of Lyles & Lyles, LLC, pursuant to Rule 5(b)(1), SCRCF and counsel's regular business practices, do hereby certify that I have this date, mailed via the United States Postal Service a true and correct copy of the **Plaintiffs' Third-Amended Summons and Complaint** to the following counsel of record:

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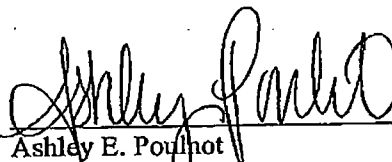
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IMK Development*

By:

  
Ashley E. Poulhot  
Legal Assistant

This 3rd day of April, 2012  
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

Plaintiffs,

vs.

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

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

SUMMONS AS TO THE CROSS CLAIM  
AGAINST BOSTIC BROTHERS  
CONSTRUCTION, CLEAR VIEW  
CONSTRUCTION, LLC, MHC  
CONTRACTORS, BUILDERS  
FIRSTSOURCE SOUTHEAST GROUP,  
SOUTHER CONCRETE SPECIALTIES,  
CARL COMPTON D/B/A COMPTOM  
ENTERPRIZE A/K/A COMPTON  
ENTERPRISES, GUNTER HEATING &  
AIR, ALL PRO HEATING, A/C, &  
REFRIGERATION, LLC, COLEMAN  
WATERPROOFING, HEYWARD  
ELECTRICAL SERVICES, INC, TINSLEY  
ELECTRICAL, LLC, HUTCH N SON  
CONSTRUCTION, INC., UPSTATE  
UTILITIES, INC., SOUTHERN  
BASEMENTS, INC., CARL CATOE  
CONSTRUCTION, INC., TG  
CONSTRUCTION, LLC, DELFINO  
CONSTRUCTION, FRANCISCO JAVIER  
ZARATE D/B/A ZARATE  
CONSTRUCTION, ALEJANDRO AVALOS  
CRUZ, HERBERTO ACROS HERNANDEZ,  
MARTIN HERNANDEZ-AVILES,  
FRANCISCO VILLALOBOS LOPEZ,  
AMBROSIO MARTINEZ-RAMIREZ,  
ESTER MORAN MENTADO, SOCORRO  
CASTIOLLO MONTEL, MJG  
CONSTRUCTION AND HOMEBUILDERS,  
INC D/B/A MJG CONSTRUCTION, KMAC  
OF THE CAROLINAS, INC., EUFACIO  
GARCIA, EVERADOJARMAMILLO,  
GARCIA PARRA INSULATION, INC., J&J  
CONSTRUCTION, JOSE NINO, JOSE  
MANUEL GARCIA, EASON  
CONSTRUCTION, INC., VINCENT  
MORALES D/B/A MORALES MASONRY;  
AND MILLER/PLAYER & ASSOCIATES

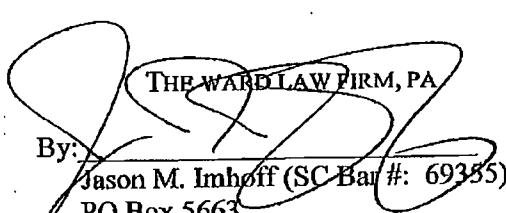
D/B/A MJG CONSTRUCTION, KMAC OF THE )  
CAROLINAS, INC., EUFACIO GARCIA, EVERADO )  
JARMAMILLO, GARCIA PARRA INSULATION, )  
INC., J&J CONSTRUCTION, JOSE NINO, JOSE )  
MANUEL GARCIA, EASON CONSTRUCTION, INC., )  
AND VINCENT MORALES D/B/A MORALES )  
MASONRY, )

(JURY TRIAL DEMANDED)

Defendants, )

TO: THE DEFENDANTS ABOVE-NAMED:

You are hereby summoned and required to answer the Cross-Claim in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Cross Claim on the subscribers at their offices, 233 S. Pine Street, Spartanburg, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of service, unless you received your copy by certified mail, in which case you must serve a copy of your answer on the subscriber within thirty-five (35) days after the service hereof, exclusive of the date of such service; and if you fail to answer the Cross Claim within the time aforesaid, these Defendants in this action will apply to the Court for the judgment demanded in the Cross Claim.

By: 

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April 5, 2012  
Spartanburg, South Carolina



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

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

Plaintiffs,

vs.

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

MARICK HOME BUILDERS, LLC AND  
RICK THOENNES' ANSWER TO  
PLAINTIFFS' THIRD AMENDED  
COMPLAINT AND CROSS CLAIM  
AGAINST BOSTIC BROTHERS  
CONSTRUCTION, CLEAR VIEW  
CONSTRUCTION, LLC, MHC  
CONTRACTORS, BUILDERS  
FIRSTSOURCE SOUTHEAST GROUP,  
SOUTHER CONCRETE SPECIALTIES,  
CARL COMPTON D/B/A COMPTON  
ENTERPRIZE A/K/A COMPTON  
ENTERPRISES, GUNTER HEATING &  
AIR, ALL PRO HEATING, A/C, &  
REFRIGERATION, LLC, COLEMAN  
WATERPROOFING, HEYWARD  
ELECTRICAL SERVICES, INC, TINSLEY  
ELECTRICAL, LLC, HUTCH N SON  
CONSTRUCTION, INC., UPSTATE  
UTILITIES, INC., SOUTHERN  
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OF THE CAROLINAS, INC., EUFACIO  
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MJG CONSTRUCTION AND HOMEBUILDERS, INC. )  
D/B/A MJG CONSTRUCTION, KMAC OF THE )  
CAROLINAS, INC., EUFACIO GARCIA, EVERADO )  
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AND VINCENT MORALES D/B/A MORALES )  
MASONRY, )

Defendants, )

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CONSTRUCTION, INC., VINCENT  
MORALES D/B/A MORALES MASONRY;  
AND MILLER/PLAYER & ASSOCIATES

(JURY TRIAL DEMANDED)

Defendants, Marick Home Builders, LLC and Rick Thoennes, (hereinafter referred to as ("Defendants")) answering the Third Amended Complaint of the Plaintiffs, would respectfully allege and show unto the Court as follows:

1. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' Third Amended Complaint and therefore deny the same.

2. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' Third Amended Complaint and therefore deny the same.

3. These Defendants deny the allegations contained in Paragraph 3 of Plaintiffs' Third Amended Complaint.

4. These Defendants admit the allegations contained in Paragraph 4 of Plaintiffs' Third Amended Complaint.

5. Paragraph 5 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required. Insofar as a response is required of them,

these Defendants deny the allegations of Paragraph 5 of Plaintiffs' Third Amended Complaint.

6. These Defendants deny the allegations contained in Paragraph 6 of Plaintiffs' Third Amended Complaint.

7. Paragraph 7 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required. Insofar as a response is required of them, these Defendants admit the allegations of Paragraph 7 of Plaintiffs' Third Amended Complaint.

8. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 8 of Plaintiffs' Third Amended Complaint.

9. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 9 of Plaintiffs' Third Amended Complaint.

10. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 10 of Plaintiffs' Third Amended Complaint.

11. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 11 of Plaintiffs' Third Amended Complaint.

12. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 12 of Plaintiffs' Third Amended Complaint.

13. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 13 of Plaintiffs' Third Amended Complaint.

14. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 14 of Plaintiffs' Third Amended Complaint.

15. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 15 of Plaintiffs' Third Amended Complaint.

16. Defendants deny the allegations contained in Paragraph 16 of Plaintiffs' Third Amended Complaint.

17. Defendants deny the allegations contained in Paragraph 17 of Plaintiffs' Third Amended Complaint.

18. Defendants deny the allegations contained in Paragraph 18 of Plaintiffs' Third Amended Complaint.

19. These Defendants admit so much of the allegations of Paragraph 19 of Plaintiffs' Third Amended Complaint as allege that Marick Home Builders, LLC is a limited liability company organized and existing of the laws of the State of South Carolina and was a licensed South Carolina builder engaged in the business of building. Marick acted as a general contractor for several of the townhomes at the project. Defendants deny the remaining allegations of Paragraph 19 of Plaintiffs' Third Amended Complaint.

20. These Defendants deny the allegations contained in Paragraph 20 of Plaintiffs' Third Amended Complaint.

21. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 21 of Plaintiffs' Third Amended Complaint and therefore deny the same.

22. These Defendants deny the allegations contained in Paragraph 22 of Plaintiffs' Third Amended Complaint.

23. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 23 of Plaintiffs' Third Amended Complaint and therefore deny the same.

24. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 24 of Plaintiffs' Third Amended Complaint and therefore deny the same.

25. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 25 of Plaintiffs' Third Amended Complaint and therefore deny the same.

26. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 26 of Plaintiffs' Third Amended Complaint and therefore deny the same.

27. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 27 of Plaintiffs' Third Amended Complaint and therefore deny the same.

28. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 28 of Plaintiffs' Third Amended Complaint and therefore deny the same.

29. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiffs' Third Amended Complaint and therefore deny the same.

30. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 30 of Plaintiffs' Third Amended Complaint and therefore deny the same.

31. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 31 of Plaintiffs' Third Amended Complaint and therefore deny the same.

32. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 32 of Plaintiffs' Third Amended Complaint and therefore deny the same.

33. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 33 of Plaintiffs' Third Amended Complaint and therefore deny the same.

34. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 34 of Plaintiffs' Third Amended Complaint and therefore deny the same.

35. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 35 of Plaintiffs' Third Amended Complaint and therefore deny the same.

36. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 36 of Plaintiffs' Third Amended Complaint and therefore deny the same.

37. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 37 of Plaintiffs' Third Amended Complaint and therefore deny the same.

38. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 38 of Plaintiffs' Third Amended Complaint and therefore deny the same.

39. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 39 of Plaintiffs' Third Amended Complaint and therefore deny the same.

40. These Defendants admit so much of the allegations of Paragraph 40 of Plaintiffs' Third Amended Complaint as allege that in its Third Party Complaint Marick identified numerous parties as subcontractors or principles of same and alleged that they are among the at fault parties by virtue of their provision of services and/or products for this Project. Defendants deny the remaining allegations of Paragraph 40 of Plaintiffs' Third Amended Complaint.

41. These Defendants admit so much of Paragraph 41 of Plaintiffs' Third Amended Complaint as allege that Southern Basement, Inc is a corporation conducting business in Oconee County, specifically on the Project, including but not limited to basement work. Defendants deny the remaining allegations of Paragraph 41 of Plaintiffs' Third Amended Complaint.

42. Paragraph 42 of Plaintiffs' Third Amended Complaint requires no response from these Defendants. Insofar as Paragraph 42 of Plaintiffs' Third Amended

Complaint requires a response from them, these Defendants deny the allegations contained in Paragraph 42 of Plaintiffs' Third Amended Complaint.

43. Defendants admit, upon information and belief, the truth of the allegations contained in Paragraph 43 of Plaintiffs' Third Amended Complaint.

44. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 44 of Plaintiffs' Third Amended Complaint and therefore deny the same.

45. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 45 of Plaintiffs' Third Amended Complaint and therefore deny the same.

46. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 46 of Plaintiffs' Third Amended Complaint and therefore deny the same.

47. Paragraph 47 of Plaintiffs' Third Amended Complaint requires no response from them. Insofar as a response is required from them, these Defendants deny the allegations contained in Paragraph 47 of Plaintiffs' Third Amended Complaint.

48. Defendants admit, upon information and belief, the allegations contained in Paragraph 48 of Plaintiffs' Third Amended Complaint.

49. Defendants deny the allegations contained in Paragraph 49 of Plaintiffs' Third Amended Complaint.

50. Defendants deny the allegations contained in Paragraph 50 of Plaintiffs' Third Amended Complaint.



51. Defendants deny the allegations contained in Paragraph 51 of Plaintiffs' Third Amended Complaint.

52. Defendants deny the allegations contained in Paragraph 52 of Plaintiffs' Third Amended Complaint.

53. Defendants deny the allegations contained in Paragraph 53 of Plaintiffs' Third Amended Complaint.

54. Defendants deny the allegations contained in Paragraph 54 of Plaintiffs' Third Amended Complaint.

55. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 55 of Plaintiffs' Third Amended Complaint and therefore deny the same.

56. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 56 of Plaintiffs' Third Amended Complaint and therefore deny the same.

57. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 57 of Plaintiffs' Third Amended Complaint and therefore deny the same.

58. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 58 of Plaintiffs' Third Amended Complaint and therefore deny the same.

59. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 59 of Plaintiffs' Third Amended Complaint and therefore deny the same.

60. Paragraph 60 of Plaintiffs' Third Amended Complaint does not require a response from these Defendants. Insofar as Paragraph 60 of Plaintiffs' Third Amended Complaint requires a response of them, these Defendants deny the same.

61. Paragraph 61 of Plaintiffs' Third Amended Complaint does not require a response from these Defendants. Insofar as Paragraph 61 of Plaintiffs' Third Amended Complaint requires a response of them, these Defendants deny the same.

62. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 62 of Plaintiffs' Third Amended Complaint and therefore deny the same.

63. These Defendants deny the allegations contained in Paragraph 63 of Plaintiffs' Third Amended Complaint.

64. These Defendants deny the allegations contained in Paragraph 64 of Plaintiffs' Third Amended Complaint.

65. These Defendants deny the allegations contained in Paragraph 65 of Plaintiffs' Third Amended Complaint.

66. These Defendants deny the allegations contained in Paragraph 66 of Plaintiffs' Third Amended Complaint.

67. These Defendants deny the allegations contained in Paragraph 67 of Plaintiffs' Third Amended Complaint.

68. These Defendants deny the allegations contained in Paragraph 68 of Plaintiffs' Third Amended Complaint.

69. These Defendants deny the allegations contained in Paragraph 69 of Plaintiffs' Third Amended Complaint.

70. Insofar as Paragraph 70 of Plaintiffs' Third Amended Complaint requires a response from it, these Defendants reallege and incorporate herein by reference their responses to the allegations of Paragraphs 1 through 69 above.

71. Paragraph 71 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required of these Defendants. Insofar as a response is required of them, these Defendants deny the allegations of Paragraph 71 of Plaintiffs' Third Amended Complaint.

72. Defendants deny the allegations contained in Paragraph 72 of Plaintiffs' Third Amended Complaint.

73. Defendants deny the allegations contained in Paragraph 73 of Plaintiffs' Third Amended Complaint.

74. Defendants deny the allegations contained in Paragraph 74 of Plaintiffs' Third Amended Complaint.

75. Insofar as Paragraph 75 of Plaintiffs' Third Amended Complaint requires a response from them, these Defendants reallege and incorporate herein by reference their responses to the allegations of Paragraphs 1 through 74 above.

76. Paragraph 76 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required of these Defendants. Insofar as a response is required of them, these Defendants deny the allegations of Paragraph 76 of Plaintiffs' Third Amended Complaint.

77. Paragraph 77 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required of these Defendants. Insofar as a response is

required of them, these Defendants deny the allegations of Paragraph 77 of Plaintiffs' Third Amended Complaint.

78. Defendants deny the allegations contained in Paragraph 78 of Plaintiffs' Third Amended Complaint.

79. Defendants deny the allegations contained in Paragraph 79 of Plaintiffs' Third Amended Complaint.

80. Defendants deny the allegations contained in Paragraph 80 of Plaintiffs' Third Amended Complaint.

81. Insofar as Paragraph 81 of Plaintiffs' Third Amended Complaint requires a response from them, these Defendants reallege and incorporate herein by reference their responses to the allegations of Paragraphs 1 through 80 above.

82. Paragraph 82 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required of these Defendants. Insofar as a response is required of them, these Defendants deny the allegations of Paragraph 82 of Plaintiffs' Third Amended Complaint.

83. Paragraph 83 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required of these Defendants. Insofar as a response is required of them, these Defendants deny the allegations of Paragraph 83 of Plaintiffs' Third Amended Complaint.

84. Defendants deny the allegations contained in Paragraph 84 of Plaintiffs' Third Amended Complaint.

85. Defendants deny the allegations contained in Paragraph 85 of Plaintiffs' Third Amended Complaint.

86. Defendants deny the allegations contained in Paragraph 86 of Plaintiffs' Third Amended Complaint.

87. Insofar as Paragraph 87 of Plaintiffs' Third Amended Complaint requires a response from them, these Defendants reallege and incorporate herein by reference their responses to the allegations of Paragraphs 1 through 86 above.

88. Paragraph 88 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required of these Defendants. Insofar as a response is required of them, these Defendants deny the allegations of Paragraph 88 of Plaintiffs' Third Amended Complaint.

89. Defendants deny the allegations contained in Paragraph 89 of Plaintiffs' Third Amended Complaint.

90. Defendants deny the allegations contained in Paragraph 90 of Plaintiffs' Third Amended Complaint.

91. Defendants deny the allegations contained in Paragraph 91 of Plaintiffs' Third Amended Complaint.

92. Insofar as Paragraph 92 of Plaintiffs' Third Amended Complaint requires a response from them, these Defendants reallege and incorporate herein by reference their responses to the allegations of Paragraphs 1 through 91 above.

93. Paragraph 93 of Plaintiffs' Third Amended Complaint sets forth a legal conclusion to which no response is required of these Defendants. Insofar as a response is required of them, these Defendants deny the allegations of Paragraph 93 of Plaintiffs' Third Amended Complaint.

94. Defendants deny the allegations contained in Paragraph 94 of Plaintiffs' Third Amended Complaint.

95. Defendants deny the allegations contained in Paragraph 95 of Plaintiffs' Third Amended Complaint.

96. Defendants deny the allegations contained in Paragraph 96 of Plaintiffs' Third Amended Complaint.

97. Defendants deny the allegations contained in Paragraph 97 of Plaintiffs' Third Amended Complaint.

98. Insofar as Paragraph 98 of Plaintiffs' Third Amended Complaint requires a response from them, these Defendants reallege and incorporate herein by reference their responses to the allegations of Paragraphs 1 through 97 above.

99. Paragraph 99 of Plaintiffs' Third Amended Complaint makes no allegations against these Defendants and therefore requires no response from them. Insofar as a response is required of these Defendants, they lack sufficient information to form belief as to the truth of the allegations contained in Paragraph 99 of Plaintiffs' Third Amended Complaint.

100. Paragraph 100 of Plaintiffs' Third Amended Complaint makes no allegations against these Defendants and therefore requires no response from them. Insofar as a response is required of these Defendants, they lack sufficient information to form belief as to the truth of the allegations contained in Paragraph 100 of Plaintiffs' Third Amended Complaint.

101. Insofar as Paragraph 101 of Plaintiffs' Third Amended Complaint requires a response from them, these Defendants reallege and incorporate herein by reference their responses to the allegations of Paragraphs 1 through 100 above.

102. Paragraph 102 of Plaintiffs' Third Amended Complaint makes no allegations against these Defendants and therefore requires no response from them. Insofar as a response is required of these Defendants, they lack sufficient information to form belief as to the truth of the allegations contained in Paragraph 102 of Plaintiffs' Third Amended Complaint.

103. Paragraph 103 of Plaintiffs' Third Amended Complaint makes no allegations against these Defendants and therefore requires no response from them. Insofar as a response is required of these Defendants, they lack sufficient information to form belief as to the truth of the allegations contained in Paragraph 103 of Plaintiffs' Third Amended Complaint.

104. Paragraph 104 of Plaintiffs' Third Amended Complaint makes no allegations against these Defendants and therefore requires no response from them. Insofar as a response is required of these Defendants, they lack sufficient information to form belief as to the truth of the allegations contained in Paragraph 104 of Plaintiffs' Third Amended Complaint.

105. These Defendants deny each and every allegations of Plaintiffs' Third Amended Complaint not hereinabove specifically admitted, explained, or modified.

**FOR A SECOND DEFEENSE**

106. These Defendants incorporate herein the allegations of their foregoing defense not inconsistent herewith.

107. These Defendants allege that Plaintiffs' Third Amended Complaint fails to state facts sufficient to constitute a cause of action upon which relief can be granted against it and is, accordingly, barred.

**FOR A THIRD DEFENSE**

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

109. Defendants allege that the Plaintiffs have failed to mitigate their damages in the manner provided for by law. Such failure to mitigate is a complete defense and bar to Plaintiffs' claims.

**FOR A FOURTH DEFENSE**

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

111. Defendants alleges that even if they were negligent or reckless in any respect, which is expressly denied and admitted solely for the purpose of this defense and no other, these Defendants are not liable to the Plaintiffs for any resulting damages, if any, because of the intervening, negligent, grossly negligent, reckless, willful and wanton acts of third-parties, which negligent and reckless acts on their part were not reasonably foreseeable and intervened and acted as the direct and proximate cause of the damages, if any, sustained by Plaintiffs.

**FOR A FIFTH DEFENSE**

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



113. Defendants state that the Plaintiffs have failed to give proper notice of the alleged defects pursuant to the South Carolina Code, or any other applicable State or Federal Statutes, and accordingly, Plaintiffs' Third Amended Complaint should be dismissed.

**FOR A SIXTH DEFENSE**

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

115. Defendants plead the doctrine of laches as a complete and total bar to Plaintiffs' claim.

**FOR A SEVENTH DEFENSE**

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

117. At the time of its construction, the Plaintiffs' homes met or exceeded all applicable Federal requirements, applicable State requirements, applicable construction requirements, and all applicable building codes and requirements in the industry, and accordingly Plaintiffs' Third Amended Complaint is barred.

**FOR AN EIGHTH DEFENSE**

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

119. Defendants state that if the homes are shown to contain a defect or malfunction, the Plaintiffs did not allow Defendants the opportunity to remedy said defects.

**FOR A NINTH DEFENSE**

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

121. Defendants state that this dispute is governed by an arbitration provision and therefore Plaintiffs' claims are barred in this forum and/or should be stayed and transferred to arbitration.

**FOR A TENTH DEFENSE**

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

123. Defendants state any alleged nonconformity does not impair the use, market value, or safety of the home, and accordingly, the Plaintiffs' Third Amended Complaint is barred.

**FOR AN ELEVENTH DEFENSE**

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

125. Defendants allege that insofar as Plaintiffs' Third Amended Complaint seeks punitive damages, such damages violate both the United States and South Carolina Constitutions. As such, Plaintiffs' claim for punitive damages is barred.

**FOR A TWELFTH DEFENSE**

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

127. Plaintiffs' claims are barred because Defendants have done all that is agreed to do under contract.

**FOR A THIRTEETH DEFENSE**

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

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

**FOR A FOURTEENTH DEFENSE**

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

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

**FOR A FIFTHTEEN DEFENSE**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

- i. Improper installation of roof;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



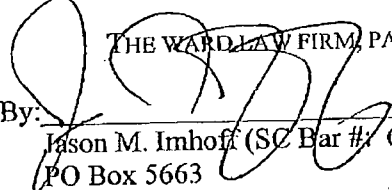
Builders FirstSource-Southeast Group, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C, & Refrigeration, LLC, Coleman Waterproofing, Tinsley Electrical, LLC, Heyward Electrical Services, Hutch N Son Construction,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

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

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

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

- d. For the cost of this action from parties other than Marick Home Builders; and
- e. For such other and further relief as this court may deem just and equitable.

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April 5, 2012  
Spartanburg, South Carolina

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Marick Home Builders, LLC's Answer to Plaintiffs' Third Amended Complaint and Cross Claim against Defendants** to the following counsel of record:

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By:



Amanda D. Steward  
Paralegal to Jason M. Imhoff

This 9 day of April, 2012  
Spartanburg, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF OCONEE )

IN THE COURT OF COMMON PLEAS

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

Plaintiffs, )

vs. )

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

C.A. NO. 2009-CP-37-652

ANSWER OF SOUTHERN  
CONCRETE SPECIALTIES, INC. TO  
ANSWER OF MARICK HOME  
BUILDERS, LLC, TO PLAINTIFFS'  
THIRD AMENDED COMPLAINT  
AND CROSS-CLAIMS

MJG Construction; KMAC of the Carolinas, )  
 Inc.; Eufacio Garcia; Everado Jarmamillo; )  
 Garcia Parra Insulation, Inc.; J&J )  
 Construction; Jose Nino; Jose Manuel )  
 Garcia; Eason Construction, Inc.; and )  
 Vincent Morales d/b/a Morales Masonry, )  
 )  
 Defendants. )

Third Party Defendant Southern Concrete Specialties, Inc. (sic) (hereinafter "Southern Concrete") answering Marick Home Builders, LLC and Rick Thoennes' Answer to Plaintiffs' Third Amended Complaint and Cross Claims, would respectfully show unto the Court the following:

1. Every allegation contained in Plaintiffs' pleadings that is not specifically admitted or modified herein is denied.

FOR A FIRST DEFENSE  
 (General Denial)

2. Paragraphs 1 through 133 constitute the responsive pleadings and affirmative defenses of Marick Home Builders, LLC (hereinafter "Marick") to Plaintiffs' Third Amended Complaint and therefore appear to require no response from Southern Concrete. To the extent those paragraphs imply or infer liability or fault on behalf of Southern Concrete, those allegations are denied.

3. In response to Paragraph 134, Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

4. Southern Concrete denies the allegations of Paragraph 135 to the extent it alleges that Clearview Construction is an existing corporation as Southern Concrete is informed and believes Clearview Construction has been dissolved. Southern Concrete is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of this paragraph, and therefore denies same.

5. Southern Concrete denies the allegations of Paragraph 136 to the extent it alleges that MHC Contractors is an existing corporation, as Southern Concrete is informed and believes MHC Contractors has been dissolved. Southern Concrete is without sufficient knowledge or information to form a belief as to the remaining allegations of this paragraph, and therefore denies same.

6. On information and belief, Southern Concrete admits the allegations of Paragraph 137.

7. On information and belief, Southern Concrete admits the allegations of Paragraph 138.

8. Southern Concrete is misnamed. Southern Concrete is a Georgia corporation the name of which is Southern Concrete Specialties, Inc., and therefore it denies being a South Carolina corporation. Southern Concrete admits the remaining allegations of Paragraph 139 only as to Phase II of the Stoncledge project. Southern Concrete performed no work in Phase I.

9. Southern Concrete lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 140.

10. On information and belief, Southern Concrete admits the allegations of Paragraph 141.

11. On information and belief, Southern Concrete admits the allegations of Paragraph 142.

12. On information and belief, Southern Concrete admits the allegations of Paragraph 143.

13. On information and belief, Southern Concrete admits the allegations of Paragraph 144.



14. On information and belief, Southern Concrete admits the allegations of Paragraph 145.
15. On information and belief, Southern Concrete admits the allegations of Paragraph 146.
16. On information and belief, Southern Concrete admits the allegations of Paragraph 147.
17. On information and belief, Southern Concrete admits the allegations of Paragraph 148.
18. On information and belief, Southern Concrete admits the allegations of Paragraph 149.
19. On information and belief, Southern Concrete admits the allegations of Paragraph 150.
20. On information and belief, Southern Concrete admits the allegations of Paragraph 151.
21. Southern Concrete lacks sufficient knowledge and information to form a belief as to the allegations of Paragraph 152.
22. On information and belief, Southern Concrete admits the allegations of Paragraph 153.
23. To the extent that the allegations of Paragraph 154 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lack sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

24. To the extent that the allegations of Paragraph 155 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

25. To the extent that the allegations of Paragraph 156 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

26. To the extent that the allegations of Paragraph 157 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

27. To the extent that the allegations of Paragraph 158 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

**FOR A FIRST DEFENSE TO MARICK'S SEVENTEENTH DEFENSE AND CROSS-CLAIM  
(Breach of Contract – Contractors)**

28. In response to Paragraph 159, Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

29. Southern Concrete admits as much of Paragraph 160 as alleges that it entered into a legally binding contract with Marick whereby Southern Concrete agreed to provide certain materials and work, provided however, that Southern Concrete specifically denies the validity of the document entitled "Work Agreement" purportedly executed in October 2007. Southern

Concrete denies the remainder of the allegations as they relate to Southern Concrete, and lacks sufficient knowledge and information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

30. To the extent that the allegations of Paragraph 161 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

31. To the extent that the allegations of Paragraph 162 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

32. To the extent that the allegations of Paragraph 163 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

FOR A FIRST DEFENSE TO MARICK'S EIGHTEENTH DEFENSE AND CROSS-CLAIM  
(Negligence)

33. In response to Paragraph 164, Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

34. In response to Paragraph 165, Southern Concrete admits a general duty to perform its work in accordance with the plans and specifications, accepted building standards and practices, and manufacturer's instructions and to provide materials and services conforming therewith, but denies the allegations of the Paragraph because the aforementioned authorities often conflicted with one another in Phase II of the Stonledge project. Additionally, the term

"other direction" is vague and Southern Concrete therefore denies this portion of the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

35. To the extent that the allegations of Paragraph 166 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete specifically denies it improperly installed concrete or acted negligently in any way. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties or other areas of work.

36. To the extent that the allegations of Paragraph 167 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

37. To the extent that the allegations of Paragraph 168 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

38. To the extent that the allegations of Paragraph 169 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

39. To the extent that the allegations of Paragraph 170 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or

information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

FOR A FIRST DEFENSE TO MARICK'S NINETEENTH DEFENSE AND CROSS-CLAIM  
(Breach of Warranties)

40. In response to Paragraph 171, Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

41. In response to Paragraph 172, Southern Concrete admits a general duty to perform its work in accordance with the plans and specifications, accepted building standards and practices, and manufacturer's instructions and to provide materials and services conforming therewith, but denies the allegations of the Paragraph because the aforementioned authorities often conflicted in Phase II of the Stoneledge project. Additionally, the term "other direction" is vague and Southern Concrete therefore denies this portion of the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

42. To the extent that the allegations of Paragraph 173 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

43. To the extent that the allegations of Paragraph 174 relate to Southern Concrete, Southern Concrete denies the allegations. Southern Concrete lacks sufficient knowledge or information to form a belief as to the allegations of the Paragraph regarding the remaining parties.

FOR A FIRST DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Sole Negligence of a Third Party)

44. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

45. With regard to the foundation walls, Southern Concrete applied the Tuff-N-Dri waterproofing system, which it was authorized by the company (Tremco Barrier Solutions) to install. The system involves application of a spray-on asphalt membrane followed by installation of an orange insulation board. Southern Concrete applied the waterproofing to a height specified by the Marick supervisor on site.

46. With regard to the foundation walls, upon information or belief, after Southern Concrete had completed its work on the foundation walls, a subcontractor or Marick representative built the grade to a height above the height of the waterproofing on the foundation walls. Upon information and belief, plans prepared by Miller-Player Architects show the grade at an improper height. Upon information and belief, plans prepared by Freeland & Associates do not adequately detail the grade specifications at and around the units and provide grade specifications which do not allow for the grading to meet applicable building codes.

47. Even if Southern Concrete did not apply the waterproofing to a sufficient height on the foundation walls, which is denied by Southern Concrete and admitted solely for the purpose of this defense, the height would have been readily apparent to the grading contractor and/or the Marick representative, and such error could have been remedied.

48. With regard to the foundation walls, Southern Concrete properly installed foot drains and, if they are not working properly, a subcontractor or Marick representative failed to ensure that the drain lines either ran to daylight or were tied into a system. Additionally, a subcontractor or Marick representative may have covered the drain line openings.

49. With regard to the concrete decks, Southern Concrete installed a rubber membrane before pouring the concrete decks and left the requisite amount of membrane "turned up" so that later waterproofing installed by other subcontractors could be properly "lapped." If the requisite amount of material is missing, Southern Concrete alleges that a later subcontractor or Marick representative cut the "turned up" membrane away.

50. Moreover, even if Southern Concrete did not leave a sufficient amount of the rubber membrane "turned up," which is denied by Southern Concrete and admitted solely for the purpose of this defense, the subcontractor responsible for lapping materials with the rubber membrane should have remedied the problem so as to properly lap the materials and/or the general contractor should have recognized the alleged deficiency and notified Southern Concrete of the alleged problem and provided Southern Concrete the opportunity remedy the problem.

51. With regard to the concrete decks, before Southern Concrete began its work, it informed Marick's representative that the framing for the decks was constructed without any slope away from the building. Marick's representative instructed Southern Concrete to proceed with its work.

52. Upon information and belief, as Marick was aware of the lack of slope of the framing of the decks, Marick could have taken steps to ensure that water did not penetrate the concrete decks.

53. In constructing the concrete decks, Southern Concrete attempted to create some slope away from the building, but was hindered in this effort as it had to maintain adequate thickness of the concrete for structural soundness.

54. Given the above, any injuries sustained by Plaintiffs were due to and caused by the acts, delicts and/or the sole negligence of third persons over whom Southern Concrete had no control, and therefore, it should not be liable to Plaintiffs in any sum whatsoever.

FOR A SECOND DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Failure to Mitigate)

55. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

56. Southern Concrete alleges that Marick has failed to mitigate its damages as required by law.

FOR A THIRD DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Intervening Negligence)

57. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

58. Southern Concrete alleges that even if it was negligent or reckless in any respect, which is expressly denied and admitted solely for the purpose of this defense, Southern Concrete is not liable to Marick for any resulting damages, if any, because of the intervening, negligent, grossly negligent, reckless, willful and wanton acts of third parties, over which Southern Concrete had no control or authority. Such negligent or reckless acts on the part of these third-parties were not reasonably foreseeable and intervened and acted as the direct and proximate cause of the damages, if any, alleged by Marick.

FOR A FOURTH DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Good Faith)



59. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

60. At all times relevant to the claims alleged in Marick's pleadings, Southern Concrete acted in good faith and in accordance with the reasonable commercial standards applicable to its business, and such constitutes a complete defense to the claims of Marick.

FOR A FIFTH DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Acceptance of Our Work)

61. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

62. Marick, subsequent owners, and subcontractors who performed work subsequent to our work accepted the work of Southern Concrete.

63. By providing payment to Southern Concrete, Marick, as owner and general contractor, accepted the work of Southern Concrete.

64. Acceptance of Southern Concrete's work by Marick, subsequent owners, and subsequent contractors constitutes a complete defense to the claims of Marick against Southern Concrete.

FOR A SIXTH DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Comparative Negligence)

65. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

66. Upon information and belief, Marick's claims are barred or limited by the doctrines of comparative negligence and assumption of the risk.

FOR A SEVENTH DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Lack of Consideration)

67. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

68. To the extent Marick relies on the document entitled "Work Agreement" executed in October 2007, Southern Concrete asserts that the agreement is not valid or binding as it lacks consideration.

FOR AN EIGHTH DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Lack of Authority)

69. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

70. To the extent Marick relies on the document entitled "Work Agreement" executed in October 2007, Southern Concrete asserts that the agreement was signed by a person without the authority to bind Southern Concrete.

FOR A NINTH DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Statute of Limitations)

71. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

72. Upon information and belief, some or all of Plaintiffs' or Marick's claims must be reduced or are barred by the applicable statute of limitations or statute of repose.

FOR A TENTH DEFENSE TO ALL OF MARICK'S  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Laches, Waiver, Estoppel)

73. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

74. Upon information and belief, some or all of Plaintiffs' or Marick's claims are barred by the doctrine of laches, waiver, and/or estoppel.

FOR AN ELEVENTH DEFENSE TO ALL OF PLAINTIFFS'  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Punitive Damages)

75. Any award of punitive damages against Southern Concrete will violate the rights guaranteed by the Constitution of the State of South Carolina for the following reasons:

- a. Any award of punitive damages violates the prohibition against excessive fines found in Article I, Section 15, of the Constitution of the State of South Carolina.
- b. Any award of punitive damages violates the guarantee of due process found in Article I, Section 3, of the Constitution of the State of South Carolina because of the lack of objective guidelines upon which a jury might base its award, and, further, that such guidelines as do exist are arbitrary and void for vagueness.
- c. Any award of punitive damages violates the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines upon which a jury might base its award, and, further, that such guidelines as do exist are arbitrary and void for vagueness.
- d. The claim of Medallion for punitive damages against Southern Concrete cannot be sustained because any award of punitive damages under South Carolina law without bifurcating the trial of all punitive damages would violate Southern Concrete's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.
- e. The claim of Medallion for punitive damages against Southern Concrete cannot be sustained, because an award of punitive damages under South Carolina law subject to no pre-determined limit, such as a maximum multiple of compensatory damages or a maximum amount on the amount of punitive damages that a jury may impose would violate Southern Concrete's due process rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and by the due process provisions of the South Carolina Constitution.

- f. The claim of Medallion for punitive damages against Southern Concrete cannot be sustained because an award of punitive damages under South Carolina law by a jury that (1) is not provided a standard of sufficient clarity for determining the appropriateness, or the appropriate size, of a punitive damages award, (2) is not instructed on the limits on punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages or determining the amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the alleged corporate status of Southern Concrete, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to judicial review on the basis of objective standards, would violate Southern Concrete's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment and by the South Carolina Constitutions provisions providing due process, equal protection, and a guaranty against double jeopardy.
- g. The claim of Medallion for punitive damages against Southern Concrete cannot be sustained, because an award of punitive damages under South Carolina law for the purpose of compensating Medallion for elements of damage not otherwise recognized by South Carolina law would violate Southern Concrete's due process rights guaranteed by the Fourteenth Amended to the United States Constitution and by the due process provisions of the South Carolina Constitution.
- h. The claim of Medallion for punitive damages against Southern Concrete cannot be sustained, because an award of punitive damages under South Carolina law without proof of every element beyond a reasonable doubt would violate Southern Concrete's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.
- i. The claim of Medallion for punitive damages cannot be sustained, because an award of punitive damages under state law without the same protections that are accorded to all criminal defendants, including protection against unreasonable searches and seizures, double jeopardy and self-incrimination and the rights to confront adverse witnesses, a speedy trial and the effective assistance of counsel would violate Southern Concrete's rights under the Fourteenth Amendment to the United States Constitution and the Fourth, Fifth, and Sixth Amendments as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and the rights to confront witnesses, a speedy trial and effective assistance of counsel and

protection against unreasonable searches and seizures, double jeopardy and compelled self-incrimination.

- j. Any award of punitive damages based on anything other than Southern Concrete's conduct in connection the specific incident that is the subject of this lawsuit would violate the due process clause of the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and a guaranty against double jeopardy, because any other judgment for punitive damages in this case cannot protect Southern Concrete against impermissible multiple punishment for the same wrong.

FOR A TWELFTH DEFENSE TO ALL OF PLAINTIFFS'  
ALLEGATIONS AGAINST SOUTHERN CONCRETE  
(Reservation of Defenses)

76. Southern Concrete incorporates by reference its responses to the foregoing paragraphs as if fully set forth herein.

77. Southern Concrete reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, having fully answered the pleadings of Marick, Southern Concrete prays that the pleadings of Plaintiffs and cross-claims of Marick be dismissed, with costs, and for such other relief as the Court may grant.

ELMORE GOLDSMITH, P.A.

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May 23, 2012

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

CERTIFICATE OF SERVICE

I, Robin G. Smith, an employee of Elmore Goldsmith, PA, pursuant to Rule 5(b)(1) SCRPC and counsel's regular business practices, do hereby certify that I have this date, mailed a copy of **ANSWER OF SOUTHERN CONCRETE SPECIALTIES, INC. TO ANSWER OF MARICK HOME BUILDERS, LLC TO PLAINTIFFS' THIRD AMENDED COMPLAINT CROSS CLAIMS** by United States Postal Service, First Class, postage pre-paid and affixed thereto and addressed as follows:

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and electronically mailed a true and correct copy to the following counsel of record:

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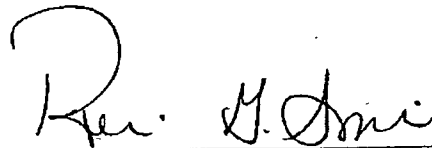
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24 68  
May 23, 2012



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS

) CASE NO. 09-CP-37-652

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

Plaintiffs,

v.

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

**Defendant Builders FirstSource –  
Southeast Group, LLC's Answer  
to Marick Home Builders, LLC  
and Rick Thoennes's Answer  
to Plaintiffs' Third Amended  
Complaint and Cross-Claims**

**And**

**Cross-Claims against Defendant  
Carl Catoe Construction, Inc.**

Eason Construction, Inc., Vincent Morales  
Masonry, and Miller/Player & Associates,

Defendants.

Defendant Builders FirstSource – Southeast Group, LLC, incorrectly identified in the Cross-Claims as “Builders FirstSource – Southeast Group” (“BFS”)<sup>1</sup> responds to Marick Home Builders, LLC (“Marick”) and Rick Thoennes’s (“Thoennes”) Answer and Cross-Claims as follows:

1. Every allegation contained in Marick and Thoennes’s Answer and Cross-Claims not specifically admitted below is denied.

**FOR A FIRST DEFENSE**

2. The allegations of Paragraphs 1 through 133 constitute Marick and Thoennes’s Answer to Plaintiffs’ Third Amended Complaint and therefore require no response from BFS; however, to the extent those paragraphs imply or infer liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE TO THE  
SIXTEENTH DEFENSE/CROSS-CLAIM**

3. In response to Paragraph 134, BFS repeats its responses above.
4. It admits the allegations of Paragraphs 135 through 137, on information and belief.
5. It admits only so much of Paragraph 138 as alleges it conducts business in Oconee County and provided framing labor and material for the subject project.

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<sup>1</sup>Defendant Mike Greene is an employee of a local store of Builders FirstSource – Southeast Group, LLC, and has no individual legal liability or fault as relates to this matter. He has been named a party to Plaintiffs’ Third Amended Complaint but not Marick and Thoennes’s Cross-Claims, specifically. Nonetheless, to the extent it is necessary, this Answer shall be deemed an Answer for Mr. Greene, as well.

6. It admits the allegations of Paragraphs 139 through 152, on information and belief. BFS, however lacks knowledge or information related to the present corporate or individual status and ongoing operations of the referenced entities.
7. Responding to Paragraph 153, BFS craves reference to Plaintiffs' Third Amended Complaint as the best evidence of the contents thereof, and it denies any allegation of fault or liability as to it.
8. It denies the allegations of Paragraphs 154 through 158.

**FOR A FIRST DEFENSE TO THE  
SEVENTEENTH DEFENSE/CROSS-CLAIM**

9. In response to Paragraph 159, BFS repeats its responses above.
10. Responding to Paragraph 160, BFS craves reference to the noted contracts as the best evidence of the contents thereof, and denies any allegation of fault or liability as to it.
11. It denies the allegations of Paragraphs 161 through 163.

**FOR A FIRST DEFENSE TO THE  
EIGHTEENTH DEFENSE/CROSS-CLAIM**

12. In response to Paragraph 164, BFS repeats its responses above.
13. Paragraph 165 consists of conclusions of law to which no response is required. To the extent a response is required, BFS denies any fault or liability as to it, and asserts that it provided its materials and labor in a manner consistent with the applicable standard of care.
14. It denies the allegations of Paragraphs 166 through 170.

**FOR A FIRST DEFENSE TO THE  
NINETEENTH DEFENSE/CROSS-CLAIM**

15. In response to Paragraph 171, BFS repeats its responses above.
16. Paragraph 172 consists of conclusions of law to which no response is required. To the extent a response is required, BFS denies any fault or liability as to it, and asserts that it provided

its materials and labor in a manner consistent with any warranties it may have provided, or which may be implied, and in a manner consistent with the applicable standard of care.

17. It denies the allegations of Paragraphs 173 and 174.
18. Responding to the "Wherefore" paragraph contained in Marick and Thoennes's Answer and Cross-Claims, BFS denies that Marick and/or Thoennes are entitled monetary or other damages or relief, of any nature, from BFS.

**FOR A SECOND DEFENSE**

19. Marick and Thoennes have failed to state facts sufficient to constitute a cause of action against BFS.

**FOR A THIRD DEFENSE**

20. Upon information and belief, Marick and Thoennes's damages, if any, were caused by the acts or omissions of other parties over whom BFS had no control.

**FOR A FOURTH DEFENSE**

21. Upon information and belief, Marick and Thoennes's claims are barred or limited by the doctrines of comparative negligence and/or assumption of the risk.

**FOR A FIFTH DEFENSE**

22. Marick and/or Thoennes's claims for indemnity must fail because there is no applicable contract containing an indemnity provision between these parties, and there is no special relationship between these parties, or any of them, which would support such a claim.

**FOR A SIXTH DEFENSE**

23. Marick and/or Thoennes's claims for indemnity against these Defendants must fail because of Marick and/or Thoennes's unclean hands.

**FOR A SEVENTH DEFENSE**

24. Upon information and belief, some or all of Marick and Thoennes's claims must be reduced or are barred by the applicable statute of limitations or statute of repose.

**FOR AN EIGHTH DEFENSE**

25. Upon information and belief, some or all of Marick and Thoennes's claims are barred by the doctrines of laches, waiver, and/or estoppel.

**FOR A NINTH DEFENSE**

26. Any claim by Marick and Thoennes for punitive damages against BFS cannot be sustained, because:
- a. any award of punitive damages under South Carolina law (1) without bifurcating the trial of all punitive damages issues; (2) for the purpose of compensating Marick and Thoennes for elements of damage not otherwise recognized by South Carolina law; (3) without proof of every element beyond a reasonable doubt; and/or (4) that is subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount on the amount of punitive damages that a jury may impose would violate BFS's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution;
  - b. an award of punitive damages under South Carolina law by a jury that (1) is not provided a standard of sufficient clarity for determining the appropriateness, or the appropriate size, of a punitive damages award, (2) is not instructed on the limits on punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages or determining the

amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the alleged corporate status of BFS, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to judicial review on the basis of objective standards, would violate BFS's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment, and by the South Carolina Constitution's provisions providing due process, equal protection, and a guaranty against double jeopardy;

- c. an award of punitive damages under state law without the same protections that are accorded to all criminal defendants, including protection against unreasonable searches and seizures, double jeopardy and self-incrimination and the rights to confront adverse witnesses, a speedy trial and the effective assistance of counsel would violate BFS's rights under the Fourteenth Amendment to the United States Constitution and the Fourth, Fifth, and Sixth Amendments as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and the rights to confront witnesses, a speedy trial and effective assistance of counsel and protection against unreasonable searches and seizures, double jeopardy, and compelled self-incrimination;
- d. any award of punitive damages based on anything other than BFS's conduct in connection with the specific incident that is the subject of this lawsuit would violate

the due process clause of the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and a guaranty against double jeopardy, because any other judgment for punitive damages in this case cannot protect BFS against impermissible multiple punishment for the same wrong.

**FOR A TENTH DEFENSE**

27. Upon information and belief, any right to recover damages against BFS is barred by the independent and intervening negligent actions of others.

**FOR AN ELEVENTH DEFENSE**

28. Upon information and belief, Marick and Thoennes's right to recover damages from BFS is barred, in whole or in part, due to Marick and Thoennes's and/or Plaintiffs' failure to mitigate damages.

**FOR A TWELFTH DEFENSE**

29. Marick and Thoennes's right to recover damages from these Defendants is barred, in whole or in part, by operation of the economic loss doctrine.

**FOR A THIRTEENTH DEFENSE**

30. BFS specifically plead and incorporate herein the terms of any limitations of remedy in any applicable warranty, if any, in bar of any recovery.

**FOR A FOURTEENTH DEFENSE**

31. If work performed or products supplied by BFS was defective, which is denied, failure to give reasonable notice is pled in bar of any recovery under a warranty claim and otherwise.

**FOR A FIFTEENTH DEFENSE**

32. Upon information and belief, Marick and Thoennes's right to recover damages from BFS is barred, in whole or in part, due to Marick and Thoennes's and/or Plaintiffs' spoliation of evidence.

**FOR A SIXTEENTH DEFENSE**

33. BFS performed its work in conformance with the applicable plans and specifications, and thus Marick and Thoennes's claims are barred or limited by operation of the *Spearin* doctrine.

**FOR AN ADDITIONAL DEFENSE**  
(Reservation/Non-Waiver and Adoption)

34. BFS specifically reserves any additional defenses, including affirmative defenses, as may be available or revealed to it during the course of its investigation and/or discovery in the case, and as are consistent with the South Carolina Rules of Civil Procedure. Further, BFS adopts by reference all defenses, including affirmative defenses, where relevant and consistent with its position, as alleged by other defendants in this action.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS-CLAIM**  
**BY BFS AGAINST CARL CATOE CONSTRUCTION, INC.**

35. BFS repeats its foregoing allegations, where consistent with the relief claimed herein.
36. During the times relevant hereto, BFS was operating under the laws of the State of South Carolina and was in the business of selling building materials, including installed sales.
37. Defendant Carl Catoe Construction, Inc. ("Catoe") is a company operating under the laws of the State of South Carolina, doing business in Oconee County, and at times relevant hereto performed framing, installed windows and doors, and installed siding and trim, among other things, at Plaintiffs' property.



38. This Court has jurisdiction over the parties hereto and the subject matter hereof.
39. Venue is proper in Oconee County.
40. Defendants Marick and Thoennes have alleged various causes of action against BFS arising out of alleged defects in work and materials provided for Plaintiffs' property at Stoneledge at Lake Keowee.

**FOR A FIRST CAUSE OF ACTION BY WAY OF CROSS-CLAIM**  
**AGAINST DEFENDANT CATOE**  
**(Contractual Indemnification)**

41. BFS repeats its foregoing allegations, where consistent with the relief claimed herein.
42. At times material to the subject matter of Marick and Thoennes's Cross-Claims, including all amendments, Defendant Catoe was a party to a Subcontractor Agreement with BFS, whereby Catoe agreed to indemnify, defend, and hold harmless BFS from claims such as those made by Marick and Thoennes as relates to work of Catoe.
43. Marick and Thoennes's claims against BFS relate to work performed and materials provided by Catoe, and as such BFS is entitled to be held harmless and indemnified, pursuant to the terms of Catoe's contract with BFS, for defense costs (including attorney fees), as well as any and all sums paid in settlement of Marick and Thoennes's and/or Plaintiffs' claims or pursuant to a verdict, order, judgment, or similar instrument, and for any such other liability as BFS might incur as a result of the work performed and materials provided by Catoe.

**FOR A SECOND CAUSE OF ACTION BY WAY OF CROSS-CLAIM**  
**AGAINST DEFENDANT CATOE**  
**(Equitable Indemnification)**

44. BFS repeats its foregoing allegations, where consistent with the relief claimed herein.
45. BFS relied upon Catoe to perform work and provide materials consistent with industry standards, in a workmanlike manner, and following the applicable building codes.

46. Marick and Thoennes have asserted cross-claims against BFS, alleging, *inter alia*, defects related to work performed and materials supplied by Catoe.
47. As a result of the foregoing, BFS has been required to defend this action and incur attorneys' fees and costs and uncertain liability exposure.
48. If BFS is found liable on any ground related to defects in work performed and/or materials supplied by Catoe, the fault would lie entirely with Catoe, and BFS's liability would be secondary and passive.
49. In spite of the foregoing, BFS has nevertheless been involved in this litigation and forced to incur damages, including but not limited to attorneys' fees and costs and uncertain liability exposure.
50. A special relationship existed between BFS and Catoe.
51. BFS is therefore entitled to full indemnification from Catoe for any liability which may be imposed on BFS, or which it pays in settlement of Marick and Thoennes's and/or Plaintiffs' claims, which relates to any of Catoe's work and/or materials, as outlined above, including recovery of reasonable attorneys' fees and costs incurred in the defense of this lawsuit.

**FOR A THIRD CAUSE OF ACTION BY WAY OF CROSS-CLAIM**  
**AGAINST DEFENDANT CATOE**  
**(Negligence)**

52. BFS repeats its foregoing allegations, where consistent with the relief claimed herein.
53. Marick and Thoennes have asserted cross-claims against BFS, alleging, *inter alia*, defects related to work performed and materials supplied by Catoe.
54. BFS contracted with Catoe to perform framing, install windows and doors, and install siding and trim, among other things, for Plaintiffs' property.

55. While supplying labor and/or materials for use in the construction of Plaintiffs' property, Catoe owed BFS a duty to exercise due care and to perform its work and supply materials in a manner consistent with, among other things, product specifications, industry standards, and codes requirements.
56. To the extent the allegations in Marick and Thoennes's Cross-Claims, including any amendments, as relate to alleged defects in the work and/or materials of Catoe are proven true, then Catoe was negligent, grossly negligent, willful and wanton in the performance of its work and/or as to materials supplied, and BFS is therefore entitled to judgment against Catoe in the amount of any sums BFS pays Marick and Thoennes and/or Plaintiffs pursuant to judgment, settlement, or otherwise, to include the costs associated with defending itself in this action, including attorney fees, as well as such other relief as the court may find proper.

**FOR A FOURTH CAUSE OF ACTION BY WAY OF CROSS-CLAIM**  
**AGAINST DEFENDANT CATOE**  
**(Breach of Contract)**

57. BFS repeats its foregoing allegations, where consistent with the relief claimed herein.
58. Marick and Thoennes have asserted cross-claims against BFS, alleging, *inter alia*, defects related to work performed and materials supplied by Catoe.
59. BFS contracted with Catoe to perform framing, install windows and doors, and install siding and trim, among other things, for Plaintiffs' property.
60. To the extent the allegations in Marick and Thoennes's Cross-Claims, including any amendments, as relate to alleged defects in the work and/or materials of Catoe are proven true, then Catoe breached its contract with BFS, and BFS is therefore entitled to judgment against Catoe in the amount of any sums BFS pays Marick and Thoennes and/or Plaintiffs

pursuant to judgment, settlement, or otherwise, to include the costs associated with defending itself in this action, including attorney fees, as well as such other relief as the court may find proper.

**FOR A FIFTH CAUSE OF ACTION BY WAY OF CROSS-CLAIM**  
**AGAINST DEFENDANT CATOE**  
**(Breach of Warranties)**

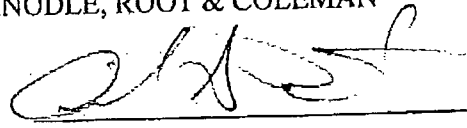
61. BFS repeats its foregoing allegations, where consistent with the relief claimed herein.
62. Marick and Thoennes have asserted cross-claims against BFS, alleging, *inter alia*, defects related to work performed and materials supplied by Catoe.
63. BFS contracted with Catoe to perform framing, install windows and doors, and install siding and trim, among other things, for Plaintiffs' property.
64. Catoe expressly and/or impliedly warranted that its work would be performed in a careful, diligent, and workmanlike manner, that its work would be of proper workmanship and reasonably fitted for the intended purpose.
65. To the extent the allegations in Marick and Thoennes's Cross-Claims, including any amendments, as relate to alleged defects in the work and/or materials of Catoe are proven true, then Catoe breached its express and/or implied warranties, and BFS is therefore entitled to judgment against it in the amount of sums BFS pays Marick and Thoennes and/or Plaintiffs pursuant to judgment, settlement, or otherwise, and to include the costs associated with defending itself in this action, including attorney fees, as well as such other relief as to the court may find proper.

WHEREFORE, having fully answered the Answer and Cross-Claims of Marick and Thoennes and asserted Cross-Claims against Catoe, BFS demands a trial by jury and prays that the

Cross-Claims of Marick and Thoennes be dismissed, with costs, that BFS be granted the relief prayed for in its Cross-Claims against Catoe, and for such other relief as the Court may deem proper.

KERNODLE, ROOT & COLEMAN

By:



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GROUP, LLC AND MIKE GREENE

Charleston, South Carolina

April 20 2012

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, the attached *Builders FirstSource - Southeast Group, LLC's Answer to Marick Home Builders, LLC and Rick Thoennes Answer and Cross-Claim* was served by Email and/or U.S. Mail, as indicated below, to the following:

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LLC**

April 20, 2012

  
David A. Root

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE )

C.A. No.: 2009-CP-37-0652

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

Plaintiffs,

vs.

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

Defendants

**DEFENDANTS CLEAR VIEW CONSTRUCTION  
LLC AND MICHAEL FRANZ'S ANSWER TO  
PLAINTIFFS' THIRD AMENDED COMPLAINT**

Defendants Clear View Construction, LLC ("Clear View") and Michael Franz (hereinafter collectively referred to as "Defendants") answer Plaintiffs' Third Amended Complaint as follows:

#### **FIRST DEFENSE**

##### **(Paragraphs 1 through 55 Respond to Plaintiffs' Class Allegations and Factual Allegations)**

1-3. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraphs 1 through 3 and therefore deny same.

4. Paragraph 4 is admitted upon information and belief.

5. The allegations in Paragraph 5 contain legal conclusions and therefore, no response is required. To the extent a response is required, Defendants deny the allegations contained in Paragraph 5.

6. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraph 6 and therefore deny same.

7. The allegations in Paragraph 7 contain legal conclusions and therefore, no response is required. To the extent a response is required, Defendants deny the allegations contained in Paragraph 7.

8-24. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraphs 8 through 24 and therefore deny same.

25. Defendants deny Clear View currently exists under the laws of the State of South Carolina. Clear View was dissolved March 10, 2009, as recorded in the South Carolina Secretary of State's Business Filings database. Defendants admit upon information and belief that they conducted business in Oconee County during the construction of the townhomes

located in Phase I and Phase II of the Stoneledge at Lake Keowee townhome community (the "Project"), and that they provided stone work for some phase of the Project. Defendants specifically deny any wrongdoing in association with services performed for or at the Project, and to the extent the allegations of Paragraph seek to impose liability on Defendants, those allegations are specifically denied.

26. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraph 26 and therefore deny same. Moreover, Defendants specifically deny any wrongdoing in association with services performed for or at the Project.

27-39. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraphs 27 through 39 and therefore deny same.

40. To the extent Paragraph 40 references the Third-Party Complaint of Defendant Marick, Defendants refer to that document for a full and complete recitation of all allegations contained therein, and to the extent the allegations of this Paragraph are inconsistent therewith, Defendants deny same. Defendants also deny all allegations in this Paragraph which relate to or seek to impose liability on Defendants.

41. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraph 41 and therefore deny same.

42. The allegations in Paragraph 42 contain a legal conclusion and therefore, no response is required. To the extent a response is required and the allegations relate to or seek to impose liability on Defendants, those allegations are denied.

43. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraph 43 and therefore deny same.

44-46. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraphs 44 through 46 and therefore deny same.

47. Paragraph 47 does not state allegations and therefore does not require a response.

48. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraph 48 and therefore deny same.

49. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraph 49 and therefore deny same.

50-61. The allegations in these Paragraphs do not pertain to Defendants and therefore do not require a response. Moreover, to the extent these Paragraphs contain legal conclusions, no response is required thereto. To the extent a response is required, the allegations in Paragraphs 50-61 are denied. Defendants lack sufficient information to form a belief as to the allegations contained in Paragraphs 50-61 and therefore deny same.

61-69. Defendants deny any allegations in this Paragraph that relate to or suggest liability on the part of Defendants. Defendants lack sufficient information to form a belief as to the remaining allegations contained in Paragraphs 61-69 and therefore deny same.

**As to the First Cause of Action**  
**(Breach of Warranty: Developers)**

70. Defendants reassert their responses set forth above as if set forth herein verbatim.

71-74. The allegations in Paragraphs 71 through 74 are not directed toward Defendants, and therefore no response by Defendants is required. However, to the extent that a response is required, Defendants deny any allegations of these Paragraphs that relate to or suggest liability on the part of the Defendants.

**As to the Second Cause of Action**  
**(Negligence: Developers)**

75. Defendants reassert their responses set forth above as if set forth herein verbatim in response to Paragraph 75.

76-80. The allegations in Paragraphs 76 through 80 are not directed toward Defendants, and therefore no response by Defendants is required. However, to the extent that a response is required, Defendants deny any allegations of these Paragraphs that relate to or suggest liability on the part of the Defendants.

**As to the Third Cause of Action**  
**(Breach of Fiduciary Duty: Developers)**

81. Defendants reassert its responses set forth above as if set forth herein verbatim in response to Paragraph 81.

82-86. The allegations in Paragraphs 82 through 86 are not directed toward Defendants, and therefore no response by Defendants is required. However, to the extent that a response is required, Defendants deny any allegations of these Paragraphs that relate to or suggest liability on the part of the Defendants.

**As to the Fourth Cause of Action**  
**(Breach of Warranty: Contractors and Subcontractors)**

87. Defendants reassert their responses set forth above as if set forth herein verbatim in response to Paragraph 87.

88. In response to allegations of Paragraph 88, Defendants crave reference to South Carolina law for any warranties implied thereunder. To the extent the allegations of Paragraph 88 seek to impose liability on Defendants, those allegations are specifically denied.

89. To the extent the allegations in Paragraph 89 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 89.

90. To the extent the allegations in Paragraph 90 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 90.

91. To the extent the allegations in Paragraph 91 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 91.

**As to the Fifth Cause of Action**  
**(Negligence: Contractors and Subcontractors)**

92. Defendants reassert their responses set forth above as if set forth herein verbatim in response to Paragraph 92.

93. To the extent the allegations in Paragraph 93 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 93.

94. To the extent the allegations in Paragraph 94 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 94.

95. To the extent the allegations in Paragraph 95 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants crave reference to the specific building codes and South Carolina law for standards imposed thereunder as referenced



in the allegations of Paragraph 95. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 95.

96. To the extent the allegations in Paragraph 96 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 96.

97. To the extent the allegations in Paragraph 97 pertain to or seek to impose liability upon Defendants, those allegations are specifically denied. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 97.

**As to the Sixth Cause of Action**  
**(Negligence: MPA-Architect)**

98. Defendants reassert their responses set forth above as if set forth herein verbatim in response to Paragraph 98.

99-100. The allegations in Paragraphs 99 through 100 do not pertain to Defendants, and therefore no response is required. To the extent any of the allegations in Paragraphs 99 through 100 pertain to or seek to impose any liability on Defendants, those allegations are specifically denied.

**As to the Seventh Cause of Action**  
**(Breach of Express and Implied Warranty: MPA-Architect)**

101. Defendants reassert their responses set forth above as if set forth herein verbatim in response to Paragraph 101.

102-104. The allegations in Paragraphs 102 through 104 do not pertain to Defendants, and therefore no response is required. To the extent any of the allegations in Paragraphs 102 through 104 pertain to or seek to impose any liability on Defendants, those allegations are specifically denied.

105. Defendants deny each and every allegation of Plaintiffs' Third Amended Complaint not hereinabove specifically admitted.

**FOR A SECOND DEFENSE**  
**(Rule 12(b)(6), SCRCP – Failure to State Claim)**

106. With regard to some or all causes of action appearing in the Third Amended Complaint, the Third Amended Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted and thus, those causes of action should be dismissed.

**FOR A THIRD DEFENSE**  
**(Attorney's Fees Not Recoverable)**

107. With regard to some or all of the causes of action appearing in the Third Amended Complaint, the Third Amended Complaint fails to state facts sufficient to constitute causes of action on which the recovery of attorney's fees are allowed.

**FOR A FOURTH DEFENSE**  
**(Alleged Damages Caused by Third-Party)**

108. Some or all damages allegedly sustained by Plaintiffs (the existence of such damages being denied) were a direct or proximate result of the acts or omissions of another party or parties over whom Defendants had no control or duty to control. Defendants plead the acts of another party or parties as a complete defense to all claims.

**FOR A FIFTH DEFENSE**  
**(Intervening Causes)**

109. Some or all damages allegedly sustained by the Plaintiffs (the existence of such damages being denied) were a proximate result of one or more independent, efficient, intervening causes which the Defendants plead as a bar to this action.

**FOR A SIXTH DEFENSE**  
**(Punitive Damages)**

110. Punitive damages as currently awarded in the State of South Carolina are violative of the United States and South Carolina Constitutions.

**FOR A SEVENTH DEFENSE**  
**(Economic Loss Rule)**

111. Plaintiffs' claims against Defendants may be barred by the economic loss doctrine.

**FOR A EIGHTH DEFENSE**  
**(Waiver and/or Estoppel)**

112. Plaintiffs' claims are barred by the doctrines of waiver and/or estoppel.

**FOR A NINTH DEFENSE**  
**(Statute of Limitations)**

113. Plaintiff's claims are barred by the applicable statute of limitations.

**FOR A TENTH DEFENSE**  
**(Spoliation)**

114. To the extent Plaintiffs fail to preserve relevant evidence, Plaintiffs' claims are barred in whole or in part by the doctrine of spoliation of evidence.

**FOR A ELEVENTH DEFENSE**  
**(Contract Defenses)**

115. Defendants specifically deny that any contract or agreement existed between Defendants and Plaintiffs. However, to the extent it is determined that a contract or agreement did exist, Defendants reserve the right to rely on all applicable contractual defenses, including any limitations of warranties.

**FOR A TWELFTH DEFENSE**  
**(Failure to Mitigate)**

116. Plaintiffs' claims may be barred in whole or in part because of Plaintiffs' or their agents' failure to mitigate damages.

**FOR A THIRTEENTH DEFENSE**  
**(Plaintiffs' Own Negligence)**

117. Plaintiffs' own negligence, gross negligence, recklessness or "willfulness contributed to their damages in a manner that should reduce or completely bar any award in this matter.

**FOR A FOURTEENTH DEFENSE**  
**(Additional Affirmative Defenses)**

118. To the extent not inconsistent herewith, Defendants incorporate each and every affirmative defense plead by any other Defendant that may apply to Plaintiffs' claims against Defendants.

**FOR A FIFTEENTH DEFENSE**  
**(Arbitration)**

119. Defendants reserve all rights they may have to demand binding arbitration.

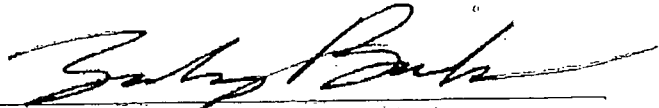
**FOR A SIXTEENTH DEFENSE**  
**(Additional Defenses)**

120. Defendants reserve the right to move to amend their Answer to assert any other defenses that become available pursuant to discovery or other fact investigation.

WHEREFORE, Defendants pray that Plaintiffs' Third Amended Complaint be dismissed with costs, for a jury trial, and for such other and further relief as the Court deems just and proper.

April 25, 2012

By:



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I, the undersigned, hereby certify that I have this date, mailed by US mail a copy to counsel for Plaintiffs and via electronic mail a true and correct copy of the foregoing document to the following counsel of record:

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This 25 day of April, 2012  
Spartanburg, SC

By: Michelle Moorey  
Michelle Moorey, Legal Assistant



|    |                                   |   |                                      |
|----|-----------------------------------|---|--------------------------------------|
| 1  | State of South Carolina           | ) | In the Court of Common Pleas         |
| 2  | County of Oconee                  | ) | Case No: 2009-CP-37-00652            |
| 3  |                                   | ) |                                      |
| 4  |                                   | ) |                                      |
| 5  | Stoneledge at Lake Keowee Owners' | ) |                                      |
|    | Assn, Inc., C. Dan Carson,        | ) |                                      |
| 6  | Jeffrey J. Dauler, Joan W.        | ) |                                      |
|    | Davenport, Michael Furnari, Donna | ) |                                      |
| 7  | Furnari, Jessy B. Grasso, Nancy   | ) |                                      |
|    | E. Grasso, Robert P. Hayes, Lucy  | ) |                                      |
| 8  | H. Hayes, Ty Hix, Jennifer D.     | ) |                                      |
|    | Hix, Paul W. Hund, III, Ruth E.   | ) |                                      |
| 9  | Isaac, Michael D. Plourde, Mary   | ) |                                      |
|    | Lou Plourde, Carol C. Pope,       | ) |                                      |
| 10 | Steven B. Taylor, Bette J.        | ) |                                      |
|    | Taylor, and Robert White,         | ) |                                      |
| 11 | Individually and on behalf of all | ) | Transcript of Record                 |
|    | others similarly situated,        | ) |                                      |
| 12 |                                   | ) |                                      |
|    | Plaintiffs,                       | ) |                                      |
| 13 |                                   | ) |                                      |
|    | -vs-                              | ) |                                      |
| 14 |                                   | ) |                                      |
|    | IMK Development Co., LLC, Keowee  | ) |                                      |
| 15 | Townhouses, LLC, Ludwig           | ) | Motions Hearing before the Honorable |
|    | Corporation, LLC, SDI Funding,    | ) | Alexander S. Macaulay                |
| 16 | LLC, Medallion at Keowee, LLC,    | ) | September 5, 2012                    |
|    | Bradford D. Seckinger, John       | ) | Walhalla, SC                         |
| 17 | Ludwig, Larry D. Lollis, William  | ) |                                      |
|    | C. Cox, Integrays Keowee          | ) |                                      |
| 18 | Development, LLC, Marick Home     | ) |                                      |
|    | Builders, LLC, M Group            | ) |                                      |
| 19 | Construction and Development,     | ) |                                      |
|    | LLC, Bostic Brothers              | ) |                                      |
| 20 | Construction, Inc., Rick          | ) |                                      |
|    | Thoennes, Mel Morris, Joe Bostic, | ) |                                      |
| 21 | Jeff Bostic, Clear View           | ) |                                      |
|    | Construction, LLC, Michael Franz, | ) |                                      |
| 22 | MHC Contractors, Miguel Porras    | ) |                                      |
|    | Chonocoas, Builders First Source  | ) |                                      |
| 23 | Southeast Group, Mike Green,      | ) |                                      |
|    | Southern Concrete Specialties,    | ) | Reported by:                         |
| 24 | Carl Compton d/b/a Compton        | ) |                                      |
|    | Enterprise a/k/a Compton          | ) |                                      |
| 25 | Enterprises, Gunter Heating &     | ) | Robin Sue Hild, FCRR, RPR            |
|    | Air, All Pro Heating, A/C &       | ) | 10th Circuit Court Reporter          |

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|    | Waterproofing, Heyward Electrical | ) |
| 2  | Services, Inc., Tinsley           | ) |
|    | Electrical, LLC, Hutch N Son      | ) |
| 3  | Construction, Inc., Carl Catoe    | ) |
|    | Construction, Inc., T.G.          | ) |
| 4  | Construction, LLC, Delfino        | ) |
|    | Construction, Francisco Javier    | ) |
| 5  | Zarate d/b/a Zarate Construction, | ) |
|    | Alejandro Avalos Cruz, Herberto   | ) |
| 6  | Acros Hernandez, Martin           | ) |
|    | Hernandez-Aviles, Francisco       | ) |
| 7  | Javier Zarate d/b/a Zarate        | ) |
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|    | Martin Hernandez-Aviles,          | ) |
| 9  | Francisco Villalobos Lopez,       | ) |
|    | Ambrosio Martínez-Ramírez, Ester  | ) |
| 10 | Moran Mentado, Socorro Castillo   | ) |
|    | Montel, Upstate Utilities, Inc.,  | ) |
| 11 | Southern Basements, Inc., MJG     | ) |
|    | Construction and Homebuilders,    | ) |
| 12 | Inc., d/b/a MJG Construction,     | ) |
|    | KMAC, Inc., d/bb/a KMAC North     | ) |
| 13 | Carolina, Eufacio Garcia, Everado | ) |
|    | Jaramillo, Garcia Parra           | ) |
| 14 | Insulation, Inc., J&J             | ) |
|    | Construction, Jose Nino, Jose     | ) |
| 15 | Manuel Garcia, Eason              | ) |
|    | Construction, Inc., and Vincent   | ) |
| 16 | Morales d/b/a Morales Masonry,    | ) |
|    | Miller/Player & Associates,       | ) |
| 17 |                                   | ) |
|    | Defendants.                       | ) |
| 18 |                                   | ) |
|    |                                   | ) |
| 19 |                                   | ) |
|    |                                   | ) |
| 20 |                                   | ) |
|    |                                   | ) |
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|    |                                   | ) |
| 24 |                                   | ) |
| 25 |                                   | ) |

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| 4  |                                                                                                            | Curt Martin, Esq.<br>For Jose Nino                     |
| 5  | Anne Culbreath, Esq.<br>For Vincente Morales d/b/a Morales Masonry                                         | Drew Williams, Esq.<br>For Martin Hernandez-Aviles     |
| 6  |                                                                                                            |                                                        |
| 7  | Grayson Smith, Esq./Shelley Montague<br>For Hutch N Son Construction                                       | John Harjehausen, Esq.<br>For Heyward Electrical       |
| 8  | Lindsay Terrell, Esq.<br>For T.G. Construction                                                             | Charles Blackburn, Esq.<br>For Tinsley Electric        |
| 9  |                                                                                                            | Andrew Carson, Esq.<br>For Alejandro Cruz              |
| 10 | Greg Horton, Esq./Batten Farrar, Esq.<br>Duffie Powers, Esq./Ron Tate, Esq.<br>For Carl Catoe Construction |                                                        |
| 11 |                                                                                                            | Erin Culbertson, Esq.<br>Medallion @ Keowee/Seckinger  |
| 12 | Lawrence B. Orr, Esq.<br>For Miller/Player & Assoc.                                                        | Ed Buckley, Esq.<br>For Everado Jaramillo              |
| 13 | Mason A. Goldsmith/Jay Anthony, Esqs.<br>For Southern Concrete Specialties                                 |                                                        |
| 14 |                                                                                                            | Frank Mack, Esq.<br>For SDI Funding                    |
| 15 |                                                                                                            |                                                        |
| 16 | Cynthia B. Brown, Esq.<br>For IMK, IK, Bill Cox, and Larry Lollis                                          |                                                        |
| 17 | Melissa M. Nichols, Esq.<br>For Clear View Construction/Franz                                              |                                                        |
| 18 | David Root<br>For Mike Green and Builders                                                                  | Alan Belcher, Esq.<br>For Bostic Brothers Construction |
| 19 | FirstSource Southeast Group                                                                                | Chad E. Poteat, Esq.<br>For Eason Construction         |
| 20 | Cynthia Buck Brown<br>For IMK Development Co., et al.                                                      | Geoff Gibbon, Esq.<br>For Socorro Castillo Montel      |
| 21 |                                                                                                            |                                                        |
| 22 | Eric W. Rowell<br>For Herberto Acros Hernandez                                                             | S. Markey Stubbs, Esq.<br>For Upstate Utilities        |
| 23 | D. Andrew Williams<br>For Martin Hernandez-Aviles                                                          | Jason F. Ward<br>For Ester Mentado                     |
| 24 |                                                                                                            |                                                        |
| 25 | Roy Hemphill, Esq.<br>For M Group                                                                          | Jared Garraux<br>For Ludwig Corporation                |

I N D E X

|                              | <u>Page</u> |
|------------------------------|-------------|
| Motions Hearing.....         | 5           |
| Certificate of Reporter..... | 219         |

E X H I B I T S

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>PAGE</u> |
|------------|--------------------|-------------|
|------------|--------------------|-------------|

There were no exhibits  
entered into evidence during this hearing.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: If y'all would forgive me, I'm going to  
2 call the case of Stoneledge at Lake Keowee Owners  
3 Association, et al., versus IMK Development, et al. This is  
4 Case No. 2009-CP-37-00652. And I hope everybody is here.  
5 It looks like we've got a full day.

6 To start off, I think after my first hearing or  
7 series of hearings in this case I discovered something that  
8 I wasn't aware of before. One of the Plaintiffs is  
9 originally from Walhalla -- in fact, lived up the street  
10 from us when we lived here in Walhalla and were friends of  
11 our children. She and her husband now live in California  
12 and I can't even think of her name. I could see if  
13 maybe -- a caption.

14 But anyway, I think -- I had my law clerk, former  
15 law clerk e-mail everyone involved because if you do feel  
16 there might be a potential conflict or any concern  
17 whatsoever, you will not be heard in my courtroom.  
18 (Laughter.) But the more important thing is, and I think  
19 we all know that, is that we have parties and clients to  
20 represent, and it's their comfort that we are -- or their  
21 confidence that we are most concerned about.

22 I have not heard from anybody about any objections;  
23 however, I would like -- if there is any, I guess, just  
24 raise your hand and I'll recognize you, or if you have any  
25 questions about any sort of effect.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 All right. It's Jennifer D. Hix, H-i-x, and her  
2 husband, of course, is from California, but she was  
3 originally from here; but, as I say, if there's any -- and  
4 I trust y'all have discussed this matter if you felt it was  
5 necessary with your clients because obviously it is their  
6 decision.

7 Now, does anybody have any questions or does  
8 anybody want to make a request, please let me know.

9 (WHEREUPON there was no response.)

10 THE COURT: Very well. All right. I take that as  
11 I will proceed as I have been.

12 All right. Madam Clerk, what's the first motion we  
13 have?

14 THE CLERK: Just to make sure that everyone is on  
15 the same page, I received a memo from Mr. Lyles' paralegal,  
16 and she had indicated that everyone -- and I think she  
17 copied everyone on the e-mail as to the order that we were  
18 going to proceed today.

19 Is everybody on board with that?

20 (WHEREUPON there was no response.)

21 THE CLERK: Okay. So we're going to proceed.

22 THE COURT: All right. According to the schedule  
23 here?

24 THE CLERK: Yes, sir. The first motion to be heard  
25 is Upstate Utilities' motion for separate trials and

1 bifurcation.

2 THE COURT: All right. Yes, sir. If you would  
3 please for the record just, and since we have so many, if  
4 you would announce yourself.

5 MR. STUBBS: Markey Stubbs with Baker Ravenel &  
6 Bender, represent Upstate Utilities. Your Honor, with this  
7 first motion, it's my understanding that the general  
8 contractor and the plaintiff are in agreement that they  
9 would willing to bifurcate Phase I or separate trials for  
10 Phase I and Phase II; and they're going to defer the issue  
11 of class certification. If that's the case, then my motion  
12 is not -- this motion is not necessary for me.

13 THE COURT: And who is on the other side?

14 MR. IMHOFF: Your Honor, Jason Imhoff. I represent  
15 Marick, the general contractors, in Phase II and  
16 potentially in Phase I.

17 THE COURT: And do you have any objection to  
18 bifurcation?

19 MR. IMHOFF: Yes, Your Honor. I haven't agreed to  
20 bifurcation in this case.

21 MR. STUBBS: I'm sorry. That was my understanding.  
22 My understanding the plaintiff does not disagree with it.  
23 Basically, Your Honor, in this action, we reasonably  
24 believe that we are entitled to separate trials with  
25 respect to Phase I and Phase II. The issues involved

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 involve totally different subcontractors in large part. So  
2 the confusion to the defendants would be overwhelming. So  
3 the request would be that there be separate trials between  
4 Phase I and Phase II.

5 My motion also requested bifurcation of the damage  
6 issues, but I have settled with the Plaintiff Medallion.  
7 The only claim that is left against me is Marick. So I am  
8 withdrawing that portion of my motion.

9 There is also an affidavit of Rhett Whitlock  
10 (phonetic) which outlines the difference between phases and  
11 work done and the different basis attached to that  
12 memorandum.

13 THE COURT: All right. What's your position on  
14 that? It's my understanding that you want to keep the two  
15 phases together?

16 MR. IMHOFF: Yes, Your Honor. And I don't know how  
17 you want to proceed logistically, but you can see probably  
18 six motions underneath this are just motions joining in the  
19 bifurcations. I don't know if you want to hear from the  
20 side that wants to bifurcate first and then hear our  
21 response or how you would like to proceed with that.

22 THE COURT: Well, I think I know what the position  
23 of the movant is. What's the position of the respondent?

24 MR. IMHOFF: Your Honor, just based on the case law  
25 that I have looked at, it looks like it is a fairly high



Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 standard to bifurcate; that a moving party for bifurcation  
2 would have to prove that the issues are so distinct that  
3 there would be no injustice in bifurcating the trials, and  
4 I'm not entirely certain that's correct.

5 As you are probably aware, the general contractor,  
6 my client, was involved in Phase I and Phase II. The  
7 developer that my client may or may not have been part --  
8 or may or may not get stuck with developer liability was  
9 part of both in Phase I and Phase II. The architect who  
10 designed the entire projects, designed both Phase I and  
11 Phase II. The Homeowners' Association is the same in Phase  
12 I and Phase II, and their damages -- or their allegations  
13 in construction defects, as well as their damages, have not  
14 been separated.

15 It is one document that says, Here are all the  
16 construction defects in the entire project, and then  
17 followed by one document that says, And to fix all of those  
18 construction defects it will cost this one amount of money.

19 So the question that I have or the reason that I  
20 cannot agree to it is, how can we separate these two phases  
21 when not only are the parties the same in both phases but  
22 the allegations are the same in both phases and the damages  
23 are the same in both phases?

24 And, if I may, one more thing. I don't want to  
25 belabor this because we'll be here all day -- and this is

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 probably not my most pressing motion -- but one of our  
2 defenses, for instance, to present you with an injustice  
3 that could occur to my client, is that there is a  
4 cross-claim or an allegation, and I think the Plaintiffs  
5 would make the same allegation, that the architect in this  
6 case failed in his design application. And because there  
7 are very, very similar construction defects or allegations  
8 of construction defects in Phase I and Phase II, there will  
9 certainly be evidence and testimony and an argument against  
10 the architect by all of the builders that this is the  
11 architect's fault.

12           The reason why you have two different phases with  
13 different subcontractors, yet you have the exact same  
14 issues in both phases is due to the architect's poor plans.  
15 And so if you separate these into two different phases, you  
16 cannot make -- my client will have a very difficult time,  
17 without potentially having some evidence excluded from the  
18 other trial, in showing the jury that, look how consistent  
19 the errors are from Phase I to Phase II, impliedly  
20 implicating the architect, or expressly implicating the  
21 architect.

22           And again, I'm not going to belabor it, but that is  
23 just one example of an injustice that could occur.

24           **THE COURT:** Very good. All right.

25           **MR. STUBBS:** Your Honor, you mentioned three

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 parties that he says has some uniformity. The separate  
2 trial issue has to do with the other however many people  
3 are listed here who have nothing to do with each others'  
4 project. We did no work on Phase I.

5 Similarly, none of the subcontractors overlap on  
6 the two complaints. He's saying the damages are the same,  
7 but construction methods are actually different. With  
8 respect to the sub-terrain, one was built with a port in  
9 place, the other was pulled up. There's also an issue of  
10 legal liability. One was arguably subject to the  
11 apportionment of post-2005, the other is not.

12 In the affidavit of Rhett Whitlock he goes through  
13 each of those. So his only complaint is he's only subject  
14 to two claims, I guess that's two insurance policies, but  
15 the truth is all the subcontractors are separate and should  
16 not be subjected to other subcontractors' work that is  
17 different.

18 **THE COURT:** Well, again, let me just, as far as the  
19 plaintiffs are concerned, what is the remedy that you seek?

20 **MR. LYLES:** Well, Mr. Imhoff is correct, that the  
21 scope of the work that's been built by our experts is  
22 similar with regard to both phases. And the way our expert  
23 priced the repair was based on the repair of the entire  
24 project. The defense witnesses actually broke that same  
25 scope of work up into two phases, the cost for Phase I and

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 the cost for Phase II. So from our perspective, even  
2 though the scope of work to repair is the same, we could  
3 easily segregate that out, which is what I've done as part  
4 of our efforts to mediate the case and whatnot, break it  
5 out on a per-unit basis..

6 THE COURT: But again, so that the plaintiffs are  
7 joined, the individual plaintiffs, homeowners, are joined  
8 as a collective body?

9 MR. LYLES: Yes, sir.

10 THE COURT: In other words, they're not seeking  
11 individual damages?

12 MR. LYLES: Well, they are seeking -- the  
13 Homeowners' Association, Stoneledge H.O.A., is seeking the  
14 costs involved in the repair of all of the units at  
15 Stoneledge including units in Phase I and in Phase II, and  
16 the H.O.A. is responsible for maintaining and ultimately  
17 effecting those repairs.

18 There is -- there are claims being asserted by  
19 individual unit owners, both from Phase I and Phase II, for  
20 loss of use.

21 MR. STUBBS: Those would be class matters that  
22 would be Class One from Phase I and Class Two from Phase  
23 II.

24 MR. HORTON: Your Honor?

25 THE COURT: Please identify yourself.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1           **MR. HORTON:** Your Honor, my name is Greg Horton, I  
2 represent Carl Catoe Construction. I'm the next lawyer  
3 down on the bifurcation motion. And just before you reach  
4 a decision, I would like to have a chance to speak.

5           **THE COURT:** All right.

6           And again, let's use the podium here. I think it  
7 would be easier on everybody.

8           **MR. HORTON:** Your Honor, I join in the motion to  
9 bifurcate on behalf of Carl Catoe, and I want to hand you a  
10 couple of things to help you visualize this that I think  
11 would be very helpful.

12          **THE COURT:** Very good.

13          **MR. HORTON:** (Handing the documents to the Court).  
14 Your Honor, this first map shows the geographical  
15 distinction between Phase I and Phase II. Phase II is in  
16 the red, Phase I is -- excuse me -- Phase I is in the red  
17 and Phase II is in the blue. The two phases are separated  
18 by a sloop. And we think of them as being distinct.

19          The second handout I want to give you also I think  
20 will help you visualize how distinct these two phases  
21 actually are. I'll give one to you and your clerk (handing  
22 the documents to the Court).

23          And, Your Honor, with this handout I want to  
24 emphasize, in addition to these phases being geographically  
25 distinct, they are distinct temporally. That is, Phase I

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 was started in 2002, Phase II was started in 2005. Because  
2 of that, most of the units in Phase I were completed before  
3 2005 whenever our State Legislature modified the  
4 contribution among joint tort-feasors act. Therefore, some  
5 or most of the units in Phase I would be subject to joint  
6 and several liability. Whereas my client, who is a Phase  
7 II contractor, is going to be able to argue the  
8 apportionment statute, whereby liability will be  
9 apportioned among the defendants. That's clear there's  
10 going to be apportion liability in Phase II.

11 So there's completely different laws that may apply  
12 to Phase I and Phase II. The building code is actually  
13 different between the Phase I and Phase II. The building  
14 code for Phase I was the 2000 International Residential  
15 Building Code and the building code for Phase II is the  
16 2003 code.

17 We've got different primary developers for Phase I  
18 and Phase II. We've got different general contractors and  
19 we have 14 subcontractors in Phase I who had absolutely  
20 nothing to do with Phase II and twenty-one subcontractors  
21 in Phase II who had absolutely nothing to do with Phase I.

22 Your Honor, if we combined this, we have the  
23 potential for confusing the jury; we have the potential for  
24 having a five-to-six-week trial that will unnecessarily  
25 burden the jurors, will cause witnesses and parties to sit

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 through weeks of testimony that has absolutely nothing to  
2 do with their work. And then most important, pursuant to  
3 Rule 42(b) -- and I've read the entire Wright Miller  
4 (phonetic) exposition of Rule 42(b). What that rule gives  
5 the Court the power to do is in the interests of justice  
6 separate a trial. And our greatest fear is that parties  
7 will be responsible or allegedly or adjudicated to be  
8 responsible for work which they had no hand in.

9           So we want to be very clear to make sure that the  
10 Phase II contractors and subcontractors don't get blamed  
11 for Phase I damage. Your Honor, that's why we think that  
12 bifurcation makes the most sense. I cannot imagine how  
13 unwieldy a five-to-six-week trial of both of these phases  
14 would be, the burden it would put on the jurors, the  
15 witnesses, and I believe it has a tremendous chance of  
16 being overturned on appeal if we were to combine this and  
17 try it together.

18           Thank you, Your Honor.

19           **THE COURT:** Thank you.

20           Anyone else?

21           **MR. STUBBS:** Your Honor, the only other thing that  
22 he brought in is the Hodgins was the expert that did  
23 testify that the damage was worse in one -- severity and  
24 frequency of damages were worse in one, so we're not  
25 dealing with identical damages, we are dealing with two

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 separate construction groups, two separate building codes,  
2 two separate law as far as how to apply responsibility  
3 between codefendants.

4 THE COURT: All right. Thank you.

5 Again, I'm going to have to ask the attorneys to  
6 identify themselves when they speak. The reason for that,  
7 this is almost like Voir Dire of a jury panel. I have to  
8 tell the, my jurors to, every time they respond to a  
9 question to give either their name or their number because  
10 that's the only way the court reporter can identify who is  
11 talking is by identification, even if you respond more than  
12 one time.

13 All right. Your name please, sir.

14 MR. ORR: If Your Honor please, my name is Lawrence  
15 Orr, I represent the architect Miller/Player & Associates.  
16 I on behalf of my client oppose the motion to bifurcate.  
17 The Homeowners' Association and the individual owners filed  
18 this as one suit, it's one Homeowners' Association  
19 representing the entire complex, both the units in Phase I  
20 and the units constructed later in Phase II.

21 The motion for class certification is for a class  
22 of the entire Homeowners' Association, owners in both  
23 phases, so that's a common issue.

24 Insofar as what Mr. Horton raised about different  
25 law applicable, joint and several liability under the



Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 pre-July of 2005 Phase I and apportion liability in Phase  
2 II, as I read the statute, the joint and several liability  
3 is no longer applicable and this apportion liability for  
4 any building that was -- the certificate of occupancy was  
5 issued after I think it was July 5 of 2005. Insofar as  
6 phase one is concerned, only about twelve or thirteen of  
7 the buildings have certificates of occupancy issued before  
8 July of 2005, all of the other units, the other -- the 37  
9 units in Phase I, so the other twenty-four would have been  
10 completed after joint and several liability was no longer  
11 the law.

12       So the jury, even if it's bifurcated, the jury is  
13 going to have to consider joint and several liability for  
14 some units and apportion liability for other units. That's  
15 not going to be any different if you have Phase II also.  
16 Miller/Player and Associates was the architect who prepared  
17 the plans for Phase I. When that developer was financially  
18 unable to complete it and IMK came in, Miller/Player was  
19 asked to revise the plans because of the changes in  
20 construction of Phase I and changes were made and those  
21 plans are essentially the same plans with some  
22 modifications were given to the contractor for Phase II.  
23 It's all one continuous stream, and I think it would be  
24 inequitable to my client to have to undergo two separate  
25 trials in this case. I don't think that it's going to

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 facilitate the jury understanding any more having it  
2 bifurcated or having it as all one trial. Thank you, sir.

3 THE COURT: You're welcome.

4 Yes, sir?

5 MR. BELCHER: Thank you, Your Honor. Alan Belcher  
6 for Bostic Construction, the Phase I general contractor,  
7 and I would just echo the statements made by Mr. Imhoff  
8 with regard to the difficulties of bifurcating this trial;  
9 but I think it cuts a different way for Bostic Construction  
10 in that it did only complete the certificate of occupancy  
11 on twelve units, maybe even eleven -- eleven or twelve that  
12 were actually sold under that developer, that the permit  
13 was pulled by Bostic Construction and completed and put  
14 into the stream of commerce. As a result of that Phase I  
15 and Phase II are almost impossible to try separately  
16 because Marick came in and did additional work to finish  
17 out Phase I. So Bostic Construction --

18 THE COURT: When you say finish out, you did  
19 complete the first twelve units?

20 MR. BELCHER: Well, we completed buildings, units  
21 one through thirty-seven to varying degrees. The permits  
22 that were pulled on eleven or twelve that were not sold by  
23 the Town Homes of Lake Keowee before they ran out of money,  
24 those twenty-five that were left, let's say there were  
25 twenty-five, those were re-permitted by Marick with

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 anywhere from 4,000 to, I believe, as high as maybe 60 or  
2 70,000 and maybe even more left on the value on the permits  
3 with Oconee County a couple years later.

4       You couple that with the fact that Marick in its  
5 most recent response in pleading to the Plaintiff's Amended  
6 Complaint, has filed a cross-claim back against Bostic  
7 Construction for any, I guess, indemnity or breaches of  
8 potential perspective purported warranty that it may have  
9 left behind when it had to leave the project because it  
10 wasn't getting paid. So we're going to be dealing with  
11 these issues in the trial; and I know that it's going to be  
12 dragging a whole lot of people along with us, but I think  
13 with that issue alone, and, you know, to reiterate the fact  
14 that we have one architect on this project, you have one  
15 scope of repair on this project for both phases, and now  
16 the expert for the plaintiffs will say the damage was worse  
17 in one phase than in the other, the scope of repair does  
18 not distinguish between the two as to what needs to be  
19 done.

20       So I think with those reasons, and also to the  
21 extent we have to address any joint and several liability  
22 issues, I think the easier remedy for that other than a  
23 bifurcation would probably be a predetermined special  
24 interrogatory on a verdict form as to who's liable for what  
25 under what law and allow the Court explain that to the jury

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 at the conclusion of the case.

2 Also, if you're going to have a five-week trial,  
3 that's shorter than two, four-week trials, which I think is  
4 ultimately what will probably happen in this. You would  
5 probably have a lot of duplication of testimony or, much  
6 worse, you might have testimony from one witness that the  
7 jury takes two different ways to the detriment of the  
8 general contractors in this case, so we cannot consent to  
9 bifurcation.

10 Thank you, Your Honor.

11 THE COURT: All right. Anyone else?

12 Yes, sir?

13 MR. HORTON: Greg Horton. Your Honor, I really  
14 don't blame the folks in Phase I from wanting to be joined  
15 with the folks in Phase II -- excuse me, Greg Horton, I  
16 apologize, for Catoe Construction.

17 The damage in Phase I is dramatically greater. And  
18 I'm sure that they would like the additional parties which  
19 exist in Phase II to be part of solving their problem. I'm  
20 going to hand you one more handout. This is the  
21 plaintiffs' expert, Derek Hodgins, and again he talks about  
22 the difference in the quality of damages between Phase I  
23 and Phase II. This is the second handout with regard to  
24 the difference in quality of damages.

25 THE COURT: I see. This is the same deponent?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. HORTON: Yes, Your Honor.

2 THE COURT: Right.

3 MR. HORTON: And he describes Phase I as a slam  
4 dunk. Phase II we believe is quite different as proven by  
5 the testimony of the plaintiffs' own expert. But again  
6 what I want to emphasize that 42(b) allows you to separate  
7 these to prevent an injustice; and we believe it would be  
8 an injustice to try to take the twenty-one subcontractors  
9 who had nothing to do with Phase I who were only working on  
10 Phase II and somehow or another looped them into some large  
11 liability verdict that covers Phase I and Phase II; that is  
12 to force them to be responsible to pay for work that they  
13 had nothing to do with.

14 And I also think as far as the unmanageability of  
15 the trials, a five-to-six-week trial is hardly something I  
16 could fathom as far as a competent juror could fathom. The  
17 risk of confusing jurors and losing jurors and so forth  
18 over that period ---

19 THE COURT: Just a moment.

20 Madam Clerk, how long was Judge Nicholson's case?

21 THE CLERK: It was a total of eight weeks.

22 MR. HORTON: Very difficult.

23 THE COURT: But I mean, in other words, I hate to  
24 say it, but apparently Oconee County citizens or jurors are  
25 not that experienced with long trials. In civil matters,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 not --

2 MR. HORTON: It would be hard on all those, Your  
3 Honor, no question about it.

4 THE COURT: In fact, what is it, in two years  
5 they'll put me down, I'll be 72. (Laughter.)

6 MR. LYLES: We'll try to get you out of here long  
7 before that, Judge.

8 THE COURT: I'm beginning to be a little bit  
9 concerned.

10 MR. HORTON: But even more important than that, I  
11 really can't -- I can't fathom placing my client, who had  
12 nothing to do with Phase I, at risk for the entire phase  
13 which is geographically distinct, separate as to times, has  
14 different applicable law. There's no question that if we  
15 separate Phase II out, we don't have any questions about  
16 whether there's gonna be allocated liability or joint and  
17 several liability. It's only one -- because all of Phase  
18 II was completed after 2005. We're all under the new  
19 apportion liability statute which we believe was fair to  
20 the defendants in the joint and several.

21 So, Your Honor, for a number of reasons, the  
22 greatest being the question of justice, we request that you  
23 bifurcate Phase I and Phase II. And I believe that with  
24 the exception of the parties -- with the exception of the  
25 architect of course, who -- and the general contractor,

## Stoneledge, etc., v: IMK, etc. -- September 5, 2012

1 Marick, who would love this to be one occurrence for a  
2 number of reasons -- everybody in this room, except for the  
3 three people you heard from against it, would be in favor  
4 of separating Phase I and Phase II.

5 THE COURT: Yes, ma'am?

6 MS. NICHOLS: Good morning, Your Honor. My name is  
7 Melissa Nichols with the Wilkes Law Firm. I represent  
8 Clear View Construction and Michael Franz. Clear View  
9 Construction was one of the two subcontractors involved in  
10 Phase II. Most of the arguments that I would make have  
11 already been made today, but we are in favor of bifurcated  
12 trials. There was a reference to a special verdict form or  
13 special interrogatories to the jury. And I can't fathom  
14 what a verdict form would look like if we were just to try  
15 to separate out the two phases, the different issues  
16 involved in the two phases, the different damages, the  
17 different subcontractors.

18 In discovery both the plaintiff and Marick, the  
19 general contractor for Phase II, admitted that they have no  
20 evidence that my clients did any work on Phase I. And, in  
21 fact, we already have the logistical issue at trial of the  
22 fact that my client only worked on certain units in Phase  
23 II, so we've already got to parse that out for the jury.  
24 So I just think logistically trying to try this case would  
25 be a nightmare if we had both phases together. And

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 considering the extent of the damages in Phase I -- and I  
2 know you don't have details in front of you -- but there's  
3 been a solid record that the damages in Phase I are much  
4 different than the damages in Phase II and are much more  
5 extensive; and I have concerns about a jury seeing  
6 photograph after photograph after photograph of damages of  
7 Phase I that really reflect nothing that is the work that  
8 my client performed and going back to the jury room after  
9 several weeks of trial and not being able to separate out  
10 the two phases in their mind.

11 THE COURT: Very good. Thank you, ma'am.

12 MS. NICHOLS: Thank you.

13 MR. MACK: Your Honor, Frank Mack. I represent SDI  
14 Funding and I'll be very brief. The claims against my  
15 client involve both phases, and I share in the comment that  
16 it would be unfair to try to separate them. I think the  
17 jury can handle these issues, and we oppose the motion to  
18 bifurcate.

19 Thank you.

20 MR. GOLDSMITH: Andy Goldsmith on behalf of  
21 Southern Concrete. We favor the bifurcation as a practical  
22 matter, Your Honor. With a witness on this witness stand  
23 who will be testifying, for example, about the construction  
24 of walls that are below grade in Phase I and then the same  
25 witness talking about the construction of walls that are



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 below grade in Phase II, and my folks had something to do  
2 with the waterproofing in Phase II. You can imagine the  
3 questions and you can imagine the cross-examination.

4 Now, are you talking about Phase I wall, or are you  
5 talking about Phase II? And this is going to be repeated  
6 over and over and over again. You might have windows as an  
7 issue in both of these units, but you've got different  
8 people installing different windows at different times  
9 where there are different problems manifested. And as a  
10 practical matter -- and we have worked with this thing now  
11 a couple of years -- it's difficult to keep what's going on  
12 in one phase, let alone in two phases, straight in your  
13 mind. And I just, I can't imagine what instructions Your  
14 Honor is going to have to give with each witness, both  
15 before and after the witness, to the jury so that they can  
16 understand and keep this straight and say it's almost like  
17 trying, you know, there is a common theme, two people have  
18 been murdered, but we're going -- you know, they're  
19 different and we're going to try them in the same  
20 courtroom. It's going to be a mess as a practical matter,  
21 and I don't think anyone in this room can deny that. They  
22 might want to bob and weave because they'd rather have it  
23 one way or the other. But when we get down to it, it will  
24 be a mess if it's not bifurcated.

25 THE COURT: Well, Mr. Goldsmith, isn't it true that

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 you'll have all -- regardless, how -- if you did bifurcate,  
2 you're still going to have the same problems even when you  
3 head into separate phases; are you not?

4 MR. GOLDSMITH: No, sir. Because if you are  
5 looking at Phase II -- just take any issue, my folks had  
6 something to do with elevated decks, you could think of  
7 them as balconies, that would come out from the main level  
8 in these townhouses that look out over Lake Hartwell. And  
9 so you've got a certain type of construction of those decks  
10 that is different than the construction in Phase I. We're  
11 in Phase II. I mean the nuts and bolts are different.

12 The testimony about what is wrong or not wrong and  
13 who caused the problem and so forth just on this one issue  
14 that I'm talking about is totally different testimony than  
15 about Phase I. Why is it different? Because it was built  
16 at different times by different people. And so you might  
17 be talking about decks, but every aspect of the issues  
18 involved and the construction methods is different. And  
19 you can just repeat that, whether it be weatherproof  
20 barrier, whether it be installation of windows or doors.

21 You know, at first blush you say both units may  
22 have issues about windows. But the particular issues and  
23 the evidence and the testimony will be totally different.  
24 So I just don't understand, if I'm sitting listening as a  
25 juror, you know, what are they talking about? It's just

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 not that simple. If you've got Phase I and Phase II, you  
2 understand that, okay, I'm dealing with Phase II, for  
3 example. And Phase II presents a lot cleaner issues than  
4 Phase I. You don't have the overlap that you have in Phase  
5 I, you don't have the legal issues and things of that  
6 nature and I can't help that.

7 But Phase II is a lot more straightforward in terms  
8 of presentation of the evidence and will be easier for a  
9 jury to understand. And then the risk is the jury just  
10 gets confused and they say, Well, you know, all the windows  
11 are bad. I've just -- I've decided all the window  
12 installation -- my folks didn't put those in, so I'm using  
13 that as something I'm not directly affected -- and so they  
14 say, Well, I've concluded that all of the window  
15 installation is improper. Well, what if that's not correct  
16 based upon the evidence? What if the windows in Phase II  
17 are not incorrectly installed? What if it's just merely a  
18 bleed-over as a result of confusion? That's the real  
19 danger here.

20 How do you keep it straight? What would be your  
21 job on a day-to-day basis during this trial, how are you  
22 going to possibly keep this straight in the jury's mind? I  
23 don't think you can do it. But it's fairly simple the  
24 other way. Certainly as to Phase II it is.

25 THE COURT: The more you talk, Mr. Goldsmith, the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 more I wish that the late Judge Epps was with us. He would  
2 have let it all in.

3 MR. GOLDSMITH: Let it all in and let the jury sort  
4 it out. I've heard that before. I've also heard I'll take  
5 care of you at the motion stage, too, but sometimes that  
6 didn't work either. (Laughter).

7 Thank you, Your Honor.

8 THE COURT: Yes, ma'am?

9 MS. BROWN: Thank you, Your Honor. Cynthia Brown,  
10 I represent IMK, IK, Bill Cox, and Larry Lollis. And  
11 just -- I feel like if I can lump into a category of not  
12 objecting to the bifurcation and now I stand up and say I  
13 do object to the bifurcation on behalf of my clients. They  
14 are involved in Phase I and Phase II. And while --

15 THE COURT: You do oppose?

16 MS. BROWN: I do oppose. And also would state that  
17 while this is a complicated case, keeping damages certain  
18 from Phase I and Phase II should be easily done by pictures  
19 and testimony from the experts and can be done, easier than  
20 from separating out developers, architects, contractors and  
21 plaintiffs that are all in both phases.

22 THE COURT: Very good.

23 MS. BROWN: Thank you.

24 THE COURT: Thank you.

25 MS. CULBERTSON: Good morning, Judge. Erin

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Culbertson. I represent Medallion at Keowee and Brad  
2 Seckinger. I just want to put on the record our opposition  
3 to motion to bifurcate. I certainly don't really want to  
4 try two cases. I don't ever really want to try one, but I  
5 certainly don't want to try it twice; and I think -- I'm  
6 one of the parties that would be stuck on both sides.

7 THE COURT: Very good. Thank you.

8 MR. GARRAUX: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. GARRAUX: Jared Garraux on behalf of Ludwig  
11 Corporation. I'm not going to beat a dead horse, but we do  
12 oppose the motion as well.

13 THE COURT: And who is your client again?

14 MR. GARRAUX: Ludwig Corporation. We are involved  
15 in both phases as well. Thank you.

16 THE COURT: Anyone else want to be heard on the  
17 motion to bifurcate?

18 MR. IMHOFF: Your Honor, Jason Imhoff for Marick  
19 again, and I'm not going to argue anymore. I think you  
20 heard enough. I just wanted -- you were given a handout  
21 and I think if you were to make this handout the law of the  
22 case, I would absolutely withdraw my disagreement with  
23 bifurcation. But I don't want this handout to go back  
24 without any objection to it because I don't think it  
25 accurately sets forth the facts of the case. And this is

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 the handout that was given to you by Mr. Horton.

2 And as you can see and as you have heard, it says  
3 Phase I joint and several liability for most Defendants,  
4 it's not all Defendants. It says Keowee Townhouses for  
5 Phase I was the developer. There are allegations, as you  
6 heard many people come up here and object, that my client,  
7 Marick, was the developers; IMK and IK was the developer;  
8 Ludwig Corporation, SDI Corporation, and many others were  
9 developers.

10 It says down here that Marick Homebuilders was the  
11 primary contractor for Phase II and Bostic was for Phase I.  
12 As you've heard earlier, that's not the allegations made by  
13 the plaintiffs. The plaintiffs have alleged that the  
14 Marick Homebuilders was the general contractor in Phase I  
15 and Phase II. So I don't know that adds anything to the  
16 arguments, I think you've heard enough arguments, but I  
17 didn't want this to go back if you were to look at it  
18 later --

19 THE COURT: Oh, I'm not ruling on evidence now. At  
20 best I would consider it as demonstrative.

21 MR. IMHOFF: There are -- as you heard, there are  
22 many different parties that are involved in both phases.  
23 Thank you, Your Honor.

24 MR. HORTON: Your Honor, can I say one more thing?

25 THE COURT: Go ahead.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. HORTON: Your Honor, I also think that some  
2 weight needs to be given to what the plaintiffs deserve and  
3 I believe he made his point clear that he sees a reason why  
4 this thing should be bifurcated. I believe he would say  
5 that the primary contractors is Bostic as the primary and  
6 Marick in two phases. And I believe that again one of the  
7 things that we don't want to have happen, whether we go  
8 through a three-week trial or six-week trial. I see this  
9 as a huge appealable issue. I would not want to spend this  
10 much time and energy into something -- glop this all into a  
11 Phase I and Phase II, and then know everybody is going to  
12 appeal this issue who is against it -- who is for the  
13 bifurcation, and here we wasted all the time and have to go  
14 try this thing again. I think it's a very, very serious  
15 issue on appeal.

16 MR. TERRELL: Your Honor --

17 THE COURT: Yes, sir?

18 MR. TERRELL: Lindsay Terrell, and I represent TG  
19 Construction, one of the Catoe subs, and I think I -- I  
20 mean, I've also joined in the motion and I just want to be  
21 heard on it quickly. I'm not going to add anything other  
22 than the fact that I can assure you that all fourteen of  
23 the Catoe subs who had nothing to do with Phase I join in  
24 the motion to bifurcate. We would all be painted with a  
25 brush that we had nothing to do with practically by the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 jury that heard this case.

2 For those reasons we join in the motion to  
3 bifurcate. You've got fourteen defendants here, as Catoe  
4 subs, who had nothing to do with Phase I, which is clearly  
5 the most severe of the two, and it just wouldn't be fair.

6 Thank you, Your Honor.

7 THE COURT: All right. Anything else?

8 (WHEREUPON there was no response.)

9 THE COURT: Reading Rule 42(b), obviously the  
10 controlling concern is for the -- not only convenience, but  
11 to avoid prejudice, but it requires bifurcation -- as I  
12 read the case law, that it has to be so distinct that there  
13 would be no, quote, overlapping.

14 Here, it's kind of like Popeye. This case is what  
15 it is. Even though it was built in phases and different  
16 contractors, architects, in other words, different parties,  
17 it is -- and different interests as far as what action was  
18 taken or not taken or as to each of the interests, I guess  
19 you would say, in this action -- but there is going to be  
20 overlapping. I don't think you can truly differ, even if  
21 we divide it into Phase I and Phase II, you're still going  
22 to have differences between the units there. I think it's  
23 obvious, looking at the schematic of the development  
24 itself, obviously you have different areas and different  
25 amenities and obviously different treatment. As I say,



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 even within the phases, you will have different issues.

2 I don't know that a bifurcation would lessen the  
3 burden on the Court to explain to the jury what they must  
4 do other than what is the general law as to liability and  
5 damages, if they find liability.

6 But more importantly, I don't know if this Court  
7 can lessen or ease any of your responsibility. Because  
8 you're going to have to make either, depending on what your  
9 place is, either make arguments that would include the ones  
10 you find at fault if you are plaintiffs, and also you're  
11 going to have to, in some fashion, defend your party from  
12 liability being found. So I think, if nothing else, what  
13 we have is a very complex problem.

14 And not to put too fine a point on it, it would  
15 take a Solomon to decide how to divide this project. So  
16 I'm going to have to deny your motion to bifurcate.

17 Now, I guess -- let me ask you this. As we go  
18 through these motions, how do you wish to proceed as far  
19 as, when a resolution is made, should I, who do I appoint?  
20 Somebody is going to draw the order on each motion or it  
21 could be collectively. But how -- is there any consensus  
22 among the major parties as to one person or one office or  
23 firm to draw orders or -- as the motions appear?

24 I mean, do you have any -- and again, when I say --  
25 what I meant -- think the record is going to have to speak

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 for itself, rather it's not going to be -- and of course  
2 unless I grant the motion such as a summary judgment,  
3 something of that nature, there will be no findings of  
4 fact, it would just be the fact that -- well I think when  
5 it's denied I think that's all that's necessary. So again  
6 I think the record will speak for itself.

7 Can you help me there in any fashion? Is somebody  
8 sort of the coordinator? Because somebody has to be in  
9 charge of depositions or scheduling or something for the  
10 two groups.

11 MR. STUBBS: Markey Stubbs, I believe that as the  
12 motions come up, since Jason opposed this motion so he  
13 would draft the order denying the motion.

14 THE COURT: Well, that's what I'm asking.

15 MR. STUBBS: And whoever does not prevail, that  
16 party -- or does prevail, that party accordingly would  
17 draft the motion.

18 THE COURT: All right. But say we have joint  
19 motions. I mean, we already -- again I've recognized you  
20 pretty much as the spokes -- the first in opposition.

21 MR. IMHOFF: Yes, sir.

22 THE COURT: Would that -- if there's no objection,  
23 then I will ask you to draw a short order denying  
24 bifurcation.

25 MR. IMHOFF: I don't have an objection. I'll be

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 happy to do it, Your Honor.

2 THE COURT: Very good. All right. I'll tell you  
3 what, and it might help things too, also inasmuch as you'll  
4 be submitting it to the Court to satisfy Rule 5. I trust  
5 y'all -- if you don't have a website, you all have a list  
6 serve or something that -- for this case, so, in other  
7 words, you just hit "all" when you transmit it to the  
8 Court.

9 MR. IMHOFF: Yes, Your Honor.

10 THE COURT: And that way that should satisfy Rule  
11 5. All right. And that will be the case on each unless  
12 there's some distinction.

13 And that's Mr. Imu; is that right?

14 MR. IMHOFF: Imhoff, Your Honor.

15 THE COURT: Imhoff. Excuse me. Very good,  
16 Mr. Imhoff. So you will do the order denying the  
17 bifurcation.

18 All right. What's the next series? We do have  
19 motions to dismiss and/or summary judgment, and this is to  
20 the contractors?

21 MR. STUBBS: Yes, Your Honor. I'm Markey Stubbs.  
22 I represent Upstate Utilities. You have numerous motions  
23 to dismiss and for summary judgment before you this  
24 morning. However, mine -- and with me is Hutch N Sons has  
25 joined in my motion. In this case we're a little bit

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 different because we settled with the plaintiff at  
2 mediation. We settled with the plaintiff, and after  
3 mediation we settled with Medallion. It was filed. It  
4 probably hasn't reached your file yet, the agreement and  
5 release -- which I circulated by e-mail to everyone --  
6 Robert has not had his client yet, but he was agreed to it  
7 and they're going to sign it and we're doing that  
8 stipulation of dismissal.

9 With respect to the Medallion claims I have the  
10 dismissal both as to Hutch N Son and as to Upstate  
11 Utilities which has also been forwarded to the Court for  
12 filing.

13 So we come in a little bit different situation than  
14 most. The only claims against us are claims by Marick who  
15 is the general contractor. We were hired by oral contract  
16 with Hutch N Sons. We were not hired by Marick. Hutch N  
17 Son was hired by contract by Marick. We performed sewer  
18 grading, backfill, that type of work only on Phase II. We  
19 settled at mediation, we settled with the person who owns  
20 some of the other buildings, which was Medallion. Despite  
21 our settlement, we still find ourselves in this litigation.

22 We filed a motion for summary judgment which is  
23 dated 6/1/12 on its file date. And I reference that motion  
24 at page 4, Marick answers to the third amended complaint,  
25 and what they've alleged is basically a claim for equitable

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 indemnity, paragraph 158. They have alleged breach of  
2 contract, not against us, not alleged against Upstate but  
3 Hutch N Son and others, paragraph 160, breach of warranty  
4 at 172.

5 With respect to each of these claims the damages  
6 they seek are simply the damages they are exposed to in  
7 this litigation, indemnity damages, which is at paragraphs  
8 158, 162, 167, and 174. Marick is not the owner or in  
9 possession of any of the buildings that is the subject  
10 matter of this litigation. Therefore, despite the fact  
11 they call it negligent warranty or contract, these are, in  
12 fact, the indemnity claims.

13 Indemnity is that form of compensation in which  
14 party liable to pay second for loss of damages the second  
15 party incurs to a third. And I have cited Vermeer  
16 Carolinas, versus Woodchuck in my brief. Your Honor, the  
17 allegations contained in the Complaint determined by the  
18 nature of the issues and remedies which are sought. I've  
19 cited State versus Yelsen (phonetic), Seebaltdt versus First  
20 Federal, Walsh versus Evans.

21 The courts use the allegations of the Complaint to  
22 determine the actual true nature of the claims. And I've  
23 included two circuit court orders and attached them to my  
24 memorandum which find that these are just misnamed claims.  
25 In other words, negligence may be the basis of it, breach

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 of contract or warranty may be the basis of it, but they  
2 are indemnity claims, there is no separate individual  
3 damages sought. As the Federal Court in CNB (phonetic)  
4 versus Stone (phonetic) stated, nothing more than claim  
5 from indemnification from the slight change in the wording.  
6 A rose under any other name is still a rose.

7 So what our argument is, is that these are all  
8 equitable indemnity claims and as such should be collapsed  
9 into one claim which is equitable indemnity.

10 We then addressed the issue of equitable indemnity.  
11 We filed separate briefs with respect to liability on  
12 equitable indemnity on 8/21/12. Now, the arguments that we  
13 have set forth are multiple. The first on is, having paid  
14 the plaintiff, we have relieved any liability that Marick  
15 may be due for our wrongdoing. The plaintiff has released  
16 us and Marick may use that as a shield. Marick may hold it  
17 up and say they did it. They are now being sued only for  
18 their own acts. If they did not do anything wrong, they  
19 cannot be sued. If they did do something wrong, if a jury  
20 finds them liable, they are jointly negligent. If they are  
21 jointly negligent, there is no right to equitable  
22 indemnity. Once again, there is no contractual indemnity  
23 alleged or involved in this claim.

24 The affidavit that we filed of Rhett Whitlock  
25 actually goes through -- and I'm going to pass up the three

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 affidavits I filed with different briefs that are important  
2 in this matter -- that set forth the deficiencies and  
3 wrongful conduct of Marick that was negligent. As a joint  
4 tort-feasor they cannot recover.

5         So in addition to the fact that we had paid and  
6 therefore they cannot recover, they are joint tort-feasors  
7 and they cannot recover. In addition, under Rock Hill, you  
8 have to have a special relationship to recover under  
9 equitable indemnity. In Rock Hill they found that when a  
10 contractor hired a person who didn't hire the person, it is  
11 too attenuous. That is what I have with respect to my  
12 client. I was not hired by Marick. I am not a  
13 subcontractor of Marick's. Marick can stand and fall on  
14 its own claim.

15         To the extent that it is entitled, it can get  
16 set-off the money I have paid. In addition, in those  
17 claims where reapportionment is found to be appropriate,  
18 the rule allows for it to get its apportion's share of  
19 set-off under 15-38-15(e).

20         So there's no reason for us to go drug through this  
21 litigation. It's simply an ability to bar parties from  
22 reaching a settlement. I would acknowledge that if there  
23 was a contractual indemnity claim, it would be different,  
24 but no such claim can be asserted or can be asserted or  
25 exists.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Thank you.

2 THE COURT: Very good.

3 MR. IMHOFF: Your Honor, again, logistics. I have  
4 Shelly Montague, who represents Hutch N Son who ---

5 I'm Jason Imhoff again. I apologize.

6 THE COURT: Please. Thank you.

7 MR. IMHOFF: I'd think that everyone did know me.

8 THE COURT: The only thing is we just need the  
9 record to reflect who is speaking.

10 MR. IMHOFF: I think I'm going to stand up on every  
11 single motion, so I may be well known by the end of the  
12 day.

13 But again, on a logistical issue, I have received  
14 many motions for summary judgment against my client on my  
15 cross claims including Shelly Montague who represents Hutch  
16 N Son who would be Marick's direct contractor who they  
17 hired.

18 In addition to the motions against me, I have also  
19 filed motions for summary judgment on the equitable  
20 indemnity claims against them based on their testimony in  
21 the case. I don't know whether you want to hear those at  
22 the same time or whether you want to hear them separately,  
23 if you want me to address each motion for summary judgment  
24 against Marick individually or in some type of a general  
25 response? I suppose ---



Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Well, I think each motion will stand on  
2 its own really, so I think the better way to do it would be  
3 to, as one is heard, then the response be at the same time.

4 MR. IMHOFF: Your Honor, to start with --

5 THE COURT: Now, when they're joint motions, of  
6 course, all parties would be...

7 MR. IMHOFF: I have prepared a brief which I have,  
8 which I would be more than happy to supplement if the Court  
9 requires that to consider these motions. But to begin with  
10 let me address the settlement of Hutch N Son and Upstate  
11 Utilities.

12 Mr. Stubbs made a statement that I am completely  
13 protected from that issue by that settlement and that, in  
14 fact, is not true. There were discussions about that  
15 settlement and whether or not a release would preclude the  
16 allegations and arguments by plaintiff at trial and the  
17 fact is that that release does not; that the work of Hutch  
18 N Son's and Upstate Utilities is still alleged to be  
19 defective and deficient and continues to be an issue in  
20 this case, which my client, Marick, has had to defend and  
21 continues to engage in discovery and the litigation and  
22 will have to do through trial.

23 So while I will certainly make an argument to you  
24 and this Court at trial that I get a set-off or argue to  
25 the jury that the culprits for this have already paid the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 plaintiffs and the issue should no longer be considered,  
2 that is not fact, that is an argument, and the Court hasn't  
3 ruled and certainly the jury has not given a verdict on  
4 that.

5           So as to that settlement I would agree that they  
6 have consented to settle or have settled with the  
7 plaintiff, but I am continuing on behalf of my client to  
8 defend those exact allegations. And the allegations in  
9 this case are that Hutch N Sons and Upstate moved the grade  
10 onto the side of the buildings too high and above the  
11 waterproofing. Mr. Goldsmith's client is the waterproofing  
12 subcontractor and he has done a very good job at showing  
13 that the grade is above the waterproofing and it's not his  
14 client's fault, it's the grader's fault. Again, this is an  
15 issue that I am having to defend and am continuing to incur  
16 expert fees, costs, and litigation defenses, which are all  
17 recoverable under an equitable indemnity cause of action.  
18 I think there's plenty of case law on that.

19           In regard to the substantive issues in this case,  
20 Upstate and Hutch N Sons and frankly all of the  
21 subcontractors that are sitting behind me are going to make  
22 two arguments to the Court. The first is, either there is  
23 no special relationship if they're not Marick's direct  
24 subcontractors, or if there is a special relationship  
25 Marick has unclean hands and, therefore, as a joint

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 tort-feasor, cannot recover for equitable indemnity.

2 We'd speak to the second issue first. In regard to  
3 the unclean hands argument, I think that there is very  
4 little question that that is an issue of fact for the jury.  
5 The reason that I say that is based on the Fields  
6 (phonetic) case which I have highlighted in my brief, which  
7 says that a general contractor is not automatically liable  
8 for the work of the subcontractors, even if it's defective.  
9 And there is an additional steps when it comes to a general  
10 contractor, and you have to prove that the general  
11 contractor failed in its duty to supervise and oversee the  
12 subcontractors.

13 So the obligations per our courts is -- on a  
14 general contractor is to supervise and oversee. There is  
15 plenty of evidence in this case, which I have put in my  
16 brief that Marick was on site, they had a daily  
17 superintendent on site, they had a survey company to go out  
18 and shoot levels and direct the placements of the grading.  
19 There was an architect involved, the architect was involved  
20 not only in drawing the plans but was actually on site. My  
21 client was overseeing and coordinating this. And there is  
22 more than a scintilla of evidence upon which a jury could  
23 find that my client, the general contractor, in fact, did  
24 perform its supervisory duties. So as to the unclean hands  
25 argument, the joint tort-feasor argument, which you will

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 hear twenty times today, I think, Your Honor, I think there  
2 is a factual issue. And I will try to relate them to each  
3 one of the subcontractors that is bringing the motion.

4 But, as you can imagine, with all of the pleadings  
5 and all of the motions and all of the depositions that have  
6 taken place and the written discovery, there is certainly a  
7 scintilla of evidence which would support our position that  
8 my client, Marick, did perform its supervisory duties, and  
9 you will hear that the rest of the day.

10 As to the second, the lack of a special  
11 relationship, you will hear this again a good bit today.  
12 There are six or seven subcontractors, I think, that Marick  
13 hired directly. Those subcontractors, Your Honor, went out  
14 and hired their own subcontractors who hired subcontractors  
15 who may have hired more subcontractors.

16 You heard over in the corner here earlier  
17 Mr. Terrell state that he is one of fifteen Builders First  
18 Source subcontractors. You can imagine how many  
19 subcontractors there are.

20 In regard to special relationship and the equitable  
21 indemnity, it's an equitable cause of action, which I  
22 believe, Your Honor, means that you as the Court and the  
23 Judge of this case has greater discretion to find justice  
24 with an equitable cause of action. The case that all of  
25 the subcontractors site to state that a subcontractor's

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 subcontractor doesn't have a special relationship with a  
2 utility, I don't think it's applicable in this case.

3       The allegations against Marick are that Marick did  
4 not supervise all of the subcontractors. This is the  
5 allegation made by plaintiff and made by the subcontractors  
6 in their motion.

7       What ultimately could result if Marick, the general  
8 contractor, is not allowed to sue under an equitable  
9 indemnity cause of action its subcontractor's  
10 subcontractors is that the subcontractors' work will cause  
11 Marick to be liable; in other words, their poor work will  
12 cause Marick to be liable because we didn't catch them  
13 doing their work or see them doing their work.

14       Yet Marick wouldn't be able to have any remedy  
15 against those subcontractors. And I don't think that's  
16 what our Court meant to happen when it decided the utility  
17 versus subcontractors' relationship in the case cited by  
18 all of these other attorneys. What I think they were  
19 trying to say and what I think will be resolved at some  
20 point is that that was a different situation than what  
21 happens on a building job site.

22       On a building job site our Court has determined  
23 that the general contractor is required to supervise. If  
24 the general contractor is required to supervise, it has to  
25 supervise everyone out there, whether they directly

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 contracted with those subcontractors or not.

2 I don't believe that our Court would allow a  
3 one-way street where the subcontractor could perform bad  
4 work or which the general contractor is liable and give the  
5 general contractor no recourse back against that  
6 subcontractor which it has an obligation to supervise.

7 So my position on that is I believe the Court would  
8 find, ultimately our appellate courts will find, that there  
9 is a special relationship on a building site between a  
10 general contractor and its subcontractors' subcontractors.

11 THE COURT: You're saying that at this point that  
12 issue hasn't been resolved or decided?

13 MR. IMHOFF: No, not -- that's correct, Your Honor.  
14 I believe that the cases cited -- I don't believe, I know.  
15 The case that is cited is a utility company and a  
16 subcontractors' subcontractor. I think that is different  
17 from this situation where we are on site every day and have  
18 a legal requirement to supervise the subcontractors. And  
19 again, I believe because it's an equitable cause of action  
20 it gives you wide latitude in deciding what is fair and  
21 just. And I would say if I'm going to be liable for your  
22 work, because I had to oversee you, then I should have an  
23 equitable cause of action against you.

24 So to sum up, and I'm going to do it all day long,  
25 I believe there's a factual issue as to whether or not I

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 have unclean hands or I'm a joint tort-feasor, and I think  
2 that in fairness there is a special relationship for  
3 anybody I'm obligated to oversee.

4 Thank you, Your Honor.

5 THE COURT: Well, let's see now. Do you represent  
6 Hutch N Son?

7 MS. MONTAGIE: Yes, Your Honor. Shelley Montague.  
8 I represent Hutch N Son Construction. We also have a  
9 motion for summary judgment. It goes together with Upstate  
10 Utilities because Upstate Utilities was our subcontractor  
11 for part of the work that we were hired by Marick to do,  
12 which included the backfill against the units. Just like  
13 with Upstate Utilities, we have settled with the  
14 plaintiffs, we have settled with Medallion, so the only  
15 claim left against us is Marick's cross claim against us.

16 And just as Mr. Stubbs argues, we believe even  
17 though they are separated into different names in the  
18 complaint -- I'm sorry, the cross claim, it's all equitable  
19 indemnity. Now, Mr. Imhoff made part of this argument easy  
20 for me in that he is saying a general contractor has the  
21 duty to supervise and the duty inspect the work of the  
22 subs.

23 Now, with them having that duty, Upstate Utilities  
24 and Hutch N Son are in a much better position to make this  
25 argument, I think, than other people. The only allegation

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 that's been supported by expert testimony that at all  
2 relates to our work is the height of the grade against the  
3 unit. We don't agree that we put the grade that high, but  
4 we can put that aside now because that's not even the  
5 issue. The issue is whether or not Marick is entitled to  
6 recover under equitable indemnity, which means he has to be  
7 free of fault. That's also something we're all going to  
8 agree on. He has to have clean hands.

9 Now, Mr. Imhoff made the comment that Mr. Goldsmith  
10 has done a good job of proving that the grade is too high.  
11 Mr. Goldsmith is an excellent attorney, but this isn't a  
12 hard thing to prove. Anybody in this courtroom can walk up  
13 there right now and see where the grade is. It's open,  
14 it's obvious, everybody sees it, nonetheless, a general  
15 contractor. If it is found to be that the grade is too  
16 high against the units and if it is found to be that  
17 condition has caused property damage, there is no question  
18 of fact that there is at least some fault as to Marick.  
19 They had the duty to supervise, they had the duty to  
20 inspect. If it was wrong, they should have done something  
21 about it. They could see it, it was open and obvious.

22 So regardless of what he may feel like he still has  
23 to argue at trial with us out of it, regardless of whatever  
24 fault my client may have, he is not free of fault if that  
25 condition is found to be wrong.



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: All right. Anyone else?

2 MR. STUBBS: Markey Stubbs, Your Honor, and --

3 THE COURT: All right. Anyone else in favor of the  
4 motion for summary judgment?

5 MS. MONTAGUE: That's just us, yes, sir.

6 THE COURT: Just the two of you; okay.

7 MR. STUBBS: Your Honor, I wanted to clarify the  
8 misstated statements of my statements. The obligation for  
9 him to defend against for his own negligence still exists.  
10 But the plaintiff having dismissed us gives him a shield  
11 with respect to ours. If he has failed to do something, he  
12 is the general contractor. He still has to defend for  
13 that. The affidavits -- and we do have to file affidavits.  
14 He referenced a brief. I never got a brief.

15 When did this brief go out.

16 MR. IMHOFF: Last night.

17 MR. STUBBS: I never got a brief. There was no  
18 affidavits filed. I have filed the affidavit of Donny  
19 White. The affidavit of -- Donny White is my contractor  
20 and he testified that they left it at an appropriate height  
21 below grade. Someone like a landscaper and the person who  
22 put in the drains -- who I don't know who that is, it  
23 wasn't us -- came in after us and they raised it. That has  
24 not disputed by anyone in this case. There's no evidence  
25 that we did it, other than the allegation that the grade is

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 higher. But we have pointed out it was not us.

2 The affidavits of Glenn Stewart (phonetic), an  
3 expert, and Rhett Whitlock have been filed with the Court,  
4 both of which reflect that we did not do that work, that  
5 that would have been a landscaper or a drain person, both  
6 of which point out the deficiencies in the very supervision  
7 that Mr. Imhoff spoke of regarding defect of his client.

8 Today was the motions for summary judgment. The  
9 date to file affidavits in opposition was today. There is  
10 nothing in opposition to any of our affidavits. So while I  
11 believe we are dismissed, number one, because we have paid  
12 and there is no right existing, and I believe he has agreed  
13 that all his claims are truly equitable indemnity, however  
14 titled, since he didn't argue against it.

15 The bottom line is even if we get to the next  
16 stage, we are the only ones who have presented admissible  
17 evidence by affidavit which has not been refuted today at  
18 this hearing. We have already paid the plaintiffs, we've  
19 paid the people who have been injured. This is merely an  
20 attempt to hold us captive in this litigation. Thank you.

21 THE COURT: All right. Anyone else?

22 (WHEREUPON there was no response.)

23 THE COURT: All right. As I understand the motion  
24 for summary judgment is on the cross claim; is that  
25 correct?

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MS. MONTAGUE: Yes, Your Honor.

2 THE COURT: And that's the only thing that that  
3 motion addresses.

4 And the -- Yes, Mr. Imhoff?

5 MR. IMHOFF: Your Honor, did you want to hear from  
6 me again?

7 THE COURT: Well, yes, sir. I just want to make  
8 sure that I understood what your position is.

9 MR. IMHOFF: I want to make sure some of the  
10 evidence that is out there and it is not in the form of  
11 affidavits, it's testimony, photographs, and that type of  
12 thing. As to whether we supervised and saw it was open and  
13 obvious and that type of thing, I think an explanation of  
14 how it happened might be necessary.

15 What they did is they went out there and they took  
16 the grade and they rough graded it and then they cut in for  
17 the foundation, so you have this ten-foot deep hole or  
18 whatever it is. The concrete is poured for walls and then  
19 the waterproofer or the general contractor comes out and  
20 sprays a line on the wall where it needs, where the  
21 waterproofing needs to be and where the grade needs to go.

22 So as soon as the grade has pushed back on to that  
23 line, you can't see it anymore, it's not open and obvious  
24 anymore. The photographs show that it's red fill dirt  
25 that's been pushed up back against there versus black fill

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 dirt which might be a landscaper or might be decayed mulch.

2           There is certainly a scintilla of evidence that the  
3 general contractor, Marick, performed its duty by hiring a  
4 surveying company to shoot these levels and make sure the  
5 grade was and showing the subcontractors how they were  
6 performing their job. I think that there are only a few  
7 places out there where it is actually on the stone and that  
8 potentially could have happened long since Marick has left.  
9 So there is certainly a question of fact as to whether or  
10 not it was open and obvious.

11           **MS. MONTAGUE:** Quickly, Your Honor. Shelley  
12 Montague for Hutch N Son. Mr. Imhoff is a great lawyer. I  
13 wish he wouldn't be so great a witness because I'm not sure  
14 I agree completely with what he said. Where the dirt is  
15 above the line of the waterproofing is not the top of the  
16 wall necessarily, so if it goes to the top of the wall,  
17 that's open and obvious and the places where it's above the  
18 stone that's open and obvious. We can forget about arguing  
19 about where the waterproofing line on the concrete wall is.  
20 The experts have opined that there are places where it  
21 comes up several inches above, there's a stone veneer  
22 clouding on it and it comes up above that. That is open  
23 and obvious to a general contractor.

24           **MR. STUBBS:** And, Your Honor, I apologize, but just  
25 briefly. There is not one bit of testimony, one affidavit

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 or one document presented to the Court that our defendant  
2 did this. It is all that they don't know, it could be the  
3 landscaper or however they presented evidence it was the  
4 landscaper. Nothing has been done to refute that.

5 THE COURT: All right. This -- anything else?  
6 (WHEREUPON there was no response.)

7 THE COURT: All right. The issue on the cross  
8 claim of course is equitable indemnity; is that correct?

9 MR. IMHOFF: On this one, yes, Your Honor.

10 THE COURT: And of course what is it -- being  
11 equity, the principles of equity apply, and one is that to  
12 be without fault. And apparently from the argument today  
13 that you do recognize that the general contractor has a  
14 supervisory responsibility, and that's not only for what it  
15 did know, but also what it should have known. And  
16 apparently before anything was obscured or no longer above  
17 ground, apparently, as it's been argued today, there's  
18 no -- or taking the argument in the light most favorable to  
19 the general contractor, it was doing its job, and  
20 therefore, it should not be found liable. But if it was  
21 doing its job, it would have discovered the defect, I guess  
22 would be the -- or defective workmanship.

23 All right. I find that under the concept of  
24 equitable relief that the equitable indemnity would be  
25 denied and the motion for summary judgment granted.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Who is going to do it, Mr. Stubbs or Ms. Montague?

2 MS. MONTAGUE: We'll fight over it.

3 THE COURT: Okay. So is that your cross claim? Is  
4 there only one cross claim?

5 MR. IMHOFF: No, Your Honor. We're going to have a  
6 lot of those.

7 THE COURT: Okay. All right. Does that let y'all  
8 out of this?

9 MS. MONTAGUE: I assume that means your motions  
10 against us are moot?

11 MR. IMHOFF: Yes.

12 MR. STUBBS: Your Honor, if I could have two  
13 minutes I can resolve this just in private.

14 THE COURT: I was going to say, let's take a break  
15 and then be back.

16 MS. MONTAGUE: Thank you, Your Honor.

17 THE COURT: Let's say a quarter till twelve.

18 (WHEREUPON a recess was observed.)

19 THE COURT: All right. I think somebody came in  
20 after we had the sign-up?

21 (WHEREUPON there was an off-the-record discussion.)

22 MR. STUBBS: Just briefly, there is another motion  
23 involving a default. With the Court's permission, we're  
24 going to postpone that because it will be moot now.

25 THE COURT: Okay. Which one is that now?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. STUBBS: It's the motion to set aside entry of  
2 default as to --

3 MR. IMHOFF: -- Frederick Thomas.

4 MR. STUBBS: -- Mr. Thomas.

5 THE COURT: Do you know where it is by any chance?

6 MR. STUBBS: I don't have that list.

7 THE COURT: But it's a motion to set aside?

8 MR. STUBBS: That would be the default.

9 THE COURT: Fifty-five, you said? All right.

10 MR. IMHOFF: Fifty-five. I think we're on three.

11 MR. STUBBS: Your Honor, I have no further motions.

12 THE COURT: Have you and Ms. Montague decided who  
13 will do the order?

14 MR. STUBBS: We'll share. Thank you, Your Honor.

15 (WHEREUPON Ms. Montague and Mr. Stubbs left the  
16 courtroom at approximately 11:55 a.m.)

17 THE COURT: We're back on the record now in  
18 Stoneledge and Lake Keowee versus IMK Development. I think  
19 we're down to 11 now, Miller/Player Motion for Summary  
20 Judgment. It's a cross claim; is that correct?

21 MOTION FOR SUMMARY JUDGMENT

22 MR. HORTON: Your Honor, Greg Horton for Catoe.

23 THE COURT: All right.

24 MR. HORTON: And I believe that my -- the people  
25 ahead of me realized that my motion is very similar to the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 one that you just heard, and it might be efficient for me  
2 to just go ahead and go forward and leap a couple up the  
3 line.

4 THE COURT: All right. What's the number?

5 MR. HORTON: Mine is number fourteen.

6 THE COURT: All right.

7 MR. HORTON: Your Honor, Greg Horton here, for  
8 Catoe Construction. My motion, like the motion before, is  
9 to dismiss Marick's cross claims against me. And, Your  
10 Honor, although I'm not as far down the line with the  
11 plaintiffs' attorney with regard to settlement, we are  
12 working directly with the plaintiffs' attorney to try to  
13 resolve the case. We've had an independent mediation with  
14 the plaintiffs' attorney, and the goal of this motion right  
15 now is to try to rid myself of the cross claims from Marick  
16 just as the previous party did; and for exactly the same  
17 reasons.

18 And, Your Honor, I've spoken with Mr. Imhoff with  
19 regard to the first part of the motion and that is that the  
20 negligence and breach of the warranty claims lapsed into  
21 indemnity, and I believe that based on your prior ruling,  
22 we're not going to reargue that again.

23 And the question that we're gonna talk about is  
24 very similar to the last one; and that is, should Marick be  
25 able to pursue an indemnity claim against Catoe



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Construction. And, Your Honor, our argument is that they  
2 should not, because, as we've cited in the brief, they are  
3 the general contractor of record. They pulled the permit  
4 saying they would be responsible for the delivering the  
5 product, that is the buildings. And their own expert --  
6 and we have cited it in our briefs -- their own expert has  
7 stated that building codes were violated and that they were  
8 responsible under the law for delivering that project in  
9 accordance with the permit because they pulled the permit.

10 Your Honor, that's the -- the argument is the same  
11 as the last and I'll see what Mr. Imhoff says before I will  
12 respond any further.

13 THE COURT: All right. Mr. Imhoff?

14 MR. IMHOFF: Your Honor, you can hear many of these  
15 motions from the subcontractors are going to be on the same  
16 issue, and that issue is unclean hands, whether or not as  
17 the general contractor we can assert a cause for equitable  
18 indemnity. And I need a little bit of clarification on  
19 that because it sounds like based on your last ruling that  
20 it's sort of a *res ipsa loquitur* or a strict liability  
21 standard. In other words, that if the defect exists,  
22 regardless of the testimony or evidence about supervision  
23 and oversight and that type of thing, that the general  
24 contractor has to have liability and then cannot pursue a  
25 cause of action for equitable indemnity, which I don't

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 believe is the case. I don't believe that's the law.

2 And in addition, as I cited in my brief, we took  
3 the deposition testimony -- I didn't take it -- these other  
4 parties took the deposition testimony of my expert, a  
5 structural engineer named Raymond Still (phonetic). His  
6 deposition is still open, as is plaintiffs' expert's  
7 deposition, they have not been concluded.

8 However, knowing that these hearings were coming up  
9 two or three weeks ago, I broke in in the middle of my own  
10 expert's deposition, in the middle of all these other  
11 attorneys and contractors, to make sure that I got at least  
12 a little bit of what his testimony would be on the record.

13 And it is in my brief, Your Honor, and if I may. I  
14 asked Mr. Still about the allegation and accusation you  
15 will see in each of these subcontractors' and the  
16 plaintiffs' brief that he has admitted that there were  
17 construction defects, code violations and necessary repairs  
18 out there. And I asked him to clarify that.

19 I said (reading): For clarification, just because  
20 there is an item on your scope of repair which you believe  
21 needs some modification or repair, does that, in your  
22 opinion, mean that Marick, my client, breached any duty or  
23 obligation?

24 He says, I don't think so, no.

25 Then I go on saying (reading): In fact are there

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 items on your scope of repair that Marick did not build.

2 That's correct.

3 Then I go on to say (reading): In fact, there are  
4 things on your scope of repair that you say are code  
5 violations that need to be repaired that aren't original  
6 construction that have been repaired after Marick left way  
7 back in 2007.

8 He goes on, Your Honor, to state, and I'll be happy  
9 to provide his testimony to you, that a general  
10 contractor -- and again this is an expert testifying,  
11 structural engineer, he works solely in construction, I  
12 believe. He says that (reading): A general contractor  
13 cannot be present for every nail that is driven; cannot be  
14 present for every shingle that is laid; has to rely on his  
15 subcontractors and their experience and expertise and  
16 frankly honesty to do the job that they are going to say.

17 And so what you will hear from these subcontractors  
18 today is because of the rulings and the statements that  
19 were made with Upstate Utilities and Hutch-N-Son's motion,  
20 it sounded like the Court said if it exists out there, and  
21 because Marick has an obligation to supervise, then Marick  
22 is automatically liable to some degree and cannot pursue an  
23 equitable indemnity cause of action at all.

24 And I don't believe that's correct. I believe the  
25 standard is that it is a factual issue whether or not a

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 general contractor has met its obligation to supervise.  
2 And the things that you will hear, and I'm going to direct  
3 this at these subcontractors right now, but you will hear  
4 from some of the other subcontractors, is that many of  
5 these things are covered. I can't go back and fix the  
6 Upstate Utilities now, but that was covered; and it only  
7 pertains to some of the units, not all of the units.

8         The weather resistant barrier was installed by  
9 these two contractors, Builders First Course and Catoe and  
10 the fifteen back here and whatever else. The weather  
11 resistant barrier, according plaintiff's expert, is missing  
12 in five to ten square feet areas. On the entirety of the  
13 forty-three units in Phase II, we have found between five  
14 and ten feet of missing weather-resistant barrier for which  
15 Marick is being sued.

16         It is Marick's position that it can't see  
17 everything, Your Honor. If Marick is responsible for every  
18 misplaced nail and every skewed shingle and every defect on  
19 the entire project, then you are right. There is really no  
20 reason to continue arguing these motions on equitable  
21 indemnity because it would be a strict liability standard,  
22 it doesn't matter what it is, we would have to be liable.

23         And that's just -- I'm just asking for  
24 clarification, Your Honor.

25         **THE COURT:** Again, I would take some exception.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 This is not a *res ipsa loquitur*. It's not the thing speaks  
2 for itself. It's the fact that a duty is not only -- a  
3 duty can be violated not only by co-missions but also by  
4 omission. Failure to do what you're supposed to do is a  
5 violation of a duty which would give rise to liability.  
6 And that's what the Court was saying, not the mere fact  
7 that there was a defect that the liability automatically  
8 attaches to the contractor.

9 But now, you're saying that you do have at least  
10 the expert testimony that would say that there is no duty?

11 MR. IMHOFF: Your Honor, if I may read it to you,  
12 one of the things that these two contractors --

13 THE COURT: Now, was he being examined as to the  
14 weather-resisting areas?

15 MR. IMHOFF: Your Honor, let me read directly from  
16 his testimony.

17 THE COURT: Well, just tell me.

18 MR. IMHOFF: Yes.

19 THE COURT: Okay.

20 MR. IMHOFF: Yes.

21 THE COURT: In other words, as to Catoe and the  
22 other sub.

23 MR. IMHOFF: Builders First Source and all of their  
24 downstream subs. Yes, there is testimony by Raymond Still,  
25 but there are also photographs, expert reports by CSE

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 (phonetic) that show issues -- one of the issues are that  
2 some of the nail spacing is incorrect. You can imagine the  
3 number of nails that went up on this project. And Marick  
4 arguably can't see every nail that is driven, and Randy  
5 Still said that.

6 THE COURT: Again, I think that that perhaps would  
7 be a question of fact as to whether that would be a breach  
8 of duty.

9 MR. IMHOFF: Okay. So as to these contractors, I  
10 would say, again, that there is a question of fact that a  
11 weather resistant barrier was put up --

12 THE COURT: Well, I think it's gonna have to stand  
13 as to what each subcontractor, as to what their areas of  
14 responsibility are and what they did.

15 All right. Anything else? Any motions?

16 MR. HORTON: Your Honor, I think you hit the nail  
17 on the head the first time, and that is that they have a  
18 duty under the law. They are the captain of the ship.  
19 They deliver the project. And the errors of omission are  
20 what is going to prevent them from being able to pursue  
21 equitable indemnity, not just to me but the other  
22 subcontractors.

23 THE COURT: Well, apparently though, he has  
24 testimony in a deposition, which is a part of the record  
25 here, which would be, would suggest that there is not, like

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 was mentioned strict liability, that is not something that  
2 has no limitations. In other words, again, I do agree that  
3 it might be a factual question whether or not under the  
4 circumstances if there should be supervision of every nail,  
5 for example.

6 MR. HORTON: Your Honor, just from my  
7 perspective --

8 THE COURT: But, of course, yours is not a nail,  
9 yours is a weather-resisting area.

10 What is that? I can understand backfill and things  
11 like that. What is weather resisting?

12 MR. HORTON: If you've seen a house go up, after  
13 the framing, you see a white Tyvek --

14 THE COURT: Right.

15 MR. HORTON: -- sometimes it says Tyvek on it?  
16 That's what we're talking about when we talk about  
17 weather-resistant barriers.

18 THE COURT: And it wasn't put up? Is that the  
19 allegation?

20 MR. HORTON: Your Honor, my --

21 THE COURT: I mean, is that the allegation?

22 MR. HORTON: That's the allegation, that it's  
23 missing in certain areas.

24 THE COURT: Now, Mr. Imhoff, that's something that  
25 could be seen up front. It's a little bit larger than a

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 nail.

2 MR. IMHOFF: Right. But again, when you're talking  
3 about five to ten square feet on these enormous buildings,  
4 it could certainly be missing in a small area and be  
5 covered up. And these contractors did drive the nails and  
6 put the siding on and all the other things -- I think -- or  
7 their subs did.

8 In addition, Your Honor, if I may, Builders First  
9 Source, you may have heard of them, I believe it's a  
10 national company that was hired by Marick, they hired a  
11 large subcontractor, Catoe. They had their own obligation  
12 of supervision. I mean, certainly if you hire a Builders  
13 First Source or a company that size and expense ---

14 THE COURT: But we're still talking about equitable  
15 indemnification; are we not?

16 MR. IMHOFF: Yes, Your Honor.

17 THE COURT: I mean it's -- I guess -- I don't think  
18 it's an equitable principle but it certainly was my  
19 mother's, that two wrongs don't make a right. I mean, if  
20 one falls down in supervisory responsibilities or duty,  
21 that doesn't excuse someone else from it.

22 MR. HORTON: Your Honor, let me just read the quote  
23 that's in my brief. And this was his expert that he's  
24 talking about.

25 The question was (reading): So you would



**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 acknowledge that as the general contractor on the project,  
2 Marick Homebuilders failed to comply with the building  
3 code?

4 And the answer was (reading): At the time that we  
5 looked at it, yes.

6 So we see that as admission from his own experts,  
7 Your Honor, and then I'll let Mr. Root speak, but we there  
8 is -- we have another argument, also.

9 **THE COURT:** All right.

10 **MR. ROOT:** That dovetails within that, Your Honor.  
11 David Root for Builders First Source. I wanted to jump in  
12 on this. The way I see this motion, it's a bit more simple  
13 than Mr. Imhoff would style it. And I understand him  
14 wanting to style it the way he has because the more  
15 confusion that can be injected into this, it's kind of like  
16 Bankruptcy Court, the party that makes it the most  
17 confusing seems to win.

18 It's not so confusing. Let me first ask, does the  
19 Court have a copy of the memorandum submitted by Builders  
20 First Source drafted by me as well as a memorandum  
21 submitted by Carl Catoe?

22 **THE COURT:** I'm sure we do, but do you have an  
23 extra one?

24 **MR. ROOT:** Well -- I do have an extra one.

25 **THE COURT:** Because I've got three boxes back here.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. ROOT: It would be good to be one handy with  
2 you (handing).

3 Just tell me when you're ready to proceed.

4 THE COURT: Anytime.

5 MR. ROOT: All right. Just stepping back a moment  
6 just to make sure, that there are allegations of breach of  
7 contract, negligence, breach of warranty, all disguised or  
8 veiled indemnity claims, and I think that we made it clear  
9 and the Court is focusing in on the fact that we're dealing  
10 with equitable indemnity, so that's what I'm addressing.

11 The motion of going piece-by-piece, nail-by-nail  
12 WRB section-by-WRB section I believe is a bit misleading  
13 because simply there is no equitable indemnity among joint  
14 tort-feasors. A party seeking it has to be without fault.

15 As Mr. Horton pointed out -- and his memo is also  
16 cited in mine -- plaintiff's own expert, Mr. Still candidly  
17 acknowledged -- excuse me -- I said plaintiff's,  
18 Mr. Imhoff's, Marick's expert. (Reading): Acknowledged  
19 that --

20 The question was (reading): Do you acknowledge  
21 that at least in some respects that we have discussed today  
22 as the general contractor on the project, Marick  
23 Homebuilders violated the applicable building code --

24 The answer was (reading): I would agree with you  
25 that there are components we talked about that now appear

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 to be a code violation because of failure.

2 The reason that ties in specifically to the general  
3 contractor and its fault, among other reasons, goes to  
4 pretty much clearly to Exhibit C which is within Catoe  
5 Construction's memorandum, which is the permit. Let me  
6 find it.

7 (WHEREUPON there was a pause in the proceedings.)

8 MR. ROOT: Exhibit C states in the bottom box, and  
9 this is the permit pulled by the general contractor  
10 (reading): I hereby certify that I have read and examined  
11 this document and know the same to be true and correct.

12 Again, he's certifying all provisions of laws and  
13 ordinances governing this type of work will be complied  
14 with, whether specified hearing or not, and all provisions  
15 of law applicable to this work are the building codes.  
16 Marick's expert testified that there are building code  
17 violations. The general contractor's duty, because the  
18 general contractor is delivering this project and these  
19 buildings as a whole as opposed to the subcontractors. The  
20 general contractor's duty is to not violate the building  
21 code because he signed off on it in such a manner.

22 And that, Your Honor, I submit is the key for among  
23 other reasons a code violation is negligence *per se*. If  
24 he's got negligence *per se*, he's at fault. He's a joint  
25 tort-feasor, he cannot pursue equitable indemnity. That is

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 the way the case law is written. To me it's more simple  
2 than the -- than breaking it down nail-by-nail.

3 THE COURT: Wait a minute. You're getting me a  
4 little bit far afield. You say it's negligence *per se*  
5 because they violated a code?

6 MR. ROOT: A code violation.

7 THE COURT: Well, maybe I'm out of step here, I've  
8 been too long at this and not kept up. But I thought a  
9 code violation was not negligence *per se* unless it's been  
10 adopted by a -- the code has been adopted by a governmental  
11 body. In other words, then it has the providence of law.

12 MR. ROOT: Your Honor, that's my understanding,  
13 that this code is done by Oconee County and it is  
14 applicable.

15 THE COURT: Oh, it has been adopted. So you're  
16 saying that it's one that has been adopted.

17 MR. ROOT: And this is on top of what I said  
18 before, which was that he says he's going to build -- he  
19 has the duty as general contractor to deliver the building  
20 as a unit without, without a violation of the code, and his  
21 expert admitted to doing the same. Just simply by reason  
22 of that, that makes him a joint tort-feasor. That gives  
23 him fault and he cannot pursue the equitable indemnity  
24 remedy that is contained within his cross claims.

25 And I think the previous arguments were covered on

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 this side of the argument already and so I would adopt  
2 those, Your Honor. Thank you.

3 THE COURT: All right. Mr. Imhoff?

4 Or do we have somebody else?

5 MR. TERRELL: Your Honor, again, Lindsay Terrell.

6 THE COURT: Are we going to take up all these cross  
7 claims and equitable indemnification?

8 MR. TERRELL: Your Honor, that was --

9 THE COURT: And what was your client?

10 MR. TERRELL: I represent T.G. Construction, one of  
11 the Catoe -- what I call one of the Catoe subs.

12 THE COURT: All right. So you are under Catoe,  
13 then?

14 MR. TERRELL: Yeah. In fact, my motion is the same  
15 motion that as --

16 THE COURT: Forgive me. But what I'm looking for  
17 right now is your area of responsibility, and that would be  
18 again the --

19 MR. TERRELL: The siding --

20 THE COURT: -- weather resisting --

21 MR. TERRELL: No. I did the siding on Phase II.

22 THE COURT: Siding on top of the weather resisting?

23 MR. TERRELL: Yes. And again I am one of the, what  
24 I call the Catoe subs. I did work in Phase II. And I'm  
25 number fifteen on the list that Your Honor has, and we made

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 a motion for summary judgment as well. That's just the  
2 same motion basically as being made by Catoe and BFS, and  
3 again we just adopt the arguments and the positions that  
4 they have put forth thus far as a basis for why we, my  
5 client would also be entitled for summary judgment.

6 Like the other codefendants, Marick has made a --  
7 basically to try to state three separate causes, but it's  
8 my understanding that they agree it's really an equitable  
9 indemnity claim that they're making in all three, and again  
10 on that basis it's our argument that they would not be  
11 entitled to make that claim because they do not have  
12 unclean hands, period, because of their position. Again,  
13 I'm just adopting the position stated thus far with regard  
14 to my client.

15 THE COURT: And that is?

16 MR. TERRELL: T.G. Construction, Your Honor.

17 THE COURT: T.G.?

18 MR. TERRELL: Yes, sir.

19 THE COURT: All right. Now you've got three.

20 MR. GOLDSMITH: We've got another one. And we may  
21 have more. I just didn't want to ---

22 MR. TERRELL: Your Honor, there are fourteen Catoe  
23 subs who made the same motion. And there's no need for  
24 Mr. Imhoff to have to deal with this piecemeal so what I'm  
25 trying to do, I'm trying to shortcut this thing and not

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 beat this to death. The other Catoe subs probably want to  
2 make the same motion or at least state on the record the  
3 same arguments that have been made by BFS and Catoe with  
4 their motion.

5 MR. GOLDSMITH: Do you want to get the names of  
6 those subs, Your Honor?

7 THE COURT: Well, I guess so if I'm going to be  
8 ruling.

9 MR. GOLDSMITH: I'm a different one than the Catoe  
10 subs, so...

11 THE COURT: All right. Well, let's see, how many  
12 Catoe subs? I've got Catoe at the top, and then I have  
13 Builders First Source and T.G. Construction, and if you  
14 would, please, give me your name and your number on the  
15 motion sheets. It might even be better if you could figure  
16 out your chronological order so it's easier for me to  
17 identify.

18 MR. CARSON: Your Honor, Andrew Carson for  
19 Alejandro Cruz, I'm number 16.

20 THE COURT: Okay.

21 MR. CARSON: We are Catoe subs, and we also adopt  
22 these arguments.

23 THE COURT: All right. What was your area of ---

24 MR. CARSON: We did framing.

25 THE COURT: Framing?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. CARSON: We did framing on Phase II only, Your  
2 Honor.

3 MR. HORTON: Your Honor, if it helps, may I hand up  
4 something to you?

5 THE COURT: Please.

6 MR. HORTON: (Handing).

7 THE COURT: All right. Mr. Carson?

8 MR. CARSON: Yes, Your Honor. We -- like T.G.  
9 Construction, we would simply adopt --

10 THE COURT: All right. You did the framing?

11 MR. CARSON: Yes, Your Honor. We adopt the same  
12 argument as to the equitable indemnification claim.

13 THE COURT: All right. And who else do we have?

14 MR. ROWELL: Your Honor, Eric Rowell on behalf of  
15 Herberto Arcos Hernandez, number seventeen on your list.  
16 We were also a Catoe sub on Phase II. We were alleged to  
17 have done some windows and doors along with some pickets  
18 and rails. And we would also like to adopt, for the  
19 record, the arguments set forth by Builders First Source and  
20 Catoe in regards to the indemnification claim of Marick.

21 THE COURT: When you say pickets, what you are  
22 talking about? Railings or something?

23 MR. ROWELL: Yes, Your Honor. Part of the  
24 extended, elevated decks that have been discussed already.

25 THE COURT: All right. Next?



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1           MR. WILLIAMS: May it please the Court, Your Honor.  
2       Drew Williams and I have, Motion number 18. I represent  
3       Martin Hernandez-Aviles, who is also a Catoe sub, solely on  
4       Phase II. Our scope of work included doing work on the  
5       aforementioned WRB, the weather resistant barrier, and also  
6       some of the doors and windows as well. Like everyone else,  
7       I would adopt the arguments previously submitted by  
8       Attorneys Root and Horton.

9           I would also add to0, specifically as it pertains  
10      to WRB, the weather resistant barrier, you know we talked  
11      about only ten square feet were missing. Again, Your  
12      Honor, that highlights the fact that the general contractor  
13      is also responsible for overseeing the coordination of  
14      trades. And the fact that a few square feet is missing,  
15      they are the ones responsible to make sure the siding guy  
16      doesn't come in and cover that up. So again, showing that  
17      they do have independent liability in addition to all the  
18      other points that have been made, which would, you know --  
19      which would render them as a joint tort-feasor, incapable  
20      of bringing an equitable indemnification claim.

21           THE COURT: All right. Forgive me now. I missed  
22      your name.

23           MR. WILLIAMS: I'm sorry. It's Drew Williams.

24           THE COURT: Williams?

25           MR. WILLIAMS: Yes, sir.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: And what number are you?

2 MR. WILLIAMS: I was the next one, number eighteen.  
3 I'm sorry. Motion number 63 --

4 THE COURT: Well, I'm looking for the tab number as  
5 well.

6 MR. WILLIAMS: Tab eighteen.

7 THE COURT: All right. That's Martin  
8 Hernandez-Aviles. I did recognize Alejandro, though. I  
9 think that's a Mexican name.

10 All right. And what was yours again? Your area of  
11 responsibility?

12 MR. WILLIAMS: Yes, sir. I had part of the WRB and  
13 part of the doors and windows.

14 THE COURT: WRB, weather resisting --

15 MR. WILLIAMS: -- barrier.

16 THE COURT: All right. There we go.

17 Next?

18 MR. GIBBON: May it please the Court, Your Honor.  
19 Geoff Gibbon, and I'm here on behalf of Socorro Castillo  
20 Montel. Our motion is tab number 19 and 19(a) and Motion  
21 55, and 55(a). We are, or Mr. Montel is also an alleged  
22 subcontractor for Carl Catoe Construction. The scope of  
23 work that he is alleged to have performed is with respect  
24 to the framing of the rear decks, and I can talk to you  
25 some more --

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: That's enough right now.

2 MR. GIBBON: Fair enough.

3 THE COURT: Unless you want to.

4 All right next? And these are all under Catoe.

5 (WHEREUPON five attorneys respond in the  
6 affirmative.)

7 MR. GOLDSMITH: Your Honor, we have one but not  
8 under Catoe.

9 THE COURT: All right. That's what -- I'm waiting  
10 to exhaust these and then we'll get to yours,  
11 Mr. Goldsmith.

12 All right. Who is next? Anybody? Is that it?

13 MR. WILLIAMS: I think that's it.

14 MR. HORTON: Your Honor, Greg Horton again for  
15 Catoe. I'm just trying to clarify we're not trying to get  
16 out of this case. We have a giant claim against us from  
17 the plaintiff. What we're trying to do is to simplify this  
18 case and knock out the cross claims.

19 THE COURT: Well, you can understand that I share  
20 your concern or interest. And I'm sure Mr. Imhoff does,  
21 too.

22 All right. Now, Mr. Imhoff?

23 MR. GOLDSMITH: Well, can I be heard, Your Honor,  
24 just in sequence?

25 THE COURT: Oh, wait a minute. I'm sorry,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Mr. Goldsmith.

2 MR. GOLDSMITH: Unless you would rather go next.

3 MR. IMHOFF: Your Honor, I would rather deal with  
4 this group because there are different issues.

5 MR. GOLDSMITH: No problem.

6 THE COURT: All right. Now, Mr. Imhoff.

7 Wait a minute. I've got somebody else.

8 MR. ROOT: I'm sorry. Again, David Root for  
9 Builders First Source. Since these folks were adopting our  
10 arguments, I want to make sure we hit them all square and  
11 fully. Two points I want to make sure were made. I talked  
12 about the building code violation, Your Honor. Randy Still  
13 also testified as cited in page 5 of my memo that the  
14 general contractor had an overall responsibility for the  
15 construction of the entire project, and the at-fault  
16 portion of this argument is whether they are at fault as to  
17 the plaintiffs. And that's where it goes back. They have  
18 fault as to the plaintiffs, as conceded by their expert.

19 So going in piece by piece, section of where the  
20 barrier, nails here, I think, in essence misses the point  
21 because they've got responsibility for the project --

22 THE COURT: Well, so far I haven't heard anything  
23 as small as a nail.

24 MR. ROOT: I thought I heard nail talk.

25 THE COURT: Well, I mean, you heard the nail talk,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 but I haven't heard anything as far as the parties -- five  
2 foot square or something like that of weather resisting  
3 siding was not done.

4 MR. ROOT: Thank you.

5 MR. IMHOFF: Your Honor, there are so many  
6 allegations by plaintiffs against, of course, the general  
7 contractor but also these subcontractors. Everything from  
8 framing, windows, doors, weather resistant barrier, nailing  
9 of siding, all of those things are alleged against Marick  
10 due to these subcontractors' work.

11 And frankly, Your Honor, the arguments that you're  
12 hearing today are arguments that change the law in South  
13 Carolina and it's a very similar to what my children make  
14 which is, Yeah, we were bad but it's your fault because you  
15 didn't catch us. And I think that --

16 THE COURT: Well, you don't agree with my mother,  
17 then. I don't know your children, but I knew my mother  
18 when she said two wrongs don't make a right.

19 MR. IMHOFF: Well, the first part --

20 THE COURT: She was speaking much like Lord Cook of  
21 Blackstone.

22 MR. IMHOFF: That's right, Your Honor. And I don't  
23 know how she felt about her liability when you misbehaved  
24 as a kid, although --

25 THE COURT: Again we're talking about the equitable

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 thing. And I'm looking at, I guess, Vermeer Carolinas  
2 versus Wood/Chuckchipper (reading):

3 The most important requirement for the finding of  
4 equitable indemnity is the party seeking to be indemnified  
5 is adjudged without fault and the indemnifying party is the  
6 one at fault.

7 MR. IMHOFF: That's right. And I think -- and I  
8 don't think there's a question about it. This is an issue  
9 of fact for the jury. There only has to be a scintilla of  
10 evidence and Mr. Still has testified -- and again, I want  
11 to highlight the fact that I had to break into Mr. Still's  
12 testimony and get what I could out of him before he is  
13 finished testifying. So what you are seeing is the middle  
14 of Mr. Still's deposition testimony.

15 I have come back, broken in out of order, which I'm  
16 not sure if I was required to do, but I certainly didn't  
17 want you, Judge Macaulay, to tell me today, Well, you  
18 should have broken in and gotten Mr. Still's testimony.  
19 But I have not had an opportunity to hear all of the  
20 questions and arguments made by these litigants in this  
21 case and then follow up with Mr. Still, fully.

22 I have broken in temporarily and what I got him to  
23 say, and there's no question that he says it, is that a  
24 general contractor has the right to rely on its  
25 subcontractors to do their jobs correctly. And while there

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 is an overall obligation of supervision and responsibility  
2 to the general, that is a question of whether or not the  
3 general contractor has met that obligation.

4 And as I was saying, some of the things that are  
5 alleged against Marick are, in fact, the spacing of nails  
6 on a side -- a piece of cedar-plank siding.

7 THE COURT: All right. Which one has the  
8 cedar-plank siding?

9 MR. TERRELL: That would be me, Your Honor.  
10 Lindsay Terrell. Pardon me.

11 THE COURT: All right. That's T.G. Construction?

12 MR. TERRELL: Yes, sir.

13 THE COURT: That's the only thing you did was put  
14 nails in cedar-plank siding?

15 MR. TERRELL: Well, we put the siding up and put  
16 nails in it. We may have done some other small things, but  
17 I think that's it. Again, I'd have to look and simply --  
18 but we basically sided, put some siding on Phase II which  
19 is forty-three units. That's what we did, Your Honor.

20 THE COURT: You missed one board or something?

21 (WHEREUPON there was laughter.)

22 THE COURT: No, I'm serious. Is the allegation  
23 that you only, you missed two nails or something? What's  
24 the plaintiff's allegations against you?

25 MR. TERRELL: I don't -- they're basically saying

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 that we missed a few nails, something like that. They also  
2 initially alleged we didn't do the raft, weather resistant  
3 raft, that Your Honor has been asking about. It turns out,  
4 Catoe acknowledges that we didn't do that anyway. All we  
5 did was put the siding up. They're saying that, alleging  
6 that we missed a few nails, alleging that maybe we didn't  
7 put flashing or something at an intersection of the roof  
8 and the siding and/or something like that. I think, again,  
9 Your Honor --

10 THE COURT: All right. Well, let me do this. I'm  
11 not trying the case right now, but I'm trying to get it  
12 down to those things that would be of significance as well  
13 as in controversy.

14 All right. What are you saying is their defect?

15 MR. IMHOFF: Well, I think both of those things,  
16 Your Honor. But let me clarify. It's not two nails next  
17 to each other. Derek Hodgins's testimony, his plaintiff's  
18 expert, he has testified that every piece of cedar siding  
19 has to come off of every single building because there are  
20 five to ten square feet of missing weather resistant  
21 barrier paper.

22 My -- my problem with that is that I am defending a  
23 complete removal of all of the siding on all of these  
24 buildings because --

25 THE COURT: But it apparently sounds like the



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 reason it comes off is not for something they did but  
2 because of the failure of having those five feet or  
3 whatever.

4 MR. IMHOFF: Well, it starts with Builders First  
5 Source, Your Honor. Builders First Source --

6 THE COURT: Maybe I'm not being clear. First of  
7 all, for indemnification you have to have at fault by the  
8 indemnifier. And I'm trying to find out, did they do  
9 something so obscure that nobody could have found it or it  
10 would not be reasonable to find it under your duty to  
11 supervise?

12 MR. IMHOFF: Yes, sir. Absolutely. That is the  
13 allegation, that is the testimony and that is the evidence,  
14 five to ten square feet on all of the exteriors of these  
15 buildings, it's a jury issue whether or not --

16 THE COURT: No. Five or ten feet is, I think, is a  
17 little bit larger than a mustard seed, or a nail head,  
18 excuse me.

19 MR. IMHOFF: That's totally. That not one place  
20 where there's five or ten square feet. It's totally where  
21 they've investigated where they had found missing wrap.  
22 And it is our position that we can't see every square inch  
23 of the property.

24 THE COURT: It's not a cumulative five square feet.  
25 In other words, you're saying that what they did was not

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 discoverable?

2 MR. IMHOFF: Yes, Your Honor. And that's the  
3 testimony and the evidence for the jury, yes, sir, is what  
4 we argued.

5 Your Honor, there is another issue here.

6 THE COURT: All right. Well, let's go with your  
7 other issue then.

8 MR. IMHOFF: The other issue is we contracted with  
9 Builders First Source. That is our direct subcontractor.  
10 And we have an agreement with Builders First Source, a  
11 contractual agreement, so we have also pled contractual  
12 agreement. Builders First Source then went out and hired  
13 all of these other subcontractors for whose work we are  
14 being sued.

15 So in addition to the equitable argument there is  
16 in addition a contractual allegation against Builders First  
17 Source. Builders First Source had --

18 THE COURT: Is that part of your cross claim?

19 MR. IMHOFF: Well, yes. We cross claimed against  
20 Builders First Source and then their subcontractors, yes.

21 THE COURT: Your cross claim is based not only on  
22 equitable indemnification but on breach of contract?

23 MR. IMHOFF: Not to everyone.

24 THE COURT: Well, that's what I'm asking, now.  
25 I've got about, I don't know how many, one, two, three,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 four, five, six, seven subcontractors who are moving to  
2 dismiss your cross claim. I need to know if -- I've been  
3 treating it as all being cross claim for equitable  
4 indemnification.

5 MR. ROOT: If I may, Your Honor?

6 THE COURT: Mr. Root?

7 MR. ROOT: Again, David Root for Builders First  
8 Source. Mr. Imhoff or his client, Marick, did not plead  
9 contractual indemnifications in his cross claim, point one.  
10 Point two, he did plead breach of contract and damages  
11 flowing from that breach of contract to various defendants;  
12 but the point is, that contract, even if we were to say let  
13 them talk about contractual indemnification, was executed  
14 after this project or BFS's work on this project was  
15 complete and it had nothing to do with these other  
16 subcontractors. I will -- I think for clarity purposes I  
17 would just like to take that on after this argument is  
18 done because the things --

19 THE COURT: All right. So, in other words, the  
20 only thing that you do have a contractual claim against is  
21 Builders First?

22 MR. IMHOFF: Yes, sir. Well, in this group, yes.

23 THE COURT: All right. Anything else?

24 MR. LYLES: Your Honor, Robert Lyles for the  
25 plaintiff. If I may, just because we talked a lot about my

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 projects and my experts. I just want to say that --

2 THE COURT: Now, this is on the cross claim. Do  
3 you have an interest in the cross claim?

4 MR. LYLES: Only to the extent that I'm trying to  
5 settle with these parties and there was a lot of talk about  
6 my experts, but I would be glad to sit down if Your Honor  
7 doesn't want --

8 THE COURT: Well, I'm just curious, if you've got  
9 something to offer, I'll --

10 MR. LYLES: I do have something to offer, Your  
11 Honor, and it does go into arguments I think we're going to  
12 make later on with regard to some of these other motions.  
13 As you pointed out when you read the Vermeer case, the most  
14 critical thing to consider when it comes to equitable  
15 indemnity is the party seeking indemnity be without fault.  
16 Without regard to WRB, without regard to nail heads, or  
17 without regard to everything else, as Mr. Horton and  
18 Mr. Root pointed out to you, Marick's own expert has  
19 testified that their client, as the general contractor, had  
20 a duty and obligation to my clients and to Oconee County to  
21 comply with the building code and they failed to do that.  
22 Whether it has to do with supervision, whether it has to do  
23 with independent work done by the general contractor  
24 doesn't matter.

25 The duty which is independent of a duty to

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 supervise was to comply with the building code, and their  
2 expert has admitted that they did not do that in certain  
3 particulars. That eliminates any argument that they have  
4 that they are without fault.

5 And I think that -- well, I believe that's all I've  
6 got to say. Thank you, Judge. I actually had something  
7 else really good to say, but I forgot it.

8 THE COURT: Let's save it.

9 A LAWYER: I want the transcript of that please,  
10 Your Honor.

11 THE COURT: Very well. Mr. Imhoff?

12 MR. IMHOFF: Your Honor, may I address that?

13 THE COURT: Please.

14 MR. IMHOFF: That is not what Mr. Still said. That  
15 is not what he meant. These two, if you read these two  
16 quotes together, he says (reading):

17 I would agree with you that there are components we  
18 talked about that now appear to be code violations because  
19 of failure.

20 And then when I asked him another question it was  
21 (reading): At the time that we looked at it, yes.

22 He clarifies that throughout his deposition and  
23 later by saying that the code section that they're  
24 referring to, which requires that water doesn't get into a  
25 building and those type of things, is a performance-based

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 code section, so -- or at least arguably a  
2 performance-based code section. Which means that if water  
3 gets in, no matter what you've done, I mean if you take a  
4 plastic wrap and plastic wrapped the whole house it doesn't  
5 mean you have done anything wrong and it certainly doesn't  
6 mean that you violated your obligation to supervise.

7         It means based on what could be interpreted as the  
8 way that the code is read, that no matter what you do, if  
9 water gets into your house, it could be a code violation.  
10 And if you read the quotes and then go back later and read  
11 what I attempted to get out of him in the middle of his  
12 deposition, he is not saying that Marick is liable and has  
13 violated the code. What he is saying is that there is an  
14 interpretation of the code that you could argue water if  
15 gets in no matter what you did it's not supposed to be  
16 there and it's a violation of the code. But that doesn't  
17 go to --

18         **THE COURT:** Aren't codes sometimes written in  
19 performance.

20         **MR. IMHOFF:** That's exactly right, and that's what  
21 this is going to.

22         **THE COURT:** Well, I mean, but it's still the code.  
23 In other words, rather than -- and again, it's been a long  
24 time since I practiced law and particularly for  
25 governmental bodies and municipalities and the like about

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 codes -- but I remember -- Mr. Goldsmith, this is a long  
2 time ago. I was at the Attorney General's Office from '70  
3 to '73 and Myrtle Beach was just going through its great, I  
4 don't know whether it was a Renaissance or just  
5 development.

6 But anyway, they had a code down there that  
7 required that all plumbing had to be soldered, you couldn't  
8 use the plastic, you know, equivalent, which would have  
9 been performance. And we looked into it and found out that  
10 the building inspector was the only plumber in Horry County  
11 that was licensed or equipped to do soldering. It's called  
12 wep (phonetic) welds, or something like that. And so we  
13 suggested that perhaps maybe performance would be the  
14 appropriate code for them. But anyway, that's what I'm  
15 talking about. But yet that was the code at that time.

16 MR. IMHOFF: The point I was trying to make ---

17 THE COURT: And that's what I'm trying to get back  
18 to. What is the point you're trying to make?

19 MR. IMHOFF: Well, thank you, Your Honor. The  
20 point I'm trying to make, Your Honor, is that Mr. Still has  
21 testimony where he tries to explain that.

22 And I asked (reading): Do you believe Marick  
23 violated any code, manufactured installation structures, et  
24 cetera, in the waterproofing of the component of Phase II,  
25 and he says no.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 And I believe that a jury should hear his  
2 explanation of that code and the performance base of that  
3 code. And as you just brought up, Your Honor, the Ocone  
4 County building inspector looked at these buildings and  
5 approved them and issued this CO. There are questions of  
6 fact for this jury to consider about what Marick did way  
7 back in 2006 and that is what I've been trying to explain  
8 to the Court. Otherwise, it's a strict liability standard  
9 if it exists out there.

10 Thank you, Your Honor.

11 THE COURT: Very well. All right. Mr. Root.

12 MR. ROOT: I'm reluctant when you give me that head  
13 nod like that. It will be very quick. Simply to the point  
14 that it's not a strict liability standard. We're dealing  
15 with equitable indemnity claims. They have to be without  
16 fault. They're not without fault. We still have the  
17 plaintiff and the claim that they have to deal with. So  
18 it's not like we're arguing against our parents there.  
19 It's not the parents we have to deal with, it's the  
20 plaintiff. He still has that claim and we still -- and  
21 that's where the allocation of damages come in that we were  
22 talking about at the very beginning of this motion.

23 So I think that it's an important point to  
24 remember, and that's all I have to say. Thank you.

25 THE COURT: All right. We're going to take up your



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 motion now?

2 MR. GOLDSMITH: Not under Catoe, but it's the same  
3 type motion.

4 THE COURT: All right. Go ahead.

5 MR. IMHOFF: Your Honor, I have completely  
6 different issues with Southern Concrete.

7 THE COURT: All right. Well then let's -- we'll  
8 come back to Southern Concrete.

9 MR. GOLDSMITH: Could I do this, Your Honor?

10 THE COURT: You can adopt theirs.

11 MR. GOLDSMITH: That's what I'd like to do on the  
12 record. Andy Goldsmith for Southern Concrete. I'll just  
13 adopt their arguments.

14 THE COURT: But you do want to be heard on yours?

15 MR. GOLDSMITH: Yes, sir. Thank you.

16 All right. Oh, we'll hear from another defendant.

17 MR. MARTIN: Your Honor, Kirk Martin, Jose Nino on  
18 Phase I. I'm not sure what's going to be addressed at this  
19 point. We're number 22 on the list this morning. If we  
20 are all adopting the arguments put forth by BFS, I would  
21 like to be included in that as well.

22 THE COURT: Now, this is dealing solely with the  
23 cross claim. Are you subject to the cross claim?

24 MR. MARTIN: We do have a cross claim from Marick,  
25 yes, sir.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: From or against?

2 MR. MARTIN: From. We have a motion for summary  
3 judgment as to Marick's cross claims.

4 THE COURT: And his cross claim against you is for  
5 equitable indemnification?

6 MR. MARTIN: Yes. Negligence, breach of warranty  
7 and indemnification, which I believe ---

8 THE COURT: I'm only addressing right now the  
9 equitable indemnification.

10 MR. MARTIN: Yes, sir. It's my understanding from  
11 earlier that those were disguised indemnity claims, thus we  
12 were dealing with equitable indemnification.

13 THE COURT: Do what now?

14 MR. MARTIN: I understood that those were agreed to  
15 be disguised indemnity claims unless we were just dealing  
16 with equitable indemnification.

17 THE COURT: Disguised?

18 MR. MARTIN: Yes, sir. The negligence claims were,  
19 in fact, indemnity claims, but I gather we'll have to take  
20 that up under a separate motion.

21 THE COURT: No. Again, I guess I'm trying to deal  
22 with something that suggests that the most important thing  
23 about equitable indemnification is that both parties be  
24 without fault, or at least the party seeking the  
25 indemnification.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. MARTIN: Yes, sir. And to the extent that  
2 allegation from Marick exists opposing Nino, I would like  
3 to adopt the argument put forth by Builders First Source.

4 THE COURT: Okay. So you want the cross claim as  
5 it relates to equitable indemnification. And your party  
6 again?

7 MR. MARTIN: Jose Nino.

8 THE COURT: That's number 21?

9 MR. MARTIN: Twenty-one, I'm sorry, not 22, Your  
10 Honor.

11 THE COURT: What did Mr. Nino do?

12 MR. MARTIN: Framing for Phase I, sir.

13 THE COURT: Very good. All right. So you will be  
14 included in whatever the ruling is on equitable  
15 indemnification.

16 MR. MARTIN: Thank you, sir.

17 THE COURT: All right. Wait a minute. We have  
18 someone else.

19 MR. YOKEL: Thank you, sir. Your Honor, In that  
20 regard -- I'm with KMAC, David Yokel.

21 MR. IMHOFF: Your Honor, before that, Phase I  
22 arguments are completely different from Phase II.

23 THE COURT: Well, I just denied bifurcation, so I  
24 mean --

25 MR. IMHOFF: The arguments -- just like setting

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 concrete is a different argument versus the framing and the  
2 weather barrier, they're different arguments. I'd be happy  
3 for them to take up these arguments, but our ruling should  
4 not apply to them as well without arguments from Marick on  
5 the cross claims, because they are different.

6 **THE COURT:** Well -- all right. So your framing was  
7 on Phase I?

8 **MR. MARTIN:** Yes, sir. Kirk Martin.

9 **THE COURT:** All right. All of the others were as  
10 to Phase II; is that correct? I had one down Alejandro  
11 Cruz being Phase II, but I guess they were all phase -- so  
12 I'll hold back on Phase I then.

13 All right. Now, so there's Phase II and that would  
14 be -- and again, only as it applies to equitable  
15 indemnification, Catoe, Builders First, T.G. Construction,  
16 Alejandro Cruz, Martin Hernandez-Aviles and Montel. I do  
17 find that here, the contractor would not be without fault  
18 and that the motion to dismiss the cross claim as to  
19 equitable indemnification of those defendants will be  
20 granted.

21 Now, who is going to do this one?

22 **MR. HORTON:** Greg Horton for Catoe. I'd be happy  
23 to.

24 **THE COURT:** Now, that's just as to equitable  
25 indemnification as it affects you and the other defendants.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1           **MR. HORTON:** Yes, Your Honor. But, Your Honor,  
2 just to clarify, it's as to all causes of action that  
3 Marick has in its cross claim against us, because as we  
4 first argued in the beginning, negligence and breach of  
5 warranty collapses into indemnity just like the first crowd  
6 argued, Your Honor.

7           **THE COURT:** In other words, they couldn't get to  
8 you unless you were negligent.

9           **MR. HORTON:** Yes, sir.

10           **THE COURT:** Okay. So you're also doing your  
11 contractual? Well, that's Mr. Root. That wouldn't be  
12 contractual.

13           **MR. HORTON:** I just want to make sure that as it  
14 stands now, all of the claims against --

15           **THE COURT:** Cross claims.

16           **MR. HORTON:** -- all of the cross claims that Marick  
17 asserted against Catoe and Catoe's subs --

18           **THE COURT:** Based on negligence and  
19 indemnification.

20           **MR. HORTON:** -- all of that is taken care of.

21           **THE COURT:** All right. Granted.

22           All right. Now, Mr. Goldsmith, and of course we're  
23 going to get back to Mr. Martin.

24           You go, Mr. Goldsmith. You've been patient.

25           **MR. GOLDSMITH:** Your Honor, our motion is not shown

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 on my sheet, but it was filed within time, but it's not on  
2 the sheet.

3 THE COURT: All right.

4 MR. GOLDSMITH: It's on behalf of Southern  
5 Concrete.

6 THE COURT: And what is it?

7 MR. GOLDSMITH: And it is the same motion that you  
8 just heard on behalf of Builders First Source and Catoe.

9 THE COURT: All right. And that's for the concrete  
10 pourings?

11 MR. GOLDSMITH: Yes, sir. And I'll tell you what  
12 our folks did.

13 THE COURT: And that's Phase I?

14 MR. GOLDSMITH: It's Phase II.

15 THE COURT: Oh, it's Phase II?

16 MR. GOLDSMITH: It's Phase II. And they did two  
17 things. Southern Concrete did two things. They  
18 waterproofed the below-grade walls -- and you heard  
19 something about that earlier, about the dirt being above  
20 the waterproofing?

21 THE COURT: Right.

22 MR. GOLDSMITH: I'll come back to that. And then  
23 they, on top of these elevated decks or balconies, whatever  
24 you might want to call it, that were a pretty good size,  
25 they were about 12 feet from the building out and then

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 maybe 20-something feet wide, we poured a concrete cap or  
2 surface, and also beneath that concrete we put a waterproof  
3 barrier and we also put a material between the barrier and  
4 the concrete. And so we did not actually build the  
5 framework of the deck, but after it was there, we didn't  
6 build the supports, we didn't build the framework,  
7 horizontal framework, but after that was there and after  
8 the tongue and groove plywood was on top so you could walk  
9 around and so forth, we came and poured a cap and we put a  
10 waterproof membrane under that cap.

11 So let me talk about these things separately. The  
12 waterproofing on the exterior walls that you heard about,  
13 the others have pointed out, and I don't think there's any  
14 question about the fact that the waterproofing extends up  
15 almost to the top.

16 THE COURT: Again, we are limiting this to cross, I  
17 mean motion to dismiss a cross claim on equitable  
18 indemnification.

19 MR. GOLDSMITH: Yes, sir.

20 THE COURT: All right.

21 MR. GOLDSMITH: Okay. You have heard from others  
22 so I won't go back into it that the waterproofing came up  
23 almost to the top of a poured concrete wall. But somebody  
24 at some point put dirt, mulch, and what have you, over the  
25 top of that waterproofing. And I'm just going to adopt

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 what others --

2 THE COURT: Well, let me --

3 MR. GOLDSMITH: Go ahead.

4 THE COURT: Well, let me suggest something here.

5 If I understand, and what I've been applying is the  
6 requirement, it's not so much what you did as what the  
7 contractor did or did not do.

8 MR. GOLDSMITH: Yes, sir.

9 THE COURT: In other words, I have to, in ruling on  
10 this motion, if I rule for you, I've got to take the  
11 evidence in the, most favorably against the opposing party.  
12 In favor of the opposing party.

13 MR. GOLDSMITH: In favor of the opposing party,  
14 yes, sir.

15 THE COURT: All right. So in other words, rather  
16 than talk about what you did, I've got to figure out what  
17 he didn't do.

18 MR. GOLDSMITH: What he didn't do, okay. I have to  
19 touch ever so slightly on what --

20 THE COURT: I'm going to wait for the main event to  
21 find out what you did do.

22 MR. GOLDSMITH: Okay. We put waterproofing against  
23 a vertical concrete wall that was later backfilled.

24 THE COURT: All right.

25 MR. GOLDSMITH: And so what we did when we left a



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 particular building to go to the next building, our  
2 waterproofing is a black spray-on material, so it's just as  
3 obvious as it can be. We didn't do any dirt. And so  
4 wherever and however the dirt got backfilled over the top  
5 of that waterproofing, and however dirt even came up over  
6 the top of the concrete wall and up on to this synthetic  
7 stone so that the dirt was actually higher, it was  
8 overtopping wood.

9 Now, however that all got done, it was after we  
10 finished. And it should have been and it's inescapable  
11 that anyone who looked would see as the dirt went above the  
12 waterproofing, which was almost at the top of the concrete  
13 wall, wait a minute, you've got to stop. And that's what  
14 the others have argued. And so however that dirt got above  
15 that wall, the contractor had to have had soiled hands in  
16 that, in that he should have said, no, don't put the dirt  
17 above the waterproofing. So that's very straightforward.

18 Now, on the decks. The decks, again, they're  
19 elevated so that you could walk out of french doors from  
20 the main level out on to these decks and you could look at  
21 Lake Keowee. And we poured the concrete. And the  
22 allegations are that the plans were not followed in that  
23 the plans called for there to be treated wood products, all  
24 through that deck and there aren't treated wood products.  
25 The plans call for this house wrap, I call it, weatherproof

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 barrier, to extend down the wall where the deck joined the  
2 wall. It doesn't. It called -- the plans called for two  
3 sets of flashings up next to where the neck joined the  
4 wall. They're not there. And I could go on.

5 All of those are things that should have been  
6 picked up by the contractor, and because they were not,  
7 then all of the allegations are that there were different  
8 causes of water getting to where it shouldn't be, but those  
9 things that are missing that were obvious -- I mean, if a  
10 barrier is not there, that's obvious, as you have already  
11 ruled. If this metal flashing is not there, it's the same  
12 type thing.

13 If the contractor is supervising at all, it should  
14 have been picked up. If it's not treated wood in deck.  
15 after deck after deck, if some was treated and some was  
16 not, the contractor should have picked up on it. We're not  
17 talking about a stray board, you know, here or there that  
18 found its way.

19 And so in all the allegations from the plaintiff  
20 and from experts who testified, there is -- they suggest  
21 fault at multiple levels. And we could argue that we are  
22 free from fault, but that's not why we're here. The  
23 question is, if these things exist, and if they are  
24 problems, was the contractor involved, and if he was, if it  
25 was a violation of code or if he didn't insist that the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 plans be followed, or both, then his hands are dirty and he  
2 cannot have equitable subrogation. So that's where we are.  
3 That's why we are moving that that equitable subrogation in  
4 a cross claim by Marick for Phase II against Southern  
5 Concrete not lie in the same way that you have already  
6 found it does not lie against these other folks, and that's  
7 why I adopted their arguments. Thank you.

8 THE COURT: Very good. All right.

9 Well, Mr. Martin, do you want to come back and tell  
10 me more about yours?

11 MR. IMHOFF: Your Honor, again, that's a completely  
12 separate argument.

13 THE COURT: All right. It's separate. All right.  
14 So you want me to rule on the Goldsmith. What do you say  
15 as to Mr. Goldsmith?

16 Wait a minute. We've got another --

17 MS. NICHOLS: Your Honor, Melissa Nichols for Clear  
18 View Construction and Michael Franz. I believe I may be  
19 the one remaining contractor in Phase II, so my claims  
20 would be very similar to the claims in the argument that  
21 Mr. Goldsmith just made.

22 THE COURT: All right. So I'll wait.

23 Do you agree that hers would come under the --

24 MR. IMHOFF: No, Your Honor.

25 THE COURT: All right. I'll take up --

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 He's the one that brought the cross claims so he's  
2 entitled to address the Court.

3 Okay. Thank you. I'll get back to you, though.

4 MR. IMHOFF: Your Honor, clearly you are focused on  
5 what Marick did or didn't do, and if there are defects out  
6 there then Marick wants to have some -- and I took the  
7 deposition or we took the deposition of Jason Collins, who  
8 is the superintendent for Southern Concrete and  
9 Mr. Goldsmith's clients. And I asked him, What were you  
10 hired to do?

11 In addition to the below grade waterproofing, they  
12 were hired to do the waterproofing on the decks.

13 And I asked him, Who chose the products?

14 And they said: Southern Concrete did. They said  
15 this was the best product out there for what we were doing.  
16 He said, We used the plan.

17 I said, Did you discuss the product that you were  
18 going to use with anyone from Marick?

19 He said, No. Other than what we priced, our price  
20 for polymembrane was on there.

21 And I said, And how about any representative of  
22 Marick Homebuilders? Did they inspect?

23 Yes.

24 They came out and looked at your installation?

25 Yes.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 On more than one occasion.

2 Yes.

3 Did he ask questions?

4 Yes.

5 About how it was installed?

6 Yes.

7 And is that how you told Nathan it should be done.

8 Yes.

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

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

12 And that Southern Concrete believed it was  
13 sufficient?

14 Yes.

15 And did you show Nathan that you were putting a  
16 slope in by sloping the concrete?

17 Yes.

18 And told him that's what you were doing?

19 Yes.

20 My point throughout all of this, Your Honor, is  
21 that there was an on-site superintendent who walks over and  
22 discusses with these subcontractors their expertise and  
23 experience in their trade. And when you have a  
24 subcontractor who is purchasing a product, recommending a  
25 product, installing a product per the manufacturer's

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 installation instructions, showing the on-site supervisor  
2 how they are going to put the waterproofing in, how it is  
3 in compliance with manufacturer's installation  
4 instructions, and he comes out and looks at them repeatedly  
5 and asks questions and inspects, and then you go out with  
6 Randy Still and all of the other experts in this case and  
7 you find that, in fact, it was not done that way, and  
8 that's a fact.

9       The waterproofing that Mr. Carlin (phonetic)  
10 testified was done in a certain manner on these decks was  
11 not done in the three or four decks we cut up to look into  
12 the way he said it was going to be done and the way we  
13 inspected and supervised it and expected it to be done.  
14 And that's why I have saved Southern Concrete because I  
15 think they are a perfect example of what a jury could hear  
16 and what a jury could decide that Marick did everything it  
17 could other than literally sit on their workers' shoulders  
18 to watch them. And that's the testimony as to Southern  
19 Concrete.

20       In addition, we have filed a contractual indemnity  
21 breach of contract cause of action.

22       **THE COURT:** I'm not addressing that at this point.

23       **MR. IMHOFF:** But that is as clear of the  
24 questioning and evidence that I can think of. There's  
25 deposition testimony from Randy Still that we have then

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 breached our supervisory obligations in that regard, they  
2 are clearly leaking, clearly inspected them, clearly relied  
3 on them, and they told us it was done a certain way, showed  
4 us it was done a certain way, and we now found that wasn't  
5 true.

6 And that has been the basis for our argument  
7 throughout this, that there is a potential for the jury to  
8 find that we did supervise out there. That we were failed  
9 solely by the subcontractors. We didn't fail. And I would  
10 submit that to the Court again. I don't think it could be,  
11 Oh, I don't know much more that Marick could have done.

12 MR. GOLDSMITH: If I could respond very briefly?

13 THE COURT: Yes, sir.

14 MR. GOLDSMITH: Your Honor, the other folks that  
15 you have found are entitled to be -- have this cross claim  
16 dismissed because of fault by Marick, there are several  
17 things involved. There is waterproof wrap, there is  
18 siding, these pieces fit together.

19 In the decks it's the same thing. Your Honor, the  
20 waterproofing that Southern Concrete was to do only was  
21 underneath the concrete. The evidence and the testimony  
22 shows other problems out there that combine and concur  
23 according to the plaintiff's theory. And so what you have  
24 is, did the Marick superintendent in the same way as these  
25 others, did he supervise the overall job? Not, you know,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 one piece of it, but did he supervise as to the Catoe folks  
2 and the Builders First Source? And you found that he  
3 didn't do it. Marick, when I say he, Marick did not  
4 supervise. And it's the same with the decks and it's the  
5 same with the below-grade waterproofing. Their hands are  
6 not clean because they needed to oversee the interaction  
7 between the various trades. Some of the things that had to  
8 go on before our people ever arrived on the job, such as  
9 the weatherproof barrier or house wrap, such as the  
10 flashing, such as the treated wood, all of those things are  
11 part of the plaintiff's case.

12 And so now Marick wants to turn around and say,  
13 Well, I get to look to you for equitable subrogation on the  
14 entire deck issue, for example; and that would be  
15 inconsistent with what Your Honor has ruled up to this  
16 point for the exact same reason.

17 Thank you.

18 **THE COURT:** Anything else?

19 **MR. WARD:** Your Honor, Jason Ward for Ester Moran  
20 Mentado, and we'd like to join in as well.

21 **THE COURT:** Are you Phase I or two?

22 **MR. WARD:** I believe we're Phase II, Your Honor.

23 **THE COURT:** Well, we're saving Phase II.

24 **MR. WARD:** Maybe the second phase of Phase I.

25 Thank you.



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: All right.

2 MR. IMHOFF: I don't know what his client --

3 THE COURT: All right. If you would please, what's  
4 your number -- tab number?

5 MR. WARD: I don't think we are on there, Your  
6 Honor. We filed our motion last week. But we did a little  
7 bit of framing apparently.

8 THE COURT: All right. And who is this again?

9 MR. WARD: Ester Moran Mentado, Your Honor.

10 THE COURT: Do you have an objection to me hearing  
11 that one, too?

12 MR. IMHOFF: No, Your Honor. That goes under the  
13 Builders First Source case.

14 THE COURT: Okay. Ester --

15 MR. WARD: -- Moran Mentado, M-e-n-t-a-d-o.

16 THE COURT: Say that again for me, please.

17 MR. WARD: M-e-n-t-a-d-o.

18 THE COURT: And your name again?

19 MR. WARD: Jason Ward.

20 THE COURT: Jason Ward?

21 MR. WARD: Yes, sir.

22 THE COURT: Thank you, sir.

23 MR. WARD: Thank you.

24 THE COURT: All right. Supervision to me is more  
25 than just going out and having a conversation with

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 somebody, because obviously, although you rely upon the  
2 expertise of the subcontractors on the project or your  
3 subcontractors' subcons, subcontractors, I trust that  
4 somebody has to have the ultimate responsibility for the  
5 work being done properly.

6 And so, to borrow from another area of law where  
7 you have a duty to look out, or to keep a lookout, you also  
8 have a duty to see, not just to look. Now we'll be taking  
9 a lunch break so I'll leave you something to think about.

10 Horatio Nelson at the battle of Denmark was a  
11 Captain and he had a little botilla (phonetic) of a British  
12 Navy fleet, and the Admiral sent him into the bay there to  
13 see if the French fleet was there. And Captain Nelson went  
14 to the bay and he signaled back to the fleet that he saw no  
15 French fleet. So the Admiral gave him permission to go in.  
16 Of course, the whole French fleet was there, but  
17 fortunately he was successful.

18 Now, when he signaled back to the Admiral that he  
19 saw no French fleet or ships in the bay, he forgot to tell  
20 him that he put his spy glass up to his right eye, which he  
21 had lost two years before (laughter) and so he was very  
22 honest about it, he did not see any French fleet.  
23 Unfortunately, the French fleet was there, and if he had  
24 used the other eye, he would have seen it.

25 Again, it's not only what you are looking at, but

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 you are supposed to see what was there.

2           So I find that under the requirement of equitable  
3 indemnification that the cross claim should be dismissed as  
4 to the -- let's see -- have we already done Catoe and  
5 Builders First? Again, as to Catoe, Builders First, T.G.  
6 Construction, Alejandro Cruz, Alberto Hernandez-Aviles, or  
7 whatever, Montel Mentado, the cross claims will be  
8 dismissed as to those.

9           MR. GOLDSMITH: How about Southern Concrete, Your  
10 Honor?

11           THE COURT: Oh, and Southern Concrete, too, because  
12 obviously, I think maybe that comes from closer to the  
13 Horatio Nelson concept.

14           MR. GOLDSMITH: Thank you.

15           THE COURT: All right. Gentlemen and ladies, it's  
16 a little bit after one. What time do you want to  
17 reconvene? We still have some motions on the cross claims,  
18 I haven't forgotten that. Do you want to try for two  
19 o'clock? That's about 50 minutes. The nice thing about  
20 Walhalla, there's not a lot of places to eat. So you have  
21 to come back.

22           All right. I'll see you at two.

23           (WHEREUPON there was an off-the-record discussion.)

24           THE COURT: By the way, Mr. Root, you stayed too  
25 long.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. ROOT: I think Mr. Horton will do the order.

2 THE COURT: You can join them all on the caption.

3 (WHEREUPON a luncheon recess occurred from 1:12  
4 p.m. until 2:00 p.m.)

5 (WHEREUPON the afternoon proceedings began at 2:22  
6 p.m.)

7 THE COURT: All right. What's the next thing we  
8 have?

9 MS. NICHOLS: Good afternoon, Your Honor, I'm  
10 Melissa Nichols. I represent Clear View Construction and  
11 Michael Franz. We performed some stone work on Phase II of  
12 the project, and I have a motion that is very, very similar  
13 to all the motions that you ruled on this morning. We move  
14 for summary judgment on the claims that Marick and one of  
15 Marick's owners, Rick Thoennes, filed against my clients,  
16 Michael Franz and Clear View Construction. The claims,  
17 regardless of how they're phrased, are indemnity claims,  
18 they are the same claims that were asserted against Catoo  
19 and Southern Concrete.

20 And I'll address the equitable indemnity issue.  
21 It's my believe that the claims are all equitable indemnity  
22 claims, but I believe Marick will assert that with regards  
23 to Marick claims against Clear View that there is also a  
24 contractual indemnity claim, and I'll address that  
25 separately if you wish.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Very well.

2 MS. NICHOLS: Okay. On equitable indemnity there  
3 is no reason to rule any differently than Your Honor has  
4 ruled on the claims asserted against Carl Catoe, BFS, and  
5 Southern Concrete. The allegations against my clients are  
6 that there was no flashing installed at the intersection of  
7 the stone and other materials.

8 THE COURT: So you did what?

9 MS. NICHOLS: We installed stone work on portions  
10 of Phase II. We didn't do the whole -- all of Phase II but  
11 we did some of the stone work on Phase II. And the  
12 allegations against my client are global allegations. It's  
13 not a little piece of flashing missing somewhere, it's that  
14 nowhere on any of the stone work that was installed is  
15 there flashing at the base of the stone or is there a weep  
16 screen, a way for the water to drain from behind the stone.  
17 We are not conceding that is part of my client's scope of  
18 work, but those are the allegations with regard to the  
19 stone.

20 The way you check for flashing, you don't need to  
21 remove the stone. You walk up to the side of the building  
22 and you look, and if there's flashing sticking out it's  
23 there, if there's not flashing sticking out, it's probably  
24 not there. It should be visible. So it's something that  
25 Marick easily could have seen if they were supervising at

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 all, would have known that there was an absence of it and  
2 like I said the allegations was that it just didn't -- it  
3 wasn't anywhere on the project, it's not that it was  
4 missing in one particular location.

5 And I know you have heard extensive argument so  
6 unless you need more from me, that's all I have.

7 THE COURT: All right. Let's see.

8 Anything else on -- Mr. Root, is this one of yours,  
9 too?

10 MR. ROOT: This is not one of mine. I think there  
11 are a few parties that have an objection on the contractual  
12 indemnity part of the argument that Marick is gonna  
13 present, so I'll have that to argue. But this one stands  
14 alone as to Clear View.

15 THE COURT: All right, Mr. Imhoff?

16 MR. IMHOFF: Your Honor, I would say the same thing  
17 that I've said throughout all of this, that there are facts  
18 and evidence which would exonerate Marick from liability  
19 for supervision, and if you take the evidence in the light  
20 most favorable to Marick, there is a scintilla of evidence  
21 upon which a jury could decide that Marick was not  
22 negligent in its supervising.

23 It is interesting today as we have proceeded how  
24 these defendants have denied any wrongdoing throughout the  
25 three years of litigation, but today, their wrongdoing is

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 so terrible that Marick would have been blind if they had  
2 not seen it. I can assure you, and I think Mr. Lyles will  
3 agree with me that that has not been how this case has  
4 proceeded. Although it would be interesting to get a  
5 transcript of this -- but I disagree completely with ---

6 **THE COURT:** Let me ask you, what are your  
7 allegations against Clear View in your cross claim?

8 **MR. IMHOFF:** Well, we don't have allegations  
9 against Clear View. My expert has said that we do not  
10 believe that the stone has to come off, that the  
11 allegations made by plaintiff's attorney are that the stone  
12 is bad. But the stone is being removed at places where it  
13 was put to remedy the water intrusion problem on the deck.  
14 In our opinion the stone doesn't need to come off.

15 **THE COURT:** Well, the thing is, if you say they  
16 didn't do anything, then how would you be entitled to any  
17 sort of indemnity?

18 **MR. IMHOFF:** Well, I think that just because we  
19 didn't disagree with plaintiff's allegations doesn't mean  
20 we don't have an equitable indemnity ---

21 **THE COURT:** Well, isn't that what indemnification  
22 is for, though, is you have a wrongdoer that should  
23 identify you?

24 **MR. IMHOFF:** Yes, Your Honor. But right now they  
25 are all allegations. Plaintiff has alleged that

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 essentially every exterior component on these buildings  
2 needs to be removed and redone. We have not agreed with  
3 that. What we have said is, if a jury determines that to  
4 be true, such as in the case with the stone, then we will  
5 be liable for the stone mason's work, if the jury decides  
6 that, but it's an issue of fact for them to decide.

7         So my expert hasn't made the allegations that this  
8 and that and other things are missing from the stone.  
9 Those allegations came from plaintiff's expert. This  
10 plaintiff disagrees. However, I asked Drew Wilke  
11 (phonetic), who is Clear View Construction's expert -- I  
12 believe he's a structural engineer or some kind of a  
13 forensic investigator -- I asked him after Mr. Lyles took  
14 his testimony to describe some of the things that he  
15 believes were wrong with Clear View Construction's work.

16         **THE COURT:** This is their expert?

17         **MR. IMHOFF:** This is their own expert. And I asked  
18 him what are the things that you believe is wrong with  
19 Clear View Construction's work.

20         **THE COURT:** Don't tell me he said nothing.

21         **MR. IMHOFF:** Oh, no. He said it was so terrible  
22 that Marick should have seen it.

23         **THE COURT:** That's correct.

24         **MR. IMHOFF:** What he did say is he named a couple  
25 of things, and we're talking about mortar cracks and this



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 kind of thing. And I asked him specifically, Your Honor,  
2 because I knew I was going to be in front of you again with  
3 this, I asked him if those issues would have been  
4 immediately observable by anyone inspecting Clear View's  
5 work and he said no.

6 So if I walk up and I'm the superintendent for  
7 Marick and looked at a mortar gap done by Clear View  
8 Construction, and it is full, it is touching the stone on  
9 this side, that side, and both sides, and then you walk up  
10 now six years later to look at it and that mortar for  
11 whatever reason, was mixed wrong, the wrong mortar, the  
12 wrong application, whatever it was, is now crap and is  
13 letting water into the decks, that is, I believe, an issue  
14 for the jury to determine if we should have or could have  
15 known at the time that the mortar was improper and cracked.  
16 And again I think that is an issue for the jury.

17 Their own expert admitted -- and I'll read it to  
18 you if you want, directly from the deposition. But their  
19 own expert testified that it wasn't immediately observable.  
20 And if it was not immediately observable at the time I  
21 inspected it, how could I have possibly have violated my  
22 supervisory obligation? So for all of the things that  
23 Clear View admitted, every one of those would not be seen  
24 until some later date; and that is the scintilla of  
25 evidence, hopefully in the light most favorable to my

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 client, that you would allow to go in front of the jury to  
2 let the jury determine that we have failed in our  
3 supervision of the work.

4 THE COURT: All right.

5 MR. IMHOFF: One other thing. I think I can  
6 clarify something. Mr. Horton asked me earlier whether or  
7 not I was conceding the negligence and warranty cause of  
8 action as to his client, Mack. And I said yes, I didn't  
9 concede those to my direct subs, which are Clear View,  
10 Builders First Source, and Southern Concrete. So while  
11 there is a better argument that all of my causes of action,  
12 not to my direct subs collapse on equitable indemnity. I  
13 don't believe that's true for my direct subs who I believe  
14 have obligations and duties to me apart from...

15 THE COURT: Yes, ma'am.

16 MS. NICHOLS: Yes, Your Honor. First I'll address  
17 the issue crap found somewhere along the building that  
18 wouldn't be observable. There is no question that Marick  
19 bears fault for defects on this building. Whether or not  
20 there are, in addition to other alleged defects exists a  
21 crack that would not have been observable is not the point.  
22 The allegations against my clients are that -- and I'm not  
23 conceding these allegations. I'm not saying --

24 THE COURT: I understand.

25 MS. NICHOLS: But the allegations against my

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 clients are that there was absolutely no flashing installed  
2 at the base of the wall system ---

3 THE COURT: That was one of your duties, or your  
4 responsibilities?

5 MS. NICHOLS: Well, that is not established. That  
6 is a question of fact. We don't concede that was one of  
7 our duties, but those are the allegations that the  
8 plaintiffs have --

9 THE COURT: Well -- but that is what they allege in  
10 the cross claim against you?

11 MS. NICHOLS: That's what the plaintiffs are  
12 alleging and what Marick is saying --

13 THE COURT: Oh, that's the plaintiff's allegations?

14 MS. NICHOLS: Yes. And what Marick is saying is,  
15 you know, if it's found that there needed to be flashings  
16 at the base of the wall, then I'm coming after you, Clear  
17 View, because you should have put it there. And I'm saying  
18 it's completely visible whether or not there is base and  
19 wall flashing. It's visible whether or not there is  
20 flashing at the intersection of the stone and the siding.  
21 These are conditions that anyone --

22 THE COURT: So they are not alleging any sort of  
23 lack of quality of the concrete?

24 MS. NICHOLS: Of the material itself they are not,  
25 as far as I know.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: This is the plaintiff?

2 MS. NICHOLS: Right.

3 THE COURT: In other words, if the plaintiff gets  
4 to you, it would be on the flashing?

5 MS. NICHOLS: Right. There have been allegations  
6 of lack of flashing, lack of any weep screen at the base of  
7 the system that would allow the system to drain. And so,  
8 you know, those allegations, those conditions, are visible  
9 whether or not -- the plaintiff also alleges that there is  
10 a crack somewhere that Marick could not see is beside the  
11 point. There is no question that Marick cannot come into  
12 this court with clean hands. There are numerous conditions  
13 that are well established that Marick didn't observe during  
14 its period where it was supposed to be supervising the  
15 project.

16 I also wanted to note as an additional condition  
17 that with regard to the claim asserted by Rick Thoennes,  
18 individually, against my clients and the claims asserted by  
19 both Marick and Rick Thoennes against Michael Franz, that  
20 there was no special relationship, either.

21 In other words, Clear View was a subcontractor with  
22 Marick. Clear View had no relationship with Rick Thoennes;  
23 and Michael Franz had no relationship with Marick or Rick  
24 Thoennes. So just as an additional grounds for claims  
25 against those entities, there is no special relationship

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 that would justify equitable indemnification either.

2 THE COURT: I'm a little bit confused then. The  
3 cross claim is against you and --

4 MS. NICHOLS: I represent an individual, Mr. Franz,  
5 who is a member of Clear View Construction, LLC. So  
6 Mr. Franz was then sued individually --

7 THE COURT: Individually.

8 MS. NICHOLS: -- and the LLC has been sued.

9 Marick, I forget whether there's a LLC, but Rick  
10 Thoennes was an owner of Marick. Rick Thoennes has sued  
11 both of my clients and he had never had a relationship with  
12 them at all. Marick has sued Mr. Franz and he had no  
13 relationship with Mr. Franz. The only parties with any  
14 relationship at all are Clear View and Marick. But I don't  
15 think we even need to get to the special relationship issue  
16 because we are in the same position as every other Phase II  
17 subcontractor whose motions you've already ruled on today,  
18 that Marick cannot come into this court with clean hands.

19 THE COURT: All right. But you say there is no  
20 allegation in the Complaint as yet that alleges anything --  
21 either in the Complaint or cross claim that alleges  
22 anything about defective mortar?

23 MS. NICHOLS: Your Honor, I'm not aware of any  
24 allegation about defective mortar; it's all about  
25 insulation.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: All right, Mr. Imhoff? I mean if it  
2 has to do -- I mean, did they have the responsibility for  
3 the flashing and the barrier or whatever?

4 MR. IMHOFF: Not the barrier, but the flashing.  
5 And what Ms. Nichols just said brings up a very, very  
6 interesting point. She has just said that there is a  
7 question of fact because we are denying that we were  
8 required to put flashing on it.

9 THE COURT: Well, let me say this, though. If they  
10 find against Clear View, it would have to be on failure of  
11 the flashing?

12 MR. IMHOFF: Well, that's potentially one of them.

13 THE COURT: So that would -- also, as you have said  
14 before, then that would be against you --

15 MR. IMHOFF: Yes, Your Honor.

16 THE COURT: -- as the general contractor.

17 MR. IMHOFF: But I think that it is important to  
18 point out that that has not been conceded. That is still  
19 a --

20 THE COURT: Well, that's not where I am. I'm  
21 saying that you have no liability for Clear View unless  
22 they find that they were responsible for the flashings.

23 MR. IMHOFF: Well, I think that's probably right.

24 THE COURT: So I mean you would have no indemnity.  
25 But the fact is flashing is a little bit more observable

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 than mortar that deteriorates in six years.

2 MR. IMHOFF: Yes, Your Honor. But if the fact has  
3 not been established that flashing hasn't been there, how  
4 could that fact be used against ---

5 THE COURT: Then how could you deny equitable  
6 indemnity if it's not established?

7 MR. IMHOFF: If the jury decides that flashing  
8 wasn't necessary but the mortar leaked because of ---

9 THE COURT: I'm sure whoever tries the case is  
10 going to limit the plaintiffs to their allegations. There  
11 is no allegation of leaking concrete.

12 MR. IMHOFF: There is, Your Honor. There  
13 absolutely is. Their own expert testified that the  
14 potential water intrusion into the deck, which has caused  
15 the vast majority of all of these problems is through the  
16 mortar joints. There absolutely is an allegation.

17 THE COURT: It doesn't have anything to do with the  
18 flashing or anything like that?

19 MR. IMHOFF: May I read that?

20 THE COURT: You can do whatever you like, but I  
21 need help.

22 MR. IMHOFF: Okay.

23 THE COURT: Because, as I tell you, I do not know  
24 as much about your case as you do.

25 MR. IMHOFF: Well, he's talking about the stone

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 debonding from the mortar and that water is getting in from  
2 the mortar debonding from the stone. You understand there  
3 are two stones with mortar in between and they crack apart  
4 and water can get in there.

5 And so I asked him (reading): Two further reasons  
6 that the mortar would crack or gap or shrink would be that  
7 the mortar would be improperly mixed? Is that a possible  
8 reason why the mortar had failed and cracked?

9 He said, That's a possibility, yes.

10 I said: Is it another possibility that the mortar  
11 was improperly installed: Too thick, too thin, not enough  
12 in those areas?

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

15 This is their own expert admitting that a potential  
16 reason why the water is the getting into these decks and  
17 causing the vast majority, at least according to the  
18 defendant, of all of the damages in all of the Phase II, is  
19 potentially at the fault of Clear View and potentially --  
20 or not even potentially -- he said flat out that those  
21 things would not be immediately observable.

22 So he admits that one of the things his own client  
23 could have done wrong is install or mix or whatever, the  
24 mortar incorrectly, and that that would not be observable  
25 by my client. I could not know that until six years later.



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 And that is a fact that the jury could base a finding on  
2 that I didn't do anything wrong -- Marick didn't do  
3 anything wrong, and I'm only at fault for the water on  
4 these decks some million, \$2 million at the fault solely of  
5 Clear View.

6 And I think that is, if viewed in the light most  
7 favorable to Marick, that is a -- well, it's more than a  
8 scintilla, but at least a scintilla of evidence, on which a  
9 jury could base a finding that we supervised appropriately  
10 in that case.

11 THE COURT: All right.

12 MS. NICHOLS: Your Honor, I'm Melissa Nichols  
13 again.

14 First of all, I wasn't clear on whose deposition he  
15 was referring to. I think at the end it sounded like it  
16 was Drew Wilke's deposition?

17 MR. IMHOFF: Right.

18 MS. NICHOLS: I just wanted to know.

19 One, I don't believe that testimony is in the  
20 record. As far as I know plaintiff hasn't asserted any  
21 allegations that the mortar was mixed improperly. But I  
22 think that's beside the point. It's been established that  
23 there are building code violations, and if there are  
24 building code violations then Marick is at fault. It  
25 cannot come into court with clean hands.

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1           Our work -- part of Clear View's work was on the  
2   elevated decks at Phase II, and there's already been  
3   discussion today about some of the alleged deficiencies on  
4   the Phase II decks, the use of untreated lumber, issues  
5   with the --

6           **THE COURT:** Did you have responsibility for the  
7   sub-flooring or lumber or whatever?

8           **MS. NICHOLS:** The plaintiff is alleging that we are  
9   partly responsible for the repair and the replacement of  
10   the decks, that these deficiencies were working together.  
11   And that goes back again to the fact that Marick, if they  
12   were performing their supervisory jobs, they would have  
13   been sure there were treated lumber, there would have been,  
14   you know, the numbering would have been appropriately  
15   placed. If there is an issue with the flashing and if the  
16   jury finds that that contributes to the deterioration of  
17   the deck, that's something that could have been observed.  
18   The plaintiff alleges that the cap stones at the top of  
19   columns, these decks are elevated decks and there are stone  
20   columns on top of the decks and there's a cap stone.

21           The plaintiff claims that the cap stone is flat and  
22   it should have been sloped and that that is causing water  
23   intrusion into the columns. Again, as an observable  
24   condition.

25           The bottom line is the plaintiff's allegations are

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 about observable conditions that a general contractor who  
2 is on site daily performing supervisory duties would have  
3 seen. If it is determined, if the jury determines there  
4 are these defects, they are visual, visible defects, and if  
5 the jury determines that there are building code  
6 violations, Marick cannot come into this court with clean  
7 hands.

8 **THE COURT:** All right.

9 **MR. IMHOFF:** Ms. Nichols is doing a good job  
10 bringing up more interesting issues, and one of them, I  
11 think, is the scope of what my unclean hands are. If I  
12 have -- if you take the other parties out of this case and  
13 I have plaintiffs versus me, four stone (phonetic) and  
14 Marick versus Clear View, none of those other things come  
15 in.

16 I mean, I'm asking the Court for a little bit of  
17 direction. It was my understanding that my unclean hands  
18 had to be directly related to what the individual  
19 subcontractor did. And as you heard Ms. Nichols talk about  
20 all types of things that she had no relationship, that her  
21 expert testified they had nothing to do with. And so, I  
22 guess I would argue --

23 **THE COURT:** Like what?

24 **MR. IMHOFF:** All of the framing.

25 **THE COURT:** Pardon?

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. IMHOFF: All of the framing.

2 THE COURT: I didn't hear framing from Ms. Nichols.  
3 Did you say framing?

4 MS. NICHOLS: I did, Your Honor. The allegation is  
5 that, and when Mr. Imhoff testified earlier about the  
6 stone --

7 THE COURT: Not testified.

8 MS. NICHOLS: I believe it was testimony, but not  
9 under oath.

10 THE COURT: I thought I was hearing things.

11 MS. NICHOLS: But when he talked earlier about the  
12 water intrusion coming in, the allegation about these  
13 elevated decks is that, when we're talking about the stone,  
14 that the stone somehow allowed water to get underneath --  
15 to the protected areas of the deck and into the framing,  
16 and part and parcel of that is the fact that there was some  
17 untreated lumber there when it should have been treated  
18 lumber. Those facts -- my client is in the exact same boat  
19 and same situation as Carl Catoe, and BFS and -- that the  
20 equitable indemnification claims against them couldn't  
21 survive but they could against my client because the  
22 evidence at trial is going to, against my client on the  
23 elevated decks is going to involve their work and the fact  
24 that Marick wasn't adequately observing their work or  
25 apparently my client's work.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: All right. Anything else?

2 (WHEREUPON there was no response.)

3 (WHEREUPON there was a pause in the proceedings.)

4 THE COURT: All right. This is a close question  
5 here, and we are at summary judgment.

6 As I understand the Complaint, and of course, at  
7 equitable indemnification, the pleadings are not  
8 determinative but still at this stage this is all I have.  
9 The allegations of the Complaint are water damages as a  
10 result of the actions -- now, these are allegations, this  
11 is not a proven fact -- that water damage as far as the  
12 area that Clear View was involved in had to do with your  
13 failure to exercise proper application or what was  
14 necessary at the time.

15 And also that that would be a basis for the  
16 liability of Marick that it didn't provide for the overall  
17 efficacy of the project, the major complaint being the  
18 water damage, which apparently there is no dispute that the  
19 lack of flashing and other things --

20 And I think did your brickwork cover or stone work  
21 cover any of the areas that were not properly  
22 weatherproofed?

23 MS. NICHOLS: Not to my knowledge, Your Honor.

24 Let me back up. I'm sorry. There are allegations  
25 with regards to the work that my client did on the decks

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 that there was not proper weatherproofing beneath the  
2 stonework.

3 THE COURT: All right. The reason I ask because  
4 again, not only does the equitable principles apply to  
5 indemnification, but also apparently if both the one  
6 seeking the indemnity and the one for whom the indemnity is  
7 sought, if both had duties and were negligent in those  
8 duties and that negligence contributed to the injury or  
9 damage for which they seek indemnification, that there  
10 would be joint tort-feasors, both wrongdoers, and that  
11 would also bar indemnification.

12 I can't, in regard to this case, I can't see how  
13 you could be exonerated for something that they did wrong.  
14 In other words, if we find that Clear View did not approach  
15 its responsibilities as to the outside covering so as to  
16 provide for a dry environment, and you wouldn't be  
17 responsible. But apparently they did know it, at least  
18 that's the allegation. So I find that they are entitled to  
19 also a dismissal of the cross claim based on the fact that  
20 both of you had duties to respond, to apply, if they were  
21 evident.

22 So the motion to dismiss the cross claim against  
23 Clear View is made.

24 MS. NICHOLS: Thank you, Your Honor. I'll draft an  
25 order.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Please.

2 All right. Next?

3 MR. IMHOFF: Your Honor, are you ruling on all of  
4 the cross claims against subcontractors negligence and  
5 breach of warranty and breach of contract, contract  
6 indemnity, or are you just ruling that ---

7 THE COURT: No. Again, the negligence is the thing  
8 which I do find it's subsumed by the equitable indemnity.  
9 But as far as a contractual obligation on liability, I  
10 think, that's going to be something else.

11 MR. IMHOFF: Just for clarification. So as a rule  
12 today as to all my cross claims against subcontractors, you  
13 are finding that any pleading of negligence which my client  
14 has made against subcontractors ---

15 THE COURT: Well, you almost have to have  
16 negligence if you're gonna have liability. And that's  
17 where the indemnification comes in, that they are  
18 negligent, they did something wrong. I say negligence in  
19 the sense they had a duty to do something they didn't do or  
20 did it wrong.

21 MR. IMHOFF: All right. So the negligence is  
22 subsumed, as you say?

23 THE COURT: Yes.

24 MR. IMHOFF: And that's your ruling across the  
25 board as to all the subcontractors' cross claims?

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1       **THE COURT:** So far -- everything that I've heard so  
2 far, yes. I mean, I haven't heard everything. But, I  
3 mean, I have to look at each one as it comes.

4       **MR. IMHOFF:** I mean, have you made a finding on  
5 Marick's breach of workmanlike service warranty claims  
6 against my direct subcontractors?

7       **THE COURT:** No. That's contractual.

8       **MR. IMHOFF:** On breach of warranty, Your Honor?

9       **THE COURT:** Yes. I mean, if it's based on the  
10 workmanlike covenant that you would provide a sound  
11 product.

12       **MR. IMHOFF:** So you have not made a ruling on that?

13       **THE COURT:** Right.

14       **MR. IMHOFF:** All right. So we still have to my  
15 direct subcontractors, we have --

16       **THE COURT:** I think I already said that, haven't I?  
17 Whoever was drawing the motions on dismissing of the cross  
18 claim based on equitable indemnification, I said it's based  
19 on negligence, which is subsumed into the equitable  
20 principle. But as far as contractual, that's an entirely  
21 different thing. It might be, but I don't know. Okay?

22       **MR. IMHOFF:** Thank you.

23       **THE COURT:** Next?

24       (WHEREUPON there was discussion off the record.)

25       **MR. ORR:** Lawrence Orr representing Miller/Player &



**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 Associates, the architect. Marick Homebuilders filed cross  
2 claims against the architect for indemnification while they  
3 were denominating negligence, breach of warranty, and  
4 equitable indemnity, they all sought indemnity for anything  
5 that Marick had to pay as a result of the plaintiff  
6 recovering a verdict against Marick.

7 In return, on behalf of Miller/Player, I filed a  
8 counterclaim against Marick for indemnification.

9 Mr. Imhoff and I have agreed to mutually withdraw  
10 our cross claim and counterclaim.

11 (WHEREUPON the Counsel confer.)

12 THE COURT: All right. Mr. Orr, state it again so  
13 we don't have any question about it.

14 MR. ORR: Mr. Imhoff has agreed to withdraw,  
15 dismiss his cross claims against Miller/Player.  
16 Miller/Player will dismiss its counterclaim against Marick  
17 Homebuilders.

18 THE COURT: And this is based on equitable  
19 indemnification?

20 MR. ORR: Yes, sir.

21 THE COURT: Is that correct?

22 MR. IMHOFF: Yes, Your Honor.

23 THE COURT: All right. Granted.

24 MR. IMHOFF: Can I count that one as a win, Your  
25 Honor?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Yes, sir. I'll let you draw the order.  
2 I don't know if an order is necessary, but I do think that  
3 a stipulation of dismissal would probably be appropriate as  
4 to both parties.

5 Does Mr. Imhoff want to do that? Who is going to  
6 do it?

7 MR. ORR: I'll be glad to do it.

8 THE COURT: All right. It's a stipulation of  
9 dismissal as to both parties on the cross claim and the  
10 counterclaim -- counter cross claim.

11 MR. ORR: Yes, sir.

12 THE COURT: Yes, sir?

13 MR. YOKEL: Your Honor, may it please the Court,  
14 David Yoke1 with regard to KMAC. We have a motion for  
15 summary judgment and dismissal against Marick and  
16 Mr. Thoennes. They have filed cross claims for equitable  
17 indemnity, breach of warranty, and negligence. And we're  
18 from Phase I.

19 THE COURT: All right. Which one is this?

20 MR. YOKEL: This is number -- it's on page 2,  
21 number 20, Your Honor.

22 THE COURT: All right. Twenty, KMAC?

23 MR. YOKEL: KMAC, Yes, Your Honor. And we are a  
24 Phase I subcontractor of Bostic.

25 THE COURT: Okay.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MS. CULBREATH: Your Honor, I'm Ann Culbreath for  
2 Vincent Morales doing business as Morales Masonry, your tab  
3 22. We, too, are alleged to be a Phase I subcontractor for  
4 Bostic.

5 THE COURT: And again, your motion for summary  
6 judgment is to the cross claim?

7 MS. CULBREATH: Yes, sir.

8 MR. MARTIN: Your Honor, Kirk Martin for Jose Nino.  
9 We are number 21. Also in Phase I, a subcontractor for  
10 Bostic.

11 THE COURT: All right.

12 MS. CULBERTSON: Your Honor, one other thing, I'm  
13 Anne Culbertson on behalf of Medallion and Seckinger.  
14 Several of these motions are pending as to additional  
15 parties other than Marick. There are some additional  
16 parties, for example, I believe my client, Integrys, IMK,  
17 Cox and Lollis are implicated in some of the summary  
18 judgment arguments that are going to be made. And I don't  
19 know, Your Honor, if you just want to handle Marick for now  
20 or if you kind of want to tackle them all as a team.

21 My arguments are completely weird and different  
22 than anything else you will hear today.

23 THE COURT: Probably about a good observation as  
24 any, I think.

25 MR. YOKEL: We expected that, so we felt the Court

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 would probably just want to finish up with Marick.

2 THE COURT: All right. Finish up. That sounds  
3 sort of anal.

4 All right. Well, let's do that. You are  
5 representing Medallion and --

6 MS. CULBERTSON: -- and Seckinger.

7 THE COURT: And who?

8 MS. CULBERTSON: And Seckinger, Brad Seckinger.

9 THE COURT: How about Lollis and MK and all those  
10 others?

11 MS. BROWN: Thank you, your Honor. Cynthia Brown  
12 for IMK, IK, Cox, and Lollis.

13 THE COURT: Just a moment, Ms. Brown.

14 You have who?

15 MS. BROWN: Cynthia Brown for IMK, IK, Lollis, and  
16 Cox.

17 THE COURT: And does that take care of everybody?  
18 How about -- now Marick and Thoennes, that's the same; is  
19 that correct? Is it Thoennes?

20 MR. IMHOFF: Thoennes, Your Honor.

21 THE COURT: Thoennes is a principal in Marick or  
22 was a principal in Marick?

23 MR. IMHOFF: Yes, sir.

24 THE COURT: So you are the same? That would be the  
25 same?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. IMHOFF: Yes. There are a couple lawyers that  
2 represent him, but yes.

3 THE COURT: Okay. All right. Now, anybody else?  
4 (WHEREUPON there was no response.)

5 THE COURT: All right. Let's start down the road.

6 MR. YOKEL: So do you just want to just hear  
7 arguments with Marick first?

8 THE COURT: Please. That would be KMAC, Morales  
9 and Nino.

10 MR. YOKEL: Thank you, Your Honor. Again, David  
11 Yoke1.

12 To get started I think some quick procedural on how  
13 this is. KMAC was involved in doing construction of the  
14 elevated concrete portion of the decks in Phase I. There  
15 are eight buildings. They only did work on buildings two,  
16 three, four, five, six, and eight. They were also  
17 responsible for doing the waterproofing underneath the  
18 deck; was not involved in doing any of the framing work,  
19 construction of any parts of the structural part of the  
20 deck. The work was done in 2003 under Bostic.

21 Marick didn't get involved in this situation until  
22 2005's construction, would be about 2006 and into 2007.  
23 Marick has no knowledge, understanding, or anything  
24 whatsoever with regard to KMAC until this lawsuit was  
25 started.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 I have answers to their interrogatories to KMAC and  
2 their response to request to produce, if I might, Your  
3 Honor (handing); where they ultimately acknowledged that  
4 there was no contract between Marick and KMAC. When asked  
5 about the scope of work performed by Marick as it would  
6 relate to the construction of -- I mean, that was in their  
7 answer to interrogatory number 6.

8 In their interrogatories number 10, when it came to  
9 work performed by Marick as it relates to the construction  
10 of the elevated decks, they put none. Then they also admit  
11 that they have no documents evidencing a contract of any  
12 type, no communications, and they had no contract with any  
13 subcontractors, buildings, with relationship to two, three,  
14 four, five, six, and eight.

15 Again, as it relates to the equitable indemnity,  
16 you must have a special relationship, and clearly as a  
17 matter of law when there was no contract, we're not even in  
18 the line of their subcontractors, we worked on a different  
19 part of the project which they weren't involved in as it  
20 relates to the construction for at least three years before  
21 that time. And when they came in, they took over the case,  
22 or the construction, once Bostic had gone into the  
23 bankruptcy and such, they bought out and then they  
24 completed the project. The information that's available is  
25 that it was mostly the interior portions of the project,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 not to the exterior portions.

2           So as it relates to that component we believe that  
3 we would be entitled to summary judgment. I believe from  
4 the previous communications or the conversations and your  
5 rulings here is that the breach of warranties and the  
6 negligence would be subsumed into the indemnity and  
7 particularly as it relates to Marick, their allegations for  
8 indemnity is based on just that it rides out of the work  
9 that any of the contractors and subcontractors might have  
10 performed.

11           Then when they make their allegations under breach  
12 of warranty and the negligence, it also states that it  
13 arises out of allegations that related to whatever work  
14 that was performed. So it is clear from their own  
15 pleadings that it is subsumed into and is all part of the  
16 equitable indemnifications.

17           Since they allege that there was no relationship  
18 that they had with KMAC, the work was performed before  
19 Marick even came onto the project, then clearly the only  
20 way they can go forward with any equitable indemnification  
21 is if they can show a special relationship, Your Honor, and  
22 do not believe they can do so in that regard, and that  
23 would relate as to all three of them.

24           **THE COURT:** All right. Mr. Imhoff, do you want to  
25 take them individually or do you want to hear what they all

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 have to say?

2 MR. IMHOFF: I don't want to hear what they all  
3 have to say, Your Honor.

4 MS. CULBREATH: Your Honor, again, Ann Culbreath  
5 for Moralas Custom Masonry. We are in the exact same  
6 position as Mr. Yoke1 just described. If you look at the  
7 discovery responses by Marick to the discovery propounded  
8 by KMAC, there is no evidence of any kind of a contract and  
9 there's assertions that there are no contracts or any kind  
10 of relationship with the alleged Phase I subs; and  
11 therefore, no need for equitable indemnification.

12 THE COURT: All right, Mr. Martin?

13 MR. MARTIN: If I may, sir, with regard to Jose  
14 Nino, I don't have much more to add.

15 THE COURT: What did Jose do?

16 MR. MARTIN: A framer for Phase I, and Mr. Nino's  
17 scope of work was finished long before Marick ever got the  
18 project. Just as an argument, there's no equitable  
19 indemnification, especially because a requirement of  
20 equitable indemnification is that the party seeking  
21 indemnification is without fault, and that has not  
22 happened. There is no special relationship.

23 THE COURT: So that would make them joint  
24 tort-feasors if they contributed to it by reason of  
25 independent action.



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 All right, Mr. Imhoff?

2 MR. IMHOFF: Your Honor, this is where it truly  
3 gets really complicated.

4 THE COURT: Okay.

5 MR. IMHOFF: I'm really not making a joke about it.

6 THE COURT: No, I'm fine.

7 MR. IMHOFF: I actually stipulate to the facts as  
8 they've alleged them. Marick is a general contractor that  
9 came to the project, at least based on the testimony of  
10 Marick, after Phase I exteriors were constructed. So the  
11 interiors were not finished, but the Phase I exteriors were  
12 constructed. So I'll stipulate to that part. We didn't  
13 hire these people, they didn't work for us. Unfortunately,  
14 I don't know everyone in the case will stipulate to that,  
15 and that's where it sort of gets complicated.

16 The allegations against Marick, the general  
17 contractor, by the plaintiffs are numerous. They allege we  
18 are either the alter ego or in a joint enterprise with a  
19 developer and therefore are developer. Mr. Hudgins has  
20 testified that he has spoken with people that believe that  
21 we constructed some of the exteriors. There is an  
22 allegation of a breach of fiduciary duty against Marick  
23 from running the Homeowners Association.

24 And so I don't disagree with these attorneys that  
25 as a general contractor Marick didn't hire them and didn't

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 build it. But the allegations from the plaintiff are that,  
2 one, Marick did build some of the exterior, but more  
3 important, that Marick is a developer and thus liable for  
4 putting these into the stream of commerce. And if I am a  
5 developer and if this Court were decides or the jury  
6 decides that I have developer liability, I believe that I  
7 do have equitable indemnification causes of actions,  
8 warranty causes of action, and negligent causes of action  
9 because I think they do have, according to the case law, a  
10 duty to subsequent purchasers of the property, which we  
11 owned the property at the time.

12 And in this case, Your Honor, for once, there can  
13 be no true allegation that I have unclean hands because  
14 Marick didn't build Phase I. There is an allegation that's  
15 completely unsupported at this time. So that is how we  
16 believe that we have equitable, and I stress the word  
17 "equitable", causes of action against the builders and  
18 subcontractors in Phase I and that there would be a special  
19 relationship there for equitable indemnity because it's  
20 alleged that we did some of this work, but more importantly  
21 the breach of the warranty and negligence in this case are  
22 separable from equitable indemnity because those  
23 obligations run to me, to my client, as a developer  
24 separate from equitable indemnification.

25 So, for instance, if I were to dismiss ---

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Wait a minute. So you do have a --  
2 part of your cross claim is warranty?

3 MR. IMHOFF: Yes. Yes, Your Honor. And if I were  
4 to dismiss today the equitable indemnity cause of action so  
5 that it would not be subsumed -- or so the negligence,  
6 warranty, whatever cause of action would not be subsumed by  
7 the equitable indemnity, I think those causes of action  
8 would stand on their own. I mean, I think they fit for  
9 Phase II also. But especially in this case when there's an  
10 allegation that I'm the developer. And I think the facts  
11 will bear out that I did not -- that Marick did not  
12 construct any of the Phase I units, so we would be a truly  
13 innocent party in an equitable indemnity situation.

14 So for those reasons I would ask the Court not to  
15 grant the Phase I subcontractors' motion for summary  
16 judgment.

17 THE COURT: As to the equitable indemnification or  
18 warranty?

19 MR. IMHOFF: Well, I think all those. I think as a  
20 developer I would have equitable indemnification. I think  
21 that I have a special relationship with these  
22 subcontractors in Phase I if I'm the developer. There's  
23 allegations earlier that just by pulling the permit in the  
24 case, I have stated that all of the buildings in Phase I  
25 are free from defects and comply with the code as a general

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 contractor and as a developer.

2 But especially, I still think equitable, and I  
3 stress equitable again, it would be unfair for me truly as  
4 an innocent party to suffer liability through no fault of  
5 my own at the hands of these subcontractors.

6 THE COURT: All right. Mr. Yokel, what do you have  
7 to say about that? In other words, he's saying it's almost  
8 like you have been hoisted on your own Batard. That you  
9 have no special relationship means that he's not a joint  
10 tort-feasor.

11 MR. YOKEL: Well, if you base it -- I mean, he's  
12 already stipulated to that. Now, if you want to base it on  
13 the plaintiff's complaint, which is alleging that he is the  
14 developer, he's the contractor because he pulled the COs on  
15 there, then he would become a joint tort-feasor. So he  
16 wants to have -- in one sense he wants to say --

17 THE COURT: So you're saying his actions, if again  
18 in the light -- well, his light would be most favorable  
19 that he would have some liability as the developer or a  
20 person who, or entity who puts the project into commerce.

21 MR. YOKEL: That is correct. He has negligence  
22 based on if we just take it on what the plaintiff is  
23 alleging. I'm a little confused --

24 THE COURT: In other words, what you're saying is  
25 that for him to do what he did, I think the term that you

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 all used was "pull the CO," that means that he took it --  
2 he took it and represented it to the public that it was  
3 good?

4 MR. YOKEL: That's right. And then at that point  
5 in time he is the contractor, and if he wants to try to  
6 hide behind, Well, I'm not the contractor, I'm the  
7 developer, therefore leave them in, when he's actually  
8 acting as the contractor.

9 THE COURT: When, in fact, he wasn't?

10 MR. YOKEL: Well, he was at some point, but he  
11 wasn't when our folks were preparing it. He also wasn't  
12 the developer at the time we were doing the work.

13 THE COURT: Well, he must have done something if he  
14 pulled the COs.

15 MR. YOKEL: That's the thing is that all this work  
16 was done in 2003. Bostic goes -- becomes bankrupt and they  
17 close the doors in 2004. Then through whatever they do  
18 they purchase -- Marick gets involved in 2005. So all the  
19 activities of whether he was a developer or whether he was  
20 a --

21 THE COURT: Did Marick purchase Bostic?

22 MR. YOKEL: Marick purchased -- Marick through SDI  
23 and these other agencies or other companies all put  
24 together little agreements where all these individuals got  
25 together, purchased out aspects --

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Were these corporations?

2 MR. YOKEL: I think some were Corps, some were  
3 LLC's.

4 THE COURT: Well, did they purchase the assets or  
5 the...

6 MR. YOKEL: I believe they purchased the assets --  
7 from the standpoint of trying to borrow --

8 THE COURT: I'm just trying to think if they  
9 assumed any responsibility.

10 MR. YOKEL: The thing is that they were not  
11 involved at all in 2003 and 2004. They couldn't -- no  
12 matter what the plaintiff alleges, they were not a  
13 developer as it relates to the work that we performed when  
14 we performed the work.

15 THE COURT: Yeah. But he's talking about, and  
16 that's what equitable indemnification is, that if he has no  
17 liability except for some sort of acts of somebody else.  
18 In other words, if he acquired a defective product but then  
19 later he turned it or put it in the stream of commerce,  
20 then he would assume the liability for whatever that -- the  
21 quality of the product.

22 And he's saying -- which means -- but as far as  
23 anything he did, he would not be liable. In other words,  
24 there was no wrong there. But he would be liable under the  
25 theory that he put the defective product, not strict

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 liability, but the fact is what was done defectively by  
2 your clients --

3 MR. YOKEL: Allegedly.

4 THE COURT: -- before he got there.

5 That to me that sounds like equitable  
6 indemnification; that he did nothing wrong, but the  
7 liability is a legal liability, not based on any wrongdoing  
8 or either a tort or anything else. And yet he assumes the  
9 liability, yet he assumes the liability based on what your  
10 client allegedly did wrong. Isn't that equitable  
11 indemnification?

12 MR. YOKEL: Yes.

13 THE COURT: Okay.

14 How about the -- let's see. Ms. Culbertson?

15 MS. CULBERTSON: Your Honor --

16 THE COURT: Wait a minute. Ms. Culbreath? I'm  
17 sorry. We've got too many C-U-L's.

18 MS. CULBREATH: Your Honor, I do need to point out  
19 that if there was some sort of independent liability for  
20 breach of fiduciary duty on the part of Marick, these folks  
21 that were allegedly working on Phase I in 2003 would have  
22 nothing to do with that. I would go back to the fact that  
23 there is absolutely no relationship between us at all. And  
24 that's where I won't agree with that.

25 THE COURT: Well, again, when you have joint

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 tort-feasors, you don't always have a relationship, it's  
2 the fact that they contribute to the damage independently.  
3 I mean, if you did have a relationship, it means then you  
4 would be more, and both of you were negligent, and of  
5 course that would be joint tort-feasors which would deny --  
6 merit indemnification. But apparently because there was no  
7 relationship other than you acquired a defective product  
8 and put the defective product out there, not in wrongdoing  
9 but because that's the condition it was in by reason of the  
10 alleged actions of your client.

11 Let's see. Now, Ms. Brown, you come in with  
12 Ms. Culbertson, right.

13 MS. CULBERTSON: Yes, Your Honor.

14 THE COURT: Mr. Martin, you're in there.

15 MR. MARTIN: I'm Kirk Martin on behalf of Nino.

16 Mr. Imhoff stated earlier that the cause of action,  
17 negligence, breach of warranty, and indemnification he  
18 believes all three could continue forward. That's under  
19 the assumption that we have causes of action and not just  
20 one disguised indemnity action. However, if we're going to  
21 argue that the negligence and breach of warranty actions  
22 are indeed separate --

23 THE COURT: Breach of warranty, I think is  
24 separate.

25 MR. MARTIN: Okay. In that situation for those to



**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 survive there still needs to be evidence of causation. And  
2 to my knowledge --

3 THE COURT: Well, the thing is indemnification only  
4 comes in when there is some causation. And at summary  
5 judgment I have to assume the allegations as being, that  
6 there was a basis for the cause of action.

7 MR. MARTIN: Okay. Just to clarify, then, are we  
8 saying that the negligence cause of action is subsumed by  
9 the indemnity cause of action from Mr. Imhoff.

10 THE COURT: Right.

11 MR. MARTIN: Okay. So --

12 THE COURT: I mean, you can't have indemnification  
13 unless there is some damages.

14 MR. MARTIN: Right. Okay.

15 THE COURT: Anything else?

16 MR. IMHOFF: Nothing from me, Your Honor.

17 THE COURT: Do you want to write some more orders.

18 MR. IMHOFF: The more orders I get to write the  
19 happier I am.

20 THE COURT: All right. Now, I do find that  
21 inasmuch as there was no special relationship between KMAC,  
22 Morales, and Nino and Marick, that the causes of action for  
23 equitable indemnification would be there, so it remains.

24 MR. IMHOFF: Thank you, Your Honor.

25 THE COURT: So those motions to dismiss are denied.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Well, I guess -- well, just do me the favor of preparing a  
2 short order that just denies them so that we'll have it in  
3 the record. And of course, if it should develop in some  
4 fashion after further discovery that there's another way of  
5 looking at it, then of course you can renew them. These  
6 are not final.

7 All right.

8 MS. BROWN: Your Honor, just to be clear, does that  
9 cover IMK, IK and --

10 THE COURT: Let me hear both of you, Ms. Culbertson  
11 and Ms. Brown. You spoke first, Ms. Brown. Whichever way  
12 you want to present it.

13 MS. CULBERTSON: I think our position is aligned so  
14 I'd be glad to speak briefly.

15 THE COURT: All right. Very good. Go ahead.

16 MS. CULBERTSON: Again, I'm Ann Culbertson for  
17 Medallion and Seckinger. Similar to what you just heard  
18 about Marick simply purchasing a defective product, that's  
19 exactly what my client did. We bought seven completed  
20 units in the Stoneledge subdivision in 2009 and we are now  
21 somehow a defendant in this action. We are not a  
22 developer, we're not a builder, we're not a contractor or a  
23 sub. So --

24 THE COURT: And you didn't contribute anything to  
25 the construction?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MS. CULBERTSON: No, sir. We're not a party to --

2 THE COURT: What's the allegation against you?

3 MS. CULBERTSON: The allegations are they are a  
4 developer although there are no facts to support that  
5 anywhere in the discovery.

6 THE COURT: And this is based -- Now is this again  
7 a cross claim by ---

8 MS. CULBERTSON: Yes, Your Honor. And then we  
9 cross claimed against all of the defendants and said y'all  
10 did this.

11 THE COURT: You mean, I've got to hear from all  
12 these people?

13 MS. CULBERTSON: No, you won't, because my position  
14 is the same as to all of them. Unlike Marick, which did  
15 have a different position as to different parcels and  
16 phases, my position is the same all across the board. We  
17 had cross claimed for equitable indemnity and negligence  
18 against everybody.

19 THE COURT: Let me ask you something. If I  
20 should -- what do they have? Do they have...

21 MS. CULBERTSON: They who?

22 THE COURT: Meaning all the other defendants in  
23 your cross claim. Do they have counter cross claims  
24 against you.

25 MS. CULBERTSON: No, Your Honor.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: So you're not --

2 MS. CULBERTSON: I am being sued by the plaintiff.

3 THE COURT: All right. By the plaintiff?

4 All right.

5 MS. CULBERTSON: Correct. And I cross claimed  
6 against everyone for equitable indemnity, saying --

7 THE COURT: But the only thing is --

8 MS. CULBERTSON: My fault is purely imputed fault.

9 THE COURT: All right. So really the only person I  
10 need to listen to is Mr. Lyles.

11 MS. CULBERTSON: Mr. Lyles has no motions as to me  
12 today, I don't believe.

13 THE COURT: Pardon?

14 MS. CULBERTSON: I don't believe Mr. Lyles has any  
15 motions as to me today.

16 THE COURT: Well, I mean, no. As far as the  
17 Complaint. You you're asking for the Complaint to be  
18 dismissed?

19 MS. CULBERTSON: No, sir. I mean yes, but --  
20 (laughter).

21 THE COURT: All right.

22 MS. CULBERTSON: No, sir, I'm sorry.

23 THE COURT: All right. So now what you're asking  
24 though is the --

25 MS. CULBERTSON: Their summary judgment as to my

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 cross claims should be dismissed.

2 MR. GOLDSMITH: You haven't heard that I don't  
3 think yet. I don't believe you heard a motion.

4 THE COURT: I haven't.

5 MS. CULBERTSON: All of the motions that you just  
6 heard from me, from those three are also directed as to my  
7 client, and then there are also about a dozen more. So I'm  
8 just...

9 THE COURT: Well, let's see. Who is on the other  
10 side? Let me hear from the other side.

11 MS. CULBERTSON: Okay.

12 THE COURT: Mr. Yokel?

13 MR. YOKEL: I believe as it be probably relates to  
14 their -- her comments -- it's probably the way you ruled  
15 with regard to Marick, she's probably correct, Your Honor.  
16 It would be the same arguments. I don't agree with your --

17 THE COURT: No, you don't have to, sir.

18 MR. YOKEL: Based on that previous ruling she was  
19 just a purchaser.

20 THE COURT: So she would be entitled to the  
21 dismissal of the cross claims ---

22 MR. YOKEL: But she's alleged to have been a  
23 developer, so since you found that based on the allegations  
24 of Marick also being a developer, that there's a special  
25 relationship. So in that regard based on the plaintiff's

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 allegations I think ---

2 THE COURT: But the only thing is, Marick acquired  
3 it soon after.

4 And you haven't sold any of yours?

5 MS. CULBERTSON: Yes, Your Honor, actually we have.

6 THE COURT: Are they plaintiffs?

7 MS. CULBERTSON: Now that they are members of the  
8 Homeowners' Association.

9 THE COURT: They are plaintiffs.

10 MS. CULBERTSON: I would assume.

11 THE COURT: That's the problem, though. If you  
12 have purchased a defective product and put it back into,  
13 the stream of commerce, then I think you do have --

14 MS. CULBERTSON: Well, I don't believe, Your Honor,  
15 that they have sued every person who's ever sold a unit.

16 THE COURT: I don't know.

17 MS. CULBERTSON: Well, maybe they have in this  
18 action.

19 THE COURT: I don't know.

20 MS. CULBERTSON: But in any case my argument as  
21 to -- in opposition to their summary judgment is simply  
22 that any fault that my client may be found to have is  
23 imputed directly to the contractor and subcontractor  
24 defendants in this action.

25 THE COURT: So again, maybe it's late in the day

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 for me. I'm not exactly sure. You are seeking to --

2 excuse me. Mr. Imhoff has a cross claim against you?

3 MS. CULBERTSON: No, I don't believe he does.

4 THE COURT: All right. Mr. Yokel has a cross claim  
5 against you?

6 MR. YOKEL: No.

7 MS. CULBERTSON: No. I have cross claims against  
8 all of them.

9 THE COURT: All right. And what do you want to do  
10 with your cross claim?

11 MS. CULBERTSON: I want them to stay alive.

12 THE COURT: Oh, you want to keep your cross claim?

13 MS. CULBERTSON: Yes. I like my cross claims.

14 MR. GARRAUX: All of the arguments that you heard  
15 earlier -- Jared Garraux on behalf of Ludwig Corporation.  
16 You will hear all the contractors have the same summary  
17 judgment or similar summary judgment motions against us or  
18 similar summary judgment motions.

19 MR. MARTIN: It should be the same argument across  
20 the board.

21 MR. BLACKBURN: And, Judge, Charles Blackburn, for  
22 Tinsley Electrical. She has filed cross claims against all  
23 defendants, and her cross claims keep me in the case.  
24 Mr. Lyles agreed to dismiss me and Mr. Imhoff agreed to  
25 dismiss me, and the only thing I'm in the case for is

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Ms. Culbertson.

2 MS. CULBERTSON: He could settle with me.

3 MR. YOKEL: One thing that has not been --

4 THE COURT: Mr. Yokel. But do identify yourself.

5 MR. YOKEL: Yes, sir. David Yokel. There is  
6 evidence -- or that -- Mr. Seckinger, that they made, that  
7 they attempted to fix or did some work on their units,  
8 seven of eight, there is some alleged negligence in what  
9 they've done because I believe that what the plaintiff's  
10 arguing is that the units they owned and then sold need to  
11 be torn down and need to be repaired, so I guess they also  
12 step in the shoes as having been -- for negligent fixing,  
13 repairing of the units; therefore, they're joint  
14 tort-feasors.

15 THE COURT: Not entitled to equitable  
16 indemnification.

17 MR. GOLDSMITH: That is correct, Your Honor.

18 THE COURT: All right. Then I guess the motion  
19 is --

20 Mr. Goldsmith?

21 MR. GOLDSMITH: I don't believe you've actually  
22 heard argument on a motion, Your Honor.

23 THE COURT: I'm trying to figure out what the  
24 motion is if you want to know the truth.

25 MR. GOLDSMITH: If you folks want to withdraw your



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 motion or do something, whatever, you ought to be heard  
2 because what you've heard the response to a motion and you  
3 haven't heard the argument on the motion.

4 THE COURT: Again that's why I'm confused. I'm  
5 still trying to figure out what I was supposed to do.

6 MR. GOLDSMITH: There are other motions that you --  
7 I'm making one of those that you certainly haven't heard.  
8 So I don't know what you guys are doing. I'm happy to step  
9 up and make mine.

10 MR. YOKEL: I think you recognized Ms. Culbertson  
11 and she was trying to explain her position, Your Honor. My  
12 understanding was that you were only going to rule with  
13 regard to Marick and that's been done.

14 THE COURT: Well, that's been my purpose so far is  
15 to just sort of sail out in Mr. Imhoff's favor, with all of  
16 the names of the contractors he's kind of like pinata here.

17 MR. IMHOFF: Thank you.

18 THE COURT: But anyway.

19 MR. GOLDSMITH: Can I go forward with --

20 THE COURT: All right. Well, let's see -- I think  
21 I might have digressed here and I apologize about doing  
22 that.

23 Ms. Brown, I guess you still want to sit in.

24 MS. BROWN: Well, I don't know if I do or not. I  
25 guess I want to make sure that I understand what's going

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 on. KMAC wants to dismiss our cross claim and you denied  
2 that as to Marick?

3 THE COURT: Right.

4 MS. BROWN: And IMK, who is the developer, would  
5 also ask for the same position as Marick in that regard?

6 THE COURT: As far as the developer?

7 MS. BROWN: Yes. As far as --

8 THE COURT: Not being responsible for anything  
9 that --

10 MS. BROWN: Right now to the equitable  
11 indemnification.

12 THE COURT: That if you are found responsible, then  
13 why is it you would be entitled to some indemnification  
14 from the tort-feasors..

15 MS. BROWN: Because we purchased a property, and  
16 their negligence has exposed my client to liability. We  
17 have no fault. IMK has no fault.

18 THE COURT: But you could be found responsible or  
19 liable on the warranty ---

20 MS. BROWN: Yes, Your Honor. And that would go for  
21 IMK, IK, Bill Cox, and Larry Lollis as well..

22 THE COURT: And yours is a cross claim against the  
23 defendants?

24 MS. BROWN: Yes, everybody.

25 MR. YOKEL: About everybody.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MS. BROWN: Just to kind of put a context on this,  
2 Your Honor, IMK is 50 percent owned by IK and 50 percent  
3 owned by Marick. Marick, under contract to IMK, performed  
4 construction after IMK purchased the property. I don't  
5 know if that helps or if that confuses you more. But  
6 that's sort of the lay of the land as far as the  
7 relationship between IMK and between Marick.

8 Now, there have been allegations made of  
9 amalgamation of interest and that sort of thing, very  
10 conclusory sort of allegations, that we have not seen any  
11 evidence or proof of so far. As well as the idea of  
12 bringing Mr. Cox, Mr. Lollis and Mr. Cox individually.

13 But from the standpoint especially with regards to  
14 the KMAC motion we would ask that those cross claims not be  
15 dismissed because we have valid claims against them and we  
16 have no fault.

17 THE COURT: All right. Now, that's  
18 Ms. Culbertson's motion to dismiss the cross claim.

19 No. You got cross claims you want dismissed --

20 MS. BROWN: I want their motion denied as to IMK,  
21 IK, Bill Cox, and Larry Lollis.

22 THE COURT: All right. When we get to it, I'll  
23 look at it. See, I haven't gotten there. I'm still trying  
24 to deal with all of these motions against Marick. May I do  
25 that?

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MS. BROWN: No. I think they have -- their motion  
2 is against IMK, IK, Lollis, and Cox as well.

3 THE COURT: But I'm only hearing Marick right now.  
4 I'm sorry. But you think you've got problems. (Laughter.)  
5 You saw what happened when I tried to go to another  
6 direction.

7 All right. So I am only dealing with the cross  
8 claims of Marick against the defendants. All right.

9 Now, I thought I already took care of you Mr. Root.

10 MR. ROOT: I wish you had in the first round. But  
11 this is just to clarify Mr. Yoke1, KMAC, that group's  
12 motion dismissing cross claims against Marick which was  
13 denied, and that's where we got off track with the other  
14 developers.

15 THE COURT: Right.

16 MR. ROOT: So we still have the general contractor,  
17 Marick, its cross claims against certain subcontractors,  
18 being Builders First Source, Clear View, and Southern  
19 Concrete, as I understand the Court's ruling, they  
20 mentioned negligence and equitable indemnity had already  
21 been disposed of on our motions, but we still have breach  
22 of warranty and breach of contract issues to deal with.  
23 Once I think these parties address those issues, then I  
24 believe all the parties that have motions against Marick as  
25 a general contractor, its subs, will be done. Its.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 subcontractors would be done after that.

2 THE COURT: I would hope. I mean, at some point I  
3 hope they have, but I don't know which ones are the  
4 subcontractors and all. Have we finished them?

5 MR. ROOT: For Phase II we have finished all of  
6 them except for the breach of warranty and breach of  
7 contract issues with Southern Concrete, Clear View --

8 THE COURT: Well, I'm not taking those up right  
9 now. As I say, what I'm dealing with is equitable  
10 indemnification and that alone. Get that -- it looks like,  
11 little parcel out of the way.

12 And have we finished? Does anybody else have a  
13 motion to dismiss a cross claim for equitable  
14 indemnification against --

15 MR. ROOT: Your Honor, I do.

16 THE COURT: All right. Then let's hear it.

17 MR. ROOT: That was the second part of my motion.

18 THE COURT: Let's find out how many more, though.  
19 How many more do we have? Equitable indemnification.

20 MS. NICHOLS: I'm one of the three that Mr. Root  
21 mentioned, Clear View Construction, Melissa Nichols.

22 THE COURT: Didn't I already take care of yours?

23 MS. NICHOLS: Your Honor, you did. I think  
24 Mr. Root and I both will have an argument as to, one,  
25 whether the breach of warranty claim really is --

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1       **THE COURT:** I'm not there yet. I'm trying to take  
2 care of the equitable indemnification cross claims.

3       **MR. ROOT:** That's what we understand, but they're  
4 all in the same. That's a rose by any other name is still  
5 a rose.

6       **THE COURT:** No, sir, they are not. Unless I don't  
7 understand equitable indemnification, it speaks of  
8 wrongdoing, it speaks of tort claims. That is entirely  
9 different from a contractual breach.

10       **MR. ROOT:** If we go through real briefly the nature  
11 of the indemnity seeking relief from us from plaintiff's  
12 claims, which is what Marick is doing, they're all claims  
13 for indemnity. And that's what the briefs that have  
14 previously been handed up to you would establish, with  
15 previous case law to establish previous --

16       **THE COURT:** Give me a case I could look at real  
17 quick to determine what you are saying.

18       **MR. HORTON:** We've got two orders on the exact same  
19 issue.

20       **THE COURT:** Very well.

21       **MR. HORTON:** From other circuit judges. One is  
22 Judge Young. Let me give you two. This is the second one,  
23 Your Honor, I apologize for reaching and handing it up to  
24 you this way (handing).

25       (WHEREUPON there was a pause in the proceedings.)

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: All right. Is there any other case  
2 other than the Vermeer Carolinas, Inc., case?

3 MR. ROOT: Your Honor, I believe Mr. Horton handed  
4 you two Circuit Court opinions.

5 THE COURT: I've got two of the same one.

6 MR. HORTON: Your Honor, the second one is right to  
7 your right. It's two copies of the same one.

8 MR. ROOT: Do you have copies of the case?

9 MR. HORTON: Your Honor, those cases I handed up  
10 are Kirkland versus Cambridge Building --

11 THE COURT: I found Kirkland. I'm sorry.

12 MR. HORTON: -- and Nelson v. Wieland Homes.

13 THE COURT: I'm just looking for any authority, and  
14 the authority in the first case of ARS or whatever relied  
15 solely on Vermeer.

16 (WHEREUPON there was a pause in the proceedings.)

17 (WHEREUPON there was discussion off the record.)

18 (WHEREUPON the Court and clerk conferred off the  
19 record.)

20 THE COURT: Mr. Marick [sic], when was one of your  
21 cross claims filed?

22 MR. IMHOFF: When was it filed?

23 THE COURT: Yes.

24 MR. IMHOFF: Against Builders First Source?

25 THE COURT: Anybody.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. IMHOFF: My cross claims were filed immediately  
2 upon answering years ago.

3 THE COURT: All right. So it would be in your  
4 first response?

5 MR. IMHOFF: Well, there would probably be at least  
6 three, but yes, it would be in my first one, I believe.

7 THE COURT: Do you have a copy?

8 MR. ROOT: You want a copy of the cross claim?

9 THE COURT: Here we go.

10 MR. ROOT: I have a copy, Your Honor, that are  
11 contained within Marick's answer to the most recently  
12 Amended Complaint and it starts on page 25. There you go.  
13 I'm sorry. Excuse me (Handing).

14 THE COURT: I'll tell you what. Why don't we use  
15 this little walkway right here. If you have anything...

16 MR. ROOT: I'm sorry. It starts on page 19 but  
17 that's was the equitable indemnity named claim. The name  
18 doesn't really make a difference.

19 (WHEREUPON there was a discussion off the record.)

20 THE COURT: All right. I hate to bother you, but  
21 let's do hold it down. If you've got conversations, take  
22 them outside. It helps me to sort of be able to understand  
23 what I'm looking at.

24 (WHEREUPON there was a pause in the proceedings.)

25 MR. ROOT: May it please the Court, may I address



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 the remainder of my motion?

2 THE COURT: Yes, you may.

3 Well, let me say this. I have reviewed what  
4 appears to be the Defendant Marick Homebuilders, LLC,  
5 and -- Answer to the third amended Complaint of plaintiffs'  
6 cross claims against the Defendants. I trust they are all  
7 the defendants in this action? I'm looking at page 19.

8 MR. ROOT: Looking at page 19, Your Honor --

9 THE COURT: And the paragraphs 135 through  
10 apparently 153? Does that have all of the Defendants  
11 there?

12 MR. ROOT: Well...

13 THE COURT: I've got 154, which I think sets them  
14 out individually.

15 MR. ROOT: As far as just a listing of them. I  
16 thought you were talking about all of the causes of action?

17 THE COURT: I'm talking about who appeared today  
18 and all the cross claims.

19 MR. ROOT: Mr. Imhoff could probably better address  
20 that because I'm not familiar with all of these parties.

21 MR. IMHOFF: Are you asking if all of the parties  
22 are...

23 THE COURT: Yes.

24 MR. IMHOFF: They are not, Your Honor.

25 THE COURT: They're not.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. IMHOFF: No, sir.

2 THE COURT: But they are the ones who are here  
3 today.

4 MR. IMHOFF: No. There are parties here that I  
5 have not cross claimed, IMK and Seckinger I have not.

6 THE COURT: Well, as far as the ones that are named  
7 in the cross claim.

8 All right. Yes, sir, Mr. Root.

9 MR. ROOT: Your Honor, did you -- I know we have  
10 time issues. Have you reviewed over -- particularly the  
11 Wieland case which addresses the issue of the disguised  
12 indemnity case?

13 THE COURT: The main thing that I did look at  
14 was -- when you say the Wieland case --

15 THE WITNESS: It's Nelson versus John Wieland  
16 Homes.

17 THE COURT: Yes, I did. As I said earlier, though,  
18 I noticed that most of it was, as far as authority and all  
19 that, Judge Young seems to rely on Premiere Carolinas,  
20 Inc., for the most part and I have seen it.

21 But I was looking at your other case, the one from  
22 Judge Coltrane, Kirkland versus Cambridge. In there, there  
23 was a little bit more that helps in that, although it looks  
24 like it's a bit of a problem for a lot of Courts, it looks  
25 like they rely on a lot of foreign jurisdictions to find

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 light in this area. But I have looked at it.

2 MR. ROOT: All right. Well, in short terms, and  
3 this may be best just to, as I understand it, Builders  
4 First Source had a motion to dismiss the cross claims of  
5 Marick as to negligence, equitable indemnity, breach of  
6 warranty and breach of contract. Negligence and equitable  
7 indemnity were taken care of by the Judge's first ruling  
8 earlier today. So remaining are breach of warranty and  
9 breach of contract.

10 THE COURT: Right. And you are saying that under,  
11 or not the authority of these cases because they are not  
12 authority but those could be persuasive.

13 MR. ROOT: And I can read off the authority from  
14 which those cases found their ruling. I was wondering if  
15 you would rather, because we have so many other motions,  
16 see if we could just get proposed orders on these two  
17 issues.

18 THE COURT: That would be fine. As a matter of  
19 fact, having read the cross-complaints -- and I guess this  
20 is the most recent one?

21 MR. IMHOFF: It should be the Third Amended  
22 Complaint.

23 THE COURT: The Third Amended Complaint? I find  
24 that these orders by Judge Coltrane and Judge Young are  
25 persuasive.

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 Now -- but as I say -- their authority seems to be,  
2 or his authority, or their authority, Judges Young and  
3 Coltrane, seems to be Vermeer, but on the question of  
4 disguised immunity, that seems to come from the Federal  
5 Court. I think it is a South Carolina District Court case.

6 MR. ROOT: It is, Your Honor. And then --

7 THE COURT: And then the others are state courts.

8 MR. ROOT: And in my memorandum Builders First  
9 Source, Southeast memorandum of law supported motions on  
10 summary judgment, and then on page 4 I cite some authority  
11 that builds up to why these are disguised indemnity claims  
12 and it's on his former memo, (reading): The character of  
13 the action is not determined by the allegations in the  
14 Complaint, it is the nature of the issues and the remedies  
15 sought.

16 THE COURT: And again, going to the language of the  
17 cross claim, it shows that it is more indemnity rather than  
18 any actions for even actual damages for the injuries  
19 suffered by the plaintiff.

20 MR. ROOT: Correct, Your Honor. On each paragraph  
21 on the cross claims looks for reimbursement essentially, in  
22 other words, for any damages for plaintiffs. So they're  
23 all indemnity causes of action regardless of how they are  
24 styled.

25 THE COURT: And then in doing that in the 16th

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 defense and first cross claim the damages sought against  
2 all the named defendants is for equitable indemnity as to  
3 any amounts the plaintiffs are entitled to recover be  
4 reimbursed and indemnified for costs of the action,  
5 including but not limited to attorneys' fees and costs, and  
6 breach of contract is, it alleges to, that pursuant to a  
7 breach of contract they would be entitled to judgment  
8 against its contractor or subcontractors for actual  
9 damages, for damages that could result in damage to  
10 plaintiff by reason of the allegations of the plaintiff.

11 MR. ROOT: Correct.

12 THE COURT: And damage to the plaintiff and due to  
13 negligent work performed, which would be then the 18th  
14 defense, and I guess third cross claim, negligence,  
15 negligent work performed. The relief sought is attorneys'  
16 fees, costs, and potential liability to the plaintiffs by  
17 which they are sued.

18 And paragraph 17, all damages recovered by the  
19 plaintiffs against Marick as well as reasonable attorneys'  
20 fees and costs is what is sought.

21 And for the 19th defense and fourth cross of the  
22 cross claim, breach of warranties, it is for legal fees and  
23 the amount, cross claimant is ordered to pay the plaintiffs  
24 which they sued.

25 MR. ROOT: Correct, Your Honor, so they are all the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 same.

2 THE COURT: All right. And, in fact, it's even  
3 pled in the alternative for indemnification in whole or in  
4 part for those amounts paid.

5 MR. ROOT: You hit the nail on the head. They are  
6 all seeking the same relief. They're essentially the same.  
7 The prior motions go would be different from the developer  
8 Marick and Builders First Source --

9 THE COURT: All right. Let me see --

10 MR. ROOT: First Source and general contractor.

11 THE COURT: What are the cases where the defendants  
12 had reached settlement with the plaintiffs. I think of  
13 course they said that that would be moot as far as  
14 indemnification.

15 In here how many defendants has the plaintiff  
16 reached.

17 MR. LYLES: I think it is four. It could be five.

18 THE COURT: All right. Are you seeking any -- I  
19 haven't looked through your pleadings to determine. Are  
20 any of those defendants named in your cross claims,  
21 Mr. Imhoff?

22 MR. IMHOFF: Yes, Your Honor. You heard motions  
23 from two of them this morning.

24 THE COURT: And I think I dismissed them, didn't I?

25 MR. IMHOFF: Yes, Your Honor.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: How about the other two? Are they  
2 represented here?

3 MR. LYLES: We've got some --  
4 John, have you got a motion filed?

5 MR. HARJEHAUSEN: We have not filed a motion to  
6 dismiss.

7 THE COURT: All right. Let's not worry about it.

8 THE COURT REPORTER: I need your name.

9 MR. HARJEHAUSEN: John Harjehausen.

10 THE COURT: Would you mind spelling the name for  
11 us, please?

12 MR. HARJEHAUSEN: Yes, Your Honor. It's  
13 H-A-R-J-E-H-A-U-S-E-N. I am on the signup sheet.

14 THE COURT: I saw that for Heyward Electrical  
15 Services.

16 MR. HARJEHAUSEN: Yes. Thank you.

17 THE COURT: All right.

18 MR. ROOT: I don't know that you need to hear  
19 anything more from me.

20 THE COURT: I want to be sure Mr. Imhoff --

21 I'll tell you, Mr. Imhoff, I am somewhat persuaded  
22 that your causes of action on the cross claims are for  
23 indemnification. You don't allege any special actual  
24 damages against any of the defendants other than the  
25 indemnification for reimbursement of attorneys' fees,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 costs, and any amount determined by the jury to be owed.

2 All right. Do you have anything else to say?

3 MR. IMHOFF: I do, Your Honor. I don't think I  
4 said anything on this at all. Because I was not ---

5 THE COURT: No. I had reserved it because I was  
6 not familiar with it if you want to know the truth. All  
7 right.

8 MR. IMHOFF: I'm sorry?

9 THE COURT: I said I had reserved it because I was  
10 not familiar with it; and I'll say this -- and as I say,  
11 that even on Judge Young and Judge Coltrane apparently  
12 pretty much was limited to the only authority I had which  
13 was the Vermeer case.

14 MR. IMHOFF: I think that's important, Your Honor.  
15 I think it's important that the only authority which you  
16 have been handed are two orders of Circuit Court Judges --  
17 and you have not been handed -- and I understand that they  
18 are persuasive but they're certainly not binding -- but you  
19 have not been handed one single reported case by the  
20 Appellate or Supreme Court. And the reason for that is ---

21 THE COURT: Other than Vermeer. And reference was  
22 also made to, I think, as I say, it was a Federal Court  
23 decision -- well, it's SC&B versus Stone, 1990.

24 MR. IMHOFF: And Your Honor, I didn't bring those  
25 cases with me. But I would be shocked to find that our



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 courts have determined that a legitimate negotiated  
2 contract between two parties which has an indemnity clause  
3 in it which presumably was reviewed, signed off on and  
4 negotiated between two commercial entities requiring a  
5 subcontractor to indemnify a general contractor is not a  
6 valid cause of action and it needs to be folded into an  
7 equitable indemnity cause of action.

8 And, Your Honor, if I might approach, I will hand  
9 you --

10 THE COURT: If you would, please. Come around this  
11 way.

12 (WHEREUPON Counsel confer.)

13 THE COURT: Reach around this way, please. Please.

14 MR. IMHOFF: (Hanging.) This is my brief. But the  
15 three tabs at the back, Your Honor, are three contracts  
16 with these three subcontractors. I have pled breach of  
17 contract, and within those contracts is an indemnity  
18 provision, an indemnity clause.

19 THE COURT: But these are the three defendants that  
20 you have indemnification by contract?

21 MR. IMHOFF: Yes. The three sitting here, Southern  
22 Concrete, Clear View and Builders First Source. Those are  
23 the three contracts.

24 THE COURT: Now, which ones of your cross claims  
25 are addressed to those three Defendants?

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. IMHOFF: Well, all four of them are, Your  
2 Honor.

3 THE COURT: Four of them, excuse me.

4 MR. IMHOFF: All four of my cross claims are  
5 addressed to them.

6 THE COURT: Well, actually you have multiple  
7 defendants listed in each one it seems.

8 MR. IMHOFF: I'm sorry. Will you ask the question  
9 again, please?

10 THE COURT: Which one of your cross claims address  
11 these contractual indemnification?

12 MR. IMHOFF: Breach of contract, Your Honor.

13 THE COURT: And so that's the 17th defense,  
14 paragraph 159. And who are the four that you -- because it  
15 looks like you've got a few more in there.

16 MR. IMHOFF: Well, I did put a few more in there.  
17 And there are some who have not showed. Component  
18 (phonetic) Enterprises, I have a contract with them. Hutch  
19 N Son, I have a contract with them. Hutch N Son you  
20 dismissed this morning and they have settled out. Ralph  
21 Compton has not appeared in this. These are the motions  
22 against me today with subcontractors who I have written  
23 contracts with.

24 THE COURT: All right. So that's the 19th. And  
25 the only -- do you have more contracts than the three

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 contracts that you have appended to your brief?

2 MR. IMHOFF: Yes, Your Honor.

3 THE COURT: And in fact you have the written  
4 contracts with each of these defendants? Paragraph 160.

5 MR. IMHOFF: I believe so. Let me make sure. I'm  
6 not sure about Southern Basement, but I believe so. If  
7 anybody is in here that doesn't think I have a contract  
8 with them, let me know. But I think that's correct, that  
9 all of these parties ---

10 MR. ROOT: No, I don't believe you have a contract  
11 on their work if that's what you're asking.

12 MR. IMHOFF: But, yeah, those parties we have  
13 contracts with -- again, the parties that I have pled here  
14 for breach of contract, you have this contract, you have  
15 three of them which has several provisions in it  
16 including --

17 THE COURT: Let me ask you something. First of  
18 all, it would apply to the indemnification principle  
19 because you have a special relationship with them. It's a  
20 contractual relationship.

21 MR. IMHOFF: Well, that's true. But it's separate  
22 from equitable indemnity.

23 THE COURT: That's what I'm saying. But it is a  
24 type of relationship or whatever that indemnification  
25 applies to.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. IMHOFF: So my position is that there is  
2 clearly law, and we've talked about Winnsboro ---

3 THE COURT: All right. Let me do this. I think he  
4 makes a good argument as to those -- or at least I'll  
5 reserve judgment on any of the defendants who have an  
6 indemnification agreement.

7 MR. GOLDSMITH: Before you go too far, let me point  
8 out that there is no agreement that those pieces of paper  
9 are effective indemnification in this matter. There was no  
10 consideration. They were signed after all the work was  
11 done.

12 THE COURT: I said reserve judgment, Mr. Goldsmith.  
13 That means I'll hear argument later. I spent a whole day  
14 trying to plow through this. I'm sorry. I didn't mean to  
15 cut you off, except I do mean to cut you off. (Laughter.)

16 MR. GOLDSMITH: I understand. No offense.

17 THE COURT: I hope not. Okay.

18 Now what, Mr. Root?

19 MR. ROOT: I just want to make sure, so breach of  
20 warranty, that one is gone and we are going to brief to you  
21 the breach of contract?

22 THE COURT: If you have a contract. The only ones  
23 I'm reserving, if Mr. Imhoff has a contract with any of the  
24 defendants, I'm not going to -- those motions will be, I'm  
25 reserving judgment on them for breach.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. ROOT: As to that cause of action, the breach  
2 of contract?

3 THE COURT: For breach of contract.

4 MR. ROOT: The other ones you ruled on and now the  
5 breach of warranty, those have been resolved?

6 THE COURT: Breach of warranty, negligence and then  
7 whatever else.

8 MR. ROOT: Equitable indemnity.

9 THE COURT: All of them are treated as equitable  
10 indemnity.

11 MR. ROOT: Thank you, Your Honor.

12 THE COURT: And now we've got to sort of bifurcate  
13 it for sure. I would rather have just one order. Oh,  
14 gosh, I don't really know how to do it because you've got  
15 so many different defendants. But any proposal?

16 MR. ROOT: I think we can do it simply enough. We  
17 took care of the earlier ones this morning with Catoe,  
18 Builders First Source and subs including equitable  
19 indemnity and negligence and breach of warranty, which you  
20 now include as to Builders First Source, Clear View and  
21 Southern Concrete. I think that's one more order.

22 And then Mr. Goldsmith, Ms. Nichols, and I will get  
23 together and have an opposing order on the breach of  
24 contract so we'll just have two.

25 THE COURT: That will be good,

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. ROOT: Fair enough?

2 THE COURT: Is that all right, Mr. Imhoff?

3 MR. IMHOFF: I think that's okay, but if I may just  
4 look over all of my notes, we're done. But, Your Honor, I  
5 haven't had a chance to argue on breach of warranty as to  
6 these three defendants at all. May we brief the breach of  
7 contract and breach of warranty, please? I know it's late,  
8 but I don't believe I've been heard on that and I ask to be  
9 heard on that.

10 THE COURT: Go ahead. I'm not going to deny you.  
11 Plus, the only thing is also, you also understand that  
12 under the rules, that even if I should enter a short order  
13 today setting forth my rulings from the bench, until the  
14 final order is signed, I can change my mind altogether so  
15 you can take a shot.

16 MR. IMHOFF: You will accept three, Judge?

17 THE COURT: Let's do this. I think I had a  
18 tremendous education today about at least some of the  
19 issues involved in this case. So I don't need a whole lot  
20 of discussion about the purpose of a summary judgment or  
21 anything like that. And it looks like there's not a whole  
22 lot of authority out there. But direct authority on the  
23 issues that you are briefing or providing information to  
24 the Court on. And so don't worry about it. I'm not even  
25 going to ask you to do any more than if you would just

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 refer the Court to controlling authority. If you have any.  
2 Like I say, I notice that one of the esteemed judges relied  
3 on Illinois and everywhere else except California, I didn't  
4 see that in there.

5 So anyway, in other words, it's going to be a,  
6 quote, brief.

7 By the way, I will say this just for your  
8 information. I have almost an unwritten rule, it's not  
9 codified in any fashion or memorialized. On a motion for  
10 summary judgment, if the memorandum is more than a page and  
11 a half, there must be a genuine issue of material fact  
12 somewhere in it.

13 MR. IMHOFF: Your Honor, all of mine were at least  
14 a page and a half. (Laughter.)

15 THE COURT: No. The thing is that if you are  
16 seeking summary judgment, keep it brief.

17 All right. Now, where does that put it on this?

18 MR. ROOT: Number 2. (Laughter.) I'm kidding.

19 THE COURT: Okay. Does that take us through 22,  
20 maybe?

21 ATTORNEY: I believe it does.

22 THE COURT: Does that take us through Ms. Brown and  
23 Ms. Culbertson?

24 MR. GOLDSMITH: Ms. Culbertson is involved, Your  
25 Honor, the motion number 23 is a joint motion by Carl

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Catoe, Builders First Source also Southern Concrete, and  
2 I'll take a stab at starting that.

3 THE COURT: All right, very good.

4 MR. GOLDSMITH: What I'll do, Your Honor, it's one  
5 of those that's a little hard to shorten but I'll try to.  
6 Then I'll ask, if I can, Mr. Tate just to back me up on if  
7 he thinks I've left out some critical fact that you need to  
8 know so that we can try to move this along.

9 THE COURT: Very good.

10 MR. GOLDSMITH: Medallion can be thought of as a  
11 company formed by Mr. Seckinger. And so at times I may say  
12 Medallion, at times I may say Seckinger except in the  
13 chronology of things, I don't believe that's really  
14 critical.

15 Where to begin -- in the history of these projects,  
16 Marick got into financial difficulty. Marick had borrowed  
17 some money from Mr. Ludwig's company, one or the other, and  
18 for shorthand I'm going to say SDI. Mr. Seckinger became a  
19 lender to SDI, and SDI in turn loaned one to Marick, and  
20 when there was an inability of Marick to repay Mr. Ludwig,  
21 then some property was transferred to Ludwig. And then if  
22 you move on in time, the Ludwig Corporation was unable to  
23 repay, Ludwig/SDI was unable to pay Mr. Seckinger some  
24 money so other things were transferred to deal with that  
25 debt.



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1       Those things included some town house units, and  
2 also some rights of action, if any, that Ludwig Corporation  
3 had. And so you have Medallion, Seckinger, coming into  
4 possession of several town house units, and also a piece of  
5 paper that was an assignment of claims. And so we find  
6 ourselves here after those several financial steps where  
7 Medallion and Seckinger have certain claims against  
8 Builders First Source, Catoe, and Southern Concrete. Now,  
9 that is a shorthand version. It's all in some detail in  
10 the memorandum.

11       Mr. Seckinger was not only lending money to SDI but  
12 was an employee of SDI, and as such he became very  
13 knowledgeable about the alleged deficiencies in these town  
14 house units. Now, he ultimately, he or Medallion,  
15 ultimately auctioned off some of these units, and in spite  
16 of Mr. Seckinger's knowledge and in spite of other  
17 knowledge held by others of which Mr. Seckinger was aware,  
18 the purchasers at auction of five of these units were not  
19 told about the information that Mr. Seckinger and others  
20 had.

21       Now I'm going to hand up, Your Honor, a couple of  
22 e-mails -- approach the bench if it's okay -- on this  
23 particular point. This is Ms. Culbertson's e-mail, and  
24 it's not protected because it was distributed to others  
25 other than client, and this series of e-mails has to do

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 with the auction and whether or not the purchasers at the  
2 auction are going to be told about what Mr. Seckinger and  
3 the others in the stream knew, so I'll give you a moment on  
4 that, Your Honor.

5 (WHEREUPON there was a pause in the proceedings.)

6 THE COURT: All right.

7 MR. GOLDSMITH: All right, sir. Now, that,  
8 obviously, is going to come into play when we talk about  
9 clean hands and equitable subrogation here in just a  
10 minute. But I have to back up prior to the time that  
11 Medallion came to own units and take this assignment of  
12 claims, let's back up one step to Ludwig Corporation.  
13 Without any notice to cure, Ludwig Corporation undertook  
14 repairs of about \$20,000 per deck to a number of decks.

15 And so where we find ourselves is with this  
16 question. Can a plaintiff who fails to give notice of an  
17 opportunity to cure go ahead and spend money and then seek  
18 to recover the money after the time when the opportunity to  
19 cure has come and gone?

20 Now, Your Honor is familiar with the fact that our  
21 Supreme Court has said although the statute says you must  
22 give notice before filing suit, they reconciled if the  
23 notice comes after you file suit, then that's okay. But  
24 briefly, the Court has not dealt with the situation where a  
25 plaintiff gives no notice and spends money and then seeks

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 to recover the money. Obviously the right to cure and the  
2 opportunity to cure has come and gone in that circumstance.  
3 And Mr. Seckinger was involved at the time that decision  
4 was made with the decision to proceed to do the repairs.

5 So now Seckinger and Medallion are coming to court  
6 when there is no opportunity to cure and say, Pay me the  
7 money that I spent. We say you can't do that.

8 The next thing is really a variation of that  
9 argument, Your Honor, and it has to do with spoliation.  
10 Because as part of these repairs stone work was taken off  
11 in certain instances, framing was redone, and epoxy coating  
12 was applied and other work was performed, and so we don't  
13 even have an opportunity now to look at what the situation  
14 was at the time Ludwig, SDI, undertook this work.

15 So between the two, Your Honor, we say you can't  
16 maintain this claim at this time because our rights have  
17 been destroyed by what was done without our knowledge.

18 As our brief indicates, there was a question put to  
19 Marick about who the subcontractors were, but there was no  
20 follow-up, and this comes from Mr. Seckinger. Basically  
21 the question was asked, perhaps Marick said, Well, we don't  
22 know who the subcontractors were and that was the end of  
23 it. But Mr. Lyles took enough time, spent enough time and  
24 enough energy to find out who was the subcontractors, so it  
25 was certainly something that could have been determined.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 And lastly when we get to equitable indemnity, we  
2 have Medallion saying, If we're sued, you need to pay us.  
3 First of all, their hands aren't clean based on their  
4 damages. They sold these units at auction without  
5 disclosing what they knew, and now they're being fussed at  
6 about that. And that was a conscious decision not to make  
7 disclosure and you can see from the e-mail chain that the  
8 auction company was concerned about that.

9 And you also have no special relationship between  
10 Ludwig, SDI, Medallion, Seckinger, they had no dealings  
11 with Builders First Source, Catoe, or Southern Contractors,  
12 they didn't have any relationship with any of those  
13 contractors. And so that's why we make our motion, Your  
14 Honor.

15 And I'm going to ask Mr. Tate, who has been  
16 listening; to touch on anything that I've omitted, and I  
17 hope I didn't take too much time with that.

18 MR. TATE: Your Honor, may it please the Court?

19 THE COURT: Yes, sir.

20 MR. TATE: I'm Ronald Tate for Carl Catoe  
21 Construction. And certainly Mr. Goldsmith has done an  
22 excellent job in framing the issues and the facts that  
23 relate to the Medallion/Seckinger claims. I have basically  
24 four things that I want to talk about. One is I want to  
25 talk about what is alleged here to give rise to this

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 supposed indemnity claim that Medallion is making against  
2 all these subcontractors.

3 Number two, I want to talk about standard because  
4 it's important to talk about the standard on a summary  
5 judgment motion involving indemnity such as this. I want  
6 to talk about what Medallion did that causes it to have  
7 unclean hands or to have fault here.

8 And then, and of course Mr. Goldsmith has touched  
9 on most of that. I'm not going to replot that ground.

10 Number four that I want to talk about what possible  
11 damages Medallion and Seckinger in this action that it's  
12 asking by way of these indemnity claims.

13 Number one, what is alleged? Mr. Lyles in his  
14 Complaint is claiming that Medallion and Seckinger are  
15 amalgamated in the activities and the interests of the  
16 SDI/Ludwig group of developers, that they are negligent in  
17 exercising their duties as the developer. That they have  
18 breached a fiduciary duty and that they have breached the  
19 implied warranties of habitability that builders and  
20 sellers of buildings in South Carolina, residential  
21 buildings in South Carolina, provide to homeowners.

22 And in turn I want to talk about what cross claims  
23 have been made against the so-called cross claimed  
24 defendants, this big group of defendants here, except for  
25 the developers. And those claims that Medallion makes

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 against these contractors are claims for equitable  
2 indemnity and negligent construction.

3 And the negligence claim is just like the  
4 negligence claim that Marick was making. It's no  
5 different. It's folded into the equitable indemnity claim.  
6 So we've got Medallion and Seckinger who are joined as  
7 direct defendants in the case by Mr. Lyles, the plaintiffs,  
8 who have now brought a claim for equitable indemnity  
9 against a whole bunch of defendants by way of these cross  
10 claims. And again, as Mr. Goldsmith said, they do not have  
11 any relationship at all whatsoever with this group of  
12 subcontractors.

13 The indemnity fails as a matter of law because  
14 there is no duty, that these subcontractors owed no duty to  
15 somebody situated as Medallion and Seckinger. Because  
16 fundamentally, no matter how you parse their cross claim  
17 here, Medallion and Seckinger are seeking indemnity from  
18 the position of a joint tort-feasor. They have no claims  
19 until and unless they are found and adjudicated to be  
20 collaborators. That is the way they chose to plead their  
21 claims against this group of subcontractors.

22 I want to talk about the standard. Because under  
23 Vermeer, and I believe the Court has Vermeer on the bench  
24 and has been referring to it today, there is a  
25 two-fold burden on the part of a punitive indemnitor.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Number one, there has to be, number one, some issue of fact  
2 on the indemnitee's liability, and number two that the  
3 indemnitor must itself show that this was free of fault.

4 I think that's important because, well, for two  
5 reasons: Number one, what is the factual issue of Carl  
6 Catoe's liability here, or for that matter any of the  
7 subcontractors who are party to these motions? There's  
8 nothing in the record from Medallion that supports this.  
9 And if they wish to piggyback the plaintiffs' and Marick's  
10 arguments on the potential liability, they put nothing in  
11 the record.

12 To the contrary, we have put in the record  
13 testimony from Carl Catoe's expert Forrest Lott and Carl  
14 Catoe's engineering expert, Bill Cary (phonetic) which may  
15 at least establish that Catoe did not violate any building  
16 code in framing the building.

17 And regardless of that, Medallion's claim is  
18 fatally flawed because it has failed to show or even  
19 attempt to show that it itself was free of fault. Its  
20 assignee, Ludwig, repaired some of these units if, either  
21 directly or knew its assignor, Ludwig, failed to give  
22 notice of repairs and spoil the evidence as Mr. Goldsmith  
23 has pointed out and failed to comply with the Right to Cure  
24 Act, and it made no effort to contact the subs, and it  
25 bought the units from Mr. Ludwig, knowing of these alleged

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 construction defects.

2 It had a, I believe, a 60-day due diligence period  
3 to conduct whatever investigation it wanted to do.  
4 Mr. Seckinger testified at deposition several interesting  
5 things, that he had or his company had three inspections  
6 performed. He knew about the lawsuit. The lawsuit had  
7 already been filed even before Medallion was formed. And  
8 he knew about the so-called stigma from the repairs because  
9 at that point it was known that these, at least the decks  
10 needed to be repaired.

11 And I'll point out, it goes without saying that he  
12 took possession of these units in the worst real estate  
13 market in recent memory, in the last eighty years.

14 But worse, as Mr. Goldsmith pointed out to the  
15 Court, Medallion consciously sold these units without  
16 making any disclosures of the defects that were known to  
17 it. And we have I believe the e-mail that you were shown  
18 earlier which pretty clearly establishes that they  
19 consciously decided that they were going to market these  
20 units without making disclosures and relying on the sales  
21 agreement to make a vague reference to the lawsuit, and  
22 basically as the e-mail pointed out leaving it to potential  
23 buyers to lawyer up and educate themselves on the  
24 condition.

25 So what are the possible damages that Medallion and



**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 Seckinger can make in making these claims when, of course,  
2 they made a conscious and informed business decision to buy  
3 these units, to accept them in the condition they were in  
4 after the construction defect litigation had already been  
5 filed, and sold them at what they referred to as fire sale  
6 prices to pay down the bank debt. That's why it had to be  
7 done then, in that worst market in recent history, and then  
8 made a woefully inadequate disclosure to the buyers at  
9 auction.

10 Basically, Your Honor, it appears that both  
11 Medallion and Seckinger were trying to double dip, they're  
12 trying to recover stigma damages here, but when they took  
13 possession of the units, that stigma was already there.  
14 They voluntarily encountered that. They undertook it and  
15 made a conscious decision to do that, and now they are  
16 trying to profit from their business decision and from  
17 their lack of disclosure at the auction sale.

18 I think that's all I have to add to what  
19 Mr. Goldsmith said, and I'll be happy to answer any  
20 questions.

21 **THE COURT:** All right. Thank you.

22 All right. Ms. Culbertson?

23 **MS. CULBERTSON:** Your Honor, first I'd like to  
24 apologize to the Court for the e-mail. I apologize for  
25 that.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: That's all right. I watched Clint  
2 Eastwood the other night. (Laughter.)

3 MS. CULBREATH: I don't know if he swore that much,  
4 though.

5 And first of all, I'd like to say that I think  
6 there were a whole lot of red herrings as you just heard.  
7 These cross claim defendants don't have any standing with  
8 regards to how we may have sold our units. There is no --  
9 we sold our units as is, where is, we sold them at a cheap  
10 discount. We fully disclosed the existence of the lawsuit  
11 to the purchasers. These in my opinion are all completely  
12 red herrings for which these cross claimed defendants have  
13 no standing to even talk about today.

14 Simply put, our cross claims are for negligence and  
15 equitable indemnity. As the plaintiffs brought this  
16 lawsuit against my client as a developer, the only  
17 allegations against my client are developer liability.  
18 Just as the argument was with Marick earlier this  
19 afternoon, his developer liability, any fault attributed to  
20 him is directly attributable or imputed to fault of the  
21 contractors or subcontractors. I think we stand in the  
22 exact same position as Marick that was argued earlier this  
23 afternoon.

24 And as to our negligence claims I do not believe we  
25 are in the same situation as Marick because I think our

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 negligence claims are supported by separate claims for  
2 damages. It clearly is a separate cause of action. It is  
3 not disguised indemnity. Regardless of all of that,  
4 everything that Mr. Tate said, everything that  
5 Mr. Goldsmith said, all of the frankly testimony that they  
6 just put into the record shows that there are multiple  
7 questions of fact still at issue here.

8           What did my client know when he bought the  
9 property? He'll testify one thing, they'll testify another  
10 thing. When the lawsuit had been filed, at that point the  
11 lawsuit was a baby lawsuit, it was three plaintiffs and  
12 three defendants. He had no way to know it was going to  
13 morph into this giant thing. There's no question what the  
14 knowledge was at the time he purchased the units.

15           With regard to the right to cure argument. Failure  
16 to assert the right to cure does not mean your case gets  
17 dismissed, it means it gets stayed until you notify the  
18 contractor.

19           Spoliation issue, the contractor who did the work  
20 is still around, it's still doing work on the project.  
21 They can depose that contractor all day long. There is no,  
22 we haven't hidden any evidence.

23           **THE COURT:** What's he working on?

24           **MR. CULBERTSON:** The plaintiffs have hired that  
25 contractor to make certain emergency repairs on the home

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 project. That hasn't gone anywhere. There's no evidence  
2 lost.

3 As far as the factual basis for the defendant's  
4 liability, I've attached to my memo the defendant's  
5 expert's report wherein he states his estimate for damages.  
6 You know, everything that Mr. Tate and Mr. Goldsmith have  
7 said, I can refute by simply saying there are issues of  
8 fact as to all of this. At this point whatever my client's  
9 relationship was with the predecessor in title, I don't  
10 understand how that has any bearing on where we are today  
11 at the summary judgment level.

12 Having said all of that, to say that my client made  
13 a conscious and informed decision to buy these seven units  
14 and to receive therewith an assignment of claims as to  
15 other units ignores the fact that -- what he knew or did  
16 not know is not in the record at this point. And I just  
17 don't believe summary judgment is appropriate as to these  
18 three cross-claimed defendants or as to any of the other  
19 subcontractor cross-claim defendants which you're gonna  
20 hear, which I assume they're going to make the same  
21 argument. And my position is the same on all of them,  
22 which is simply there are still enough facts still to be  
23 determined, that summary judgment is not appropriate at  
24 this stage.

25 MR. TATE: Your Honor, may I reply to that?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Certainly.

2 MR. TATE: Thank you. Your Honor, first  
3 Ms. Culbertson says that the arguments that we raised were  
4 red herrings. But those arguments all go to, number one,  
5 what did Medallion and Seckinger know about the conditions;  
6 and number two, more important, the degree to which it had  
7 unclean hands, which is important in assessing the claims  
8 for equitable indemnity.

9 Let me tell you or provide some of the deposition  
10 testimony from Mr. Seckinger. Ms. Culbertson said a minute  
11 ago that there were lots of facts about what Mr. Seckinger  
12 knew and the risk that he assumed. There's really no  
13 question at all. On page 191 of his deposition, which is  
14 in the record, which we filed with our motion paper, the  
15 question was asked (reading): You became aware of the  
16 water intrusion or the deck issues in approximately the  
17 first week of April, 2009? Informed Medallion on June 2nd,  
18 2009, and purchased the units, seven units from Ludwig  
19 Corporation on July 27th, 2009. So prior to your purchase  
20 of the seven units from Ludwig Corporation, you were aware  
21 of the alleged disuse out at Stoneledge, correct? You  
22 being Medallion?

23 And the answer was yes. And his answer was yes, he  
24 knew about these issues.

25 And then on page 192 (reading): You knew about

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 these issues before you purchased them from Ludwig  
2 Corporation, didn't you?

3 I just stated that I did, yes.

4 He goes on to say (reading): I did, and they were  
5 purchased again at a discount.

6 Now, he goes on to say on page 193 (reading): You  
7 knew about the issues with the decks, the alleged  
8 construction deficiencies before you entered into this  
9 agreement with Mr. Ludwig and before you turned around and  
10 sold these very same units that you knew had deficiencies?

11 And then he asked for clarification, and the  
12 question was (reading): Would you agree with me that you  
13 knew about the alleged construction deficiencies, the deck  
14 repairs, before you entered into your agreement and before  
15 you created your as-is agreement for the sale of the units?

16 And then he goes, the question continues on: But  
17 the answer is, That is true. And he explains.

18 And then the question was raised on page 194  
19 (reading): But you knew about the stigma of the lawsuit  
20 before you even got them, correct? Referring to the units  
21 before he even took the units.

22 And then he says (reading): Correct. But the bank  
23 dictated the time frame that they needed the funds.

24 So there's not any question of fact about what he  
25 knew and what he knew he was taking at the time he took the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 units, Your Honor. Thank you.

2 MR. GOLDSMITH: I just have one point, Your Honor.

3 THE COURT: Yes, sir.

4 MR. GOLDSMITH: With regard to the idea that under  
5 the right to cure there could be a stay, if Your Honor  
6 recalls, Ludwig undertook repairs without any notice to the  
7 subcontractors. The repairs were undertaken several years  
8 ago. That's over and done with. Ludwig then sold the  
9 property, and then Medallion in turn sold it to someone  
10 else. Medallion can't now give a right to cure. That day  
11 has come and gone. That day came and went before Medallion  
12 ever acquired the property.

13 And if you were to stay this litigation in that  
14 respect, to what end? There can't possibly be a right to  
15 cure given either by Ludwig or by Medallion. They don't  
16 own or control the units. They would have absolutely no  
17 ability to deliver the units up for work to be done. I  
18 mean, that's just impossible. They've made it impossible.

19 And so that action that they had a window of  
20 opportunity under the statute to give the notice. They  
21 didn't do it and went forward and did the repairs. And  
22 whenever you have that situation, it amounts to a waiver of  
23 the right to give that right to cure. And the contractor  
24 can't be the loser in that. The contractor had no say in  
25 it. The contractor is now being asked to dip into the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 wallet and give these folks money at the same time that the  
2 plaintiffs are saying, That work wasn't any good. Give me  
3 some more money.

4 So you have the contractor standing here being  
5 asked by two people to pay, and out of the two people one  
6 of those had the opportunity to give the notice of right to  
7 cure, for whatever reason did not do it, and there has to  
8 be a consequence for that. And a stay is a useless  
9 suggestion. Thank you.

10 MS. CULBREATH: Your Honor, my client could never  
11 have known the extent of the deficiencies at the time he  
12 purchased the property. No one knew the extent of the  
13 deficiencies so there is, in fact, a question as to what he  
14 knew. He may say he knew about the water intrusion. I  
15 don't know what water intrusion means in the context of  
16 this forty-gazillion-dollar lawsuit. My clients did not  
17 know the extent of the commission fees, there have been no  
18 plaintiffs' reports, there have been no experts retained.

19 Furthermore, I don't know how knowledge is the same  
20 thing as unclean hands. What he knew or did not know does  
21 not make him a tort-feasor. And it sounds a lot like what  
22 they're arguing is comparative negligence or assumption of  
23 the risk or some analogy to that. That is all fine and  
24 well and good, but that is up to the finder of facts. That  
25 is a jury issue as to who is to blame, how much everyone is



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 to blame if these are problems to be attributed between us  
2 equitably.

3 Furthermore, Ludwig only made repairs on some  
4 units. Mr. Goldsmith is acting like we caused irreparable  
5 harm to every unit in Stoneledge. And it's my  
6 understanding that the right to cure was given on more than  
7 one occasion by plenty of other parties in this matter, and  
8 all of that was denied and refused. So the right to cure  
9 argument seems to me to be a little bit small potatoes in  
10 the grand scheme of what we're looking at in this lawsuit.

11 Again, my simple request is that the equitable  
12 indemnity argument and the negligence arguments be allowed  
13 to stand as there are issues of fact that are remaining at  
14 this point on both of these matters.

15 THE COURT: How much discovery has been taken?

16 MR. LYLES: Sir?

17 MS. CULBREATH: How much discovery --

18 MR. LYLES: Has been done?

19 THE COURT: How much?

20 MR. LYLES: I believe we've taken probably close to  
21 a hundred depositions, maybe ninety to a hundred.

22 THE COURT: How much more needs to be done?

23 (Laughter.)

24 MR. LYLES: The plaintiff would like not to take  
25 any more.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: No, I'm serious. Because -- all right.

2 MR. TATE: Your Honor, that raises a lot of  
3 interesting questions. There still is a lot of discovery  
4 to be done. There are so many parties. Each of these  
5 parties has one, two, or three experts. And, you know, at  
6 this point we scratched the surface, we scratched the  
7 surface pretty well, but we're not anywhere close to being  
8 done yet.

9 THE COURT: Mr. Imhoff?

10 MR. IMHOFF: Your Honor, I know Mr. Lyles is  
11 probably going to object vehemently to this. But one of  
12 the problems -- and you may not remember this -- but one of  
13 the problems, and you heard it several times today is it  
14 continues to be a moving target. It seems like every  
15 couple of weeks there is more investigation done by  
16 somebody else, including plaintiffs' own experts, with more  
17 either evidence of defects or different defects.

18 And you probably don't remember this. It was a  
19 while ago. But I was the one that filed, Marick, the  
20 general contractor, that filed the stay. That's an  
21 opportunity to cure and ask the Court to require plaintiffs  
22 to go out and determine what they are alleging and then let  
23 us look at it and inspect it. And this was litigation that  
24 was filed before this.

25 And so that has been part of the problem. Back

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 then this was a fairly simple lawsuit back in 2010 and now  
2 we have this. And it seems to grow exponentially as more  
3 investigation and inspection and destructive testing is  
4 done. And that's why more and more discovery seems to be  
5 done. It's almost a snowball effect. The more parties we  
6 get in, the more discovery goes out.

7           **MR. LYLES:** I don't want to burden the Court, but I  
8 do want to object vehemently, and he anticipated that  
9 because it is simply not true. You entered into the first  
10 scheduling order in this case, and I complied with it with  
11 respect to my experts' forensic report, with respect to the  
12 scope of work and with respect to the estimate to repair.

13           Those have never changed. They were produced in  
14 November and December of 2010, the scope of work was  
15 produced in January of 2011, and our estimate was produced  
16 in March of 2011. Mr. Imhoff is right, that the defendants  
17 have continued to go out to the project well past the  
18 deadlines in your subsequent scheduling orders, which has  
19 been the subject of some e-mails back and forth.

20           My experts have obviously been on the site when  
21 those efforts have occurred. And as of one month ago, for  
22 the first time in a year and a half my experts went back  
23 out to look at two locations on Phase II.

24           Now, there has been some additional work that's  
25 been done as far as these emergency repairs you heard about

**Stoneledge, etc., v. IMK, etc. -- September 5, 2012**

1 because I got roofs falling in and decks falling off. And  
2 the owners are out there while this lawsuit grinds on into  
3 its fourth year, the owners are having to patch, to the  
4 extent they can, to keep water from entering into their  
5 ceilings and light fixtures from falling down on them.

6 So to the extent that there has been some  
7 additional work along those lines is done out of necessity  
8 by these owners. And we could take depositions in this  
9 case for the next ten years. But the truth of the matter  
10 is that the substance of the plaintiffs' claims are set  
11 forth in Derek Hodgins' first report which was produced in  
12 December of 2010. Our scope of repair has not changed. It  
13 was produced in January of 2011. January of 2011. Now,  
14 we're halfway through 2012.

15 (WHEREUPON the Court conferred with the law clerk  
16 off the record.)

17 MR. LYLES: So I have worked with these guys, it's  
18 been a great bunch of lawyers and a great bunch of experts.  
19 I think you saw evidence of all that today. I guess we're  
20 sort of back into getting a scheduling order for this case  
21 and trying to come up with a trial date for it.

22 But it is not fair to say that we scratched the  
23 surface of discovery. To the extent opinions have not been  
24 finalized, it is because the expert for the defendants have  
25 not gone out and done the work they should have done before

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 now.

2 Mr. Imhoff's expert, Randy Still, went out and  
3 looked at Phase I for the first time a month ago. I sued  
4 him on Phase I three-and-a-half years ago.

5 The expert for Bostic, who was retained in December  
6 of 2011 and went to the project for the first time in March  
7 of 2012. I sued him three years ago.

8 And so to the extent we scratched any surface, it's  
9 only because these guys have just asked their experts to do  
10 that work. And I'm not being critical of the defense  
11 lawyers except to the extent there is some argument that we  
12 dragged our feet because we have not. Or that the case is,  
13 the discovery is just scratching the surface. This case is  
14 going to be ready for trial from the plaintiffs'  
15 perspective as soon as you will give us a trial date.

16 And I'm happy to work with these guys. My clients  
17 have made this project available *ad nauseam*. Anybody,  
18 anytime anybody has asked to go out, they opened up units,  
19 they facilitated getting people up on ladders, and we've  
20 done all we could to facilitate this. And I've been at  
21 every deposition save four or five of them, and I'll go to  
22 every one of them they notice. But we would like a trial  
23 date as soon as we can get one.

24 THE COURT: All right.

25 MR. POTEAT: Your Honor, Chad Poteat on behalf of

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Eason Construction, Inc. I haven't spoken yet today. And  
2 I just, I'm not taking exception to anything Mr. Lyles just  
3 said. I just wanted to alert the Court that, I think I  
4 speak on behalf of most everybody here, that one of the  
5 things we had hoped that would happen today would be that  
6 we would address the status of this case. This  
7 conversation has just morphed into a status conference  
8 hearing almost in the middle of a motion hearing.

9 And I know it is a late hour and I don't know how  
10 long you intend for us to go. But I do know that some of  
11 us would like to get some idea of a scheduling order,  
12 whether or not it's going to be amended, with the idea that  
13 I think we need a trial date and I think everything else  
14 followed that.

15 But I also wanted to bring to the Court's attention  
16 that there are some parties in this case that have only  
17 been in three months, not three years. Mine would be one  
18 of them. I got involved on May 1st, I believe, of this  
19 year.

20 And while I think that's more on Phase I  
21 defendants, and there might be some Phase II defendants,  
22 that has a lot to do with problems with Counsel for Bostic  
23 in trying to arrange and obtain documents from his clients.  
24 I'm not sure there's fault involved, but I just wanted to  
25 bring to the Court's attention that there are some of us

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 who have been trying to do a pretty good job of playing  
2 catch-up. And I have not seen any dillydallying as far as  
3 discovery over the last three months. It has been a pretty  
4 active piece of litigation since May 1st.

5 So to the extent that you are entertaining a status  
6 conference, we certainly would be appreciative of it if the  
7 end game is to set a trial date and set a final plan.

8 THE COURT: I can assure you as far as this Court  
9 is concerned I would like to see this matter resolved.  
10 Obviously we've got so many players I'm not sure we can do  
11 that short of a trial date.

12 Now, who -- well, let's see, Mr. Lyles. What do  
13 you say? You have heard there are some people who have  
14 only been here for three months and, like you say, others  
15 have been here four years.

16 MR. LYLES: One of the difficulties that we have  
17 had, and I think this is what Mr. Poteat is referring to, I  
18 think all of the parties were served, either by publication  
19 or otherwise, in sufficient time to be required to try the  
20 case in October as the Court is currently on record  
21 scheduling.

22 Now, in many instances we've had people that we  
23 served who didn't tend to the matter with their insurance  
24 companies quickly enough or the insurance companies didn't  
25 make a decision about whether or not they were going to

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 hire a lawyer and defend the case. So I can't tell you  
2 when Mr. Poteat's client was served, but I'll guarantee you  
3 it was before May of 2012. It's just when his insurance  
4 carrier got him involved and served him in the case.

5 MR. POTEAT: I don't disagree with anything that he  
6 said.

7 MR. LYLES: So I want to give everybody plenty of  
8 time, and that ---

9 THE COURT: Well, let's stop talking about it.  
10 Yes, sir.

11 MR. HORTON: I was just talking to Robert about, we  
12 were thinking this thing might be bifurcated and I told him  
13 I would represent to this Court we got together among the  
14 Phase II defendants and we figured we would be able to try  
15 the case by the third or fourth week in January.

16 THE COURT: If bifurcated?

17 MR. HORTON: Yes, Your Honor. I told him that I  
18 would stand up and mention to the Court that Phase II would  
19 go first and would be ready sometime in the not-too-distant  
20 future.

21 MR. LYLES: He indicated January, he talked to me  
22 January, and I told him practically that would be as soon  
23 as you could get a multi-week term of court up here. And  
24 so obviously I would like to get it done in January if we  
25 could accomplish that.



Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: You are talking about Phase II. In  
2 other words, we're all together again --

3 MR. LYLES: The whole case, yes, sir.

4 THE COURT: -- in January?

5 MR. LYLES: Yes, sir.

6 THE COURT: All right. Yes, ma'am.

7 MS. NICHOLS: Your Honor, Melissa Nichols. Just  
8 for the record, I actually was a part of the Phase II  
9 discussion. I'm a Phase II Defendant. January is about  
10 the earliest we can be ready. We dispute the plaintiffs'  
11 claim that my clients, Clear View Construction and Michael  
12 Franz, were served. There was a request for a certified  
13 publication and a default entered. We filed a motion to  
14 try to lift the default with additional exhibits showing  
15 that Michael Franz, Clear View Construction was dissolved  
16 and Michael moved out of state prior to publication.

17 Ultimately by agreement the default was lifted and  
18 we answered the end of April, beginning of May. So I don't  
19 think it's clear at all that Michael Franz as Clear View  
20 was served before that time period.

21 THE COURT: Well, again, am I wrong, because I've  
22 signed some orders vacating default judgment and all of  
23 that as well as orders of dismissal and the like.

24 MR. YOKEL: Your Honor?

25 THE COURT: Yes, sir. You are Mr. Yokel?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 MR. YOKEL: I'm David Yokel. And it would seem  
2 that if we are looking at a potential four-to-six-week  
3 trial, from what we have been hearing today, that could  
4 cause some problems as it relates to just from that  
5 standpoint.

6 THE COURT: Of course it does.

7 MR. YOKEL: The weather.

8 THE COURT: Of course, I could ask that you all  
9 agree to go with less than 12. You could get down to one.  
10 (Laughter.)

11 MR. LYLES: He brings up a good point, but there's  
12 another side to that story, and that is that my clients are  
13 sitting up at Lake Keowee right now with homes that leak,  
14 and that's problematic in the wintertime, too. So we need  
15 to get this trial as soon as we can.

16 THE COURT: Mr. Imhoff, you have been awfully quiet  
17 this afternoon. Do you have anything to say about...

18 MR. IMHOFF: I don't feel like I've been quiet.

19 THE COURT: Well, excuse me. You have been very  
20 engaged.

21 MR. IMHOFF: I think it's correct that Phase II has  
22 moved much, much faster than Phase I, and obviously we  
23 built Phase II so we're involved in Phase II. And  
24 liability is -- I mean, I don't have any problem trying the  
25 case in January except for the weather and such things.

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 And I don't know if you would ever get a term of court in  
2 January. I would really defer to the Phase I Defendants.  
3 I don't feel like Phase II defendants would have a problem  
4 doing that at all.

5 MR. BELCHER: Your Honor, I'm Alan Belcher for  
6 Bostic Construction. I don't speak for everyone on behalf  
7 of Phase I but as the general contractor for Phase I I'm  
8 done and ready as far as I'm concerned. January would be  
9 great. I think a trial date in this case is going to be  
10 beneficial on multiple sides of the coin and I think we  
11 need to get one set. I think we need to ---

12 THE COURT: Let me see. This is almost like a  
13 classroom now. A show of hands that would go with Phase I.  
14 I mean in January is what I'm talking about. January.  
15 Both cases, both phases tried at the same time, in January.

16 (WHEREUPON multiple attorneys raised hands.)

17 THE COURT: Those who would like a later date? A  
18 later date than January.

19 (WHEREUPON two attorneys raised hands.)

20 THE COURT: All right. So in other words --  
21 Mr. Yoke1, you say later? How much later would you say?  
22 Because I tell you, I have problems, too. Fortunately or  
23 unfortunately, I'll be chief administrative judge for the  
24 Tenth Circuit starting in January so I should have a little  
25 more flexibility. Plus Court Administration is not going

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 to let me travel, so I'll be available.

2 MR. YOKEL: Judge, David Yokel. My expert, we're  
3 attempting to get that scheduled hopefully while we're up  
4 here it's being coordinated. I think hopefully sometime in  
5 October, and he will be the first actual subcontractor  
6 expert other than Bostic's expert that's being deposed.  
7 There may be some information that might come from that.

8 THE COURT: All right. So you've got a deposition  
9 in October?

10 MR. YOKEL: I think we're trying to get it done.  
11 And so that could just somehow or another affect the  
12 decision so maybe, you know, if we move to February or  
13 March?

14 THE COURT: The reason I said January is that's  
15 going to be sort of a tentative beginning time to see  
16 because I've got to check with the Clerk of Court and see  
17 what else we have, but also just in putting together a  
18 venire for a case like this. And so I need, but I need to  
19 start looking down the road to see what might happen.

20 But it sounds like the first of the year would be a  
21 realistic time, in other words, rather than go take off  
22 because we're going through the holidays and everything  
23 else until then, and so those are always going to cause a  
24 problem.

25 Let me also say this. I'm one that lets lawyers,

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 you know, control their case in the sense that I came up  
2 under Judge Ness and the others that assume control. But I  
3 found out lawyers do better when they understand two  
4 things. One, they don't get paid until the case is  
5 resolved; or two, that other cases come up so they have to  
6 move what they have.

7 My point is if we set on a date or decide on a date  
8 and that's by your agreement, as much as you can, it will  
9 be final, and if you have problems with witnesses or  
10 something like that, it's going to be your problem. So, in  
11 other words, if we set a date in January or February like  
12 that, we can agree on a date in January or February, just  
13 put your witnesses on notice that they need to set aside,  
14 you know, a period of time to be available, not come live  
15 with you, but just be on call so not to schedule something  
16 else during those times. So obviously, if they care about  
17 you and your clients, they'll be there.

18 Now, with that said, how do you propose getting all  
19 of these different interests in agreement on something? Do  
20 you want to consult among yourselves or do you want to give  
21 me some tentative dates or something like that, that I  
22 might work around?

23 MR. LYLES: Your Honor, you have I think hit on the  
24 most important issue is what you're going to be able to do  
25 in terms of getting us a multi-week term and it seems to me

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 that's going to come from Columbia.

2       **THE COURT:** The thing is it helps me and it helps  
3 them to know what would be some tentative times. In other  
4 words, obviously you have other cases and you know you're  
5 going to be in Federal Court or you know you're going to be  
6 somewhere else. But something, if you could just say the  
7 middle of January or early February or something like that,  
8 if you can give me a consensus.

9       Yes, sir.

10       **MR. BELCHER:** Alan Belcher for Bostic Construction.  
11 I have a pretty busy trial calendar. It would seem to me  
12 that setting a date certain would sort of trump any other  
13 trials. At least down in the Low Country, if I tell the  
14 judges down there I've got a date certain in Oconee County,  
15 they hold court up there twice a year, that will get me off  
16 the calendar down there. So I think as soon as we set a  
17 date, everybody is going to be able ---

18       **THE COURT:** Let me say this. Now, again, I don't  
19 want to be insensitive. But this is a small county, and we  
20 have to draw a jury. It's not like a capital case. I  
21 don't know if anybody has made a motion to change venue or  
22 anything like that. But I need to consult with staff to  
23 find out what will be available. And so I don't want to  
24 just, you know, arbitrarily set a date. But if there is  
25 something we could do in the sense of give me -- unless you

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 don't have -- what we could do, I'll set the first  
2 reasonable date that I can find starting in January,  
3 dealing with Court Administration and the Clerk's Office  
4 here.

5 MR. HORTON: Your Honor, I would just simply  
6 request the third or fourth week in January to give us a  
7 breather after the holidays.

8 THE COURT: All right. The third or the fourth  
9 week in January. Anybody else?

10 MR. TATE: There are at least two or maybe three or  
11 four lawyers who are involved in a case that's been set for  
12 a day certain trial in Richland County, another big multi,  
13 multi-defendant condo case that Judge Barber has set down  
14 for February the 25th to begin.

15 THE COURT: If we did this one in say the third  
16 week in January, you would have time to catch your breath  
17 and maybe go into the next one?

18 MR. TATE: Maybe. (Laughter.)

19 THE COURT: Really, something tells me that,  
20 because I've been involved in other cases, that a lot of  
21 times once the case starts, things seem to move along. And  
22 I can assure you, although we have multiple parties, a lot  
23 of it can probably be covered without a whole lot of  
24 repetition. So I think we will -- in other words, I've  
25 heard everything from four to six weeks. I don't think

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 it's going to be four to six weeks. But we'll find out.

2 All right. So I would say -- I'll give you a time right  
3 now and wait to hear from you, but I'll look at the third  
4 week in January. Let's see. The third week in January  
5 would be the 21st, which is blacked out. What is that?  
6 Does anybody know?

7 MR. YOKEL: Martin Luther King's day.

8 MR. LYLES: The 22nd.

9 THE COURT: It's a Monday, so that must be the  
10 closest. That's a holiday but that might be a good day to  
11 travel so we can be here to start. And you say you've got  
12 the one in February in Richland, that would be the 18th,  
13 maybe?

14 MR. TATE: That would be the 25th, Your Honor.

15 THE COURT: Oh, that would be the 25th. That's the  
16 fourth week. Very good.

17 All right. So what I'm going to do tentatively now  
18 is give you a date for the week of the 21st which will  
19 probably start on the 22nd of January, 2013.

20 All right. Now, is there anything else we can do  
21 today? I know there's a lot we've got to do, but is there  
22 anything we can do?

23 MR. LYLES: From a housekeeping standpoint, I'd  
24 also like to suggest this. If you can give us maybe a day  
25 every four or six weeks between now and January just where



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 you can set aside a few hours for motions that are pending  
2 and maybe put settlements on the record and things like  
3 that in advance?

4 THE COURT: I certainly can.

5 MR. LYLES: That would be helpful.

6 THE COURT: I don't have my schedule with me.  
7 Let's see. Wait a minute. I may have it in here. Yeah.

8 MR. HORTON: Your Honor, may I ask you a question?

9 THE COURT: Yes, sir.

10 MR. HORTON: This motion that was being argued  
11 before we went to this status conference, for sake of time  
12 maybe it would be appropriate to have the parties submit  
13 briefs to you.

14 THE COURT: We will. That's what I was going to do  
15 anyway.

16 All right. I'll tell you what. If you don't mind,  
17 well, we had today. My next Ocone non jury will be  
18 October the 8th. Is that too soon? That's about a month.

19 MR. LYLES: No, sir.

20 THE COURT: All right. Madam Clerk, if you could  
21 find a day or an afternoon at least that week of October  
22 the 8th?

23 THE CLERK: I know we have one, that one day and a  
24 half trial, so that would probably go Tuesday and  
25 Wednesday, so we could do it on Thursday of that week, so

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 that would be...

2 THE COURT: Anybody have a lake house other than  
3 Mr. Lyles' clients. Big Arnold used to always come over to  
4 Oconee County when we were trying cases, Cochran or Billy  
5 Hagood or somebody, and to check in to find out how the  
6 case was going.

7 MR. GOLDSMITH: Offer suggestions.

8 THE COURT: Oh, yeah. And of course in his  
9 inimicable sawmill voice, it's a whisper.

10 But anyway, the thing is, would Thursday or Friday,  
11 I'll do Friday if you want to, or not do a Friday if you  
12 don't want to. Thursday would be better?

13 MR. LYLES: Thursday.

14 THE COURT: All right. Let's look at that. That  
15 would be Thursday the week of the 8th which would probably  
16 be --

17 THE CLERK: Thursday, the 11th.

18 THE COURT: The 11th, right. So put that on your  
19 calendars.

20 Now, as far as the briefs and the proposed orders  
21 and everything else that I tried to do today, how much time  
22 do you need on those? Again, today is the 5th.

23 MR. HORTON: Your Honor, I'm doing a case that  
24 involves various subcontractors and other parties. I'd  
25 like to at least have twenty days.

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: Well, let's do. I'll give you the 1st  
2 of October. That will ruin your weekend.

3 MR. TERRELL: Your Honor, Lindsay Terrell for T.G.  
4 Construction and I'm getting back to the motions we were  
5 arguing to begin with.

6 THE COURT: Right.

7 MR. TERRELL: I just want to note on the record at  
8 least for myself and probably for the other Catoe  
9 defendants, we have formerly joined in Catoe and Builders  
10 First Source's and Southern Concrete's motions that were  
11 argued by Mr. Tate and Mr. Goldsmith, and we would like to  
12 adopt the arguments that they presented on that. As far as  
13 we're concerned, that was our motion as well.

14 LAWYER: Judge, I'm going to let Mr. Mack go first.

15 THE COURT: Yes, sir.

16 MR. MACK: Your Honor, my name is Frank Mack, I  
17 represent SDI Funding. I have a housekeeping matter.

18 THE COURT: Yes, sir.

19 MR. MACK: Mr. Lyles noticed the 30(b)(6)  
20 deposition of our client. Our principal, the person who  
21 would be the 30(b)(6) designee is John Ludwig. He  
22 currently resides at Livesay Correctional Institute. We  
23 need to get a Court order for Mr. Lyles to be able to take  
24 his deposition. We filed a motion, we have a proposed  
25 order if Your Honor would be inclined to...

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: All right. Any comments on the order  
2 to allowing an inmate deposition of one John Ludwig? John  
3 G. Ludwig?

4 MR. IMHOFF: I say we prefer not to spend the  
5 night. (Laughter.) They have to let us out.

6 THE COURT: Where is Livesay?

7 MR. BLACKBURN: Spartanburg.

8 THE COURT: Oh, he's in this area.

9 MR. BLACKBURN: I'm Charles Blackburn. Mr. Lyles  
10 brought up putting settlement on the record. Judge, we had  
11 a mediation in this case two or three months ago, and I  
12 resolved my claim with Mr. Lyles. I'm a direct defendant.  
13 Mr. Imhoff has agreed to let his cross claims against me  
14 go. Mr. Lyles has settled with me. The only thing keeping  
15 me in this case are Medallion's cross claims. That's what  
16 I came here for today. I made a motion.

17 THE COURT: Is your cross claim also for  
18 indemnification?

19 MR. BLACKBURN: Yes, sir, it is.

20 THE COURT: Well, if I read the cases, it seems  
21 that the plaintiff and the defendant settled and that takes  
22 you out of indemnification.

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

24 THE COURT: Now, do you have any objection?

25 MS. CULBREATH: I don't think that's correct, Your

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Honor. I thought that indemnification claims survive even  
2 if settlement...

3 THE COURT: Well, you find me the authority because  
4 all I found was that that was at least one Judge's  
5 observation.

6 MR. BLACKBURN: Correct. I believe that's Judge  
7 Young.

8 THE COURT: I believe so. In one other case. If  
9 there's been a settlement by the plaintiffs with the  
10 defendant, then that means that the codefendant cannot be  
11 liable for anything the plaintiff would do.

12 MS. CULBREATH: I'd be glad to, I could...

13 THE COURT: What I'm trying to do is I'd like to go  
14 ahead and take care of that matter, get them out of here.  
15 But you can look at it and see.

16 MS. CULBREATH: I'd like to.

17 THE COURT: You're going to be doing a brief or  
18 memorandum or something on your case to keep your cross  
19 claims alive.

20 MR. BLACKBURN: And, Your Honor, if I may submit an  
21 order to the effect of granting the motion for summary  
22 judgment as to their cross claims, attaching Judge Young's  
23 Order in a similar case where the defendant settled with  
24 the plaintiffs, the only thing keeping him in were  
25 equitable indemnity cross claims. If I could do that?

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: You can do that.

2 Yes, sir, Mr. Yoke1.

3 MR. YOKEL: David Yoke1 for KMAC. We would just  
4 like to, for purposes of the motion that was just argued,  
5 we just want to adopt, we had filed the same motion, but we  
6 just adopt the same arguments that have been made by the  
7 lawyers already.

8 THE COURT: All right.

9 MS. NICHOLS: Your Honor, Melissa Nichols for Clear  
10 View Construction and Michael Franz. We had also filed a  
11 motion for summary judgment on Medallion's and Seckinger's  
12 claims, and we would like to adopt the arguments that they  
13 had.

14 MR. WILLIAMS: Your Honor, Drew Williams for the  
15 Defendant Martin Hernandez-Aviles, tab number 28, formally  
16 adopting the motions that were just argued before you and  
17 we would like to join in on them as well.

18 THE COURT: Very good.

19 MR. CARSON: Andrew Carson, Your Honor, for  
20 Alejandro Cruz, we are motion number 27. We would also  
21 formally join to Catoe and Builders First Source and we  
22 would like to adopt their motion for the record.

23 THE COURT: All right. Let's come around to the  
24 podium here.

25 MR. GIBBON: Your Honor, Geoff Gibbon on behalf of

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 Socorro Castillo Montel. We had actually resolved the  
2 cross claim against Montel. I believe it was filed  
3 yesterday.

4 THE COURT: Oh, wonderful.

5 (WHEREUPON there was discussion off the record.)

6 THE COURT: Yes, ma'am.

7 MS. CULBREATH: Your Honor, Anne Culbreath. We  
8 have motion number 64 with no tab number. We just join in  
9 and adopt as full the Medallion cross claims.

10 MR. WARD: Jason Ward on behalf of Mentado. We are  
11 adopting Mr. Tate's arguments as well.

12 THE COURT: Very good.

13 MR. BLACKBURN: Your Honor, I would like to make  
14 that same adoption for the record.

15 THE COURT: All right. For the record, though,  
16 your name?

17 MR. BLACKBURN: Charles Blackburn.

18 THE COURT: All right, Mr. Blackburn.

19 MR. BELCHER: Alan Belcher for Bostic Construction  
20 on the same issue. I filed a motion but it's not timely.

21 THE COURT: Well, you're just joining in, that will  
22 be fine.

23 Yes, sir.

24 MR. ORR: Your Honor, Lawrence Orr for  
25 Miller/Player Associates, the architect. We were not the

## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 contractor, we are the architect defendant. We have a lot  
2 of the same issues that have been raised with respect to  
3 Medallion's motion, so we would like to adopt those  
4 arguments.

5 THE COURT: All right. You are adopting the Catoe  
6 arguments?

7 MR. ORR: Yes, sir.

8 MR. POTEAT: Your Honor, the same thing. Chad  
9 Poteat on behalf of Eason Construction. We're not on the  
10 docket. One of the equitable indemnity claims being  
11 brought against us is from Medallion and so we would just  
12 simply join in that argument.

13 THE COURT: Very good.

14 MR. ROWELL: Your Honor, Eric Rowell on behalf of  
15 Herberto Hernandez, and we also adopt the argument of  
16 Medallion and Seckinger.

17 THE COURT: Very good.

18 MR. MARTIN: Your Honor, Mr. Martin for Jose Nino.  
19 We also have a motion pending against Medallion. We also  
20 would like to adopt their argument.

21 THE COURT: Very good.

22 MR. ROOT: David Root for Builders first Source.  
23 Our motion is on the same motion with Catoe and Southern  
24 Concrete. We would also like to adopt their same  
25 arguments.



## Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 THE COURT: All right. Very good. Thank you.

2 Anyone else?

3 (WHEREUPON there was no response.)

4 THE COURT: All right. So the 1st of October we'll  
5 have the proposed orders, let's do it that way, and make  
6 them as succinct as possible. And then we're looking for  
7 January the 22nd, 2013, that's a Tuesday, it looks like  
8 Monday is a holiday, for the tentative trial date, and I'll  
9 see if I can find the powers that are.

10 MR. LYLES: Your Honor, the balance of the motions  
11 that were on the docket today, we'll hear those on October  
12 the 11th.

13 THE COURT: We'll try.

14 MR. LYLES: Yes, sir.

15 THE COURT: We'll try.

16 All right. Anything else?

17 (Court adjourned at approximately 6:00 p.m.)

18 \* \* \* \* \* END OF TRANSCRIPT \* \* \* \* \*

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Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 STATE OF SOUTH CAROLINA )

2 COUNTY OF AIKEN )

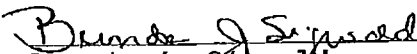
) CERTIFICATE OF TRANSCRIPTION

3  
4  
5  
6 I, THE UNDERSIGNED, Brenda J. Sigwald, do hereby  
7 certify that I transcribed the proceedings in the captioned  
8 case that were reported by Robin Hild, Circuit Court  
9 Reporter for the State of South Carolina, in the Court of  
10 Common Pleas in and for the State of South Carolina on the  
11 5th day of September, 2012.

12 I FURTHER CERTIFY that the foregoing pages,  
13 numbered 1 through 217, constitute a true, accurate and  
14 complete transcript of said hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,  
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and  
18 seal at Aiken County, this 18th day of December, 2012.

19  
20  
21   
22 Brenda J. Sigwald,  
23 Court Reporter and  
24 Notary Public for the  
25 State of South Carolina  
My commission expires  
January 4, 2020