

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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SC Court of Appeals

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.

RECORD ON APPEAL
Volume IV of IV

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

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

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

~~STONELEDGE AT LAKE KEOWEE OWNERS~~

ASSOCIATION, INC., C. DAN CARSON, JEFFREY M. RICK HOME BUILDERS AND RICK
J. DAULER, JOAN W. DAVENPORT, MICHAEL THOENNES' MEMORANDUM IN SUPPORT
FURNARI, DONNA FURNARI, JESSY B. GRASSO,) OF THE S.C.R.C.P. 59(e) MOTION AS TO
NANCY E. GRASSO, ROBERT P. HAYES, LUCY) CLEAR VIEW CONSTRUCTION AND
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.) MICHAEL FRANZ
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 ENTERPRISE A/K/A)
COMPTON ENTERPRISES, GUNTER HEATING &)
AIR, ALL PRO HEATING, A/C &)
REFRIGERATION, LLC, COLEMAN)
WATERPROOFING, HEYWARD ELECTRICAL)
SERVICES, INC., TINSLEY ELECTRICAL, LLC,)
HUTCH N SON CONSTRUCTION, INC., CARL)

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

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

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

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

FACTS

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

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

STANDARD OF REVIEW

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

I. SUMMARY JUDGMENT WAS IMPROPER

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

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

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

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

(1) INDEMNITY

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

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

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

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

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

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

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

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

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

A: I did.

Q: And was it corrected to your satisfaction?

A: Yes.

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

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

Clear View's own expert, Drew Wilkie, admits that Hornaday provided supervision at the project:

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

A: Based on some of the testimony I've read, I believe Mr. Hornaday, there was some supervision provided and I think he was -- Mr. Hornaday was in a role of providing for that supervision.

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

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

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

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

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

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

A: Yes.

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

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

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

A: I think in many cases he has to.

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

A: Yes.

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

A: Yes.

(Still Dep. at 169:12 – 170: 18.)

Mr. Still further testified:

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

A: No.

(Still Dep. 174:18:24.)

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

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

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

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

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

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

which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n.

3. However, in this case, Plaintiffs continue to allege defective stonework against Marick. Thus, Marick is required to continue litigating claims associated with Clear View's defective work.

Marick continues to incur attorney fees and costs associated with Clear View's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

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

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

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

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1900) citing *Addy v. Bolton*, 257, S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was

upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

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

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

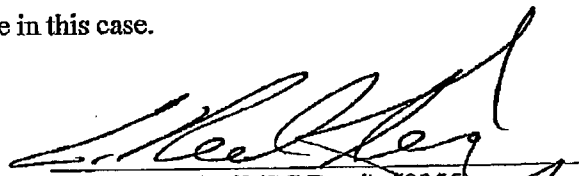
Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139

Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, separate causes of action for negligence and

breach of contract do not collapse into a single indemnity claim. Marick had a contractual relationship and was owed separate duties by Clear View, which it was overseeing to perform the work at issue in this action; if Clear View failed to perform the work it was hired to perform properly, it breached duties and contractual obligations owed to Marick and thus should be liable to Marick.

CONCLUSION

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



Jason M. Imhoff (SC Bar #: 69355)

C. Reed Teague (SC Bar #: 79933)

The Ward Law Firm, PA

PO Box 5663

Spartanburg, SC 29304

(864) 582-3075

(864) 585-3090

jimohff@wardfirm.com

April 9, 2013

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

EXHIBIT 1

FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

2063

01/11/2013

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (12/2011)

Page 1

000982

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
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Charleston, SC 29402

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Court Reporter: N/A

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The Ward Law Firm
P O Box 5663
Spartanburg, SC 29304
Melissa M. Nichols
Michael B. T. Wilkes
Lindsay L. Bullder
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306

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

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 D. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.
HUND, III, RUTH E. ISAAC, MICHAEL D.
FLOURDE, MARY LOU FLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

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

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

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

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AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,	)
MARTIN HERNANDEZ-AVILES, FRANCISCO	)
VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-	)
RAMIREZ, ESTER MORAN MENTADO, SOCORRO	)
CASTILLO MONTEL, UPSTATE UTILITIES, INC.,	)

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

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

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

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

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

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

STANDARD OF REVIEW

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

DISCUSSION

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

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Marick's cross-claims for negligence and equitable indemnity against Clear View Defendants stem from the potential liability Marick faces from the claims brought against it by the Plaintiffs in this matter, the Stoneledge at Lake Keowee Owners' Association and individual

townhome owners (hereinafter collectively "Plaintiffs"). Plaintiffs allege that the townhomes at Stoneledge have construction and design defects leading to water intrusion which has damaged and deteriorated the building components of the townhomes.

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

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

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

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

contract are absorbed by the equitable indemnification claim. See *Nelson v. John Weiland Homes*, 2009-CP-10-6573 (unpublished order); *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (unpublished order).

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

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

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

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

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

A: Yes.

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

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

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

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

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

A: Yes.

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

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

A: That's my opinion.

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

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

C. No Special Relationship between the Individual Defendants

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

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

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

CONCLUSION

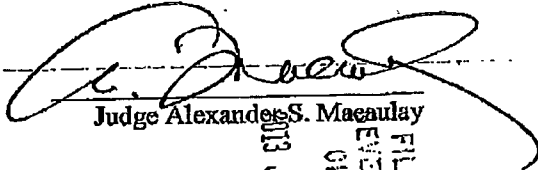
Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds there is no genuine issue of material fact that Marick's negligence cross-claim is subsumed by its equitable indemnification claim. This Court finds that Marick has at least some fault for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

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

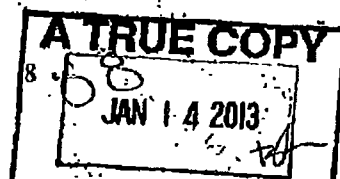
IT IS SO ORDERED.

Walhalla, South Carolina

October 11, 2012


Judge Alexander S. Macaulay

FILED OCTOBER 30
EVERLY M. WHITEFIELD
CLERK OF COURT
JAN 14 PM 3 42



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EXHIBIT 2

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF Oconee

IN THE COURT OF COMMON PLEAS

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

Circuit Court Judge

2063

Judge Code

01/11/2013

Date

For Clerk of Court Office Use Only

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

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Mason A Goldsmith

PO Box 1887

Greenville, SC 29602

Keith A Gowder

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Spartanburg, SC 29306

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON
PLEAS

THE TENTH JUDICIAL CIRCUIT

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

Plaintiffs,)

vs.)

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

CASE NUMBER: 2009-CP-37-0652

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

FILED OCONEE, SC
REBEKAH H. WHITEFIELD
CLERK OF COURT
2013 JAN 14 PM 3 54

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On.

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

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

Procedural Posture

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

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

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

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

Standard

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

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

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Dr.

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

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

Discussion

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

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

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

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

BFS, Southern Concrete, and Clear View are entitled to summary judgment as to

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

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

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

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

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

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

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

Marick has no viable claims for contractual indemnity

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

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

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

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

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

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

~~between it and BFS, Clear View, or Southern Concrete which contains contractual~~

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

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

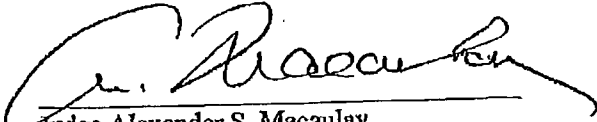
⁵The Court also takes notice that evidence was presented during its hearing on the various motions for summary judgment as to Marick's cross-claims that Marick had no contractor's license, and would thus be prohibited from enforcing a contract as a matter of law. (See Memorandum in Support of Carl Catoe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

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

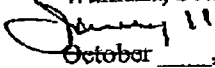
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Concrete, and Clear View are entitled to judgment as a matter of law as to the Cross-Claims of
Marick for Breach of Contract and Breach of Warranty.

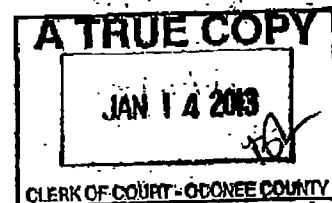
IT IS SO ORDERED.


Judge Alexander S. Macaulay

Walhalla, South Carolina


October __, 2013

FILED OODNEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 JAN 14 PM 3 44



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EXHIBIT 3



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

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

Project: on all projects for this subcontractor

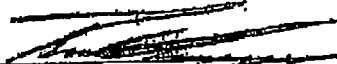
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

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



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

BY:



BY:



DATE:

10/1/07

DATE:

10-30-07

Rick Thoennes

NAME and TITLE

Mike Owen

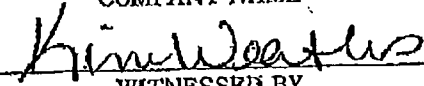
NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Clewis Const.

COMPANY NAME


WITNESSED BY

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

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

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

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

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

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

13 A. Sure.

14 Q. Phase II, 55?

15 A. Sure.

16 Q. Since we're there already.

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

22 Q. Let's go back.

23 A. Okay.

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

25 A. Okay.

1 Q. And the reason I want to do that is I want to see
2 it before you tore it apart..

3 A. Okay.

4 Q. Or 4635.

5 A. Yes, sir.

6 Q. It appears to me that the siding actually
7 terminates, I don't know, inches above the water --
8 the stone water table. And there is a piece of
9 trim installed there with a piece of flashing over
10 it.

11 A. Yes, sir.

12 Q. Matter of fact, I think that may have been one of
13 the pieces we were just talking about.

14 A. Yes, sir.

15 Q. That has the caulk joint. Okay. Is this -- does
16 this installation still require yet another piece
17 of flashing between the trim and the stone water
18 table? Is that what you call a water table?

19 A. Yes.

20 Q. Okay.

21 A. I believe it's the manufacturer's requirements that
22 have the flashing above the water table. I would
23 think that it would be important to segregate the
24 two sections of cladding with flashing. And just
25 for clarification, the trim flashing is required by

- 1 the code. But I think toward the end of 703.8 it
2 says flashing shall be installed over projected
3 wood trim. Something like that, that you can't
4 have flat pieces of wood coming out of the wall
5 that aren't flashed. So the trim is really a
6 separate building code requirement that it be
7 flashed, which they did. There's some minor issues
8 with how that was done. But this is a separate
9 issue down at the stone water table level.
10 Q. So in your opinion this needs to be double flashed?
11 A. Correct.
12 Q. Let's go ahead and look at the Code Section 703.8,
13 I guess, is what you ---
14 A. Okay.
15 Q. --- cited.
16 A. It'd probably just be easier for me to ---
17 Q. You haven't looked at the code?
18 A. It should be in the report. But I was going to
19 look at it.
20 Q. Are you looking at 2003 or 2000?
21 A. I'm looking at the 2000 IRC and the commentary.
22 Also I don't know if you have the commentary. Do
23 you want to look at it at my copy and then let me
24 know if there's something you want me to read into
25 the record?

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

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

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

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

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

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

19 A. I think so.

20 Q. Owens Corning Cultured Stone?

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

25 Q. Yes. Do you have a page?

- 1 A. I think it's Page 4. And at the bottom left it
2 looks like 1-B. I believe it's stucco above the
3 water table. But the detail is generically
4 identified as "sheathing and wood studs, water
5 table or wainscot." So basically this is when your
6 entire wall is not covered with stone, you've got
7 to interrupt and you've got this water table
8 feature. There is a GSM flashing identified. It
9 says, "See note A2." It extends, in this case,
10 from behind the stucco out onto the stone sill. I
11 think GSM is metal flashing.
- 12 Q. Will you flip to page 8 for me, please?
- 13 A. Sure.
- 14 Q. And this may not be right, but it seems closer.
15 Where you have at 1B, "Sheathing/wood studs,
16 horizontal trim, recessed base flashing." Is
17 this -- and there's another one right next to it
18 also that has wood, the horizontal trim piece, and
19 then the stone below.
- 20 A. I don't think any of them have exactly what we
21 have. I mean, the reason I picked the -- that
22 first one was because it has the sill component.
23 And it was identified as water table -- as the
24 water table detail. But it doesn't matter which
25 one you look at. All three of them, that one on

1 page 4, and then two of them on page 8, both the
2 1.14A and 1.14B also call out that same GSM
3 flashing. See note A2.

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

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

13 Q. Is this condition causing damage?

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

22 Q. Have you composed a remedy for this issue?

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

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

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

6 A. Okay.

7 Q. Let's do 55 first.

8 A. Were you asking about damages at 55?

9 Q. Right.

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

12 Q. Oh. What's 4649 and 4650?

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

20 Q. Is that the Grace Vycor Plus?

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

25 Q. Yes.

1 A. That means that any water that comes down the face
2 of the weather-resistant barrier from above is
3 going to go directly behind that felt and be in
4 intimate contact with the one layer of weather-

5 resistant barrier behind it. That's a significant
6 problem particularly in brick veneer and any kind
7 of intimate masonry exterior wall assembly.

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

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

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

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

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

24 A. I think I agree with that.

25 Q. Let's go to 81.

1 ~~weather-resistant barriers.~~

2 Q. Well, that's what I'm asking you. I mean,
3 obviously, you know, hindsight is 20/20. But at

4 the time that the contractors built this building
5 were they -- did they deviate from a code
6 requirement or an industry standard in regard to
7 the way they constructed it and the barriers that
8 they used?

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

1 top of the first layer.

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

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

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

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

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

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

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

3 A. You'll have to be more specific than that. There's

4 a section in the code that talks about alternate
5 products that can be used. And if they're not
6 specifically addressed by the code, the building
7 official can ask for code evaluation reports or
8 some evidence of code compliance.

9 Q. Can I see your ---

10 A. Yeah.

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

13 A. Correct.

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

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

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

19 BY MR. IMHOFF:

20 All right. What time is it?

21 (OFF THE RECORD).

22 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

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

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

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

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

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

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

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

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

16 A. There's a couple pages.

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

18 A. The first line that I drew between Issues 7 and 8
19 are between Unit Number 73 and 15. If you go to
20 the next page, I added three lines. Between Issues
21 10 and 11, the line goes between Unit 66 and Unit
22 8. Between 11 and 12 between Unit 66 and 25 and
23 between 12 and 13 between Units 91 and 33.

24 Q. Let's move on to D7.

25 A. Okay.

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

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

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

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

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

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

23 Q. And not the issue at 55 and 73?

24 A. Correct. Would you like to look at the pictures of
25 32?

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

3 A. All right.

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

6 A. Yes.

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

8 A. 55 is not part of Issue Number 8.

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

10 A. Okay.

11 Q. It looks like for both 8 and 9, again, you've cited
12 the general provision of 703.8. Well, no, you cite
13 Note 3 and Note 4 about "Under and at the ends of
14 masonry wood or metal copings and sills," and Note
15 4, continuously above all projecting wood trim,"
16 corrosion-resistant flashing needs to be installed.
17 All right. Let's look at that, and identify a
18 picture, if you would. Or a photo, I should say.

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

1 ~~guess it would be called at this location.~~

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

4 A. Around the window?

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

7 A. Cedar.

8 Q. That's a piece of cedar trim?

9 A. Yes, sir.

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

14 A. Yes, sir.

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

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

23 Q. Below the piece of stone?

24 A. Right.

25 Q. That creates the sill?

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

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

9 BY MR. IMHOFF:

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

11 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

12 Q. I think we're done with 9.

13 A. Okay.

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

15 A. Okay.

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

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

1 Q. Let's go ahead and look at 59, if we could?

2 A. Okay.

3 Q. This looks to be the new one. The one we talked
4 about before.

5 A. I seem to have two sets of the same photographs.
6 I'm not sure. Yeah, there's a tag that says
7 "duplicate photos." There's some field notes from
8 Mr. Metcalf on July 1st, 2010. And then some
9 photographs at the base of one of the stone clad
10 walls.

11 Q. And this just evidences the lack of the -- what do
12 you call it, through flashing at the base of the
13 wall?

14 A. You might be referring to through wall flashing,
15 which is flashing that would extend from behind the
16 weather-resistant barrier, through the outer
17 masonry veneer to daylight. That's what we -- what
18 would be missing.

19 Q. Is that what this issue is?

20 A. Yes.

21 Q. I think you've told me previously that you have not
22 actually taken any stone off to see if there's
23 damage to this wall. I don't see that you've done
24 that here, and I don't see any photographs on
25 damage to the wall. Am I wrong about that?

1 Q. Let's go to 66, which I think is the next one.

2 A. All right.

3 Q. This looks to be a fairly large file.

4 A. ~~All right. I found some exterior wall photos, but~~
5 the stone goes below grade, and there is no
6 excavation to see where the stone actually
7 terminates. But my earlier point was that the
8 entire purpose of the base of the wall flashing
9 would be to exit water in front of the wood framed
10 wall areas. And so you would see this flashing
11 extending through a linear, horizontal joint at the
12 base of the wall between the concrete foundation
13 and the wood framing, which you don't see in
14 Photographs 0595 through 0603. So they're kind of
15 overview pictures. But what's being shown is the
16 absence of any flashing that would extend through
17 the stone.

18 Q. And you haven't done any investigation or
19 destructive testing to determine if there's any
20 damage between or behind the stone on any of the
21 units that you looked at in Phase II?

22 A. The only thing -- and I didn't think about it a
23 minute ago when you asked me the question. We were
24 looking at these photographs -- and maybe that's
25 the reason we were taking pictures of this outside

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

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

17 A. Yes, sir.

18 BY MR. IMHOFF:

19 Lunch?

20 BY WITNESS:

21 Sure.

22 BY MR. IMHOFF:

23 Okay, let's just stop here for lunch?

24 (OFF THE RECORD).

25 EXAMINATION RESUMED BY MS. MONTAGUE:

~~regarding the stone veneer, its termination,~~

presence or absence of any weep system and the extent that it extended below grade.

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

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

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

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

Q. So this is Unit Number 32?

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

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

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

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

7 A. Okay.

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

9 A. I think that's right.

10 Q. Seem about right?

11 A. Yeah.

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

14 A. Yes.

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

17 A. Okay.

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

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

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

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

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

4 A. It looks like it, yeah.

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

8 A. Yes.

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

10 A. Correct.

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

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

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

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

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

25 A. Okay.

1 Q. So we can get an idea of what ---

2 A. It says, "7/1/2010" at the set of notes. It looks
3 like the photographs -- there's a series of

4 photographs, but in terms of regarding this
5 particular condition it would be images 7241
6 through 7246 prior to removing the stone, seeing
7 how it terminates against the top of a concrete
8 balcony.

9 Q. And maybe I misunderstood that. This is talking
10 about on top of the balcony or on the balcony?

11 A. Well, it could be at other locations. Like it
12 could be below the balcony, where that same column
13 would hit the slab on grade foundation. Or it
14 could be -- we don't show it, but there would be at
15 the front entrance in that 7240, those stone clad
16 base of columns would come down against a concrete
17 entry porch.

18 Q. And that is, according to your chart here, a
19 manufacturer's installation instruction violation?

20 A. Yes, sir.

21 Q. What is the violation, exactly?

22 A. Well, they were supposed to be held up off of these
23 surfaces. I can think of a couple of reasons why
24 that would be important. I don't know exactly what
25 the manufacturer details, without looking at it,

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

4 Q. To allow it to drain?

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

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

12 A. Yes.

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

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

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

3 Stoneledge at Lake Keowee

4 Owners' Association, et.al.,

5 Plaintiffs,

6 vs.

7 SDI Funding, LLC, Ludwig

8 Corporation, LLC, et.al.,

9 Defendants,

10 Marick Home Builders, LLC,

11 Third-Party Plaintiff,

12 vs.

13 Michael Franz, Clearview

14 Construction, et. al.

15 Third-Party Defendants,

16 Builders FirstSource-SE Group,

17 Fourth-Party Plaintiff,

18 vs.

19 Carl Catoe Construction, Inc.,

20 Fourth-Party Defendant.

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

22

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

- 1 A. I don't know.
- 2 Q. How about this, at the height of Marick's existence
- 3 when it was at its busiest, how many employees did
- 4 it have?
- 5 A. Probably three or four.
- 6 Q. Describe the job duties or titles of those
- 7 employees.
- 8 A. Administrative Assistant in the office. Would have
- 9 had a superintendent, assistant superintendent and
- 10 probably a laborer.
- 11 Q. So when Marick was doing its construction it
- 12 subcontracted out its work?
- 13 A. Correct.
- 14 Q. And who at Marick was responsible for selecting and
- 15 contacting with subcontractors?
- 16 A. Me.
- 17 Q. And who at Marick was responsible for observing and
- 18 supervising the work of subcontractors?
- 19 A. Our superintendents.
- 20 Q. Can you name your superintendents at Marick, and
- 21 tell me the years that they were with Marick?
- 22 A. I don't know about that, but I can tell you some of
- 23 the superintendents.
- 24 Q. Okay.
- 25 A. Matthew Gooch ---

1 Q. Can you spell that last name?

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

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

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

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

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

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

16 Q. Who hired Mr. Hornaday?

17 A. I did.

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

21 A. Yes.

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

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

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

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

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

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

10 A. Whatever Nathan needed.

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

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

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

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

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

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

2 A. No.

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

4 work being done by Carl Catoe or his crews?

5 A. Some.

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

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

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

1 ~~he was on site?~~

2 WITNESS ANSWERS:

3 A. A week to a week and a half.

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

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

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

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

18 Q. Pardon?

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

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

23 A. You have to ask him.

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

1 A. No.

2 Q. You were on site approximately once a week?

3 A. Once to once, every week and a half.

4 Q. And your communications, though, with Nathan were
5 how consistent?

6 A. Daily.

7 Q. What kind of ---

8 A. Well, I say "daily," there may have been a day he
9 was gone or I was gone, but for the most part daily.

10 Q. As far as a quantity of time, how much time during a
11 typical week would you spend talking to Nathan?

12 A. No idea.

13 Q. Couldn't say?

14 A. Wouldn't even venture to guess. One week it could
15 be, you know, an hour, next week it could be five
16 minutes, next week it could be two hours.

17 Q. I understand. Was there any particular stage of
18 construction during which you were on the site more
19 frequently than another stage?

20 A. Probably during the layout, like when they were
21 staking or that kind of thing. If they were doing
22 any work on the lake itself, then I was there.

23 Q. As to Nathan's onsite time, you said essentially for
24 a vacation or something where you would expect
25 someone to be absent from the site, he was generally

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

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

9 A. Yes.

10 Q. Who?

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

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

18 A. Right. I think windows and doors.

19 Q. Mike Green?

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

21 Q. All right, go ahead.

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

24 Q. General outside sales?

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

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

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

5 Q. Okay.

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

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

12 A. That's correct.

13 Q. Only Builders First Source was?

14 A. Correct.

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

17 A. Sure.

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

21 A. I'm sure Nathan did.

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

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

1 Q. Was Nathan calling Carl Catoe or Builders First

2 Source with these issues?

3 A. Both. I mean it would start with Carl to see if it

4 could be worked out in the field, I'm sure, but then

5 it would go -- if it couldn't be worked out in the

6 field with Carl then it would go to Builders First

7 Source.

8 Q. I had asked you about warranty issues, and to me

9 typically that means issues once you've left a

10 site ---

11 A. Oh, oh, I don't know of -- I don't know of any.

12 Q. But you were starting to tell me about some issues

13 while construction was ongoing ---

14 A. Right.

15 Q. --- and you mentioned some siding that was warping

16 and popping and then you mentioned the over-spanned

17 truss issue that you already talked about with

18 David. On the siding that was warping or popping,

19 was it an isolated board, was it widespread or was

20 it somewhere in between those two?

21 A. No, I mean, it was an isolated board according to

22 Nathan. He called and asked Carl to fix it.

23 Normally they were on site, but after they had left

24 site then he'd have to call Builders First Source.

25 Q. And was Builders First Source generally responsive?

1 A. Would ---

2 Q. I'm sorry, the finished floor, not the finished
3 grade.

4 A. No.

5 Q. Would you expect it to show the grade at the
6 building?

7 A. Yes, within plus or minus.

8 Q. Would you expect it to show the slope away from the
9 building?

10 A. Yes.

11 Q. If the Freeland drawings don't show or did not show
12 the grade at the building, how would the -- to your
13 knowledge, how would the grading subcontractor know
14 where to set the grade?

15 A. You're asking a hypothetical question there. It
16 should show it, period.

17 Q. I think you said that you assumed that Nathan
18 contacted Hutch N Son regarding some issues with the
19 grade, do you know that for sure or do you just
20 assume that?

21 A. No, I know that for sure.

22 Q. Okay. And that was relating to this standing water?

23 A. Standing water and the slope.

24 Q. And the slope?

25 A. Yes.

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

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **NATHAN HORNADAY**
22

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

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

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

7 A. No.

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

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

15 Q. Were you supervising subcontractors?

16 A. Yes.

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

19 A. No.

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

22 A. Yes.

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

25 A. No.

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

3 A. Yes.

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

8 A. Yes.

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

11 A. No.

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

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

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

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

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

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

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

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

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

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

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

19 A. Okay.

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

21 A. Okay.

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

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

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

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **J. DREW WILKIE**
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the August 16, 2012 commencing at
25 approximately 10:12 a.m. attended by counsel as follows:

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

3 A. Based on some of the testimony I've read by, I

4 ~~believe Mr. Hornaday, there was some supervision~~
5 provided and I think he was -- Mr. Hornaday was in a
6 role of providing for that supervision. Aside from
7 what Mr. Hornaday said in his deposition I'm not
8 aware of what other supervision there was.

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

11 A. I do not.

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

14 A. I do not.

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

17 A. I do not.

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

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

1 ~~outboard of the weather-resistant barrier that's on~~
2 the wall sheathing underneath it. So it's -- this
3 is all occurring outboard so I don't think that

4 that -- that the presence of that gap or crack is a
5 condition that by itself is a violation of the
6 building code. Is that what you were asking?

7 Q. Right.

8 A. Okay.

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

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

13 Q. Yes.

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

15 Q. Sure.

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

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

1 dislodged.

2 Q. Two further reasons that that mortar would crack or
3 gap or shrink there would be that the mortar was

4 improperly mixed; is that a possible reason why the
5 mortar has failed and cracked?

6 A. That's a possibility, yes.

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

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

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

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

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

22 A. I do not.

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

1 ~~A. I believe the other examples I gave would take time.~~

2 You wouldn't be able to see those right away.

3 Q. Do you have any opinion as to the overall quality of

4 the stone installation done by Clear View at the
5 project?

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

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

18 A. Okay. (Witness complies).

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

20 BY MS. NICHOLS:

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

22 BY MR. IMHOFF:

23 Wilkie ---

24 BY MS. NICHOLS:

25 Do you have a Bates number?

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

3
4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
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13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19

20
21 Deposition of **RANDY STILL**
22

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

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You

4 would expect they would but I don't know
5 contractually. I think it becomes a legal question
6 of duty.

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

10 A. I would think so.

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

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

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

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

20 A. Ask questions.

21 Q. Of whom?

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

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

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 ~~Object to the form.~~

4 WITNESS ANSWERS:

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

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

14 A. I would think so.

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

17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

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

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

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

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

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

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

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

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

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

1 A. Yes.

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

4 education and experience in that area?

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

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

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

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

14 A. Yes.

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

18 A. Yes.

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

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

1 or a prototypical installation and that will serve
2 as the standard by which an installation is
3 accepted. For example, if you put a window in and

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

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

20 A. I'm not sure.

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

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

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

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

5 A. No.

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

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

12 Q. Is that a "no"?

13 A. No.

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

18 A. No.

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

24 A. No.

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

CERTIFICATE OF SERVICE

2013 APR 10 AM 11 01

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1),
SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically

mailed a true and correct copy of the Defendants Marick Home Builders, LLC and Rick Thoenness'

Memorandum in Support of the SCRPC 59(e) Motion as to Clearview Construction and Michael

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Attorney for Alejandro Avalos Cruz

This 9 day of April, 2014
Spartanburg, SC

By:

Amanda D. Steward
Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

STONELEDGE AT LAKE KEOWEE OWNERS')

ASSOCIATION, INC., C. DAN CARSON, JEFFREY)

J. DAULER, JOAN W. DAVENPORT, MICHAEL)

FURNARI, DONNA FURNARI, JESSY M. GRASSO,)

NANCY E. GRASSO, ROBERT P. HAYES, LUCY)

H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W.)

HUND, III, RUTH E. ISAAC, MICHAEL D.)

PLOURDE, MARY LOU PLOURDE, CAROL C.)

POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,)

AND ROBERT WHITE, INDIVIDUALLY AND ON)

BEHALF OF ALL OTHERS SIMILARLY SITUATED)

Plaintiffs,

vs.

IMK DEVELOPMENT Co., LLC, KEOWEE)

TOWNHOUSES, LLC, LUDWIG CORPORATION,)

LLC, SDI FUNDING, LLC, MEDALLION AT)

KEOWEE, LLC, BRADFORD D. SECKINGER,)

JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.)

COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,)

MARICK HOME BUILDERS, LLC, M GROUP)

CONSTRUCTION AND DEVELOPMENT, LLC,)

BOSTIC BROTHERS CONSTRUCTION, INC., RICK)

THOENNES, MEL MORRIS, JOE BOSTIC, JEFF)

BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,)

MICHAEL FRANZ, MHC CONTRACTORS,)

MIGUEL PORRAS CHONCOAS, BUILDERS FIRST)

SOURCE SOUTHEAST GROUP, MIKE GREEN,)

SOUTHERN CONCRETE SPECIALTIES, CARL)

COMPTON D/B/A COMPTON ENTERPRIZE A/K/A)

COMPTON ENTERPRISES, GUNTER HEATING &)

AIR, ALL PRO HEATING, A/C &)

REFRIGERATION, LLC, COLEMAN)

WATERPROOFING, HEYWARD ELECTRICAL)

SERVICES, INC., TINSLEY ELECTRICAL, LLC,)

HUTCH N SON CONSTRUCTION, INC., CARL)

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

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

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

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

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

FACTS

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

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

STANDARD OF REVIEW

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

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

I. SUMMARY JUDGMENT WAS IMPROPER

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

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

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

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

(1) INDEMNITY

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

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

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

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

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

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

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

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

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

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

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

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

A: I did.

Q: And was it corrected to your satisfaction?

A: Yes.

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

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

representatives' testimony, Terry Rosamond (BFS 30(b)(6) designee) testified that Marick provided supervision and oversight at the project (see: Rosamond Dep. at 48:23 - 49:6). Rosamond further testified that he had no evidence that Marick was negligent in its performance

of its duties at Stoneledge (see: Rosamond Dep. at 53:11-17). Rosamond also provided the following testimony concerning BFS's supervision of the work performed by its subcontractors:

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

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

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

A: He's expected to go through BFS.

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

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

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

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

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

Mr. Still stated further:

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

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

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

A: Yes.

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

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

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

A: I think in many cases he has to.

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

A: Yes.

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

A: Yes.

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

Mr. Still further testified:

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

A: No.

(Still Dep. 174:18:24.)

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

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

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

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

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

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

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

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

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

Carolina courts have held:

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

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

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

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

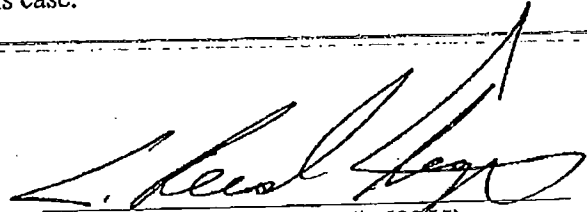
and breach of contract against BFS seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third

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

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

CONCLUSION

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



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April 9, 2013

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

EXHIBIT 1

FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

2063

01/11/2013

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (12/2011)

Page 1

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For Clerk of Court Office Use Only

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

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ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. W. Stutfield
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, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Miller/Player & Associates, John Ludwig, William Cox, Larry D. Lollis, Rick Thoennes, M Group Construction and Development, LLC, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders FirstSource Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Upstate Utilities, Inc., Southern Basements, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Heriberto Acros

CASE NUMBER: 2009-CP-37-0652

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

FILED OCONEE, SC
REBECCA E. WHITFIELD
CLERK OF COURT
2013 JUN 14 PM 3 49

001080

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

Defendants.)

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

Procedural Posture

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

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

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by separate orders, determined that BFS, Southern Concrete, and Clear View are entitled to judgment as a matter of law as to Marick's causes of action for negligence and equitable

~~indemnity. Thus, this order addresses the remaining causes of action asserted by Marick in its~~

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

Standard

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

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

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

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

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

Marick has no viable claims for contractual indemnity

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

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

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

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

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

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

between it and BFS, Clear View, or Southern Concrete which contains contractual

indemnification provisions which it is attempting to enforce. Further, to the extent Marick

argues that it does have contracts with these parties that contain indemnification provisions, it

has offered no evidence that the contracts applied to the Project or would otherwise be

enforceable in this matter.⁵ Finally, Marick has presented no evidence to rebut evidence

demonstrating that such contracts were not supported by consideration. The documents in

question were signed after the subcontractors completed their work and Marick appears to have

paid the subcontractors only for the work performed.⁶

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

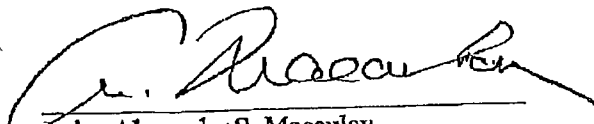
⁵The Court also takes notice that evidence was presented during its hearing on the various motions for summary judgment as to Marick's cross-claims that Marick had no contractor's license, and would thus be prohibited from enforcing a contract as a matter of law. (See Memorandum in Support of Carl Catoe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

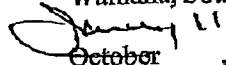
⁶ Marick submitted a Supplemental Memorandum in Opposition to this motion, which included BFS, Southern Concrete and Clear View's "contracts" with Marick. While Marick argued a "hold harmless" provision in these contracts should apply, the Court notes that Marick provided no supporting evidence for the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

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

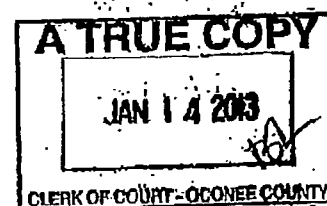
IT IS SO ORDERED.


Judge Alexander S. Macaulay

Walhalla, South Carolina

October 11, 2013

FILED OCOONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 JAN 14 PM 3 44

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EXHIBIT 2

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ALEXANDER S. MACAULAY

2063

01/11/2013

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (12/2011)

Page 1

001090

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

Jason M. Imhoff
The Ward Law Firm
P O Box 5663
Spartanburg, SC 29304
Melissa M. Nichols
Michael B. T. Wilkes
Lindsay L. Bulder
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306

ATTORNEY(S) FOR THE PLAINTIFF(S)

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

Court Reporter: N/A

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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, HAYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

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

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

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

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D.

AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,)
 MARTIN HERNANDEZ-AVILES, FRANCISCO)
 VILLALOBOS LOPEZ, AMEROSIO 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, BUFACIO)
 GARCIA, EVERADO JARMAMILLO, GARCIA)
 PARRA INSULATION, INC., J&J CONSTRUCTION,)
 JOSE NINO, JOSE MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT MORALES)
 D/B/A MORALES MASONRY, MILLER/PLAYER &)
 ASSOCIATES,)
 Defendants,)

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

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

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

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

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

STANDARD OF REVIEW

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

DISCUSSION

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

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

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

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

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

defendants for breach of contract, negligence, and fraud were nothing more than claims for contribution or indemnification with a slight change in wording). The circuit courts in South Carolina have likewise found that claims for ~~negligence, breach of warranty, and breach of~~ contract are absorbed by the equitable indemnification claim. See *Nelson v. John Weiland Homes*, 2009-CP-10-6573 (unpublished order); *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (unpublished order).

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

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

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

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

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

A: Yes.

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

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

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

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

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

A: Yes.

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

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

A: That's my opinion.

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

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

C. No Special Relationship between the Individual Defendants

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

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

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

CONCLUSION

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

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

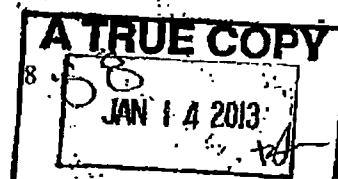
IT IS SO ORDERED.

Walhalla, South Carolina

October 11, 2012


Judge Alexander S. Macaulay

FILED
EVERLY H. WHITEFIELD
CLERK OF COURT
2013 JAN 14 PM 3 42



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EXHIBIT 3



8. Payment schedule:

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

9. Completion schedule:

As required per job

10. Documentation required for payment:

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

11. Warranty:

One year

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

BY:

BY:

DATE:

DATE:

Mark Thoenes

NAME and TITLE

Marick Home Builders, LLC.

COMPANY NAME

EE Binder

WITNESSED BY

Deryl Ward

NAME and TITLE

Builder's First Source Southwest Group, LLC

COMPANY NAME

Subject To Written Changes

B

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

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

19
20 DEPOSITION of DEREK HODGIN (DAY 1)
21
22

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

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

11 Q. The cedar ceiling above the ground floor?

12 A. Correct.

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

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

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

21 A. No, not at all.

22 Q. Was there damage you found behind the siding?

23 A. There was.

24 Q. Water damage?

25 A. Yes.

1 Q. And this is the connection between -- or the
2 intersection between the lap siding and the stone?

3 A. Yes.

4 Q. And you said you took siding off of, I think, a
5 cantilevered window area above the open second
6 floor patio?

7 A. That's correct.

8 Q. Below a window?

9 A. Well, it would be below a window, at the very base
10 of the wall. It would be probably two or more feet
11 below a window, just above -- I guess you would
12 call it a soffit. I don't know what you call it.
13 It's an overhanging, cantilevered window. And it
14 has -- so it has a very short, maybe foot or two
15 soffit or ceiling area that was stained. And so I
16 took siding off just above that -- the base of that
17 wall.

18 Q. Did you find damage there?

19 A. I did.

20 Q. Did you prepare any reports or anything in writing
21 about your findings at Dr. Hund's unit?

22 A. I don't think any of the work I did for Dr. Hund
23 ever made it into a written report. I think it was
24 visual only and then discussed verbally either with
25 him or then communicating that to the HOA later, as

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

4 A. Well ---

5 Q. Go ahead.

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

8 Q. The 2010 report?

9 A. The November 1, 2010 report, yes.

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

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

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

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

1 from a code standpoint, I would say only -- there's
2 a couple of generic paragraphs that you could say
3 it would violate the code. One is the 703.1 which

4 says, "Exterior walls shall provide weather
5 protection." And then a flashing paragraph later
6 on, maybe 703.8 that says, "Flashing shall be
7 installed in a manner to preclude water intrusion,"
8 or something to that effect. So there's not
9 specific detail that says, install kickout
10 flashing, but there are two code paragraphs that I
11 would say have been violated by the as-built
12 conditions that have led to the damage.

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

16 A. Yes, sir.

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

19 A. I think we said industry group, yes.

20 Q. That publishes an industry standard?

21 A. Yes, sir.

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

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

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

1 Q. Unit 327

2 A. Yes, sir. While I'm looking for that one, this
3 last illustration is a great example of what I was
4 talking about earlier. You see the siding is taken
5 off and there is totally unprotected interior-grade
6 drywall with no weather barrier and no adequate
7 flashing. So that even though my damage might be
8 very localized, there is no possible way from an
9 engineering standpoint for me to fix that in a
10 localized way. I have to tear off all the siding
11 far back enough to either get to where there is
12 some weather barrier or take off all the siding to
13 install weather barrier. I have to see all the
14 extent of damage to the drywall sheathing so I make
15 sure I repair that during the process. So I know
16 that's kind of off the subject, but you asked me
17 earlier about the statistics and how do I pick how
18 many places. When you see that type of a defect,
19 it just causes you to have a more comprehensive
20 repair scope. I found some roof/wall intersection
21 photographs, but I -- I want to make sure I've
22 found all of them before we start talking about it.

23 Q. Are these all on discs?

24 A. I think so.

25 (OFF THE RECORD).

1 visible flashing.

2 BY MR. ROOT:

3 Thank you. Sorry.

4 BY THE WITNESS:

5 What was the next one?

6 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

7 Q. 89, I believe you have listed. 578 is the address.

8 And while you're looking, do you know why you chose
9 this unit?

10 A. No. 578 -- I'm sorry, was that the unit number?
11 578?

12 Q. According to your document, yeah. Yes.

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

14 Q. Okay.

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

16 Q. Yeah, 89.

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

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

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

19
20 DEPOSITION of DEREK HODGIN (DAY 2)
21

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

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

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

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

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

14 A. That's okay. On 67 it looks like there's some trim
15 at the base of one of those cantilevered window
16 sections. And this is field notes dated June 30,
17 2010. Above the trim there's a reverse lap with
18 the metal flashing and the weather barrier. So the
19 weather barrier extends down behind the flashing
20 and behind some trim.

21 Q. What picture are you looking at?

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

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

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

8 A. Yes, sir.

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

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

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

18 A. No, I think it actually went a little bit further
19 down. If you look at the -- well, if you look at
20 4623 and 4624 you can see, you're looking at the
21 bottom of that flashing. So that WRB comes down
22 like maybe another inch or so below it.

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

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

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

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

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

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

20 A. Okay.

21 Q. Does the Z flashing change color?

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

1 A. Correct. I think this is pretty common in most
2 flashing integrations, that they put all the
3 flashing on the outboard side of the weather

4 barrier. So I agree with you. I mean, I think
5 that's probably the bigger problem is that
6 integration.

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

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

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

13 A. No, sir.

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

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

20 Q. Okay.

21 A. The first image numbers are behind the October 7
22 2009 tab. And they are images 4044 and 4045. And
23 it's just some trim that protrudes from the
24 exterior wall. The weather barrier came down to
25 the top of the trim and stopped. And then there

1 was flashing installed improperly over the outboard
2 side of the weather barrier. And there's just a
3 very narrow gap. That one looks like it would have

4 been really easy to properly integrate the
5 flashing, but was not properly integrated.

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

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

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

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

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

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

23 Q. Let's go to 76, please.

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

25 Q. Oh, I'm sorry.

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

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

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

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

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

14 A. Correct.

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

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

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

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

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

1 front wall.

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

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

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

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

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

15 A. Yes.

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

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

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

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

1 Q. It appears that there is some weather barrier there
2 in the corner with lettering on it.

3 A. I agree.

4 Q. Is there a bigger picture which would show how far
5 ~~that extends or where it came from?~~

6 A. Let me look. I don't see it in these photographs,
7 no.

8 Q. How do you know that the weather barrier wasn't
9 removed to show the water damaged gypsum in 4722?

10 A. We would have indicated that in our field notes and
11 I don't think we would have photographed it and
12 included it as incomplete weather barrier if we
13 were the ones who removed the weather barrier.

14 Q. Again, this shows some incomplete weather barrier
15 here in Unit 89?

16 A. Yes, sir.

17 Q. And that ---

18 A. And ---

19 Q. Go ahead.

20 A. Well, I was just going to agree with you that, I
21 mean, the patterns that we came across are very
22 strange in terms of where the weather barrier is
23 included and where it is not. I mean, there's two
24 things on this unit, before we leave it. One is
25 you've got kind of a swath of missing weather

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

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

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

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

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

1 exterior walls D3.

2 A. Okay.

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

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

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

11 A. Yes, sir.

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

14 A. Okay.

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

17 A. Yep.

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

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

1 it's usually pretty bad. You know, if it's close
2 to 16 inches or where it should be, I don't know
3 that we would make a big deal about it,
4 particularly in the Upstate. We don't have as
5 significant of a code prescribed wind load. But on
6 this one if you look at Image 4607 through 4610,
7 there are fasteners that were 46 inches, 41 inches,
8 47 1/2 inches. These are just the spacing of the
9 fasteners that are marked on the back of the siding
10 that we removed. In 4607 the spacings are 41
11 inches and 46 inches. In 4608 the spacings are 40
12 1/2 and 47 1/2 inches. In 4609 it might be the
13 same 40 1/2 inches. I can't be sure. And then 72
14 1/4 inches. And in the last image I see 28 inches.
15 So it was, I would say, excessive in terms of the
16 spacing of fasteners used to attach the siding.

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

18 A. Okay. Are you ready?

19 Q. Yeah.

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

24 Q. Where are you?

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

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

3 A. All right.

4 Q. Let's move on to 8, and I guess 9 at the same time.

5 It looks like they're both talking about windows?

6 A. Yes.

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

8 A. 55 is not part of Issue Number 8.

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

10 A. Okay.

11 Q. It looks like for both 8 and 9, again, you've cited
12 the general provision of 703.8. Well, no, you cite
13 Note 3 and Note 4 about "Under and at the ends of
14 masonry wood or metal copings and sills," and Note
15 4, continuously above all projecting wood trim,"
16 corrosion-resistant flashing needs to be installed.
17 All right. Let's look at that, and identify a
18 picture, if you would. Or a photo, I should say.

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

1 guess it would be called at this location.

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

4 A. Around the window?

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

7 A. Cedar.

8 Q. That's a piece of cedar trim?

9 A. Yes, sir.

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

14 A. Yes, sir.

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

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

23 Q. Below the piece of stone?

24 A. Right.

25 Q. That creates the sill?

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

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

8 A. Correct.

9 Q. In your opinion?

10 A. Yes.

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

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

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

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

1 Q. Let's look at Unit 81.

2 A. Okay.

3 Q. This talks about inadequate flashing of the
4 windows, sort of a -- it looks like sort of in a
5 general sense.

6 A. Yes.

7 Q. There is only one Phase II unit listed, that's this
8 Unit 81. Do you have an opinion, I like your word,
9 of whether the absence of adequate flashing on this
10 unit is an anomaly or is prevalent across Phase II?

11 A. I think our destructive tests -- we'll have to see
12 how many Phase II areas we've looked at around
13 windows. I have a hard time not lumping them
14 together. And I know Phase II is important to you,
15 or more important to you than Phase I. I think
16 that at least from a head flashing standpoint I
17 don't remember seeing anything different than what
18 we talked about earlier, always the flashing is
19 installed outboard of the weather-resistant barrier
20 and would not be weather lapped properly. But as
21 far as Phase II goes, I'm going to have to go
22 basically unit by unit from the table to remember
23 what conditions. I just don't have them that
24 cleanly segregated in my head as to what I saw
25 where without ---

1 A. Okay.

2 Q. Tell us what these ---

3 A. Wait a minute. Sorry.

4 Q. Yeah, it looks like we need a separation between 1
5 and 2; is that right?

6 A. No, I was going to circle the screw up on this.
7 These are actually not a problem. Where are we
8 going next?

9 Q. Exterior doors. Why don't you do ahead and tell us
10 what the issue is and then use a Phase II example,
11 if you wanted to show us.

12 A. So the first Phase II exterior door looks like Unit
13 43 on July 9, 2010. It looks like in the
14 photograph there's a balcony door where some trim
15 is removed. If you're standing looking out the
16 doors it would be the right side of the door and
17 then at the middle location. And it looks like if
18 you just go all the way from 7704 to 7783 that
19 should encompass all the door photographs. So the
20 trim's taken off the right side first, if you're
21 standing at the balcony looking at the rear wall.
22 And then you can see at the top of the door 7714,
23 which is the top right photograph on this index
24 sheet, the weather barrier comes over to the rough
25 opening and just simply folds in to the rough

1 opening. There's no additional protection at that
2 location. There's a close-up view of it in 7715.
3 And then the bottom of the door is observed in
4 7716.

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

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

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

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

1 the door to preclude water intrusion.

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

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

10 Q. Right.

11 A. There's some minor staining at the base of the OSB
12 sheathing next to the door. And then it looks like
13 they took that wood block out. You can see in
14 7722?

15 Q. Yeah.

16 A. And so the concrete extends below the threshold.

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

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

21 Q. Right.

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

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

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

8 A. Okay.

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

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

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

19 A. No.

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

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

24 Q. Okay.

25 A. Regardless, they're constructed with wood framing

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

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

12 A. Yes.

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

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

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

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

1 about the trusses -- the floor trusses being
2 damaged.

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

5 A. Right.

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

9 A. Yes.

10 Q. Where the slab meets the wall?

11 A. The rear wall, yes.

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

14 A. Yes.

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

16 A. I don't think so.

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

18 A. No.

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

21 A. No, I haven't.

22 Q. At this time can you disagree with that?

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

25 Q. And an additional problem with the rear patios and

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

3 A. Yes.

4 Q. And rotting them?

5 A. Yes.

6 Q. Especially at the bottom?

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

8 Q. No.

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

13 Q. The concrete top.

14 A. Thanks.

15 Q. That still doesn't change your testimony?

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

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

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

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

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

11 A. Well ---

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

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

20 Q. Yeah.

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

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

2 COUNTY OF OCONEE

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

3
4 Stoneledge at Lake Keowee

5 Owners' Association, et.al.,

6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.

9 Keowee Townhouses, LLC,

10 Ludwig Corporation, LLC,

11 SDI Funding, LLC, Medallion

12 At Keowee, LLC, Integrys

13 Keowee Development, LLC,

14 Marick Home Builders, LLC,

15 Bostic Brothers Construction,

16 Miller/Player & Associates,

17 et. al.

18 Defendants.

19
20
21 Deposition of **RANDY STILL**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the August 15, 2012 commencing at
25 approximately 10:20 a.m. attended by counsel as follows:

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

001135

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You

4 would expect they would but I don't know

5 contractually. I think it becomes a legal question

6 of duty.

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

10 A. I would think so.

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

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

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

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

20 A. Ask questions.

21 Q. Of whom?

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

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

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 Object to the form.

4 WITNESS ANSWERS:

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

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

14 A. I would think so.

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

17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

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

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

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

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

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

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

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

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

1 A. Yes.

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

4 education and experience in that area?

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

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

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

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

14 A. Yes.

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

18 A. Yes.

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

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

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

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

20 A. I'm not sure.

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

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

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

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

5 A. No.

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

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

12 Q. Is that a "no"?

13 A. No.

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

18 A. No.

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

24 A. No.

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

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF OCONEE

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

Stoneledge at Lake Keowee

Owners' Association, et.al.,

Plaintiffs,

vs.

IMK Development Company, Inc.

Keowee Townhouses, LLC,

Ludwig Corporation, LLC,

SDI Funding, LLC, Medallion

At Keowee, LLC, Integrys

Keowee Development, LLC,

Marick Home Builders, LLC,

Bostic Brothers Construction,

Miller/Player & Associates,

et. al.

Defendants.

DEPOSITION of TERRY ROSAMOND

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

TERRY ROSAMOND

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

3 Construction.

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

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

12 Q. So Mike Greene may be better ---

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

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

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

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

22 A. I guess Mike since Mike wrote those contracts.

23 Q. Okay. "Any contract(s) between you and any person
24 or entity relating" -- well, it looks like I got --
25 3 and 4 looks like exactly the same question, so

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

3 Q. Was Mike on site?

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

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

11 A. With in-house employees?

12 Q. Correct.

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

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

18 A. Yes, sir.

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

22 A. Correct.

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

25 A. Yes, sir.

TERRY ROSAMOND

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1 A. I do not.

2 Q. You don't know?

3 A. I don't know.

4 Q. Who at BFS would know that?

5 A. I'm assuming that Mike Greene would be the best
6 since he was the one that had the most contacts with
7 Marick. That's normally the location wherever the
8 market's at, that the job is done, who they work
9 with would be who they would contact.

10 Q. Do you know when Marick was first contacted by me
11 and my client about alleged deficiencies in the work
12 performed by BFS?

13 A. I do not know exactly.

14 Q. But to your knowledge, Marick, other than through
15 the lawsuit, has never made a demand on BFS to go to
16 the Stoneledge Project and investigate alleged
17 deficiencies?

18 A. To my knowledge, there has not been any
19 communication like that.

20 Q. Would you or Mike be in the best position to testify
21 about how Marick staffed the Stoneledge Project?

22 A. Mike would be.

23 Q. As you're testifying, do you know whether or not
24 Marick performed any supervisory function with
25 regard to the work performed by BFS and its

1 subcontractor?

2 A. Mike could better testify, but I know that they did

3 have someone on site, because I've seen it in some
4 of the documents, that they had supervisory position
5 out there. Which it's common for general

6 contractors to always have their own people there.

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

15 A. Yes.

16 BY MR. IMHOFF:

17 Object to the form.

18 WITNESS CONTINUES:

19 A. A general contractor does have that authority.

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

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

24 Q. Okay.

25 A. I would like to be.

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

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

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

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

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

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

22 A. There again I don't know.

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

1 been the one reviewing them.

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

3 A. Okay.

4 BY MR. IMHOFF:

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

6 Thank you.

7 EXAMINATION BY MR. ANTHONY:

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

13 A. Okay.

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

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

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

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

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

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

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

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

TERRY ROSAMOND

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

3 A. He's expected to go through BFS.

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

5 A. Most of the time.

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

9 A. Thank you.

10 EXAMINATION BY MR. POWERS:

11 Q. How are you doing?

12 A. Pretty good.

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

15 A. Okay.

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

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

22 Q. Yes, sir.

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

1 A. Normally.

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

5 BY MR. ROOT:

6 Object to form.

7 WITNESS ANSWERS:

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

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

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

19 Q. How would you deal with that situation?

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

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

1 handle it?

2 BY MR. ROOT:

3 Object to form.

4 WITNESS ANSWERS:

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

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

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

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

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

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

3
4 Stoneledge at Lake Keowee
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8 IMK Development Company, Inc.
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13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20
21 Deposition of **NATHAN HORNADAY**

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

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

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

7 A. No.

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

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

15 Q. Were you supervising subcontractors?

16 A. Yes.

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

19 A. No.

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

22 A. Yes.

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

25 A. No.

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

3 A. Yes.

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

8 A. Yes.

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

11 A. No.

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

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

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

24 A. I did.

25 Q. And was it corrected to your satisfaction?

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

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3 Stoneledge at Lake Keowee
4 Owners' Association, et.al.,
5 Plaintiffs,
6 vs.
7 SDI Funding, LLC, Ludwig
8 Corporation, LLC, et.al.,
9 Defendants,
10 Marick Home Builders, LLC,
11 Third-Party Plaintiff,
12 vs.
13 Michael Franz, Clearview
14 Construction, et. al.
15 Third-Party Defendants,
16 Builders FirstSource-SE Group,
17 Fourth-Party Plaintiff,
18 vs.
19 Carl Catoe Construction, Inc.,
20 Fourth-Party Defendant.
21 DEPOSITION of **FREDERICK (RICK) R. THOENNES**
22
23 Pursuant to notice, a deposition was taken in the
24 above case on the November 21, 2011, commencing at
25 approximately 10:10 a.m. attended by counsel as follows:

- 1 A. I don't know.
- 2 Q. How about this, at the height of Marick's existence
- 3 when it was at its busiest, how many employees did
- 4 it have?
- 5 A. Probably three or four.
- 6 Q. Describe the job duties or titles of those
- 7 employees.
- 8 A. Administrative Assistant in the office. Would have
- 9 had a superintendent, assistant superintendent and
- 10 probably a laborer.
- 11 Q. So when Marick was doing its construction it
- 12 subcontracted out its work?
- 13 A. Correct.
- 14 Q. And who at Marick was responsible for selecting and
- 15 contacting with subcontractors?
- 16 A. Me.
- 17 Q. And who at Marick was responsible for observing and
- 18 supervising the work of subcontractors?
- 19 A. Our superintendents.
- 20 Q. Can you name your superintendents at Marick, and
- 21 tell me the years that they were with Marick?
- 22 A. I don't know about that, but I can tell you some of
- 23 the superintendents.
- 24 Q. Okay.
- 25 A. Matthew Gooch ---

1 Q. Can you spell that last name?

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

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

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

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

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

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

16 Q. Who hired Mr. Hornaday?

17 A. I did.

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

21 A. Yes.

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

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

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

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

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

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

10 A. Whatever Nathan needed.

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

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

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

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

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

1 A. From time to time he would tell me if somebody was
2 doing a good job or he would tell me if somebody was
3 doing a bad job, what he felt was a bad job. Which

4 may have been scheduling, may have been that he
5 didn't have enough people on the site, or vice-
6 versa, the subcontractor was on schedule and was
7 manning the job properly.

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

10 A. No.

11 Q. That was your job?

12 A. That would've fallen to me.

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

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

16 Q. Marick Builders.

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

22 Q. Who maintained the records of Marick Builders?

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

25 Q. And who was that?

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

2 A. No.

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

4 work being done by Carl Catoe or his crews?

5 A. Some.

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

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

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

1 he was on site?

2 WITNESS ANSWERS:

3 A. A week to a week and a half.

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

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

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

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

18 Q. Pardon?

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

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

23 A. You have to ask him.

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

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

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

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

9 A. Yes.

10 Q. Who?

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

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

18 A. Right. I think windows and doors.

19 Q. Mike Green?

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

21 Q. All right, go ahead.

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

24 Q. General outside sales?

25 A. That's right. He handled my account.

1 Catoe? That is, who did monthly inspections for
2 subcontractor payment?

3 A. Nathan would inspect -- well, there was a draw
4 schedule that Mike Green and I worked out ---

5 Q. Okay.

6 A. --- for all aspects when we did the contract and
7 then all Nathan had to do was look and see what
8 portion of that schedule was done and then he'd sign
9 off on it and then we'd pay it. Not Carl, BFS.

10 Q. Yeah, right, because Carl was -- Carl Catoe was not
11 your subcontractor, correct?

12 A. That's correct.

13 Q. Only Builders First Source was?

14 A. Correct.

15 Q. But nonetheless you got to occasionally communicate
16 with Carl Catoe by virtue of being on the site?

17 A. Sure.

18 Q. Did anyone at Marick ever call or otherwise contact
19 Carl Catoe Construction regarding any warranty
20 issues?

21 A. I'm sure Nathan did.

22 Q. You say that you're sure he did. What do you know
23 that he did?

24 A. Siding that had warped and popped, a truss, the
25 truss that was over-spanned.

- 1 Q. Was Nathan calling Carl Catoe or Builders First
2 Source with these issues?
3 A. Both. I mean it would start with Carl to see if it
4 could be worked out in the field, I'm sure, but then
5 it would go -- if it couldn't be worked out in the
6 field with Carl then it would go to Builders First
7 Source.
8 Q. I had asked you about warranty issues, and to me
9 typically that means issues once you've left a
10 site ---
11 A. Oh, oh, I don't know of -- I don't know of any.
12 Q. But you were starting to tell me about some issues
13 while construction was ongoing ---
14 A. Right.
15 Q. --- and you mentioned some siding that was warping
16 and popping and then you mentioned the over-spanned
17 truss issue that you already talked about with
18 David. On the siding that was warping or popping,
19 was it an isolated board, was it widespread or was
20 it somewhere in between those two?
21 A. No, I mean, it was an isolated board according to
22 Nathan. He called and asked Carl to fix it.
23 Normally they were on site, but after they had left
24 site then he'd have to call Builders First Source.
25 Q. And was Builders First Source generally responsive?

1 A. Would ==

2 Q. I'm sorry, the finished floor, not the finished
3 grade.

4 A. No.

5 Q. Would you expect it to show the grade at the
6 building?

7 A. Yes, within plus or minus.

8 Q. Would you expect it to show the slope away from the
9 building?

10 A. Yes.

11 Q. If the Freeland drawings don't show or did not show
12 the grade at the building, how would the -- to your
13 knowledge, how would the grading subcontractor know
14 where to set the grade?

15 A. You're asking a hypothetical question there. It
16 should show it, period.

17 Q. I think you said that you assumed that Nathan
18 contacted Hutch N Son regarding some issues with the
19 grade, do you know that for sure or do you just
20 assume that?

21 A. No, I know that for sure.

22 Q. Okay. And that was relating to this standing water?

23 A. Standing water and the slope.

24 Q. And the slope?

25 A. Yes.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF OCONEE

C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrays
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

DEPOSITION of CARL CATOE

Pursuant to notice, a deposition was taken in the
above case on the December 5, 2011, commencing at
approximately 10:15 a.m. attended by counsel as follows:

CARL CATOE

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1 A. I don't know.

2 Q. What did you do in connection with the roof? What

3 did Carl Catoe do?

4 A. We installed the roof trusses.

5 Q. And sheeting?

6 A. Sheeting.

7 Q. How about the felt or paper?

8 A. I don't think that was in my scope of work.

9 Q. But you didn't install the shingles?

10 A. We did not install the shingles.

11 Q. But you set the windows and set the doors?

12 A. We set the windows and set the doors.

13 Q. And y'all did the rough opening flashing for the
14 windows?

15 A. I don't understand the question.

16 Q. You framed the stud walls; correct?

17 A. Correct.

18 Q. And then y'all set the windows; correct?

19 A. Correct.

20 Q. And in setting the windows, was Carl Catoe
21 responsible for flashing the rough opening that the
22 windows were set in?

23 A. I wouldn't call it flashing. I would call it --

24 it's called wrap or -- is that what you're

25 referring to?

CARL CATOE

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1 Q. Sure.

2 A. Yes, we were required to install the house wrap.

3 Q. How about flashing around windows?

4 A. Window tape.

5 Q. Y'all were required to do that?

6 A. Yes.

7 Q. And did Carl Catoe install the siding?

8 A. Yes.

9 Q. And did Carl Catoe install the sheathing? The
10 exterior wall sheathing?

11 A. Yes.

12 Q. And did Carl Catoe install the building wrap?

13 A. Yes.

14 Q. And all that was the responsibility of Carl Catoe?

15 A. Yes.

16 Q. In Phase II?

17 A. That's correct.

18 Q. And in connection with the porches and the decks,
19 Carl Catoe was responsible for framing those
20 porches and decks; is that right?

21 A. That's correct.

22 Q. And flashing the components of the decks that
23 needed to be flashed?

24 BY MR. ROOT:

25 Objection.

CARL CATOE

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1 WITNESS ANSWERS:

2 A. No flashing at all.

3 Q. Carl Catoe didn't do the stone work?

4 A. No.

5 Q. And there was no flashing that was required between
6 the heated walls and the decks?

7 A. That's correct.

8 Q. And that is there was no flashing required in the
9 plans or that's just not something that would ever
10 be flashed?

11 A. When the question come up in the beginning about
12 any flashing behind the band, and I was told not to
13 do any flashing.

14 Q. And who told you that?

15 A. I believe it was Nathan and Mike. They were not
16 going to do anything. The waterproofer would
17 install all the flashing on the deck.

18 Q. How does the waterproofer install flashing after
19 the siding has gone up?

20 A. He doesn't.

21 Q. Did the waterproofer do his work after you did your
22 work?

23 A. No.

24 Q. So the waterproofer was actually there before Carl
25 Catoe finished its work?

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, ET AL. V. IMK DEVELOPMENT, ET AL.
CASE NO.: 2009-CP-37-0652

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2013 APR 10 AM 10 44

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1),
~~SCRCP and counsel's regular business practices, do hereby certify that I have this date, electronically~~
mailed a true and correct copy of the **Defendants Marick Home Builders, LLC and Rick Thoennes'**
Memorandum in Support of the SCRCP 59(e) Motion as to Builders FirstSource to the following
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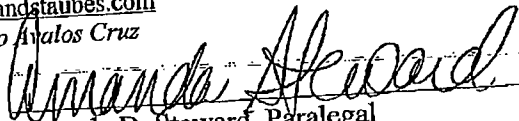
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This 9 day of April, 2014
Spartanburg, SC

By:


Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

~~STONELEDGE AT LAKE KEOWEE OWNERS'~~)

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FURNARI, DONNA FURNARI, JESSY B. GRASSO,)

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HUND, III, RUTH E. ISAAC, MICHAEL D.)

PLOURDE, MARY LOU PLOURDE, CAROL C.)

POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,)

AND ROBERT WHITE, INDIVIDUALLY AND ON)

BEHALF OF ALL OTHERS SIMILARLY SITUATED)

Plaintiffs,)

vs.)

IMK DEVELOPMENT CO., LLC, KEOWEE)

TOWNHOUSES, LLC, LUDWIG CORPORATION,)

LLC, SDI FUNDING, LLC, MEDALLION AT)

KEOWEE, LLC, BRADFORD D. SECKINGER,)

JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.)

COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,)

MARICK HOME BUILDERS, LLC, M GROUP)

CONSTRUCTION AND DEVELOPMENT, LLC,)

BOSTIC BROTHERS CONSTRUCTION, INC., RICK)

THOENNES, MEL MORRIS, JOE BOSTIC, JEFF)

BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,)

MICHAEL FRANZ, MHC CONTRACTORS,)

MIGUEL PORRAS CHONCOAS, BUILDERS FIRST)

SOURCE SOUTHEAST GROUP, MIKE GREEN,)

SOUTHERN CONCRETE SPECIALTIES, CARL)

COMPTON D/B/A COMPTON ENTERPRIZE A/K/A)

COMPTON ENTERPRISES, GUNTER HEATING &)

AIR, ALL PRO HEATING, A/C &)

REFRIGERATION, LLC, COLEMAN)

WATERPROOFING, HEYWARD ELECTRICAL)

SERVICES, INC., TINSLEY ELECTRICAL, LLC,)

HUTCH N SON CONSTRUCTION, INC., CARL)

COPY
MARICK HOME BUILDERS AND RICK
THOENNES' MEMORANDUM IN SUPPORT OF
THE S.C.R.C.P. 59(e) MOTION AS TO CARL
CATOE AND AFFILIATED SUBCONTRACTORS
HIRED BY CARL CATOE

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 APR 10 AM 10 52

CATOE CONSTRUCTION, INC., T.G.)
 CONSTRUCTION, LLC, DELFINO)
 CONSTRUCTION, FRANCISCO JAVIER ZARATE)
 D/B/A ZARATE CONSTRUCTION, ALEJANDRO)
 AVALOS CRUZ, HERBERTO ACROS)
 HERNANDEZ, MARTIN HERNANDEZ-AVILES,)
 FRANCISCO VILLALOBOS LOPEZ, AMBROSIO)
 MARTINEZ-RAMIREZ, ESTER MORAN)
 MENTADO, SOCORRO CASTILLO MONTEL,)
 UPSTATE UTILITIES, INC., SOUTHERN)
 BASEMENTS, INC., MJG CONSTRUCTION AND)
 HOMEBUILDERS, INC. D/B/A MJG)
 CONSTRUCTION, KMAC, INC., D/B/A KMAC)
 NORTH CAROLINA, EUFACIO GARCIA,)
 EVERADO JARMAMILLO, GARCIA PARRA)
 INSULATION, INC., J&J CONSTRUCTION, JOSE)
 NIÑO, JOSE MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT MORALES)
 D/B/A MORALES MASONRY, MILLER/PLAYER &)
 ASSOCIATES,)
 Defendants,)

Defendants, Marick Home Builders, LLC and Rick Thoennes (hereinafter collectively referred to as "Marick") filed cross-claims alleging negligence, breach of warranty and indemnification against subcontractor Carl Catoe Construction, Inc. (hereinafter "Catoe") associated with phase II construction. Additionally, Marick filed cross-claims for breach of warranty, negligence and equitable indemnification against the following subcontractors retained by Catoe: T.G. Construction, LLC, Alejandro Avalos Cruz, Herbert Acros Hernandez, Martin Hernandez Aviles, Ester Moran Mentado, Socorro Castillo Montel, and Zarate Construction (collectively referred to as "Catoe Subcontractors"). In an order dated January 11, 2013, the Court granted summary judgment in favor of Catoe and the Catoe Subcontractors as to Marick's cross-claims for equitable indemnification, negligence and breach of warranty (see: January 11, 2013 Order attached hereto as Exhibit "1").

Marick timely filed a Motion to Alter and/or Amend the Order pursuant to S.C.R.C.P.

59(e). Marick submits this Memorandum to the Court in support of its Motion.

FACTS

~~The Stoneledge Owners Association (hereinafter "SOA") filed suit against the architect,~~
general contractors, subcontractors, developers and some of the individuals associated with the defendant entities in relation to both phases of construction at Stoneledge.

The Court is fully aware of the allegations at issue in this lawsuit. Marick was the general contractor for phase II construction at Stoneledge. Marick did not perform the actual construction labor at the project; subcontractors performed all of the construction labor. Marick contracted directly with Builders First Source for Builders First Source to provide supplies to the project and install the framing, decks, doors, siding and windows. Builders First Source then subcontracted with Catoe to perform the construction related labor and installation services (see: Carl Catoe Dep. at 45-47). Catoe then subcontracted the labor and installation services out to the Catoe Subcontractors. Thus, Builders First Source (hereinafter "BFS") was a supplier of goods to the project and provided oversight of its subcontractors. Catoe did not perform the work, but merely hired the Catoe Subcontractors; thus, Catoe provided oversight for its subcontractors.

Catoe and the Catoe Subcontractors did not have a contractual relationship with Marick.

STANDARD OF REVIEW

"Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes. See *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). We explained in *Elam* that 'there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously

raised argument.' *Id.* at 22, 602 S.E.2d at 779. Indeed, 'it is inherently unfair to disallow such an opportunity.'²²¹ *Home Med. Sys., Inc. v. S. Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

~~I. SUMMARY JUDGMENT WAS IMPROPER~~

Marick's Third Amended Answer asserted cross-claims for (1) Equitable Indemnification; (2) Negligence; and (3) Breach of Warranties against Catoe and the Catoe Subcontractors. In its January 11, 2013 Order, the Court summarily dismissed all of Marick's cross-claims pled against Catoe and the Catoe Subcontractors (See: Exhibit "1", Order).

First and foremost, discovery is not complete in this case. Plaintiffs' expert's, Derrick Hodgin, deposition is still open and has not been completed and Marick's expert's, Randy Still, deposition is still open and has not been completed. Thus, since discovery is not complete in this matter, the Court's Orders awarding summary judgment were premature in this matter. *Bayle v. S. Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

This Memorandum will first address the Court's holding that Marick had unclean hands. The second section of this Memorandum will discuss the errant determination that all pled causes of action collapse into one action for equitable indemnification.

(1) INDEMNITY

The Court's Order held that Marick's equitable indemnity claims failed because Marick cannot be adjudged without fault and/or that Marick had unclean hands (see: Exhibit "1", Court's

Order). The Court further ordered that Marick had no "special relationship" with Catoe or the

Catoe Subcontractors. First, Marick will address the issue of fault and second, the "special relationship" between Marick, Catoe and the Catoe Subcontractors.

A. A QUESTION OF FACT EXISTS AS TO FAULT/UNCLEAN HANDS

Based on the testimony presented in this case, Marick has presented evidence that it was not at fault for the alleged defective work performed by the Catoe Subcontractors.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994).

The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor. The Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub-contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight. *Id.*

Plaintiffs' expert, Derrick Hodgin, testified that there are alleged defects associated with the wood-siding installation and failure to apply appropriate flashing and weather resistant barrier to the structures at Phase II of the project (see: Hodgin Dep. (Day 1) at 38:22-39:3, 97:1 - 98:12, 104:2-7, 113:16-25 and Hodgin Dep. (Day 2) at 16:14 - 18:25, 24:5-14, 25:18 - 26:12, 49:20 - 50:18). Hodgin also testified that the weather resistant barrier installed by the Catoe

Subcontractors did not integrate properly with the flashing (see: Hodgin Dep. (Day 2) at 20:21 – 21:5). Further, Hodgin testified that the siding fasteners installed by the Catoe Subcontractors were not spaced properly which could result in future damage (see: Hodgin Dep. (Day 2) at 63:5

64:16). Additionally, Hodgin opines the flashing applied between the windows and the stone is inadequate and that flashing associated with windows throughout phase II is inadequate (see: Hodgin Dep. (Day 2) at 108:11 – 109:1, 195:1-6). Among other things, Hodgin located the following deficiencies which correlate with work performed by the Catoe Subcontractors: improper flashing of doors, improper construction of exterior balconies and damage to balconies (see: Hodgin Dep. (Day 2) at 151:14-21, 211:9 – 213:9, and 224:9 – 228:4).

In addition to Mr. Hodgin's testimony, Catoe's expert, William Cary, testified that he noticed work performed by the Catoe Subcontractors that was not proper and construction performed by the Catoe Subcontractors that deviated from the plans (see: William Cary Dep. at 127:13 – 128:2, 101:19 – 102:3, 113:14-17, 144:2-9, 146:7-19, and 147:24-148:5).

As stated earlier, Marick was the general contractor and provided no construction related labor associated with actual construction of the project at Stoneledge; Marick only provided supervision/oversight (see: Rick Thoennes Dep. at 36:17-22 and Randy Still Dep. at 172:21-24). Thus, the only function that Marick served (as the general contractor) was to hire subcontractors, schedule construction and provide supervision/oversight. Further, Builders First Source and Catoe were responsible for providing supervision and oversight to the Catoe Subcontractors.

Rick Thoennes, one of the owners of Marick Home Builders, testified that Marick had a superintendent at the project supervising the subcontractors and scheduling construction (see: Thoennes Dep. at 30:17-19). Thoennes testified that Nathan Hornaday was employed by Marick to serve as the superintendent responsible for providing supervision of the project (see: Thoennes

Dep. at 31:6-12). In addition to Hornaday's supervision and oversight, Thoennes visited the project weekly to oversee construction (see: Thoennes Dep. at 131:8-132:3). Further, Thoennes had daily communications with Hornaday concerning construction of the project (see: Thoennes Dep. at 176:4-6). According to Thoennes, during construction, Nathan Hornaday provided

supervision on site at Stoneledge 10-12 hours per day. (Thoennes Dep. at 176:23 -177:4). According to Thoennes, on several occasions, Hornaday contacted separate subcontractors to discuss construction related issues noticed during Hornaday's inspections of work performed by subcontractors (Thoennes Dep. at 224:18 - 225:7, 244).

Hornaday also testified that he provided supervision at the project (Hornaday Dep. at 18:15-16).

Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I don't like the way you're doing that'?"

A: I did.

Q: And was it corrected to your satisfaction?

A: Yes.

(Hornaday Dep. at 19:21 -20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision was provided at the project. In addition to Marick's representatives' testimony, Carl Catoe testified that Marick provided supervision and oversight at the project.

A: There was a question about the offsets, what happened there. Was this rated? Was this a two-hour wall? Was this a one-hour wall? Is this - - has it got to go horizontal? Does it continue? How far does it continue? Different things like that.

Q: And who provided you with the direction that you used to build those conditions?

A: Nathan.

Q: So that came directly from Marick?

A: Yes.

(Catoe Dep. at 90:21-25.)

~~Catoe further testified that when he needed additional plans to perform his work, he~~
would ask Nathan and Nathan would provide him with additional plans to follow (see: Catoe Dep. at 159:20 – 160:6). Thus, Carl Catoe testified that Marick provided supervision, oversight and guidance concerning construction of the project. Additionally, Catoe's expert, William Cary, testified that Marick provided supervision and guidance to Catoe when issues arose concerning the plans (see: Cary Dep. at 152:6-16.)

Marick's expert, Randy Still, testified that a general contractor can rely on a subcontractor's assurance that they will perform their craft appropriately (Still Dep. at 84 – 85).

Mr. Still stated further:

Q: In your experience and education and in your work, do you hold the opinion that a general contractor is always liable for all defects in construction which were performed by subcontractors?

A: I think what I have found is the term "liable" is a legal term and my belief is that the general contractor can rely on the subcontractors who have the specialty crafts and knowledge to perform their work correctly.

Q: Is it fair to say that in many cases a subcontractor is in fact more experienced and better qualified to perform their particular trade than a general contractor?

A: Yes.

Q: Is that because they have specialized over the years in that particular area and have focused their education and experience in that area?

A: Yes, and they've performed the work and they know what works and what doesn't work.

Q: In your opinion is it fair – is it acceptable for a general contractor to rely on that experience and education of a subcontractor in a particular trade?

A: I think in many cases he has to.

Q: Would you agree that obviously a general contractor cannot see every nail which is driven or every board which is installed?

A: Yes.

Q: Would you agree that he must, out of necessity, rely on a subcontractor's experience and knowledge and compliance with good building practices and the code?

A: Yes.

(Still Dep. at 169:12 - 170: 18.)

Mr. Still further testified:

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of any of the waterproofing, framing, grading, or other construction components in Phase II?

A: No.

(Still Dep. 174:18:24.)

Thus, in South Carolina, the non-moving party is merely required to present a mere scintilla of evidence to survive summary judgment, and certainly, the fact that Marick's representatives testified that supervision was provided at the project, that Carl Catoe and Catoe's expert testified that guidance and supervision was provided by Marick and that Marick's expert, Randy Still, testified that Marick had a right to rely on the expertise of the subcontractors, presents more than a scintilla of evidence that Marick supervised and was not at fault for the alleged damages associated with the work performed by the Catoe Subcontractors at Stoneledge. Based upon these facts, a jury is required to determine fault.

B. SPECIAL RELATIONSHIP

BFS was Marick's direct subcontractor, BFS subcontracted with Catoe who in turn hired the Catoe Subcontractors to perform the construction labor. Due to the supervision which Marick was required to provide Catoe and the Catoe Subcontractors, Marick had a special relationship entitling it to equitable indemnification. *First Gen. Servs.*, 314 S.C. at 442, 445 S.E.2d at 448.

In the attached Order, the Court held that the relationship between Marick and Catoe/Catoe Subcontractors was too remote to establish the special relationship required to seek equitable indemnification under South Carolina law citing *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

The Court erred in finding that Marick had no special relationship with Catoe and the Catoe Subcontractors, as Marick was responsible for providing direct oversight and supervision to Catoe and the Catoe Subcontractors. Plaintiffs' Complaint alleges that Marick failed to provide proper supervision of the work performed at the property. The Catoe Subcontractors were performing the labor at the project under the direction of Catoe, BFS and Marick; thus, according to Plaintiffs, Marick was responsible for providing oversight of the work performed by Catoe and its subcontractors.

The Court's Order cites *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005), as precedence for its determination that the relationship between Catoe/Catoe Subcontractors and Marick was too remote to warrant Marick's request for equitable indemnity. Marick asserts that a determination concerning a general contractor's right to equitable indemnity from a subcontractor's subcontractor in a construction setting has not been decided by a court in South Carolina.

The facts in *Rock Hill Telephone Co.* involve a utility company that hired an independent contractor to perform installation work for the Utility Company. There are no allegations that the Utility was providing any oversight or guidance to the hired independent contractor. The independent contractor was overseeing the job, hired its own subcontractors to

perform the work and provided oversight for those subcontractors. There is nothing in the case indicating that the Utility was overseeing the independent contractor's or the subcontractor's work. *Id.*

However, in a construction related setting, as is at issue in the present case before the Court, the general contractor is responsible for providing oversight and supervision for the entire project. Thus, Marick's obligations are different from the obligations of the Utility in *Rock Hill Tele. Co.* If Marick was responsible for overseeing and supervising Catoe and its subcontractors, then a "special relationship" exists between those parties, thus warranting a right to equitable indemnity.

As stated above, "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994). Thus, if Marick is responsible for providing oversight and guidance on a daily basis for the work performed by Catoe and its subcontractors, then a sufficient relationship between the parties exists to obligate Catoe and the Catoe Subcontractors to indemnify Marick for exposing Marick to liability for the alleged deficient work performed. Marick has admitted no fault in this action; thus, if a jury determines that Marick has no fault associated with the alleged deficient work performed by Catoe and the Catoe Subcontractors, Marick should be entitled to indemnity. It would be inequitable to allow the subcontractors which were supervised and

overseen by Marick, and for which Marick is being sued, to escape liability to Marick while Marick suffers liability at the hands of those subcontractors deficient work. Where there is a wrong, there is a remedy; thus, if found without fault, Marick should be indemnified.

Thus, Marick respectfully requests that the Court hold that in a construction setting, a general contractor that oversees the project has a special relationship with all subcontractors for which it is required to oversee and supervise.

(2) The Court Erred in Collapsing all of Marick's Cross-Claims Into One Claim for Equitable Indemnification.

The Court erred in collapsing Marick's cross-claims for breach of warranty and negligence into one claim for equitable indemnity. The Court cited no binding case law in support of its holding. In support of its holding, the Court cited two non-binding federal district court cases (*U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)) and two non-binding unpublished South Carolina circuit court orders (*Nelson v. John Weiland Home*, 2009-CP-10-6573 (Order by Judge Roger M. Young, October 26, 2011) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006).

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Marick asserts cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n. 3. However, in this case, Plaintiffs continue to allege defective siding application, inadequate flashing, inadequate flashing around windows and exterior doors, defective construction of

balconies, inadequate or improper installation of weather resistant barrier (among other deficiencies) against Marick. Thus, Marick is required to continue litigating claims associated with Catoe and the Catoe Subcontractors' alleged defective work. Marick continues to incur

~~attorney fees and costs associated with Catoe and the Catoe Subcontractors' failure to perform~~ duties owed to Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Marick asserts that the federal court holdings should not be persuasive in this matter. Marick further asserts that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Marick's claims for breach of warranty and negligence are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1990) citing *Addy v. Bolton*, 257, S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the

tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs' claims arising from the Defendant Subcontractor's tortious conduct (negligent performance of work) and breach of warranty (failure to perform work in a workmanlike manner); thus, Marick properly filed claims for negligence and breach of warranty against Catoe and the Catoe Subcontractors seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including special damages claims against the subcontractors as Catoe and the Catoe Subcontractors were sued directly by Plaintiffs for their defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The duties owed by Catoe and the Catoe Subcontractors to Marick constitute separate causes of action which did not arise through Plaintiffs' relationship to the parties. The Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate obligations and duties from a party, a separate cause of action for negligence does not collapse into a single indemnity claim.

CONCLUSION

For the reasons stated hereinabove, Marick respectfully requests that this Court alter and/or amend its January 11, 2013 Order and deny summary judgment to Catoe and the Catoe

Subcontractors as clearly there are questions of fact for a jury to determine in this case.



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April 9, 2013

*Attorney for Marick Home Builders,
LLC and Rick Thoennes*

EXHIBIT 1

FORM 4

JUDGMENT IN A CIVIL CASE

STATE OF SOUTH CAROLINA

COUNTY OF Oconee

IN THE COURT OF COMMON PLEAS

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee Owners Assn; et al

IMK Development Co LLC; et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
 Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/Alexander S. Macaulay
 Circuit Court Judge

2063
 Judge Code

01/11/2013
 Date

Page 1

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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CLERK OF COURT

Court Reporter: N/A

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,
Integrays 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 OCT 15 2013
BEVERLY R. 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")¹ against Builders FirstSource - Southeast Group, LLC ("BFS"), Carl Catoe Construction, Inc. ("Catoe") and Catoe's subcontractors T.G. Construction LLC, Alejandro Avalos Cruz, Herbert Acros Hernandez, Martin Hernandez Aviles, Ester Moran Mentado, Socorro Castillo Montel, and Zarate Construction (collectively, "Catoe's Subcontractors"). For simplicity, BFS, Catoe and Catoe's Subcontractors are collectively referenced here as the Moving Defendants.

This litigation involves construction defect claims by owners at Stoneledge at Lake Keowee. Marick served as the General Contractor for Phase II of the townhome development. Marick subcontracted a portion of its work to BFS. BFS, in turn, subcontracted the labor portion

¹ The caption of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross Claims against the subcontractor defendants appears to indicate that the cross claims were being asserted by both Marick and Rick Thoennes. In the body of the cross claims, however, only Marick asserted the claims. Thus, there is not a cross claim by Defendant Rick Thoennes against the moving Defendants.

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of its work to Catoe, which hired the Catoe Subcontractors. Neither Catoe nor any of the Catoe Subcontractors had a direct contractual relationship with Marick.

~~Plaintiffs have brought suit for construction defects and related damages against all~~
defendants. Marick, asserted cross-claims against its subcontractors and other remote contractors alleging breach of warranty, negligence, and equitable indemnity.

STANDARD OF REVIEW

In ruling on a Rule 12(b)(6) motion, the Court will base its decision solely on the allegations contained in the Complaint. Baird v. Charleston Cty., 333 S.C. 519, 511 S.E.2d 69, 73 (1999). While viewing the allegations in the light most favorable to the non-moving party, the motion must be granted where, as here, the facts alleged in the Complaint and inferences reasonably deducible therefrom do not entitle the claimant to relief. Jarrell v. Petro Seed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered "when it is clear that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Toomer v. Norfolk S. Ry Co., 344 S.C. 486, 492-93, 544 S.E.2d 634, 637 (Ct. App. 2001) (affirming summary judgment award on equitable indemnity claim); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 518 S.E.2d 301, (Ct. App. 1999) (affirming summary judgment on equitable indemnity claim).

DISCUSSION

A. Negligence and Breach of Warranty Claims

1. As to claims against Catoe and Catoe's Subcontractors

At the September hearing, counsel for Marick conceded that the negligence and breach of warranty claims against Catoe and Catoe's Subcontractors should be dismissed, leaving equitable

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, Catco, and Catco'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

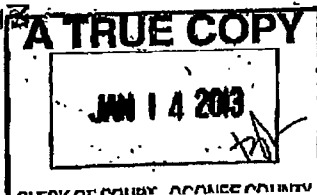
South Carolina Supreme Court comprehensively analyzed our state's equitable indemnity jurisprudence in Rock Hill Telephone, and held that an attenuated relationship will not support an equitable indemnity claim. Rock Hill Tel. Co. v. Globe Comm'n, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) (certified 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



Judge Alexander S. Macaulay

FILED OCTOBER 30
BENJAMIN H. WHITEFIELD
CLERK OF COURT
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1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20 DEPOSITION of **DEREK HODGIN (DAY 1)**
21

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the January 23, 2012, commencing at
25 approximately 9:25 a.m. attended by counsel as follows:

1 side of the front porch. And I removed siding from
2 the top of a stone clad area, just above the water
3 table feature on the stone. And then at the rear
4 of the unit I removed some siding from above the
5 cantilevered window area that comes out over the
6 open balcony. And we may have -- I can't remember
7 if there were ceiling pieces removed from his
8 basement patio ceiling, or if we removed them and
9 then looked at the framing outboard of his patio
10 door. .

11 Q. The cedar ceiling above the ground floor?

12 A. Correct.

13 Q. Why did you choose to remove siding at the front of
14 his unit?

15 A. It was easy to get to. It was an area that I was
16 concerned about the flashing detail between the
17 siding and the stone, and -- well, I think one of
18 the biggest reasons it was easy to get to.

19 Q. Well, did he have complaints about that particular
20 area or water damage that he identified there?

21 A. No, not at all.

22 Q. Was there damage you found behind the siding?

23 A. There was.

24 Q. Water damage?

25 A. Yes.

1 Q. ~~And this is the connection between -- or the~~
2 intersection between the lap siding and the stone?

3 A. Yes.

4 Q. ~~And you said you took siding off of, I think, a~~
5 cantilevered window area above the open second
6 floor patio?

7 A. That's correct.

8 Q. Below a window?

9 A. Well, it would be below a window, at the very base
10 of the wall. It would be probably two or more feet
11 below a window, just above -- I guess you would
12 call it a soffit. I don't know what you call it.
13 It's an overhanging, cantilevered window. And it
14 has -- so it has a very short, maybe foot or two
15 soffit or ceiling area that was stained. And so I
16 took siding off just above that -- the base of that
17 wall.

18 Q. Did you find damage there?

19 A. I did.

20 Q. Did you prepare any reports or anything in writing
21 about your findings at Dr. Hund's unit?

22 A. I don't think any of the work I did for Dr. Hund
23 ever made it into a written report. I think it was
24 visual only and then discussed verbally either with
25 him or then communicating that to the HOA later, as

1 A is "Roofing," B is "Attics," C is "Life Safety/
2 Fire Protection," D is "Exterior Walls." Okay. So
3 A "Roofing," I guess, let's do ---

4 A. Well ---

5 Q. Go ahead.

6 A. I was thinking it must follow -- it follows the
7 format of the written report.

8 Q. The 2010 report?

9 A. The November 1, 2010 report, yes.

10 Q. Great. What is the construction defect identified
11 in Number 1?

12 A. That the wood siding is what's referred to as a
13 drainage type cladding, that incidental moisture
14 will get behind the wood siding. And at a
15 roof/wall intersection effort needs to be made to
16 properly waterproof the intersection to preclude
17 water penetration at that point. And that would be
18 accomplished by the installation of a kickout
19 flashing.

20 Q. Is this a code compliance issue with damage, a life
21 safety issue, or a physical damage issue?

22 A. It's not a life safety issue. But I do think it
23 would represent the other two. There is physical
24 damage at roof/wall intersections. I would guess
25 at most if not all of the observations listed. And

1 ~~from a code standpoint, I would say only~~ there's
2 a couple of generic paragraphs that you could say
3 it would violate the code. One is the 703.1 which

4 says, "Exterior walls shall provide weather
5 protection." And then a flashing paragraph later
6 on, maybe 703.8 that says, "Flashing shall be
7 installed in a manner to preclude water intrusion,"
8 or something to that effect. So there's not
9 specific detail that says, install kickout
10 flashing, but there are two code paragraphs that I
11 would say have been violated by the as-built
12 conditions that have led to the damage.

13 Q. And you don't reference the code. You actually
14 reference an industry standard, NRCA Roofing and
15 Waterproofing Manual?

16 A. Yes, sir.

17 Q. That is an industry group? What did you call it
18 earlier?

19 A. I think we said industry group, yes.

20 Q. That publishes an industry standard?

21 A. Yes, sir.

22 Q. Is the NRCA Roofing and Waterproofing Manual
23 section that you've identified citing the code?

24 A. No. That's what makes it an industry standard.

25 Q. So this is an -- now, is there an alternate means

1 Q. Unit 323

2 A. Yes, sir. While I'm looking for that one, this
3 last illustration is a great example of what I was

~~4 talking about earlier. You see the siding is taken~~

5 off and there is totally unprotected interior-grade
6 drywall with no weather barrier and no adequate
7 flashing. So that even though my damage might be
8 very localized, there is no possible way from an
9 engineering standpoint for me to fix that in a
10 localized way. I have to tear off all the siding
11 far back enough to either get to where there is
12 some weather barrier or take off all the siding to
13 install weather barrier. I have to see all the
14 extent of damage to the drywall sheathing so I make
15 sure I repair that during the process. So I know
16 that's kind of off the subject, but you asked me
17 earlier about the statistics and how do I pick how
18 many places. When you see that type of a defect,
19 it just causes you to have a more comprehensive
20 repair scope. I found some roof/wall intersection
21 photographs, but I -- I want to make sure I've
22 found all of them before we start talking about it.

23 Q. Are these all on discs?

24 A. I think so.

25 (OFF THE RECORD).

1 visible flashing.

2 BY MR. ROOT:

3 Thank you. Sorry.

4 BY THE WITNESS:

5 What was the next one?

6 DIRECT EXAMINATION RESUMED BY MR. IMHOFF:

7 Q. 89, I believe you have listed. 578 is the address.

8 And while you're looking, do you know why you chose
9 this unit?

10 A. No. 578 -- I'm sorry, was that the unit number?
11 578?

12 Q. According to your document, yeah. Yes.

13 A. 89. How about if we stick to the unit numbers.

14 Q. Okay.

15 A. Because that's the way the tabs are.

16 Q. Yeah, 89.

17 A. 89, 7/1/2010 is the date of the observations. And
18 there's a pretty clean looking intersection shown
19 in Image 4714. Actually, I don't know if that's
20 the -- yeah, that's shown close up in 4715. And
21 then we take the siding off and there's torn
22 weather barrier, no kickout flashing, water stained
23 siding and damage to the unprotected interior
24 gypsum wall sheathing below, shown in Image 4722
25 and 4725.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
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4 Stoneledge at Lake Keowee
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13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20 DEPOSITION of *DEREK HODGIN (DAY 2)*
21

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the January 24, 2012, commencing at
25 approximately 9:15 a.m. attended by counsel as follows:

1 A. ~~No, I don't know if this one was reported to have a~~
2 leak at that window or not.

3 Q. What would be an efficient remedy for this
4 particular issue on 63?

5 A. Whenever you can identify areas that are localized
6 in nature like that, you could just remove the
7 siding at the base of the wall and then what I
8 would probably do is maybe take a six-inch wide
9 piece of self-adhered flashing and slip it
10 underneath the weather barrier where it stops short
11 and over the top of that flashing and then put the
12 siding back.

13 Q. I'm sorry, I've asked you to go to 67.

14 A. That's okay. On 67 it looks like there's some trim
15 at the base of one of those cantilevered window
16 sections. And this is field notes dated June 30,
17 2010. Above the trim there's a reverse lap with
18 the metal flashing and the weather barrier. So the
19 weather barrier extends down behind the flashing
20 and behind some trim.

21 Q. What picture are you looking at?

22 A. Well, I'm going to tell you. And then stops short
23 behind the trim. The photo images would be 4622,
24 it's really through the rest of the page. But that
25 particular area 4623, 4624. I think that would be

1 ~~it. The rest are photographs of the moisture meter~~
2 showing reasonable moisture levels, with the
3 exception of the adjacent trim piece, which is 4627
4 is the image number.

5 Q. You call it cantilevered, but this is an overhang
6 over the exterior doors onto the back or lakeside
7 patio porch?

8 A. Yes, sir.

9 Q. So the siding actually comes down -- I'm looking
10 back up at 4604. The siding actually comes down
11 and stops. And there is a piece of trim with a --
12 what did you call this piece of flashing?

13 A. Well, it's just metal flashing, but you could call
14 it "Z flashing" perhaps. That's a common term for
15 it.

16 Q. And was that Z flashing at about the same level as
17 the termination of the WRB?

18 A. No, I think it actually went a little bit further
19 down. If you look at the -- well, if you look at
20 4623 and 4624 you can see, you're looking at the
21 bottom of that flashing. So that WRB comes down
22 like maybe another inch or so below it.

23 Q. Can we assume that they were trying to flash or
24 incorporate the house wrap and the flashing at
25 about the level where the house wrap stopped? I

~~mean, was that the idea of why it stops there so~~
that they could flash it out and then put the trim
piece there?

A. I would think so. I mean, they're both right there
at the same level. It's just, if they're going to
do that then the weather barrier would need to go
over the vertical leg of the Z flashing to keep the
water from going behind the trim.

Q. Right. Do we know if it was done that way? Is
there a photograph that shows that it was not?

A. Yeah, the first -- let's see, look at 4604 with the
knife stuck in behind the vertical leg of the
flashing. So they just put the Z flashing over the
weather barrier. They didn't properly incorporate
it, like you were talking about. So now the water
is going to run behind the flashing and get the
trim and the OSB wet.

Q. Not having been there, it's a little difficult for
me to see this. I want to look at 4606.

A. Okay.

Q. Does the Z flashing change color?

A. It does. I mean, there's the outboard part of the
horizontal leg is painted brown. But I think when
they installed it, it's actually -- comes to the
site with a white painted finish.

- 1 A. Correct. I think this is pretty common in most
2 flashing integrations, that they put all the
3 flashing on the outboard side of the weather
4 barrier. So I agree with you. I mean, I think
5 that's probably the bigger problem is that
6 integration.
7 Q. Let's look at the next one which is 73. Did I ask
8 you why you chose Unit 67?
9 A. I believe so. And I believe I said, I don't know.
10 Which is the next one? 77?
11 Q. 73. And again, do you know why you chose this
12 unit?
13 A. No, sir.
14 Q. And I think we're looking for incomplete weather
15 barrier; is that right?
16 A. Yes, sir. I see a couple of images. I'm not
17 finished looking at all the images. But if we want
18 to -- I'm going backwards, if that's okay, in the
19 photos.
20 Q. Okay.
21 A. The first image numbers are behind the October 7
22 2009 tab. And they are images 4044 and 4045. And
23 it's just some trim that protrudes from the
24 exterior wall. The weather barrier came down to
25 the top of the trim and stopped. And then there

1 was flashing installed improperly over the outboard
2 side of the weather barrier. And there's just a
3 very narrow gap. That one looks like it would have

4 been really easy to properly integrate the
5 flashing, but was not properly integrated.

6 Q. Is this essentially the same issue as what we found
7 in 67?

8 A. It is. But instead of terminating behind the trim,
9 it terminates just above the trim.

10 Q. But could have been integrated with the flashing at
11 the length it is?

12 A. Correct. And this one, it's cut off, you know,
13 pretty cleanly above the trim. You could have just
14 lifted that weather barrier, put the vertical leg
15 of the flashing underneath and it actually have
16 been a functional detail.

17 Q. Is that the repair for these two items, you just
18 put the weather barrier over the flashing, put the
19 siding back on and you're done?

20 A. Sure. I think if that's the only issue that you
21 have to deal with, that would be a reasonable fix,
22 yes.

23 Q. Let's go to 76, please.

24 A. I'm sorry, there's more on this.

25 Q. Oh, I'm sorry.

1 Q. But when you walk down to this door, this wall
2 would be on your right side. Looking at
3 Photographs 3998 and on, you're lifting something
4 up. What is that?

5 A. That's the weather barrier that went behind the
6 metal flashing and then I'm looking at the damaged
7 drywall.

8 Q. Where does it show the weather barrier behind the
9 flashing?

10 A. That would be Photos 3960, 3961 I'll say through
11 about 3967 are probably good ones.

12 Q. And you found some damage from this condition at
13 the parking lot side of this unit?

14 A. Correct.

15 Q. And is the fix, again, to just lap the weather-
16 resistant barrier over the flashing?

17 A. I would say you've got some -- you have some
18 sheathing that you might need to replace. But,
19 yes, I mean, as far as what went wrong with that
20 particular location, the flashing would be --
21 should be properly integrated with the weather-
22 resistant barrier. I think also from a durability
23 standpoint, the Z flashing extends below the
24 vertical flashing at the corner. If you look at --
25 I think there's a better shot. But at least 3975

1 and 3976 -- oh, here's a close up, 3970. And then
2 at least a couple before that. The flashing goes
3 underneath that vertical trim. That's a bad detail

4 ~~from a trim standpoint. You can see the close up~~
5 of how water is wicking up at the end of that trim.
6 Cedar is not as susceptible, but I get involved
7 with a lot of other trim products, in particular
8 engineered trim products like MDF and it just
9 disintegrates or gets really soft and swells at the
10 base. The better detail would be to have an end
11 dam on that flashing and then butt the two pieces
12 of trim tight together and have a caulk joint. If
13 you don't do that, you need to run the flashing
14 continuously around the corner and raise that trim
15 up, like a -- even just a quarter inch to get it
16 off of the flashing so water doesn't wick up the
17 end of it.

18 Q. We're sort of jumping back and forth. The missing
19 weather-resistant barrier house wrap is on that
20 one, I want to call it, side or patio side next to
21 the exterior doors on the patio. Did you find that
22 anywhere else on this unit?

23 A. No, I think it was just three destructive test
24 areas: above the cantilevered window, that adjacent
25 wall on the screened-in, closed porch and then that

1 front wall.

2 Q. And you found it on the front wall and on the
3 cantilevered window, you just didn't find it on
4 ~~that side wall. Is that fair?~~

5 A. We found it to be incomplete on the two back patio.
6 I mean, that one -- the first one we looked at had
7 that -- just that little gap.

8 Q. Where are we looking? Give me the picture number,
9 please.

10 A. 4044 and 4045. Where it comes right down to the
11 trim but there's a gap and then the flashing was
12 put on the outboard side of it.

13 Q. Well, I understand that, but it's long enough to
14 lap over the trim?

15 A. Yes.

16 Q. Which it's your opinion should have been done;
17 right?

18 A. Yeah. In terms of it's there. It would just be
19 incomplete and not properly integrated. As far as
20 missing, it would just be that side wall of the
21 screened-in, closed porch.

22 Q. And I didn't see, Mr. Hodgin, any field notes for
23 all of these first sets of pictures. Am I wrong
24 about that? Are they missing?

25 A. I don't see them in mine either.

1 Q. It appears that there is some weather barrier there
2 in the corner with lettering on it.

3 A. I agree.

4 Q. Is there a bigger picture which would show how far
5 that extends or where it came from?

6 A. Let me look. I don't see it in these photographs,
7 no.

8 Q. How do you know that the weather barrier wasn't
9 removed to show the water damaged gypsum in 4722?

10 A. We would have indicated that in our field notes and
11 I don't think we would have photographed it and
12 included it as incomplete weather barrier if we
13 were the ones who removed the weather barrier.

14 Q. Again, this shows some incomplete weather barrier
15 here in Unit 89?

16 A. Yes, sir.

17 Q. And that ---

18 A. And ---

19 Q. Go ahead.

20 A. Well, I was just going to agree with you that, I
21 mean, the patterns that we came across are very
22 strange in terms of where the weather barrier is
23 included and where it is not. I mean, there's two
24 things on this unit, before we leave it. One is
25 you've got kind of a swath of missing weather

1 barrier at a very critical location directly below
2 the roof/wall intersection. And then you have kind
3 of a triangular missing section above the roof

4 line. It's in the same wall area, but completely
5 removed and separate from the area below. So we --
6 it's a very odd pattern where there's large areas
7 of weather barrier that are completely missing from
8 some locations.

9 Q. In regard only to the weather barrier and its
10 repair, how would you repair these two locations?

11 A. You'd have to remove the siding to the extent that
12 you could identify the areas of missing weather
13 barrier. And then you could -- if you were
14 satisfied that there's no damage below the areas
15 that do have weather barrier, you could try to
16 integrate new weather barrier with the laps that we
17 talked about and then tape joints and then put the
18 siding back.

19 Q. Okay. Were those all of the units that you
20 investigated in Phase II for this issue?

21 A. I don't know. I mean, I think Burgess' attempt was
22 to have each of the issues identified and then to
23 the extent possible show photographic examples of
24 each issue. But I don't know that there's been an
25 effort made to identify every single issue with all

1 exterior walls D3.

2 A. Okay.

3 Q. And tell us about, I guess just in general terms,

4 what this observed condition consists of?

5 A. I believe it would just be that in some locations
6 where we pulled off siding we also measured the
7 fasteners, and found the fasteners spacing to be
8 excessive.

9 Q. Let's go ahead and take a look at that. You've
10 identified Units 55 and 67?

11 A. Yes, sir.

12 Q. We already have 67 open. Let's look at that one
13 first.

14 A. Okay.

15 Q. Don't you? Don't you have that right in front of
16 you?

17 A. Yep.

18 Q. I'm getting familiar with these units looking back
19 at them. I recognize the Clemson paw every time we
20 come by this unit.

21 A. Yep. It looks like there's -- I guess there's only
22 one set of field notes, June 30, 2010. And if you
23 look at the siding that was removed -- and I would
24 say if it was documented by us it's probably --
25 hopefully I won't be taking us back later. But

1 it's usually pretty bad. You know, if it's close

2 to 16 inches or where it should be, I don't know

3 that we would make a big deal about it,

4 ~~particularly in the Upstate. We don't have as~~

5 significant of a code prescribed wind load. But on

6 this one if you look at Image 4607 through 4610,

7 there are fasteners that were 46 inches, 41 inches,

8 47 1/2 inches. These are just the spacing of the

9 fasteners that are marked on the back of the siding

10 that we removed. In 4607 the spacings are 41

11 inches and 46 inches. In 4608 the spacings are 40

12 1/2 and 47 1/2 inches. In 4609 it might be the

13 same 40 1/2 inches. I can't be sure. And then 72

14 1/4 inches. And in the last image I see 28 inches.

15 So it was, I would say, excessive in terms of the

16 spacing of fasteners used to attach the siding.

17 Q. Let's look at 55 real quick also.

18 A. Okay. Are you ready?

19 Q. Yeah.

20 A. I don't see as many locations measured. But

21 there's some siding taken off adjacent to a window.

22 And all I can see is what's written on the weather

23 barrier, 25, 16 ---

24 Q. Where are you?

25 A. Oh, I'm sorry. The image number is 4667.

1 Q. I'll let somebody else do that, because we're
2 moving pretty slow.

3 A. All right.

4 Q. ~~Let's move on to 8, and I guess 9 at the same time~~

5 It looks like they're both talking about windows?

6 A. Yes.

7 Q. Well, back to Unit 55, I guess, since we're here.

8 A. 55 is not part of Issue Number 8.

9 Q. No, but it's part of Issue Number 9.

10 A. Okay.

11 Q. It looks like for both 8 and 9, again, you've cited
12 the general provision of 703.8. Well, no, you cite
13 Note 3 and Note 4 about "Under and at the ends of
14 masonry wood or metal copings and sills," and Note
15 4, continuously above all projecting wood trim,"
16 corrosion-resistant flashing needs to be installed.
17 All right. Let's look at that, and identify a
18 picture, if you would. Or a photo, I should say.

19 A. I don't know that that's an issue a whole lot
20 different than Number 6. I mean, I know it's in
21 that same area. So what this is saying is that
22 there should be flashing not only at the cedar to
23 stone intersection, but also the window stone
24 intersection. There should be flashing below
25 the -- between the window and that stone sill, I

1 guess it would be called at this location.

2 Q. Let me make sure that I understand. What is the
3 trim material?

4 A. ~~Around the window?~~

5 Q. Well, around the window and above the stone water
6 table?

7 A. Cedar.

8 Q. That's a piece of cedar trim?

9 A. Yes, sir.

10 Q. So if we look at, I guess Photograph 4636 where you
11 can see the bottom of the trim piece around the
12 window right above the water table feature, the
13 stone water table feature?

14 A. Yes, sir.

15 Q. That's where you say a piece of flashing needs to
16 be put?

17 A. I believe it would be below the sill. Below the
18 window sill, which we have been calling a water
19 table at -- running away from the window we call it
20 a water table. Here it's a sill. And there should
21 be flashing that extends out below that location
22 based on that section of the code.

23 Q. Below the piece of stone?

24 A. Right.

25 Q. That creates the sill?

1 concrete taken up so the flashing details can be
2 reworked and make it a whole repair. I don't think
3 you're ever going to have it all fixed unless it's
4 ~~taken down to that level. And I'm not sure -- I'm~~

5 not sure of the extent of the other repairs, if
6 that was addressed or not.

7 Q. And if it hasn't been, it needs to be done?

8 A. Correct.

9 Q. In your opinion?

10 A. Yes.

11 Q. You've testified, I guess, repeatedly that you
12 found consistent methods and manner of construction
13 between Phase I and Phase II?

14 A. I think I've testified about certain details. The
15 last one that we talked about was the stone veneer
16 details of flashing and so forth. And maybe about
17 the grading. But there are -- I mean, there are
18 some differences I would acknowledge. I said that
19 mostly because of the balconies. With the
20 balconies there is a significant difference in the
21 framing and the damage at the balconies.

22 Q. There's a framing structural issue in Phase I that
23 is not present in Phase II; is that fair?

24 A. Right. I've got water intrusion and staining on
25 pressure treated wood components, but they would be

1 Q. Let's look at Unit 81.

2 A. Okay.

3 Q. This talks about inadequate flashing of the
4 windows, sort of a -- it looks like sort of in a
5 general sense.

6 A. Yes.

7 Q. There is only one Phase II unit listed, that's this
8 Unit 81. Do you have an opinion, I like your word,
9 of whether the absence of adequate flashing on this
10 unit is an anomaly or is prevalent across Phase II?

11 A. I think our destructive tests -- we'll have to see
12 how many Phase II areas we've looked at around
13 windows. I have a hard time not lumping them
14 together. And I know Phase II is important to you,
15 or more important to you than Phase I. I think
16 that at least from a head flashing standpoint I
17 don't remember seeing anything different than what
18 we talked about earlier, always the flashing is
19 installed outboard of the weather-resistant barrier
20 and would not be weather lapped properly. But as
21 far as Phase II goes, I'm going to have to go
22 basically unit by unit from the table to remember
23 what conditions. I just don't have them that
24 cleanly segregated in my head as to what I saw
25 where without ---

1 A. Okay.

2 Q. Tell us what these ---

3 A. Wait a minute. Sorry.

4 Q. Yeah, it looks like we need a separation between 1
5 and 2; is that right?

6 A. No, I was going to circle the screw up on this.
7 These are actually not a problem. Where are we
8 going next?

9 Q. Exterior doors. Why don't you do ahead and tell us
10 what the issue is and then use a Phase II example,
11 if you wanted to show us.

12 A. So the first Phase II exterior door looks like Unit
13 43 on July 9, 2010. It looks like in the
14 photograph there's a balcony door where some trim
15 is removed. If you're standing looking out the
16 doors it would be the right side of the door and
17 then at the middle location. And it looks like if
18 you just go all the way from 7704 to 7783 that
19 should encompass all the door photographs. So the
20 trim's taken off the right side first, if you're
21 standing at the balcony looking at the rear wall.
22 And then you can see at the top of the door 7714,
23 which is the top right photograph on this index
24 sheet, the weather barrier comes over to the rough
25 opening and just simply folds in to the rough

1 opening. There's no additional protection at that
2 location. There's a close-up view of it in 7715.
3 And then the bottom of the door is observed in
4 7716.

5 Q. It looks like the house wrap is wrapped incorrectly
6 at the bottom, because it's closer, but much
7 further away at the top. Is that a camera trick
8 or -- I mean, am I wrong about that?

9 A. I don't think we can move the framing with the
10 camera. It's a wider gap for sure at the top of
11 the door; it looks like an inch or more. I
12 don't -- I can look and see if there's any comments
13 about it. I don't see anything about the framing.
14 It's all about the flashing and the weather barrier
15 details.

16 Q. Well, tell us about the weather barrier. What
17 should have happened or what should be there?

18 A. Well, it should be, you would think, some type of
19 termination detail at the base of the wall where
20 some flashing would extend to the -- well, I'm
21 sorry, this is the trim. There's stone above here.
22 The stone should have been raised up and have the
23 weep screed detail at the base. The trim is
24 probably fine to extend all the way down, but there
25 needed to be some type of flashing at the base of

1 the door to preclude water intrusion.

2 Q. At the base of the door or at the base of that
3 piece of trim?

4 A. I don't think the trim needs flashing. I think the
5 door should probably have sill pan flashing below
6 it. It does at least to be -- at least seem to be
7 a small step, like a piece of wood, below the
8 aluminum threshold of the door and the concrete
9 balcony surface.

10 Q. Right.

11 A. There's some minor staining at the base of the OSB
12 sheathing next to the door. And then it looks like
13 they took that wood block out. You can see in
14 7722?

15 Q. Yeah.

16 A. And so the concrete extends below the threshold.

17 Q. Do you mean it's lower than the threshold?

18 A. Yeah. I mean, the concrete goes between or goes
19 below where that brown aluminum threshold comes
20 out. That's 7723.

21 Q. Right.

22 A. And it looks like there's no flashing or
23 waterproofing that comes up from below the concrete
24 to integrate with the door opening flashing and
25 then no sill pan or effective flashing at the base

1 into it and see the success, you know, in
2 Charleston. If that works that could save some
3 labor costs.

4 Q. ~~Let's talk about the balconies a little bit. I~~

5 think everybody wants to get out of here, so I'm
6 not going to -- I'm not going to try to belabor
7 this. Okay?

8 A. Okay.

9 Q. Can you give us sort of general overview of the
10 issues with the balconies?

11 A. Sure. If it's okay -- well, let me just first
12 discuss the differences between Phase I and Phase
13 II. Neither Phase I or Phase II, I believe,
14 followed the architects plans for CMU and concrete
15 construction. They both got switched to wood frame
16 balconies. Phase ---

17 Q. Let me stop you there a minute. You have not seen
18 the wood framed balcony plans?

19 A. No.

20 Q. You don't know if they exist or not?

21 A. I don't think I've seen them. I mean, if I've got
22 them, I don't recall seeing them. I just remember
23 seeing CMU and concrete.

24 Q. Okay..

25 A. Regardless, they're constructed with wood framing

1 on both Phase I and Phase II. Phase I is parallel
2 cord wood floor trusses. Phase II includes
3 pressure treated 2-by floor framing. Both exhibit
4 ~~water intrusion, but because the Phase II buildings~~

5 were using the pressure treated wood, all you
6 really have, that I've seen, is water stained wood
7 framing. I don't know that the framing has been
8 damaged to the point that it needs to be repaired
9 or replaced.

10 Q. Are you talking about the wood framing that is
11 supporting the concrete deck?

12 A. Yes.

13 Q. Or also that is -- was used to create the
14 supporting columns?

15 A. I think and I hope, it would be both. Pressured
16 treated wood, I believe, was used in both vertical
17 and horizontal framing.

18 Q. Now, is the boxing of the columns a different story
19 or is that also pressure treated wood boxing? Do
20 you understand what I'm asking?

21 A. Yeah, I don't know. I don't know in Phase II. I
22 just know what I did with the borescope, looking at
23 the framing and the ceilings on Phase II and told
24 them everything is okay structurally. You know,
25 it's not an issue. But on Phase I had concerns

1 about the trusses -- the floor trusses being
2 damaged.

3 Q. So you've got a structural problem in Phase I that
4 ~~you don't have in Phase II?~~

5 A. Right.

6 Q. We've talked a little bit about the integration of
7 the waterproofing under the cement deck with the
8 heated space; is that what you called it?

9 A. Yes.

10 Q. Where the slab meets the wall?

11 A. The rear wall, yes.

12 Q. The rear wall. Okay. You've also described some
13 slope issues on the deck?

14 A. Yes.

15 Q. Have you found any slope on any of the decks?

16 A. I don't think so.

17 Q. Do you know how many you've tested?

18 A. No.

19 Q. Have you read any testimony that the decks are
20 sloped?

21 A. No, I haven't.

22 Q. At this time can you disagree with that?

23 A. No. I mean, if there are some that sloped, I mean,
24 it could be that those are ones I didn't look at.

25 Q. And an additional problem with the rear patios and

1 decks, I guess, is that the water is getting into
2 the columns?

3 A. Yes.

4 Q. And rotting them?

5 A. Yes.

6 Q. Especially at the bottom?

7 A. Yes. Do you mind if I ask a question?

8 Q. No.

9 A. When you said "slope," can you clarify, did you
10 mean that there's testimony that the framing was
11 sloped or that the topping -- the concrete topping
12 was sloped?

13 Q. The concrete top.

14 A. Thanks.

15 Q. That still doesn't change your testimony?

16 A. No, I just wanted to be clear that -- what the
17 testimony was.

18 Q. I may be wrong about that. And people are welcome
19 to correct me, but -- all right, in your opinion,
20 what is the defect that is allowing water to get
21 into the columns?

22 A. Well, I can say it very generally and then you can
23 try to hone down on what the particulars are. But
24 there is just a terrible installation of
25 waterproofing details including weather-resistant

1 barriers, self-adhered flashing, lathe and stone.

2 I mean, that installation over the balconies, I
3 would say, did a very ineffective job of protecting

4 ~~the underlying wood framing.~~

5 Q. All of those are just -- you're just talking about
6 columns? That they're self-adhesive flashing
7 weather barrier, you said some other things, stone,
8 lathe. That's all -- you're just talking about the
9 columns? We're not back at the heated space, we're
10 out ---

11 A. Well ---

12 Q. --- I think my observations will be primarily at
13 the columns?

14 A. Well, I think my observations may be primarily at
15 the columns. But I think you can see some of the
16 same defects on the arches between it. There's
17 really not a whole lot of stone to talk about at
18 the balcony. I mean, there's the columns and then
19 there's the arches between the columns.

20 Q. Yeah.

21 A. So when I've been up on a ladder looking at the
22 exterior of some of the columns, and you can see
23 bare OSB. I've seen rusty metal lathe. I've seen
24 incomplete weather barrier. It's just very poorly
25 constructed, in terms of the ability of the

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

3
4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.

19
20
21 Deposition of **WILLIAM CARY**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the April 27, 2012 commencing at
25 approximately 10:20 a.m. attended by counsel as follows:

1 A. ~~They're all covered.~~

2 Q. Do you know why Carl Catoe and his subcontractors
3 would have installed WRB at some of these locations
4 and not others?

5 A. Well, it's kind of an odd -- an oddity on these
6 buildings. A lot of times when you're building a
7 building like this, you're moving pretty fast.
8 You're doing the big areas fast and moving pretty
9 fast on the large areas to try to cover as much
10 ground as possible. These smaller areas, like the
11 side of these screen porches may have been done
12 later. You know, they're susceptible to a little
13 bit more wind in a small area that may have had a
14 small triangle of WRB that blew off. I don't
15 know -- I don't know why it's not there. That's
16 why I assumed they're missing on all ten.

17 Q. The fastening of the cedar siding?

18 A. Yes.

19 Q. And you say, "Verify all siding is attached to the
20 structure at a maximum spacing of 18 inches." And
21 then you have suggested adding fasteners. And I
22 believe you said just a moment ago that only two or
23 three percent of the cedar siding is blind nailed?

24 A. Yes. Somewhere in there. There was some blind
25 nails that I saw. That may have been just to hold

1 the board in place until they got the nail guns out
2 to start nailing it. But it's almost all face
3 nailed.

4 Q. Have you observed in any of the CSE photographs
5 areas where the siding is blind nailed and there
6 are facing -- excuse me, there are fastener spacing
7 issues?

8 A. No, I haven't seen that.

9 Q. Let's go over and look, if we can, at Section A.
10 You have provided a detail for the repair of the
11 Parkside overhang condition; is that right?

12 A. Yes.

13 Q. And you've got a description of that which is Sheet
14 Number SK-3 of 4. And you indicate it was to
15 "Remove the bottom row of siding and the trim board
16 in the area designated by Section A. Remove the
17 base of wall Z-shaped metal flashing." And then
18 "Add new galvanized metal flashing per Section A
19 behind WRB; paint metal to match the trim board
20 color; replace the trim board and the removed
21 flashing. Replace the siding with salvaged or new
22 material and apply the exterior grade coating to
23 all affected areas." Is that right?

24 A. Yes.

25 Q. If we could flip over to SK 4 of 4, you are showing

1 EXAMINATION BY MR. ANTHONY:

2 Q. My name's Jay Anthony, and I represent Southern
3 Concrete Specialties.

4 A. Okay.

5 Q. They did work on Phase II only. You testified that
6 you omitted the decks from your repair scope. Can
7 you tell me why you did that?

8 A. Well, as I said earlier, it looked like Carl Catoe
9 Construction built them according to the drawings,
10 which is flat. And it looked like the work that he
11 performed matched the drawings, so I didn't go any
12 further than that. And I was only dealing with
13 what he was working on.

14 Q. You're aware of complaints of some water intrusion
15 into the cedar ceilings below the decks and into
16 some units?

17 A. Yes.

18 Q. Who do you hold responsible for those if not Carl
19 Catoe?

20 BY MR. TATE:

21 Object to form.

22 BY MS. LANG:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I don't know where the water's coming from, so I

1 based on Mr. Catoe saying that the decks were built
2 and framed level, and he did not do the
3 waterproofing or concrete work?

4 A. That's right.

5 Q. Any other reason you decided not to investigate the
6 decks?

7 A. Well, it looks like there were -- it seems like
8 everybody was assuming they're going to be torn
9 down or fixed or something done to them, so I
10 didn't investigate them. It looked like Carl Catoe
11 had done his work according to the drawings and the
12 direction he got from his general contractor.

13 Q. Did you ask Mr. Catoe any questions regarding his
14 work on the columns? And I guess by "columns" I
15 should define -- I think I was actually calling
16 them "piers" yesterday. But the -- basically the
17 column that comes up above the deck.

18 A. No. He said he built the wood columns, but I don't
19 know much more than that.

20 Q. Did you examine the plans to see how those were
21 supposed to be built?

22 A. Yes.

23 Q. And did it look like they were built in conformance
24 with the plans?

25 A. I haven't torn one apart. I've seen pictures that

1 show the plywood going across the top of the deck

2 level, and the drawings don't show that, but ---

3 Q. So that's a deviation from the plans?

4 A. Well, there's lots of deviations from the plans on

5 this job, yes.

6 Q. Are there any other ways that the decks weren't
7 built in accordance with the plans from a framing
8 standpoint?

9 A. I don't know of any. I mean, it's kind of hard to
10 tell. They don't match some details, but then they
11 match some other details. I mean, some of the
12 details on the drawings don't match another part of
13 the same drawing. I mean, they show beams with
14 stone all the way around them and then another part
15 of that same sheet shows framing coming out to that
16 beam, so depends on what part of the drawings
17 you're looking at. But it looks like from the
18 intent on the framing drawings that he built the
19 framing according to those.

20 Q. So you're aware that the plans did not show that
21 plywood bottom, I guess, of the piers?

22 A. Right. It looks like that they just call for
23 blocking at that level. Then the plywood stops and
24 it doesn't go into that pier.

25 Q. So this should be an opening essentially for water

1 Q. And I understood ---

2 A. On the outside edge, yes. The concrete is right
3 adjacent on the very outside edge. The stone is
4 adjacent to the concrete.

5 Q. And I understood your earlier testimony to be that
6 that is one condition that makes it difficult for
7 water to exit. Am I misunderstanding earlier
8 testimony?

9 A. No, that's correct.

10 Q. Have you reviewed the plans at all to determine
11 whether or not the stone in that location was built
12 in accordance with the plans?

13 A. I don't think that detail shows on the drawings
14 anywhere.

15 Q. If you were to design the decks, is there a way
16 that you would design the intersection of the
17 concrete and the stonework differently? Is there
18 any feature or detail that you would include at
19 that location that you don't believe is shown in
20 the as-built condition?

21 A. I would have the concrete -- I wouldn't have the
22 concrete butting into stone. I would have the
23 concrete or whatever that top surface is that's
24 draining overhang the stone. I would have a drip
25 edge to where that water could drip off the edge

1 BY MR. ORR:

2 Adequately before trial?

3 BY MR. TATE:

4 Yes, sir.

5 (OFF THE RECORD).

6 EXAMINATION RESUMED BY MR. ORR:

7 Q. Would you look at Exhibit Number 176, please, which
8 is your scope of repair?

9 A. Yes.

10 Q. On SK-2, which is the side of Unit 62, how was it
11 determined that there was no WRB behind that area?

12 A. I took a pry bar and pried up some of the siding
13 and looked under it.

14 Q. Okay. As you look at this, I assume we're looking
15 at the -- is that the parking lot side?

16 A. Yes.

17 Q. So on Unit 62, more towards the parking lot, there
18 was no WRB?

19 A. Yes.

20 Q. Did you look at the area below the intersection of
21 the roof of 63 with the wall of 62 to determine the
22 condition of the wall there?

23 A. Where? At the bottom of the hatch pattern?

24 Q. Yes.

25 A. Oh, no, I did not.

1 Q. ~~Yeah, in the wall the wall area on the parking~~
2 lot side of the front wall of Unit 63.

3 A. I didn't look at the base of any wall there, no.
4 Just in the main field.

5 Q. Did you investigate any or look at any of the wall
6 areas that were adjacent to the step flashing where
7 the roof and the walls intersect?

8 A. Yes.

9 Q. Did you observe any deterioration of those walls?

10 A. No.

11 Q. Did you look at any roof sheathing to determine the
12 condition of that?

13 A. No, I couldn't see the roof sheathing from where I
14 was looking.

15 Q. As I understand it, the issue that you found with
16 the cantilevered sections on the Parkside units was
17 there was some discoloration of the cedar ceiling
18 board adjacent to this intersecting wall?

19 A. Yes.

20 Q. And that was due to the end of the cedar ceiling
21 board being more porous and so it absorbed some of
22 the moisture from the cedar trim board?

23 A. Yes.

24 Q. You indicated that it appeared to you that Mr.
25 Catoe or Catoe Construction Company or whoever

1 ~~constructed the elevated decks according to the~~
2 plans?

3 A. According to most of the details on the plans, yes.

4 Q. Are there details on the plans he did not follow?

5 A. Yes.

6 Q. What were those?

7 A. I can show you on the drawings.

8 Q. May I come look over your shoulder?

9 A. Absolutely. We'll start with the framing plan
10 first, because that's where a framer, I think,
11 would start his particular looking at the drawings.
12 And this is sheet A-11. And it's the middle
13 detail -- the middle plan in here and it's the
14 ground floor framing plan. It shows treated 2x10's
15 at 12 inches on center. There's a cloud around it.
16 I think at one time it was 16 inches on center.
17 And it shows the perimeter boards at the lake side,
18 the lake edge of the decks and the screen porch.
19 And they have a little symbol and a triangle -- I
20 mean, a diamond shape. And the schedule calls for
21 that to be four 2x10's. And those four 2x10's are
22 drawn to be flush with the outside face of the
23 columns. If you look back at A-8 and you look at
24 column detail 15A-8, it shows those four 2x10's
25 coming into the middle of the column. So I'm not

1 ~~take for it. I don't know.~~

2 Q. And you don't know what Carl Catoe Construction --
3 what issue, if any, Carl Catoe Construction raised

4 or with whom?

5 A. I do not.

6 Q. As I understood what you said when you were
7 deciding not to investigate the decks any further,
8 said it -- as I wrote down it looked like Catoe
9 constructed the deck in accordance with the plan
10 and as directed by the general contractor. Did he
11 tell you a specific direction he got from the
12 general contractor about constructing the decks?

13 A. I believe he told me he asked if he was supposed to
14 build them flat or not. And I think he was told to
15 build them according to the drawings as best he
16 could and to build them flat.

17 BY MR. ORR:

18 I think that's all I have. Thank you.

19 BY THE WITNESS:

20 Okay.

21 BY MS. LANG:

22 Anybody on the phone have any questions?

23 BY MR. BELCHER:

24 Alan Belcher. No questions.

25 BY MR. LYLES:

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3 ~~Stoneledge at Lake Keowee~~

4 Owners' Association, et.al.,
5 Plaintiffs,
6 vs.

7 SDI Funding, LLC, Ludwig
8 Corporation, LLC, et.al.,
9 Defendants,

10 Marick Home Builders, LLC,
11 Third-Party Plaintiff,
12 vs.

13 Michael Franz, Clearview
14 Construction, et. al.
15 Third-Party Defendants,

16 Builders FirstSource-SE Group,
17 Fourth-Party Plaintiff,
18 vs.

19 Carl Catoe Construction, Inc.,
20 Fourth-Party Defendant.

21 DEPOSITION of **FREDERICK (RICK) R. THOENNES**

22
23 Pursuant to notice, a deposition was taken in the
24 above case on the November 21, 2011, commencing at
25 approximately 10:10 a.m. attended by counsel as follows:

1 A. I don't know.

2 Q. How about this, at the height of Marick's existence
3 when it was at its busiest, how many employees did

4 it have?

5 A. Probably three or four.

6 Q. Describe the job duties or titles of those
7 employees.

8 A. Administrative Assistant in the office. Would have
9 had a superintendent, assistant superintendent and
10 probably a laborer.

11 Q. So when Marick was doing its construction it
12 subcontracted out its work?

13 A. Correct.

14 Q. And who at Marick was responsible for selecting and
15 contacting with subcontractors?

16 A. Me.

17 Q. And who at Marick was responsible for observing and
18 supervising the work of subcontractors?

19 A. Our superintendents.

20 Q. Can you name your superintendents at Marick, and
21 tell me the years that they were with Marick?

22 A. I don't know about that, but I can tell you some of
23 the superintendents.

24 Q. Okay.

25 A. Matthew Gooch ---

1 Q. ~~Can you spell that last name?~~

2 A. G-O-O-C-H, Mike Franz, F-R-A-N-Z, Nathan Hornaday,
3 just like it sounds. There's a couple I can picture

4 but I can't name. There are probably two, maybe
5 three others.

6 Q. Who was the superintendent who was responsible for
7 observation and supervision of the subcontractors in
8 connection with what Marick did at the Stoneledge
9 project?

10 A. Nathan.

11 Q. Hornaday?

12 A. Yes.

13 Q. Did Mr. Hornaday hold any sort of license,
14 contractor's license?

15 A. I don't know. Not that I know of.

16 Q. Who hired Mr. Hornaday?

17 A. I did.

18 Q. Are you the one that assigned him to the -- his
19 responsibilities in connection with the Stoneledge
20 project?

21 A. Yes.

22 Q. What were his qualifications such that you felt
23 comfortable he could supervise subcontractors' work
24 at the Stoneledge project?

25 A. He had worked as a subcontractor for us for years

1 A. ~~There were one or two laborers down there and an~~
2 on-site administrative assistant.

3 Q. What would you have expected the role of the
4 laborers of Marick to be at the Stoneledge project?

5 A. Well, Nathan hired them and supervised them so he
6 would have told them what their responsibilities
7 would have been.

8 Q. What was your expectation of what work they would
9 have been performing for Marick?

10 A. Whatever Nathan needed.

11 Q. Okay. Do you know as you're testifying today what
12 work was, at Stoneledge, was actually done by
13 laborers employed by Marick?

14 A. I know some. They would clean up, keep the streets
15 clean, keep the units clean. Those are things I
16 observed when I went down there.

17 Q. Is there any aspect of the construction of the
18 Stoneledge units that was done by Marick that you
19 believe was self-performed by Marick or was it all
20 done by subcontractors?

21 A. I think it was all subcontracted other than the
22 cleanup like they -- like I mentioned.

23 Q. Okay. Did Mr. Hornaday ever express to you any
24 concern about the quality of the work at Stoneledge
25 that was being performed by the subcontractors?

1 Q. Had you had any experience with Carl Catoe before?

2 A. No.

3 Q. Did you have occasion to talk with or observe the

4 work being done by Carl Catoe or his crews?

5 A. Some.

6 Q. Did you have any questions about the work they were
7 doing?

8 A. No, they seemed to be doing fine, and then of course
9 I got most of my input from Nathan who was there
10 every day.

11 Q. You indicated that you would -- how often would you
12 talk with him about what was going on?

13 A. We'd talk daily, or every other day.

14 Q. How frequently would you actually visit the site?

15 A. Depends on when it was, depended on what was going
16 on, so you'd have to be a little more specific.

17 Q. During the time the framing was being done and the
18 building wrap was installed, the flashing installed,
19 how frequently ---

20 A. Probably once a week.

21 Q. About once a week?

22 A. Uh-huh (indicates affirmative response). Maybe
23 every week and a half, week to week and a half.

24 BY MR. ROOT:

25 Larry, I'm sorry, I couldn't. Was that once a week

1 he was on site?

2 WITNESS ANSWERS:

3 A. A week to a week and a half.

4 Q. He was on site once a week or once every week and a
5 half. During the time that the framing work was
6 being done, did Nathan ever indicate to you that he
7 had any problems or had corrected any of the work
8 that Carl Catoe was doing?

9 A. I don't recall any workman type problems except for
10 one. We had a floor truss that was put in wrong and
11 we had to support it. That's the only thing that
12 jumps out at me. Of course, we always looked at
13 scheduling, and for the most part he manned the job
14 the way he was supposed to.

15 Q. Any problems associated with the installation of the
16 building wrap or the flashing?

17 A. Not that I know of. Nathan would've seen that.

18 Q. Pardon?

19 A. Nathan would've seen that and he didn't mention it
20 to me.

21 Q. If there had been a problem, would he have mentioned
22 it to you?

23 A. You have to ask him.

24 Q. Would you, I mean, based upon you working with him
25 over the time, would you have expected him to ---

1 A. No.

2 Q. You were on site approximately once a week?

3 A. Once to once, every week and a half.

4 Q. And your communications, though, with Nathan were
5 how consistent?

6 A. Daily.

7 Q. What kind of ---

8 A. Well, I say "daily," there may have been a day he
9 was gone or I was gone, but for the most part daily.

10 Q. As far as a quantity of time, how much time during a
11 typical week would you spend talking to Nathan?

12 A. No idea.

13 Q. Couldn't say?

14 A. Wouldn't even venture to guess. One week it could
15 be, you know, an hour, next week it could be five
16 minutes, next week it could be two hours.

17 Q. I understand. Was there any particular stage of
18 construction during which you were on the site more
19 frequently than another stage?

20 A. Probably during the layout, like when they were
21 staking or that kind of thing. If they were doing
22 any work on the lake itself, then I was there.

23 Q. As to Nathan's onsite time, you said essentially for
24 a vacation or something where you would expect
25 someone to be absent from the site, he was generally

1 there every day?

2 A. Correct.

3 Q. Typical eight to ten-hour workday?

4 A. Typical ten to twelve.

5 Q. Ten to twelve. Did you have any, during the course
6 of the construction of Phase II, any interactions
7 with any employees or representatives of Builders
8 First Source, BFS?

9 A. Yes.

10 Q. Who?

11 A. Lots of people. Mike Green, Brock Bauknight,
12 Elaine, can't remember her last name, for the
13 windows ---

14 Q. And that's what I was going to get to next if you
15 want to say that while you go through their names,
16 you can tell me what you dealt with them about. You
17 said Elaine you dealt with windows?

18 A. Right. I think windows and doors.

19 Q. Mike Green?

20 A. Mike Green, I dealt with materials and labor.

21 Q. All right, go ahead.

22 A. And Brock Bauknight was my outside representative
23 that I dealt with on all of those things.

24 Q. General outside sales?

25 A. That's right. He handled my account.

1 ~~Catoe? That is, who did monthly inspections for~~
2 subcontractor payment?

3 A. Nathan would inspect -- well, there was a draw
4 schedule that Mike Green and I worked out ---

5 Q. Okay.

6 A. --- for all aspects when we did the contract and
7 then all Nathan had to do was look and see what
8 portion of that schedule was done and then he'd sign
9 off on it and then we'd pay it. Not Carl, BFS.

10 Q. Yeah, right, because Carl was -- Carl Catoe was not
11 your subcontractor, correct?

12 A. That's correct.

13 Q. Only Builders First Source was?

14 A. Correct.

15 Q. But nonetheless you got to occasionally communicate
16 with Carl Catoe by virtue of being on the site?

17 A. Sure.

18 Q. Did anyone at Marick ever call or otherwise contact
19 Carl Catoe Construction regarding any warranty
20 issues?

21 A. I'm sure Nathan did.

22 Q. You say that you're sure he did. What do you know
23 that he did?

24 A. Siding that had warped and popped, a truss, the
25 truss that was over-spanned.

- 1 ~~Q. Was Nathan calling Carl Cateo or Builders First~~
2 Source with these issues?
3 A. Both. I mean it would start with Carl to see if it
4 could be worked out in the field, I'm sure, but then
5 it would go -- if it couldn't be worked out in the
6 field with Carl then it would go to Builders First
7 Source.
8 Q. I had asked you about warranty issues, and to me
9 typically that means issues once you've left a
10 site ---
11 A. Oh, oh, I don't know of -- I don't know of any.
12 Q. But you were starting to tell me about some issues
13 while construction was ongoing ---
14 A. Right.
15 Q. --- and you mentioned some siding that was warping
16 and popping and then you mentioned the over-spanned
17 truss issue that you already talked about with
18 David. On the siding that was warping or popping,
19 was it an isolated board, was it widespread or was
20 it somewhere in between those two?
21 A. No, I mean, it was an isolated board according to
22 Nathan. He called and asked Carl to fix it.
23 Normally they were on site, but after they had left
24 site then he'd have to call Builders First Source.
25 Q. And was Builders First Source generally responsive?

1 A. Would ---

2 Q. I'm sorry, the finished floor, not the finished
3 grade.

4 A. NO.

5 Q. Would you expect it to show the grade at the
6 building?

7 A. Yes, within plus or minus.

8 Q. Would you expect it to show the slope away from the
9 building?

10 A. Yes.

11 Q. If the Freeland drawings don't show or did not show
12 the grade at the building, how would the -- to your
13 knowledge, how would the grading subcontractor know
14 where to set the grade?

15 A. You're asking a hypothetical question there. It
16 should show it, period.

17 Q. I think you said that you assumed that Nathan
18 contacted Hutch N Son regarding some issues with the
19 grade, do you know that for sure or do you just
20 assume that?

21 A. No, I know that for sure.

22 Q. Okay. And that was relating to this standing water?

23 A. Standing water and the slope.

24 Q. And the slope?

25 A. Yes.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,
7 vs.
8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.
18 Defendants.
19
20

21 Deposition of **RANDY STILL**
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the August 15, 2012 commencing at
25 approximately 10:20 a.m. attended by counsel as follows:

1 Object to the form.

2 WITNESS ANSWERS:

3 A. I think that's a legal question for "duty." You

4 would expect they would but I don't know

5 contractually. I think it becomes a legal question

6 of duty.

7 Q. It is a duty, is it not, of the general contractor

8 to comply with the applicable building codes in the

9 performance of a project?

10 A. I would think so.

11 Q. Is it the duty of a general contractor to coordinate

12 the work of subcontractors?

13 BY MR. IMHOFF:

14 Object to form.

15 WITNESS ANSWERS:

16 A. I would think so to the extent he understands that

17 coordination effort.

18 Q. And if he doesn't understand the coordination effort

19 what should the general contractor do?

20 A. Ask questions.

21 Q. Of whom?

22 A. Subcontractors, make sure they're putting them

23 together correctly.

24 Q. Is it a duty of the general contractor on a project

25 like the Stoneledge Project to supervise the work of

1 subcontractors he has retained?

2 BY MR. IMHOFF:

3 Object to the form.

4 WITNESS ANSWERS:

5 A. I'm thinking about the word "supervise." You would
6 think that he would make sure they were doing what
7 entity they were supposed to be doing. In other
8 words, you would want a framing contractor doing
9 framing and you would rely upon them to perform
10 their craft appropriately. And the supervisory
11 condition would be, I would think, contractual.

12 Q. Between the general contractor and the
13 subcontractors?

14 A. I would think so.

15 Q. Do you think a general contractor has any obligation
16 to insure that his subcontractors(phone ringing) ---

17 (OFF THE RECORD).

18 DIRECT EXAMINATION RESUMED BY MR. LYLES:

19 Q. Is it an obligation of a general contractor to
20 insure his subcontractor's in compliance with the
21 contract documents?

22 BY MR. IMHOFF:

23 Object to form.

24 WITNESS ANSWERS:

25 A. I'm not sure I'd use the word "insure." I would

1 obligation in the construction or installation of
2 the low slope roofs, whether it be code violation,
3 violation of the design documents or non-compliance
4 with the design documents or violation of

5 manufacturers' installation instructions or any
6 other obligation on the installation of the low
7 slope roofs?

8 A. I think the only place in the low slope roofs that
9 there is question is there's some very limited areas
10 where felts are missing, and that is an omission of
11 felts, a single layer of felts.

12 Q. Let's talk about that for just a minute. In your
13 experience and education and in your work, do you
14 hold the opinion that a general contractor is always
15 liable for all defects in construction which were
16 performed by subcontractors?

17 A. I think what I have found is the term "liable" is a
18 legal term and my belief is that the general
19 contractor can rely on the subcontractors who have
20 the specialty crafts and knowledge to perform their
21 work correctly.

22 Q. Is it fair to say that in many cases a subcontractor
23 is in fact more experienced and better qualified to
24 perform their particular trade than a general
25 contractor?

1 A. Yes.

2 Q. Is that because they have specialized over the years
3 in that particular area and have focused their
4 education and experience in that area?

5 A. Yes, and they've performed the work and they know
6 what works and what doesn't work.

7 Q. In your opinion is it fair -- is it acceptable for a
8 general contractor to rely on that experience and
9 education of a subcontractor in a particular trade?

10 A. I think in many cases he has to.

11 Q. Would you agree that obviously a general contractor
12 cannot see every nail which is driven or every board
13 which is installed?

14 A. Yes.

15 Q. Would you agree that he must, out of necessity, rely
16 on a subcontractor's experience and knowledge and
17 compliance with good building practice and the code?

18 A. Yes.

19 Q. Let me go back to my question then again. If based
20 upon that, if there are violations of code such as a
21 completely missing felt under a roof, do you hold
22 the opinion that the general contractor has violated
23 the code or some other obligation if the work was
24 done by a subcontractor?

25 A. No, but clearly when something like felt is missing

~~or a prototypical installation and that will serve~~

as the standard by which an installation is
accepted. For example, if you put a window in and

you've got a mock-up wall and you put in the rough

opening flashing and you put in the -- all the

flashings that would be there, all the peel-and-

stick and you've got all of the entities, for

example, the window manufacturer and the wrap

manufacturer and the peel-and-stick manufacturer and

the exterior cladding person there. And if they're

all there and they say, "Yeah, this is the way it

needs to be done." And your subcontractor who's

doing all those different components install it that

way, says he's going to install it that way, that's

how it should be installed. I'm not sure that

answers your question but ---

Q. Okay. Let me try to get to it a little bit

different way. Are you familiar with the term

"paper contractor"?

A. I'm not sure.

Q. Do you know if Marick actually drove any nails or

constructed any part of Stoneledge?

A. I think my understanding is he did not self-perform

any work.

Q. What in your opinion is the role of a general

1 Q. Do you believe or do you have an opinion that Marick
2 violated any code, manufacturers' instructions,
3 design drawings in the installation of the cedar
4 shake and plank siding in Phase II?

5 A. No.

6 Q. Do you have any opinion that Marick violated any
7 code, manufacturers' installation instructions,
8 design drawings or any other obligation in the
9 installation of the doors and windows in Phase II?

10 A. I am not aware that he installed any of those
11 components.

12 Q. Is that a "no"?

13 A. No.

14 Q. Do you believe Marick violated any code,
15 manufacturers' installation instructions, design
16 drawings or any other obligation in the stone
17 installation in Phase II?

18 A. No.

19 Q. Do you believe Marick violated any code,
20 manufacturers' installation instructions, design
21 drawings or any other obligation in the installation
22 of any of the waterproofing, framing, grading or
23 other construction components in Phase II?

24 A. No.

25 Q. I don't think I have any more questions for you

~~STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS~~
COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652

Stoneledge at Lake Keowee
Owners' Association, et.al.,
Plaintiffs,

vs.

IMK Development Company, Inc.
Keowee Townhouses, LLC,
Ludwig Corporation, LLC,
SDI Funding, LLC, Medallion
At Keowee, LLC, Integrys
Keowee Development, LLC,
Marick Home Builders, LLC,
Bostic Brothers Construction,
Miller/Player & Associates,
et. al.

Defendants.

DEPOSITION of CARL CATOE

Pursuant to notice, a deposition was taken in the
above case on the December 5, 2011, commencing at
approximately 10:15 a.m. attended by counsel as follows:

CARL CATOE

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1 A. I don't know.

2 Q. What did you do in connection with the roof? What

3 did Carl Catoe do?

4 A. We installed the roof trusses.

5 Q. And sheeting?

6 A. Sheeting.

7 Q. How about the felt or paper?

8 A. I don't think that was in my scope of work.

9 Q. But you didn't install the shingles?

10 A. We did not install the shingles.

11 Q. But you set the windows and set the doors?

12 A. We set the windows and set the doors.

13 Q. And y'all did the rough opening flashing for the
14 windows?

15 A. I don't understand the question.

16 Q. You framed the stud walls; correct?

17 A. Correct.

18 Q. And then y'all set the windows; correct?

19 A. Correct.

20 Q. And in setting the windows, was Carl Catoe
21 responsible for flashing the rough opening that the
22 windows were set in?

23 A. I wouldn't call it flashing. I would call it --
24 it's called wrap or -- is that what you're
25 referring to?

CARL CATOE

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1 Q. Sure.

2 A. Yes, we were required to install the house wrap.

3 Q. How about flashing around windows?

4 A. Window tape.

5 Q. Y'all were required to do that?

6 A. Yes.

7 Q. And did Carl Catoe install the siding?

8 A. Yes.

9 Q. And did Carl Catoe install the sheathing? The
10 exterior wall sheathing?

11 A. Yes.

12 Q. And did Carl Catoe install the building wrap?

13 A. Yes.

14 Q. And all that was the responsibility of Carl Catoe?

15 A. Yes.

16 Q. In Phase II?

17 A. That's correct.

18 Q. And in connection with the porches and the decks,
19 Carl Catoe was responsible for framing those
20 porches and decks; is that right?

21 A. That's correct.

22 Q. And flashing the components of the decks that
23 needed to be flashed?

24 BY MR. ROOT:

25 Objection.

001266

CARL CATOE

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1 WITNESS ANSWERS:

2 A. No flashing at all.

3 Q. Carl Catoe didn't do the stone work?

4 A. No.

5 Q. And there was no flashing that was required between
6 the heated walls and the decks?

7 A. That's correct.

8 Q. And that is there was no flashing required in the
9 plans or that's just not something that would ever
10 be flashed?

11 A. When the question come up in the beginning about
12 any flashing behind the band, and I was told not to
13 do any flashing.

14 Q. And who told you that?

15 A. I believe it was Nathan and Mike. They were not
16 going to do anything. The waterproofer would
17 install all the flashing on the deck.

18 Q. How does the waterproofer install flashing after
19 the siding has gone up?

20 A. He doesn't.

21 Q. Did the waterproofer do his work after you did your
22 work?

23 A. No.

24 Q. So the waterproofer was actually there before Carl
25 Catoe finished its work?

CARL CATOE

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1 A. There again, "Go look at Phase I."

2 Q. So you did ask and you were told to go look at

3 ~~Phase I?~~

4 A. "Go look at Phase I."

5 Q. Other than that, were the plans and specifications
6 that you received satisfactory?

7 A. A lot to be desired.

8 Q. They left a lot -- what do you think that was
9 missing in the plans? What would you have liked to
10 have seen, I should say, in the plans?

11 A. A lot more details.

12 Q. Are there any conditions out there that you can
13 specifically recall not having details that
14 concerned you?

15 A. There was a question about the offsets, what
16 happened there. Was this rated? Was this a two-
17 hour wall? Was this a one-hour wall? Is this --
18 has it got to go horizontal? Does it continue?
19 How far does it continue? Different things like
20 that.

21 Q. And who provided you with the direction that you
22 used to build those conditions?

23 A. Nathan.

24 Q. So that came directly from Marick?

25 A. Yes.

1 feet over. I don't believe it was required on that
2 job.

3 Q. Who told you it wasn't required?

4 A. I think it was Nathan. I'm not sure.

5 Q. Do you know where Nathan was getting that
6 information?

7 A. I don't know.

8 Q. And you didn't talk to the inspector about that?

9 A. There again, they get mad when I talk to the
10 inspector. They don't want me talking to the
11 inspector. They don't want me calling the
12 architect.

13 Q. How many times did you meet or speak with Rick
14 Thoennes?

15 A. The only time I met with him is in the beginning.
16 I remember him coming to the jobsite a couple three
17 times. There was never a conversation. "How you
18 doing, Carl?" "How you doing, Mr. Rick?" That was
19 pretty much it.

20 Q. Did you have a full set of plans onsite the entire
21 time you were there?

22 A. I had a set of plans. It was -- I didn't have like
23 Unit A, B and C in that building. I had A -- I'd
24 get unit plans, but I didn't have something telling
25 me that Building 20 was A, B and C.

CARL CATOE

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1 Q. How did you determine that?

2 A. Sometimes I'd ask Nathan.

3 ~~Q. And he had something that would tell him that~~

4 A. He had something that would tell me, Building 20
5 was, you know, A, B and a C or D. You know,
6 whatever.

7 Q. Did you leave those plans onsite for your crews or
8 did you take them with you?

9 A. I mean, not that master set, no. I mean, he had
10 that set. All I had was what I had. That's all I
11 ever had was a unit -- set of unit plans.

12 Q. But did you take them with you or did you leave
13 them for your superintendents or ---

14 A. I believe I took them with me. I believe
15 they're -- we actually have them.

16 Q. Did you have any issues with Nathan while you were
17 onsite?

18 A. Would you be more specific, please?

19 Q. Well, did you ever have any issues with what he was
20 telling you to do or not telling you to do?

21 A. I thought looking -- you know, going and looking at
22 Phase I in the beginning was just, you know, kind
23 of weird. But, you know, that was the answer every
24 time, "Go look at Phase I."

25 Q. What did you do if you weren't able to determine

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF OCONEE C.A. NO. 2009-CP-37-0652
3

4 Stoneledge at Lake Keowee
5 Owners' Association, et.al.,
6 Plaintiffs,

7 vs.

8 IMK Development Company, Inc.
9 Keowee Townhouses, LLC,
10 Ludwig Corporation, LLC,
11 SDI Funding, LLC, Medallion
12 At Keowee, LLC, Integrys
13 Keowee Development, LLC,
14 Marick Home Builders, LLC,
15 Bostic Brothers Construction,
16 Miller/Player & Associates,
17 et. al.

18 Defendants.
19
20

21 Deposition of **NATHAN HORNADAY**
22

23 Pursuant to notice, a deposition was taken in the
24 above case on the March 30, 2012 commencing at
25 approximately 10:15 a.m. attended by counsel as follows:

1 A. Yes.

2 Q. --- generally?

3 A. Yes.

~~4 Q. Had you ever -- when you went to Stoneledge, had~~
5 you ever been a supervisor or superintendent on a
6 job?

7 A. No.

8 Q. When you went over there, did you think that you
9 had the skills to be -- did you call yourself
10 supervisor or superintendent first of all. Let me
11 ask you that. Or what title did you use, if you
12 used one?

13 A. Supervisor. I mean, I was mostly just supervising
14 everything that was being done.

15 Q. Were you supervising subcontractors?

16 A. Yes.

17 Q. Or did Marick have any other employees doing such
18 things as framing or other work of that type?

19 A. No.

20 Q. So it was all -- all the work was being done by
21 subcontractors?

22 A. Yes.

23 Q. Prior to the time you went to Stoneledge, had you
24 ever supervised subcontractors?

25 A. No.

1 Q. When you arrived at Stoneledge, did you feel like
2 you were up to that job?

3 A. Yes.

4 Q. ~~In other words, you felt like you had enough~~
5 general experience to be able to monitor what the
6 different subs were doing and to determine whether
7 they were doing it correctly or not?

8 A. Yes.

9 Q. And were there times when you thought they were not
10 doing something correctly?

11 A. No.

12 Q. So basically the subs you felt like were proceeding
13 correctly?

14 A. I believe each sub, depending on what he did, I
15 mean, obviously knew more than I did about it.
16 That's why we hired them. And each sub, you know,
17 was an expert in their field. So I was basically
18 there to make sure -- schedule them to do their
19 work, when to come in, and make sure they got it
20 done.

21 Q. I understand that. Did you ever see something that
22 caused you to say to a sub, "Wait a minute, I don't
23 like the way you're doing that"?

24 A. I did.

25 Q. And was it corrected to your satisfaction?

1 A. Yes.

2 Q. Do you remember specific instances, or are you just
3 saying that from time to time ---

4 ~~A. From time to time I would see something that they~~
5 would cut a corner on, but I would talk to them and
6 they would fix it. But it was nothing major. It
7 was like nail guards on pipes, painting, you know,
8 caulking, stuff like that, on the inside -- the
9 interior unit.

10 Q. Did you do any work on Phase I?

11 A. I did a lot of repair work.

12 Q. On Phase I?

13 A. Yes. I ---

14 Q. And what -- I'm sorry.

15 A. --- supervised a lot of repair work.

16 Q. By the way, if I start to ask you a question before
17 you finish -- I'll try not to do that, but
18 sometimes you can't help it.

19 A. Okay.

20 Q. Just let me know there's more in your answer.

21 A. Okay.

22 Q. Did this supervising of repair work in Phase I, was
23 that going on while ---

24 BY MR. GOLDSMITH:

25 Do we have someone on the line?

FILED DOCUMENTS
BEVERLY WHITFIELD
CLERK OF COURT

~~2013 APR 10 AM 10:25Z~~

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Defendants Marick Home Builders, LLC and Rick Thoennes' Memorandum in Support of the SCRPC 59(e) Motion as to Carl Catoe and Affiliated Subcontractors hired by Carl Catoe** to the following counsel of record:

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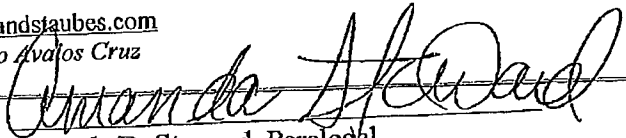
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This 9 day of April, 2014
Spartanburg, SC

By:


Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. DAN CARSON, JEFFREY
J. DAULER, JOAN W. DAVENPORT, MICHAEL
FURNARI, DONNA FURNARI, JESSY B. GRASSO,
NANCY E. GRASSO, ROBERT P. HAYES, LUCY
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HUND, III, RUTH E. ISAAC, MICHAEL D.
PLOURDE, MARY LOU PLOURDE, CAROL C.
POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR,
AND ROBERT WHITE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, KEOWEE
TOWNHOUSES, LLC, LUDWIG CORPORATION,
LLC, SDI FUNDING, LLC, MEDALLION AT
KEOWEE, LLC, BRADFORD D. SECKINGER,
JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C.
COX, INTEGRYS KEOWEE DEVELOPMENT, LLC,
MARICK HOME BUILDERS, LLC, M GROUP
CONSTRUCTION AND DEVELOPMENT, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES, MEL MORRIS, JOE BOSTIC, JEFF
BOSTIC, CLEAR VIEW CONSTRUCTION, LLC,
MICHAEL FRANZ, MHC CONTRACTORS,
MIGUEL PORRAS CHONCOAS, BUILDERS FIRST
SOURCE SOUTHEAST GROUP, MIKE GREEN,
SOUTHERN CONCRETE SPECIALTIES, CARL
COMPTON D/B/A COMPTON ENTERPRIZE A/K/A
COMPTON ENTERPRISES, GUNTER HEATING &
AIR, ALL PRO HEATING, A/C &
REFRIGERATION, LLC, COLEMAN
WATERPROOFING, HEYWARD ELECTRICAL
SERVICES, INC., TINSLEY ELECTRICAL, LLC,
HUTCH N SON CONSTRUCTION, INC., CARL
CATOE CONSTRUCTION, INC., T.G.
CONSTRUCTION, LLC, DELFINO
CONSTRUCTION, FRANCISCO JAVIER ZARATE
D/B/A ZARATE CONSTRUCTION, ALEJANDRO

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

**DEFENDANTS CLEAR VIEW
CONSTRUCTION, LLC AND MICHAEL
FRANZ'S BRIEF IN OPPOSITION TO
MARICK HOME BUILDERS AND RICK
THOENNES' S.C.R.C.P 59(e) MOTION
TO RECONSIDER AND ALTER
JUDGMENT**

AVALOS CRUZ, HERBERTO ACROS HERNANDEZ,)
 MARTIN HERNANDEZ-AVILES, FRANCISCO)
 VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-)
 RAMIREZ, ESTER MORAN MENTADO, SOCORRO)
 CASTILLO MONTEL, UPSTATE UTILITIES, INC.,)
 SOUTHERN BASEMENTS, INC., MJG)
 CONSTRUCTION AND HOMEBUILDERS, INC.)
 D/B/A MJG CONSTRUCTION, KMAC, INC.,)
 D/B/A KMAC NORTH CAROLINA, EUFACIO)
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 JOSE NINO, JOSE MANUEL GARCIA, EASON)
 CONSTRUCTION, INC., AND VINCENT MORALES)
 D/B/A MORALES MASONRY, MILLER/PLAYER &)
 ASSOCIATES,)
 Defendants,)

Defendants Clear View Construction, LLC ("Clear View") and Michael Franz (collectively "Clear View Defendants") submit this Brief in Opposition to the Motion to Reconsider of Marick Homebuilders, LLC and Rick Thoennes (collectively hereinafter "Marick"). For the reasons set forth below, Marick's Motion to Reconsider and Alter Judgment should be denied in its entirety.

PROCEDURAL BACKGROUND

On August 24, 2012, Clear View Defendants moved for summary judgment on Marick's claims. Clear View Defendants filed a Brief in support of its Motion on August 31, 2012. Marick filed a Memorandum in Opposition to Clear View's Motion, as well as numerous other parties motions, on September 4, 2012. The Court conducted a hearing on Clear View Defendants and the other parties' Motions on September 5, 2012. The Court requested that Clear View Defendants submit a proposed Order on Marick's Negligence and Equitable Indemnification claims and that Clear View Defendants, Builders FirstSource Southeast Group, LLC ("BFS"), and Southern Concrete Specialties, Inc. ("Southern Concrete") submit a proposed

Order on Marick's Breach of Contract and Breach of Warranty claims (collectively "Orders"). In Orders dated January 11, 2013, the Court granted summary judgment in favor of Clear View Defendants as to all of Marick's cross-claims.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). When an argument is presented before the trial judge but is not addressed in the judge's final order, a Rule 59(e), SCRPC, motion is proper to preserve the issue for appellate review. *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003).

"A party cannot raise an issue for the first time in a Rule 59(e), SCRPC, motion which could have been at trial [or at the substantive hearing.]" *MailSource, LLC v. M.A. Bailey & Assocs, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). "Post-trial motions [and post-hearing motions] are not necessary to preserve issues that have been ruled upon at trial [hearing]; they are used to preserve those that have been raised to the trial court but not ruled upon. *Bailey v. Segards*, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001).

"Under Rule 59 (f), SCRPC, a Rule 59 (e) motion may in the discretion of the court be determined on the briefs filed by the parties without oral argument." *Pollard v. City of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). The decision to grant or deny such motions will be reviewed for an abuse of discretion. *See id.*

ARGUMENT

I. The Court Has Fully Ruled on the Pending Motions; Therefore, the Motions to Reconsider Are Unnecessary and Without Merit.

Marick's Rule 59(e) Motion should be denied because the Court properly found in the Orders that Marick's equitable indemnity claims must fail and that all of Marick's claims were claims for equitable indemnification. As noted above, Rule 59(e) Motions are intended to address situations when a trial judge has not addressed in a final order arguments raised before him. Each argument presented in Marick's Rule 59(e) Motion was properly decided and addressed after careful consideration of the arguments from both parties in the Court's January 11, 2013 Orders; therefore, there is no need to reconsider and alter judgment, and Marick's Motion should be denied in full.

A. The Court Properly Found that Marick Cannot be Adjudged Without Fault

In the Orders, the Court expressly found that Clear View Defendants are entitled to summary judgment on Marick's equitable indemnity claims because Marick cannot be adjudged without fault. Marick's argument that this finding was improper because discovery is not complete does not change the fact that summary judgment was properly granted based on the testimony in the record of Marick's own witnesses regarding Marick's ultimate responsibility for construction and compliance with the building code. The Court properly found that testimony in the record established that if Plaintiffs' allegations regarding defective construction are proven, Marick cannot be found without fault due to its role as the permit holder for Phase II construction and party ultimately responsible for construction and compliance with the building code. Marick's reliance on *Field v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), for the its proposition that a general contractor is not automatically responsible for the work of its

subcontractors is misplaced and is not a proper basis for altering the Court's judgment. The basis for Court's finding that Marick cannot be adjudged without fault is not premised on the general contractor being automatically responsible for the alleged negligence of its subcontractors. The Court's Orders were properly decided on the finding that to the extent Plaintiffs' allegations of defective construction in violation of the building code are proven, Marick as the general contractor, cannot be adjudged without fault.

B. The Court Properly Found that Marick's Argument for Contractual Indemnification Must Fail

The Court's Orders correctly found that Marick has presented no evidence to support a potential claim for contractual indemnification. Marick's failures to allege an entitlement to contractual indemnification in its Cross-Claims and then to offer any evidence supporting the enforcement of a contract in this matter was specifically addressed in the Court's Orders. As this matter was specifically addressed in the Court's Orders and Marick presents no authority supporting reconsideration or alteration of the Court's finding, this matter is not the appropriate subject of a Rule 59(e) Motion.

C. The Court Properly Determined that Marick's Negligence, Breach of Warranty, and Breach of Contract Claims were Claims for Equitable Indemnification

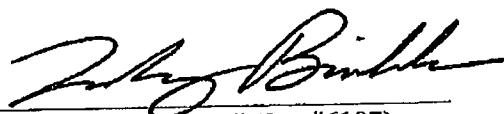
Marick erroneously contends that the Court cited no proper authority in support of finding that Marick's cross-claims were claims for indemnity. Contrary to Marick's contention, the Court relied on well-established authority in specifically holding that each of Marick's claims were based on the same issues and sought the same relief as its equitable indemnification claim. This matter was specifically addressed in the Court's Orders and the findings were based on

proper authority; therefore, this matter merits no reconsideration or alteration under a Rule 59(e) Motion.

CONCLUSION

The Court's decisions granting Clear View Defendants summary judgment were complete and proper, and Marick's Motion to Reconsider and Alter Judgment should therefore be denied. In further opposition to Marick's arguments, Clear View Defendants incorporate their Brief in Support of Motion for Summary Judgment and the arguments of Builders FirstSource-Southeast Group, LLC ("BFS"), Carl Catoe Construction, Inc., and Southern Concrete Specialties, Inc., contained in briefs and memoranda previously filed with Court.

April 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I have this date, electronically mailed a true and correct copy of *Defendants Clear View Construction LLC and Michael Franz's Brief in Opposition to Marick Home Builders and Rick Thoennes' Motion to Reconsider and Alter Judgment* to the following counsel of record:

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Attorney for Coleman Waterproofing

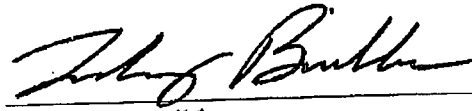
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d/b/a Morales Masonry

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Attorney for MHC Contractors

April 9, 2013

Spartanburg, South Carolina

By:



Lindsay L. Builder



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First-Source (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$2,000,000
 - Personal & Advertising Injury: \$1,000,000
 - Bach Occurrence: \$1,000,000
 - Damage to Rented Premises: \$100,000
 - Medical Payments: \$5,000
 - With "Marick Home Builders" as Additional Insured. - per endorsement form LA 2002-0305
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
 Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors, but only to the extent of Subcontractor's negligence or willful misconduct.

BY: [Signature]

BY: [Signature] *

DATE: 10/31/07

DATE: 10/31/07 *

Rick Thoennes
 NAME and TITLE

Deryl Ward
Senior Attorney *

Marick Home Builder, LLC.
 COMPANY NAME

Builds First Source - Southeast Group, LLC
 COMPANY NAME

[Signature]

WITNESSED BY

Subject To Written Changes



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor**
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature] BY: Mike [Signature] ★
DATE: 10/1/07 DATE: 10-30-07 ★

Rick Thoennes Mike Owner ★
NAME and TITLE NAME and TITLE

Marick Home Builder, LLC. Clearview Const. ★
COMPANY NAME COMPANY NAME

Kim Weaver
WITNESSED BY

10/31/2007 08:28 FAX

10/30/2007 11:00 FAX

0002
001/000



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Bach Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

001291

10/31/2007 08:28 FAX
10/30/2007 11:00 FAX

0003



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see Item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: _____

BY: Shannon Barker *

DATE: _____

10/1/07

DATE: 10/1/07 *

Rick Thoennes

NAME and TITLE

Shannon Barker *

NAME and TITLE

Marick Home Builder, LLC

COMPANY NAME

Southern Concrete Spec. Inc *

COMPANY NAME

Kim Weather
WITNESSED BY

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 -CP-37-00652

FILED OCONEE, SC
STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION,
INC. ET AL
BEVERLY H. WHITFIELD
CLERK OF COURTIMK DEVELOPMENT CO., LLC, LARRY D. LOLLIS,
WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT,
LLC; MARICK HOME BUILDERS, LLC, BOSTIC
BROTHERS CONSTRUCTION, INC., RICK THONNES

2013 NOV 8 PM 12:48

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), 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: Jury found for the Plaintiff on the cause of action for negligence as to Defendants Bostic Brothers Construction, Inc., IMK Development Co., LLC, and Marick Home Builders, LLC in the amount of \$3,000,000.00; Jury found for the Plaintiff on the cause of action for breach of warranty of workmanlike service as to Defendants Bostic Brothers Construction, Inc. and Marick Home Builders, LLC in the amount of \$1,000,000.00. Jury found for the Plaintiff on the cause of action for breach of fiduciary duty as to Defendants IMK Development Co., LLC, Integrlys Keowee Development, LLC, Rick Thonnes, William C. Cox and Larry D. Lollis in the amount of \$1,000,000.00 (See Attached Verdict Form and Apportionment Form for more specific details.) All parties have 10 days to submit post-trial motions.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: This trial encompassed Phase 1 of Stoneledge only.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Stoneledge at Lake Keowee Owner's Assoc., Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D.	IMK Development Cp., LLC	\$1,150,000.00

Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White		
Stoneledge at Lake Keowee Owners' Assoc., Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White	Larry D. Lollis	\$ 200,000.00
Stoneledge at Lake Keowee Owners' Assoc., Inc. C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White	William C. Cox	\$ 200,000.00
Stoneledge at Lake Keowee Owners' Assoc., Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White	Integrays Keowee Development, LLC	\$ 200,000.00
Stoneledge at Lake Keowee Owners' Assoc., Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White	Marick Home Builders, LLC	\$ 950,000.00
Stoneledge at Lake Keowee Owners' Assoc., Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Issac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White	Bostic Brothers Construction, Inc.	\$2,100,000.00

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

Stoneledge at Lake Keowee

IMK Development Co., LLC, et al

Owners' Assoc., Inc., et al
PLAINTIFF(S)

DEFENDANT(S)

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

Submitted by: _____

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), 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: See Page 1

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Stoneledge at Lake Keowee Owners' Assoc., Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX Steven B. Taylor, Bette J. Taylor, Robert White, Nancy E. Grasso	Rick Thoennes	\$ 200,000.00

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.

[Signature]
Circuit Court Judge

2063
Judge Code

11/08/13
Date

2013 NOV 8 PM 12:48

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

For Clerk of Court Office Use Only

This judgment was entered on the 08th day of November, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 08th day of November, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Robert T. Lyles

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jason Imhoff, Alan Belcher,
Cynthia Brown

ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. Whitfield
CLERK OF COURT

Court Reporter: Renee Tollison

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

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
Situating

Plaintiffs,

vs.

IMK Development Co., LLC, Larry D. Lollis, William
C. Cox, Integrys Keowee Development, LLC, Marick
Home Builders, LLC, Bostic Brothers Construction,
Inc., Rick Thoennes,

Defendants

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

Civil Action No.: 2009-CP-37-0652

APPORTIONMENT FORM

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 NOV 8 AM 9 09

Using the combined negligence that proximately caused the plaintiffs' injuries as one hundred percent (100%), what percentage of that negligence is attributable to each defendant? [The percentage must add up to 100%.]

IMK Development Co., LLC/Marick Home Builders, LLC

40 %

Bostic Brothers Construction, Inc.

60 %

Total

100%

Using the combined breach of implied warranty of workmanlike service that proximately caused the plaintiffs' injuries as one hundred percent (100%), what percentage is attributable to each defendant? [The percentage must add up to 100%.]

IMK Development Co., LLC/Marick Home Builders, LLC

70 %

Bostic Brothers Construction, Inc.

30 %

Total

100%

Walhalla, South Carolina
November 7, 2013

Morris R. Cobb
MORRIS R. COBB, Foreman

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., ET AL

Plaintiffs,

vs.

IMK DEVELOPMENT CO., LLC, LARRY D. LOLLIS,
WILLIAM C. COX, INTEGRYS KEOWEE
DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC,
BOSTIC BROTHERS CONSTRUCTION, INC., RICK
THOENNES,

Defendants,

VERDICT FORM

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 NOV 8 AM 9 09

1. On the cause of action for negligence as to the Defendant Bostic Brothers Construction, Inc., we, the jury, unanimously find for the:

✓ Plaintiff

_____ Defendant

On the cause of action for negligence as to the Defendants IMK Development Co., LLC, and Marick Homebuilders, LLC, we, the jury, unanimously find for the:

✓ Plaintiff

_____ Defendants

If you find for the Plaintiff on the negligence cause of action as to any of the above Defendants, please set forth the amount of actual damages resulting to the Plaintiff as a result of negligence.

three million dollars (\$ 3,000,000.00)

After you have completed the above, please respond to Number 2, below.

2. On the cause of action for breach of warranty of workmanlike service as to the Defendant Bostic Brothers Construction, Inc., we, the jury, unanimously find for the:

✓ Plaintiff
 Defendant

On the cause of action for breach of warranty of workmanlike service as to the Defendant Marick Homebuilders, LLC, we, the jury, unanimously find for the:

✓ Plaintiff
 Defendant

If you find for the Plaintiff on the breach of warranty of workmanlike service cause of action as to any of the above Defendants, please set forth the amount of actual damages resulting to the Plaintiff as a result of the breach of warranty of workmanlike service.

one million dollars (\$ 1,000,000.00)

After you have completed the above, please respond to Number 3 below.

3. On the cause of action for breach of fiduciary duty as to the following Defendants we, the jury, unanimously find for the:

a. ✓ Plaintiff
 Defendant IMK Development Co., LLC

b. ✓ Plaintiff
 Defendant Integrys Kowee Development, LLC

c. ✓ Plaintiff
 Defendant Rick Thoennes

d. ✓ Plaintiff

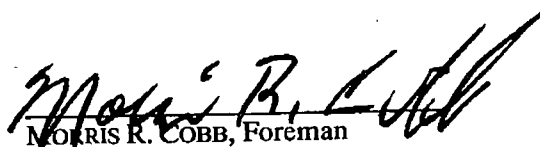
 Defendant William C. Cox

e. ✓ Plaintiff

 Defendant Larry D. Lollis

If you find for the Plaintiff as to any of the of the above Defendants on the breach of fiduciary duty on this cause of action, please set forth the amount of actual damages resulting to the Plaintiff as a result of the breach of fiduciary cause of action.

one million dollars (\$1,000,000.00)


NORRIS R. COBB, Foreman

Walhalla, South Carolina
November 7, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No. 2013-001404

Stoneledge At Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, Individually and on Behalf of All others similarly situated, Plaintiffs,

IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source-Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin-Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., Southern Basements, Inc., MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC, Inc., d/b/a KMAC North Carolina, Eufacio Garcia, Everado Jarmamillio, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, Miller/Player & Associates, Defendants,

Of whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And Builders First Source-Southeast Group, Southern Concrete Specialties, Inc., Clear View Construction, LLC and Michael Franz are the Respondents,

Bostic Construction, Inc., Third Party Plaintiffs,

v.

Southern Stone, Inc., and Buck Smith Construction, Third Party Defendants

CERTIFICATION OF COUNSEL

The undersigned hereby certified that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Jason M. Imhoff (SC Bar #: 69355)

C. Reed Teague (SC Bar #: 79933)

The Ward Law Firm, PA

PO Box 5663

Spartanburg, SC 29304

(864) 582-3075

(864) 585-3090

jimhoff@wardfirm.com

rteague@wardfirm.com

*Attorneys for Appellants Marick Home
Builders, LLC and Rick Thoennes*

September 22, 2014

RECEIVED

SEP 24 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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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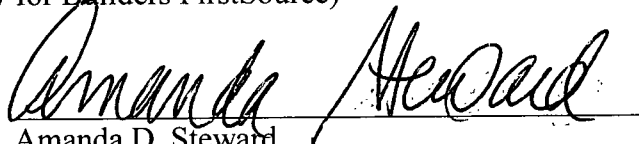
SEP 24 2014

SC Court of Appeals

Southern Stone, Inc., and Buck Smith Construction, Third Party Defendants

PROOF OF SERVICE

I, Amanda D. Steward, certify that I have served the Record on Appeal by depositing a copy of it in the United States Mail, First Class postage prepaid, on September 24, 2014, addressed to Respondents' attorneys of record, Michael B.T. Wilkes, Esquire and Ellen S. Cheek, Esquire, 127 Dunbar Street, Suite 200 Spartanburg, SC 29306 (attorney for Clear View Construction, LLC and Michael Franz), Mason A. Goldsmith, Esquire, PO Box 1887, Greenville, SC, 29602 (attorney for Southern Concrete Specialties), Robert T. Lyles, Jr., Esquire, PO Box 773, Charleston, SC, 29401 (attorneys for Plaintiffs) and David A. Root, Esquire, PO Box 13897, Charleston, SC, 29422 (attorney for Builders FirstSource)


Amanda D. Steward
Paralegal to Jason M Imhoff

September 24, 2014

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