

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Judge

Court of Common Pleas Case No. 2015-CP-26-07275
Appellate Case No. 2019-002001

RECEIVED

Jun 16 2020

SC Court of Appeals

BEI-BEACH, LLC,

Plaintiff,

v.

MASHBURN CHRISTMAN, LLC;
LEND LEASE (US) CONSTRUCTION
INC., f/k/a Bovis Lend Lease, Inc.; and
MCRORY CONSTRUCTION COMPANY
LLC.,

Defendants,

Of whom

LEND LEASE (US) CONSTRUCTION
INC., f/k/a Bovis Lend Lease, Inc. is the

Appellant/
Third-Party Plaintiff,

v.

SPANN ROOFING & SHEET METAL, INC.,
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERCIA,
STRICKLAND WATERPROOFING COMPANY,
EVEREST REINSURANCE COMPANY,
WALLCRAFT CONSTRUCTION, INC., OLD
REPUBLIC INSURANCE COMPANY,
MADISON CONSTRUCTION GROUP, INC.,
WORTHINGTON INTEGRATED BUILDING
SYSTEMS, McDOWELL COMMERCIAL
CONSTRUCTION, LLC, JOLLAY MASONRY,
NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD, R.J. KENNEY ASSOCIATES,
INC., ANTUNOVICH ASSOCIATES, TG
CONSTRUCTION, LLC, LUIS BANEGAS d/b/a

LUIS TRIM WORK, NORA DEL CARMEN
LAGOS, NORA DEL CARMEN LAGOS d/b/a
LUIS TRIM WORK, and OVATION CUSTOM
TRIM, LLC.

Third-Party Defendants,

Of whom

ANTONOVICH ASSOCIATES is the

Respondent.

RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)
CASE NO.: 2015-CP-26-7275

BEI-Beach, LLC,

Plaintiff,

vs.

Mashburn Christman, JV, Lend Lease (US))
Construction, Inc., f/k/a Bovis Lend Lease,)
Inc., and McCrory Construction Company,)
LLC,

Defendants.

Mashburn Christman, JV,

Third-Party Plaintiff,

vs.

Wallcraft Construction, Inc.; Alpha Insulation)
& Waterproofing, Inc.; Baker Roofing, Inc.;)
Collins & Wright, Inc.; Liberty Mutual)
Insurance Company; Old Republic Surety)
Company; Hartford Fire Insurance Co.;)
Travelers Casualty and Surety Company of)
America; The Muhler Company, Inc.; and)
Companion Property and Casualty Insurance)
Company,

Third-Party Defendants.

Lend Lease (US) Construction Inc. f/k/a Bovis)
Lend Lease, Inc.,

Third-Party Plaintiff,

vs.

Spann Roofing & Sheet Metal, Inc.; Travelers)
Casualty and Surety Company of America;)
Strickland Waterproofing Company;)
Merchants Bonding Company; Everest)
Reinsurance Company; Wallcraft)
Construction, Inc., Old Republic Insurance)

**CONSENT ORDER RESOLVING THIRD-
PARTY DEFENDANTS JOSEPH
ANTUNOVICH'S AND ANTUNOVICH
ASSOCIATES INC.'S MOTION TO
DISMISS AMENDED THIRD-PARTY
COMPLAINT OF LEND LEASE (US)
CONSTRUCTION INC. F/K/A BOVIS
LEND LEASE, INC.**

Company; Madison Construction Group, Inc.,)
Worthington Integrated Building Systems;)
McDowell Commercial Construction, LLC;)
Jollay Masonry; National Fire Insurance)
Company of Hartford; R.J. Kenney)
Associates, Inc.; Joseph Antunovich;)
Antunovich Associates; TG Construction,)
LLC; Luis Banegas d/b/a Luis Trim Work;)
Nora Del Carmen Lagos, Nora Del Carmen)
Lagos d/b/a Luis Trim Work; and Ovation)
Custom Trim, LLC,)

Third-Party Defendants.)

McCrory Construction Company, LLC,)

Third-Party Plaintiff,)

vs.)

Collins & Wright; Baker Roofing; Glasstech)
Inc.; Palmetto State Roofing and Sheet Metal;)
Strickland Waterproofing; Maiday, Inc.; and)
Atlas Drywall & Acoustics, Inc.,)

Third-Party Defendants.)

This matter came before the Court on September 25, 2017, upon Third-Party Defendants Joseph Antunovich's and Antunovich Associates Inc.'s (improperly identified in Third-Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.'s Amended Third-Party Complaint as Antunovich Associates) (collectively, "Antunovich") Motion to Dismiss Third-Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.'s ("Lend Lease") Amended Third Party Complaint ("Antunovich's Motion to Dismiss"). Antunovich and Lend Lease have agreed as follows in disposition of Antunovich's Motion to Dismiss:

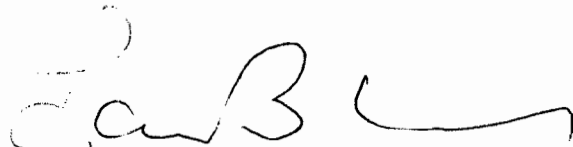
1. Antunovich withdraws Antunovich's Motion to Dismiss; and
2. Lend Lease dismisses *with prejudice* its Amended Third-Party Complaint against Joseph Antunovich, individually. Such dismissal of Joseph Antunovich is without prejudice to

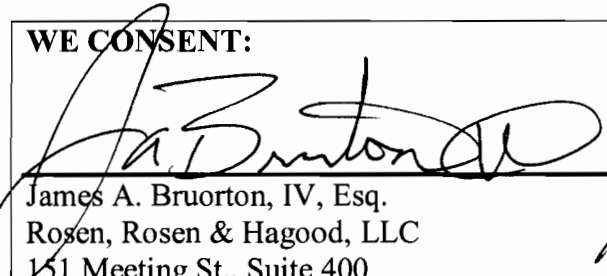
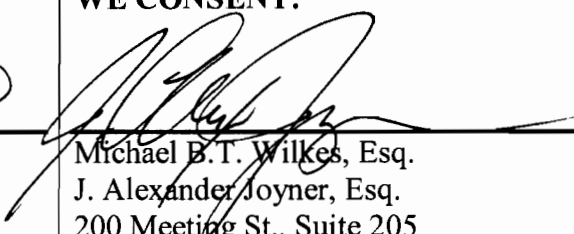
Lend Lease's remaining Third-Party Complaint against Antunovich Associates, Inc., which remains pending.

It is therefore ORDERED that Lend Lease's Amended Third-Party Complaint against Joseph Antunovich is dismissed *with prejudice*, and that this dismissal of Joseph Antunovich is without prejudice to Lend Lease's Amended Third-Party Complaint against Antunovich Associates, Inc., which remains pending. It is further ORDERED that Antunovich Associates, Inc.'s Answer to Lend Lease's Third-Party Complaint is due within thirty (30) days of this Order.

IT IS SO ORDERED!

September 25, 2017
Myrtle Beach, South Carolina


The Hon. Larry B. Hyman, Jr.
Circuit Court Judge for the 15th Judicial Circuit

WE CONSENT:  James A. Bruorton, IV, Esq. Rosen, Rosen & Hagood, LLC 151 Meeting St., Suite 400 P.O. Box 893 Charleston, SC 29402 (843) 577-6726 <i>Attorney for Defendant and Third-Party Plaintiff Lend Lease (US) Construction, Inc. f/k/a Bovis Lend Lease, Inc.</i>	WE CONSENT:  Michael B.T. Wilkes, Esq. J. Alexander Joyner, Esq. 200 Meeting St., Suite 205 Charleston, SC 29401 (843) 737-6229 <i>Attorneys for Third-Party Defendants Joseph Antunovich and Antunovich Associates Inc.</i>
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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

CASE NO.: 2015-CP-26-7275)

COUNTY OF HORRY)

BEI-Beach, LLC,)

Plaintiff,)

vs.)

Mashburn Christman, JV, Lend Lease (US))
Construction, Inc., f/k/a Bovis Lend Lease,)
Inc., and McCrory Construction Company,)
LLC,)

Defendants.)

Mashburn Christman, JV,)

Third-Party Plaintiff,)

vs.)

Wallcraft Construction, Inc.; Alpha Insulation)
& Waterproofing, Inc.; Baker Roofing, Inc.;)
Collins & Wright, Inc.; Liberty Mutual)
Insurance Company; Old Republic Surety)
Company; Hartford Fire Insurance Co.;)
Travelers Casualty and Surety Company of)
America; The Muhler Company, Inc.; and)
Companion Property and Casualty Insurance)
Company,)

Third-Party Defendants.)

Lend Lease (US) Construction Inc. f/k/a Bovis)
Lend Lease, Inc.,)

Third-Party Plaintiff,)

vs.)

Spann Roofing & Sheet Metal, Inc.; Travelers)
Casualty and Surety Company of America;)
Strickland Waterproofing Company;)
Merchants Bonding Company; Everest)
Reinsurance Company; Wallcraft)
Construction, Inc., Old Republic Insurance)

**ORDER GRANTING THIRD-PARTY
DEFENDANT ANTUNOVICH
ASSOCIATES, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AS TO LEND LEASE (US)
CONSTRUCTION, INC., F/K/A BOVIS
LEND LEASE, INC.'S FIRST CAUSE OF
ACTION FOR CONTRIBUTION, FIFTH
CAUSE OF ACTION FOR
NEGLIGENCE / GROSS NEGLIGENCE /
RECKLESSNESS, AND EIGHTH CAUSE
OF ACTION FOR BREACH OF
WARRANTY OF PLANS AND
SPECIFICATIONS
(not ending action)**

Company; Madison Construction Group, Inc.,)
Worthington Integrated Building Systems;)
McDowell Commercial Construction, LLC;)
Jollay Masonry; National Fire Insurance)
Company of Hartford; R.J. Kenney Associates,)
Inc.; Antunovich Associates; TG Construction,)
LLC; Luis Banegas d/b/a Luis Trim Work;)
Nora Del Carmen Lagos, Nora Del Carmen)
Lagos d/b/a Luis Trim Work; and Ovation)
Custom Trim, LLC,)

Third-Party Defendants.)

McCrory Construction Company, LLC,)

Third-Party Plaintiff,)

vs.)

Collins & Wright; Baker Roofing; Glasstech)
Inc.; Palmetto State Roofing and Sheet Metal;)
Strickland Waterproofing; Maiday, Inc.; and)
Atlas Drywall & Acoustics, Inc.,)

Third-Party Defendants.)

Spann Roofing & Sheet Metal, Inc.,)

Fourth-Party Plaintiff,)

vs.)

Coastal Commercial Roofing Co., Inc., and)
Daniel Kniffen d/b/a East Coast)
Improvements,)

Fourth-Party Defendants.)

Wallcraft Construction, Inc.,)

Fourth-Party Plaintiff,)

vs.)

Vienamin Petresku d/b/a BT Construction,)
LLC,)

Fourth-Party Defendant.)

THIS MATTER COMES BEFORE THE COURT upon motion of Third-Party Defendant Antunovich Associates, Inc.'s ("Antunovich") for partial summary judgment ("Antunovich's Motion"), as to Lend Lease (US) Construction, Inc., F/K/A Bovis Lend Lease, Inc.'s ("Lend Lease") First Cause Of Action For Contribution, Fifth Cause Of Action For Negligence / Gross Negligence / Recklessness, And Eighth Cause Of Action For Breach Of Warranty Of Plans And Specifications. The Court received oral arguments on this motion on October 30, 2019, with The Honorable William H. Seals, Jr., presiding. After careful consideration of the record before the Court, and those oral arguments, the Court hereby GRANTS Antunovich's Motion for the reasons set forth herein.

SUMMARY OF FACTS

This is a construction defect case, involving buildings A2, A3, A4, A5, A6, A7, and A8 of The Market Common multi-use development in Myrtle Beach, South Carolina (the "Project"). The current Project owner is Plaintiff BEI-Beach, LLC, ("Plaintiff" or "BEI"), which has asserted claims against the three general contractors which built the Project, based on numerous alleged construction defects. Lend Lease was the general contractor for buildings A6, A7, and A8.

Antunovich was the Project architect which contracted with the developer, which later sold the Project to BEI. There's no contract between Lend Lease and Antunovich. Lend Lease filed its Amended Third-Party Complaint against Antunovich on April 24, 2017, alleging design deficiencies and asserting claims for "Contribution" (Lend Lease Third-Party Compl., ¶¶ 76-78), "Negligence/Gross Negligence/Recklessness" (*Id.* at ¶¶ 97-105), "Equitable Indemnity" (*Id.* at ¶¶ 116-128), and "Breach of Warranty of Plans and Specifications" (*Id.* at ¶¶ 129-135).

ANALYSIS

I. Lend Lease's Contribution Claim.

The South Carolina Code states that “[t]he right of contribution exists **only** in favor of a tortfeasor **who has paid** more than his pro rata share of the common liability....” S.C. Code Ann. § 15-38-20 (emphasis added). The South Carolina Supreme Court has held that “the right to contribution does not arise prior to payment.” *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 445, 445 S.E.2d 446, 448 (1994)

Lend Lease concedes that it has not made any payment to Plaintiff in this case, and that its contribution claim is not ripe, but contends that such claim may become ripe prior to a trial of this case. The Court finds this argument unpersuasive. Lend Lease's potential future right to contribution has not accrued,¹ and this third-party claim must be dismissed.

II. Lend Lease's Negligence/Gross Negligence/Recklessness and Breach of Warranty of Plans and Specifications Claims.

Antunovich argues that Lend Lease's claims for Negligence / Gross Negligence / Recklessness, and Breach of Warranty of Plans and Specifications are merely disguised equitable indemnity claims and should be dismissed, leaving only Lend Lease's seventh cause of action for Equitable Indemnity. This Court agrees.

To determine the true nature of a given claim, one must look to the “nature of the issues and the remedies which are sought,” as opposed to just the nomenclature of same. *State v. Yelsen Land Co.*, 257 S.C. 401, 403, 185 S.E.2d 897, 898 (1972); *see also Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692-93, 239, S.E.2d 726, 727 (1977). South Carolina's Court of Appeals has held that disguised equitable indemnity claims should be summarily dismissed. *Stoneledge at*

¹ This Court makes no finding herein as to whether Lend Lease may potentially be entitled to Contribution from Antunovich in the future.

Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders Firstsource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); (see also *Horry Elec. Coop., Inc. v. S.C. Pub. Serv. Auth.*, 2016 WL 4208091, at *2 (S.C. Ct. App., Aug. 10, 2016)). Lend Lease claims it may "incur actual damages in the amount of any money adjudged to be owed to the Plaintiff by Lend Lease, or which Lend Lease must pay Plaintiff in settlement of Plaintiff's Claims, plus the costs associated with investigating the Plaintiff's claims and defending this action." (Lend Lease's Amend. Third-Party Compl., ¶ 134). Lend Lease prays for judgment on its Third-Party claims in "the amount of any settlement paid by Lend Lease to the Plaintiff or judgement rendered against Lend Lease in favor of the Plaintiff and all attorney's fees and cost incurred by Lend Lease as a result of this action." (Lend Lease's Amend. Third-Party Compl., ¶ a. Prayer for Relief). As in Stoneledge, Lend Lease has not shown that it has suffered its own damages as a result of Antunovich's alleged negligence or breach of warranty. Rather, Lend Lease's allegations and prayer for relief show damages and claims that have arisen exclusively from having to defend itself in this lawsuit, perhaps including a judgment to BEI for which it seeks indemnity. Lend Lease's negligence and breach of warranty claims are not independent of Lend Lease's equitable indemnity claim; in substance, they are nothing more than equitable indemnity claims, and must therefore be dismissed.

Lend Lease also alleges it has suffered damages to its "business reputation" because of BEI's claims against it, and contends that this "business reputation" damage claim is separate and distinct from its indemnity claims. Lend Lease cites no South Carolina legal authority for the proposition that it may recover "business reputation" damages in a negligence or breach of implied warranty cause of action, and the Court finds no such authority. Furthermore, Lend Lease has

presented no admissible evidence that it has incurred "business reputation" damages. This Court finds that the alleged "business reputation" damages claim does not support an independent cause of action by Lend Lease against Antunovich for negligence or breach of warranty.

CONCLUSION

For these reasons, Lend Lease's claims against Antunovich for Contribution, Negligence / Gross Negligence / Recklessness, and Breach of Warranty of Plans and Specifications are hereby dismissed *with prejudice*. This Order is without prejudice to Lend Lease's sole remaining cause of action against Antunovich for equitable indemnity, which remains pending.

IT IS SO ORDERED!

[Judge's Electronic Signature Page to Follow]



Horry Common Pleas

Case Caption: BEI Beach LLC , plaintiff, et al VS Mashburn Christman JV ,
defendant, et al

Case Number: 2015CP2607275

Type: Order/Summary Judgment

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2019-11-20 14:02:30 page 7 of 7

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	CASE NO.: 2015-CP-26-7275
	)	
BEI-Beach, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER DENYING LEND LEASE (US)
Mashburn Christman, JV, Lend Lease (US)	)	CONSTRUCTION, INC., F/K/A BOVIS
Construction, Inc., f/k/a Bovis Lend Lease,	)	LEND LEASE, INC.'S MOTION FOR
Inc., and McCrory Construction Company,	)	PARTIAL RECONSIDERATION FILED
LLC,	)	ON NOVEMBER 26, 2019
	)	
Defendants.	)	
	)	
Lend Lease (US) Construction Inc. f/k/a Bovis	)	
Lend Lease, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Spann Roofing & Sheet Metal, Inc., et al,	)	
	)	
Third-Party Defendants.	)	
	)	

THIS MATTER COMES BEFORE THE COURT upon Defendant and Third-Party Plaintiff Lend Lease (US) Construction, Inc., F/K/A Bovis Lend Lease, Inc.'s ("Lendlease") Motion for Partial Reconsideration of this Court's November 21, 2019 Order Granting Third-Party Defendant Antunovich Associates, Inc.'s Motion for Partial Summary Judgment as to Lendlease's First Cause of Action for Contribution, Fifth Cause of Action for Negligence/Gross Negligence/Recklessness, and Eighth Cause of Action for Breach of Warranty of Plans and Specifications. Lendlease moved for reconsideration only as to the portion of the Court's Order dismissing its claims for Negligence/Gross Negligence/Recklessness and Breach of Warranty of Plans and Specifications. Lendlease did not move for reconsideration as to the Court's dismissal of its Contribution claim.

After careful consideration of the record before the Court and applicable law, this Court denies Lendlease's Motion for Reconsideration in its entirety.

IT IS SO ORDERED!

[Judge's Electronic Signature Page to Follow]



Horry Common Pleas

Case Caption: BEI Beach LLC , plaintiff, et al VS Mashburn Christman JV ,
defendant, et al

Case Number: 2015CP2607275

Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2020-01-03 11:41:40 page 3 of 3

From: [Seals, William Law Clerk \(Catherine Holland\)](#)
To: [Seals, William Secretary \(Anna Meetze\)](#)
Cc: [Chip Bruorton](#); [Suzy Eschenbrenner](#); [A. Aikman](#); [Abby Saunders](#); [Alex Joyner](#); [Alex Russell](#); [Michael Wilkes](#); [Alexandra Lemons](#); [Amanda Camp](#); [Barbara Wagner](#); [Barbara Wilson](#); [Barnwell Fishburne](#); [Batten Farrar](#); [Beth Tobul](#); [Bill Lyles](#); [Brent M. Boyd, Esquire](#); [Brian Autry](#); [Brian Wolfe](#); [C. Anderson](#); [C. Kirkland](#); [C. Legrand](#); [Caleb Riser](#); [Carla Lindler](#); [Caroline Lankford](#); [Caroline McIntosh](#); [Carter Massingill](#); [Catherine Walley](#); [Christina Bisset](#); [Cindy Porter](#); [Construction Paralegal](#); [Danielle Bange](#); [David Cobb](#); [David Parrish](#); [David Sligh](#); [Dawn Abernathy](#); [Duffie Powers](#); [Elizabeth Nicholson](#); [Emily Gifford](#); [Frank Staiano](#); [Gail Vieth](#); [Gayle Millage](#); [Heather Hagen](#); [Helen Elliott](#); [Heyward Grimball](#); [James Elliott](#); [Jamie Flynn](#); [Janet Segell](#); [Jay Jones](#); [Jeanne Lyles](#); [John Paul Simkovich](#); [Jon Asbill](#); [Jonathan L. Anderson](#); [Joshua Bennett](#); [Julie Owens](#); [Kacey Huff](#); [Kathryn Mixson](#); [Kevin Mims](#); [Kimberly Westmoreland](#); [kkehoe@gwblawfirm.com](#); [Laura Phillips](#); [Markey Stubbs](#); [Matt Tillman](#); [Megan Stacy](#); [Michael Barfield](#); [Michael Ethridge](#); [Miriam Peeler](#); [Paige Ornduff](#); [Patricia Reconnu](#); [Paul Sperry](#); [Robert Gunst](#); [Robert Hawk](#); [Robin Herron](#); [Robyn Atrial](#); [Ron Tate](#); [Shanna Stephens](#); [Sheila Clause](#); [Shelley Hunka](#); [Summers Clarke](#); [Susan Gladden](#); [Susan Hatch](#); [Thomas Dudley](#); [Timothy Dargan](#); [Whidbee Perrin](#); [William Warnock](#)
Subject: RE: BEI-Beach, LLC v. Mashburn Christman, et al.
Date: Monday, November 4, 2019 10:37:57 AM

Counselors,

The Court appreciates your diligence and advocacy on behalf of your clients. After careful and deliberate consideration, Judge Seals hereby:

- 1) Grants Defendant Antunovich Associates, Inc.'s (Antunovich) Partial Motion for Summary Judgment as to Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc.'s (Lend Lease) first cause of action for contribution;
- 2) Grants Defendant Antunovich's Partial Motion for Summary Judgment as to Lend Lease's fifth cause of action for negligence/recklessness;
- 3) Grants Defendant Antunovich's Partial Motion for Summary Judgment as to Lend Lease's eighth cause of action for breach of warranty of plan's and specifications;
- 4) Denies BEI-Beach, LLC's Consent Motion to Amend Complaint;

Mr. Wilkes, please prepare proposed orders for the Court's previous four rulings.

- 5) Denies Wallcraft Construction Inc.'s Motion for Leave to Amend Third Party Complaint;

Mr. Autry, please prepare the above order.

- 6) Denies Nationwide Mutual Insurance Company's Motion to Intervene;
- 7) Grants Lend Lease's Motion to Amend its Answer; and
- 8) Grants Lend Lease's Motion for Ordered Mediation to be held by the end of January 2020.

Mr. Bruorton, please prepare proposed orders for the Court's previous three rulings.

- 9) Lend Lease's Motion to Bifurcate not ruled upon.

Furthermore, Judge Seals requests that the prepared orders be reasonably short and non-argumentative. Please prepare and e-file the orders by November 18, 2019. Once the orders are uploaded for the Judge's signature, please send me an email letting me know. If I may be of assistance to anyone, please let me know.

I hope everyone has a nice week.

Best,

C. Hunter Holland

Law Clerk to the Honorable William H. Seals, Jr.
Circuit Court Judge, At-Large, Seat 6
103 North Main Street
Marion, South Carolina
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**From:** [Seals, William Law Clerk \(Catherine Holland\)](#)  
**To:** [Laura Croft](#); [Seals, William Secretary \(Anna Meetze\)](#)  
**Cc:** [A. Aikman](#); [Abby Saunders](#); [Alex Joyner](#); [Alex Russell](#); [Alexandra Lemons](#); [Amanda Camp](#); [Amanda Castellano](#); [Barbara Wagner](#); [Barbara Wilson](#); [Barnwell Fishburne](#); [Batten Farrar](#); [Beth Tobul](#); [Bill Lyles](#); [Brent M. Boyd](#); [Esquire](#); [Brian Autry](#); [Brian Wolfe](#); [C. Anderson](#); [C. Kirkland](#); [C. Legrand](#); [Caleb Riser](#); [Carla Lindler](#); [Caroline Lankford](#); [Caroline McIntosh](#); [Carter Massingill](#); [Catherine Walley](#); [Chip Bruorton](#); [Christina Bisset](#); [Cindy Porter](#); [Construction Paralegal](#); [Danielle Bange](#); [David Cobb](#); [David Parrish](#); [David Sligh](#); [Dawn Abernathy](#); [Duffie Powers](#); [Elizabeth Nicholson](#); [Emily Gifford](#); [Frank Staiano](#); [Gail Vieth](#); [Gayle Millage](#); [Heather Hagen](#); [Helen Elliott](#); [Heyward Grimball](#); [James Elliott](#); [Jamie Flynn](#); [Janet Segell](#); [Jay Jones](#); [Jeanne Lyles](#); [John Paul Simkovich](#); [Jon Asbill](#); [Jonathan L. Anderson](#); [Joshua Bennett](#); [Julie Owens](#); [Kacey Huff](#); [Kathryn Mixson](#); [Kevin Mims](#); [Kimberly Westmoreland](#); [Laura Phillips](#); [Markey Stubbs](#); [Matt Tillman](#); [Megan Stacy](#); [Michael Barfield](#); [Michael Ethridge](#); [Mike Wilkes](#); [Miriam Peeler](#); [Paige Ornduff](#); [Patricia Reconnu](#); [Paul Sperry](#); [Robert Gunst](#); [Robert Hawk](#); [Robin Herron](#); [Robyn Ariail](#); [Ron Tate](#); [Shanna Stephens](#); [Sheila Clause](#); [Shelley Hunka](#); [Sheryl Beczynski](#); [Summers Clarke](#); [Susan Gladden](#); [Susan Hatch](#); [Thomas Dudley](#); [Timothy Dargan](#); [Whidbee Perrin](#); [William Warnock](#)  
**Subject:** RE: BEI-Beach, LLC v. Lend Lease (US) Construction, Inc., et al. (Case No: 2015-CP-26-7275)  
**Date:** Tuesday, December 3, 2019 12:23:57 PM

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Counselors,

As always, the Court appreciates your continued diligence and advocacy on behalf of your clients. After careful and deliberate reconsideration of the motions, arguments and case law, Judge Seals hereby denies the Motion to Reconsider, Alter or Amend the Order made by Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc. Mr. Wilkes, Judge Seals requests that you prepare a very short and non-argumentative order to that effect. Please submit the prepared order to all other counsel for their review, prior to submitting to the Court. Once downloaded to the Que, please send an email advising that the proposed order is ready for electronic signature. If I may be of any assistance, please do not hesitate to reach out. I hope everyone has a nice rest of the week.

Best,

***C. Hunter Holland***

Law Clerk to the Honorable William H. Seals, Jr.  
Circuit Court Judge, At-Large, Seat 6  
103 North Main Street  
Marion, South Carolina  
Ph: (843) 423-0446  
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---

**From:** Laura Croft <lcroft@rosenhagood.com>  
**Sent:** Wednesday, November 27, 2019 11:16 AM  
**To:** Seals, William Secretary (Anna Meetze) <wsealssc@sccourts.org>; Seals, William Law Clerk (Catherine Holland) <wsealslc@sccourts.org>  
**Cc:** A. Aikman <aaikman@barnwell-whaley.com>; Abby Saunders <Abby.saunders@mgclaw.com>; Alex Joyner <Ajoyner@wilkeslaw.com>; Alex Russell <arussell@slk-law.com>; Alexandra Lemons <asaber@carlockcopeland.com>; Amanda Camp <Acamp@wilkeslaw.com>; Amanda Castellano <Amanda.Castellano@rtt-law.com>; Barbara Wagner <bwagner@barnwell-whaley.com>; Barbara Wilson <bawilson@murphygrantland.com>; Barnwell Fishburne <bfishburne@lmlawllp.com>; Batten Farrar <bfarrar@gwblawfirm.com>; Beth Tobul <Btobul@richardsonplowden.com>; Bill Lyles <bill@billyleslaw.com>; Brent M. Boyd, Esquire <bboyd@murphygrantland.com>; Brian Autry <autry@conlaw.com>; Brian Wolfe <bwolfe@baucomclaytor.com>; C. Anderson

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**Subject:** BEI-Beach, LLC v. Lend Lease (US) Construction, Inc., et al. (Case No: 2015-CP-26-7275)

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. **\*\*\***

Ms. Holland,

Good morning! Lend Lease filed a Motion to Reconsider yesterday afternoon and I am attaching it for your review and for Judge Seals.

If you have any questions, please let us know.

I hope you and your family have a Happy Thanksgiving.

Sincerely,

Laura

Laura Croft

*|Paralegal|*

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BEI-Beach, LLC,

Plaintiff,

vs.

Mashburn Christman, LLC, Lend Lease (US)
Construction Inc. f/k/a Bovis Lend Lease, Inc.,
and McCrory Construction Company, LLC,

Defendants.

IN THE CIRCUIT COURT

Case No.

COMPLAINT

Plaintiff BEI Beach, LLC ("BEI"), complaining of the Defendants would allege and prove the following:

PARTIES, JURISDICTION, AND VENUE

1. BEI is a Delaware limited liability company with its principal place of business in Myrtle Beach, South Carolina. BEI is the owner of the Market Common, a mixed use development including retail and residential, in Myrtle Beach.

2. Defendant Mashburn Christman, LLC ("Mashburn Christman") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. Mashburn Christman was one of the general contractors for a portion of the Market Common.

3. Defendant Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. ("Lend Lease") is, upon information and belief, a Florida corporation engaged in the business of construction contracting in South Carolina. Lend Lease was one of the general contractors for a portion of the Market Common.

4. Defendant McCrory Construction Company, LLC ("McCrory") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. McCrory was one of the general contractors for a portion of the Market Common.

5. Jurisdiction and venue are proper in this Court.

FACTS

6. The Market Common was originally owned by an entity named LUK-MB1, LLC. LUK-MB1, LLC contracted with the Defendants to construct certain portions of the Market Common.

7. The Market Common buildings at issue in this matter are identified in the design documents as Buildings A-2, A-3, A-4, A-5, A-6, A-7, and A-8.

8. McCrory constructed Buildings A-2 and A-5. Mashburn Christman constructed Buildings A-3 and A-4. Lend Lease constructed Buildings A-6, A-7, and A-8.

9. McCrory achieved substantial completion of Buildings A-2 and A-5 on March 24, 2008. Mashburn Christman achieved Substantial Completion of Buildings A-3 and A-4 on April 3, 2008. Lend Lease achieved Substantial Completion of Buildings A-6, A-7, and A-8 in March 2008.

10. The Defendants were under a duty to develop, construct and/or repair and supply defect-free buildings and building components that make up the Market Common buildings at issue in this matter, in accordance with the applicable building code and construction industry standards.

11. On January 7, 2011, BEI purchased the Market Common from LUK-MB1, LLC out of receivership.

12. BEI was purchased by HomeFed Corporation ("HomeFed") on March 28, 2014. HomeFed then took over management responsibility for the Market Common.

13. Following purchase of the Market Common, Plaintiff became aware of defects and deficiencies in the Market Common buildings.

14. Through its undersigned counsel, BEI engaged Applied Building Sciences, Inc. to conduct investigations of the defects and deficiencies. As a result of those investigations, BEI discovered that:

- a. The exterior stucco has been misapplied on Buildings A-2 through A-8, resulting in cracking, efflorescence, failure of water resistance, water intrusion, and damage to substructures, including elements of the building envelopes and interior floors, walls, and ceilings.
- b. Improper flashing or no flashing at all was installed around windows and other building envelope penetrations in various locations on Buildings A-2 through A-8, resulting in water intrusion and damage to substructures, including elements of the building envelope and interior walls.
- c. Improper waterproofing was installed on external walkways, resulting in water intrusion and damage to substructures, including metal framing.
- d. External guardrail assemblies were installed in violation of applicable building codes in regard to the required width of gaps in the assemblies.
- e. Building envelope elements were constructed without proper weeps and channels to allow for water to escape, resulting in damage to substructures.
- f. Portions of the roofs were improperly installed, resulting in water intrusion and damage to substructures and interior walls and ceilings.

15. BEI is informed and believes that the damages resulting from these defects must be repaired in order for the Market Common buildings to function as intended.

16. As a result of the defects, BEI has been damaged by way of repair costs, loss of use, and such other damages as may be determined at trial.

FOR A FIRST CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
(Breach of Implied Warranty)

17. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

18. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

19. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

20. As a result of Mashburn Christman's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Mashburn Christman in such amounts as are proven at trial.

FOR A SECOND CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

21. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

22. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

23. Mashburn Christman was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-3 and A-4;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements;
- h. In improper installation of roofs and related flashing; and
- i. In other deficiencies and failures to be proven at trial.

24. BEI is entitled to judgment against Mashburn Christman for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A THIRD CAUSE OF ACTION
AS TO LEND LEASE
(Breach of Implied Warranty)

25. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

26. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

27. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

28. As a result of Lend Lease's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Lend Lease in such amounts as are proven at trial.

FOR A FOURTH CAUSE OF ACTION
AS TO LEND LEASE
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

29. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

30. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

31. Lend Lease was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-6, A-7, and A-8;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;

- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

32. BEI is entitled to judgment against Lend Lease for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A FIFTH CAUSE OF ACTION
AS TO MCCRORY
(Breach of Implied Warranty)

33. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

34. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

35. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

36. As a result of McCrory's breach of the warranty of workmanlike service, BEI is entitled to a judgment against McCrory in such amounts as are proven at trial.

FOR A SIXTH CAUSE OF ACTION
AS TO MCCRORY
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

37. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

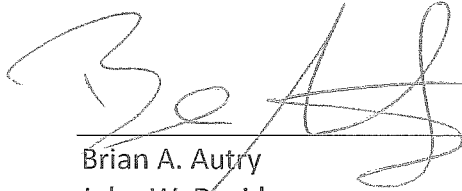
38. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

39. McCrory was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-2 and A-5;
- b. In improper installing and constructing the exterior wall systems and related flashing and waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and cement board cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

40. BEI is entitled to a judgment against McCrory for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

WHEREFORE, Plaintiff prays that the Court enter judgment in its favor on all causes of action against the Defendants and award Plaintiff damages in the amounts to be proven at trial.

A handwritten signature in black ink, appearing to read "Be AS", is written over a horizontal line.

Brian A. Autry
John W. Davidson
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Attorneys for Plaintiff, BEI Beach, LLC

September 30, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BEI-Beach, LLC,

Plaintiff,

vs.

Mashburn Christman, JV, Lend Lease (US)
Construction, Inc. f/k/a Bovis Lend Lease,
Inc., and McCrory Construction Company,
LLC,

Defendants.

Mashburn Christman, JV,

Third-Party Plaintiff,

vs.

Wallcraft Construction, Inc.; Alpha
Insulation & Waterproofing, Inc., Baker
Roofing, Inc., Collins & Wright, Inc.; Liberty
Mutual Insurance Company; Old Republic
Surety Company; Hartford Fire Insurance
Co.; Travelers Casualty and Surety Company
of America, The Muhler Company, Inc.; and
Companion Property and Casualty
Insurance Company,

Third-Party Defendants.

IN THE CIRCUIT COURT

Case No. 2015-CP-26-07275

AMENDED COMPLAINT

Lend Lease (US) Construction Inc. f/k/a
Lend Lease, Inc.,

Third-Party Plaintiff,

vs.

Spann Roofing & Sheet Metal, Inc.;
Travelers Casualty and Surety Company of
America; Strickland Waterproofing
Company; Merchants Bonding Company;
Everest Reinsurance Company; Wallcraft
Construction, Inc.; Old Republic Insurance
Company; Madison Construction Group,
Inc.; Worthington Integrated Building
Systems; McDowell Commercial
Construction, LLC; Jollay Masonry; National
Fire Insurance Company of Hartford; and
R.J. Kenney Associates, Inc.,

Third-Party Defendants.

McCrory Construction Company, LLC,

Third-Party Plaintiff,

vs.

Collins and Wright; Baker Roofing;
Glasstech, Inc.; Palmetto State Roofing and
Sheet Metal; Strickland Waterproofing;
Maiday, Inc., and Atlas Drywall & Acoustics,
Inc.,

Third-Party Defendants.

Plaintiff BEI Beach, LLC ("BEI"), complaining of the Defendants would allege and prove
the following:

PARTIES, JURISDICTION, AND VENUE

1. BEI is a Delaware limited liability company with its principal place of business in Myrtle Beach, South Carolina. BEI is the owner of the Market Common, a mixed use development including retail and residential, in Myrtle Beach.

2. Defendant Mashburn Christman, JV ("Mashburn Christman") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. Mashburn Christman was one of the general contractors for a portion of the Market Common.

3. Defendant Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. ("Lend Lease") is, upon information and belief, a Florida corporation engaged in the business of construction contracting in South Carolina. Lend Lease was one of the general contractors for a portion of the Market Common.

4. Defendant McCrory Construction Company, LLC ("McCrory") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. McCrory was one of the general contractors for a portion of the Market Common.

5. Jurisdiction and venue are proper in this Court.

FACTS

6. The Market Common was originally owned by an entity named LUK-MB1, LLC. LUK-MB1, LLC contracted with the Defendants to construct certain portions of the Market Common.

7. The Market Common buildings at issue in this matter are identified in the design documents as Buildings A-2, A-3, A-4, A-5, A-6, A-7, and A-8.

8. McCrory constructed Buildings A-2 and A-5. Mashburn Christman constructed Buildings A-3 and A-4. Lend Lease constructed Buildings A-6, A-7, and A-8.

9. McCrory achieved substantial completion of Buildings A-2 and A-5 on March 24, 2008. Mashburn Christman achieved Substantial Completion of Buildings A-3 and A-4 on April 3, 2008. Lend Lease achieved Substantial Completion of Buildings A-6, A-7, and A-8 in March 2008.

10. The Defendants were under a duty to develop, construct and/or repair and supply defect-free buildings and building components that make up the Market Common buildings at issue in this matter, in accordance with the applicable building code and construction industry standards.

11. On January 7, 2011, BEI purchased the Market Common from LUK-MB1, LLC out of receivership.

12. BEI was purchased by HomeFed Corporation ("HomeFed") on March 28, 2014. HomeFed then took over management responsibility for the Market Common.

13. Following purchase of the Market Common, Plaintiff became aware of defects and deficiencies in the Market Common buildings.

14. Through its undersigned counsel, BEI engaged Applied Building Sciences, Inc. to conduct investigations of the defects and deficiencies. As a result of those investigations, BEI discovered that:

- a. The exterior stucco has been misapplied on Buildings A-2 through A-8, resulting in cracking, efflorescence, failure of water resistance, water intrusion, and damage to substructures, including elements of the building envelopes and interior floors, walls, and ceilings.

- b. Improper flashing or no flashing at all was installed around windows and other building envelope penetrations in various locations on Buildings A-2 through A-8, resulting in water intrusion and damage to substructures, including elements of the building envelope and interior walls.
- c. Improper waterproofing was installed on external walkways, resulting in water intrusion and damage to substructures, including metal framing.
- d. External guardrail assemblies were installed in violation of applicable building codes in regard to the required width of gaps in the assemblies.
- e. Building envelope elements were constructed without proper weeps and channels to allow for water to escape, resulting in damage to substructures.
- f. Portions of the roofs were improperly installed, resulting in water intrusion and damage to substructures and interior walls and ceilings.

15. BEI is informed and believes that the damages resulting from these defects must be repaired in order for the Market Common buildings to function as intended.

16. As a result of the defects, BEI has been damaged by way of repair costs, loss of use, and such other damages as may be determined at trial.

FOR A FIRST CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
(Breach of Implied Warranty)

17. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

18. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

19. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

20. As a result of Mashburn Christman's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Mashburn Christman in such amounts as are proven at trial.

FOR A SECOND CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

21. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

22. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

23. Mashburn Christman was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-3 and A-4;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;

- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements;
- h. In improper installation of roofs and related flashing; and
- i. In other deficiencies and failures to be proven at trial.

24. BEI is entitled to judgment against Mashburn Christman for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A THIRD CAUSE OF ACTION
AS TO LEND LEASE
(Breach of Implied Warranty)

25. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

26. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

27. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

28. As a result of Lend Lease's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Lend Lease in such amounts as are proven at trial.

FOR A FOURTH CAUSE OF ACTION
AS TO LEND LEASE
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

29. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

30. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

31. Lend Lease was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-6, A-7, and A-8;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

32. BEI is entitled to judgment against Lend Lease for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A FIFTH CAUSE OF ACTION
AS TO MCCRORY
(Breach of Implied Warranty)

33. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

34. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

35. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

36. As a result of McCrory's breach of the warranty of workmanlike service, BEI is entitled to a judgment against McCrory in such amounts as are proven at trial.

FOR A SIXTH CAUSE OF ACTION
AS TO MCCRORY
(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)

37. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

38. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

39. McCrory was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-2 and A-5;
- b. In improper installing and constructing the exterior wall systems and related flashing and waterproofing;

- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and cement board cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

40. BEI is entitled to a judgment against McCrory for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

WHEREFORE, Plaintiff prays that the Court enter judgment in its favor on all causes of action against the Defendants and award Plaintiff damages in the amounts to be proven at trial.

s/Brian A. Autry

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Attorneys for Plaintiff, BEI Beach, LLC

April 7, 2017
 Columbia, South Carolina

| | | |
|---|---|--------------------------------------|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | CASE NO. 2015-CP-26-7275 |
| COUNTY OF HORRY |) | |
| |) | |
| BEI- Beach, LLC, |) | |
| |) | LEND LEASE (US) CONSTRUCTION, |
| Plaintiff, |) | INC. f/k/a BOVIS LEND LEASE, |
| |) | INC.'S ANSWER TO PLAINTIFF'S |
| Mashburn Christman, JV, Lend Lease (US) |) | AMENDED COMPLAINT & LEND |
| Construction, Inc., f/k/a Bovis Lend Lease, Inc., |) | LEASE'S AMENDED THIRD-PARTY |
| and McCrory Construction Company, LLC, |) | COMPLAINT |
| |) | (Jury Trial Demanded) |
| Defendants. |) | |
| |) | |
| Mashburn Christman, JV, |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| Wallcraft Construction, Inc.; Alpha Insulation & |) | |
| Waterproofing, Inc., Baker Roofing, Inc., Collins |) | |
| & Wright, Inc.; Liberty Mutual Insurance |) | |
| Company; Old Republic Surety Company; |) | |
| Hartford Fire Insurance Co.,; Travelers Casualty |) | |
| and Surety Company of America, The Muhler |) | |
| Company, Inc.; and Companion Property and |) | |
| Casualty Insurance Company, |) | |
| |) | |
| Third-Party Defendants. |) | |
| |) | |
| Lend Lease (US) Construction Inc. f/k/a Bovis |) | |
| Lend Lease, Inc. |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| Spann Roofing & Sheet Metal, Inc., Travelers |) | |
| Casualty and Surety Company of America, |) | |
| Strickland Waterproofing Company, Merchants |) | |
| Bonding Company, Everest Reinsurance |) | |
| Company, Wallcraft Construction, Inc., Old |) | |
| Republic Insurance Company; Madison |) | |
| Construction Group, Inc., Worthington |) | |
| Integrated Building Systems, McDowell |) | |
| Commercial Construction, LLC., Jollay |) | |
| Masonry, National Fire Insurance Company of |) | |
| Hartford, R.J. Kenney Associates, Inc., Joseph |) | |
| Antunovich, Antunovich Associates, TG |) | |
| Construction, LLC, Luis Banegas d/b/a Luis |) | |

| | |
|---|---|
| Trim Work, Nora Del Carmen Lagos, Nora |) |
| Del Carmen Lagos d/b/a Luis Trim Work and |) |
| Ovation Custom Trim, LLC. |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| McCrory Construction Company, LLC, |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| Vs. |) |
| |) |
| Collins and Wright; Baker Roofing; Glasstech |) |
| Inc.; Palmetto State Roofing and Sheet Metal; |) |
| Strickland Waterproofing; Maiday, Inc., and |) |
| Atlas Drywall & Acoustics, Inc., |) |
| |) |
| Third-Party Defendants. |) |
| |) |

Lend Lease (US) Construction Inc., formerly known as Bovis Lend Lease, Inc. (“Lend Lease”), in answer to the Plaintiff’s Amended Complaint, and by way of Third-Party Complaint alleges and states as follows:

I. FOR A FIRST DEFENSE

1. Each and every allegation which is not hereinafter specifically admitted, modified or explained is hereby denied.
2. Lend Lease admits the allegations of Paragraphs 1 and 2 upon information and belief.
3. Lend Lease admits the allegations of Paragraph 3.
4. Lend Lease admits the allegations of Paragraphs 4 and 5 upon information and belief.
5. Lend Lease admits the allegations of Paragraph 6.
6. Lend Lease admits the allegations of Paragraphs 7, 8 and 9 upon information and belief.

7. Lend Lease admits the allegations of Paragraph 10.
8. Lend Lease admits the allegations of Paragraphs 11, 12 and 13 upon information and belief.
9. Lend Lease denies the allegations of Paragraphs 14, 15, and 16.

**AS TO THE FIRST CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
(Breach of Implied Warranty)**

10. By way of response to Paragraph 17, Lend Lease reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

11. The allegations of Paragraphs 18, 19 and 20 are directed at a Defendant other than Lend Lease and do not require a response from Lend Lease. To the extent the allegations of Paragraphs 18, 19 and 20 can be construed as requiring a response from Lend Lease, Lend Lease denies the same and demands strict proof thereof.

**AS TO THE SECOND CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness and Wantonness)**

12. By way of response to Paragraph 21, Lend Lease reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

13. The allegations of Paragraphs 22, 23 and 24 are directed at a Defendant other than Lend Lease and do not require a response from Lend Lease. To the extent the allegations of Paragraphs 22, 23 and 24 can be construed as requiring a response from Lend Lease, Lend Lease denies the same and demands strict proof thereof.

**AS TO THE THIRD CAUSE OF ACTION
AS TO LEND LEASE
(Breach of Implied Warranty)**

14. By way of response to Paragraph 25, Lend Lease reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

15. Lend Lease admits the allegations of Paragraph 26.

16. Lease Lease denies the allegations of Paragraphs 27 and 28 as written and demands strict proof thereof.

**AS TO THE FOURTH CAUSE OF ACTION
AS TO LEND LEASE
(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness and Wantonness)**

17. By way of response to Paragraph 29, Lend Lease reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

18. Lend Lease denies the allegations of Paragraph 30 as written and demands strict proof thereof.

19. Lend Lease denies the allegations of Paragraphs 31, including subparts, and 32 and demands strict proof thereof.

**AS TO THE FIFTH CAUSE OF ACTION
AS TO McCrory
(Breach of Implied Warranty)**

20. By way of response to Paragraph 33, Lend Lease reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

21. The allegations of Paragraphs 34, 35 and 36 are directed at a Defendant other than Lend Lease and do not require a response from Lend Lease. To the extent the allegations of Paragraphs 34, 35 and 36 can be construed as requiring a response from Lend Lease, Lend Lease denies the same and demands strict proof thereof.

**AS TO THE SIXTH CAUSE OF ACTION
AS TO McCrORY
(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness and Wantonness)**

22. By way of response to Paragraph 37, Lend Lease reasserts and realleges the above Paragraphs as if fully restated herein verbatim.

23. The allegations of Paragraphs 38, 39, and 40 are directed at a Defendant other than Lend Lease and do not require a response from Lend Lease. To the extent the allegations of Paragraphs 38, 39 and 40 can be construed as requiring a response from Lend Lease, Lend Lease denies the same and demands strict proof thereof.

24. Lend Lease denies that Plaintiff is entitled to the relief requested in its WHEREFORE clause.

**FOR A SECOND DEFENSE
(Failure to State a Claim)**

25. Further and affirmatively answering the Plaintiff's Complaint and as an additional and complete defense thereto, Plaintiff's Complaint should be dismissed pursuant to S.C. R. CIV. PRO. 12(b)(6) for failure to state facts sufficient to constitute a claim against Skanska.

**FOR A THIRD DEFENSE
(Warranties of Others)**

26. Further and affirmatively answering the Plaintiff's Complaint and as an additional and complete defense thereto, Lend Lease is in no way responsible for any warranties or representation of others.

**FOR A FOURTH DEFENSE
(Superseding/Intervening Negligence)**

27. Further and affirmatively answering the Complaint and as an additional and complete defense thereto, the claims of Plaintiff are barred because even if Lend Lease was negligent as alleged by Plaintiff, which is specifically denied, the intervening and/or superseding

negligence of an entity or entities other than Lend Lease was the direct and proximate cause of the damages, if any, suffered by Plaintiff.

FOR A FIFTH DEFENSE

(Failure to Mitigate)

28. Further and affirmatively answering, Lend Lease alleges Plaintiff failed to mitigate its damages, if any.

FOR A SIXTH DEFENSE

(Statute of Limitations/Statute of Repose)

29. Further and affirmatively answering, Lend Lease alleges that Plaintiff's claims are barred by the applicable statute of limitations and statute of repose.

FOR A SEVENTH DEFENSE

(Rights under section 15-38-15 of the SC Code)

30. To the extent that the Plaintiff establishes that it has suffered damages, the fact finder is permitted to allocate the fault of all tortfeasors and potential tortfeasors on a special verdict form. Therefore, Lend Lease affirmatively states that it has rights to allocation under section 15-38-15 of the South Carolina Code and hereby provide notice of its intention to request such relief if a verdict is reached in favor of the Plaintiff.

FOR AN EIGHT DEFENSE

(Actual Notice/Assumption of Risk)

31. Further and affirmatively answer, Lend Lease alleges that Plaintiff's claims are barred as Plaintiff had actual notice of the deficiencies alleged in its complaint when it purchased the property and assumed the risk of any consequential losses from the alleged deficiencies.

FOR A NINTH DEFENSE

(Reservation of Additional Defenses)

32. Defendant Lend Lease reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner

that is consistent with the South Carolina Rules of Civil Procedure.

**AS A TENTH DEFENSE AND
BY WAY OF THIRD-PARTY CLAIMS**

33. Defendant/Third Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. (“Lend Lease”), complaining of Spann Roofing & Sheet Metal, Inc. (“Spann”), Travelers Casualty and Surety Company of America (“Travelers”), Strickland Waterproofing Company (“Strickland”), Merchants Bonding Company (“Merchants”), Everest Reinsurance Company (“Everest”), Wallcraft Construction, Inc. (“Wallcraft”), Old Republic Insurance Company (“Old Republic”), Madison Construction Group, Inc. (“Madison”), Worthington Integrated Building Systems (“Worthington”), McDowell Commercial Construction (“McDowell”), Jollay Masonry (“Jollay”), National Fire Insurance Company (“National Fire”), R.J. Kenney Associates, Inc. (“RJ Kenney”), Joespeh Antunovich, individually and Antunovich Associates (together referred to as “Architect”), TG Construction, LLC (“TG”), Luis Banegas d/b/a Luis Trim Work (“Banegas”), Nora Del Carmen Lagos (“Lagos”), Nora Del Carmen Lagos d/b/a Luis Trim Work (“Trim Work”) and Ovation Custom Trim, LLC (“Ovation”) all collectively referred to herein as “Third-Party Defendants”, would respectfully show unto this Court the following:

34. Defendant/Third-Party Plaintiff Lend Lease is a Florida limited liability company licensed in the State of South Carolina and engaged in doing business in the State of South Carolina.

35. Upon information and belief, Spann is a corporation organized and existing under the laws of the State of South Carolina engaged in doing business in the State of South Carolina, including performing work on the Market Common Project in Myrtle Beach, South Carolina (hereinafter referred to as “Project”), which is the subject of this matter.

36. Upon information and belief, Travelers is a surety company licensed to do business in the State of South Carolina and provided a performance bond as surety to Spann for the Project.

37. Upon information and belief, Strickland is a company organized and existing under the laws of the State of North Carolina, and at all time relevant hereto conducted business in South Carolina, including performing work on the Project, which is the subject of this matter.

38. Upon information and belief Merchants is a surety company licensed to do business in the State of South Carolina and provided a performance bond as surety to Strickland for the Project.

39. Everest Reinsurance Company is a surety company licensed to do business in the State of South Carolina and provided a performance bond as surety to Strickland for the Project.

40. Upon information and belief, Wallcraft is a corporation organized and existing under the laws of the State of Georgia, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

41. Upon information and belief, Old Republic is a surety company licensed to do business in the State of South Carolina and provided a performance bond as surety to Wallcraft for the Project.

42. Upon information and belief, Madison is a corporation organized and existing under the laws of the State of North Carolina, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

43. Upon information and belief, Worthington is a corporation organized and existing under the laws of the State of Ohio, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

44. Upon information and belief, McDowell is a corporation organized and existing under the laws of the State of South Carolina, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

45. Upon information and belief, Jollay is a corporation organized and existing under the laws of the State of Georgia, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

46. Upon information and belief, National Fire is a surety company licensed to do business in the State of South Carolina and provided a performance bond as surety to Wallcraft for the Project.

47. Upon information and belief, RJ Kenny is a corporation organized and existing under the laws of the State of Massachusetts, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

48. Upon information and belief Joseph Antunovich is, or at all times pertinent hereto, a licensed design professional in the State of South Carolina.

49. Upon information and belief Antunovich Associates is a corporation organized and existing under the laws of the state of Illinois and at all times relevant hereto conducted business in the State of South Carolina, including providing design professionals services on the Project, which is the subject of this matter.

50. Upon information and belief, TG is a corporation organized and existing under the laws of the State of North Carolina, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

51. Upon information and belief, Banegas is a citizen and resident of the State of South Carolina and does business as Luis Trim Work in South Carolina, including performing work on the Project, which is the subject of this matter.

52. Upon information and belief, Lagos is a citizen and resident of the State of South Carolina and does business as Luis Trim Work in South Carolina, including performing work on the Project, which is the subject of this matter.

53. Upon information and belief, Trim Work is a corporation organized and existing under the laws of the State of North Carolina, and at all times relevant hereto conducted business in South Carolina, including performing work on the Project, which is the subject of this matter.

54. Upon information and belief, Ovation is a corporation organized and existing under the laws of the State of North Carolina, and at all times relevant hereto conducted business in the State of South Carolina, including performing work on the Project, which is the subject of this matter.

55. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper in Horry County, South Carolina, which is the location of the Project.

56. Spann, Strickland, Wallcraft, Madison, Worthington, McDowell, and Jollay are referred to collectively herein as the Third-Party Subcontractor Defendants.

57. Joseph Antunovich and Antunovich Associates are referred to collectively herein as the Architect.

58. TG, Banegas, Lagos, Trim Work and Ovation are referred to collectively herein as the Third-Party Sub-subcontractor Defendants.

FACTS

59. Plaintiff, BEI-Beach, LLC has brought suit against various entities, including Lend Lease, claiming damages caused by alleged defective and deficient construction related to the Project.

60. Upon information and belief, Plaintiff purchased the Project from LUK-MB1, LLC., an Illinois limited liability company.

61. The Project consists of multiple buildings, with office, retail and residential mix-use.

62. The buildings at issue in this matter, as alleged by Plaintiff, are A-2, A-3, A-4, A-5, A-6, A-7 and A-8. Of those 7 buildings, Lend Lease served as the general contractor on buildings A-6, A-7 and A-8.

63. Upon information and belief, the Architect provided design professional services on A-2, A-3, A-4, A-5, A-6, A-7 and A-8.

64. The Plaintiff has sued Lend Lease claiming damages caused by alleged defective construction and violations of building code requirements related to the design and construction of the Project.

65. Lend Lease entered into subcontract agreements with Spann, Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry for various scopes of work on the Project. Madison, provided various scopes of work on the Project for Lend Lease through the financial support of another entity in order to meet Lend Lease's insurance and bonding requirements.

66. By virtue of Spann, Strickland, Wallcraft, Worthington, McDowell, Jollay Masonry and Madison ("Third-Party Subcontractor Defendants") providing services for the Project on behalf of Lend Lease, a special relationship was created and exists between Lend Lease and the Third-Party Subcontractor Defendants.

67. Lend Lease entered into a contract with RJ Kenny for building consulting services including material testing, product evaluations, building envelope condition surveys, building envelope design review, contract administration and construction inspections.

68. By virtue of RJ Kenny providing building envelope plan review, quality assurance review, quality control inspections, field testing and close out inspection services on behalf of Lend Lease, a special relationship was created and exists between Lend Lease and RJ Kenny.

69. The Architect entered into a contract with the Plaintiff to provide design professional services, including but not limited to material specifications and building envelope details along with providing those specifications and design documents to the Plaintiff and Contractor for use in the construction of the Project.

70. The Architect's obligations and responsibilities on the Project, including those obligations owed to Lend Lease as the general contractor, a special relationship was created and exists between Lend Lease and the Architect.

71. TG, Banegas, Lagos, Trim Work, and Ovation entered into a contract with Madison to provide siding, trim and related component part installation on the Project. As a subcontractor on the Project to Madison, the Sub-Subcontractor Defendants owed Lend Lease as the general contractor certain obligations and responsibilities; therefore, a special relationship was created and exists between Lend Lease and the Sub-Subcontractor Defendants.

72. Upon information and belief, Plaintiff's claims against Lend Lease arise in whole or in part out of the acts, omissions, including various breaches of warranty and the defective products, services and materials provided by the Third-Party Defendants.

73. Lend Lease has denied Plaintiff's substantive allegations and its claims against Lend Lease.

74. Although Lend Lease is without fault, by virtue of the alleged acts and omissions, including breaches of warranty and the defective products, services and materials provided by the Third-Party Defendants, Lend Lease has been subjected to the Plaintiffs' suit and to the costs, expenses, attorneys' fees and liabilities associated therewith.

75. The damages to Lend Lease included the costs and fees, including attorneys' fees, associated with the investigations and defense of the Plaintiffs claims, as well as special and consequential damages, including injury and damage to Lend Lease's business reputation and the liability for the damage to the Project building, which, according to Plaintiffs' allegations, include deterioration and failure of the building structure and systems due to the acts and omissions of the Third-Party Defendants, which combined to result in consequential damage to non-defective building components and other property.

FOR A FIRST CAUSE OF ACTION
(Contribution against Third-Party Defendants)

76. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

77. If Lend Lease becomes jointly and severally liable in tort to the Plaintiff, which liability is herein denied, Lend Lease is entitled to contribution from the Third Party Defendants who are also jointly and severally liable in tort to the Plaintiffs, in accordance with the South Carolina Contribution Among Tort Feasors Act (S.C. Code Ann. § 15-38-10, *et seq.*)

78. Pursuant to its right to contribution, Lend Lease is entitled to recover from the the Third-Party Defendants any and all amounts paid by Lend Lease in excess of its pro rata share of any common liability.

FOR A SECOND CAUSE OF ACTION

(Breach of Warranty against Third-Party Subcontractor Defendants
And Sub-Subcontractor Defendants)

79. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

80. The Third-Party Subcontractor Defendants and Sub-Subcontractor Defendants provided labor and materials for their various trades used in the construction of the Project.

81. As labor service providers, the Third-Party Subcontractor Defendants and Sub-Subcontractor Defendants expressly warranted their work and impliedly warranted that the work was performed with proper workmanship and in compliance with industry standards.

82. Upon information and belief, the work performed by the Third-Party Subcontractor Defendants and Sub-Subcontractor Defendants failed to meet industry standards and failed to conform to the warranties, whether express or implied, for proper workmanship.

83. The defective work performed by the respective Third-Party Subcontractor Defendants and Sub-Subcontractor Defendants constitutes breaches of the warranties applicable thereto.

84. As a result of the Third-Party Subcontractor Defendants and Sub-Subcontractor Defendants' breaches of these warranties, Lend Lease has incurred, and will continue to incur actual damages in the amount of any money adjudged to be owed to the Plaintiff by Lend Lease, or which Lend Lease must pay Plaintiff in settlement of the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action. In addition, Lend Lease has incurred and will continue to incur special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

85. Lend Lease is entitled to a judgment against the Third-Party Subcontractor Defendants and Sub-Subcontractor Defendants for its actual, special and consequential damages.

FOR A THIRD CAUSE OF ACTION

(Breach of Contract against Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry)

86. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

87. Lend Lease contracted with Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry to provide labor and materials and other services on the Project. Under terms of their respective subcontracts, Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry assumed a duty to perform their work correctly and in accordance with the plans and specifications independent of Lend Lease's supervision and/or inspection of their work.

88. Upon information and belief, Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry have failed to perform their work in accordance with industry standards and the plans and specifications applicable to the Project.

89. As a result of Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry's breach of contract, Lend Lease has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

90. Lend Lease is entitled to a judgment against Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry for its actual, special and consequential damages.

FOR A FOURTH CAUSE OF ACTION

(Breach of Contract against RJ Kenny)

91. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

92. Lend Lease contracted with RJ Kenny to provide, among other services, building envelope plan review, supplemental project documents, quality assurance review, construction administration services and quality control inspections.

93. Under terms of its contract, RJ Kenny assumed a duty to perform their work correctly, make changes in the building envelope details, if needed, verify subcontractor work compliance with contract documents, and noting any work deficiencies, improper product installation and deviations from the contract documents independent of Lend Lease's supervision and/or inspection of their subcontractor's work.

94. Upon information and belief, RJ Kenny failed to properly perform the work under its contract in accordance with industry standards and the quality assurance expectations applicable to the Project.

95. As a result of RJ Kenny's breach of contract, Lend Lease has incurred, and will continue to incur actual damages in an amount to be determined by the court, including lost value of contracted services, and may incur settlement costs in settling the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

96. Lend Lease is entitled to a judgment against RJ Kenny for its actual, special and consequential damages.

FOR A FIFTH CAUSE OF ACTION

(Third-Party Defendants Negligence/Gross Negligence/Recklessness)

97. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

98. The Third-Party Defendants undertook and owed a duty to Lend Lease to specify materials, construct various building components, oversee the Project and provide materials and services in accordance with applicable plans and specifications, applicable building codes, applicable manufacturer's instructions, generally recognized and accepted construction industry standards, and good construction practices.

99. The Plaintiff has alleged property damage resulting from alleged construction and design deficiencies that violate the applicable plans and specifications, applicable building codes, applicable manufacturer's instructions and generally recognized and accepted construction industry standards and good construction practices.

100. Plaintiffs' alleged property damage includes the deterioration and failure of the building structure and systems due to the careless, recklessly and gross negligence of the Third-Party Defendants, which combined to result in consequential damage to non-defective building components and other property and constitutes an occurrence under applicable policies of insurance for the Third-Party Defendants.

101. Lend Lease, as the Project's General Contractor, has incurred actual, special and consequential damages resulting from the careless, reckless and gross negligence of the Third-Party Defendants.

102. Based on the allegations of the Plaintiffs and the responsibilities undertaken by the Third-Party Defendants on the Project, the Third-Party Defendants breached their duty of due care owed to Lend Lease by recklessly selecting materials that were improper for installation at the Project, recklessly failing to install materials in accordance with applicable plans and specifications and recklessly failing to ensure proper levels of workmanship were achieved.

103. Specifically as to the design professional services, Third-Party Defendant Architect actions as it relates to the performance of his professional obligations owed to the Owner and

Contractor, constitutes a breach of a design professional's standard of care and responsibilities as set forth in the Affidavit of Richard H. Moore, P.E. being filed along herewith.

104. As a result of the Third-Party Defendants gross negligence and recklessness, Lend Lease has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

105. Lend Lease is entitled to a judgment against the Third-Party Defendants for its actual, special and consequential damages.

FOR A SIXTH CAUSE OF ACTION

(Contractual Indemnity as to Strickland, Wallcraft,
Worthington, McDowell, and Jollay Masonry)

106. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

107. Through their subcontracts, the Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry promised to perform their construction trades in a workmanlike manner, in accordance with the plans, specifications, Contract Documents, applicable building codes, and manufacturer installation instructions.

108. Investigations of the buildings' construction by construction professionals has revealed that Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry breached the promises they made to perform work in a workmanlike manner and in accordance with all Contract Documents and building codes.

109. Plaintiff has brought suit against Lend Lease seeking monetary damages against Lend Lease to repair the property damage caused by Strickland, Wallcraft, Worthington,

McDowell, and Jollay Masonry's work and to compensate Plaintiff for its loss of use of the premises.

110. Lend Lease has retained experts to investigate and assess the Plaintiffs' allegations.

111. Additionally, Lend Lease has retained attorneys and incurred legal costs to investigate and defend against Plaintiff's claims.

112. Lend Lease is experiencing and will continue to experience damages as a consequence of the Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry's failure to perform their work as promised.

113. Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry per their subcontracts with Lend Lease promised to indemnify and hold Lend Lease harmless from all claims, damages, losses, expenses, including attorneys' fees, arising out of or resulting from the their performance of work on the Project.

114. Lend Lease has tendered Plaintiffs' claim to the Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry and has demanded indemnity from them. To date, Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry have denied and/or refused to assume the defense of Lend Lease and provide the indemnity previously promised.

115. Lend Lease is entitled to judgment against Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry for any judgment rendered against it in favor of Plaintiff relating to defective work Strickland, Wallcraft, Worthington, McDowell, and Jollay Masonry, all expert costs, all attorneys' fees, and all litigation costs incurred in this matter, plus prejudgment interest on all liquidated sums.

FOR A SEVENTH CAUSE OF ACTION
(Equitable Indemnity as to the Third-Party Defendants)

116. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs

as if said allegations are set forth herein verbatim.

117. The Third-Party Defendants oversaw and installed the various building components installed at the Project.

118. The Third-Party Defendants recognized and understood that they were being placed in positions of trust and expected by Lend Lease to perform their work in accordance with workmanlike standards, the Contract Documents, and the applicable building codes.

119. Lend Lease relied on the Third-Party Defendants to abide by the building codes, manufacturer installation instructions, and the Contract Documents when performing work on the Project.

120. Lend Lease's reliance on the Third-Party Defendants was justified, as the Third-Party Defendants undertook and owed a duty to design and construct the Project and provide materials and services in accordance with applicable building codes, applicable manufacturer's instructions, generally recognized and accepted construction industry standards, and good construction practices throughout the construction of the Project.

121. Based on these circumstances, a special relationship existed between Lend Lease and the Third-Party Defendants.

122. Plaintiff has asserted claims against Lend Lease alleging property damage resulting from design and construction deficiencies.

123. Lend Lease denies that it has any responsibility for the Plaintiffs' damages.

124. Lend Lease retained experts to investigate and assess Plaintiffs' allegations.

125. Additionally, Lend Lease has retained attorneys and incurred legal costs to investigate and defend against Plaintiff's claims.

126. Lend Lease is experiencing and will continue to experience damages as a consequence of the Third-Party Defendant's failure to perform their work as expected.

127. To the extent, if any, that Lend Lease is held liable to the Plaintiff, in this action, such liability would be a direct and proximate result of the acts, omissions, negligence/gross negligence, recklessness, and/or representations of the Third-Party Defendants, which have damaged Lend Lease as Lend Lease has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

128. Lend Lease is entitled to full indemnification from the Third-Party Defendants for any liability Lend Lease is found to have to the Plaintiff, and Lend Lease is entitled to damages for the Third-Party Defendants acts, omissions, recklessness and gross negligence, entitling Lend Lease to recover from the Third-Party Defendants its attorney's fees, costs and other expenses incurred in defending this action.

FOR AN EIGHTH CAUSE OF ACTION

(Breach of Warranty of Plans and Specifications as to Architect)

129. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

130. The Architect provided design professional services, including material specification and building design details for use in the construction of the Project.

131. As Architect of record, the Architect warranted that its design plans and specifications would comply with building code requirements, local rules, ordinances and regulations, and in compliance with industry standards.

132. The Plaintiff has alleged multiple construction deficiencies for buildings A2, A3, A4, A5, A6, A7 and A8 of the project against three (3) separate general contractors who each had different subcontractors working for them. The only constant variable among all buildings alleged to have deficiencies by the Plaintiff is the Architect.

133. Deficiencies in the design professional services, as set forth in the Affidavit of Richard H. Moore, by the Architect constitutes a breach of the warranty of plans and specifications owed by the Architect to Lend Lease.

134. As a result of the Architect's breaches of warranty of plans and specifications, Lend Lease has incurred, and will continue to incur actual damages in the amount of any money adjudged to be owed to the Plaintiff by Lend Lease, or which Lend Lease must pay Plaintiff in settlement of the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action. In addition, Lend Lease has incurred and will continue to incur special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

135. Lend Lease is entitled to a judgment against the Architect for its actual, special and consequential damages.

FOR A NINTH CAUSE OF ACTION

(Payment Bond Claim Against Travelers, Merchants,
Everest, Old Republic and National Fire)

136. Lend Lease repeats and realleges the allegations set forth in the above Paragraphs as if said allegations are set forth herein verbatim.

137. As part of its subcontract obligations, Third-Party Defendant Spann obtained a subcontract performance bond from Travelers (Bond No. 104905389). The terms and conditions of the bond are incorporated herein by reference.

138. As part of its subcontract obligations, Third-Party Defendant Strickland obtained subcontract performance bonds from Merchants and Everest (Bond No. SCC 40164). The terms and conditions of the bond are incorporated herein by reference.

139. As part of its subcontract obligations, Third-Party Defendant Wallcraft obtained a subcontract performance bond from Old Republic (Bond No. CAN-1175384). The terms and conditions of the bond are incorporated herein by reference.

140. As part of its subcontract obligations, Third-Party Defendant Jollay Masonry obtained a subcontract performance bond from National Fire (Bond No. 92). The terms and conditions of the bond are incorporated herein by reference.

141. Travelers, Merchants, Everest, Old Republic and National Fire are collectively referred to as "Surety Third-Party Defendants".

142. The Plaintiff has alleged defects with the labor, materials and/or services provided by the Subcontractor Third-Party Defendants. Based on the Plaintiffs' alleged defects, the Subcontractor Third-Party Defendants are in default as that term is applicable to their respective performance bonds.

143. Lend Lease has notified all of the Surety Third-Party Defendants of the Subcontractor Third-Party Defendants' defaults and have complied with all conditions precedent to the enforcement of the respective performance bonds.

144. Based on the Third-Party Subcontractors' default on their contractual obligations, and Lend Lease's rights as Obligee on the respective performance bonds, Lend Lease is entitled to recover against the Surety Third-Party Defendants on their respective performance bonds issued for their principals.

WHEREFORE, Lend Lease prays unto this Court for the following relief:

- a. Award Lend Lease its damages, including special and consequential damages, on its Third-Party claims, including but not limited to, the amount of any settlement paid by Lend Lease to the Plaintiff or judgment

rendered against Lend Lease in favor of the Plaintiff and all attorney's fees and cost incurred by Lend Lease as a result of this action;

- b. Require the Third-Party Defendants to fully indemnify Lend Lease against all losses and expenses incurred as a result of Plaintiff's claims, including but not limited to, the amount of any settlement or judgment paid to Plaintiff by Lend Lease and all attorney's fees and cost incurred by Lend Lease as a result of this action; and
- c. Award Lend Lease such other and further relief as may be just and proper.

ROSEN, ROSEN & HAGOOD, LLC.

By: s/James A. Bruorton, IV
James A. Bruorton, IV, Esquire
Liam D. Duffy
151 Meeting Street, Suite 400
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

**ATTORNEY FOR LEND LEASE (US)
CONSTRUCTION INC. f/k/a BOVIS LEND
LEASE, INC.**

April 24, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BEI- Beach, LLC,

Plaintiff,

Mashburn Christman, JV, Lend Lease (US)
Construction, Inc., f/k/a Bovis Lend Lease, Inc.,
and McCrory Construction Company, LLC,

Defendants.

Mashburn Christman, JV,

Third-Party Plaintiff,

Wallcraft Construction, Inc.; Alpha Insulation &
Waterproofing, Inc., Baker Roofing, Inc., Collins
& Wright, Inc.; Liberty Mutual Insurance
Company; Old Republic Surety Company;
Hartford Fire Insurance Co.; Travelers Casualty
and Surety Company of America, The Muhler
Company, Inc.; and Companion Property and
Casualty Insurance Company,

Third-Party Defendants.

Lend Lease (US) Construction Inc. f/k/a Bovis
Lend Lease, Inc.

Third-Party Plaintiff,

vs.

Spann Roofing & Sheet Metal, Inc., Travelers
Casualty and Surety Company of America,
Strickland Waterproofing Company, Merchants
Bonding Company, Everest Reinsurance
Company, Wallcraft Construction, Inc., Old
Republic Insurance Company; Madison
Construction Group, Inc., Worthington
Integrated Building Systems, McDowell
Commercial Construction, LLC., Jollay

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-07275

**AFFIDAVIT OF
RICHARD H. MOORE, P.E.**

| | |
|---|----|
| Masonry, National Fire Insurance Company of |) |
| Hartford, and R.J. Kenney Associates, Inc. |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| McCrory Construction Company, LLC, |) |
| |) |
| Third-Party Plaintiff, |)) |
| |) |
| Vs. |) |
| |) |
| Collins and Wright; Baker Roofing; Glasstech |) |
| Inc.; Palmetto State Roofing and Sheet Metal; |) |
| Strickland Waterproofing; Maiday, Inc., and |) |
| Atlas Drywall & Acoustics, Inc., |) |
| |) |
| Third-Party Defendants. |) |
| |) |

PERSONALY APPEARED BEFORE ME, Richard H. Moore, who, after being first duly sworn, deposes and says as follows:

1. I, Richard H. Moore, am over 18 years of age and am fully competent to testify as to the matters stated in this affidavit.
2. I am a licensed engineer in the State of South Carolina as well as a Registered Roof Consultant (RRC), Registered Exterior Wall Consultant (REWC), Registered Waterproofing Consultant (RWC), Registered Building Envelope Consultant (RBEC), Certified Level I Unbonded PT Inspector and a Construction Document Technologist.
3. I have been regularly engaged as a professional engineer for more than 30 years with experience in building envelope design. Accordingly, I possess actual professional knowledge and experience in the field of engineering design.
4. I have reviewed, among other things, the architectural and structural details, drawings, and specifications prepared by and stamped by Antunovich Associates and Joseph M.

Antonovich, who was the Architect of Record for the Market Commons Project. I have also reviewed window submittals reviewed and approved by Antunovich for Market Common Buildings A6, A7 and A8.

5. In my professional opinion, the vinyl windows specified for the Market Common Project, Buildings A6, A7 and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which this Project is located. Specifically, the architectural project plans dated 12-27-06 show that negative wind pressures for the project were 59.3 psf for these partially enclosed buildings. Antunovich's supplemental instructions dated 4-2-07 modify specification 08561 to require minimum C45 grade windows with a DP45 rating. The window shop drawings approved by Antunovich dated 7-23-07 have a hand-written note that requires a minimum DP40. The local building code and ASTM 7-02 required a minimum DP 70 for Zone 5 for Buildings A6, A7 and A8.
6. It is my opinion, to a reasonable degree of professional certainty, a reasonably prudent design professional in similar circumstances would not have made the same errors and omissions as Antunovich.
7. At a minimum, Antunovich's actions as it relates to the performance of his professional obligations owed to the Owner and Contractor, constitutes a breach of a design professional's standard of care and responsibilities.

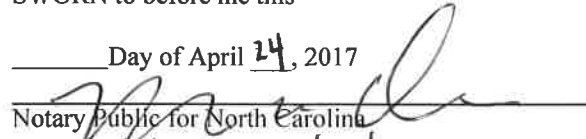
FURTHER AFFIANT SAYETH NAUGHT




Richard H. Moore, PE

SWORN to before me this

____ Day of April 24, 2017


Notary Public for North Carolina

My commission expires: 3/30/2021

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

BEI-Beach, LLC,)
Plaintiff,)

vs.)

Mashburn Christman, JV, Lend Lease (US))
Construction, Inc., f/k/a Bovis Lend Lease,)
Inc., and McCrory Construction Company,)
LLC,)

Defendants.)

Mashburn Christman, JV,)
Third-Party Plaintiff,)

vs.)

Wallcraft Construction, Inc.; Alpha)
Insulation & Waterproofing, Inc.; Baker)
Roofing, Inc.; Collins & Wright, Inc.;)
Liberty Mutual Insurance Company; Old)
Republic Surety Company; Hartford Fire)
Insurance Co.; Travelers Casualty and)
Surety Company of America; The Muhler)
Company, Inc.; and Companion Property)
and Casualty Insurance Company,)

Third-Party Defendants.)

Lend Lease (US) Construction Inc. f/k/a)
Bovis Lend Lease, Inc.,)

Third-Party Plaintiff,)

vs.)

Spann Roofing & Sheet Metal, Inc.;)
Travelers Casualty and Surety Company of)
America; Strickland Waterproofing)
Company; Merchants Bonding Company;)
Everest Reinsurance Company; Wallcraft)
Construction, Inc., Old Republic Insurance)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-26-7275

**THIRD-PARTY DEFENDANT
ANTUNOVICH ASSOCIATES, INC.'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO LEND LEASE (US)
CONSTRUCTION, INC., F/K/A BOVIS
LEND LEASE, INC.'S FIRST CAUSE OF
ACTION FOR CONTRIBUTION, FIFTH
CAUSE OF ACTION FOR
NEGLIGENCE/GROSS
NEGLIGENCE/RECKLESSNESS, AND
EIGHTH CAUSE OF ACTION FOR
BREACH OF WARRANTY OF PLANS
AND SPECIFICATIONS**

Company; Madison Construction Group,)
Inc., Worthington Integrated Building)
Systems; McDowell Commercial)
Construction, LLC; Jollay Masonry;)
National Fire Insurance Company of)
Hartford; R.J. Kenney Associates, Inc.;)
Antunovich Associates; TG Construction,)
LLC; Luis Banegas d/b/a Luis Trim Work;)
Nora Del Carmen Lagos, Nora Del Carmen)
Lagos d/b/a Luis Trim Work; and Ovation)
Custom Trim, LLC,)
)
Third-Party Defendants.)

McCrory Construction Company, LLC,)
)
Third-Party Plaintiff,)
)
vs.)
)
Collins & Wright; Baker Roofing; Glasstech)
Inc.; Palmetto State Roofing and Sheet)
Metal; Strickland Waterproofing; Maiday,)
Inc.; and Atlas Drywall & Acoustics, Inc.,)
)
Third-Party Defendants.)

Pursuant to Rule 56(b), SCRCP, Third-Party Defendant Antunovich Associates Inc. (improperly identified in Third-Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.'s Amended Third-Party Complaint as Antunovich Associates) ("Antunovich") hereby moves for Partial Summary Judgment as to Third-Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.'s ("Lend Lease") claims against Antunovich as follows:

I. LEND LEASE'S FIRST CAUSE OF ACTION FOR CONTRIBUTION

Antunovich is entitled to summary judgment on Lend Lease's Contribution cause of action because such claim is not ripe. S.C. Code Ann. § 15-38-20 ("The right of contribution exists **only** in favor of a tortfeasor **who has paid** more than his pro rata share of the common

liability...”) (emphasis added). Lend Lease has made no payment in this case; therefore, its claim for Contribution is premature and should be summarily dismissed. *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443-44, 445 S.E.2d 446, 448 (1994) (“Under this statute, the right to contribution does not arise prior to payment.”).

II. LEND LEASE’S FIFTH CAUSE OF ACTION FOR NEGLIGENCE/GROSS NEGLIGENCE/RECKLESSNESS AND EIGHTH CAUSE OF ACTION FOR BREACH OF WARRANTY OF PLANS AND SPECIFICATIONS

Antunovich is entitled to summary judgment on Lend Lease’s Negligence/Gross Negligence/Recklessness and Breach of Warranty of Plans and Specifications causes of action, because they fail to constitute causes of action independent of Lend Lease’s separate, Seventh Cause of Action for Equitable Indemnity. *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Clear View Construction, LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Lend Lease alleges only damages which are derivative of Plaintiff’s claims against Lend Lease, and thus these purported causes of action are merely disguised claims for equitable indemnity and should be summarily dismissed. *Id.*, see also 8.07.12 *Order Granting Summary Judgment as to Joyce Letellier, WW Services, Inc., and DVS, Inc.*, by the Honorable R. Markley Dennis, Jr., C.A. No. 2008-CP-08-1759 (granting summary judgment where cross-claims for negligence, breach of warranty, and breach of contract were merely disguised equitable indemnity claims); 10.26.11 *Order Granting in Part and Denying in Part Third-Party Defendant American Residential Services of South Carolina, Inc.’s Motion for Summary Judgment*, by the Honorable Roger M. Young, C.A. No. 2009-CP-10-6573 (granting summary judgment on third-party claims for negligence, breach of warranty, and breach of contract, because such claims were merely disguised equitable indemnity claims); 5.30.06 *Order Granting Motion for Summary Judgment of Sto Corp. and Acrocrete*, by the Honorable Curtis L. Coltrane, C.A. No. 05-CP-07-1312

(granting summary judgment where third-party plaintiff's breach of warranties and negligence claims were merely disguised claims for equitable indemnity).

This motion is based on the pleadings, South Carolina law, and any memorandum of authority to be filed hereafter.

WILKES LAW FIRM, P.A.

October 19, 2017

/s/ Michael B.T. Wilkes

Michael B.T. Wilkes, Esq. (S.C. Bar 6107)

mwilkes@wilkeslaw.com

J. Alexander Joyner, Esq. (S.C. Bar 101771)

ajoyner@wilkeslaw.com

200 Meeting St., Suite 205

Charleston, SC 29401

843.737.6229

Attorneys Antunovich Associates, Inc.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF HORRY)

C.A. No.: 2015-CP-26-7275)

BEI Beach, LLC,)

Plaintiff,)

v.)

Mashburn Christman, LLC, Lend Lease (US)
Construction, Inc., f/k/a Bovis Lend Lease, Inc., and
McCrory Construction Company, LLC,)

Defendants.)

**CONSENT MOTION TO
AMEND COMPLAINT**

Mashburn Christman, JV,)

Third-Party Plaintiff,)

v.)

Wallcraft Construction, Inc, Alpha Insulation &
Waterproofing, Inc., Baker Roofing, Inc., Collins &
Wright, Inc., Liberty Mutual Insurance Company,
Old Republic Surety Company, Hartford Fire
Insurance Co., Travelers Casualty and Surety
Company of America, The Muhler Company, Inc.
and Companion Property and Casualty Insurance
Company,)

Third-Party Defendants.)

Lend Lease (US) Construction, Inc., f/k/a Bovis
Lend Lease, Inc.,)

Third-Party Plaintiff,)

v.)

Spann Roofing & Sheet Metal, Inc., Travelers
Casualty and Surety Company of America,
Strickland Waterproofing Company, Merchants
Bonding Company, Everest Reinsurance Company,
Wallcraft Construction, Inc., Old Republic
Insurance Company, Madison Construction Group,
Inc., Worthington Integrated Building Systems,
McDowell Commercial Construction, LLC, Jollay)

| | |
|---|---|
| Masonry, National Fire Insurance Company of |) |
| Hartford, R.J. Kenney Associates, Inc., Joseph |) |
| Antunovich, Antunovich Associates, TG |) |
| Construction, LLC, Luis Banegas d/b/a Luis Trim |) |
| Work, Nora Del Carmen Lagos, Nora Del Carmen |) |
| Lagos d/b/a Luis Trim Work, and Ovation Custom |) |
| Trim, LLC, |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| _____
McCrary Construction Company, LLC, |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Collins and Wright, Baker Roofing, Glasstech, Inc., |) |
| Palmetto State Roofing and Sheet Metal, |) |
| Strickland Waterproofing, Maiday, Inc. and Atlas |) |
| Drywall & Acoustics, Inc., |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| _____
Spann Roofing & Sheet Metal, Inc., |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Coastal Commercial Roofing Co., Inc., and Daniel |) |
| Kniffen d/b/a East Coast Improvements, |) |
| |) |
| Third-Party Defendants. |) |
| |) |
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Wallcraft Construction, Inc., |) |
| |) |
| Third-Party Defendant. |) |
| |) |
| v. |) |
| |) |
| Vienamin Petresku d/b/a BT Construction, LLC, |) |
| |) |
| Third-Party Defendant. |) |
| _____ |) |

Comes now Plaintiff, BEI-Beach, LLC ("BEI"), with the consent of Defendants, Mashburn Christman, LLC, Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc., and McCrory Construction Company, LLC ("Defendants"), to move the Court, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, for an Order allowing Plaintiff to amend its Complaint to add causes of action against a fourth Defendant – Antunovich Associates. In support of this Motion, Plaintiff would show the Court as follows:

1. Counsel for BEI and Counsel for Defendants have consulted with each other and have consented to this motion.
2. This motion will not cause any delay in this matter. Antunovich Associates is already a Third-Party Defendant in this action and was brought in by Defendant Lend Lease on the same facts and circumstances under which BEI now wishes to assert direct claims.
3. There will be no prejudice to the Defendants by allowing Plaintiff to amend its Complaint.
4. Rule 15 of the South Carolina Rules of Civil Procedure provides that leave to amend pleadings shall be freely given when justice so requires. S.C.R.C.P. 15(a).
5. A copy of the proposed Second Amended Complaint is attached hereto as Exhibit A.
6. For these reasons, and by consent of the Defendants, Plaintiff respectfully requests that its motion for leave to file its Second Amended Complaint be granted.

Respectfully submitted this 26th day of June, 2019.

s/Brian A. Autry
Brian A. Autry (SC Bar #69401)
Thomas E. Dudley, III (SC Bar #66154)
Kenison, Dudley & Crawford, LLC
1122 Barnwell Street
Columbia, SC 29201
P: (803) 605-5271
Email: autry@conlaw.com
Attorneys for Plaintiff, BEI Beach, LLC

WE CONSENT:

s/ James A. Bruorton, IV

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Attorneys for Defendant Lend Lease (US) Construction Inc., f/k/a Bovis Lend Lease, Inc.

s/ Caroline C. McIntosh

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cmcintosh@lmlawllp.com
Attorneys for Defendant Mashburn Christman, LLC

s/ David S. Cobb

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dcobb@turnerpadget.com
Attorneys for Defendant McCrory Construction Company

EXHIBIT A

ELECTRONICALLY FILED - 2019 Jun 26 11:45 AM - HORRY - COMMON PLEAS - CASE#2015CP2607275

| | | |
|---|---|------------------------------|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF HORRY |) | C.A. No.: 2015-CP-26-7275 |
| |) | |
| BEI Beach, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Mashburn Christman, LLC, Lend Lease (US) |) | AMENDED SUMMONS |
| Construction, Inc., f/k/a Bovis Lend Lease, Inc., |) | |
| McCrary Construction Company, LLC, and |) | |
| Antunovich Associates, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| <hr/> Mashburn Christman, JV, |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Wallcraft Construction, Inc, Alpha Insulation & |) | |
| Waterproofing, Inc., Baker Roofing, Inc., Collins & |) | |
| Wright, Inc., Liberty Mutual Insurance Company, |) | |
| Old Republic Surety Company, Hartford Fire |) | |
| Insurance Co., Travelers Casualty and Surety |) | |
| Company of America, The Muhler Company, Inc. |) | |
| and Companion Property and Casualty Insurance |) | |
| Company, |) | |
| |) | |
| Third-Party Defendants. |) | |
| |) | |
| <hr/> Lend Lease (US) Construction, Inc., f/k/a Bovis |) | |
| Lend Lease, Inc., |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Spann Roofing & Sheet Metal, Inc., Travelers |) | |
| Casualty and Surety Company of America, |) | |
| Strickland Waterproofing Company, Merchants |) | |
| Bonding Company, Everest Reinsurance Company, |) | |
| Wallcraft Construction, Inc., Old Republic |) | |
| Insurance Company, Madison Construction Group, |) | |
| Inc., Worthington Integrated Building Systems, |) | |

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| McDowell Commercial Construction, LLC, Jollay |) |
| Masonry, National Fire Insurance Company of |) |
| Hartford, R.J. Kenney Associates, Inc., Joseph |) |
| Antunovich, Antunovich Associates, TG |) |
| Construction, LLC, Luis Banegas d/b/a Luis Trim |) |
| Work, Nora Del Carmen Lagos, Nora Del Carmen |) |
| Lagos d/b/a Luis Trim Work, and Ovation Custom |) |
| Trim, LLC, |) |
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| Third-Party Defendants. |) |
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| <hr/> McCrary Construction Company, LLC, |) |
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| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Collins and Wright, Baker Roofing, Glasstech, Inc., |) |
| Palmetto State Roofing and Sheet Metal, |) |
| Strickland Waterproofing, Maiday, Inc. and Atlas |) |
| Drywall & Acoustics, Inc., |) |
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| Third-Party Defendants. |) |
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| <hr/> Spann Roofing & Sheet Metal, Inc., |) |
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| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Coastal Commercial Roofing Co., Inc., and Daniel |) |
| Kniffen d/b/a East Coast Improvements, |) |
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| Third-Party Defendants. |) |
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| <hr/> Wallcraft Construction, Inc., |) |
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| Third-Party Defendant. |) |
| |) |
| v. |) |
| |) |
| Vienamin Petresku d/b/a BT Construction, LLC, |) |
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| Third-Party Defendant. |) |
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TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY summoned and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Amended Complaint on the subscribers at their offices, 1230 Main Street, Suite 700, Post Office Drawer 2426, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgement by default will be rendered against you for the relief demanded in the Amended Complaint.

Respectfully submitted,

s/Brian A. Autry

Brian A. Autry (SC Bar #69401)
Thomas E. Dudley, III (SC Bar #66154)
Kenison, Dudley & Crawford, LLC
1122 Barnwell Street
Columbia, SC 29201
(803) 605-5271
Facsimile: (864) 242-4844
Email: autry@conlaw.com

Attorneys for Plaintiff, BEI Beach, LLC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF HORRY)

C.A. No.: 2015-CP-26-7275)

BEI Beach, LLC,)

Plaintiff,)

v.)

Mashburn Christman, LLC, Lend Lease (US)
Construction, Inc., f/k/a Bovis Lend Lease, Inc.,
McCrary Construction Company, LLC, and
Antunovich Associates,)

Defendants.)

Mashburn Christman, JV,)

Third-Party Plaintiff,)

v.)

Wallcraft Construction, Inc, Alpha Insulation &
Waterproofing, Inc., Baker Roofing, Inc., Collins &
Wright, Inc., Liberty Mutual Insurance Company,
Old Republic Surety Company, Hartford Fire
Insurance Co., Travelers Casualty and Surety
Company of America, The Muhler Company, Inc.
and Companion Property and Casualty Insurance
Company,)

Third-Party Defendants.)

Lend Lease (US) Construction, Inc., f/k/a Bovis
Lend Lease, Inc.,)

Third-Party Plaintiff,)

v.)

Spann Roofing & Sheet Metal, Inc., Travelers
Casualty and Surety Company of America,
Strickland Waterproofing Company, Merchants
Bonding Company, Everest Reinsurance Company,
Wallcraft Construction, Inc., Old Republic
Insurance Company, Madison Construction Group,
Inc., Worthington Integrated Building Systems,
McDowell Commercial Construction, LLC, Jollay)**SECOND AMENDED COMPLAINT**

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|---|---|
| Masonry, National Fire Insurance Company of |) |
| Hartford, R.J. Kenney Associates, Inc., Joseph |) |
| Antunovich, Antunovich Associates, TG |) |
| Construction, LLC, Luis Banegas d/b/a Luis Trim |) |
| Work, Nora Del Carmen Lagos, Nora Del Carmen |) |
| Lagos d/b/a Luis Trim Work, and Ovation Custom |) |
| Trim, LLC, |) |
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| Third-Party Defendants. |) |
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McCrary Construction Company, LLC, |) |
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| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Collins and Wright, Baker Roofing, Glasstech, Inc., |) |
| Palmetto State Roofing and Sheet Metal, |) |
| Strickland Waterproofing, Maiday, Inc. and Atlas |) |
| Drywall & Acoustics, Inc., |) |
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| Third-Party Defendants. |) |
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Spann Roofing & Sheet Metal, Inc., |) |
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| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Coastal Commercial Roofing Co., Inc., and Daniel |) |
| Kniffen d/b/a East Coast Improvements, |) |
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| Third-Party Defendants. |) |
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Wallcraft Construction, Inc., |) |
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| Third-Party Defendant. |) |
| |) |
| v. |) |
| |) |
| Vienamin Petresku d/b/a BT Construction, LLC, |) |
| |) |
| Third-Party Defendant. |) |
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Plaintiff BEI Beach, LLC ("BEI"), complaining of the Defendants would allege and prove the following:

PARTIES, JURISDICTION, AND VENUE

1. BEI is a Delaware limited liability company with its principal place of business in Myrtle Beach, South Carolina. BEI is the owner of the Market Common, a mixed use development including retail and residential, in Myrtle Beach.

2. Defendant Mashburn Christman, JV ("Mashburn Christman") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. Mashburn Christman was one of the general contractors for a portion of the Market Common.

3. Defendant Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. ("Lend Lease") is, upon information and belief, a Florida corporation engaged in the business of construction contracting in South Carolina. Lend Lease was one of the general contractors for a portion of the Market Common.

4. Defendant McCrory Construction Company, LLC ("McCrory") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. McCrory was one of the general contractors for a portion of the Market Common.

5. Upon information and belief, Antunovich Associates is a corporation organized and existing under the laws of the state of Illinois and, at all times relevant hereto, conducted business in the State of South Carolina, including providing design professionals services on the Project, which is the subject of this matter.

6. Jurisdiction and venue are proper in this Court.

FACTS

7. The Market Common was originally owned by an entity named LUK-MB1, LLC. LUK-MB1, LLC contracted with the Defendants to construct certain portions of the Market Common.

8. The Market Common buildings at issue in this matter are identified in the design documents as Buildings A-2, A-3, A-4, A-5, A-6, A-7, and A-8 (the "Buildings").

9. The Buildings were designed by Defendant Antunovich Associates ("Antunovich"), which provided professional design services for the Project, including material specifications.

10. Antunovich owed a duty to LUK-MB1, LLC and subsequent owners of the Market Common to provide design professional services meeting the applicable standard of care, building codes, industry standards, and good industry practices.

11. McCrory constructed Buildings A-2 and A-5. Mashburn Christman constructed Buildings A-3 and A-4. Lend Lease constructed Buildings A-6, A-7, and A-8.

12. McCrory achieved substantial completion of Buildings A-2 and A-5 on March 24, 2008. Mashburn Christman achieved Substantial Completion of Buildings A-3 and A-4 on April 3, 2008. Lend Lease achieved Substantial Completion of Buildings A-6, A-7, and A-8 in March 2008.

13. McCrory, Mashburn Christman, and Lend Lease were under a duty to develop, construct and/or repair and supply defect-free buildings and building components that make up the Market Common buildings at issue in this matter, in accordance with the applicable building code and construction industry standards.

14. On January 7, 2011, BEI purchased the Market Common from LUK-MB1, LLC out of receivership.

15. BEI was purchased by HomeFed Corporation ("HomeFed") on March 28, 2014. HomeFed then took over management responsibility for the Market Common.

16. Following purchase of the Market Common, Plaintiff became aware of defects and deficiencies in the Market Common buildings.

17. Through its undersigned counsel, BEI engaged Applied Building Sciences, Inc. to conduct investigations of the defects and deficiencies. As a result of those investigations, BEI discovered that:

- a. The exterior stucco has been misapplied on Buildings A-2 through A-8, resulting in cracking, efflorescence, failure of water resistance, water intrusion, and damage to substructures, including elements of the building envelopes and interior floors, walls, and ceilings.
- b. Improper flashing or no flashing at all was installed around windows and other building envelope penetrations in various locations on Buildings A-2 through A-8, resulting in water intrusion and damage to substructures, including elements of the building envelope and interior walls.
- c. Improper waterproofing was installed on external walkways, resulting in water intrusion and damage to substructures, including metal framing.
- d. External guardrail assemblies were installed in violation of applicable building codes in regard to the required width of gaps in the assemblies.
- e. Building envelope elements were constructed without proper weeps and channels to allow for water to escape, resulting in damage to substructures.
- f. Portions of the roofs were improperly installed, resulting in water intrusion and damage to substructures and interior walls and ceilings.
- g. The vinyl windows specified for Buildings A3, A4, A6, A7, and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which the Market Common is located.

18. BEI is informed and believes that the damages resulting from these defects must be repaired in order for the Market Common buildings to function as intended.

19. As a result of the defects, BEI has been damaged by way of repair costs, loss of use, and such other damages as may be determined at trial.

FOR A FIRST CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
(Breach of Implied Warranty)

20. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

21. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

22. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

23. As a result of Mashburn Christman's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Mashburn Christman in such amounts as are proven at trial.

FOR A SECOND CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

24. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

25. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

26. Mashburn Christman was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-3 and A-4;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;

- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements;
- h. In improper installation of roofs and related flashing; and
- i. In other deficiencies and failures to be proven at trial.

27. BEI is entitled to judgment against Mashburn Christman for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A THIRD CAUSE OF ACTION
AS TO LEND LEASE
(Breach of Implied Warranty)

28. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

29. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

30. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

31. As a result of Lend Lease's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Lend Lease in such amounts as are proven at trial.

FOR A FOURTH CAUSE OF ACTION
AS TO LEND LEASE
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

32. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

33. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

34. Lend Lease was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-6, A-7, and A-8;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

35. BEI is entitled to judgment against Lend Lease for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A FIFTH CAUSE OF ACTION
AS TO MCCRORY
(Breach of Implied Warranty)

36. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

37. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

38. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

39. As a result of McCrory's breach of the warranty of workmanlike service, BEI is entitled to a judgment against McCrory in such amounts as are proven at trial.

FOR A SIXTH CAUSE OF ACTION
AS TO MCCRORY
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

40. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

41. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

42. McCrory was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-2 and A-5;
- b. In improper installing and constructing the exterior wall systems and related flashing and waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and cement board cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

43. BEI is entitled to a judgment against McCrory for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A SEVENTH CAUSE OF ACTION
AS TO ANTUNOVICH
(Gross Negligence and Recklessness)

44. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

45. Antunovich, by virtue of its professional design services provided for Buildings A2 through A8, owed a duty to BEI independent of any contract to accomplish such design and design-related services in accordance with the applicable standard of care, building codes, and industry standards.

46. Antunovich breached the standard of care and was grossly negligent and reckless in regard to its design services related to the vinyl windows at Buildings A3, A4, A6, A7, and A8, as more

fully described in the Affidavit of Scott A. Harvey, AIA, RWC, LEED AP, filed contemporaneously with this Second Amended Complaint.

47. BEI has incurred actual and consequential damages, including property damage, as a result of Antunovich's grossly negligent and reckless actions, namely deterioration and water intrusion resulting in damage to non-defective building components and other property and other deficiencies and failures to be proven at trial.

48. BEI is entitled to a judgment against Antunovich for its gross negligence and recklessness for such damages as are proven at trial.

WHEREFORE, Plaintiff prays that the Court enter judgment in its favor on all causes of action against all the Defendants and award Plaintiff damages in the amounts to be proven at trial.

s/ Brian A. Autry

Brian A. Autry (SC Bar #69401)
Thomas E. Dudley, III (SC Bar #66154)
1122 Barnwell Street
Columbia, SC 29201
Office: (803) 605-5271
Facsimile: (864) 242-4844
E-mail: autry@conlaw.com

Attorneys for Plaintiff, BEI Beach, LLC

June 13, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

BEI Beach, LLC,)

Plaintiff,)

v.)

Mashburn Christman, LLC, Lend Lease (US)
Construction, Inc., f/k/a Bovis Lend Lease, Inc., and
McCrory Construction Company, LLC,)

Defendants.)

Mashburn Christman, JV,)

Third-Party Plaintiff,)

v.)

Wallcraft Construction, Inc, Alpha Insulation &
Waterproofing, Inc., Baker Roofing, Inc., Collins &
Wright, Inc., Liberty Mutual Insurance Company,
Old Republic Surety Company, Hartford Fire
Insurance Co., Travelers Casualty and Surety
Company of America, The Muhler Company, Inc.
and Companion Property and Casualty Insurance
Company,)

Third-Party Defendants.)

Lend Lease (US) Construction, Inc., f/k/a Bovis
Lend Lease, Inc.,)

Third-Party Plaintiff,)

v.)

Spann Roofing & Sheet Metal, Inc., Travelers
Casualty and Surety Company of America,
Strickland Waterproofing Company, Merchants
Bonding Company, Everest Reinsurance Company,
Wallcraft Construction, Inc., Old Republic
Insurance Company, Madison Construction Group,
Inc., Worthington Integrated Building Systems,
McDowell Commercial Construction, LLC, Jollay)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2015-CP-26-7275

**AFFIDAVIT OF
SCOTT A. HARVEY, AIA, RWC**

Masonry, National Fire Insurance Company of
Hartford, R.J. Kenney Associates, Inc., Joseph
Antunovich, Antunovich Associates, TG
Construction, LLC, Luis Banegas d/b/a Luis Trim
Work, Nora Del Carmen Lagos, Nora Del Carmen
Lagos d/b/a Luis Trim Work, and Ovation Custom
Trim, LLC,

Third-Party Defendants.

McCrary Construction Company, LLC,

Third-Party Plaintiff,

v.

Collins and Wright, Baker Roofing, Glasstech, Inc.,
Palmetto State Roofing and Sheet Metal,
Strickland Waterproofing, Maiday, Inc. and Atlas
Drywall & Acoustics, Inc.,

Third-Party Defendants.

Spann Roofing & Sheet Metal, Inc.,

Third-Party Plaintiff,

v.

Coastal Commercial Roofing Co., Inc., and Daniel
Kniffen d/b/a East Coast Improvements,

Third-Party Defendants.

Wallcraft Construction, Inc.,

Third-Party Defendant.

v.

Vienamin Petresku d/b/a BT Construction, LLC,

Third-Party Defendant.

PERSONALLY APPEARED BEFORE ME, Scott A. Harvey, who, after being first duly sworn, deposes and says as follows:

1. I am over 18 years of age and am fully competent to testify as to the matters stated in this affidavit.

2. I am a licensed architect in the State of South Carolina as well as a Registered Waterproofing Consultant (RWC).

3. I have over 20 years of experience in the field of architecture and have been a licensed architect for more than 15 years. Accordingly, I possess actual professional knowledge and experience in the field of architectural design and principles.

4. I have reviewed plans, specifications, architectural details, and other design documents prepared and stamped by Antunovich Associates, the Architect of Record for the development known as the Market Common, which is the subject of the above-captioned lawsuit. I have also reviewed Architect's Supplemental Instructions from Antunovich for Market Common Buildings A3, A4, A6, A7, and A8.

5. In my professional opinion, the vinyl windows specified for the Market Common Project, in Buildings A3, A4, A6, A7, and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which this Project is located.

6. The architectural project plans, dated December 27, 2006 for Buildings A3 and A4 and dated August 21, 2006 for Buildings A6, A7, and A8, indicate the following design pressures (DP) for the Components and Cladding Design Loads for the buildings:

- a. Storefront: Positive Net Pressure 30 psf and Negative Net Pressure -32.5 psf.
- b. Residential Windows: Positive Net Pressure 45.2 psf and Negative Net Pressure -59.3 psf.

7. Antunovich's Architect's Supplemental Instructions during performance of the Project modify the Performance Class and Grade of the Vinyl Windows and Doors for the buildings to require a minimum design pressure (DP) of C45 grade windows with a DP45 rating (ANT_017872).

8. Observations and calculations performed by Applied Building Sciences, Inc. (ABS) and documented in the following ABS reports require minimum design pressures, in areas, greater than those specified by Antunovich:

- a. *Supplemental Report for: Building Envelope Assessment* dated March 28, 2016.
- b. *Second Supplemental Report: Building Envelope Assessment Buildings A-3 and A-4* dated February 14, 2018.
- c. *Second Supplemental Report: Building Envelope Assessment Buildings A-6, A-7, and A-8* dated February 28, 2018.

9. The components and cladding design pressures specified by Antunovich were not in compliance with applicable codes at the time of design and construction. However, this fact alone does not constitute gross negligence, in my opinion.

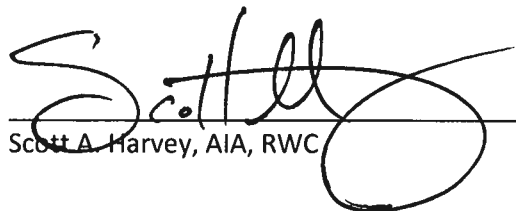
10. In October of 2016, ABS received Weather Shield window test reports provided by Mr. Rick Moore, PE of Moore Hackney & Associates (MHA), the expert for general contractor Lend Lease. In August of 2017, ABS received additional window test report documents pertaining to the Weather Shield 9103 Single Hung and 924 Casement vinyl windows through case production of Mashburn-Christman. The Weather Shield windows installed on the residential levels of the Mashburn-Christman constructed buildings A-3 and A-4 are the same make and models as the residential windows installed on the Lend Lease constructed building A-6, A-7, and A-8.

11. In this new documentation, it was discovered that other project participants questioned the design pressure ratings specified by Antunovich and that, despite these efforts, Antunovich issued final instructions and specifications on the design pressure ratings that were in error.

12. It is my opinion, to a reasonable degree of professional certainty, that a reasonably prudent design professional in similar circumstances would not have made the same errors and omissions that Antunovich did on the Market Common Project related to the design pressure ratings for windows specified on Buildings A3, A4, A6, A7, and A8 after new information was brought to its attention by other project participants.

13. Antunovich's performance of its professional obligations in this regard, specifically its failure to correct design mistakes when the issue was raised by other project participants, constitutes an egregious breach of a design professional's standard of care and responsibilities.

FURTHER AFFIANT SAYETH NAUGHT.



Scott A. Harvey, AIA, RWC

Sworn to and subscribed before me this

17th day of MAY, 2019



Notary Public for South Carolina

My commission expires: 12/21/26



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

BEI-Beach, LLC,

Plaintiff,

vs.

Mashburn Christman, JV, Lend Lease (US)
Construction, Inc. f/k/a Bovis Lend Lease,
Inc.,

Defendants.

Mashburn Christman, JV,

Third-Party Plaintiff,

vs.

Wallcraft Construction, Inc., Alpha
Insulation & Waterproofing, Inc., Baker
Roofing, Inc., Collins & Wright, Inc.,
Liberty Mutual Insurance Company, Old
Republic Surety Company, Hartford Fire
Insurance Co., Travelers Casualty and
Surety Company of America, The Muhler
Company, Inc., and Companion Property
and Company,

Third-Party Defendants.

Lend Lease (US) Construction , Inc. f/k/a
Lena Lease, Inc.,

Third-Party Plaintiff,

vs.

Spann Roofing & Sheet Metal, Inc.,
Travelers Casualty and Surety Company of
American, Strickland Waterproofing
Company, Merchants Bonding Company,
Everest Reinsurance Company, Wallcraft
Construction, Inc., Old Republic Insurance
Company, Madison Construction Group,

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

) CASE NO: 2015-CP-26-07275
)

**THIRD PARTY DEFENDANT
ANTUNOVICH ASSOCIATES, INC.'S
INITIAL MEMORANDUM
IN OPPOSITION TO
PLAINTIFF BEI-BEACH, LLC'S
CONSENT MOTION TO
AMEND COMPLAINT**

Inc., Worthington Integrated Building)
Systems, McDowell Commercial)
Construction, LLC, Jollay Masonry,)
National Fire Insurance Company of)
Hartford, R.J. Kenney Associates, Inc.,)
Joseph Antunovich, Antunovich Associates,)
TG Construction, LLC, Luis Banegas d/b/a)
Luis Trim Work, Nora Del Carmen Lagos,)
Nora Del Carmen Lagos d/b/a Luis Trim)
Work, and Ovation Custom Trim, LLC,)
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Third-Party Defendants.)
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McCrory Construction Company, LLC,)
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Third-Party Plaintiff,)
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Collins and Wright, Baker Roofing,)
Glasstech, Inc., Palmetto State Roofing and)
Sheet Metal, Strickland Waterproofing,)
Maiday, Inc., and Atlas Drywall &)
Acoustics, Inc.,)
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Third-Party Defendants.)

Wallcraft Construction, Inc.)
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Third-Party Plaintiff,)
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vs.)
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BT Construction, LLC,)
))
Third-Party Defendant.)
))

Spann Roofing & Sheet Metal, Inc.,)
))
Fourth-Party Plaintiff,)
))
))
vs.)
))
Coastal Commercial Roofing Co., Inc., and)
Daniel Kniffen d/b/a East Coast)
Improvements,)
Fourth-Party Defendants.)

)

Third-Party Defendant Antunovich Associates, Inc., (“Antunovich”) hereby submits this Initial Memorandum in Opposition to Plaintiff BEI Beach, LLC’s (“BEI”) Consent Motion to Amend Complaint (“BEI’s Motion”). The prejudice, futility, and other improprieties of BEI’s Motion will be briefed in further detail in a subsequent memorandum; this Initial Memorandum raises only the fact that BEI’s Motion is **not** by consent and should be viewed by the Court as a contested motion requiring a hearing.

BEI improperly contends that its Motion to Amend is by consent, because the three First-Party Defendants have consented thereto. However, this is insufficient; BEI required the consent of **all parties** to file its “Consent” Motion to Amend. *See, e.g., Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 380 (Ct. App. 2005) (holding that a party may amend its pleadings under the present circumstances “only ... by leave of the court or with express consent of the **other parties**”) (*cf.*, “... or by written consent of the **adverse party**,” as written in Rule 15, SCRCP). (emphasis added). The *Armstrong* Court’s use of this broader phrase is telling, as it evidences a requirement that **all parties** consent to a motion to amend. Because BEI did not obtain the consent of all parties, its Motion to Amend cannot be considered a “Consent” Motion.

Again, additional deficiencies in BEI’s Motion will be further briefed in a forthcoming Supplemental Memorandum in Opposition; undersigned counsel merely intended to (1) raise this preliminary issue to the Court, and (2) request a contested motion hearing before the Court, prior to any ruling based on the improper title of BEI’s Motion.

SIGNATURE PAGE TO FOLLOW

WILKES LAW FIRM, P.A.

June 27, 2019

s/ J. Alexander Joyner

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*Attorneys for Defendant Antunovich
Associates, Inc.*

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

BEI-Beach, LLC,)
Plaintiff,)

vs.)

Mashburn Christman, JV, Lend Lease (US))
Construction, Inc., f/k/a Bovis Lend Lease,)
Inc., and McCrory Construction Company,)
LLC,)

Defendants.)

Mashburn Christman, JV,)
Third-Party Plaintiff,)

vs.)

Wallcraft Construction, Inc.; Alpha)
Insulation & Waterproofing, Inc.; Baker)
Roofing, Inc.; Collins & Wright, Inc.;)
Liberty Mutual Insurance Company; Old)
Republic Surety Company; Hartford Fire)
Insurance Co.; Travelers Casualty and)
Surety Company of America; The Muhler)
Company, Inc.; and Companion Property)
and Casualty Insurance Company,)

Third-Party Defendants.)

Lend Lease (US) Construction Inc. f/k/a)
Bovis Lend Lease, Inc.,)

Third-Party Plaintiff,)

vs.)

Spann Roofing & Sheet Metal, Inc.;)
Travelers Casualty and Surety Company of)
America; Strickland Waterproofing)
Company; Merchants Bonding Company;)
Everest Reinsurance Company; Wallcraft)
Construction, Inc., Old Republic Insurance)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-26-7275

**BRIEF IN SUPPORT OF THIRD-PARTY
DEFENDANT ANTUNOVICH
ASSOCIATES, INC.'S PARTIAL MOTION
FOR SUMMARY JUDGMENT AS TO
LEND LEASE (US) CONSTRUCTION,
INC., F/K/A BOVIS LEND LEASE, INC.'S
FIRST CAUSE OF ACTION FOR
CONTRIBUTION, FIFTH CAUSE OF
ACTION FOR NEGLIGENCE/GROSS
NEGLIGENCE/RECKLESSNESS, AND
EIGHTH CAUSE OF ACTION FOR
BREACH OF WARRANTY OF PLANS
AND SPECIFICATIONS**

Company; Madison Construction Group,)
Inc., Worthington Integrated Building)
Systems; McDowell Commercial)
Construction, LLC; Jollay Masonry;)
National Fire Insurance Company of)
Hartford; R.J. Kenney Associates, Inc.;)
Antunovich Associates; TG Construction,)
LLC; Luis Banegas d/b/a Luis Trim Work;)
Nora Del Carmen Lagos, Nora Del Carmen)
Lagos d/b/a Luis Trim Work; and Ovation)
Custom Trim, LLC,)

Third-Party Defendants.)

McCrory Construction Company, LLC,)

Third-Party Plaintiff,)

vs.)

Collins & Wright; Baker Roofing; Glasstech)
Inc.; Palmetto State Roofing and Sheet)
Metal; Strickland Waterproofing; Maiday,)
Inc.; and Atlas Drywall & Acoustics, Inc.,)

Third-Party Defendants.)

Third-Party Defendant Antunovich Associates Inc. (“Antunovich”) hereby submits this Brief in Support of its Motion for Partial Summary Judgment as to Third-Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.’s (“Lend Lease”) First Cause of Action for Contribution, Fifth Cause of Action for Negligence/Gross Negligence/Recklessness, and Eighth Cause of Action for Breach of Warranty of Plans and Specifications.

SUMMARY OF ARGUMENT

In 2005, Antunovich contracted with LUC-MB1, LLC, (the “Developer”) to design the Market Common project. Lend Lease contracted with the Developer to construct buildings A6, A7, and A8. Lend Lease has no contract with Antunovich, so Lend Lease does not assert a contractual indemnity claim against Antunovich. Lend Lease’s only viable claim against

Antunovich is for equitable indemnity, which will fail at trial because of Lend Lease's own fault. Antunovich's motion is to reduce Lend Lease's claims to only its equitable indemnity claim.

Lend Lease's third-party claim for Contribution should be dismissed because it is premature, per the codified definition of this cause of action: "[t]he right of contribution exists **only** in favor of a tortfeasor **who has paid** more than his pro rata share of the common liability...." S.C. Code Ann. § 15-38-20 (emphasis added). Therefore, Lend Lease's claim in this regard is not ripe, and should be summarily dismissed.

Moreover, while Lend Lease purports to assert third-party claims against Antunovich for "Negligence/Gross Negligence/Recklessness," and "Breach of Warranty of Plans and Specifications," such claims are merely disguised claims for equitable indemnity (which Lend Lease also claims), because these claims are contingent upon Lend Lease's liability/exposure to Plaintiff, and Lend Lease merely seeks reimbursement from Antunovich for expenses/losses Lend Lease has or will incur as a result of Plaintiff's claims against Lend Lease. Therefore, such disguised and duplicative equitable indemnity claims should be dismissed. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders Firstsource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (discussed further below).

SUMMARY OF FACTS

This case arises out of alleged construction defects existing in buildings A2, A3, A4, A5, A6, A7, and A8 of The Market Common multi-use development in Myrtle Beach, SC (the "Project" or "Property"). The development's current owner is Plaintiff BEI-Beach, LLC, ("Plaintiff" or "BEI"), which asserted claims against the three general contractors which built the subject buildings (again, Lend Lease was the general contractor for buildings A6, A7, and A8).

Plaintiff alleges a host of construction defects, including water intrusion through the roofs, missing weeps and cracking in the stucco system, structurally unsound and inadequately protected balcony connections, water intrusion into the exterior walkway assemblies, and inadequate design pressure ratings for many of the Project's windows and doors.

Antunovich was the architect for the subject buildings. Lend Lease filed its Amended Third-Party Complaint against Antunovich on April 24, 2017, asserting claims for "Contribution" (Lend Lease Third-Party Compl., ¶¶ 76-78), "Negligence/Gross Negligence/Recklessness" (*Id.* at ¶¶ 97-105), "Equitable Indemnity" (*Id.* at ¶¶ 116-128), and "Breach of Warranty of Plans and Specifications" (*Id.* at ¶¶ 129-135). Lend Lease's claims against Antunovich are limited to Antunovich's specification/approval of windows with allegedly-deficient design pressure ratings; neither Lend Lease nor any other party is asserting claims against Antunovich with respect to the various other alleged defects in the Property.

STANDARD OF REVIEW

The South Carolina Rules of Civil Procedure state that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

ARGUMENT AND CITATION OF AUTHORITY

I. Lend Lease's First Cause Of Action For Contribution Should Be Dismissed Because It Is Not Ripe.

Antunovich is entitled to dismissal of Lend Lease's third-party claim for contribution, because this claim is premature. The South Carolina Code states that "[t]he right of contribution

exists **only** in favor of a tortfeasor **who has paid** more than his pro rata share of the common liability....” S.C. Code Ann. § 15-38-20 (emphasis added). Lend Lease has not made any payment to Plaintiff in this case, much less paid more than its share of any alleged common liability. Therefore, no right to contribution has accrued, and this third-party claim must be dismissed.

In *First Gen. Servs. of Charleston, Inc. v. Miller*, the South Carolina Supreme Court affirmed the trial court’s finding that the third-party plaintiff contractor “must have paid before an action for contribution [was] viable”. 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994). The Court held that “the right to contribution does not arise prior to payment,” and found that, because the third-party contractor had not yet made any payments to the owner, it did not have a ripe contribution action against the third-party defendant subcontractor. *Id.* at 444, 445 S.E.2d 446, 448. Therefore, the Supreme Court affirmed the dismissal of this third-party contribution claim. *Id.*

The present scenario is nearly identical to that in *First Gen. Servs. of Charleston, Inc.*: Lend Lease asserts a premature contribution claim against Antunovich derivative of the owner’s claims against Lend Lease. Because Lend Lease has not paid Plaintiff for its direct claims against Lend Lease, it has no right to contribution from Antunovich. Therefore, Lend Lease’s third-party contribution claim must be dismissed as a matter of law.

II. Lend Lease’s Fifth Cause Of Action For Negligence/Gross Negligence/Recklessness And Eighth Cause Of Action For Breach Of Warranty Of Plans And Specifications Must Be Dismissed Because They Are Merely Disguised And Duplicative Claims For Equitable Indemnity.

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.” *Rock Hill Tel. Co. v. Globe Commc’ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (quoting *First Gen. Servs. Of*

Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 449 (1994)); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 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)). “The character of an action is not to be determined by the terminology which the pleader may choose to give it. On the contrary, [it] is fixed by the events which the pleaders have recited....” *Walsh v. Evans*, 112 S.C. 131, 136, 99 S.E.2d 546, 548 (1919). Therefore, to determine the true and proper nature of Lend Lease’s claims, this Court must look to the “nature of the issues and the remedies which are sought,” as opposed to merely Lend Lease’s nomenclature of its claims. *State v. Yelsen Land Co.*, 257 S.C. 401, 403, 185 S.E.2d 897, 898 (1972); see also *Seebaldt v. First Fed. Sav. & Loan Ass’n*, 269 S.C. 691, 692-93, 239, S.E.2d 726, 727 (1977).

South Carolina’s Court of Appeals has already held that disguised equitable indemnity claims should be summarily dismissed. *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015); *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders Firstsource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015)¹; (see also *Horry Elec. Coop., Inc. v. S.C. Pub. Serv. Auth.*, 2016 WL 4208091, at *2 (S.C. Ct. App., Aug. 10, 2016)). In the *Stoneledge* cases, now-Justice Few found that “the circuit court properly granted summary judgment on [the general contractor’s] breach of contract and breach of warranty cross-claims because they [were] not independent causes of action from [the general contractor’s] equitable indemnity claim.” *Stoneledge*, at 639, 776 S.E.2d at 439. Justice Few made an identical conclusion in relation to a negligence cause of action. *Stoneledge*, at 624, 776 S.E.2d at 431. In following the reasoning from two district court cases, the Court in *Stoneledge* found that the general contractor’s “claims arose only when it faced potential liability

¹ A copy of these opinions are attached hereto as Exhibit “A.”

for [the owner's] damages and incurred fees and costs defending against" those claims. *Stoneledge*, at 637, 776 S.E.2d at 438. In sum, "'without [the] plaintiffs suing the ... defendants[,] the 'independent claims' ... would not exist,' and thus 'these claims are really nothing more than claims for indemnity.'" *Id.* (citing *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F.Supp. 880 (D.S.C. 1992)). Therefore, the Court affirmed the Circuit Court's dismissal of the general contractor's masked equitable indemnity claims.

Notably, numerous South Carolina Circuit Courts have granted dispositive relief on causes of action which the Court determined were merely disguised equitable indemnity claims. *See, e.g.*, 8/7/12 *Order Granting Summary Judgment As To Joyce Letellier, WW Services, Inc. And DVS, Inc.*, by the Honorable R. Markley Dennis, Jr., C.A. No. 2008-CP-08-1759 (granting summary judgment where crossclaims for negligence, breach of warranty and breach of contract were merely veiled equitable indemnity claims); 10/26/11 *Order Granting in Part and Denying In Part Third-Party Defendant American Residential Services of South Carolina, Inc.'s Motion for Summary Judgment*, by the Honorable Roger M. Young, C.A. No. 2009-CP-10-6573 (granting summary judgment on third-party claims for negligence, breach of warranty and breach of contract, because such claims were merely concealed equitable indemnity claims); 5/30/06 *Order Granting Motion for Summary Judgment Of Sto Corp. And Acrocrete*, by the Honorable Curtis L. Coltrane, C.A. No. 05-CP-07-1312 (granting summary judgment where third-party plaintiff's breach of warranties and negligence claims were merely disguised claims for equitable indemnity).²

Moreover, numerous South Carolina District Court cases have likewise recognized that equitable indemnity claims, even when disguised as legal claims, should be treated as claims for

² Copies of these Circuit Court Orders are attached hereto collectively as Exhibit "B"

equitable indemnity. *See, e.g., Hampton Hall, LLC, v. Chapman Coyle Chapman & Associates Architects AIA, Inc.*, 2018 WL 3475472 (D.S.C. July 19, 2018) (where a contractor's negligence, breach of warranty, and breach of contract claims against a subcontractor were dismissed, despite the contractor's request for additional discovery and additional relief, because they were duplicative of the contractor's equitable indemnity claim); *U.S. Fid. & Guar. Co. v. Patriot's Point Dev. Auth.*, 788 F.Supp. 880, 881 n.1 (D.S.C. 1992) (stating that the non-settling defendants did not possess any claims independent from indemnification and contribution; purportedly independent claims were nothing more than claims for indemnity and would not exist without plaintiff's suing the non-settling defendants); *SCNB v. Stone*, 749 F.Supp. 1419, 1433 (D.S.C. 1990) (after noting that "a rose by any other name is still a rose," holding that the offered crossclaims for breach of contract, negligence, and fraud were "nothing more than claims for contribution or indemnification with a slight change in wording"). Other jurisdictions have likewise held that such camouflaged claims should, in fact, be treated by the court as indemnity claims. *See, e.g., Adkinson v. Int'l Harvester Co.*, 975 F.2d 208, 216-7 (5th Cir. 1992) (regarding third-party plaintiff's claim for breach of warranty as one for indemnification); *Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-9 (Ill. 1983) (observing that, although the third-party claims "were stated as counts for breach of implied warranty," they should be dismissed as claims for indemnity); *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 821 (Ga. Ct. App. 1976) ("regardless of what [plaintiff] may name [his claim], it is an action for contribution and indemnity"), *aff'd*, 235 S.E.2d 142, 144 (Ga. 1977); *Warner v. Reagan Buick*, 483 N.W.2d 764, 770 (Neb. 1992) (noting that, although the third-party plaintiff made claims for breach of contract, "the gravamen of the third-party petition is indemnification, and we shall treat it as such").

Similar to those claims outlined in the foregoing precedent, Lend Lease's third-party claims for "Negligence/Gross Negligence/Recklessness" and "Breach of Warranty of Plans and Specifications" *sub judice* are merely camouflaged claims for equitable indemnity. This is because such claims against Antunovich are derivative of Plaintiff's claims against Lend Lease, as evidenced by the fact that that Lend Lease seeks to recover from Antunovich only those liabilities/costs/damages Lend Lease allegedly has incurred or will incur because of Plaintiff's direct claims against Lend Lease. (Lend Lease Third-Party Compl., ¶¶ 104 and 134). Otherwise stated, Lend Lease seeks to hold Antunovich liable to pay Lend Lease for damages it allegedly has sustained by way of Plaintiff's claims against it, which is the definition of indemnity. *See, e.g., Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005).

For the foregoing reasons, there is no genuine issue of material fact as to whether Lend Lease's third-party claims for "Negligence/Gross Negligence/Recklessness" and "Breach of Warranty of Plans and Specifications" are simply disguised claims for equitable indemnity, and/or whether they are duplicative of Lend Lease's third-party claim for equitable indemnity. Therefore, Antunovich is entitled to their dismissal as a matter of law.

CONCLUSION

Because Lend Lease has not paid Plaintiff for its liability thereto, its third-party claim against Antunovich for contribution is premature, and must be dismissed. Because Lend Lease's third-party claims against Antunovich for "Negligence/Gross Negligence/Recklessness" and "Breach of Warranty of Plans and Specifications" are merely disguised and duplicative claims for equitable indemnity, those must also be dismissed. This Court should dismiss these claims, relegating Lend Lease to its only arguably legitimate/tenable third-party claim: equitable indemnity.

WILKES LAW FIRM, P.A.

October 1, 2019

/s/ Mike Wilkes

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EXHIBIT A

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015)

and

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders Firstsource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015)

413 S.C. 615

Court of Appeals of South Carolina.

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessie B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, individually, and on behalf of all others similarly situated, Plaintiffs,

v.

CLEAR VIEW CONSTRUCTION, LLC, IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, [SDI Funding, LLC](#), Medallion at Keowee, LLC, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrays Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, [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 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., Vincent Morales d/b/a Morales Masonry, and Miller/Player & Associates, Defendants,
Of whom Marick Home Builders, LLC and Rick Thoennes are Appellants,
and
Clear View Construction, LLC and Michael Franz are Respondents.

Appellate Case No. 2013-001403.

No. 5343.

Heard March 5, 2015.

Decided Aug. 19, 2015.

Synopsis

Background: Townhome association brought action against general contractor alleging construction defects, and contractor cross-claimed against subcontractor and its owner for negligence and equitable indemnity. The Circuit Court, Oconee County, [Alexander S. Macaulay](#), J., granted summary judgment against contractor on its cross-claims, and contractor appealed.

Holdings: The Court of Appeals, [Few](#), J., held that:

[1] general contractor's negligence cross-claim against subcontractor did not constitute an independent cause of action from its equitable indemnity claim, and

[2] genuine issues of material fact as to whether general contractor was at fault for alleged construction defects precluded summary judgment on its equitable indemnification cross-claim against subcontractor.

Affirmed in part, reversed in part, and remanded.

[Lockemy](#), J., filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (8)

[1] Action Different forms of relief

General contractor's negligence cross-claim against subcontractor did not constitute an independent cause of action from its equitable indemnity claim, where the only potential claim for damages were those incurred by general contractor in defending against townhome association's lawsuit based on construction defects.

[3 Cases that cite this headnote](#)

[2] Pleading Theory and form of action

The character of an action is primarily determined by the allegations contained in the complaint.

[Cases that cite this headnote](#)

[3] Appeal and Error Sufficiency of evidence; verdict, findings, and judgment

Principal of general contractor failed to preserve any issues for appeal with regard to cross-claims asserted by general contractor against subcontractor for equitable indemnification, where principal did not file a motion to contest the trial court's finding that only the contractor asserted any cross-claims, and did not raise the finding as an issue on appeal or argue it in his brief. [Rules Civ.Proc., Rule 59\(e\); Appellate Court Rule 208\(b\)\(1\)\(B\)](#).

[Cases that cite this headnote](#)

[4] Judgment Contract cases in general

Genuine issues of material fact as to whether general contractor was at fault for alleged construction defects precluded summary judgment on its equitable indemnification cross-claim against subcontractor.

[Cases that cite this headnote](#)**[5] Indemnity** Right of One Compelled to Pay Against Person Primarily Liable

An equitable indemnity claim may arise when a third party makes a claim against the indemnity plaintiff for damages the third party sustained as a result of another party's tortious conduct.

[3 Cases that cite this headnote](#)

[6] Indemnity Equitable indemnification in general**Indemnity** Costs and expenses

The right of equitable indemnity allows the indemnity plaintiff to recover the necessary expenses it incurred defending itself against the third party's claim; whether the right exists depends on the nature of the relationship between the indemnity plaintiff and the party who caused the third party's damages.

[4 Cases that cite this headnote](#)

[7] Indemnity Contractors, subcontractors, or owners

A general contractor's relationship with its subcontractor in the residential construction context is sufficient to support the general contractor's right of equitable indemnity against the subcontractor.

[Cases that cite this headnote](#)

[8] Indemnity Equitable indemnification in general

To recover damages on its equitable indemnity claim, the indemnity plaintiff must prove the following: (1) the indemnity defendant was at fault in causing damages; (2) the indemnity plaintiff has no fault for those damages; and (3) the indemnity plaintiff incurred expenses that were necessary to protect its interest in defending against a third-party claim.

[4 Cases that cite this headnote](#)

Attorneys and Law Firms

****428** [Jason Michael Imhoff](#) and [Carl Reed Teague](#), The Ward Law Firm, PA, both of Spartanburg, for appellants.

[Robert T. Lyles, Jr.](#), Lyles & Lyles, LLC, of Charleston, and [Michael B.T. Wilkes](#) and [Ellen S. Cheek](#), Wilkes Law Firm, PA, both of Spartanburg, all for respondents.

Opinion

FEW, C.J.

***618** Marick Home Builders, LLC served as one of several general contractors for the construction of townhomes known as Stoneledge at Lake Keowee. The Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge") brought suit against Marick and others alleging construction defects in the townhomes. The circuit court granted summary judgment ***619** against Marick on its cross-claim for negligence, finding "Marick's negligence claim is a claim for equitable indemnity." The circuit court also found Marick's fault required summary judgment on its equitable indemnity claim. We affirm the court's ruling that Marick did not have a separate claim for negligence. However, we find Marick presented a question of fact on its equitable indemnity claim. We reverse the summary judgment on that issue and remand for trial on the equitable indemnity claim.

I. Facts and Procedural History

IMK Development Company developed a lakefront community known as Stoneledge at Lake Keowee. IMK hired Marick as a general contractor for the construction of townhomes in the community, and Marick subcontracted with Clear View Construction, LLC to perform stonework. Rick Thoennes is the principal of Marick.

In 2012, Stoneledge brought this lawsuit seeking damages resulting from construction defects that allowed water into the townhomes. Two of the construction defects alleged by Stoneledge related to the stonework performed by Clear View—"installation of stone below grade and complete lack of flashing at the water table at intersections of differing building components." Marick denied liability and brought cross-claims for equitable indemnity, negligence, breach of

contract, and breach of warranty. The cross-claim defendants included the respondents Clear View and Michael Franz—Clear View's owner.

Clear View and Franz filed a motion for summary judgment on all of Marick's cross-claims, which the circuit court granted. The court ruled "Marick's negligence claim is a claim for equitable indemnity," explaining "the allegations and remedies sought by both ****429** actions stem directly from the potential liability [Marick] could face for the damages claimed by [Stoneledge]."

The court then considered the only remaining cross-claim against Clear View and Franz—equitable indemnity—and granted summary judgment. The court's decision was premised on its finding that Marick "cannot be adjudged without fault" because it failed to discover building code violations that ***620** resulted, in part, from Clear View's faulty installation of stone and failure to install flashing. Based on Marick's fault for not discovering these building code violations, the court concluded Marick's cross-claim "for equitable indemnity must fail."

The court addressed Marick's claims for breach of contract and breach of warranty in a separate order not at issue in this appeal. Marick filed a motion under [Rule 59\(e\)](#), SCRCp, which the circuit court denied.

II. Summary Judgment

[Rule 56\(c\) of the South Carolina Rules of Civil Procedure](#) provides the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." When the circuit court grants summary judgment on a question of law, we review the ruling de novo. [Town of Summerville v. City of N. Charleston](#), 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." [Quail Hill, LLC v. Cnty. of Richland](#), 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." [Town of Hollywood v. Floyd](#), 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

A. Negligence Claim

[1] First, Marick argues its negligence cross-claim is a separate cause of action from its equitable indemnity claim, and thus, the circuit court erred in granting summary judgment.¹ We disagree.

[2] “The character of an action is primarily determined by the allegations contained in the complaint.” *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). The issue Marick raises—whether the circuit court *621 properly interpreted its claim for negligence as a claim for equitable indemnity—requires us to construe its cross-complaint, and thus presents a question of law. See *Monteith v. Harby*, 190 S.C. 453, 455, 3 S.E.2d 250, 250 (1939) (“The construction of a pleading involves a matter of law.”). We therefore review the circuit court's ruling de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; see also *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008) (stating appellate courts review questions of law de novo).

In its cross-complaint, Marick alleged Clear View's negligence caused Marick “to incur attorneys' fees, costs, and face potential liability to [Stoneledge].” The cross-complaint also stated, “Should [Stoneledge] prevail on [its] claims, Marick ... is entitled to recover ... legal fees and costs or [any amount it is] ordered to pay to [Stoneledge].” Marick's allegations demonstrate it did not sustain its own damages as a result of any negligence by the respondents. Rather, the allegations show Stoneledge is the party that suffered damages, and Marick's injuries arose exclusively from having to defend itself in Stoneledge's lawsuit. Consequently, the damages Marick seeks to recover resulted only from its potential liability to Stoneledge and from the expenses it incurred defending itself. When pressed at oral argument, Marick's counsel could not identify any damages it claimed in this lawsuit that did not arise exclusively from the claims made by Stoneledge.²

****430** To support the finding that Marick's negligence cross-claim was actually a claim for equitable indemnity, the circuit court relied on two federal district court cases — *South Carolina National Bank v. Stone*, 749 F.Supp. 1419 (D.S.C.1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F.Supp. 880 (D.S.C.1992) (*USF & G*). In *Stone*, the defendants asserted

cross-claims for breach of contract, negligence, and fraud against co-defendants that *622 settled with the plaintiffs.

749 F.Supp. at 1432–33. The district court barred the non-settling defendants from asserting these cross-claims against the settling defendants because it found they were not independent causes of action. *749 F.Supp. at 1433*. The court explained the cross-claims arose only if the non-settling defendants were liable to the plaintiffs, and “these purported causes of action are nothing more than claims for ... indemnification with a slight change in wording.” *Id.*

Similarly, in *USF & G*, the defendants argued they had “independent claims” against a co-defendant in addition to their claim for indemnification. *788 F.Supp. at 881 n. 1*. The district court barred the defendants from bringing these claims, finding “without [the] plaintiffs suing the ... defendants [,] the ‘independent claims’ ... would not exist,” and thus “these claims are really nothing more than claims for indemnity.” *Id.*

We agree with *Stone* and *USF & G* and find the reasoning in those decisions applies to this case. Under Marick's own allegations, its negligence cross-claim arose only when it faced potential liability for Stoneledge's damages and incurred fees and costs defending against Stoneledge's lawsuit. Marick's negligence cross-claim is nothing more than a claim for equitable indemnity.

Marick argues *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), supports the argument that it may recover from the respondents under a negligence theory independent of its claim for equitable indemnity. *Addy* is one of the seminal cases in South Carolina on the theory of equitable indemnity.

See *Town of Winnsboro v. Wiedeman–Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992) (stating, “This Court has long recognized the principle of equitable indemnification,” and citing *Addy*). We agree *Addy* controls this case to the extent it shows Marick may assert a claim for equitable indemnity against a negligent co-defendant. See *Addy*, 257 S.C. at 33, 183 S.E.2d at 709 (stating “where the wrongful act of the defendant has involved the plaintiff in litigation with others ... as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original *623 wrongful act and may be recovered as damages”); see also *McCoy v. Greenwave Enters., Inc.*, 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (“In cases

of ... equitable indemnification, 'reasonable attorney['s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.' ” (second alteration in original) (quoting [Addy](#), 257 S.C. at 33, 183 S.E.2d at 710)).

However, we do not read [Addy](#) to support Marick's separate negligence claim against Clear View. First, the only claim made by the *Addy* appellants was for indemnity. See 257 S.C. at 31, 183 S.E.2d at 709 (“The appellants also [in addition to their answer] filed a cross action against the respondent demanding judgment in an amount equal to any judgment which may be rendered against them in favor of the Addys, together with the costs of the action and attorney fees for defending such.”); [257 S.C. at 32, 183 S.E.2d at 709](#) (stating “the appellants contend ... [an indemnity] contract was created by operation of law and under such an implied contract of indemnity they are entitled to recover from the respondent the fees paid their attorneys in the successful defense of this action”); [257 S.C. at 32–33, 183 S.E.2d at 709](#) (“We think this appeal can be disposed of by a determination of the single question of whether the appellants ... are entitled to ****431** recover their costs and attorneys' fees incurred in the successful defense of this action under an implied contract, or because they were put to the necessity of defending themselves against the lessees' claim by the tortious conduct of the contractor...”); [257 S.C. at 33, 183 S.E.2d at 709](#) (stating “the [appellants] seek to recover from the contractor the attorneys' fees incurred by them in defending themselves against the claim asserted by the tenants”). Second, the only theory of recovery the supreme court addressed in *Addy* was indemnity.

Finally, *Addy* is distinguishable from this case on the question of whether Marick may assert a claim for negligence. In *Addy*, the appellants suffered their own damages as a direct result of the contractor's conduct—-independent of having to defend the lawsuit against them. As the supreme court explained, “the appellants ... are the owners of a store building,” and the dispute arose after “the appellants engaged ... a general contractor ... to make ... needed repairs” to the building. [257 S.C. at 31, 183 S.E.2d at 708](#). “In making ***624** the necessary repairs the [contractor] used an oxygen acetylene torch for the purpose of welding certain steel beams in the building. This welding operation started a fire in [the] building...” *Id.* Thus, to the extent *Addy* allowed a direct claim for negligence against the contractor, the claim would

have been based on damages to the building that the *Addy* appellants suffered directly as a result of the fire. Unlike in this case, therefore, the *Addy* appellants did suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit.

We find the circuit court properly granted summary judgment on Marick's negligence cross-claim because it is not an independent cause of action from Marick's equitable indemnity claim. The court correctly ruled that the only potential claim for the damages Marick incurred defending against Stoneledge's lawsuit is for equitable indemnity.

B. Thoennes's Appeal

[3] In addition to the reasons set forth above, we affirm summary judgment as to Thoennes's negligence cross-claim because we find he presented no issues preserved for appeal. The circuit court found only Marick—not Thoennes—asserted cross-claims against the respondents. Thoennes did not file a [Rule 59\(e\), SCRPC](#), motion to contest this finding and did not raise the finding as an issue on appeal or argue it in his brief. See [Ness v. Eckerd Corp.](#), 350 S.C. 399, 403–04, 566 S.E.2d 193, 196 (Ct.App.2002) (“If a trial judge grants relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to [Rule 59\(e\), SCRPC](#), to alter or amend the judgment in order to preserve the issue for appeal.” (citation and internal quotation marks omitted)); [Rule 208\(b\)\(1\)\(B\), SCACR](#) (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”).

C. Equitable Indemnity

[4] We find the circuit court erred in granting summary judgment on the merits of Marick's equitable indemnity cross-claim because Marick presented a question of fact as to whether it was at fault for the alleged construction defects.

[5] [6] [7] An equitable indemnity claim may arise when a third party (Stoneledge) makes a claim against the indemnity plaintiff ***625** (Marick) for damages the third party sustained as a result of another party's tortious conduct. See [Addy](#), 257 S.C. at 33, 183 S.E.2d at 709 (stating an indemnity plaintiff may recover damages for equitable indemnity “where the wrongful act of the

[indemnity] defendant has involved the [indemnity] plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest" (citation omitted)). The right of indemnity allows the indemnity plaintiff to recover the necessary expenses it incurred defending itself against the third party's claim. *Id.* Whether the right exists depends on the nature of the relationship between the indemnity plaintiff and the party who caused the third party's damages—Marick's subcontractor

Clear View. See  *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (stating "a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is **432 an obligation on one party to indemnify the other"). A general contractor's relationship with its subcontractor in the residential construction context is sufficient to support the general contractor's right of equitable indemnity against the subcontractor.  *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994); see generally *McCoy*, 408 S.C. at 359, 360–61, 759 S.E.2d at 138 (stating "to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established," and giving examples, including the relationship of residential contractor/subcontractor (citation and internal quotation mark omitted)).

[8] To recover damages on its equitable indemnity claim, Marick must prove the following: (1) Clear View was at fault in causing Stoneledge's water intrusion damages; (2) Marick has no fault for those damages; and (3) Marick incurred expenses that were necessary to protect its interest in defending against Stoneledge's claim. See *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct.App.2013) (stating the elements of equitable indemnity); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct.App.2011) (same); see also  *Addy*, 257 S.C. at 33, 183 S.E.2d at 709–10 (describing the requirements for proving equitable indemnity).

The circuit court granted summary judgment because it found no genuine issue as to the second element—that Marick *626 must have been without fault in causing Stoneledge's damages. See *Meacher*, 392 S.C. at 486, 709 S.E.2d at 74 ("The most important requirement for ... equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." (citation omitted)); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct.App.1999)

("[T]here can be no [equitable] indemnity among mere joint tortfeasors."). Under this element, Marick cannot recover for equitable indemnity if it had any fault in causing Stoneledge's damages. We have carefully examined the record in this case, and we cannot say as a matter of law Marick is at fault. Rather, we find the evidence is conflicting, and viewing the evidence in the light most favorable to Marick, the record contains evidence a factfinder could reasonably find supports the conclusion Marick was not at fault. Because of this conflicting evidence, the equitable indemnity cause of action must be remanded for a trial.

III. Conclusion

The circuit court's order granting summary judgment is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for trial.

THOMAS, J., concurs.

LOCKEMY, J., concurring in part and dissenting in part.

I respectfully concur in part and dissent in part. I agree with the majority that the trial court erred in granting summary judgment on Marick's cross-claim for equitable indemnity. I disagree, however, with the majority that summary judgment was proper on Marick's negligence cross-claim. I believe *Addy v. Bolton*³ and its progeny support Marick's theory of recovery of attorney's fees and costs as "special damages" under a negligence action. Therefore, I would reverse the trial court's grant of summary judgment on the negligence cross-claim and remand for further proceedings.

In *Addy*, Thomason contracted to make repairs for a retail building owned by the  *627 *Boltons* and leased to the *Addys*. 257 S.C. at 31, 183 S.E.2d at 708. During the repairs, Thomason set fire to the building damaging the *Addys*' goods. *Id.* The *Addys* sued the *Boltons* and Thomason, alleging the *Boltons* were negligent in engaging unskillful agents to make the repairs. *Id.* Thus, the *Boltons* were sued for their own negligence, not vicariously for the negligence of another party. The *Boltons* cross-claimed against Thomason for indemnity from any judgment that might be recovered plus attorney's fees incurred in defending the action.  *Id.* at 31, 183 S.E.2d at 709. At trial, the jury returned a verdict against Thomason only, and the *Boltons* were **433 exonerated from all liability.  *Id.* at 32, 183 S.E.2d at 709. The trial

court, however, refused to award indemnity and granted a directed verdict against the Boltons on their cross-claim. *Id.* The Boltons appealed and our supreme court reversed, basing its decisions on two alternative holdings. See *id.* at 33, 183 S.E.2d at 709 (“The weight of authority sustains [the Boltons’] 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 Addys’] claim by the tortious conduct of [Thomason], or by his breach of contract.” (emphasis added)). First, it found the Boltons could recover attorney’s fees incurred in the action because they were forced to defend themselves against the Addys’ claim by the tortious conduct of Thomason. *Id.* Specifically, the court held,

[W]here 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 expense to protect his interest, such costs and expenses, including attorney[’s] fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. In order to recover attorney[’s] fees under this principle, the plaintiff must show: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of [the] defendant’s tortious conduct; (2) that the dispute was with a third party—not with the defendant; and (3) that the plaintiff incurred attorney[’s] fees connected with that dispute. If the attorney[’s] fees were incurred as a result of a breach of contract between plaintiff and defendant, the defendant will be deemed to have contemplated that his *628 breach might cause plaintiff to seek legal services in his dispute with the third party.

Id. at 33, 183 S.E.2d at 709–10 (internal quotation marks omitted); see also *Restatement (Second) of Torts* § 914

(1979) (“One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.”).

Alternatively, the *Addy* court found that, on the facts of the case, the Boltons could also recover expenses incurred in the litigation under the theory of equitable indemnity. *257 S.C. at 33–34, 183 S.E.2d at 710*; see also *Town of Winnsboro v. Wiedeman–Singleton, Inc.*, 303 S.C. 52, 59, 398 S.E.2d 500, 504 (Ct.App.1990), *aff’d* by *307 S.C. 128, 414 S.E.2d 118 (1992)*. Because the jury exonerated the Boltons of any fault for the Addys’ injuries, equity required Thomason, the at-fault party, to indemnify them as a matter of law. *Addy, 257 S.C. at 34, 183 S.E.2d at 710.*

In the present case, the trial court granted summary judgment on Marick’s negligence cross-claim against Clear View, finding it was merely a disguised claim for equitable indemnification. I believe the trial court erred because *Addy* specifically allows the recovery of attorney’s fees and costs “*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) (stating that in *Addy*, the supreme court “held that recovery may be had *at law in the form of special damages, or in equity in the form of equitable indemnity*” (emphasis added)). Here, as in *Addy*, “the wrongful act of [Clear View] has involved [Marick] in litigation with [Stoneledge]” such that it has made it necessary for Marick “to incur expense to protect [its] interest.” Specifically, Stoneledge sued Marick and Clear View based on allegations that Clear View’s stone work was deficient, which Clear View has admitted. As a result of the underlying action, Marick has incurred expenses, including attorney’s fees, in an attempt to protect itself from liability to Stoneledge. Thus, *Addy* supports Marick’s attempt to recover attorney’s fees and costs as “special damages” arising from Clear View’s tortious conduct.

*629 Admittedly, the cases Marick cites in its brief do not involve the recovery of “special damages” under an independent cause of action for negligence. For example, in *Town of Winnsboro*, Turner–Murphy, the party awarded attorney’s fees, argued on appeal “that it [wa]s entitled to recover its attorney’s fees as an element of special

damage **434 arising directly from Specialty's breach of contract *or, alternatively*, under the principle of equitable indemnity.” 303 S.C. at 55, 398 S.E.2d at 502 (emphasis added). This court agreed, finding *Addy* “clearly supports the position of Turner–Murphy” and “hold[ing] that the judgment of the circuit court may be affirmed *both* on the theory of special damages *and* on the theory of equitable indemnity.” ((emphasis added)). *Id.* at 59, 398 S.E.2d at 504. Thus, although *Town of Winnsboro* involved the recovery of attorney's fees and costs as “special damages” arising from a breach of contract, it stands for the proposition that a party can recover these damages *at law* independent of a claim for equitable indemnity.

I see no reason to allow recovery of attorney's fees and costs as “special damages” in a breach of contract action, yet deny it under a negligence cause of action. The plain language of *Addy* makes clear that attorney's fees and costs incurred by Marick in defending itself against Stoneledge's claim “should be treated as the *legal consequences* of the original wrongful act and may be recovered as *damages*.” Notably, nothing in *Addy* or any other controlling authority⁴ precludes Marick from recovering these damages under a negligence theory. *Addy* did not limit the recovery of these damages to breach

of contract actions alone. *630 257 S.C. at 33, 183 S.E.2d at 709 (stating that to recover attorney's fees and costs under the theory of special damages, “the plaintiff must show ... that [he became] involved in a legal dispute *either* because of a breach of contract by the defendant *or because of [the] defendant's tortious conduct* ” (emphasis added)); *see also* *id.* at 33, 183 S.E.2d at 710 (“If the attorney[']s fees were incurred as a result of a breach of contract between plaintiff and defendant, the defendant will be deemed to have contemplated that his breach might cause plaintiff to seek legal services in his dispute with the third party.” (emphasis added)). Although the concept of “special damages” generally arises in breach of contract actions, these damages can also arise in tort. *See* 11 S.C. Jur. *Damages* § 4 (1992) (“In a tort action, special damages must be the direct consequence of the illegal act done, and flowing from it....” (emphasis added) (internal quotation marks omitted)).

Based on the foregoing, I would reverse the circuit court's grant of summary judgment on Marick's negligence cross-claim.

All Citations

413 S.C. 615, 776 S.E.2d 426

Footnotes

- 1 We address in this opinion only the circuit court's decision to grant summary judgment on the negligence cross-claim. We address the circuit court's ruling on the breach of contract and breach of warranty cross-claims in a separate appeal.
- 2 Counsel made several arguments that Marick suffered damages independent of those arising from the claims made by Stoneledge. However, we have carefully examined the record, particularly Marick's cross-complaint, and we find Marick did not allege any damages except those it suffered exclusively as a result of potential liability to Stoneledge. As for any damages Thoenes contends he sustained independent of the Stoneledge claim, see section II. B. of this opinion.
- 3 257 S.C. 28, 183 S.E.2d 708 (1971).
- 4 In finding Marick's negligence cross-claim was merely a disguised claim for equitable indemnification, the circuit court and the majority rely on two federal district court cases—*South Carolina National Bank v. Stone*, 749 F.Supp. 1419 (D.S.C.1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F.Supp. 880 (D.S.C.1992). I find these cases unpersuasive for several reasons. First, federal district court decisions are not binding on this court. *See Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 209, 731 S.E.2d 324, 326 (Ct.App.2012). Next, I question the applicability of these cases because they involved federal securities law, which, unlike the present general contractor and subcontractor context, have policies that disfavor indemnification. *See Stone*, 749 F.Supp. at 1429; *Patriot's Point Dev. Auth.*, 788 F.Supp. at 882 n. 2. Most importantly, these decisions conflict with the holding in *Addy*—a decision of our supreme court that we must follow. *See Town of Winnsboro*, 303 S.C. at 60–61, 398 S.E.2d at 505 (“Of course, the rule in *Addy*, as a decision of the [s]upreme [c]ourt, must prevail.”).

413 S.C. 630

Court of Appeals of South Carolina.

STONELEDGE AT LAKE KEOWEE OWNERS'
ASSOCIATION, INC., C. Dan Carson, Jeffrey J.Dauler, Joan W. Davenport, Michael Furnari, Donna
Furnari, Jessie B. Grasso, Nancy E. Grasso, Robert P.
Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul
W. Hund, III, Ruth E. Isaac, Michael D. Plourde,
Mary Lou Plourde, Carol C. Pope, Steven B. Taylor,
Bette J. Taylor, and Robert White, individually and
on Behalf of all others similarly situated, Plaintiffs,

v.

BUILDERS FIRSTSOURCE–SOUTHEAST GROUP,
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, Integrus 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,

Mike Green, Southern Concrete Specialties,

Carl Compton d/b/a Compton Enterprise a/
k/a Compton Enterprises, Gunter Heating &
Air, All Pro Heating, A/C & Refrigeration, LLC,[Coleman Waterproofing, Heyward Electrical](#)
[Services, Inc.](#), Tinsley Electrical, LLC, [Hutch N](#)
[Son Construction, Inc.](#), Carl Catoe Construction,Inc., T.G. Construction, LLC, [Delfino Construction,](#)Francisco Javier Zarate d/b/a Zarate Construction,
Alejandro Avalos Cruz, Herberto Acros Hernandez,

Martin Hernandez–Aviles, Francisco Villalobos

Lopez, Ambrosio Martinez–Ramirez, Ester

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 FirstSource–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.

Appellate Case No. 2013–001404.

Nos. 5344, 2013–001404.

Heard June 4, 2015.

Decided Aug. 19, 2015.

Rehearing Denied Sept. 14, 2015.

Certiorari Denied Oct. 20, 2016.

Synopsis**Background:** Townhome association brought action against
general contractor alleging construction defects, and
contractor brought cross-claims against subcontractors for
breach of contract, breach of warranty, negligence, and
equitable indemnity. The Circuit Court, Oconee County,
[Alexander S. Macaulay](#), J., granted summary judgment
against contractor on cross-claims. Contractor appealed.**Holdings:** The Court of Appeals, [Few](#), C.J., held that:[\[1\]](#) breach of contract and breach of warranty cross-claims
were not independent from equitable indemnity cross-claim,
and[\[2\]](#) there was no evidence of applicable indemnity clause as
required to support contractual indemnity.

Affirmed.

See also [413 S.C. 615](#), [776 S.E.2d 426](#), [2015 WL 4925497](#).

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] Appeal and Error

🔑 [De novo review](#)

When the circuit court grants summary judgment on a question of law, the ruling is reviewed de novo.

[Cases that cite this headnote](#)

[2] Judgment

🔑 [Absence of issue of fact](#)

For a triable issue of fact to preclude summary judgment, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.

[Cases that cite this headnote](#)

[3] Pleading

🔑 [Theory and form of action](#)

The character of an action is primarily determined by the allegations contained in the complaint.

[Cases that cite this headnote](#)

[4] Pleading

🔑 [Disjunctive and alternative allegations](#)

Pleading

🔑 [Particular causes of action](#)

General contractor's breach of contract and breach of warranty cross-claims against subcontractors, brought in lawsuit by townhome association against contractor relating to alleged construction defects, were not independent causes of action from contractor's equitable indemnity cross-claim, and therefore contractor could not recover on the breach cross-claims as alternative causes of action; cross-complaint did not allege that contractor sustained its own damages as a result of any breach by subcontractors, and cross-claims arose only

when contractor faced potential liability for association's damages and incurred fees and costs defending against association's lawsuit.

[4 Cases that cite this headnote](#)

[5] Indemnity

🔑 [Admissibility](#)

Indemnity

🔑 [Weight and sufficiency](#)

There was no evidence that contracts between general contractor and subcontractor containing indemnity provision applied to subcontractors' work on project that was the subject of townhome association's lawsuit against contractor, as required to support contractor's cross-claim against subcontractor for contractual indemnity, even though witness testified that subcontractor had contract with contractor; witness did not identify any writing expressing the contract, mere existence of a contract did not indicate whether contract contained an indemnity provision, and witness's testimony was not admissible to prove content of writing. [Rules of Evid., Rule 1002.](#)

[2 Cases that cite this headnote](#)

[6] Appeal and Error

🔑 [Judgment](#)

Appeal and Error

🔑 [Summary judgment](#)

Principal of contractor did not preserve for appeal challenge to circuit court's finding on summary judgment that only contractor, not principal, asserted cross-claims against subcontractors for breach of contract and breach of warranty; principal did not file motion for new trial, did not raise finding as an issue on appeal, and did not argue issue in his brief. [Rules Civ.Proc., Rule 59\(e\).](#)

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

****436** Jason Michael Imhoff and Carl Reed Teague, The Ward Law Firm, PA, both of Spartanburg, for appellants.

Robert T. Lyles, Jr., Lyles & Lyles, LLC, of Charleston, for all respondents.

David A. Root, Kernodle Root & Coleman, of Charleston, for respondent Builders FirstSource;

Mason A. Goldsmith, Elmore Goldsmith, PA, of Greenville, for respondent Southern Concrete Specialties;

Michael B.T. Wilkes and Ellen S. Cheek, Wilkes Law Firm, PA, both of Spartanburg, for respondents Clear View Construction, LLC, and Michael Franz.

Opinion

FEW, C.J.

***633** Marick Home Builders, LLC served as one of several general contractors for the construction of townhomes known as Stoneledge at Lake Keowee. The Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge") brought suit against Marick and others alleging construction defects in the townhomes. The circuit court granted summary judgment ***634** against Marick on its cross-claims for breach of contract and breach of warranty, finding these claims were "merely disguised ... claims for equitable indemnity and are not viable as alternative causes of action." We affirm.

I. Facts and Procedural History

IMK Development Company developed a lakefront community known as Stoneledge at Lake Keowee. IMK hired Marick as a general contractor for the construction of townhomes in the community. Marick subcontracted with Builders FirstSource—Southeast Group, Southern Concrete Specialties, Inc., Clear View Construction, LLC, and others. Rick Thoennes is the principal of Marick.

In 2012, Stoneledge brought this lawsuit seeking damages resulting from construction defects that allowed water into the townhomes. Marick denied liability and brought cross-claims for breach of contract (including a claim for contractual indemnity), breach of warranty, negligence, and equitable indemnity. The cross-claim defendants included the respondents Builders FirstSource, Southern Concrete, Clear View and Michael Franz—Clear View's owner.

The respondents filed motions for summary judgment on all of Marick's cross-claims, which the circuit court granted. The circuit court found Marick's breach of contract and breach of warranty claims were "merely disguised ... claims for equitable indemnity." The court explained the claims "stem from the potential liability Marick faces from the claims brought against it by [Stoneledge]" because "Marick is not alleging ****437** personal injury or property damage as to it[self]."

The court addressed Marick's claims for negligence and equitable indemnity in a separate order not at issue in this appeal. Marick filed a motion under Rule 59(e), SCRCP, which the circuit court denied.

II. Summary Judgment

[1] [2] Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." When the circuit court grants summary judgment on a question ***635** of law, we review the ruling de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

A. Breach of Contract and Warranty Claims

Marick argues its cross-claims for breach of contract and breach of warranty are separate causes of action from its equitable indemnity claim, and thus, the circuit court erred in granting summary judgment.¹ We disagree.

[3] "The character of an action is primarily determined by the allegations contained in the complaint." *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). The issue Marick raises—whether the circuit court properly interpreted its claims for breach of contract and breach of warranty as one claim for equitable indemnity—

requires us to construe its cross-complaint, and thus presents a question of law. See *Monteith v. Harby*, 190 S.C. 453, 455, 3 S.E.2d 250, 250 (1939) (“The construction of a pleading involves a matter of law.”). We therefore review the circuit court's ruling de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; see also *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008) (stating appellate courts review questions of law de novo).

[4] In its cross-complaint, Marick alleged the following to support its claims for breach of contract and breach of warranty, respectively:

If [Stoneledge's] allegations are true, ... [the respondents] have provided defective materials or services in breach of *636 each of their contracts with Marick.... [S]aid breach of contract has resulted or could result in damage to [Stoneledge], which could or will be assessed against Marick.

If [Stoneledge's] allegations are true ..., [the respondents] breached their express and/or implied warranties.... Should [Stoneledge] prevail on [its] claims, Marick will be damaged as a direct and proximate result of [the respondents'] breach of their express and/or implied warranties.

Marick's allegations demonstrate it did not sustain its own damages as a result of any breach of contract or breach of warranty by the respondents. Rather, the allegations show Stoneledge is the party that suffered damages, and Marick's injuries arose exclusively from having to defend itself in Stoneledge's lawsuit. Consequently, the damages Marick seeks to recover resulted only from its potential liability to Stoneledge and from the expenses Marick incurred defending itself. When pressed at oral argument, Marick's counsel could not identify any damages it claimed in this lawsuit that did not arise exclusively from the claims made by Stoneledge.²

**438 To support the finding that Marick's breach of contract and breach of warranty cross-claims were actually claims for equitable indemnity, the circuit court relied on two federal district court cases—*South Carolina National Bank v. Stone*, 749 F.Supp. 1419 (D.S.C.1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F.Supp. 880 (D.S.C.1992) (*USF & G*). In *Stone*, the defendants asserted cross-claims for breach of contract, negligence, and fraud against co-defendants that settled with the plaintiffs. 749 F.Supp. at

1432–33. The district court barred the non-settling defendants from asserting these cross-claims against the settling defendants because it found they were not independent causes of action. 749 F.Supp. at 1433. The court explained the cross-claims arose only if the non-settling defendants were liable to the plaintiffs, and “these purported causes *637 of action are nothing more than claims for ... indemnification with a slight change in wording.” *Id.*

Similarly, in *USF & G*, the defendants argued they had “independent claims” against a co-defendant in addition to their claim for indemnification. 788 F.Supp. at 881 n. 1. The district court barred the defendants from bringing these claims, finding “without [the] plaintiffs suing the ... defendants[,] the ‘independent claims’ ... would not exist,” and thus “these claims are really nothing more than claims for indemnity.” *Id.*

We agree with *Stone* and *USF & G* and find the reasoning in those decisions applies to this case. Under Marick's own allegations, its cross-claims arose only when it faced potential liability for Stoneledge's damages and incurred fees and costs defending against Stoneledge's lawsuit. Marick's breach of contract and breach of warranty cross-claims are nothing more than claims for equitable indemnity.

Marick argues *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), supports the argument that it may recover from the respondents under a breach of contract theory independent of its claim for equitable indemnity. *Addy* is one of the seminal cases in South Carolina on the theory of equitable indemnity.

See *Town of Winnsboro v. Wiedeman–Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992) (stating, “This Court has long recognized the principle of equitable indemnification,” and citing *Addy*). We agree *Addy* controls this case to the extent it shows Marick may assert a claim for equitable indemnity against the respondents. See *Addy*, 257 S.C. at 33, 183 S.E.2d at 709 (stating “where the wrongful act of the defendant has involved the plaintiff in litigation with others ... as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages”); see also *McCoy v. Greenwave Enter., Inc.*, 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (“In cases of ... equitable indemnification, ‘reasonable attorney[’s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.’ ” (second alteration in

original) (quoting  *Addy*, 257 S.C. at 33, 183 S.E.2d at 710)).

***638** However, we do not read  *Addy* to support Marick's separate claim for breach of contract. First, the only claim made by the *Addy* appellants was for indemnity. See 257 S.C. at 31, 183 S.E.2d at 709 (“The appellants also [in addition to their answer] filed a cross action against the respondent demanding judgment in an amount equal to any judgment which may be rendered against them in favor of the Addys, together with the costs of the action and attorney fees for defending such.”);  257 S.C. at 32, 183 S.E.2d at 709 (stating “the appellants contend ... [an indemnity] contract was created by operation of law and under such an implied contract of indemnity they are entitled to recover from the respondent the fees paid their attorneys in the successful defense of this action”);  257 S.C. at 32–33, 183 S.E.2d at 709 (“We think this appeal can be disposed of by a determination ***439** of the single question of whether the appellants ... are entitled to recover their costs and attorneys' fees incurred in the successful defense of this action under an implied contract, or because they were put to the necessity of defending themselves against the lessees' claim by the tortious conduct of the contractor....”); ³  257 S.C. at 33, 183 S.E.2d at 709 (stating “the [appellants] seek to recover from the contractor the attorneys' fees incurred by them in defending themselves against the claim asserted by the tenants”). Second, the only theory of recovery the supreme court addressed in *Addy* was indemnity.

Finally, *Addy* is distinguishable from this case on the question of whether Marick may assert a claim for breach of contract. In *Addy*, the appellants suffered their own damages as a direct result of the contractor's conduct—*independent of* having to defend the lawsuit against them. As the supreme court explained, “the appellants ... are the owners of a store building,” and the dispute arose after “the appellants engaged ... a general contractor ... to make ... needed repairs” to the building.  257 S.C. at 31, 183 S.E.2d at 708. “In making the necessary repairs the [contractor] used an oxygen acetylene torch for the purpose of welding certain steel beams in ***639** the building. This welding operation started a fire in [the] building....” *Id.* Thus, to the extent *Addy* allowed a direct claim for breach of contract against the contractor, the claim would have been based on damages to the building that the *Addy* appellants suffered directly as a result of the fire. Unlike in this case, therefore, the *Addy* appellants did suffer

their own damages independent of their obligation to defend themselves in the underlying lawsuit.

We find the circuit court properly granted summary judgment on Marick's breach of contract and breach of warranty cross-claims because they are not independent causes of action from Marick's equitable indemnity claim.

B. Contractual Indemnity

Marick also argues it has a right of contractual indemnity against the respondents, and the circuit court erred in granting summary judgment on that claim. We disagree.

[5] Marick contends it had contracts with the respondents that provided, “Subcontractor shall indemnify the Contractor ... from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.” However, the circuit court found Marick “offered no evidence that the contracts applied to the [Stoneledge] Project.” In particular, the court found as a matter of law the contracts were executed in October 2007—after all respondents completed their work on the Stoneledge project.

The record supports the circuit court's finding. The only contracts in the record are dated either October 1 or October 31, 2007. Clear View submitted invoices to Marick showing Clear View received final payment for its work on the Stoneledge project before August 30, 2007. Builders FirstSource and Southern Concrete presented evidence they completed their work on the Stoneledge project in June 2007. A witness for Builders FirstSource testified the contract dated October 1, 2007 was not “the contract that governed the work” on the Stoneledge project “because it was signed after” Builders FirstSource finished its work on the project. The circuit court also noted the contracts do not state they govern the Stoneledge project.

***640** In the face of this evidence, Marick was obligated to present evidence demonstrating a question of fact exists as to whether the contracts applied to the respondents' work on the Stoneledge project.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a ****440** genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRPC; see also *Lord v. D & J Enters., Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (“Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial.” (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991))); *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct.App.2004) (“Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial.” (citing *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545)).

The circuit court found Marick made no such showing, stating “to the extent Marick argues that it does have contracts with [the respondents] that contain indemnification provisions, it has offered no evidence that the contracts applied to the [Stoneledge] Project.”

On appeal, Marick relies on one piece of evidence to support its position: the deposition testimony of a witness Builders FirstSource designated under Rule 30(b)(6), SCRPC. When the witness was asked whether there were “[a]ny contracts between you and any person or entity relating ... to the [Stoneledge] project?” the witness answered, “My understanding, we had two contracts; one was [with a subcontractor], and the other one was with Marick Builders. They were our only two contracts in the project.” Marick asserts this evidence creates a question of fact “concerning the Respondents’ contractual obligations to indemnify Marick and [their] breach of ***641** the Contracts for failing to abide by the ‘Hold Harmless’ Provision of the Contracts.” We disagree.

First, the testimony does not contain specific facts showing a genuine issue for trial. In particular, because the witness did not identify any writing expressing the contract, his testimony

would not support a finding that the “contract” is the same one, or even in the same form, as the one Marick presented from October 2007. Thus, the testimony would not support a finding that a contract applicable to Builders FirstSource’s work on the Stoneledge project contained an indemnity provision. It certainly does not support a finding that Southern Concrete or Clear View had a contract applicable to the Stoneledge project containing an indemnity provision. We find this evidence does not establish the existence of a genuine issue of material fact. See *Town of Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166 (“[I]t is not sufficient for a party to create ... an issue of fact that is not genuine.”).

Second, we question the admissibility of the testimony. The mere existence of a contract does not indicate whether the contract contains an indemnity provision. This witness’s testimony creates an issue of fact for trial only to the extent it proves the content of the contract—specifically that it contained an indemnity provision. However, Rule 1002 of the South Carolina Rules of Evidence provides, “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required....” Thus, the witness’s testimony—without reference to a specific writing—is inadmissible to prove the contract contained an indemnity provision.

We find the circuit court correctly granted summary judgment on Marick’s contractual indemnity claim. Because we affirm the circuit court’s ruling as explained above, it is not necessary to address the other reasons the court gave for granting summary judgment on this issue. See  *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when the court’s resolution of the issues it does address are dispositive of the appeal).

C. Thoennes’s Appeal

[6] In addition to the reasons set forth above, we affirm summary judgment as to Thoennes’s breach of contract and ***642** breach of warranty cross-claims because we find he presented no issues preserved for appeal. ****441** The circuit court found only Marick—not Thoennes—asserted cross-claims against the respondents. Thoennes did not file a Rule 59(e), SCRPC, motion to contest this finding and did not raise the finding as an issue on appeal or argue it in his brief. See *Ness v. Eckerd Corp.*, 350 S.C. 399, 403–04, 566 S.E.2d 193, 196 (Ct.App.2002) (“If a trial judge grants relief not

previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to [Rule 59\(e\), SCRC](#), to alter or amend the judgment in order to preserve the issue for appeal.” (citation and internal quotation marks omitted)); [Rule 208\(b\)\(1\)\(B\), SCACR](#) (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”).

The circuit court's order granting summary judgment is **AFFIRMED**.

[HUFF](#) and [WILLIAMS](#), JJ., concur.

All Citations

413 S.C. 630, 776 S.E.2d 434

III. Conclusion

Footnotes

- 1 We address in this opinion only the circuit court's decision to grant summary judgment on the breach of contract and breach of warranty cross-claims. We address the circuit court's ruling on the negligence cross-claim in a separate appeal.
- 2 Counsel made several arguments that Marick suffered damages independent of those arising from the claims made by Stoneledge. However, we have carefully examined the record, particularly Marick's cross-complaint, and we find Marick did not allege any damages except those it suffered exclusively as a result of potential liability to Stoneledge. As for any damages Thoenes contends he sustained independent of the Stoneledge claim, see section II. C. of this opinion.
- 3 This passage continues, “or by his breach of contract,” words which appear in one other place in the opinion.  [257 S.C. at 33, 183 S.E.2d at 709](#). However, the supreme court was not referring with these words to the appellants' right to recover for breach of contract, but to the contractor's conduct being a breach of the contract resulting in the fire.

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EXHIBIT B

*Order Granting Summary Judgment As To Joyce Letellier, WW
Services, Inc. And DVS, Inc.*

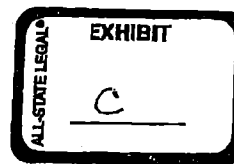
The Honorable R. Markley Dennis, Jr., C.A. No. 2008-CP-08-
1759

*Order Granting in Part and Denying In Part Third-Party
Defendant American Residential Services of South Carolina,
Inc. 's Motion for Summary Judgment*

The Honorable Roger M. Young, C.A. No. 2009-CP-10-6573

*Order Granting Motion for Summary Judgment Of Sto Corp.
And Acrocrete,*

The Honorable Curtis L. Coltrane, C.A. No. 05-CP-07-1312



STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO: 2008-CP-08-1759
) (formerly 2008-CP-08-0936)

CHARLES B. NEWTON, JR. and
DONNA LOU NEWTON,

Plaintiffs,

vs.

ROGER M. MUIR, DEBORAH L.
MUIR, INDIVIDUALLY, AND MUIR
CUSTOM HOMES, LLC, J. H. LEE
MASONRY, INC., TERRY MILES
d/b/a MILES CONSTRUCTION
COMPANY, JOYCE LETELLIER, WW
SERVICES, INC., DVS, INC.,
WOODMASTERS, INC., and
LARRY'S TERMITE AND PEST
CONTROL INC., a/k/a LARRY'S
TERMITE CONTROL, INC., n/k/a
LIGHTING TERMITE AND PEST
CONTROL, LLC.,

Defendants.

ORDER GRANTING SUMMARY
JUDGMENT AS TO JOYCE
LETELLIER, WW SERVICES,
INC. AND DVS, INC.

This matter comes before the Court upon motion by Defendants Joyce Letellier, WW Services, Inc., and DVS, Inc. ("Movants"), seeking an Order of this Court granting summary judgment in their favor on the cross claims asserted by co-Defendants Roger M. Muir and Deborah L. Muir ("Muir")¹. For the reasons discussed herein, this Court grants the Movants' motions².

¹ WW Services asserted cross claims against Letellier, but agreed on the record to dismiss those claims.

² Letellier moved, in the alternative, for a bifurcation of the cross claims against her to a non-jury trial. However, because this Order disposes of the cross claims, Letellier's request in that regard is moot and does not need to be considered by this Court.



The instant litigation involves construction defects claims at the Plaintiffs' residence in Goose Creek. The Muirs constructed the residence, hiring the Movants and other defendants as subcontractors. Letellier served as the roofing subcontractor, WW Services installed the HVAC system, and DVS installed siding and exterior trim. The Muirs then sold the subject residence to the Plaintiffs, who, in their Complaint, have alleged defects in the construction of the residence. In their responsive pleading, the Muirs deny those allegations and assert cross claims against the Movants (and others) based upon causes of action in negligence, breach of warranty, breach of contract, and indemnity. At a mediation held on May 10, 2012, the Plaintiffs and Movants reached compromised settlements of the claims asserted against each of the Movants.

As part of the separate settlement agreements with each Movant, the Plaintiffs provided an issue preclusion release, in which the Plaintiffs agree to extinguish their claim related to each Movants' scope of work at the residence. However, the Muirs refused to dismiss their cross claims against the Movants, ultimately leading to the filing of the summary judgment motions addressed within this Order.

Standard of Review

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

Analysis

The Muirs contend that their cross claims should survive because they are entitled to seek recovery, from the Movants, of damages allegedly related to the respective movant's services as well as for the costs incurred by the Muirs in defending against the Plaintiffs' claims, regardless of the nature of the agreement between the Movants and Plaintiffs, this Court disagrees.

Although the Muirs have alleged several causes of action against the Movants, the claim, however phrased or titled in the pleading, is one based upon equitable indemnification. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." State v. Yelsen Land Co., 257 S.C. 401, 403, 185 S.E.2d 847 (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 the action. See Seebaldt at 692, 239 S.E.2d

at 727 ("The character of an action is primarily determined by the allegations contained in the complaint.").

The Muirs' four cross-claims all request the same relief. As the claim asserted is actually one in indemnity, the remaining three cross-claims (negligence, breach of warranty, breach of contract) are duplicative of the indemnity claim. The cross-claims seek to recover the amount the Muirs are found to be liable to the Plaintiffs at trial, and attorneys' fees incurred in defending against the Plaintiffs' claims. They are contingent on the outcome of the trial. The Muirs do not seek damages from the Movants for personal injury, property damages, or other damages actually incurred by the Muirs, and cross-claims are therefore claims for indemnity. Vermeer at 60, 518 S.E.2d at 305. Moreover, the Muirs' cross claims are derivative of the Plaintiffs' claims, as the Muirs would not have a right to assert the cross claims had the Plaintiffs not first commenced this litigation.

Further, the highest courts in other states have also dismissed disguised indemnity claims: See, e.g., Dodge Trucks, Inc. v. Wilson, 231 S.E.2d 818, 821 (Ga. Ct. App. 1976) (stating "regardless of what [Plaintiff] may name [his claim], it is an action for contribution and indemnity"), aff'd, 235 S.E.2d 142, 144 (Ga. 1977) Frazer v. A.F. Munsternan, Inc., 527 N.E.2d 1248, 1258-59 (Ill. 1983) (observing that, although the claims were "stated as counts for breach of implied warranty," they should be regarded as claims for indemnity); Warner v. Reagan Bulck, Inc., 483 N.W.2d 764, 770 (Neb. 1992) (noting that, although the third-party plaintiff made claims for breach of contract, "[t]he gravamen of the third-

party petition is indemnification, and we shall treat it as such"); Adkinson v Int'l Harvester Co., 975 F.2d 208,216 (5th Cir. 1992) (regarding third-party plaintiff's claim for breach of warranty as one for indemnity). Accordingly, although the Muirs have alleged multiple causes of action in their cross claims, this Court finds that the sole claim asserted by the Muirs is based upon equitable indemnification.

Courts have traditionally allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties. Toomer v. Norfolk Southern Ry Co., 344 S.C. 486, 490-1, 544 S.E.634, ___ (Ct. App. 2001). According to principles of equity, this right arises "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." Id. (quoting Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24, 301 S.E. 552, 553 (1983)) see also Restatement (First) of Restitution § 76 (1937) ("A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."); Restatement (Third) of Torts: Apportionment Liab. § 22 (2000) (Indemnity available if indemnitee "was not liable except vicariously for the tort of the indemnitor").

Additionally, it is the law of South Carolina that:

For a party to recover under a theory of equitable indemnification, three things must be proven: (1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee

suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor.

Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. If the second party is also at fault, he comes to court without equity and has no right to indemnity. 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 Carolina's, Inc. v. Wood/Chuck Chipper Corp., 338 S.C. 53, 63, 518 S.E.2d 301, 307. (Ct. App. 1999) (citations omitted).

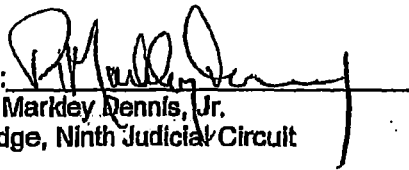
Issue preclusion, also known as collateral estoppel, refers to the "binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties..." Black's Law Dictionary 279 (Deluxe 8th Ed. 2004). It also can refer to nonmutual collateral estoppel, which is "asserted either offensively or defensively by a nonparty to an earlier action to prevent a party to that earlier action from relitigating an issue determined against it." Id.

Based upon the agreements between each Movant and the Plaintiffs, it is clear that the parties intended to release, resolve, preclude, and render *res judicata* the respective claims related to the installation and performance of the roof and related flashings, HVAC system, and the siding and exterior trim, and those claims have been effectively extinguished. The Plaintiffs will not be presenting these issues to a jury; therefore, there will be no finding that the Movants were liable for the Plaintiffs' damages. Likewise, there can be no exoneration of the Muirs on those issues. Equally importantly, the issues relating to the roof/flashings, HVAC systems, and siding, exterior trim, having been

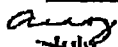
extinguished, the Muirs are not exposed to liability by any act or omission of the movants. Accordingly, the Muirs are unable to satisfy the elements of a claim for equitable indemnification.

Accordingly, it is adjudged, and decreed: (1) Joyce Letellier's Motion for Summary Judgment is granted and the cross-claims asserted against her by the Muirs are dismissed with prejudice (along with the cross claims asserted against her by WW Services; (2) WW Services's Motion for Summary Judgment is granted and the cross claims asserted against it by the Muirs are dismissed with prejudice; (3) DVS, Inc.'s Motion for Summary Judgment is granted and the cross claims asserted against it by the Muirs are dismissed with prejudice.

IT IS SO ORDERED!

By: 
R. Markley Dennis, Jr.
Judge, Ninth Judicial Circuit

 Thomas Corner, South Carolina


July 7, 2012.

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Cheryl H. Nelson,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc. and McGee
Brothers Co., Inc.

Defendants.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc.,

Third-Party Plaintiff,

vs.

Benjamin Mora d/b/a Mora Construction,
Sondles Builders, LLC, Carolina Custom
Security & Sound, Inc., Barr Construction,
Inc., Brancifort Concrete Industries, Inc.
American Residential Services, LLC d/b/a
American Residential Services of South
Carolina, Inc. f/k/a Atlas Services, Inc. and
Coastline Construction, Inc. f/k/a Coastline
Construction,

Third-Party Defendants

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2009-CP-10-6573

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

ORDER GRANTING IN PART AND
DENYING IN PART THIRD-PARTY
DEFENDANT AMERICAN
RESIDENTIAL SERVICES OF SOUTH
CAROLINA, INC.'S MOTION FOR
SUMMARY JUDGMENT

This matter came before the Court for a hearing on July 25, 2011, for consideration of
Third-Party Defendant American Residential Services of South Carolina Inc's ("ARS") Motion
for Summary Judgment. Counsel for the parties were present, and this Court entertained and



considered oral arguments as well as memorandums of law and affidavits submitted by the parties.

Facts

Plaintiff homeowner brings this suit, filed on October 19, 2009, to recover damages resulting from alleged faulty construction or repair of her home. Defendant Wieland Homes filed a third-party complaint against Third-Party Defendant ARS on December 2, 2010, alleging the work ARS did in installing the HVAC system in 1996 cause or contributed to the Plaintiff's damages. Defendant Wieland Homes brings four causes of action against ARS including 1) indemnity, 2) negligence, 3) breach of warranty, and 4) breach of contract.

ARS contends it is entitled to summary judgment as a matter of law to the claims of negligence, breach of warranty, and breach of contract, because these claims are disguised indemnity claims. It also argues that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes owes no liability to the Plaintiff as a result of ARS's work.

Standard of Review

Summary judgment is only appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 627, 541 S.E.2d 831, 833 (2001). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id.

Discussion

I. ARS's Motion for Summary Judgment as to the Claims of Negligence, Breach of Warranty and Breach of Contract.

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

Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Courts may use the allegations in the complaint to determine the correct character of an action. Id. "Indemnity is that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (citations omitted).

In this case, Defendant Wieland Homes' Complaint requests the remedy of "any monies [Wieland Homes] is adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claims." Third-Party Complaint ¶ 160, 170, 164. Because these claims seek to recover the amount Wieland Homes paid to Plaintiffs, rather than personal injury or property damages, the claims are claims for indemnity. Vermeer Carolina's Inc., 336 S.C. at 60, 518 S.E.2d at 305.

This court finds that the causes of action for negligence, breach of warranty, and breach of contract are all disguised indemnity claims and Wieland Homes has failed to state facts sufficient to constitute independent causes of action and therefore Third-Party Defendant ARS is entitled to Summary Judgment as a matter of law.

II. ARS's Motion for Summary Judgment as to the Claim of Indemnity.

Third-Party Defendant ARS contends that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes has failed to present evidence that it is liable to the Plaintiff as a result of ARS's work and because all claims arising out of ARS's work are barred by the applicable three-year statute of limitations.

After thorough review, this Court finds that there is evidence in the record that Plaintiff has been damaged by excessive water and moisture damage in her home and there is a genuine issue of material fact regarding whether ARS's HVAC work contributed to Plaintiff's damage.

Additionally, the Plaintiff's Complaint alleges that the applicable statute of repose does not apply because the conduct is subject to the statutory exception for reckless conduct. S.C. Code Ann. §15-3-670. If the statutory exception applies, then the exception could apply to the work ARS did in installing the HVAC system in 1996.

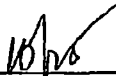
For these reasons, the Third-Party Defendant ARS's Motion for Summary Judgment as to the claim of indemnity is denied.

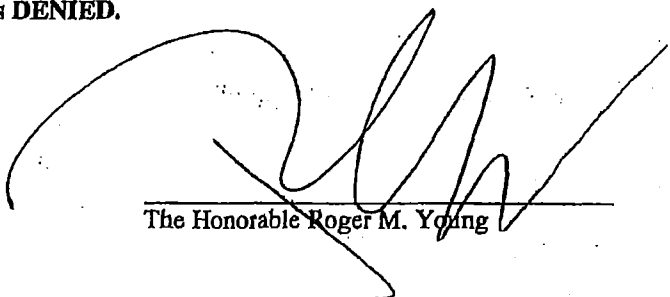
Conclusion

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

- 1) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Negligence, Breach of Warranty, and Breach of Contract is **GRANTED**.
- 2) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Indemnity is **DENIED**.

AND IT IS SO ORDERED.


_____, 2011
Charleston, South Carolina.



The Honorable Roger M. Young

(mcmt)

STATE OF SOUTH CAROLINA
COUNTY OF BRAUFORT }

IN THE COURT OF COMMON PLEAS
CASE NO. 05-CP-07-1312

Carl T. Kirkland, Mary Alice Kirkland,
Carl T. Kirkland Qualified Personal
Residence Trust and Mary Alice Kirkland
Qualified Residence Trust,

Plaintiffs,

v.

Cambridge Building Corporation, MAJ
Enterprises, Southern Roof and Wood Care
Corp., T.R. Johnson Builders, Inc.,
Figueras's Exterior Trim & Woodwork,
William Vitto, Susanne T. Shelk,
Lang's Heating & Air Conditioning,
Anderson Windows, Inc., and
Clarence R. Floyd d/b/a Wiggins Iron
and Fence,

Defendants.

Cambridge Building Corp.

Third-Party Plaintiff,

v.

Sto Corp. and Acrocrete, Inc.,

Third-Party Defendants.

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT
OF STO CORP. AND
ACROCRETE, INC.

This matter is before the Court on the motion of Third-Party Defendants Sto Corp. ("Sto") and Acrocrete, Inc. ("Acrocrete") for summary judgment as to the claims asserted by the Third-Party Plaintiff, Cambridge Building Corporation ("Cambridge"). The case involves the construction of a house on Hilton Head Island, South Carolina, now owned by the Plaintiffs, who bought it in 1997. Cambridge served as general contractor for the house, which was built in 1993 for a previous owner. As originally constructed, the exterior siding of the house was an Exterior Insulation and

CLW # 1010



Finish System ("BFS"), sometimes referred to as synthetic stucco. It is undisputed that Cambridge's BFS subcontractor mixed materials sold by two different manufacturers, Aerocrete and Sto, when installing the BFS on this house.

Plaintiffs, in their Fourth Amended Complaint, assert claims against Cambridge for faulty construction resulting in water damage to the structure.¹ Cambridge's Third-Party Complaint against Sto and Aerocrete contains causes of action for indemnity, negligence and breach of warranty. For the reasons stated below, the Court concludes that summary judgment should be granted.

1. Summary judgment standard.

Rule 56(e) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered forthwith when depositions and other evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a summary judgment motion, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. The non-moving party, however, can not rest on the mere allegations of its pleadings but must present specific, admissible facts which reasonably create a genuine issue for trial, and the Court need not consider unreasonable inferences from the proffered evidence. *Main v. Corley*, 281 S.C. 525, 526-527, 316 S.E.2d 406, 407 (1984); *Humana Hospital-Bayside v. Lighthouse*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991); *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1992).

¹ As part of a settlement with Sto and Aerocrete, the Plaintiffs amended their Complaint to clarify that they do not allege the remaining defendants, including Cambridge, are liable in any way for supplying a defective product. It is clear that the Plaintiffs' claims against Cambridge relate solely to construction defects, including but not limited to the failure to properly supervise the installation of BFS.

2. *The negligence and breach of warranty claims.*

The Court concludes as a matter of law that Cambridge's claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 59, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Wimsboro v. Wiseman-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 *Rook Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

Although Cambridge contends otherwise, a fair reading of the language of its third-party complaint reveals that the first and second causes of action for negligence and breach of warranty are, in reality, claims for indemnity. In stating both claims, Cambridge seeks recovery, not for its own independent personal injury or property damage, but merely for the liability it might incur to the Plaintiffs. In stating the negligence cause of action, paragraph 19 of the Third-Party Complaint reads as follows:

If Cambridge is liable to the Plaintiffs in any respect, which is denied, then such liability arose from [Sto and Aurore's] breach of the duties described above. Such breaches constitute negligence, and [Sto and Aurore] should indemnify Cambridge, in whole or in part, for any liability that may be adjudged against it in the Plaintiffs' favour. (emphasis added).

Likewise, the cause of action for breach of warranty contains virtually identical language seeking reimbursement of any amounts which Cambridge is found to owe to Plaintiffs. The causes of action for negligence and breach of warranty mirror that for

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indemnity. These claims not only seek a form of relief that could only be defined as indemnity but also actually use the word "indemnify." Therefore, there can be no doubt that Cambridge's negligence and warranty claims are, essentially, indemnity claims in disguise.

Proof of a breach of warranty or negligence may be relevant for an indemnitee to establish the indemnitor's fault in causing a plaintiff's damages, which is an essential element of a claim for equitable indemnity. Such proof does not support stand-alone claims, however. Thus, to recover against Bio or Aerocrete, Cambridge must still establish the other elements of equitable indemnity. The Supreme Court of South Carolina recognized as much when it observed the following:

The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.

Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992). As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." *SCNB v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

The highest courts in other states have also concluded that a third-party plaintiff's claims for breach of warranty necessarily fold into and are absorbed by an overarching cause of action for indemnification. See *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 820 (Ga. Ct. App. 1976); *aff'd*, 235 S.E.2d 142, 144 (Ga. 1977) (claim couched as

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breach of warranty was really one for indemnity); *Prater v. A.R. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (claims "stated as counts for breach of implied warranty" should be regarded as claims for indemnity); *Warner v. Reagan Bulok, Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) ("[t]he gravamen of the third party position is indemnification, and we shall treat [claims titled breach of warranty] as such"); *Adkinson v. International Harvester Co.*, 975 F.2d 208 (5th Cir. 1992) (interpreting third-party claim for breach of warranty as one for indemnity).

Since Cambridge has not alleged or submitted evidence of any damages other than Plaintiffs' potential judgment against it and the costs incurred in defending Plaintiffs' claims, the only viable cause of action against Sto or Acrocrete is one for indemnity.² Therefore, the Court grants summary judgment on the causes of action for negligence and breach of warranty.

5. Equitable indemnity - lack of a special relationship.

The Court also concludes as a matter of law that there is no special relationship between Cambridge and Sto or Acrocrete on which to base Cambridge's right to equitable indemnity.³ Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Yarnes v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Cl. App. 1999). In order to maintain a claim for equitable indemnity, Cambridge must demonstrate that a special relationship existed between it and Sto or Acrocrete. See *Towner v. Norfolk Southern Railway Company*, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637, (Cl. App. 2001); see also, *Soon v. Prushauf Corp.*, 302 S.C. 364, 368, 395 S.E.2d

² To the extent that Cambridge's request to be indemnified "in part" for any liability it incurs to Plaintiffs can be construed as a request for contribution, such request is merited since any contribution claim was extinguished by Sto and Acrocrete's good faith settlements with the Plaintiffs. S.C. Code § 15-38-30.

³ There was no contract between Cambridge and Sto or Acrocrete so there can be no claim for contractual indemnity; the only applicable legal concept is that of equitable indemnity.

354, 358 (1990) ("[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them").

The South Carolina Supreme Court recently clarified that this special relationship "must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another's wrongdoing." *Rook Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, 34 (2005). The Court believes that *Rook Hill* is controlling precedent. Applying its principles to the instant case, it is clear that there is no special relationship between Cambridge and Sto or Aerocrete to support a claim for equitable indemnity. First, in its Third-Party Complaint, Cambridge fails to even allege that any such special relationship exists. Second, any relationship that did exist was even more attenuated than the relationship between the utility and subcontractor in *Rook Hill*, who were separated by just one level - the contractor. Here, Cambridge is separated from any dealings with Sto or Aerocrete by at least two levels - the BIFS subcontractor and the respective distributors of Sto and Aerocrete materials.

Furthermore, the undisputed facts of the case reveal that there was no relationship of any kind between Cambridge and Sto or Aerocrete at the time the house in question was built. The contract between Cambridge and the original owner of the house did not specify any particular manufacturer's products or system and simply called for the use of synthetic stucco or "EIFS" generically. Sto and Aerocrete submitted uncontradicted testimony from Cambridge's construction supervisor that Cambridge was not in the practice of specifying which manufacturer's system to use and generally left it to the

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discretion of the BIFS subcontractor. This was confirmed by the uncontradicted testimony of Cambridge's BIFS subcontractor that he had "free reign" to decide which manufacturer's BIFS materials to use on the job. Furthermore, there is no evidence in the record that Cambridge possessed or relied on any Sto or Aerocrete product literature at the time the house was built.

The BIFS subcontractor freely admitted in deposition testimony that he commonly mixed materials from various manufacturers on jobs and did just that in this case with Aerocrete and Sto materials. As pointed out by Sto and Aerocrete, no party or expert witness in the case has been able to determine where Aerocrete materials stop and Sto materials begin. The only evidence in the record on the issue is the uncontradicted testimony of Plaintiffs' expert that the BIFS materials were "hopelessly mixed" and that the BIFS system on the house was a "home-made" system and could not be said to be either an Aerocrete or a Sto system.

There is simply no evidence in the record that Cambridge had any sort of relationship with Sto or Aerocrete on which to base a right of indemnity. As such, Cambridge's claim falls to meet the standard set forth in the *Rock Hill* case, and the Court grants summary judgment on the cause of action for equitable indemnity.

4. *Equitable indemnity - alternative grounds.*

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second is not. [text omitted]. If the second party is also at fault, he comes to court without equity and has no right to indemnity. [text omitted]. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."

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Vermaser v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 307 (Cl. App. 1999). See *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). It is not enough for Cambridge to prove that the alleged defective design of BIFS contributed, in part, to the moisture damage on the house at issue. Under the established law of equitable indemnity, Cambridge must prove that it was wholly without fault in causing Plaintiffs' damages. See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, 237 fn. 2 (2005).

There is no evidence in the record that Cambridge was wholly without fault. In fact, the only evidence in the record is that Cambridge was at least partly at fault for the water intrusion damage to Plaintiffs' house. Sto and Acrocrete submitted the uncontradicted testimony of Plaintiffs' expert that many of the problems causing the water intrusion were the result of Cambridge's negligence in failing to properly sequence the work of its subcontractors on the project. The expert testified, without rebuttal, that there was no damage on the house caused solely by the alleged defective design of BIFS and that any damage to the house was caused, at least in part, by the improper workmanship of Cambridge and its subcontractors. Cambridge's inability to establish its own lack of fault bars any claim for equitable indemnity. Therefore, Acrocrete and Sto would be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

The Court concludes that there is yet another reason summary judgment is proper on the equitable indemnity claim. It is axiomatic that there can be no indemnity among mere joint tortfeasors. *Vermaser v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Cl. App. 1999). The claims against Cambridge in the Fourth Amended

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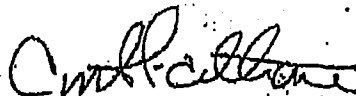
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Complaint all relate to defective construction work, including but not limited to faulty BIFS installation. Plaintiffs do not allege in any way that Cambridge is responsible for supplying a defective product. As a result of the settlement with Acrocrete and Sto, Plaintiffs have removed the BIFS design issue from the case. Therefore, Cambridge can never be held liable to Plaintiffs for something Sto or Acrocrete did. As such, Cambridge is a mere joint tortfeasor with no right to indemnity.

The Court agrees with Sto and Acrocrete's argument that, while Cambridge may defend itself on the grounds that Plaintiffs' damages were caused by the alleged defective design of the BIFS product and not by improper construction work, the right to defend itself and establish its lack of liability does not establish a right to indemnity in favor of Cambridge. Therefore, Acrocrete and Sto would also be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

NOW, THEREFORE, IT IS ORDERED that summary judgment is granted to Sto Corp. and Acrocrete, Inc. on all causes of action in Cambridge's Third-Party Complaint, which is hereby dismissed with prejudice.

AND IT IS SO ORDERED.



Curtis L. Coltrane, Master-In-Equity
and Special Circuit Judge for Beaufort County,
South Carolina

BEAUFORT, SC
May 30, 2006

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-26-7275

BEI-Beach, LLC,

Plaintiff,

vs.

Mashburn Christman, JV, Lend Lease (US)
Construction, Inc., f/k/a Bovis Lend Lease, Inc.,
and McCrory Construction Company, LLC,

Defendants.

Mashburn Christman, JV,

Third-Party Plaintiff,

vs.

Wallcraft Construction, Inc., Alpha Insulation &
Waterproofing, Inc., Baker Roofing, Inc., Collins
& Wright, Inc., Liberty Mutual Insurance
Company, Old Republic Surety Company,
Hartford Fire Insurance Co., Travelers Casualty
and Surety Company of America, The Muhler
Company, Inc., and Companion Property and
Casualty Insurance Company,

Third-Party Defendants.

Lend Lease (US) Construction Inc. f/k/a Bovis
Lend Lease, Inc.

Third-Party Plaintiff,

vs.

Spann Roofing & Sheet Metal, Inc., Travelers
Casualty and Surety Company of America,
Strickland Waterproofing Company, Merchants
Bonding Company, Everest Reinsurance
Company, Wallcraft Construction, Inc., Old
Republic Insurance Company, Madison
Construction Group, Inc., Worthington
Integrated Building Systems, McDowell
Commercial Construction, LLC, Jollay Masonry,

**THIRD PARTY DEFENDANT
ANTUNOVICH ASSOCIATES, INC.'S
SUPPLEMENTAL BRIEF IN
OPPOSITION TO PLAINTIFF
BEI-BEACH, LLC'S MOTION TO
AMEND COMPLAINT**

National Fire Insurance Company of Hartford,)
R.J. Kenney Associates, Inc., Joseph)
Antunovich, Antunovich Associates, TG)
Construction, LLC, Luis Banegas d/b/a Luis)
Trim Work, Nora Del Carmen Lagos, Nora Del)
Carmen Lagos d/b/a Luis Trim Work, and)
Ovation Custom Trim, LLC,)

Third-Party Defendants.)

McCrory Construction Company, LLC,)

Third-Party Plaintiff,)

vs.)

Collins & Wright, Baker Roofing, Glasstech inc.,)
Palmetto State Roofing and Sheet Metal,)
Strickland Waterproofing, Maiday, Inc., and)
Atlas Drywall & Acoustics, Inc.,)

Third-Party Defendants.)

Spann Roofing & Sheet Metal, Inc.)

Fourth-Party Plaintiff,)

v.)

Coastal Commercial Roofing Co., Inc. and)
Daniel Kniffen d/b/a East Coast)
Improvements,)

Fourth-Party Defendants)

Wallcraft Construction, Inc.,)

Third-Party Plaintiff)

v.)

BT Construction, LLC,)

Third-Party Defendant.)

Third-Party Defendant Antunovich Associates, Inc., (“Antunovich”) hereby submits this Supplemental Brief in Opposition to Plaintiff BEI-Beach, LLC’s (“BEI”) Motion to Amend Complaint (“BEI’s Motion”), and incorporates the position laid out in its June 27, 2019, Initial Memorandum in Opposition to BEI’s Motion. The Court should deny BEI’s Motion because it is both (1) patently futile, because the pleadings establish that any direct claims against Antunovich by BEI are barred by the three-year statute of limitations, and (2) prejudicial to Antunovich, in violation of Rule 15, SCRPC.

INTRODUCTION & BACKGROUND

This is a construction defect case related to The Market Common, a large multi-use development in Myrtle Beach, South Carolina. At issue are buildings A2, A3, A4, A5, A6, A7, and A8, each of which have retail space at ground level and apartments on the floors above. Antunovich was the architect of record for The Market Common development, through its contract with the project’s developer. (2nd Amend. Compl. ¶¶ 9-10).

In its Complaint, originally filed on October 2, 2015, Plaintiff complains of nearly every component of these buildings, and has produced a roughly \$23 million repair estimate. Defendant McCrory Construction Company, LLC, built Buildings A2 and A5 (the “McCrory Buildings”); Mashburn Christman, JV, built A3 and A4 (the “Mashburn Buildings”); and Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc., built A6, A7, and A8 (the “Lend Lease Buildings”). (2nd Amend. Compl., ¶ 11). Each of these general contractors has sued several third-parties, most of which are subcontractors or the subcontractors’ sureties. Lend Lease (and only Lend Lease) also sued Antunovich as a third-party defendant, alleging negligence with respect to Antunovich’s design pressure (“DP”) specifications for the windows on the three Lend Lease Buildings.

Now, **more than four years after filing this civil action**, Plaintiff has moved for an order allowing it, for the first time, to make a direct claim against Antunovich for alleged “gross negligence,” because of its DP specifications for the Lend Lease Buildings and the Mashburn Buildings. (See, 2nd Amend. Compl., ¶¶ 44-48). Plaintiff has known about these alleged DP specification deficiencies for more than three years, as evidenced by its own proposed amended complaint, which cites and incorporates by reference the reports of its own experts at its forensic architectural and engineering firm, Applied Building Sciences, Inc. (“ABS”). A timeline of relevant events follows:

| Date | Event | Reference |
|-------------------------------|---|---|
| Spring 2008 | Substantial Completion of The Market Common | 2 nd Amend. Compl. ¶ 12 ¹ |
| Before Feb. 2015 ² | BEI retains counsel for known “defects and deficiencies in the Market Common buildings.” | 2 nd Amend. Compl. ¶ 16 |
| 10.02.15 | BEI files comprehensive construction defect suit against Mashburn, Lend Lease, and McCrory | Compl. |
| 03.28.16 | ABS’ Report to Plaintiff specifically reporting deficiencies in Antunovich’s DP specification (discussed further below) | 2 nd Amend. Compl. ¶ 17g
Harvey Affd. ¶ 8a
Ex. B, p. 2 |
| 10.02.18 | Three Year Anniversary of Filing Civil Action | |
| 03.28.19 | Three Year Anniversary of ABS Report Noting DP Specification Defects | |
| 06.26.19 | BEI Files the Motion to Amend to sue Antunovich | |

STANDARD OF REVIEW

Where a proposed amendment to a Complaint would be futile, the motion to amend shall be denied. *See, e.g., Health Promotion Specialists, L.L.C. v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812-13 (2013) (affirming the circuit court’s denial of a party’s motion to amend its complaint when the amendment would be futile); *Couram v. Davis*, 2015 WL 477266,

¹ BEI’s proposed Second Amended Complaint, including the attached Affidavit of Scott Harvey, is attached hereto as Exhibit A.

² We know BEI retained counsel before February 2015, because ABS began its investigation in February 2015, and BEI’s Complaint alleges that ABS was hired through counsel. (2nd Amend. Compl., ¶ 17).

at *1 (Ct. App. Feb. 4, 2015) (affirming the denial of a motion to amend as futile because the applicable statute of limitations had expired).

Proposed amendments that would be prejudicial to a party are also prohibited. Rule 15(a), SCRCp; *see also Health Promotion Specialists*, at 632, 743 S.E.2d at 812-13 (affirming the denial of a motion to amend as prejudicial when several years had passed between the original complaint and motion to amend).

ARGUMENT

BEI seeks to amend its original Complaint, over four years after filing it, to assert direct claims against Antunovich for the first time. Such an amendment would be patently futile and prejudicial to Antunovich, and should therefore be prohibited.

I. BEI'S MOTION TO AMEND IS FUTILE, BECAUSE ITS PROPOSED CLAIM AGAINST ANTUNOVICH IS UNQUESTIONABLY BARRED BY THE STATUTE OF LIMITATIONS.

A. BEI's forensic architect's and engineer's March 28, 2016, report proves that BEI actually knew of its claim against Antunovich more than three years ago.

ABS (again, Plaintiff's forensic architectural and engineering firm), was hired by BEI's counsel because BEI was already "aware of defects and deficiencies in the Market Common Buildings." Compl., ¶¶ 13-14; 2nd Amend. Compl., ¶¶ 16-17. According to BEI's October 2015, Complaint, ABS discovered defects in the stucco, flashings (including around the windows), walkways, guardrails, weeps, and roofs, which were causing damage to the buildings' substructures. Compl., ¶ 14.

On March 28, 2016 (three years and seven months ago), ABS issued a report specifically finding that the design pressure ratings specified by Antunovich were insufficient. Ex. B,

incorporated through 2nd Amend Compl., ¶ 17(g), Harvey Aff'd, ¶ 8(a).³ At that time, ABS reported that its "calculations show that the components and cladding design pressure specifications **provided by the architect** are not in compliance with design pressures for [these buildings]" and that the "windows provided in buildings A-3, A-4, A-6, A-7, and A-8 appear to be deficient"). Ex. B (emphasis added). Expert Harvey further testifies in his Affidavit that these design pressure specifications "were not in compliance with applicable codes at the time of design and construction." Harvey Aff'd, ¶ 9.

This is the exact damage for which Plaintiff now seeks to sue Antunovich. 2nd Amend. Compl. ¶ 17(g) ("The vinyl windows specified ... were inappropriate for the designated wind zone design pressure requirements"); ¶ 46 ("Antunovich breached the standard of care ... in regard to its design services related to the vinyl windows ... as more fully described in the Affidavit of Scott A. Harvey."). It is clear from the proposed 2nd Amended Complaint that BEI knew of Antunovich's alleged negligence, and the injury resulting therefrom, more than three years ago. Therefore, any claim based on that negligence/damage is patently barred by the three-year statute of limitations, because "[i]f ... a plaintiff knows or should know that she had some claim against someone else, **the statute of limitations begins to run for all claims based on that injury.**" *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 370, 597 S.E.2d 27, 29 (Ct. App. 2004) (citing *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994)) (emphasis added).

³ Because ABS' reports have been incorporated by reference in BEI's pleadings and the Harvey Affidavit attached thereto, they are properly part of the Court's record for consideration in this dispute.

B. BEI's original Complaint also proves that it knew or should have known of its claims against Antunovich more than three years ago.

BEI filed its original Complaint on October 2, 2015 (over four years ago), alleging widespread, comprehensive, and systemic construction defects. Compl., ¶¶ 13, 14, 23, 31, and 39. Even assuming *arguendo* that October 2, 2015, was the first date BEI knew of defects in its buildings in general, it had three years from that date to investigate its potential claims related thereto, and sue all potentially-responsible parties. The **actual** identification of all potential wrongdoers is not required to trigger the limitations period, nor is a full-blown theory of recovery. *Cline*, 359 S.C. 367, 597 S.E.2d 27; *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981). “[T]he date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations.” *Cline*, 359 S.C. at 370, 597 S.E.2d at 29 (citing *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170). Moreover, “the fact that the injured party may not comprehend the full extent of the damage is immaterial.” *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). Rather, “the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist.” *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647 (citing *Snell*, 276 S.C. 301, 278 S.E.2d 333) (emphasis original).

Therefore, BEI's retention of counsel for the purpose of prosecuting widespread construction defect claims, and subsequent filing of this lawsuit on October 2, 2015, is proof that it knew of its injury (*i.e.*, allegedly-defective buildings) as of that date **at the latest**, which triggers the limitations period as to all claims and against all parties based upon that injury. *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. South Carolina courts have found it an “insurmountable hurdle” to argue that an attorney's letter did not trigger the statute of limitations. *Watters v. Terminix Serv., Inc.*, 376 S.C. 632, 635, 658 S.E.2d 110, 112 (Ct. App. 2008); *see also, Hampton Hall, LLC v.*

Chapman Coyle Chapman & Associates Architects AIA, Inc., 2018 WL 6790308, at *4 (D.S.C. Dec. 26, 2018) (where the Court, as a matter of South Carolina law, found that the plaintiff was aware of its cause of action as of the date of its attorney's letter, despite that the plaintiff was not aware of all potential defendants or the full scope of the damages). Here, Plaintiff **actually filed a lawsuit more than three years ago based on the same injury for which it now seeks to sue Antunovich**. Since an attorney's mere letter triggers the SOL, the filing of a lawsuit absolutely does as well. Because BEI's claim against Antunovich is barred by the statute of limitations, BEI's Motion is futile, and must be denied. *Health Promotion Specialists*, 403 S.C. at 632, 743 S.E.2d at 812-13; *Couram*, 2015 WL 477266, at *1.

II. BEI'S MOTION TO AMEND SHOULD BE DENIED, BECAUSE IT WOULD BE PREJUDICIAL TO ANTUNOVICH UNDER RULE 15, SCRPC.

If a proposed amendment would be prejudicial, it should be denied. Rule 15(a), SCRPC. The South Carolina Supreme Court has found that seeking to assert new theories/causes of action after significant time has elapsed would be prejudicial, warranting denial of a motion to amend. *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812-13 (2013) (where the Court affirmed the denial of a motion to amend because it would force the defendant to "defend against 'arguably new theories of the case when so much time had elapsed'").

In the four years that this case has been pending, Antunovich has been defending same in response to the only existing (viable) claims against it: third-party equitable indemnity claims by a general contractor on three of the seven buildings at issue. For example, Antunovich's counsel has purposefully limited their questions during the depositions of fact and expert witnesses, and even abstained from attending depositions related to the other buildings. Antunovich's review of

the massive document productions has also been performed in reliance upon these limited claims against it.

BEI now moves to make a direct claim against Antunovich in relation to both the Lend Lease Buildings and the Mashburn Buildings. If BEI is allowed to do so, Antunovich would be forced to start from scratch, especially as it relates to the Mashburn Building claims. Weeks' worth of already-completed depositions would have to be re-opened, and Antunovich would be required to re-review the colossal document productions. Antunovich's addition as a first-party defendant would also significantly delay this case.

All of the above demonstrates great prejudice under Rule 15, SCRCP, and also warrants the denial of BEI's Motion to Amend.

CONCLUSION

Plaintiff's proposed claims against Antunovich are clearly barred by the statute of limitations, given that all of the following occurred more than three years ago: (1) Plaintiff retained legal counsel to prosecute known construction defect claims, (2) Plaintiff actually filed this comprehensive construction defect lawsuit, and (3) Plaintiff's experts reported the exact defect for which Plaintiff now seeks to sue Antunovich. Thus, it is clear that Plaintiff knew of its claims against Antunovich more than three years ago, and that Plaintiff's Motion to Amend is therefore futile and should be denied.

Moreover, Plaintiff's Motion to Amend would be deeply prejudicial to Antunovich, given the progress of this four-year-old case, and Antunovich's strategic participation therein in reliance upon the limited claims against it.

October 25, 2019

s/ Michael B. T. Wilkes
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WILKES LAW FIRM, P.A.
200 Meeting St., Suite 205
Charleston, SC 29401
843.737.6229

*Attorneys for Third-Party Defendant
Antunovich Associates, Inc.*

EXHIBIT A

ELECTRONICALLY FILED - 2019 Jun 26 11:45 AM - Horry - COMMON PLEAS - CASE#2015CP2607275
ELECTRONICALLY FILED - 2019 Oct 25 4:07 PM - Horry - COMMON PLEAS - CASE#2015CP2607275

| | | |
|---|---|------------------------------|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF HORRY |) | C.A. No.: 2015-CP-26-7275 |
| |) | |
| BEI Beach, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Mashburn Christman, LLC, Lend Lease (US) |) | AMENDED SUMMONS |
| Construction, Inc., f/k/a Bovis Lend Lease, Inc., |) | |
| McCrary Construction Company, LLC, and |) | |
| Antunovich Associates, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| <hr/> Mashburn Christman, JV, |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Wallcraft Construction, Inc, Alpha Insulation & |) | |
| Waterproofing, Inc., Baker Roofing, Inc., Collins & |) | |
| Wright, Inc., Liberty Mutual Insurance Company, |) | |
| Old Republic Surety Company, Hartford Fire |) | |
| Insurance Co., Travelers Casualty and Surety |) | |
| Company of America, The Muhler Company, Inc. |) | |
| and Companion Property and Casualty Insurance |) | |
| Company, |) | |
| |) | |
| Third-Party Defendants. |) | |
| |) | |
| <hr/> Lend Lease (US) Construction, Inc., f/k/a Bovis |) | |
| Lend Lease, Inc., |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Spann Roofing & Sheet Metal, Inc., Travelers |) | |
| Casualty and Surety Company of America, |) | |
| Strickland Waterproofing Company, Merchants |) | |
| Bonding Company, Everest Reinsurance Company, |) | |
| Wallcraft Construction, Inc., Old Republic |) | |
| Insurance Company, Madison Construction Group, |) | |
| Inc., Worthington Integrated Building Systems, |) | |

| | |
|---|---|
| McDowell Commercial Construction, LLC, Jollay |) |
| Masonry, National Fire Insurance Company of |) |
| Hartford, R.J. Kenney Associates, Inc., Joseph |) |
| Antunovich, Antunovich Associates, TG |) |
| Construction, LLC, Luis Banegas d/b/a Luis Trim |) |
| Work, Nora Del Carmen Lagos, Nora Del Carmen |) |
| Lagos d/b/a Luis Trim Work, and Ovation Custom |) |
| Trim, LLC, |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| McCrory Construction Company, LLC, |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Collins and Wright, Baker Roofing, Glasstech, Inc., |) |
| Palmetto State Roofing and Sheet Metal, |) |
| Strickland Waterproofing, Maiday, Inc. and Atlas |) |
| Drywall & Acoustics, Inc., |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| Spann Roofing & Sheet Metal, Inc., |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Coastal Commercial Roofing Co., Inc., and Daniel |) |
| Kniffen d/b/a East Coast Improvements, |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| Wallcraft Construction, Inc., |) |
| |) |
| Third-Party Defendant. |) |
| |) |
| v. |) |
| |) |
| Vienamin Petresku d/b/a BT Construction, LLC, |) |
| |) |
| Third-Party Defendant. |) |
| |) |

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY summoned and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Amended Complaint on the subscribers at their offices, 1230 Main Street, Suite 700, Post Office Drawer 2426, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgement by default will be rendered against you for the relief demanded in the Amended Complaint.

Respectfully submitted,

s/Brian A. Autry

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Email: autry@conlaw.com

Attorneys for Plaintiff, BEI Beach, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
BEI Beach, LLC,)
Plaintiff,)
v.)
Mashburn Christman, LLC, Lend Lease (US))
Construction, Inc., f/k/a Bovis Lend Lease, Inc.,)
McCrary Construction Company, LLC, and)
Antunovich Associates,)
Defendants.)

Mashburn Christman, JV,)
Third-Party Plaintiff,)
v.)
Wallcraft Construction, Inc, Alpha Insulation &)
Waterproofing, Inc., Baker Roofing, Inc., Collins &)
Wright, Inc., Liberty Mutual Insurance Company,)
Old Republic Surety Company, Hartford Fire)
Insurance Co., Travelers Casualty and Surety)
Company of America, The Muhler Company, Inc.)
and Companion Property and Casualty Insurance)
Company,)
Third-Party Defendants.)

Lend Lease (US) Construction, Inc., f/k/a Bovis)
Lend Lease, Inc.,)
Third-Party Plaintiff,)
v.)
Spann Roofing & Sheet Metal, Inc., Travelers)
Casualty and Surety Company of America,)
Strickland Waterproofing Company, Merchants)
Bonding Company, Everest Reinsurance Company,)
Wallcraft Construction, Inc., Old Republic)
Insurance Company, Madison Construction Group,)
Inc., Worthington Integrated Building Systems,)
McDowell Commercial Construction, LLC, Jollay)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2015-CP-26-7275

SECOND AMENDED COMPLAINT

| | |
|---|---|
| Masonry, National Fire Insurance Company of |) |
| Hartford, R.J. Kenney Associates, Inc., Joseph |) |
| Antunovich, Antunovich Associates, TG |) |
| Construction, LLC, Luis Banegas d/b/a Luis Trim |) |
| Work, Nora Del Carmen Lagos, Nora Del Carmen |) |
| Lagos d/b/a Luis Trim Work, and Ovation Custom |) |
| Trim, LLC, |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| _____
McCrary Construction Company, LLC, |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Collins and Wright, Baker Roofing, Glasstech, Inc., |) |
| Palmetto State Roofing and Sheet Metal, |) |
| Strickland Waterproofing, Maiday, Inc. and Atlas |) |
| Drywall & Acoustics, Inc., |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| _____
Spann Roofing & Sheet Metal, Inc., |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| v. |) |
| |) |
| Coastal Commercial Roofing Co., Inc., and Daniel |) |
| Kniffen d/b/a East Coast Improvements, |) |
| |) |
| Third-Party Defendants. |) |
| |) |
| _____
Wallcraft Construction, Inc., |) |
| |) |
| Third-Party Defendant. |) |
| |) |
| v. |) |
| |) |
| Vienamin Petresku d/b/a BT Construction, LLC, |) |
| |) |
| Third-Party Defendant. |) |
| _____ |) |

Plaintiff BEI Beach, LLC ("BEI"), complaining of the Defendants would allege and prove the following:

PARTIES, JURISDICTION, AND VENUE

1. BEI is a Delaware limited liability company with its principal place of business in Myrtle Beach, South Carolina. BEI is the owner of the Market Common, a mixed use development including retail and residential, in Myrtle Beach.

2. Defendant Mashburn Christman, JV ("Mashburn Christman") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. Mashburn Christman was one of the general contractors for a portion of the Market Common.

3. Defendant Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. ("Lend Lease") is, upon information and belief, a Florida corporation engaged in the business of construction contracting in South Carolina. Lend Lease was one of the general contractors for a portion of the Market Common.

4. Defendant McCrory Construction Company, LLC ("McCrory") is, upon information and belief, a South Carolina limited liability company engaged in the business of construction contracting in South Carolina. McCrory was one of the general contractors for a portion of the Market Common.

5. Upon information and belief, Antunovich Associates is a corporation organized and existing under the laws of the state of Illinois and, at all times relevant hereto, conducted business in the State of South Carolina, including providing design professionals services on the Project, which is the subject of this matter.

6. Jurisdiction and venue are proper in this Court.

FACTS

7. The Market Common was originally owned by an entity named LUK-MB1, LLC. LUK-MB1, LLC contracted with the Defendants to construct certain portions of the Market Common.

8. The Market Common buildings at issue in this matter are identified in the design documents as Buildings A-2, A-3, A-4, A-5, A-6, A-7, and A-8 (the “Buildings”).

9. The Buildings were designed by Defendant Antunovich Associates (“Antunovich”), which provided professional design services for the Project, including material specifications.

10. Antunovich owed a duty to LUK-MB1, LLC and subsequent owners of the Market Common to provide design professional services meeting the applicable standard of care, building codes, industry standards, and good industry practices.

11. McCrory constructed Buildings A-2 and A-5. Mashburn Christman constructed Buildings A-3 and A-4. Lend Lease constructed Buildings A-6, A-7, and A-8.

12. McCrory achieved substantial completion of Buildings A-2 and A-5 on March 24, 2008. Mashburn Christman achieved Substantial Completion of Buildings A-3 and A-4 on April 3, 2008. Lend Lease achieved Substantial Completion of Buildings A-6, A-7, and A-8 in March 2008.

13. McCrory, Mashburn Christman, and Lend Lease were under a duty to develop, construct and/or repair and supply defect-free buildings and building components that make up the Market Common buildings at issue in this matter, in accordance with the applicable building code and construction industry standards.

14. On January 7, 2011, BEI purchased the Market Common from LUK-MB1, LLC out of receivership.

15. BEI was purchased by HomeFed Corporation (“HomeFed”) on March 28, 2014. HomeFed then took over management responsibility for the Market Common.

16. Following purchase of the Market Common, Plaintiff became aware of defects and deficiencies in the Market Common buildings.

17. Through its undersigned counsel, BEI engaged Applied Building Sciences, Inc. to conduct investigations of the defects and deficiencies. As a result of those investigations, BEI discovered that:

- a. The exterior stucco has been misapplied on Buildings A-2 through A-8, resulting in cracking, efflorescence, failure of water resistance, water intrusion, and damage to substructures, including elements of the building envelopes and interior floors, walls, and ceilings.
- b. Improper flashing or no flashing at all was installed around windows and other building envelope penetrations in various locations on Buildings A-2 through A-8, resulting in water intrusion and damage to substructures, including elements of the building envelope and interior walls.
- c. Improper waterproofing was installed on external walkways, resulting in water intrusion and damage to substructures, including metal framing.
- d. External guardrail assemblies were installed in violation of applicable building codes in regard to the required width of gaps in the assemblies.
- e. Building envelope elements were constructed without proper weeps and channels to allow for water to escape, resulting in damage to substructures.
- f. Portions of the roofs were improperly installed, resulting in water intrusion and damage to substructures and interior walls and ceilings.
- g. The vinyl windows specified for Buildings A3, A4, A6, A7, and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which the Market Common is located.

18. BEI is informed and believes that the damages resulting from these defects must be repaired in order for the Market Common buildings to function as intended.

19. As a result of the defects, BEI has been damaged by way of repair costs, loss of use, and such other damages as may be determined at trial.

FOR A FIRST CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
(Breach of Implied Warranty)

20. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

21. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

22. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

23. As a result of Mashburn Christman's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Mashburn Christman in such amounts as are proven at trial.

FOR A SECOND CAUSE OF ACTION
AS TO MASHBURN CHRISTMAN
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

24. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

25. Mashburn Christman, by virtue of its construction of Buildings A-3 and A-4 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

26. Mashburn Christman was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-3 and A-4;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;

- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements;
- h. In improper installation of roofs and related flashing; and
- i. In other deficiencies and failures to be proven at trial.

27. BEI is entitled to judgment against Mashburn Christman for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A THIRD CAUSE OF ACTION
AS TO LEND LEASE
(Breach of Implied Warranty)

28. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

29. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

30. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

31. As a result of Lend Lease's breach of the warranty of workmanlike service, BEI is entitled to a judgment against Lend Lease in such amounts as are proven at trial.

FOR A FOURTH CAUSE OF ACTION
AS TO LEND LEASE
(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)

32. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

33. Lend Lease, by virtue of its construction of Buildings A-6, A-7, and A-8 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

34. Lend Lease was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-6, A-7, and A-8;
- b. In improper installing and constructing the exterior wall and roof systems and related waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and related cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

35. BEI is entitled to judgment against Lend Lease for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A FIFTH CAUSE OF ACTION
AS TO MCCRORY
(Breach of Implied Warranty)

36. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

37. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common, extended to BEI a warranty of workmanlike service in regard to the construction thereof.

38. This warranty has been breached by virtue of the defects alleged above, singly and in combination, all resulting in the necessity for repair of the defects.

39. As a result of McCrory's breach of the warranty of workmanlike service, BEI is entitled to a judgment against McCrory in such amounts as are proven at trial.

FOR A SIXTH CAUSE OF ACTION
AS TO MCCRORY
**(Negligence, Gross Negligence, Carelessness,
Recklessness, Willfulness, and Wantonness)**

40. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

41. McCrory, by virtue of its construction of Buildings A-2 and A-5 at the Market Common project, owed a duty to BEI independent of any contract to accomplish such construction in accordance with applicable building codes and industry standards.

42. McCrory was negligent, grossly negligent, careless, reckless, willful, and wanton in regard to its construction which has caused or contributed to the defects described above, more specifically:

- a. In failing to use due care in the construction of Buildings A-2 and A-5;
- b. In improper installing and constructing the exterior wall systems and related flashing and waterproofing;
- c. In performing construction that fails to provide sufficient barriers against the intrusion of water into the exterior wall system and an adequate avenue for exit of water that does get into the exterior wall system;
- d. In failing to properly select building materials and materials free from defect;
- e. In performing construction in violation of applicable building codes and accepted industry standards and practices;
- f. In failing to properly select qualified subcontractors to perform construction and failing to properly manage the selected subcontractors and review the work performed;
- g. In improper installation of exterior stucco and cement board cladding, resulting in water intrusion and damage to other building elements; and
- h. In other deficiencies and failures to be proven at trial.

43. BEI is entitled to a judgment against McCrory for its negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness in regard to its construction responsibilities for such damages as are proven at trial.

FOR A SEVENTH CAUSE OF ACTION
AS TO ANTUNOVICH
(Gross Negligence and Recklessness)

44. BEI realleges each of the allegations of the preceding paragraphs as if repeated verbatim.

45. Antunovich, by virtue of its professional design services provided for Buildings A2 through A8, owed a duty to BEI independent of any contract to accomplish such design and design-related services in accordance with the applicable standard of care, building codes, and industry standards.

46. Antunovich breached the standard of care and was grossly negligent and reckless in regard to its design services related to the vinyl windows at Buildings A3, A4, A6, A7, and A8, as more

fully described in the Affidavit of Scott A. Harvey, AIA, RWC, LEED AP, filed contemporaneously with this Second Amended Complaint.

47. BEI has incurred actual and consequential damages, including property damage, as a result of Antunovich's grossly negligent and reckless actions, namely deterioration and water intrusion resulting in damage to non-defective building components and other property and other deficiencies and failures to be proven at trial.

48. BEI is entitled to a judgment against Antunovich for its gross negligence and recklessness for such damages as are proven at trial.

WHEREFORE, Plaintiff prays that the Court enter judgment in its favor on all causes of action against all the Defendants and award Plaintiff damages in the amounts to be proven at trial.

s/ Brian A. Autry

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Attorneys for Plaintiff, BEI Beach, LLC

June 13, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BEI Beach, LLC,

Plaintiff,

v.

Mashburn Christman, LLC, Lend Lease (US)
Construction, Inc., f/k/a Bovis Lend Lease, Inc., and
McCrory Construction Company, LLC,

Defendants.

Mashburn Christman, JV,

Third-Party Plaintiff,

v.

Wallcraft Construction, Inc, Alpha Insulation &
Waterproofing, Inc., Baker Roofing, Inc., Collins &
Wright, Inc., Liberty Mutual Insurance Company,
Old Republic Surety Company, Hartford Fire
Insurance Co., Travelers Casualty and Surety
Company of America, The Muhler Company, Inc.
and Companion Property and Casualty Insurance
Company,

Third-Party Defendants.

Lend Lease (US) Construction, Inc., f/k/a Bovis
Lend Lease, Inc.,

Third-Party Plaintiff,

v.

Spann Roofing & Sheet Metal, Inc., Travelers
Casualty and Surety Company of America,
Strickland Waterproofing Company, Merchants
Bonding Company, Everest Reinsurance Company,
Wallcraft Construction, Inc., Old Republic
Insurance Company, Madison Construction Group,
Inc., Worthington Integrated Building Systems,
McDowell Commercial Construction, LLC, Jollay

IN THE COURT OF COMMON PLEAS

C.A. No.: 2015-CP-26-7275

**AFFIDAVIT OF
SCOTT A. HARVEY, AIA, RWC**

Masonry, National Fire Insurance Company of
 Hartford, R.J. Kenney Associates, Inc., Joseph
 Antunovich, Antunovich Associates, TG
 Construction, LLC, Luis Banegas d/b/a Luis Trim
 Work, Nora Del Carmen Lagos, Nora Del Carmen
 Lagos d/b/a Luis Trim Work, and Ovation Custom
 Trim, LLC,

Third-Party Defendants.

McCrary Construction Company, LLC,

Third-Party Plaintiff,

v.

Collins and Wright, Baker Roofing, Glasstech, Inc.,
 Palmetto State Roofing and Sheet Metal,
 Strickland Waterproofing, Maiday, Inc. and Atlas
 Drywall & Acoustics, Inc.,

Third-Party Defendants.

Spann Roofing & Sheet Metal, Inc.,

Third-Party Plaintiff,

v.

Coastal Commercial Roofing Co., Inc., and Daniel
 Kniffen d/b/a East Coast Improvements,

Third-Party Defendants.

Wallcraft Construction, Inc.,

Third-Party Defendant.

v.

Vienamin Petresku d/b/a BT Construction, LLC,

Third-Party Defendant.

PERSONALLY APPEARED BEFORE ME, Scott A. Harvey, who, after being first duly sworn, deposes and says as follows:

1. I am over 18 years of age and am fully competent to testify as to the matters stated in this affidavit.

2. I am a licensed architect in the State of South Carolina as well as a Registered Waterproofing Consultant (RWC).

3. I have over 20 years of experience in the field of architecture and have been a licensed architect for more than 15 years. Accordingly, I possess actual professional knowledge and experience in the field of architectural design and principles.

4. I have reviewed plans, specifications, architectural details, and other design documents prepared and stamped by Antunovich Associates, the Architect of Record for the development known as the Market Common, which is the subject of the above-captioned lawsuit. I have also reviewed Architect's Supplemental Instructions from Antunovich for Market Common Buildings A3, A4, A6, A7, and A8.

5. In my professional opinion, the vinyl windows specified for the Market Common Project, in Buildings A3, A4, A6, A7, and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which this Project is located.

6. The architectural project plans, dated December 27, 2006 for Buildings A3 and A4 and dated August 21, 2006 for Buildings A6, A7, and A8, indicate the following design pressures (DP) for the Components and Cladding Design Loads for the buildings:

- a. Storefront: Positive Net Pressure 30 psf and Negative Net Pressure -32.5 psf.
- b. Residential Windows: Positive Net Pressure 45.2 psf and Negative Net Pressure -59.3 psf.

7. Antunovich's Architect's Supplemental Instructions during performance of the Project modify the Performance Class and Grade of the Vinyl Windows and Doors for the buildings to require a minimum design pressure (DP) of C45 grade windows with a DP45 rating (ANT_017872).

8. Observations and calculations performed by Applied Building Sciences, Inc. (ABS) and documented in the following ABS reports require minimum design pressures, in areas, greater than those specified by Antunovich:

- a. *Supplemental Report for: Building Envelope Assessment* dated March 28, 2016.
- b. *Second Supplemental Report: Building Envelope Assessment Buildings A-3 and A-4* dated February 14, 2018.
- c. *Second Supplemental Report: Building Envelope Assessment Buildings A-6, A-7, and A-8* dated February 28, 2018.

9. The components and cladding design pressures specified by Antunovich were not in compliance with applicable codes at the time of design and construction. However, this fact alone does not constitute gross negligence, in my opinion.

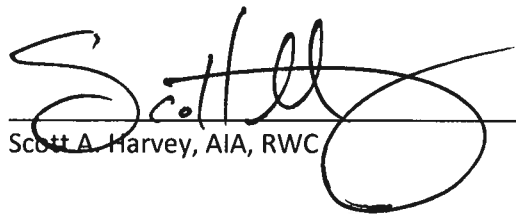
10. In October of 2016, ABS received Weather Shield window test reports provided by Mr. Rick Moore, PE of Moore Hackney & Associates (MHA), the expert for general contractor Lend Lease. In August of 2017, ABS received additional window test report documents pertaining to the Weather Shield 9103 Single Hung and 924 Casement vinyl windows through case production of Mashburn-Christman. The Weather Shield windows installed on the residential levels of the Mashburn-Christman constructed buildings A-3 and A-4 are the same make and models as the residential windows installed on the Lend Lease constructed building A-6, A-7, and A-8.

11. In this new documentation, it was discovered that other project participants questioned the design pressure ratings specified by Antunovich and that, despite these efforts, Antunovich issued final instructions and specifications on the design pressure ratings that were in error.

12. It is my opinion, to a reasonable degree of professional certainty, that a reasonably prudent design professional in similar circumstances would not have made the same errors and omissions that Antunovich did on the Market Common Project related to the design pressure ratings for windows specified on Buildings A3, A4, A6, A7, and A8 after new information was brought to its attention by other project participants.

13. Antunovich's performance of its professional obligations in this regard, specifically its failure to correct design mistakes when the issue was raised by other project participants, constitutes an egregious breach of a design professional's standard of care and responsibilities.

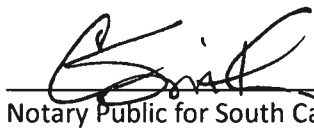
FURTHER AFFIANT SAYETH NAUGHT.



Scott A. Harvey, AIA, RWC

Sworn to and subscribed before me this

17th day of MAY, 2019



Notary Public for South Carolina

My commission expires: 12/21/26





APPLIED BUILDING SCIENCES INC.
ENGINEERS, ARCHITECTS AND
ENVIRONMENTAL CONSULTANTS

March 28, 2016

Brian Autry, Esquire

Kenison, Dudley & Crawford, LLC

1320 Main Street, Suite 300

Columbia, SC 29201

Sent via email: autry@conlaw.com

**RE: Supplemental Report for: Building Envelope Assessment
The Market Common
Buildings A-2, A-3, A-4, A-5, A-6, A-7, and A-8
4017 Deville Street
Myrtle Beach, South Carolina 29577
ABS Project Number: 900.1504**

Dear Mr. Autry:

Pursuant to your request, Applied Building Sciences, Inc. (ABS) conducted a supplemental assessment at the above referenced buildings. The primary purpose of the supplemental assessment was to determine the cause and extent of building envelope leaks. This report supplements our previous reports of the preliminary findings, which were dated March 17, 2015, September 29, 2015, October 13, 2015, and October 26, 2015. The following report summarizes our findings and conclusions; additional photos, information, and field data not contained herein are available upon request. If you should have any questions, please do not hesitate to contact me.

Sincerely,

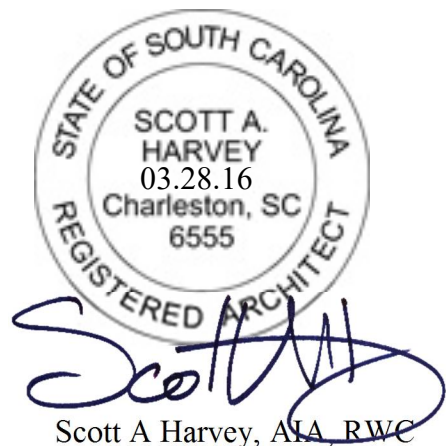
APPLIED BUILDING SCIENCES, INC.



Jason D. Gregorie, PE, CFM



Attachment – Report



Scott A Harvey, AIA, RWC

Design Evaluation

Sheet S1.1 of the structural plans contains the main structural notes and specifications. The “Wind Design Data” section of Sheet S1.1 lists some basic wind data parameters, including building enclosure classification. For buildings A-3, A-4, A-7, and A-8, the engineer lists the buildings as “Partially Enclosed.” For building A-6, the building is listed as “Open (typical); Partially Enclosed (portions).” Currently, Sheet S1.1 has not been provided for buildings A-2 and A-5. Regarding design pressures for components and cladding, the engineer states on Sheet S1.1: “[f]or design wind pressures for components and cladding, see architectural drawings.” Therefore, the architect provided the design wind pressures for windows and doors for the project. On the project data sheet for each plan package, which is Sheet G1.01, the architect lists the following components and cladding wind pressures, under “Design Loads”:

Storefront:

Positive Net Pressure: 30 psf
Negative Net Pressure: -32.5 psf

Residential Windows:

Positive Net Pressure: 45.2 psf
Negative Net pressure: -59.3 psf

ABS performed structural analysis and wind load calculations in accordance with IBC 2003, ASCE 7-02, IBC 2012, and ASCE 7-10 in order to evaluate building code compliance of the original components and cladding design pressure specifications. The calculations show that the components and cladding design pressure specifications provided by the architect are not in compliance with design pressures for a Partially Enclosed structure (Table 3).

| Component & Cladding Wind Analysis | | | | | | | | | | | |
|------------------------------------|--|--|-------|---|--------|-----------|--------|---|--------|-----------|--------|
| Bldg | Enclosure Classification | Design Wind Pressures | | | | | | | | | |
| | Specified by Original Structural Engineer ¹ | Max Wind Pressures Specified by Original Architect (psf) | | ABS Calculated Max Wind Pressures for Partially Enclosed ² (psf) | | | | ABS Calculated Max Wind Pressures for Enclosed ² (psf) | | | |
| | | | | ASCE 7-02 | | ASCE 7-10 | | ASCE 7-02 | | ASCE 7-10 | |
| | | Pos | Neg | Pos | Neg | Pos | Neg | Pos | Neg | Pos | Neg |
| A-2 | Not available | 45.2 | -59.3 | 57.70 | -72.02 | 44.26 | -55.25 | 42.97 | -57.30 | 32.97 | -43.96 |
| A-3 | Partially Enclosed | 45.2 | -59.3 | 62.99 | -79.24 | 48.32 | -60.80 | 47.95 | -64.21 | 36.79 | -49.26 |
| A-4 | Partially Enclosed | 45.2 | -59.3 | 57.70 | -72.02 | 44.26 | -55.25 | 42.97 | -57.30 | 32.97 | -43.96 |
| A-5 | Not available | 45.2 | -59.3 | 57.70 | -72.02 | 44.26 | -55.25 | 42.97 | -57.30 | 32.97 | -43.96 |
| A-6 | Open (typical); Partially Enclosed (portions) | 45.2 | -59.3 | 57.18 | -71.37 | 43.86 | -54.76 | 42.59 | -56.78 | 32.67 | -43.56 |
| A-7 | Partially Enclosed | 45.2 | -59.3 | 62.48 | -78.60 | 47.93 | -60.30 | 47.56 | -63.69 | 36.49 | -48.86 |
| A-8 | Partially Enclosed | 45.2 | -59.3 | 62.48 | -78.60 | 47.93 | -60.30 | 47.56 | -63.69 | 36.49 | -48.86 |

¹ No information on tributary area and wall zone was provided.

² Worst case Zone 5 and tributary area of 10 ft².

Table 3 – Component and Cladding Design Pressure Analysis Summary

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF HORRY |) | CASE NO. 2015-CP-26-07275 |
| BEI-BEACH, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| MASHBURN CHRISTMAN, LLC; |) | LENLEASE (US) CONSTRUCTION |
| LEND LEASE (US) CONSTRUCTION |) | INC., f/k/a BOVIS LEND LEASE, INC.'S |
| INC., f/k/a Bovis Lend Lease, Inc.; and |) | MEMO IN OPPOSITION TO |
| McCRORY CONSTRUCTION |) | ANTUNOVICH ASSOCIATES, INC.'S |
| COMPANY, LLC, |) | MOTION FOR PARTIAL SUMMARY |
| |) | JUDGMENT |
| Defendants. |) | |
| |) | |
| LEND LEASE (US) CONSTRUCTION |) | |
| INC., f/k/a Bovis Lend Lease, Inc.; |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| SPANN ROOFING & SHEET METAL, |) | |
| INC., ET AL. |) | |
| |) | |
| Third-Party Defendants. |) | |
| |) | |

The Defendant/Third-Party Plaintiff, Lendlease (US) Construction Inc., f/k/a Bovis Lend Lease, Inc. ("Lendlease"), by and through its undersigned attorneys, submits this Memorandum of Law in opposition to Antunovich Associates, Inc.'s ("Antunovich") Motion for Partial Summary Judgment as to Lendlease's First Cause of Action for Contribution, Fifth Cause of Action for Negligence/Gross Negligence/Recklessness, and Eighth Cause of Action for Breach of Warranty of Plans and Specifications. For the reasons set forth herein, Antunovich's Motion should be DENIED, in its entirety.

SUMMARY OF ARGUMENT

Antunovich's Motion for Partial Summary Judgment seeks summary judgment as to Lendlease's Third-Party causes of action for Contribution, Negligence/Gross Negligence/Recklessness and Breach of Warranty of Plans and Specifications. Antunovich does not move for summary judgment on Lendlease's equitable indemnity claim. In support of its third-party claims and in opposition to Antunovich's motion for partial summary judgment, Lendlease states as follows:

- (1) Disposing of Lendlease's contribution claim at summary judgment is premature;
- (2) Antunovich's negligence/gross negligence/recklessness has caused damages to Lendlease independent of those damages sought by Plaintiff against Lendlease;
- (3) Antunovich, as the Architect of Record on the Market Common Project, owed Lendlease a duty that the plans and specifications provided by Antunovich on the Market Common Project would be free of defects and in compliance with applicable building codes and jurisdictional ordinances, rules and regulations.

For the reasons set forth herein, Lendlease has viable causes of action against Antunovich for claims other than equitable indemnity. Questions of fact exist as to liability and damages on each of the stated causes of action. As a matter of law, Antunovich's motion for partial summary judgment must be denied.

FACTUAL BACKGROUND

BEI-Beach, LLC is the owner of a 113-acre mixed-use development complex, known as The Market Common, in Myrtle Beach, S.C. ("Project"). BEI-Beach, LLC purchased The Market Common Property on January 7, 2011 from LUK-MB1, LLC. LUK-MB1, LLC was the original development entity of multiple residential/retail mixed use buildings known as Buildings A2, A3, A4, A5, A6, A7, and A8, which were all designed by one (1) architect, Antunovich, and

constructed by three (3) separate contractors. Lendlease served as the general contractor for Buildings A6, A7 and A8, through its October 3, 2006 contract with LUK-MB1, LLC. In 2005, Antunovich contracted with LUK-MB1, LLC to design the Market Common Project, including Buildings A2, A3, A4, A5, A6, A7 and A8.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law.” S.C.R.C.P 56 (c); *see also Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). Under SCRC.P 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Once the party moving for summary judgment meeting 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. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. SCRC.P 56(e); *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *Nations Bank v. Scott Farm*, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Hamiter v. Retirement Div. of South Carolina*, 326 S.C. 93, 484 S.E.2d 586 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996).

ARGUMENT

A. Disposing of Lendlease's Contribution Cause of Action is Premature

Antunovich argues it is entitled to summary judgment as to Lendlease's First Cause of Action, Contribution, because such a claim is not ripe. Lendlease concedes it has not paid any money to extinguish the liability of Antunovich and that its claim for contribution is not ripe. However, dismissing Lendlease's pending claim for contribution would be premature. Under S.C. Code Ann. § 15-38-20(B), "the right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability..." As settlement negotiations between the Plaintiff and Lendlease continue, Lendlease's right to contribution may become ripe prior to the trial of this case in January 2020.

To dismiss Lendlease's claim for contribution now, would only delay the ultimate disposition of this case by Lendlease having to later amend and add the contribution cause of action to its Third-Party Complaint. By the time this case is tried, if Lendlease has not reached a settlement with Plaintiff and extinguished its liability, as well as the liability of Antunovich, Lendlease would not be able to meet its burden of proof and Antunovich would be entitled to directed verdict as to Lendlease's contribution cause of action.

Under SCRCP 14(a), at any time after the commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. *See* SCRCP 14(a). As in *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994), Lendlease, as third-party plaintiff, has causes of action against Antunovich for contribution, negligence/gross negligence/recklessness and breach of warranty of plans and specifications. Depending upon the status of the claims between Lendlease and Plaintiff at the

time of trial, Lendlease's sole claim may be for contribution. Antunovich's motion for summary judgment as to Lendlease's First Cause of Action, Contribution should be denied.

B. Lendlease has suffered damages as a result of Antunovich's negligence/gross negligence/recklessness independent of those sought by Plaintiff against Lendlease

Antunovich relies upon the South Carolina Court of Appeals decision in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) to support its position that Lendlease's claims against Antunovich are masked indemnity claims and not independent causes of action for breach of contract and/or negligence. The Supreme Court has granted *Petition for Certiorari* in *Stoneledge*. Therefore, the Court of Appeals' decision has the potential to be reversed in whole, or in part. Nevertheless, Lendlease's claim against Antunovich for negligence/gross negligence/recklessness is distinguishable from the general contractor's claims in *Stoneledge*.

First, Lendlease's claims against Antunovich are Third-Party claims, not cross-claims. Second, Antunovich is the Architect of Record on the Market Common Project, not a subcontractor like Clear View Construction was to Marick Home Builders, LLC in *Stoneledge*. Third, the Plaintiff in *Stoneledge* had direct claims against Clear View Construction whereas BEI-Beach, LLC has not asserted any direct claims against Antunovich.¹ Fourth, Lendlease has alleged damages resulting from Antunovich's negligence separate and distinct from any damages Plaintiff seeks against Lendlease.

In *Stoneledge*, the Court held that the general contractor's negligence cross-claim against its subcontractor did not constitute an independent cause of action from its equitable indemnity

¹ Plaintiff, BEI-Beach, LLC, has a Motion to Amend its Complaint to add direct claims against Antunovich. Said motion is scheduled to be heard on October 30, 2019.

claim, where the only potential claim for damages were those incurred by the general contractor in defending against the townhome association's lawsuit based on construction defects. *Stoneledge*, 776 S.E.2d 426 (Ct. App. 2015). Here, Lendlease's negligence/gross negligence/recklessness claim against Antunovich includes damages to Lendlease's business and business reputation resulting from errors and omissions in the contract documents created by Antunovich. The negligence/gross negligence/recklessness claim seeks damages on behalf of Lendlease not derivative of Plaintiff's claim.

Lendlease did not contract with Antunovich. Lendlease did not pay Antunovich any money to perform design professional services on the Market Common Project. Our courts have held that where there is a special relationship between alleged tort-feasor and injured party, not arising in contract, a breach of that duty will support tort action. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995). Here, Plaintiff has no claim against Lendlease for damage to Lendlease's business or business reputation. Such claims are wholly owned by Lendlease and are separate and distinct from any claim Plaintiff has against Lendlease or any claim for recovery that Plaintiff has against Lendlease.

Lendlease's claim for negligence/gross negligence/recklessness against Antunovich is not a masked indemnity claim. A design professional, such as an architect or engineer, owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the Owner, notwithstanding the absence of privity of contract between the contractor and the design professional, due to the special relationship that exists between the two, and consequently, the contractor may, upon proper proof, recover purely economic damages in an

action alleging professional negligence on the part of the design professional. *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001).

To support its claim for negligence/gross negligence/recklessness, Lendlease must show the following, (1) a duty owed by Antunovich to Lendlease, (2) a breach of that duty by a negligent act or omission, and (3) damages proximately caused by such breach.

(1) Duty Owed by Antunovich to Lendlease

South Carolina Court's recognize a duty owed by a design professional to a contractor when the design professional furnishes plans and specifications for a contractor to follow in a construction job. *See Beachwalk Villas Condominium Associations v. Martin*, 305 S.C. 144, 406 S.E.2d 372 (1991). This holding supports Lendlease's burden of proof as to the first element of its claim. Antunovich prepared and provided to plans and specifications for the Market Common Project for Lendlease to follow during construction of Buildings A6, A7 and A8. Thus, Antunovich owes Lendlease a duty in furnishing plans and specifications for Lendlease's use on the Market Common Project.

(2) Antunovich Breached its Duty to Lendlease

Lendlease's claim for negligence/gross negligence/recklessness is supported by the Affidavit of Richard H. Moore, P.E. filed contemporaneously with Lendlease's third-party complaint. *See* Affidavit of Richard H. Moore, P.E. filed April 24, 2017. Mr. Moore has attest to a reasonable degree of professional certainty, that a reasonable prudent design professional in similar circumstances would not have made the same errors and omissions as Antunovich. See Affidavit of Richard H. Moore P.E. ¶¶ 4. Further, Mr. Moore attest that Antunovich's actions, as it relates to the performance of its professional obligations owed to the Owner and Lendlease,

constitute a breach of a design professional's standard of care and responsibilities. See Affidavit of Richard H. Moore P.E. ¶¶ 6 & 7.

An affidavit of Scott Harvey, AIA filed more recently by the Plaintiff in this action, and a report prepared by L.G. Lewis, Jr., P.E. on behalf of Defendant Mashburn/Christman provide additional support to Lendlease's negligence/gross negligence/recklessness claim against Antunovich. Lendlease meets the second element of its claim against Antunovich that Antunovich breached its duty of care owed to Lendlease.

(3) Lendlease has Suffered Damages as a Result of Antunovich's Breach

To meet its burden of proving the third element of its negligence/gross negligence/recklessness cause of action, Lendlease must show that Antunovich's breach of duty was the proximate cause of Lendlease's claimed injury. However, Lendlease does not have to prove that Antunovich's negligence was the sole proximate cause of its injury. See *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 635 S.E.2d 97 (2006). In its Third-Party Complaint, Lendlease alleges that as a result of Antunovich's negligence/gross negligence/recklessness, Lendlease has incurred, and will continue to incur actual damages, including investigative costs in defending the removal and replacement of improperly specified windows, as well as special and consequential damages, including damage to its business and business reputation. See Amended Answer and Third-Party Complaint ¶ 104.

Unless the evidence shows reasonable persons could not disagree, the question of proximate cause is one for the jury. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct. Appl. 1997). Lendlease has properly pled its cause of action for negligence/gross negligence/recklessness against Antunovich and will provide evidence of its damages proximately caused by Antunovich to the jury at trial for the jury's consideration.

Antunovich's motion for summary judgment as to Lendlease's Fifth Cause of Action, Negligence/Gross Negligence/Recklessness should be denied.

C. Sufficient evidence exists to support Lendlease breach of warranty cause of action against Antunovich, and Antunovich, as the moving party has not carried its burden of showing an absence of evidentiary support for Lendlease's claim.

In *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951), the South Carolina Supreme Court found that one who undertook to design and oversee a construction project for another impliedly warranted the design and quality of construction despite the lack of privity between the parties. Likewise, in *Beachwalk Villas Condominium Associations v. Martin*, 305 S.C. 144, 406 S.E.2d 372 (1991), the Court specifically recognized "[i]f a party furnishes plans and specifications for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view." *Id.* at 146, 406 S.E.2d at 374.

South Carolina recognizes a special relationship between a design professional and a contractor. Where there is a special relationship between alleged tort-feasor and injured party, not arising in contract, a breach of that duty will support tort action. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995). In *Tommy L. Griffin Plumbing*, the South Carolina Supreme Court held a contractor can maintain a cause of action for breach of implied warranty of plans and specifications against a design professional when there is no contractual privity between the contractor and architect. *Id.* at 89. The Court went on to say it sees no logical reason to insulate design professionals from liability when the relationship between the design professional and the claimant is such that the design professional owes a professional duty to the claimant arising separate and distinct from any contractual duties

between the parties. *Id.* Whether a duty exists is a question of fact that depends on the circumstances of each case. *Id.*

In this case, Antunovich, through its contract with the Owner/developer provided plans and specifications for the Market Common Project. In doing so, Antunovich impliedly warranted the plans and specifications for Lendlease to follow in the construction of buildings A6, A7, and A8 of the Market Common Project. *Hill*, 64 S.E.2d 885 (1951). The *Hill* case is noteworthy for the Supreme Court's adoption of language regarding the furnishing of plans and specifications, and the broader affirmation that the person holding himself out as specially qualified impliedly warrants that the work he undertakes will be of proper workmanship and reasonably fit for its intended use. *Id.* Lendlease relied upon the plans and specifications provided by Antunovich in the construction of the Market Common Project. By failing to provide proper windload specifications for windows, failing to adequately detail waterproofing details and failing to specify proper materials on the Project, Antunovich has breached its duty to Lendlease.

Multiple affidavits and reports have been filed and or issued criticizing the sufficiency of Antunovich's plans and specifications for the Market Common Project. For example,

Affidavit of Richard H. Moore, P.E. filed April 24, 2017

- "In my professional opinion, the vinyl windows specified for the Market Common Project, Buildings A6, A7 & A8 were inappropriate for the designated wind zone design pressure requirements for the region in which the Project is located."
- "The window shop drawings approved by Antunovich dated 7-23-07 have a hand-written note that requires a minimum DP40. The local building code

and ASTM 7-02 required a minimum DP70 for Zone 5 for Buildings A6, A7 and A8.”

- “At a minimum, Antunovich’s actions as it relates to the performance of his professional obligations owed to the Owner and Contractor, constitutes a breach of a design professional’s standard of care and responsibilities.”

Affidavit of Scott A. Harvey, AIA, RWC filed June 26, 2019

- “In my professional opinion, the vinyl windows specified for the Market Common Project, in Buildings A3, A4, A6, A7 and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which this Project is located.”
- “The components and cladding design pressures specified by Antunovich were not in compliance with applicable codes at the time of design and construction.”
- “... other project participants questioned the design pressure ratings specified by Antunovich and that, despite these efforts, Antunovich issued final instructions and specifications on the design pressure ratings that were in error.”
- “Antunovich’s performance of its professional obligations in this regard, specifically its failure to correct design mistakes when the issue was raised by other project participants constitutes an egregious breach of a design professional’s standard of care and responsibilities.”

Report of L.G. Lewis, Jr., P.E., F.NSPE dated August 7, 2017

- “Evidence of water infiltration behind cladding at and below the balcony framing was observed. Supplementary sketches provided by Architect for this condition are considered to be faulty.”
- “H2L attributes this repair (balcony framing) and repair cost to design defects and not construction.”
- “ABS concludes that design pressure ratings specified by architect do not comply with minimum requirements of the code. H2L agrees.”
- “it is the opinion of H2L that quality issues at Building A3 and Building A4 are caused in large measure by the many envelope design errors and omissions that exist in the construction contract documents. We suspect this may also be the case at other buildings in which construction defect claims have been alleged.”

Further, the reports of Applied Building Sciences, Moore Hackney Associates and H2L Consulting Engineers contain findings from qualified, licensed design professionals that Antunovich’s plans and specifications contain errors and omissions that have contributed to Plaintiff and Lendlease’s alleged damages. While Lendlease’s negligence/gross negligence/recklessness claim is supported by the affidavits of Mr. Moore and Mr. Harvey, other design deficiencies further support Lendlease’s claim for breach of warranty of plans and specifications as to Antunovich. Specifically, the following errors and omissions are noted in the contract documents prepared and administered by Antunovich:

- Inadequate flashing details at retail roof to exterior residential wall intersection;
- Lack of steel angle flashing detail at deck/balcony to wall intersection;

- No bond breaker detail between exterior cladding and sheathing;
- Improper wind load specification for exterior cladding;
- No comments or instructions by Antunovich during construction administration of improper installation.

Antunovich denies and contests the allegations of Lendlease related to errors and omissions within the contract documents prepared and administered by Antunovich. The differences of opinion among Antunovich and engineers for the Plaintiff, Lendlease and Mashburn/Christman create issues of fact as to whether Antunovich has breached its implied warranty to Lendlease with regards to the Market Common Project. Antunovich's motion for summary judgment as to Lendlease's Eight Cause of Action for Breach of Warranty of Plans and Specifications should be denied.

CONCLUSION

For all the foregoing reasons, Antunovich's motion for partial summary judgment should be DENIED.

ROSEN HAGOOD, LLC

s/James A. Bruorton IV, Esq.
James A. Bruorton, IV, Esq.
Elizabeth F. Nicholson, Esq.
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Charleston, SC 29401
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Attorneys for Defendant Lendlease

Charleston, South Carolina
October __, 2019

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| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | CASE NO.: 2015-CP-26-7275 |
| COUNTY OF HORRY |) | |
| |) | |
| BEI-Beach, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| Mashburn Christman, JV, Lend Lease (US) |) | REPLY BRIEF IN SUPPORT OF THIRD- |
| Construction, Inc., f/k/a Bovis Lend Lease, |) | PARTY DEFENDANT ANTUNOVICH |
| Inc., and McCrory Construction Company, |) | ASSOCIATES, INC.'S PARTIAL MOTION |
| LLC, |) | FOR SUMMARY JUDGMENT |
| |) | |
| Defendants. |) | |
| <hr/> |) | |
| Mashburn Christman, JV, |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| Wallcraft Construction, Inc.; Alpha |) | |
| Insulation & Waterproofing, Inc.; Baker |) | |
| Roofing, Inc.; Collins & Wright, Inc.; |) | |
| Liberty Mutual Insurance Company; Old |) | |
| Republic Surety Company; Hartford Fire |) | |
| Insurance Co.; Travelers Casualty and Surety |) | |
| Company of America; The Muhler |) | |
| Company, Inc.; and Companion Property and |) | |
| Casualty Insurance Company, |) | |
| |) | |
| Third-Party Defendants. |) | |
| <hr/> |) | |
| Lend Lease (US) Construction Inc. f/k/a |) | |
| Bovis Lend Lease, Inc., |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| Spann Roofing & Sheet Metal, Inc.; |) | |
| Travelers Casualty and Surety Company of |) | |
| America; Strickland Waterproofing |) | |
| Company; Merchants Bonding Company; |) | |
| Everest Reinsurance Company; Wallcraft |) | |
| Construction, Inc., Old Republic Insurance |) | |

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|--|
| Company; Madison Construction Group,) |
| Inc., Worthington Integrated Building) |
| Systems; McDowell Commercial) |
| Construction, LLC; Jollay Masonry;) |
| National Fire Insurance Company of) |
| Hartford; R.J. Kenney Associates, Inc.;) |
| Antunovich Associates; TG Construction,) |
| LLC; Luis Banegas d/b/a Luis Trim Work;) |
| Nora Del Carmen Lagos, Nora Del Carmen) |
| Lagos d/b/a Luis Trim Work; and Ovation) |
| Custom Trim, LLC,) |
|) |
| Third-Party Defendants.) |
| McCrory Construction Company, LLC,) |
|) |
| Third-Party Plaintiff,) |
|) |
| vs.) |
|) |
| Collins & Wright; Baker Roofing; Glasstech) |
| Inc.; Palmetto State Roofing and Sheet) |
| Metal; Strickland Waterproofing; Maiday,) |
| Inc.; and Atlas Drywall & Acoustics, Inc.,) |
|) |
| Third-Party Defendants.) |

Third-Party Defendant Antunovich Associates Inc. (“Antunovich”) hereby submits this Brief in Reply to Third-Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.’s (“Lend Lease”) Memo in Opposition to Antunovich’s Partial Motion for Summary Judgment (“Lend Lease’s Brief”).

I. Lend Lease’s Brief Is Untimely, And Thus Should Be Ignored By The Court.

The 9.26.19 Scheduling Order in this case, submitted to the Court by Lend Lease itself, states that all opposing memoranda to pending motions “must be submitted to the Court no later than three (3) days before the scheduled hearing.” Antunovich’s Motion for Partial Summary Judgment was scheduled on 10.18.19 to be heard on 10.30.19. Therefore, opposing memoranda were required to be filed on or before 10.25.19; Rule 6(a), SCRCP, necessitates that weekends be

excluded from the time computation, because the stated period is less than seven days. Lend Lease's 10.28.19 Brief was submitted fewer than three days before the hearing, and is untimely under both the Scheduling Order and Rule 6(a), SCRPC. Therefore, Lend Lease's Brief should be ignored by the Court and stricken from the record.

II. Lend Lease's Own Concession Warrants The Summary Dismissal Of Its Contribution Claim.

"Lend Lease concedes ... that its claim for contribution is not ripe." (Lend Lease's Brief, p. 4). This statement is dispositive of its contribution claim against Antunovich. Lend Lease's contention that its contribution claim "may become ripe"¹ is not a ground for sustaining that cause of action. Lend Lease provides no legal support for its argument, and its contribution claim must be dismissed as premature.

III. The Potential Of *Stoneledge* Being Overruled Is Not A Basis To Ignore Its Binding Precedence.

As stated in Antunovich's Brief in Support of its Motion for Partial Summary Judgment, the Court of Appeals' decisions in the two *Stoneledge* cases² require dismissal of all of Lend Lease's claims, except for its equitable indemnity claim. Lend Lease implies that the Court should ignore those binding decisions, because they have "the potential to be reversed," (Lend Lease's Brief, p. 5), because the Supreme Court has granted certiorari in that case. However, the Supreme Court's grant of certiorari in *Stoneledge* involves a separate phase of that case; so the Court of Appeals' decisions as to equitable indemnity claims stand and control.

¹ Antunovich notes that Lend Lease also cannot extinguish Antunovich's liability to Plaintiff (which Lend Lease contends would ripen its contribution claim against Antunovich), because no such liability to Plaintiff exists, for the reasons set forth in Antunovich's Brief(s) in Opposition to Plaintiff's Motion to Amend.

² *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015).

Lend Lease has failed to distinguish this case from the *Stoneledge* decisions. Lend Lease notes that (1) it asserts third-party claims, and not cross-claims, (2) Antunovich is an architect, and not a subcontractor, and (3) that Plaintiff does not assert direct claims against Antunovich. However, it does not even try to explain why these technical points differentiate this case from *Stoneledge*, because these points make no difference. Lend Lease's only claims are for partial indemnity against a damage verdict in favor of Plaintiff against Lend Lease, and *Stoneledge* dictates that such claims may be asserted only as equitable indemnity claims.

IV. Lend Lease Has No Viable Claim Under South Carolina Law for “Business Reputation” Damages, and Lend Lease Has Not Provided Even A Scintilla Of Evidence Proving Such Damages.

Lend Lease argues that it has suffered damages to its “business reputation,” that these damages are not derivative of those claims Plaintiff makes against it, and that the “business reputation” damages support causes of action independent of its equitable indemnity claim. This argument fails for two primary reasons:

First, Lend Lease cites no legal authority for the proposition that it may recover “business reputation” damages in South Carolina in a negligence action or breach of implied warranty action, and there is no such authority. This is not a defamation case. Lend Lease has no viable claim for “business reputation” damages.

Second, Lend Lease has not provided even a scintilla of evidence supporting these claimed damages to its business reputation; it has only generally alleged that they exist. It is axiomatic that this general allegation is not enough to survive summary judgment. *See, e.g., City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994); *Thomas v. Waters*, 315 S.C. 524, 445 S.E.2d 659, 661 (Ct. App. 1994); *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. app. 1991), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700

(1993) (all holding that a party opposing a motion for summary judgment cannot rest on mere allegations, but must point to specific facts showing there is a genuine issue of material fact). In the face of Antunovich's Motion, Lend Lease is/was required to produce specific evidence of these damages to its business reputation, in order to survive summary judgment. *Id*; see also, *Humana Hospital Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment"). **Lend Lease has not made the specific factual or evidentiary showings required to survive summary judgment on this issue.** Therefore, Antunovich is entitled to judgment as a matter of law on Lend Lease's claims.

CONCLUSION

For those reasons set forth herein and in Antunovich's Brief in Support of its Partial Motion for Summary Judgment, the Court should grant Antunovich's Partial Motion for Summary Judgment on each Lend Lease cause of action against Antunovich, other than Lend Lease's equitable indemnity cause of action.

WILKES LAW FIRM, P.A.

October 29, 2019

/s/ Mike Wilkes

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) CASE NO. 2015-CP-26-7275

COUNTY OF HORRY)

BEI- Beach, LLC,)

Plaintiff,)

Mashburn Christman, JV, Lend Lease (US))
 Construction, Inc., f/k/a Bovis Lend Lease, Inc.,)
 and McCrory Construction Company, LLC,)

Defendants.)

Mashburn Christman, JV,)

Third-Party Plaintiff,)

Wallcraft Construction, Inc.; Alpha Insulation &)
 Waterproofing, Inc., Baker Roofing, Inc., Collins)
 & Wright, Inc.; Liberty Mutual Insurance)
 Company; Old Republic Surety Company;)
 Hartford Fire Insurance Co.,; Travelers Casualty)
 and Surety Company of America, The Muhler)
 Company, Inc.; and Companion Property and)
 Casualty Insurance Company,)

Third-Party Defendants.)

Lend Lease (US) Construction Inc. f/k/a Bovis)
 Lend Lease, Inc.)

Third-Party Plaintiff,)

vs.)

Spann Roofing & Sheet Metal, Inc., Travelers)
 Casualty and Surety Company of America,)
 Strickland Waterproofing Company, Merchants)
 Bonding Company, Everest Reinsurance)
 Company, Wallcraft Construction, Inc., Old)
 Republic Insurance Company; Madison)
 Construction Group, Inc., Worthington)
 Integrated Building Systems, McDowell)
 Commercial Construction, LLC., Jollay)
 Masonry, National Fire Insurance Company of)
 Hartford, and R.J. Kenney Associates, Inc.)

Third-Party Defendants.)

**LEND LEASE (US) CONSTRUCTION,
 INC. f/k/a BOVIS LEND LEASE,
 INC.'S ANSWER TO PLAINTIFF'S
 AMENDED COMPLAINT,
 COUNTERCLAIM & AMENDED
 THIRD-PARTY COMPLAINT**

(Jury Trial Demanded)

| | |
|---|---|
| _____ |) |
| McCrory Construction Company, LLC, |) |
| |) |
| Third-Party Plaintiff, |) |
| |) |
| Vs. |) |
| |) |
| Collins and Wright; Baker Roofing; Glasstech |) |
| Inc.; Palmetto State Roofing and Sheet Metal; |) |
| Strickland Waterproofing; Maiday, Inc., and |) |
| Atlas Drywall & Acoustics, Inc., |) |
| |) |
| Third-Party Defendants. |) |
| _____ |) |

Lend Lease (US) Construction Inc., formerly known as Bovis Lend Lease, Inc.
 ("LendLease"), in answer to the Plaintiff's Amended Complaint, and by way of Third-Party
 Complaint alleges and states as follows:

I. FOR A FIRST DEFENSE

1. Each and every allegation which is not hereinafter specifically admitted is expressly denied.
2. Lendlease craves reference to its Answer to Plaintiff's Amended Complaint filed April 7, 2017 and incorporates the answers and defenses included therein as if repeated herein verbatim.
3. Lendlease craves reference to its Third-Party Complaint filed May 16, 2016 and incorporates the allegations and causes of action against the Third-Party Defendants included therein as if repeated herein verbatim.

FOR A SECOND DEFENSE (Failure to State a Claim)

4. Further and affirmatively answering the Plaintiff's Amended Complaint and as an additional and complete defense thereto, the Amended Complaint should be dismissed pursuant to S.C. R. CIV. PRO. 12(b)(6) for failure to state facts sufficient to constitute a claim against

Lendlease.

FOR A THIRD DEFENSE
(Warranties of Others)

5. Further and affirmatively answering the Plaintiff's Amended Complaint and as an additional and complete defense thereto, Lendlease is in no way responsible for any warranties or representation of others.

FOR A FOURTH DEFENSE
(Superseding/Intervening Negligence)

6. Further and affirmatively answering the Plaintiff's Amended Complaint and as an additional and complete defense thereto, the claims of Plaintiff are barred because even if Lendlease was negligent as alleged by Plaintiff, which is specifically denied, the intervening and/or superseding negligence of any entity or entities other than Lendlease was the direct and proximate cause of the damages, if any, suffered by Plaintiff.

FOR A FIFTH DEFENSE
(Failure to Mitigate Damages)

7. Further and affirmatively answering the Plaintiff's Amended Complaint and as an additional and complete defense thereto, the Amended Complaint should be dismissed as Plaintiff has failed to mitigate its damages.

FOR A SIXTH DEFENSE
(Statute of Limitations/Repose)

8. Further and affirmatively answering the Plaintiff's Amended Complaint and as an additional and complete defense thereto, the Amended Complaint should be dismissed as Plaintiff's claims as to Lendlease are barred by the applicable statute of limitations and statute of repose.

FOR A SEVENTH DEFENSE

(Rights under section 15-38-15 of the S.C. Code Ann.)

9. Further and affirmatively answering the Amended Complaint and as an additional and complete defense thereto, Lendlease denies that it is, or can be, jointly and severally liable for the claims alleged in Plaintiff's Amended Complaint, and denies that joint and several liability applies to it because its conduct cannot be determined to be 50% or more of the total fault for the damages when compared with the fault of all Defendants and the fault (comparative negligence) of Plaintiffs. Therefore, in accordance with S.C. Code Ann. § 15-38-15, Lend Lease cannot be jointly and severally liable and is entitled to an apportionment of any fault.

FOR AN EIGHTH DEFENSE

(Actual Notice/Assumption of Risk)

10. Further and affirmatively answering the Plaintiff's Amended Complaint, Lendlease alleges that Plaintiff's claims are barred as Plaintiff had actual notice of the deficiencies alleged in its Complaint when it purchased the property and assumed the risk of any consequential losses from the alleged deficiencies.

FOR A NINTH DEFENSE

(Comparative and/or Contributory Negligence)

11. Further and affirmatively answering the Amended Complaint and as an additional and complete defense thereto, if and to the extent that Plaintiff was damaged as alleged, such damages were the result, in whole or in part, of the fault, negligence, and/or culpable conduct of Plaintiff and/or its agents, as a result of which such damages are barred or must be reduced accordingly.

FOR A TENTH DEFENSE

(Actual Notice/Assumption of Risk)

12. Further and affirmatively answering the Amended Complaint and as an additional and complete defense thereto, Plaintiff's claims against Lendlease are barred, in whole or in part

as Lend Lease performed its work on the Project pursuant to a contract with the original developer and the work was completed and accepted by the developer.

FOR AN ELEVENTH DEFENSE

(Breach of Implied Warranty of Plans and Specifications)

13. Further and affirmatively answering the Amended Complaint and as an additional and complete defense thereto, the Plaintiff and/or its predecessor, warranted the sufficiency of the plans and specifications for the Project to Lendlease, and Plaintiff's claims are barred against Lendlease to the extent the damages claimed were proximately caused by deficiencies in the plans and specifications for the Project.

FOR A TWELFTH DEFENSE

(Disclaimer and/or Expiration of Warranties)

14. Further and affirmatively answering the Amended Complaint and as an additional and complete defense thereto, any alleged warranties made by Lendlease expired prior to any claim by Plaintiff and/or were properly disclaimed by Lendlease.

FOR A THIRTEENTH DEFENSE

(Waiver/Release)

15. Further and affirmatively answering the Plaintiff's Amended Complaint and as an additional and complete defense thereto, Plaintiff's claims against Lendlease are barred in whole or in part by the doctrine of waiver and/or Plaintiff's execution of a Release of all claims alleged in this action against Lendlease.

FOR A FOURTEENTH DEFENSE

(Reservation of Additional and Further Defenses)

16. Lendlease reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

AS A FIFTEENTH DEFENSE AND BY
WAY OF COUNTERCLAIM
(Declaratory Judgment)

Defendant/Third Party Plaintiff Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. (“Lendlease”), complaining of Plaintiff, BEI-Beach, LLC, hereby files this Counterclaim for Declaratory Judgment, and alleges as follows:

17. Defendant/Third-Party Plaintiff Lendlease is a Florida limited liability company licensed in the State of South Carolina and at all times relevant hereto was engaged in doing business in the State of South Carolina.

18. Upon information and belief, Plaintiff, BEI-Beach, LLC is a South Carolina limited liability company, engaged in doing business in the State of South Carolina, and the Owner of the Market Common Project in Myrtle Beach, South Carolina (hereinafter referred to as “Project”), which is the subject of this matter.

19. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper in Horry County, South Carolina, which is the location of the Project.

20. The issues presented in this Counterclaim require a legal interpretation and/or application to terms of a Contract of Sale and are considered a matter of law to be determined by the Court.

FACTS

21. Plaintiff, BEI-Beach, LLC executed a Contract of Sale to purchase the Project on or around January 6, 2011 from LUK-MB1, LLC. A copy of the referenced Contract of Sale is attached as Exhibit 1 and incorporated herein.

22. The Project consists of multiple buildings, with office, retail and residential mix-use.

23. The buildings at issue in this matter, as alleged by Plaintiff, are A-2, A-3, A-4, A-5, A-6, A-7 and A-8.

24. Defendant/Third-Party Plaintiff Lendlease served as the contractor for the construction of Buildings A6, A7, and A8 of the Project pursuant to a contract agreement with LUK-MB1, LLC. Lendlease Contract Agreement with LUK-MB1, LLC is attached as Exhibit 2 and incorporated herein.

25. The Plaintiff has sued Lendlease claiming damages caused by alleged defective construction and deficient construction related to the Project. Plaintiff's Amended Complaint is incorporated herein by reference.

26. The claims alleged against Lendlease by Plaintiff have previously been released by Plaintiff through its execution of the Contract of Sale to purchase The Market Common, Phase 1, Myrtle Beach, S.C., previously defined herein as the Project.

27. LUK-MB1, LLC executed the Contract of Sale, as Seller, agreeing to the terms set forth in the Contract of Sale, through its Receiver, by Order of the Court of Common Pleas, Horry County, South Carolina.

28. Plaintiff, BEI-Beach, LLC executed the Contract of Sale, as Purchaser, agreeing to the terms set forth in the Contract of Sale, through its Vice President, Joseph M. O'Connor.

29. Joseph M. O'Connor, also executed the Release of Claims, Exhibit F to the Contract of Sale, on behalf of LUK-MB, LLC, Leucadia National Corporation, and BEI-Beach, LLC as Vice President of each of those companies (the Seller, Purchaser and parent corporation of both).

30. Joseph M. O'Connor, as Vice President of BEI-Beach, LLC, was duly authorized to execute the Contract of Sale on behalf of BEI-Beach, LLC and his action is binding upon BEI-Beach, LLC.

31. The Contract of Sale contains thirty-two (32) numbered paragraphs, with subparts, including Paragraph 15 “AS IS” SALE; RELEASE, which states specifically as follows:

PURCHASER ACKNOWLEDGES THAT SELLER IS CONTRACTING TO SELL THE PREMISES BY AND THROUGH THE RECEIVER, GREGORY T. MALONEY, AND SELLER WILL CONVEY THE PREMISES ONLY UPON ENTERING OF THE SALE APPROVAL ORDER BY THE COURT OF COMMON PLEAS, PURCHASER FURTHER ACKNOWLEDGES THAT THE RECEIVER HAS HAD NO INVOLVEMENT IN THE DEVELOPMENT, ENTITLEMENT OR CONSTRUCTION OF THE PREMISES. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN CONTAINED, PURCHASER EXPRESSLY UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THE CONVEYANCE OF THE PREMISES SHALL BE MADE BY SELLER TO PURCHASER ON AN “AS IS, WHERE IS” BASIS, AND “WITH ALL FAULTS,” AND PURCHASER ACKNOWLEDGES THAT PURCHASER HAS AGREED TO BUY THE PREMISES IN ITS PRESENT CONDITION (SUBJECT TO PURCHASER’S RIGHT OF INSPECTION AND REVIEW AS PROVIDED HEREIN) AND THAT PURCHASER IS RELYING SOLELY ON ITS OWN EXAMINATION AND INSPECTIONS OF THE PREMISES AND NOT ON ANY MATERIALS OR INFORMATION (INCLUDING BUT NOT LIMITED TO ANY ENVIRONMENTAL REPORTS, INVESTIGATIONS OR ASSESSMENTS) FURNISHED OR STATEMENTS OR REPRESENTATIONS MADE, BY SELLER OR ANY AGENTS OR REPRESENTATIVES OF SELLER OR RECEIVER ACTING IN BEHALF OF SELLER, EXCEPT AS OTHERWISE SPECIFICALLY SET FORTH HEREIN. PURCHASER HEREBY ACKNOWLEDGES THAT, EXCEPT AS OTHERWISE SPECIFIED HEREIN, SELLER MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING BUT IN NO WAY LIMITED TO, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE PREMISES OR ANY PORTION THEREOF, OR WITH RESPECT TO THE ECONOMICAL, FUNCTIONAL, ENVIRONMENTAL OR PHYSICAL CONDITION, COMPLIANCE WITH ALL APPLICABLE LAWS, ORDINANCES AND REGULATIONS, OR ANY OTHER ASPECT, OF OR AFFECTING THE PREMISES. PURCHASER ACKNOWLEDGES AND AGREES THAT IT IS REPRESENTED BY AN ATTORNEY OF ITS SELECTION AND UNDERSTANDS THE LEGAL AND PRACTICAL EFFECT OF THE WRITTEN DISCLAIMERS AND LIMITATIONS OF WARRANTIES, WHICH ARE DEEMED BARGAINED FOR AND THAT SELLER WOULD NOT HAVE ENTERED THIS CONTRACT OF SALE WITH PURCHASER FOR THE PURCHASE PRICE STATED UNLESS PURCHASER AGREED TO THE DISCLAIMERS AND LIMITATIONS OF THE CLOSING. PURCHASER AGREES THAT THE DISCLAIMERS AND LIMITATIONS OF WARRANTIES SHALL CONSTITUTE A DEFENSE TO ANY CLAIM BY PURCHASER, ITS SUCCESSOR OR ASSIGN, RELATED TO THE CONDITION OF THE PREMISES THAT DOES NOT COME WITHIN THE LIMITED WARRANTIES. ADDITIONALLY, EXCEPT AS OTHERWISE PROVIDED HEREIN, NEITHER SELLER NOR THE RECEIVER IN ITS INDIVIDUAL CAPACITY, OR ANY AGENT OR REPRESENTATIVE ENGAGED BY RECEIVER ACTING IN ITS REPRESENTATIVE CAPACITY, MAKES ANY WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, AS TO THE ACCURACY OR COMPLETENESS OF ANY INFORMATION (INCLUDING, BUT NOT LIMITED TO, ANY ENVIRONMENTAL REPORTS, INVESTIGATIONS OR ASSESSMENTS) FURNISHED PURCHASER PURSUANT TO THIS CONTRACT. EXCEPT AS OTHERWISE PROVIDED HEREIN,

SELLER HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY OR REPRESENTATION, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, OR CONCERNING: (i) THE NATURE AND CONDITION OF THE PREMISES, THE PERSONAL PROPERTY, THE INTANGIBLE RIGHTS, THE TENANT LEASES OR ANY PART THEREOF, INCLUDING, BUT NOT BY WAY OF LIMITATION, AS TO ENVIRONMENTAL CONDITION, WATER, SOIL OR GEOLOGY, OR THE SUITABILITY THEREOF, FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASER MAY ELECT TO CONDUCT THEREON, OR ANY IMPROVEMENTS PURCHASER MAY ELECT CONSTRUCT THEREON, OR ANY INCOME TO BE DERIVED THEREFROM OR EXPENSES TO BE INCURRED WITH RESPECT THERETO, OR ANY OBLIGATIONS OR ANY OTHER MATTER OR THING RELATING TO OR AFFECTING THE SAME; (ii) THE ABSENCE OF ASBESTOS OR ANY ENVIRONMENTALLY HAZARDOUS SUBSTANCES ON, IN OR UNDER THE PREMISES OR ON, IN OR UNDER ANY PROPERTY ADJACENT TO OR ABUTTING THE PREMISES; (iii) THE MANNER OF CONSTRUCTION OR CONDITION OR STATE OF REPAIR OR LACK OF REPAIR OF ANY IMPROVEMENTS CONSTITUTING PART OF OR LOCATED WITHIN THE PREMISES; (iv) THE NATURE OR EXTENT OF ANY EASEMENT, RESTRICTIVE COVENANT, RIGHT-OF-WAY, LEASE, POSSESSION, LIEN, ENCUMBRANCE, LICENSE, RESERVATION, CONDITION OR OTHER SIMILAR MATTER PERTAINING TO THE PREMISES, OR PORTION THEREOF; AND (v) THE COMPLIANCE OF THE PREMISES OR THE OPERATION OF THE PREMISES OR PORTION THEREOF WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY GOVERNMENT OR OTHER BODY. IF EITHER SELLER OR PURCHASER DISCOVERS THE PRESENCE OF HAZARDOUS SUBSTANCES (INCLUDING, WITHOUT LIMITATION, FRIABLE ASBESTOS) ON THE PREMISES PRIOR TO CLOSING, IN ADDITION TO PURCHASER'S RIGHTS UNDER PARAGRAPH 28 HEREOF, SELLER SHALL HAVE THE RIGHT TO TERMINATE THIS CONTRACT BY WRITTEN NOTICE DELIVERED TO PURCHASER. THE PROVISIONS OF THIS PARAGRAPH 15 SHALL SURVIVE THE EXECUTION AND DELIVERY OF THE DEED BY SELLER AND THE CLOSING OF THE TRANSACTION CONTEMPLATED BY THIS CONTRACT.

EFFECTIVE UPON THE CLOSING, AND TO THE FULLEST EXTENT PERMITTED BY LAW, PURCHASER HEREBY RELEASES, DISCHARGES AND FOREVER ACQUITS SELLER, THE RECEIVER INDIVIDUALLY AND EVERY INDIVIDUAL AND ENTITY AFFILIATED WITH SELLER AND RECEIVER AND ALL OF THEIR RESPECTIVE OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AGENTS AND INDEPENDENT CONTRACTORS (EXCEPT PURSUANT TO ANY SEPARATE AGREEMENTS ENTERED INTO BY PURCHASER AND JONES LANG LASALLE AMERICASE, INC.) AND THE SUCCESSOR OF EACH AND EVERY ONE OF THEM, FROM ALL DEMANDS, CLAIMS, CAUSES OF ACTION, LIABILITIES, OBLIGATIONS, COSTS AND EXPENSES WHICH PURCHASER MAY SUFFER OR INCUR RELATING TO THE PREMISES, OR CONDITIONS OR ANY OTHER ASPECT OF THE PREMISES AS PART OF THE FOREGOING PROVISIONS OF THIS CONTRACT, BUT NOT AS A LIMITATION THEREON, PURCHASER HEREBY AGREES, REPRESENTS AND WARRANTS THAT THE MATTERS RELEASED HEREIN ARE NOT LIMITED TO MATTERS WHICH ARE KNOWN OR DISCLOSED, AND PURCHASER HEREBY WAIVES ANY AND ALL RIGHTS AND BENEFITS WHICH PURCHASER NOW HAS OR IN THE FUTURE MAY HAVE CONFERRED UPON PURCHASER, BY VIRTUE OF THE PROVISIONS OF FEDERAL, STATE OR LOCAL LAW, RULES OR REGULATIONS.

THE RELEASE PROVIDED HEREIN SHALL SURVIVE THE CLOSING.

32. Plaintiff knowingly purchased the Project “AS-IS” with all faults and based on no representations or warranties, in its present condition.

33. Plaintiff acknowledges having been represented by an attorney of its choice during the Contract of Sale transaction.

34. Plaintiff acknowledges and agrees that it understood the legal and practical effect of the disclaimers and limitations of warranty prior to executing the Contract of Sale.

35. Upon closing on the purchase transaction, Plaintiff released, discharged, and forever acquitted LUK-MB1, LLC, as Seller, Jones Lang Lasalle Americas, Inc. as Receiver, and every individual and entity affiliated with LUK-MB1, LLC and Jones Lang Lasalle Americas, Inc. and all of their respective officers, directors, shareholders, employees, agents and independent contractors from all demands, claims, causes of action, liabilities, obligations, costs and expenses which Plaintiff may suffer or incur relating to the Project, or conditions or any other aspect of the Project.

36. Plaintiff agreed, represented and warranted that the matters released within the Contract of Sale are not limited to matters which were known or disclosed at the time of the purchase, but includes matters that may arise in the future.

37. Plaintiff expressly waived any and all rights and benefits which it had, has, or in the future may have related to the Project against LUK-MB1, LLC and its independent contractors.

38. Lendlease is identified as the “Contractor” in the AIA A111-1997 Standard Form of Agreement Between Owner and Contractor with LUK-MB1, LLC attached as Exhibit 2.

39. An “independent contractor” is an entity with whom a principal/owner directly contracts to perform a certain task or tasks and is left free to do the assigned work and to choose the method for accomplishing it.

40. A “general contractor” is an entity with whom the principal/owner directly contracts to perform a job, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work.

41. An independent contractor’s status changes to that of a general contractor when any part of the work is subcontracted to another entity.

42. Lendlease is an independent contractor to LUK-MB1, LLC and served in a general contractor capacity on the Project through the use of various subcontractors, some of which are named as Third-Party Defendants in this action.

43. Lendlease, as an independent contractor to LUK-MB1, LLC, was released discharged, and forever acquitted by Plaintiff from all demands, claims, causes of action, liabilities, obligations, costs and expenses which Plaintiff may suffer or incur relating to the Project, or conditions or any other aspect of the Project.

44. A Release is a contract, and principles of law applicable to contracts are generally also applicable to Releases, and are to be construed by the Court.

45. The express language of Paragraph 15 “AS IS” SALE; RELEASE of the Contract of Sale is clear and unambiguous with only one possible interpretation.

46. Plaintiff is bound by the clear express intent of the unambiguous terms in the Contract of Sale.

47. Lendlease is entitled to judgment in its favor on all causes of action brought against it by Plaintiff pursuant to the terms and conditions of the Contract of Sale, specifically the express terms of Paragraph 15 “AS IS” SALE; RELEASE.

FIRST COUNTERCLAIM – DECLARATORY JUDGMENT
(Clear and Unambiguous Contract)

48. Lendlease re-alleges and reasserts the allegations contained in Paragraphs 1 through 47 to this Amended Answer and Counterclaim as if fully set forth herein verbatim.

49. Lendlease is informed and believes that this Honorable Court has the power pursuant to the South Carolina Declaratory Judgment Act, codified at §§ 15-53-10, et. seq., to decide and determine the issues presented in this action and may enter final judgment with respect to these issues.

50. The terms and conditions of the Contract of Sale, attached as Exhibit 1, govern the purchase of the Market Common Project by BEI-Beach, LLC.

51. The language of the Contract of Sale clearly sets forth the intent of the parties and is open to only one interpretation.

52. The Court is bound by the unambiguous terms and clearly expressed intent of the Contract of Sale without resort to extrinsic evidence.

53. Paragraph 15 of the Contract of Sale contains Release language, written in a conspicuous manner that details the rights released by BEI-Beach, LLC, as the Purchaser, in its acquisition of the Market Common Project.

54. The language of the Contract of Sale expressly releases, discharges and forever acquits the seller, LUK-MB1, LLC, and every individual or entity affiliated with LUK-MB1, LLC and their respective officers, directors, shareholders, employees, agents and independent contractors.

55. As a matter of law, the language of the Contract of Sale is clear and unambiguous, subject to only one interpretation, which such interpretation and application is legal in nature and must be determined by the Court.

56. The Court should interpret and apply the terms and conditions of the Contract of Sale as expressly written finding the language clear and unambiguous with no need for extrinsic evidence to determine the parties' intent.

SECOND COUNTERCLAIM – DECLARATORY JUDGMENT
(Lendlease is an Independent Contractor)

57. Lendlease re-alleges and reasserts the allegations contained in Paragraphs 1 through 56 to this Amended Answer and Counterclaim as if fully set forth herein verbatim.

58. Lendlease is informed and believes that this Honorable Court has the power pursuant to the South Carolina Declaratory Judgment Act, codified at §§ 15-53-10, et. seq., to decide and determine the issues presented in this action and may enter final judgment with respect to these issues.

59. The terms and conditions of the Contract of Sale, attached as Exhibit 1, govern the purchase of the Market Common Project by BEI-Beach, LLC.

60. The language of the Contract of Sale clearly sets for the intent of the parties and is open to only one interpretation.

61. An “independent contractor” is an entity with whom a principal/owner directly contracts to perform a certain task or tasks and is left free to do the assigned work and to choose the method for accomplishing it.

62. A “general contractor” is an entity with whom the principal/owner directly contracts to perform a job, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work.

63. An independent contractor's status changes to that of a general contractor when any part of the work is subcontracted to another entity.

64. As a matter of law, Lendlease is an independent contractor to LUK-MB1, LLC.

THIRD COUNTERCLAIM – DECLARATORY JUDGMENT
(Release of Independent Contractors)

65. Lendlease re-alleges and reasserts the allegations contained in Paragraphs 1 through 64 to this Amended Answer and Counterclaim as if fully set forth herein verbatim.

66. Lendlease is informed and believes that this Honorable Court has the power pursuant to the South Carolina Declaratory Judgment Act, codified at §§ 15-53-10, et. seq., to decide and determine the issues presented in this action and may enter final judgment with respect to these issues.

67. The terms and conditions of the Contract of Sale, attached as Exhibit 1, govern the purchase of the Market Common Project by BEI-Beach, LLC.

68. The language of the Contract of Sale clearly sets for the intent of the parties and is open to only one interpretation.

69. The Court is bound by the unambiguous terms and clearly expressed intent in the contract without resort to extrinsic evidence.

70. Paragraph 15 of the Contract of Sale contains Release language, written in a conspicuous manner that details the rights released by BEI-Beach, LLC, as the Purchaser, in its acquisition of the Market Common Project.

71. The language of the Contract of Sale expressly releases, discharges and forever acquits the seller, LUK-MB1, LLC, and every individual or entity affiliated with LUK-MB1, LLC and their respective officers, directors, shareholders, employees, agents and **independent contractors**.

72. Lendlease was an independent contractor hired by LUK-MB1, LLC to construct Buildings A6, A7 and A8 of the Market Common Project.

73. Lendlease, pursuant to its contract with LUK-MB1, LLC served as a general contractor by providing labor and materials for the construction through various subcontractors.

74. As a matter of law, Lendlease, as an independent contractor to LUK-MB1, LLC, was released discharged, and forever acquitted by Plaintiff from all demands, claims, causes of action, liabilities, obligations, costs and expenses which Plaintiff may suffer or incur relating to the Project, or conditions or any other aspect of the Project.

75. The Court should interpret and apply the terms and conditions of the Contract of Sale as expressly written finding the language clear and unambiguous with no need for extrinsic evidence to determine the parties' intent.

WHEREFORE, Defendant/Third-Party Plaintiff respectfully prays that this Honorable Court inquire into the matters set forth herein and find judgment, as a matter of law, as follows:

- (a) The language of the Contract of Sale is clear and unambiguous;
- (b) BEI-Beach, LLC, through execution of the Contract of Sale, expressly released, discharged and forever acquitted the Seller, LUK-MB1, LLC, and every individual or entity affiliated with LUK-MB1, LLC and their respective officers, directors, shareholders, employees, agents and independent contractors;
- (c) Defendant/Third-Party Plaintiff Lendlease is an independent contractor;
- (d) BEI-Beach, LLC through execution of the Contract of Sale released Lendlease from all demands, claims, causes of action, liabilities, obligations, costs and expenses which BEI-Beach, LLC has suffered or may suffer relating to the Market Common Project;
- (e) Defendant/Third-Party Plaintiff cannot be held liable to BEI-Beach, LLC for the claims asserted in this action; and
- (f) Award Lend Lease such other and further relief as may be just and proper.

ROSEN, ROSEN & HAGOOD, LLC.

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Elizabeth F. Nicholson, Esquire
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P.O. Box 893
Charleston, SC 29402
(843) 577-6726

**ATTORNEY FOR LEND LEASE (US)
CONSTRUCTION INC. f/k/a BOVIS LEND
LEASE, INC.**

November 23, 2019
Charleston, South Carolina

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF HORRY |) | CASE NO. 2015-CP-26-07275 |
| BEI-BEACH, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| MASHBURN CHRISTMAN, LLC; |) | LENLEASE (US) CONSTRUCTION |
| LEND LEASE (US) CONSTRUCTION |) | INC., f/k/a BOVIS LEND LEASE, INC.’S |
| INC., f/k/a Bovis Lend Lease, Inc.; and |) | NOTICE OF MOTION AND MOTION |
| McCRORY CONSTRUCTION |) | TO RECONSIDER PURSUANT |
| COMPANY, LLC, |) | TO SCRCP 59(e) |
| |) | |
| Defendants. |) | |
| |) | |
| LEND LEASE (US) CONSTRUCTION |) | |
| INC., f/k/a Bovis Lend Lease, Inc.; |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| SPANN ROOFING & SHEET METAL, |) | |
| INC., ET AL. |) | |
| |) | |
| Third-Party Defendants. |) | |
| |) | |

The Defendant, Lendlease (US) Construction Inc., f/k/a Bovis Lend Lease, Inc. (“Lendlease”), by and through its undersigned attorneys, submits this Motion and Memorandum of Law in support of its Motion to Reconsider, Alter or Amend the Order, received from the Court on November 21, 2019, granting Third-Party Defendant Antunovich Associates, Inc.’s (“Antunovich”) Motion for Partial Summary Judgment as to Lendlease’s First Cause of Action for Contribution, Fifth Cause of Action for Negligence/Gross Negligence/Recklessness, and Eighth Cause of Action for Breach of Warranty of Plans and Specifications.

PROCEDURAL HISTORY

Antunovich filed its motion for partial summary judgment on October 19, 2017. A hearing on Antunovich's motion, along with other pending motions in this case, was held on October 30, 2019. This Court, through its Order dated November 21, 2019, granted Antunovich's motion for partial summary judgment, ending Lendlease's claims for Contribution, Negligence/Gross Negligence/Recklessness and Breach of Warranty of Plans and Specifications. Lendlease files its Motion to Reconsider, Alter or Amend the Court's Order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. This Memorandum is offered in support of that motion.

SUMMARY OF ARGUMENT

Lendlease seeks the Court's reconsideration of its prior ruling as to Lendlease's Fifth (Negligence/Gross Negligence/Recklessness) and Eighth Cause of Action (Breach of Warranty of Plans and Specifications) respectfully. Lendlease does not seek reconsideration of the Court's granting of summary judgment as to Lendlease's First Cause of Action for Contribution. Lendlease's grounds for consideration are as follows:

- (1) Lendlease's claim for negligence/gross negligence/recklessness is an independent cause of action supported by the Affidavit of Richard H. Moore, PE, filed contemporaneously with Lendlease's Third-Party Complaint.
- (2) South Carolina recognizes a special relationship between an Architect and a Contractor, which supports a cause of action for Breach of Warranty of Plans and Specifications.

Antunovich relies upon the South Carolina Court of Appeals decision in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) for its base line argument that Lendlease's claims are nothing more than disguised equitable

indemnity claims, which should be summarily dismissed. Following Antunovich's logic, a contractor sued for construction defects by an Owner would never have a claim for anything other than equitable indemnity. The independent causes of action a contractor has with regards to an Architect, as recognized by the State of South Carolina, would be meaningless.

This Court erred in finding that Lendlease's sole claim against Antunovich arises out of a theory of equitable indemnity. Accordingly, Lendlease seeks reconsideration of the Court's Order granting Antunovich's motion for partial summary judgment.

STANDARD OF REVIEW

The South Carolina Supreme Court has set forth that Rule 59(e) of the South Carolina Rules of Civil Procedure is a vehicle not only to request a trial judge alter or amend the judgment, but also a vehicle to seek reconsideration of issues and arguments presented to the Court. See *Elam v. S.C.D.O.T.*, 361 S.C. 9, 602 S.E.2d772 (2004). In *Elam*, the Court held:

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) has long been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decisions even if it means rehashing all or part of an argument previously presented ... 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. It is inherently unfair to disallow such an opportunity.

See also *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009).

ARGUMENT

(1) Lendlease's Negligence Action

Under South Carolina Law, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina, including Architects, the claimant must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. *See* S.C. Code Ann. §15-36-100 (B). Lendlease's Third-Party Complaint against Antunovich is supported by the Affidavit of Richard H. Moore, P.E. *See* Lendlease's Third-Party Complaint. According to Mr. Moore, the vinyl windows specified for the Market Common Project, Buildings A6, A7, and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which the Project is located. *See* Affidavit of Richard H. Moore § 5. In Mr. Moore's professional opinion, Antunovich's actions, as it relates to the performance of its obligations owed to the Owner and Contractor, constitutes a breach of a design professional's standard of care and responsibilities. *See* Affidavit of Richard H. Moore § 5.

In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, our state Supreme Court recognized a duty owed by a design professional to a contractor, independent of any contract duties, not to negligently design or negligently supervise a project. *See Tommy L. Griffin Plumbing*, 320 S.C. 49, 463 S.E.2d 85 (1995). A special relationship creates a duty of care outside the terms of any contract. *Id.* at 55. The Supreme Court found that the trial judge erred in finding the doctrine of "economic loss" prohibited the plaintiff from maintaining a suit in tort for purely economic losses. *Id*; *see also State Ports Autho v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986) (tort action maintainable by third party against professional when duty

exists). Here, Antunovich has a special relationship with Lendlease and owes certain duties and obligations to Lendlease as such.

In a professional negligence cause of action, as alleged in this case, Lendlease, as the third-party Plaintiff, must prove that Antunovich failed to conform to generally recognized and accepted practices in the profession. *City of York v. Turner-Murphy Co., Inc.*, 317 S.C. 194, 425 S.E.2d 615 (Ct. App. 1994). The affidavit of Rick Moore supports Lendlease's allegation that Antunovich breached the duty of care owed to Lendlease on this project. See Affidavit of Richard H. Moore § 5. The laws of the State of South Carolina provide that a tort action is maintainable by a third party against a design professional when a duty exists. *State Ports Autho.*, 289 S.C. 373 (1996). Having established the presence of a duty, and an alleged breach of that duty, Lendlease's must show its damages were proximately caused by Antunovich. Ordinarily, the question of whether proximate cause exists is one of fact for the jury. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002).

Lendlease, through its pleadings, alleges to have incurred actual damages resulting from the negligence of Antunovich. No Lendlease representative has been deposed in this matter by Antunovich, the Plaintiff, or any other party. Lendlease representatives will testify that Lendlease has incurred the following actual damages:

- Cost of windows purchased by Lendlease that do not meet required wind load requirements, which are now recommended for removal and replacement;
- Investigative fees paid to Richard H. Moore, P.E. to analyze the project documents and determine whether the windows specified and approved by Antunovich meet applicable building code requirements at the time of construction;
- Loss of business revenues as a result of pending construction defect claims

The damages set forth above and alleged by Lendlease in its negligence cause of action are not all derivative of the damages sought by Plaintiff. Lendlease has properly pled its cause of action for negligence and provided evidence that it can carry its burden of proof. The Court erred in granting summary judgment and denying Lendlease the opportunity for a jury to determine the extent of the damages incurred by Lendlease attributable to Antunovich.

(2) Lendlease's Breach of Warranty of Plans and Specifications

If a party furnishes plans and specifications for a contractor to follow in a construction job, the party impliedly warrants their sufficiency for the purpose in view. *Tommy L. Griffin Plumbing*, 320 S.C. at 56 (1995). By preparing the plans and specifications for The Market Common Project, Antunovich warranted their sufficiency for Lendlease's use. *Id.* According to Richard Moore, P.E., the vinyl windows specified by Antunovich for The Market Common Project, Buildings A6, A7 and A8 were inappropriate for the designated wind zone design pressure requirements for the region in which the Project is located. *See* Affidavit of Richard H. Moore § 5.

Specifically, the architectural plans prepared by Antunovich for The Market Common, dated 12-27-06 show negative wind pressures for the project were 59.3 psf for these partially enclosed buildings. *See* Affidavit of Richard H. Moore § 5. Antunovich's supplemental instructions dated 4-2-07 modify specification 08561 to require minimum C45 grade windows with a DP45 rating. *See* Affidavit of Richard H. Moore § 5. The window shop drawings approved by Antunovich dated 7-23-07 have a hand-written note that requires a minimum DP40. *See* Affidavit of Richard H. Moore § 5. The local building code and ASTM 7-02 required a minimum DP 70 for Zone 5 for Buildings A6, A7, and A8. *See* Affidavit of Richard H. Moore § 5. As a result, Antunovich breached its warranty of plans and specifications to Lendlease.

An architect is generally liable for foreseeable consequences of the failure to exercise reasonable care in preparation of architectural design. *See Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). Thus, an architect is liable when the design plans and specifications are faulty and defective. *Id.* *Polar Pantries* is noteworthy for the Supreme Court's adoption of language regarding the furnishing of plans and specifications, and the broader affirmation that the person holding himself out as specially qualified impliedly warrants that the work he undertakes will be of proper workmanship and reasonably fit for the intended use. *See* 7 S.C. Jur. *Architects and Engineers* § 19.

If the Supreme Court of South Carolina wanted to limit a contractor's rights to recover against an architect solely to equitable indemnity, the legal theory of breach of warranty of plans and specifications would be non-existent. However, our Supreme Court recognizes such a claim and the general contractor's right to rely on the design professional's expertise. *See Tommy L. Griffin Plumbing*, 320 S.C. 49 (1995). Lendlease's claim for breach of warranty of plans and specifications stands separate and distinct from Plaintiff's claims against Lendlease. The Architect/Contractor relationship is a different dynamic from the Contractor/Subcontractor relationship at issue in *Stoneledge*. *See Stoneledge*, 413 S.C. 615 (Ct. App. 2015).

As with Lendlease's negligence cause of action, the question of damages resulting from Antunovich's breach of warranty of plans and specifications is a question for the jury based upon the evidence presented by Lendlease at trial. The Court erred in granting summary judgment and denying Lendlease the opportunity for a jury to determine the extent of the damages incurred by Lendlease attributable to Antunovich.

CONCLUSION

For all the foregoing reasons, Defendant Lendlease's Motion to Reconsider the Court's prior ruling on Third-Party Defendant Antunovich's Motion for Summary Judgment should be granted as a matter of law, the Court's prior Order revoked, and all claims asserted by Lendlease against Antunovich, with the exception of Lendlease's Contribution cause of action, restored.

ROSEN HAGOOD, LLC

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***Attorneys for Defendant Lendlease (US)
Construction Inc. f/k/a Bovis Lendlease Inc.***

Charleston, South Carolina
November 26, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
CASE NO.: 2015-CP-26-7275)

BEI-Beach, LLC,)

Plaintiff,)

vs.)

Mashburn Christman, JV, Lend Lease (US))
Construction, Inc., f/k/a Bovis Lend Lease,)
Inc., and McCrory Construction Company,)
LLC,)

Defendants.)

Mashburn Christman, JV,)

Third-Party Plaintiff,)

vs.)

Wallcraft Construction, Inc., Alpha Insulation)
& Waterproofing, Inc., Baker Roofing, Inc.,)
Collins & Wright, Inc., Liberty Mutual)
Insurance Company, Old Republic Surety)
Company, Hartford Fire Insurance Co.,)
Travelers Casualty and Surety Company of)
America, The Muhler Company, Inc., and)
Companion Property and Casualty Insurance)
Company,)

Third-Party Defendants.)

Lend Lease (US) Construction Inc. f/k/a Bovis)
Lend Lease, Inc.)

Third-Party Plaintiff,)

vs.)

Spann Roofing & Sheet Metal, Inc., Travelers)
Casualty and Surety Company of America,)
Strickland Waterproofing Company,)
Merchants Bonding Company, Everest)
Reinsurance Company, Wallcraft)
Construction, Inc., Old Republic Insurance)
Company, Madison Construction Group, Inc.,)

THIRD-PARTY DEFENDANT
ANTUNOVICH ASSOCIATES, INC.'S
ANSWER TO DEFENDANT LEND
LEASE (US) CONSTRUCTION INC.
F/K/A BOVIS LEND LEASE, INC'S
ANSWER TO PLAINTIFF'S AMENDED
COMPLAINT, COUNTERCLAIM &
AMENDED THIRD-PARTY
COMPLAINT

Worthington Integrated Building Systems,)
McDowell Commercial Construction, LLC,)
Jollay Masonry, National Fire Insurance)
Company of Hartford, R.J. Kenney Associates,)
Inc., Antunovich Associates, TG Construction,)
LLC, Luis Banegas d/b/a Luis Trim Work,)
Nora Del Carmen Lagos, Nora Del Carmen)
Lagos d/b/a Luis Trim Work, and Ovation)
Custom Trim, LLC,)
)
Third-Party Defendants.)

McCrary Construction Company, LLC,)
)
Third-Party Plaintiff,)
)
vs.)
)
Collins & Wright, Baker Roofing, Glasstech)
Inc., Palmetto State Roofing and Sheet Metal,)
Strickland Waterproofing, Maiday, Inc., and)
Atlas Drywall & Acoustics, Inc.,)
)
Third-Party Defendants.)

Third-Party Defendant Antunovich Associates, Inc. (improperly identified in Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.'s Answer and Third-Party Complaint as Antunovich Associates) ("Antunovich") hereby answers Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc.'s ("Lend Lease") Answer to Plaintiff's Complaint, Counterclaim & Amended Third-Party Complaint ("Lend Lease's Third-Party Complaint") as follows:

FOR A FIRST DEFENSE

(Paragraphs 1-75 correspond to the like-numbered paragraphs in
Lend Lease' Third-Party Complaint)

1. This Paragraph contains a requested rule of construction for Lend Lease's Third-Party Complaint, to which no response by Antunovich is required.

2-3. Antunovich craves reference to its responsive pleadings filed in this action, and incorporates the language thereof as if repeated herein verbatim.

4-16. These paragraphs contain Lend Lease's affirmative defenses to Plaintiff's claims against it, to which no response by Antunovich is required. To the extent a response by Antunovich is deemed to be required, Antunovich denies the allegations in these paragraphs to the extent they allege or imply any fault or liability on the part of Antunovich.

17-75. These paragraphs contain Lend Lease's counterclaims against Plaintiff, to which no response by Antunovich is required. To the extent a response by Antunovich is deemed to be required, Antunovich denies the allegations in these paragraphs to the extent they allege or imply any fault or liability on the part of Antunovich.

76. Antunovich denies each and every allegation contained in Lend Lease's Third-Party Complaint not expressly admitted herein. Moreover, Antunovich denies the allegations contained in the paragraph of Lend Lease's Third-Party Complaint which begins "WHEREFORE," including subparts, to the extent they allege or imply any fault or liability on the part of Antunovich.

FOR A SECOND DEFENSE

77. To the extent Lend Lease's Third-Party Complaint seeks to re-assert causes of action against Antunovich other than Equitable Indemnity, such causes of action must be dismissed on the grounds of res judicata and/or collateral estoppel.

FOR A THIRD DEFENSE

78. Lend Lease's Third-Party Complaint is barred by the statute of limitations, the statute of repose, and/or the doctrine of laches.

FOR A FOURTH DEFENSE

79. Lend Lease's Third-Party Complaint fails to state facts sufficient to constitute a cause of action and should therefore be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A FIFTH DEFENSE

80. Lend Lease's alleged damages were caused by Lend Lease's own fault, and such fault is pled in complete defense of Lend Lease's claims, or, in the alternative, in proportionate reduction of Lend Lease's claims. Moreover, Antunovich is entitled to an allocation of fault among potential wrongdoers.

FOR A SIXTH DEFENSE

81. If Lend Lease's alleged damages were caused by the intervening or superseding fault or breach of other parties, such fault/breach is pled in complete defense of Lend Lease's claims.

FOR A SEVENTH DEFENSE

82. Lend Lease's claims may be barred by the equitable doctrines of waiver, estoppel, and/or unclean hands.

FOR AN EIGHTH DEFENSE

83. Lend Lease may have failed to mitigate its alleged damages.

FOR A NINTH DEFENSE

84. To the extent Lend Lease has or does receive financial compensation from others with regard to the damages alleged herein, Antunovich is entitled to a setoff for such compensation.

FOR A TENTH DEFENSE

85. The acceptance of Antunovich's work on the subject project constitutes a complete defense to all claims asserted by Lend Lease.

FOR AN ELEVENTH DEFENSE

86. To the extent portions of the subject property have been modified and/or destroyed, Antunovich pleads the doctrine of spoliation of evidence as a complete bar to Lend Lease's claims.

FOR A TWELFTH DEFENSE

87. Antunovich reserves the right to assert additional defenses as discovery proceeds. Moreover, to the extent consistent herewith, Antunovich incorporates by reference all affirmative defenses asserted by other parties.

WHEREFORE, Antunovich prays that Lend Lease's Third-Party Complaint be dismissed with prejudice, for a trial by jury, and for such other and further relief as the Court deems just and proper.

WILKES LAW FIRM, P.A.

November 27, 2019

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Attorneys for Antunovich Associates, Inc.

| | | |
|----------------------------------|---|------------------------------|
| State of South Carolina |) | Court of Common Pleas |
| |) | Fifteenth Judicial Circuit |
| County of Horry |) | Case No. 2015-CP-26-07275 |
| |) | |
| BEI-Beach, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| -vs- |) | Transcript of Record |
| |) | (Motions - October 30, 2019) |
| |) | |
| Mashburn Christman, JV, Lend |) | |
| Lease (US) Constructions, Inc., |) | |
| f/k/a Bovis Lend Lease, Inc., |) | |
| and McCrory Constructions |) | |
| Company, LLC, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| Mashburn Christman, JV, |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| -vs- |) | |
| |) | |
| Wallcraft Construction, Inc.; |) | |
| Alpha Insulation & Water- |) | |
| Proofing, Inc.; Baker Roofing, |) | |
| Inc.; Collins & Wright, Inc.; |) | |
| Liberty Mutual Insurance |) | |
| Company; Old Republic Surety |) | |
| Company; Hartford Fire |) | |
| Insurance Co.; Travelers |) | |
| Casualty and Surety Company of |) | |
| America; The Muhler Company, |) | |
| Inc.; and Companion Property |) | |
| and Casualty Insurance Company.) |) | |
| |) | |
| Third-Party Defendants. |) | |
| |) | |
| Lend Lease (US) Construction, |) | |
| Inc. f/k/a Bovis Lend Lease, |) | |
| Inc., |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| -vs- |) | |
| |) | |

Spann Roofing & Sheet Metal,)
Inc.; Travelers Casualty and)
Surety Company of America;)
Strickland Waterproofing)
Company; Merchants Bonding)
Company; Everest Reinsurance)
Company; Wallcraft Construction)
Inc.; Old Republic Insurance)
Company; Madison Construction)
Group, Inc.; Worthington)
Integrated Building Systems;)
McDowell Commercial)
Construction, LLC; Jollay)
Masonry; National Fire)
Insurance Company of Hartford;)
R.J. Kenney Associates, Inc.;)
Antunovich Associates; TG)
Construction, LLC; Luis)
Banegas d/b/a Luis Trim Work;)
Nora Del Carmen Lagos, Nora)
Del Carmen Lagos, d/b/a Luis)
Trim Work; and Ovation Custom)
Trim, LLC,)

Third-Party Defendants.)

McCrary Construction Company,)
LLC,)

Third-Party Plaintiff,)

-vs-)

Collins & Wright; Baker)
Roofing; Glasstech, Inc.;)
Palmetto State Roofing and)
Sheet Metal; Strickland)
Waterproofing; Maiday, Inc.,;)
And Atlas Drywall & Acoustics,)
Inc.,)

Third-Party Defendants.)

October 30, 2019
Florence, South Carolina

B E F O R E:

The Honorable William H. Seals, Jr., Judge

A P P E A R A N C E S:

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Attorney for the Third-Party Defendant Antunovich

James Atkinson "Chip" Bruorton IV, Esquire
Attorney for the Defendant Lend Lease

Brian Autry, Esquire
Attorney for the Plaintiff BEI-Beach, LLC

David Sligh, Esquire
Attorney for the Third-Party Defendant Wallcraft

W. James Flynn, Esquire
Attorney for Nationwide Mutual Insurance Company

Barnwell Fishburne, Esquire
Attorney for Defendant Mashburn Christman

Krystal J. Smith
Circuit Court Reporter

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1 OCTOBER 30, 2019

2 (WHEREUPON, the proceedings began at 9:18 a.m.)

3 THE COURT: All right. I am ready whenever you are or
4 whoever wants to go first.

5 THE LAW CLERK: Yeah. Will y'all just make it clear
6 which motion or --

7 THE COURT: Yeah.

8 THE LAW CLERK: -- what you're arguing when you come up?
9 That way I can take good notes for him.

10 THE COURT REPORTER: And what your name is.

11 THE LAW CLERK: Yes, yes.

12 MR. WILKES: Good morning, Your Honor. My name is Mike
13 Wilkes. I represent Antunovich Associates in this BEI case.

14 THE COURT: Okay.

15 MR. WILKES: And the first filed motion that's at issue
16 is the Lend Lease motion to bifurcate.

17 So I think that's correct, Chip. Any other?

18 MR. BRUORTON: Yeah. I think there's -- Your Honor,
19 there's about seven motions. Chip Bruorton here on behalf of
20 Lend Lease. Just for the -- for the record, R.J. Kenney's
21 motion for summary judgment that was filed on April the 4th
22 has been resolved.

23 THE COURT: Okay. Good.

24 MR. BRUORTON: That was resolved this morning in the car
25 on the way up here. So --

1 THE COURT REPORTER: What was his name?

2 THE COURT: I'm sorry. Chip Bruorton.

3 THE COURT REPORTER: Y'all went right through those
4 names so fast I didn't get a one of them.

5 MR. BRUORTON: Chip Bruorton on behalf of Lend Lease.

6 THE COURT: Okay. All right.

7 MR. BRUORTON: And then the motion to bifurcate was
8 filed first. However, I think that motion probably should be
9 deferred until you hear some of the other motions,
10 specifically the motion to amend that the plaintiff has as to
11 the architect because I think that would make a difference as
12 it relates to that motion.

13 THE COURT: Okay.

14 MR. WILKES: That's fine, Your Honor.

15 THE COURT: All right.

16 MR. WILKES: Your Honor, I believe the next filed motion
17 is our motion for partial summary judgment.

18 And, Madam Court Reporter, have you got my name?
19 Michael Wilkes for Antunovich Associates Architects.

20 And, Your Honor, this case has been pending for over
21 four years. Just for your information, Joseph Antunovich was
22 an individual defendant until about two years ago, actually a
23 third-party defendant. So it's only the firm that is -- that
24 is a defendant now.

25 We have moved for partial summary judgment on the third-

1 party causes of action of Lend Lease. Your Honor, I guess
2 you have read many -- some of these briefs and have the basic
3 background.

4 We've got the developer, the current owner of this large
5 113-acre Market Commons project, suing three general
6 contractors. Those are the only named defendants. Each of
7 the three general contractors, of course, built different
8 buildings, two, three, and two buildings in total as far as
9 count.

10 Lend Lease is the second named defendant. It
11 constructed I think 6, 7, and 8.

12 Is that right, Chip?

13 MR. BRUORTON: That's correct.

14 MR. WILKES: Buildings 6, 7, and 8. And Lend Lease is
15 the only defendant that's sued the architect.

16 Now, Antunovich was called the architect for simplicity.
17 My client, the architect, was the architect of record for all
18 buildings. So there's no question about any of that.

19 So the plaintiff chose to file a civil action against
20 just the general contractors alleging the usual breach of
21 warranties that general contractors face when they perform
22 their work and sell their goods and services.

23 THE COURT: Uh-huh.

24 MR. WILKES: Lend Lease filed a third-party complaint
25 eventually against Antunovich Associates. It pleads a

1 negligence cause of action, a contribution cause of action, a
2 breach of implied warranty cause of action, and an equitable
3 indemnity cause of action.

4 Your Honor, we have -- we have briefed this and I have
5 -- Mr. Bruorton filed another brief yesterday and, if you
6 wish, I can give you a copy of our original brief and the
7 reply brief we filed yesterday. If I may approach?

8 THE COURT: Yes, sir.

9 MR. WILKES: Thank you, Your Honor.

10 THE COURT: All right. Thank you.

11 MR. WILES: Now, first of all, it's -- there's --
12 there's no question in the law that Lend Lease does not have
13 the right to assert a contribution cause of action at this
14 time procedurally or substantively. Lend Lease hasn't paid
15 anything that it contends we owe. It hasn't obtained a
16 release of Antunovich as a defendant.

17 And so procedurally, there's absolutely no basis for it
18 asserting a contribution cause of action and there is no
19 exception. Lend Lease argues that essentially it would be a
20 nice idea just to leave it pending and let's decide this
21 later. Well, that's -- that's not the way it works. If
22 you've got the right to make a claim, you can make a claim.
23 If you don't have the right to make the claim, the claim
24 should be dismissed.

25 If Lend Lease ever develops a contribution cause of

1 action later on, if it actually settles the case and obtains
2 a release of our client, fine. We'll deal with that when the
3 time comes.

4 The more interesting issue is simple. It falls under
5 the *Stoneledge* case. So there -- there is no doubt that the
6 primary claim of Lend Lease is that it wants to be
7 indemnified for some portion of a verdict that may be
8 rendered against it in favor of the owner, the building owner
9 plaintiff, in particular because of the design pressure of
10 the windows in the building.

11 And, you know, how that would actually be handled at
12 trial is a whole other issue, but there's no question the
13 thrust of their claim is we think your DP pressure on the
14 windows wasn't good. We have exposure to the plaintiff
15 because of that.

16 Now, as really a footnote, under the *Spearin* doctrine, I
17 don't think that Lend Lease will ever be liable for plans
18 that are supposedly incorrect, but that's a whole other
19 matter and not what we're here to decide today, Your Honor,
20 or to consider today.

21 What is clear is that the Lend Lease claims are for
22 indemnity. If it doesn't win the case, if it suffers a
23 judgment to the plaintiff, then it wants some portion of that
24 judgment awarded against us that it says relates to the
25 windows. Well, that's indemnity.

1 So Lend Lease has no contract with us. Obviously, the
2 architect's contract was with the original developer. So
3 there is no written contract between Lend Lease and
4 Antunovich.

5 Lend Lease relies on the *Tommy L. Griffin* case for the
6 proposition that if the architect prepares plans, et cetera,
7 that causes the contractor damages, the contractor can make
8 claims for those damages. We understand that and acknowledge
9 that. So there is a duty for foreseeable damages and that
10 duty can only be challenged by way of an equitable indemnity
11 claim.

12 Now, we know what the facts are and what the law is.
13 With respect to equitable indemnity, Lend Lease has to prove
14 it's not at fault. Well, that's going to be -- that's going
15 to be a tough -- tough job for it. I know we're not trying
16 to decide that today, but that, in my opinion, is the reason
17 why they want to assert a negligence cause of action and
18 breach of warranty cause of action so that they can escape
19 the burden that they have under equitable -- it has under
20 equitable indemnity cause of action.

21 The *Stoneledge* case is the case that I was involved in.
22 There are two -- two orders because Judge McCauley wanted two
23 orders. One addresses the negligence cause of action; the
24 other addresses the -- the warranty and contract causes of
25 action. Your Honor, I have copies of those cases if you

1 would like to have them.

2 THE COURT: Yes, please.

3 MR. WILKES: I did attach them to my brief, but it's
4 hard to beat having a hard copy.

5 THE COURT: Thank you.

6 MR. WILKES: Thank you, Your Honor.

7 So Judge McCauley ruled and the Court of Appeals agreed
8 that the claims of the general contractor against our client,
9 Clearview, which is a subcontractor that had no, you know,
10 written indemnity agreement with -- with the general
11 contractor, that those claims were all -- all the different
12 claims, negligence and warranty, were all just claims for
13 equitable indemnity. That the negligence and warranty claims
14 were disguised or masked claims for equitable indemnity.

15 I spoke or communicated with the general counsel --
16 excuse me -- the counsel of record for the general contractor
17 yesterday, who confirmed to me that the portion of the
18 *Stoneledge* case regarding equitable indemnity is not on
19 appeal to the Supreme Court. I've noted that in our reply
20 brief. Mr. Bruorton noted that the -- that there is a
21 *Stoneledge* for which the Supreme Court granted cert, but that
22 issue is not on appeal.

23 So the *Stoneledge* decisions are the law that apply --
24 that applies and there's no question that they find that you
25 dismiss the negligence cause of action or grant summary

1 judgment on that, summary judgment on the implied warranty
2 cause of action. That leaves Lend Lease with an equitable
3 indemnity claim. If it can meet its burden one day, then so
4 be it. They'll have that opportunity.

5 So we have moved for partial summary judgment on the
6 contribution claim because it's not ripe and on the warranty
7 and negligence claims, leaving only equitable indemnity.
8 Thank you, Your Honor.

9 THE COURT: All right. Yes, sir?

10 MR. BRUORTON: Thank you, Your Honor. First, from the
11 standpoint of the negligence and the breach of warranty
12 claims, this case that is before you today is a different set
13 of circumstances than what was in the *Stoneledge* case, and I
14 think that distinction is important.

15 The *Stoneledge* case and equitable indemnity arguments
16 that were brought up in the *Stoneledge* case was between a
17 contractor and a subcontractor. That's not what we have
18 here. Lend Lease was a contractor, Antunovich was the
19 architect. There is no contract between Lend Lease and
20 Antunovich, and I think that's important.

21 The law in the state of South Carolina recognizes a
22 cause of action for professional negligence to the contractor
23 when the architect or engineer or design professional
24 furnishes plans and specifications for the contractor to
25 follow on a construction deal. That's exactly what we have

1 here.

2 There are -- and I outlined this in our brief. There
3 are multiple arguments as to issues related to the plans and
4 specifications. Lend Lease's engineer, Rick Moore with Moore
5 Hackney and Associates, has spent significant time doing
6 research, investigation, calculations to determine the fact
7 that this DP rated issue was problematic and that the windows
8 needed to be removed and replaced because of the fact that
9 they don't meet the DP rating.

10 This is not an if/then argument on behalf of Lend Lease.
11 We're not arguing that if there's liability to the owner,
12 then Lend Lease can pass that liability on to the architect.
13 Lend Lease has done an independent investigation and
14 determined that the windows that were specified by the
15 architect don't meet the code requirements and, therefore,
16 they've incurred costs to perform that research and that
17 investigation. They've suffered damages that we've laid out
18 in our brief as it relates to their business.

19 Not a single Lend Lease person has been deposed in this
20 case, and Mr. Moore has not been deposed but for a very
21 limited scope, and Antunovich I don't believe even asked
22 questions yet. They've asked for his deposition to be held
23 in the next few weeks here in December.

24 So I think it's a little premature to be arguing that
25 there is no scintilla of evidence that Lend Lease can meet

1 its burden of proof to establish the elements of its
2 negligence cause of action and its breach of implied warranty
3 cause of action, which we've outlined in our brief how we
4 meet each one of those elements. So we would ask that the
5 Court would deny summary judgment as to Antunovich's claims
6 on the breach of warranty and the negligence.

7 As to contribution, you saw my brief. We certainly
8 concede the fact that there's been no money paid yet to
9 absolve the liability of Antunovich. So if the Court feels
10 inclined to remove that cause of action, Lend Lease isn't
11 going to object to that.

12 The only thing that I would ask is if a settlement
13 occurs and a contribution action is to be brought, I don't
14 want it to -- this case is four years old. I don't want it
15 to be another two years before we have a chance to try that
16 case.

17 And so that's -- that's my argument of let's just leave
18 it in there and if, by the time we get to trial, there hasn't
19 been a resolution, then certainly that claim goes away and we
20 try these other causes of action, but, you know, to take it
21 out and then put it back in and have a -- you know, another
22 delay as it relates to this case I don't think is fair to the
23 parties, but certainly, the law is what it is as it relates
24 to the standing to bring a contribution claim.

25 Let's see if I've missed anything.

1 There is a timeliness issue that was raised in the brief
2 and the reply brief. Mr. Wilkes didn't really touch on that.
3 I swore to myself I would quit self-imposing deadlines, but
4 unfortunately, I failed in this case to do that and there is
5 a scheduling order that does mention three days to submit
6 briefing. Three days as it relates to Antunovich would have
7 been on Sunday. We filed our brief on Monday. That is what
8 it is.

9 THE COURT: All right.

10 MR. BRUORTON: Thank you, Your Honor.

11 THE COURT: Why don't I hear the other motions as well
12 and then I'll rule on all of them by the end of today?

13 MR. WILKES: May it please the Court.

14 THE COURT: Yes.

15 MR. WILKES: Your Honor, the -- there is -- there is --
16 there's no distinction between the general contractor and
17 subcontractor relationship and the, so to speak, GC/architect
18 relationship except that the GC/architect relationship is
19 much more tenuous. But under *Tommy L. Griffin*, our courts
20 have held that even though the general contractor doesn't
21 have a contract or a relationship with the architect, it can
22 -- it can make claims in certain circumstances.

23 It's patently obvious that a subcontractor has, you
24 know, direct obligations to a general contractor. In that --
25 in the *Stoneledge* case, it just turned out that the general

1 could not prove that it had a written contract with a written
2 indemnity agreement and so that's part of the two *Stoneledge*
3 decisions and actually in the contract part of it, the
4 implied warranty decision, the Court found there's no
5 evidence that there was a written contract with a written
6 indemnity. So all you have is equitable indemnity against
7 your general contractor.

8 So if you were -- if you were going to try to make a
9 distinction, the relationship between general contractor and
10 sub is much stronger than the one between a general
11 contractor and the architect that actually have no contract
12 and no direct relationship of any sort. I make that fact --
13 those factual comments because there is no distinction of
14 *Stoneledge*.

15 *Stoneledge* clearly applies in our case where there is no
16 contract, no direct relationship, and the only way they can
17 get any kind of recovery from us is in equity. They do not
18 have -- Lend Lease does not have a legal claim against my
19 client.

20 I did not mention in my first argument -- I did brief
21 this for the first time yesterday. Lend Lease has argued and
22 it has pled something called business reputation damages in
23 its complaint. So it's been in a third-party complaint.
24 It's been at issue.

25 There is no law in South Carolina for the proposition

1 that a business can recover business reputation damages in a
2 negligence or warranty case. You certainly could conjure up
3 a defamation case where you could have some business
4 reputation damages.

5 And so what -- what they have -- what Lend Lease has
6 contended in its brief is that, well, even if *Stoneledge*
7 applies to the claims that we -- that Lend Lease has arising
8 out of derivative liability to the plaintiff, we have
9 independent damages, alleged damages to business reputation.

10 So a couple of things about that. Number one, again,
11 there is no law in South Carolina to support a claim for
12 damage to business reputation in a circumstance like this
13 that has already been cited. I've looked for it and haven't
14 found anything. And then secondly, the only issue or fact
15 that we have argued is that also Lend Lease has not presented
16 any evidence, admissible evidence, that it has business
17 reputation damages.

18 So with respect to discovery, Your Honor, our *Stoneledge*
19 position stands independent of any discovery issues or
20 testimony or anything of that nature. This one exception
21 that Lend Lease contends, we have different damages than
22 indemnity type damages. We have a damage to business
23 reputation.

24 So again, there's no law to support that and there is no
25 evidence in the record that Lend Lease actually has any

1 business reputation damages. So I wanted to make sure the
2 Court heard me on that point since I did not address it in my
3 original comments.

4 Even if the Court were to believe or find that there is
5 potentially -- that there's evidence in the record of a
6 business reputation damage, that would not change, in my
7 opinion, the fact that the Court should grant summary
8 judgment on the negligence and warranty causes of action as
9 to any indemnity-related damages and that indemnity-related
10 damages by Lend Lease can be claimed only in the equitable
11 indemnity cause of action.

12 Thank you, Your Honor.

13 THE COURT: All right. Thank you.

14 MR. BRUORTON: Just briefly, Your Honor. As it relates
15 to damages, I think that, you know, damages and the proximate
16 cause of damages are certainly a question of fact for the
17 jury. So I think all of these arguments can be made, but I
18 think it should be made and determined by a jury.

19 THE COURT: All right. Let's hear --

20 MR. WILKES: Your Honor, it's not a question for the
21 jury if there's no legal basis for the making of that damage
22 claim.

23 THE COURT: All right. Let's hear the second motion,
24 whatever it is.

25 MR. WILKES: I guess it's plaintiff's motion to amend.

1 MR. AUTRY: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. AUTRY: I'm Brian Autry. I'm here on behalf of the
4 plaintiff, BEI-Beach LLC, on the plaintiff's motion that was
5 filed June the 26th of this year. It's a consent motion to
6 amend the plaintiff's complaint. The reason it's a consent
7 motion is because all of the named defendants have also
8 consented to this motion.

9 The basis for the motion is to add direct claims against
10 Antunovich Associates related to the same design pressure
11 rating issue that you just heard. So I do not want to
12 belabor the Court further with that issue. I think Mr.
13 Wilkes and Mr. Bruorton did a good job of laying it out in
14 terms of the factual basis for that.

15 Attached to our motion is, obviously, the proposed
16 amended summons and the complaint. Attached to that is an
17 affidavit of Scott Harvey.

18 Scott is an architect, a licensed architect, that
19 practices with Applied Building Sciences in Charleston. Mr.
20 Harvey has provided an affidavit and opinion related to the
21 negligence of Antunovich and the fact that gross negligence
22 of Antunovich. His affidavit, in conjunction with the
23 affidavit of Rick Moore that Mr. Bruorton talked about just a
24 minute ago, provides the basis for these claims against
25 Antunovich and, in our opinion, there is not any dispute over

1 the fact that Antunovich breached the standard of care in
2 this regard.

3 Obviously, this is a motion to amend. It's not a
4 dispositive motion. It is not a motion on the merits. The
5 standard for a motion to amend would be that as justice
6 allows, and this Court certainly has the raw discretion in
7 that regard. The defendants have consulted with plaintiff
8 and they have consented to the motion.

9 The motion will not cause any delay in this matter,
10 despite Antunovich's claims. Antunovich has been in the case
11 for two years on this very issue, and Lend Lease brought them
12 in on that and Rick Moore in his affidavit laid out the basis
13 for the claims that are essentially laid out by BEI-Beach as
14 well.

15 There's no prejudice to the -- to -- to the defendants
16 and particularly to Antunovich by allowing us to amend our
17 complaint in this regard. It's a very finite, narrow issue
18 that's part of this larger case.

19 I don't think -- you know, just for all of these
20 reasons, we would ask that the Court allow BEI-Beach to amend
21 its complaint to just bring a direct claim against Antunovich
22 on these same issues. I would like the opportunity to
23 respond to anything Mr. Wilkes might have.

24 THE COURT: All right.

25 MR. WILKES: Thank you, Your Honor. May it please the

1 Court, Your Honor.

2 THE COURT: Yes, sir.

3 MR. WILKES: Your Honor, we've filed a brief in
4 opposition to this matter. I'll hand up a hard copy.

5 THE COURT: Yes.

6 MR. WILKES: Thank you.

7 THE COURT: Thank you.

8 MR. WILKES: Your Honor, I was looking forward to
9 plaintiff's counsel's argument about why a case that's four
10 years old that he can add a new direct defendant in a case
11 that's four years old, but if I -- if I may, I'll go through
12 the timing of this.

13 Our -- our position is that the plaintiff's amendment
14 would be futile because the claim is barred by the statute of
15 limitations. Your Honor, if I might invite you to look at
16 page 4 of our brief, it has the chronology.

17 So, in the middle of that page, we have the chronology.
18 That the project was completed in 2008. Sometime before
19 February 2015, BEI obtained counsel. That's not important.
20 That's background.

21 But what is a matter of record is on October 2, 2015,
22 literally more than four years ago, BEI filed a comprehensive
23 construction defect suit against the three general
24 contractors, and it's still the same three general
25 contractors. It's still the same seven buildings at issue.

1 The plaintiff did attach to its proposed amended
2 complaint the affidavit of Architect Harvey. Architect
3 Harvey sites to various reports that his firm, Applied
4 Building Sciences, Inc., has prepared and, Your Honor, I'll
5 just cite those, but in his affidavit on the first page of
6 the report, they have -- as of April 28, 2016, Mr. -- Mr.
7 Harvey was part of a report that ABS issued that specifically
8 found that there were design pressure specification issues
9 with respect to the windows in the buildings at this project.
10 That's March 28, 2016, more than three years ago.

11 This is the plaintiff's own expert. There's no doubt
12 about that. It's their own expert whose affidavit is
13 attached to the complaint.

14 And before that, so suit was filed October 2, 2015. ABS
15 issued various reports including March 7, 2015, September 29,
16 2015, October 13, 2015, October 26, 2015, and then -- and I
17 cite those from the cover page of the ABS report. It's at
18 the back of our brief, Your Honor, if I might ask you to bear
19 with me and look at the second to last page in what I've
20 handed up to you.

21 THE COURT: Uh-huh.

22 MR. WILKES: That's the cover page of the March 28,
23 2016, report that cites the four preceding reports.

24 So in general, plaintiff filed a comprehensive
25 construction defect lawsuit against the general contractors.

1 That filing in and of itself is enough to clearly show that
2 the statute of limitations has begun to run as of at least
3 the filing of the lawsuit on October 2, 2015.

4 But furthermore, as -- as ABS continued to do its work,
5 looking at the very last page of what I handed you, it looked
6 specifically at the design pressure issues. And on the last
7 page there, I cite page 64 of 72 of the report that Harvey
8 cites in his report. So it's a legitimate part of this
9 record we're talking about today.

10 It says the architect provided the design pressure
11 windows for the -- excuse me -- design wind pressures for
12 windows and doors for the project, and then finds the
13 calculations show the components and cladding design pressure
14 specifications provided by the architect are not in
15 compliance with the design pressures for partially enclosed
16 structures.

17 Your Honor, there's no question that as of March 28,
18 2016, ABS issued this report making its finding criticizing
19 the architect. The plaintiff -- the report is to the
20 plaintiff. It's to the attorney for the plaintiff; so it's
21 for the plaintiff while the litigation is going on.

22 So for whatever reason, the plaintiff has chosen not to
23 move to amend until this summer, June 26, 2019, more than
24 three years after the report and three-and-a-half years after
25 the filing of the lawsuit.

1 So there is -- I see that the Harvey affidavit makes an
2 interesting distinction. It finds that at a point in time he
3 thought that the architect was responsible for simple
4 negligence and then he says -- well, then some report came
5 out and it looks like maybe the architect must not have paid
6 attention to it. So that -- he called it egregious.

7 Mr. Autry has referred to gross negligence. I haven't
8 heard that there's some effort to distinguish between the
9 statute of limitations for simple negligence and gross
10 negligence, but there is no -- there is no distinction.

11 Your Honor, the statute of limitations is 15-3-530. May
12 I hand up a copy of that?

13 THE COURT: Yes, sir. Thank you.

14 MR. WILKES: Your Honor, we -- we note essentially
15 innate in our knowledge that there is no difference in the
16 statute of limitations for a tort claim based on negligence
17 or gross negligence or intentional misconduct or reckless
18 misconduct. There is a three-year statute of limitations for
19 all implied warranty causes of action.

20 I believe they've amended -- moved to amend just to
21 plead gross negligence because they know they would have a
22 statute problem anyway. With all that is said, what we also
23 know is that this statute of limitations is three years for
24 trespass, for example, intentional -- an intentional tort.

25 So, Your Honor, the plaintiff hasn't cited to any sort

1 of authority for the proposition that if it goes from
2 deciding, well, it's simple negligence and later I decided
3 it's gross negligence, I'm now going to sue this additional
4 defendant. There's no authority to allow the plaintiff to
5 sue us late.

6 Your Honor, the -- we have cited the -- there's also no
7 -- there's no authority for the proposition -- well, first of
8 all, it's clear that the plaintiff learned about its alleged
9 window claims against the architect more than three years
10 ago, but it's also clear under South Carolina law, as cited
11 in the *Klein* case in our brief and the *Riggins* case in our
12 brief, that the statute of limitations is based on when you
13 have knowledge of your claim or deemed to have knowledge, and
14 both of those cases hold that the date when a plaintiff
15 learns of a potential new defendant has absolutely no bearing
16 on the time of the statute of limitations.

17 So in both those cases there was some effort to add
18 defendants later, you know, like car wrecks, you know when
19 the statute of limitations began to run and the Court said,
20 no, I'm sorry, you know you needed to sue whomever you were
21 going to sue within three years of filing -- well, within
22 three years of the -- of the accident.

23 So, Your Honor, I look forward to responding to the
24 counterarguments. That's our position with respect to the
25 motion to amend. It should be denied because, on the face of

1 it, the records provided, the -- I'll say again the amended
2 -- the proposed amended complaint has the affidavit of their
3 expert. It cites their March 28, 2016, report. So the
4 record shows that not only because this case is four years
5 old -- the record shows that -- but also because their own
6 expert's report shows it was more than three years ago he
7 wrote a specific report on this specific issue criticizing
8 the architect. Thank you.

9 THE COURT: All right. Any reply to that?

10 MR. AUTRY: Your Honor, just briefly.

11 Just I want to go through the sequence here. We are
12 asking to amend the complaint based on the rule allowing for
13 amendment, which is very, very broad and allows the amendment
14 where justice would be required at the discretion of the
15 Court.

16 Antunovich is obviously arguing that they're entitled to
17 summary judgment on the statute of limitations issue, but we
18 have enough evidence in the record based on Scott Harvey's
19 affidavit and even Rick Moore's affidavit that would
20 certainly raise a scintilla of evidence that would prevent
21 the granting of a motion for summary judgment, in our
22 opinion, but we don't believe that this is the time for a
23 motion for summary judgment to be heard.

24 So obviously, Mr. Wilkes and Antunovich have the right
25 to file a motion for summary judgment if the amendment is

1 allowed. I do believe the amendment should be allowed.

2 There are lots of facts and circumstances related to this
3 case, hundreds of thousands of documents, all the parties
4 that you have seen in the pleadings. Lots of work has been
5 done in regard to the investigation of these claims.

6 And just to sort of back up Mr. Harvey's affidavit,
7 we've had a number of experts on this case. Mr. Harvey
8 actually himself physically went to Chicago to the offices of
9 Antunovich during initial investigations of this matter.

10 My client takes very seriously not suing a party unless
11 it has an expert in this case who would say that that party
12 has done something wrong. And until -- as Mr. Harvey lays
13 out in his affidavit, until Mr. Harvey was in receipt of the
14 documentation that he discusses in his affidavit, there was
15 no -- we had no basis as a plaintiff for suing Antunovich.

16 And so we believe that based on the fact that -- based
17 on Mr. Harvey's affidavit, based on our motion to amend,
18 based on the fact that Antunovich has been in the case for as
19 long as it has been anyway, certainly we would argue against
20 the prejudice, as I said at the top, but we believe that the
21 motion to amend the complaint to add Antunovich should be
22 granted and then if Antunovich wants to -- and I'm sure they
23 will file a motion for summary judgment. We can take that up
24 and have a full-blown briefing over a motion for summary
25 judgment.

1 THE COURT: All right.

2 MR. AUTRY: Thank you, Your Honor.

3 THE COURT: You get the last word.

4 MR. WILKES: Briefly, Your Honor. On page 4 of our
5 brief under standard of review, we cite the *Health Promotion*
6 *Specialist* case and the cases which make it clear that if the
7 motion -- if the pleading would be futile, if it is a futile
8 claim, then making a motion to amend should be denied.

9 And this is one of those situations where everybody had
10 all the information that the Court needs and the Court's own
11 record, the filing of the complaint nearly 4 years ago,
12 October 2, 2015, shows that we are beyond the three years.
13 Within three years of filing this civil action, the plaintiff
14 had to decide all the parties that they wanted to sue. They
15 hired a great firm, ABS, who as of March had done five
16 reports, March 2016, and it's had since 2016. You know, it
17 had another year or so or two -- or two years to decide
18 whether it wanted to sue Antunovich and why it chose not to,
19 that's not here to be decided.

20 So if the motion -- if the result of granting the
21 amendment would be that the amendment is futile because the
22 claim is barred by the statute of limitations, then the
23 motion to amend should be denied, and we have enough record
24 to make that decision. Thank you, Your Honor.

25 THE COURT: Let's hear the third.

1 MR. AUTRY: I don't have anything further, Your Honor.

2 THE COURT: All right. Let's hear the third motion.

3 MR. SLIGH: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. SLIGH: David Sligh here on behalf of Wallcraft

6 Construction, and I have a motion to amend to add an

7 additional party, Your Honor. If you don't have a copy of

8 that, I've got a copy.

9 THE COURT: That would be good.

10 MR. SLIGH: I'm not aware of any opposition to this

11 motion.

12 THE COURT: Thank you.

13 MR. SLIGH: It's simply to bring in a party that we

14 believe may have been a subcontractor on a couple of the

15 buildings to my client. We understand the timing component

16 and certainly, if the Court were to grant this motion, once

17 we get that party in and see -- we don't even know anything

18 about insurance or anything along those lines or whether this

19 is anything that would be helpful to this case. And so once

20 we make those determinations, we'll certainly be agreeable to

21 making sure that this amendment does not affect the timing of

22 any other aspect of the case, Your Honor.

23 THE COURT: All right. Anybody here to oppose it?

24 MR. BRUORTON: Your Honor, no opposition from Lend

25 Lease. Wallcraft was Lend Lease's subcontractor. Other than

1 the 180-day requirement when a new party comes in. We
2 certainly don't want timing -- the timeline of this case to
3 be affected by the addition of a new party.

4 THE COURT: Right.

5 MR. BRUORTON: That's our only objection.

6 MR. AUTRY: The same comment as Lend Lease. We have no
7 objection to adding except for the 180-day requirement.

8 THE COURT: All right. Let me think about it and I'll
9 let you know.

10 MR. SLIGH: Yes, sir, Your Honor. Thank you.

11 THE COURT: Thank you.

12 All right. The fourth motion?

13 MR. FLYNN: Good morning, Your Honor. I'm told I'm next
14 up.

15 THE COURT: Yes.

16 MR. FLYNN: I'm Jamie Flynn with Goodwin McGuffey. I
17 represent Nationwide Mutual Insurance Company, and we filed a
18 motion to intervene back on March 13th of 2018.

19 We -- we have -- we've notified our insured, Wallcraft,
20 that this motion had been filed via a letter on September 30th
21 of 2019, at that time letting the insured know that we
22 expected that there was going to be a hearing on this motion
23 in the somewhat near future. We have not heard anything back
24 from Wallcraft on that, but Lend Lease does oppose our
25 motion.

1 Your Honor, I filed a memorandum in support of the
2 motion. I have an extra copy if you'd like --

3 THE COURT: Yes, sir.

4 MR. FLYNN: -- a hard copy.

5 THE COURT: Thank you.

6 MR. FLYNN: Thank you. To just -- to give the Court a
7 brief bit of background, Nationwide Mutual issued a policy to
8 Wallcraft. Wallcraft is a subcontractor that did stucco
9 work, and Wallcraft is a third-party defendant in the case.

10 The policy was in effect from June 23rd of 2007 through
11 June 23rd of 2008, and right in the window of when there was
12 ongoing construction on the project. Nationwide is defending
13 Wallcraft in this action under a reservation of rights, and
14 the primary basis for the motion is we take the position that
15 *Auto-Owners v. Newman*, as cited in our brief, and then the
16 *Harleysville Group v. Heritage* decision mandate that we make
17 such a motion.

18 On the *Auto-Owners v. Newman* case, there was an
19 arbitration award that went up on review to the Supreme
20 Court. The Supreme Court said an after-the-fact slicing and
21 dicing of what might be covered and what is not was not
22 possible in a post-judgment DJ, and the Supreme Court further
23 noted that Auto-Owners had an opportunity to raise the matter
24 when the issue of damages was being litigated before the
25 arbitrator.

1 And so the short version is we believe *Auto-Owners*
2 requires Nationwide to make a motion to intervene because it
3 is the only mechanism within which during the litigation of
4 the underlying action to get that issue decided by the jury,
5 not in the form of -- and Nationwide's -- the scope of this
6 intervention request is limited. We're not trying to
7 participate in discovery. Nationwide doesn't want to be an
8 active participant in the trial.

9 The request is to be involved basically at the charge
10 conference by submission of special interrogatories,
11 submission of a proposed verdict form, in order that there be
12 an allocation of damages in this underlying action. Again,
13 all per *Auto-Owners v. Newman*.

14 We have also cited the *Harleysville v. Heritage*
15 decision, another Supreme Court decision from 2017, which we
16 believe supports the same proposition. In that case, juries
17 in underlying construction defect cases returned only general
18 verdicts. After the fact, *Harleysville* and those cases filed
19 a couple of declaratory judgment actions, and the Supreme
20 Court in the decision included this quote.

21 The duty not to prejudice the insured's right by failing
22 to request special interrogatories or a special verdict in
23 order to clarify coverage of damages was a -- that was
24 something that went along with the so-called right to control
25 the litigation that the carrier has. That's citing case law

1 from -- from other jurisdictions.

2 Another quotation citing another case from a federal
3 Fifth Circuit case, *Duke v. Hoch*, the Court citing that said
4 if the burden of apportioning damages between covered and
5 non-covered were to rest with the insured, who is not in
6 control of the defense, the insurer could obtain for itself
7 an escape from responsibility merely by failing to request a
8 special verdict or special interrogatories.

9 So it is our position then that the only mechanism by
10 which Nationwide can obtain an allocated verdict is to
11 request intervention and is to request a special verdict or
12 special interrogatories.

13 I have not appeared before Your Honor before and I do
14 not know if you've had this issue before you. I know that
15 Lend Lease's response included an order by Judge Newman
16 denying a similar motion in another case.

17 The only thing I would say to that is is that, very
18 respectfully, Judge Newman's decision is not binding
19 precedent on other trial courts. I think that that decision
20 is subject to an appeal at this point, but it's in its very
21 early stages. So we do not have further clarification from
22 the higher courts at this time.

23 THE COURT: All right. Mr. Bruorton?

24 MR. BRUORTON: Thank you, Your Honor. Chip Bruorton
25 here again on behalf of Lend Lease.

1 Your Honor, I submitted a brief which did include two
2 exhibits. One was our second amended complaint and the other
3 was Judge Newman's order. Do you have those?

4 THE COURT: I believe so.

5 MR. BRUORTON: Okay. Great.

6 Inter -- this intervention for a limited purpose is
7 extremely troublesome and problematic, and I think -- you
8 know, while I understand that Judge Newman's order is not
9 binding precedent, I certainly think it's persuasive and I
10 think he says a lot of things in his order that make a lot of
11 sense and really would be the arguments that I'm going to
12 make.

13 In his order, he finds two things, which I think are
14 important. He states that I find that the deep injection of
15 the insurance coverage issues into this construction defect
16 action would place counsel defending an insured in an
17 irreconcilable conflict created by the diametrical opposed
18 goals where, on the one hand, counsel must try to minimize
19 its insured's liability by showing lack of consequential
20 damages and, on the other hand, counsel would likely be faced
21 with the necessity of proving consequential damages in order
22 to trigger maximized cover -- maximized coverage for its
23 insured.

24 He also says I find that the special interrogatories
25 and/or special verdict forms requested by the insurer would

1 likely be confusing to the jury and may unfairly prejudice
2 the parties participating in the trial due to the
3 interjection of extraneous insurance coverage issues into an
4 already complex construction defect case, particularly given
5 that the insurers have requested that they not be made
6 parties and their involvement in the issue of insurance not
7 be exposed to the jury and that there may not be any evidence
8 in the record to support the special interrogatories and/or
9 special verdict form.

10 And I think that's important. Nationwide wants to
11 intervene and have the Court basically put to the jury a
12 special verdict form and special interrogatories that can
13 assist them in their coverage dispute that they have with
14 their insured. Meanwhile, they don't want the jury to know
15 that the insured has insurance coverage and they don't want
16 to be a named party and they don't want to be participating
17 in the trial of the case, which I think is patently unfair to
18 the people that have claims against their insured.

19 So Judge Newman's order I think is very specific. I
20 think it's very well written. It cites to various provisions
21 and case law that support a denial of the motion to
22 intervene. You know, to have the ability to intervene, a
23 party needs to have an interest in the outcome of the case,
24 not just a peripheral interest, and that was one of the
25 findings of Judge Newman is that the insurers didn't have

1 standing to intervene into the case.

2 And I think that's certainly the situation here. This
3 motion that was brought by Nationwide is a mirror image of
4 the motions that were brought by the insurers in the Barefoot
5 Landing cases. It's for that limited scope of special
6 interrogatories and a special verdict form.

7 So for the reasons that we've cited in our brief and
8 Judge Newman's order -- also, there is already a pending
9 declaratory judgment action, which we reference the case in
10 our brief. There's a federal court case that we filed on
11 behalf of Lend Lease against the insurers related to
12 additional insured obligations.

13 So there's already an avenue to make all of these
14 coverage arguments in that declaratory judgment action. So
15 to do it in this case I believe would be extremely
16 inappropriate and prejudicial to the parties. So we would
17 ask that the Court deny the motion.

18 THE COURT: All right. Would you like to reply?

19 MR. FLYNN: Just briefly, Your Honor. On the last
20 point, as far as the idea that the pending declaratory
21 judgment action that Lend Lease has filed against a number of
22 its sub's insurers, including Nationwide, primarily on the
23 issue of additional insurance coverage, has nothing to do
24 with the allocation of covered versus non-covered damages as
25 between Nationwide and its own insured.

1 I disagree with the point that -- and point out that
2 both *Auto-Owners* states it and if *Harleysville v. Heritage*
3 doesn't state it, it strongly suggests it that a post-
4 judgment DJ is not the place to litigate covered versus non-
5 covered if there's not been a finding by the factfinder on
6 this allocation, which is all we're attempting to achieve
7 here.

8 And just for clarification, Your Honor, the position
9 that the insurers take in a declaratory judgment action is to
10 the extent that there is additional insured coverage is only
11 to the extent that there is coverage for the underlying
12 insured, which I do think is an issue in that case.

13 THE COURT: All right. Let's hear the next motion.

14 MR. BRUORTON: Your Honor, may I be heard briefly on
15 that last motion?

16 THE COURT: Go ahead. Introduce yourself.

17 MR. FISHBURNE: For the record, I'm Barnwell Fishburne.
18 I'm here today for the defendant, Mashburn Christman.

19 And just briefly, Your Honor, for a little bit of
20 background, my client is a named defendant. We're also a
21 general contractor, just like the defendant Lend Lease, and
22 Wallcraft was a subcontractor of my client as well.

23 And I would just like the record to reflect that we
24 share in the opposition to the motion to intervene by
25 Nationwide, and I just want the record to reflect that.

1 Thank you.

2 THE COURT: All right. Good. All right.

3 MR. BRUORTON: Your Honor, I think there's two motions
4 left. One is the bifurcation motion which we deferred and
5 then earlier this week I filed a motion to amend an answer on
6 behalf of Lend Lease to assert some of the affirmative
7 defenses that were discussed at the summary judgment motion
8 hearing a few weeks ago and also to add a counterclaim for
9 declaratory judgment.

10 I have spoken with Mr. Autry. He is not opposing the
11 motion, but I think your ruling as to the motion to amend to
12 add the architect makes a difference when it comes to this
13 motion because if you allow him to amend, then I'll just put
14 my declaratory judgment action in through my answer to that
15 amended complaint. If you do not allow them to amend and
16 bring in the architect, I would ask that my motion be granted
17 to give me the opportunity to add those affirmative defenses
18 in my declaratory judgment action.

19 MR. AUTRY: Just for the record, Your Honor, the
20 plaintiff doesn't have any objection to that. It doesn't
21 have any objection to them amending their answer to add a
22 defense of release and the affirmative counterclaim for
23 declaratory judgment.

24 MR. WILKES: Your Honor, Mike Wilkes for Antunovich.
25 Could I confer with --

1 THE COURT: Yes.

2 MR. WILKES: -- counsel for just one second? Because I
3 -- actually, I wasn't aware of this declaration. I just
4 thought he was amending to plead the defense of release.

5 THE COURT: Take your time.

6 (WHEREUPON, there was a pause in the proceedings, after
7 which the proceedings resumed as follows.)

8 MR. WILKES: Your Honor, I didn't read the second part
9 of his motion. I apologize. I have no position with respect
10 to his motion to amend to plead release and to plead his DJ
11 claim.

12 THE COURT: All right. So is there anything else?

13 MR. BRUORTON: The motion to bifurcate, Your Honor, and
14 this -- this motion goes all the way back to August 23rd,
15 2016, and it was really a motion that was filed early on and
16 it was consented to by the general contractor defendant
17 counsel and plaintiff's counsel.

18 And the purpose of that motion is we've got different
19 subcontractors for each of the general contractors, and so we
20 were moving to bifurcate that the A2 and A5 buildings, which
21 were built by McCrory, would be one case, A3 and A4 that was
22 built by Mashburn Christman would be one case, and the
23 buildings that were built by Lend Lease, A6, A7, and A8,
24 would be one case.

25 Now that the plaintiff has moved to add the architect

1 into the mix, if he's allowed to do that and the architect
2 becomes a defendant, there are similar defenses as it relates
3 to the general contractors and it may make sense for that
4 case to be tried plaintiff versus the three general
5 contractors and the architect and then bifurcate the general
6 contractors' claims against each of their subcontractors.
7 Well, not bifurcate against each, but bifurcate their
8 specific claims as to the subcontractors.

9 So I don't know what other people in the courtroom's
10 thought is on that type of structure, but I think the ruling
11 on the motion to amend dictates really what bifurcation would
12 look like in this case.

13 THE COURT: All right.

14 MR. AUTRY: Your Honor, we agree with that position and
15 that if -- if Antunovich is added, we believe that the trial
16 should proceed against the three named defendants -- the four
17 named defendants and then it can be separated out by general
18 contractor as they pursue their individual subcontractors and
19 suppliers.

20 THE COURT: Okay.

21 MR. WILKES: Your Honor, Antunovich is a third-party
22 defendant in only the -- only the Lend Lease, and it sounds
23 like this motion needs to just be set aside until we see
24 where we -- where we fall out and, in fact, if the Court
25 allowed the motion to amend, I'm going to immediately move

1 for summary judgment, which I think would dispose of the --
2 of the claims.

3 And just for the Court's information, the -- I think
4 it's the McCrory buildings are really not at issue for my
5 client. We are only at issue for two of the -- two of the
6 three defendants.

7 So I would ask Chip whether his position -- whether we
8 can just fold this and see where things fall out.

9 MR. BRUORTON: I think that's fine.

10 THE COURT: All right. Sounds good.

11 MR. WILKES: Thank you, Your Honor. I believe we're out
12 of motions. Anybody got anything else?

13 MR. BRUORTON: I do have one issue, Your Honor.

14 We mediated this case in October of last year for two
15 days. There was significant progress made at the mediation,
16 but things have just kind of been in a dark hole --

17 THE COURT: Right.

18 MR. BRUORTON: -- since then. I've had several
19 conversations with Mr. Autry about maybe trying to get
20 together again for another mediation. We haven't been able
21 to reach an agreement on that yet.

22 I think he's still working on it on his end, but I'd
23 like the Court to issue an order that we have another
24 mediation before the trial of this case. We've got new
25 parties that have been added since the first mediation.

1 We've got motions to bring in some other parties since the
2 first mediation.

3 So I think it makes sense that we have another mediation
4 before the trial. I don't know if it's feasible to get that
5 in before the end of the year. Certainly, maybe in January
6 we can accomplish that. So I would ask for the Court to
7 issue an order compelling another mediation between the
8 parties.

9 THE COURT: All right.

10 MR. AUTRY: Your Honor, we would leave that to the
11 Court's discretion. I'm not sure we can consent to it being
12 ordered. We would prefer it not be ordered. We are
13 certainly making every effort we can to see if that will
14 work.

15 Chip and I talked again this week about the possibility
16 of mediating it and what that might look like. Obviously,
17 it's in the Court's discretion if you want to order another
18 mediation, but we will -- we will continue to earnestly work
19 towards resolving this case.

20 THE COURT: All right. Anybody else?

21 MR. WILKES: Your Honor, for Antunovich, I guess I join
22 in plaintiff's position there. This is the first I've heard
23 of this and this is a typical construction case. Everybody
24 is working like crazy behind the scenes, discovery,
25 everything that you can imagine.

1 So I don't consent to another mediation. My folks are
2 in Chicago. They'd have to come back down here. My claim
3 rep is in Washington DC. He'd have to come back down here.
4 We worked hard for a couple of days and there was a lot
5 going on. There always is, and none of it ends. Thank you.
6 THE COURT: All right. I'll let you know by the end of
7 the week.
8 MR. BRUORTON: Thank you, Your Honor.
9 THE COURT: Thank you.
10 (WHEREUPON, the proceedings ended at 10:13 a.m.)
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12 --- END REQUESTED TRANSCRIPT ---
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Judge

Court of Common Pleas Case No. 2015-CP-26-07275
Appellate Case No. 2019-002001

BEI-BEACH, LLC,

Plaintiff,

v.

MASHBURN CHRISTMAN, LLC;
LEND LEASE (US) CONSTRUCTION
INC., f/k/a Bovis Lend Lease, Inc.; and
MCRORY CONSTRUCTION COMPANY
LLC.,

Defendants,

Of whom

LEND LEASE (US) CONSTRUCTION
INC., f/k/a Bovis Lend Lease, Inc. is the

Appellant,

v.

SPANN ROOFING & SHEET METAL, INC.,
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA,
STRICKLAND WATERPROOFING COMPANY,
EVEREST REINSURANCE COMPANY,
WALLCRAFT CONSTRUCTION, INC., OLD
REPUBLIC INSURANCE COMPANY,
MADISON CONSTRUCTION GROUP, INC.,
WORTHINGTON INTEGRATED BUILDING
SYSTEMS, McDOWELL COMMERCIAL
CONSTRUCTION, LLC, JOLLAY MASONRY,
NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD, R.J. KENNEY ASSOCIATES,
INC., ANTUNOVICH ASSOCIATES, TG
CONSTRUCTION, LLC, LUIS BANEGAS d/b/a
LUIS TRIM WORK, NORA DEL CARMEN

LAGOS, NORA DEL CARMEN LAGOS d/b/a
LUIS TRIM WORK, and OVATION CUSTOM
TRIM, LLC.

Third-Party Defendants,

Of whom

ANTONOVICH ASSOCIATES is the

Respondent.

CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

ROSEN HAGOOD, LLC.

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