STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

LISMORE VILLAGE HOMEOWNER'S ASSOCIATION,

Plaintiff,

v.

EASTWOOD CONSTRUCTION, LLC F/K/A EASTWOOD CONSTRUCTION COMPANY, INC., EASTWOOD HOMES, INC., SK BUILDERS, INC., ANDERSON EXCAVATING, INC., SOUTH PAW PROPERTIES OF UPSTATE, LLC, LISMORE TOWNES, LLC, LANDCRAFT MANAGEMENT, LLC, MARIN FRAMING, INC., ALL CONSTRUCTION, LLC, P&L ENTERPRISES, LLC, JOSE QUIROZ D/B/A TICOS QUIROZ ENTERPRISE, INC. A/K/A TICOS-QUIROZ ENTERPRISES, INC., PRO.TRIM, INC., ALPHA OMEGA CONSTRUCTION GROUP, INC., RAFAEL MARTINEZ MASONRY, INC., CBU ENTERPRISES, INC., DOROTEO RANGEL D/B/A RANGEL CONCRETE A/K/A RANGEL CONCRETE, LLC, J.W. CONCRETE CONSTRUCTION, INC., BUILDER SERVICES GROUP, INC. D/B/A GALE CONTRACTOR SERVICES, STOCK BUILDING SUPPLY, LLC F/K/A STOCK BUILDING SUPPLY, INC., JELD-WEN, INC. F/K/A CRAFTMASTER MANUFACTURING, INC. D/B/A CMI, MI WINDOWS & DOORS, INC., NEW ALENCO WINDOWS LTD., A TEXAS LIMITED PARTNERSHIP, WHITE BROTHERS MASONRY A/K/A WB MASONRY, BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, VAILE ENTERPRISES, LLC, PALMETTO

CASE NO. 2016-CP-23-0331

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JELD-WEN, INC. f/k/a CRAFTMASTER MANUFACTURING, INC. d/b/a CMI'S MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS ASSERTED BY PLAINTIFF LISMORE VILLAGE HOMEOWNERS' ASSOCIATION

BUILDING SOLUTIONS, INC. F/K/A PALMETTO BUILDING SOLUTIONS, LLC, E&S CONSTRUCTION, INC. and JOHN DOE SUBCONTRACTORS 11-15,

Defendants.

P&L ENTERPRISES, LLC,

Third-Party Plaintiff,

v.

E&S CONSTRUCTION, INC.,

Third-Party Defendant.

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC,

Third-Party Plaintiff,

v.

FIVE STAR CONSTRUCTION, INC.,

Third-Party Defendant.

STOCK BUILDING SUPPLY, LLC F/K/A STOCK BUILDING SUPPLY, INC.

Third-Party Plaintiff,

v.

JERRY MICHAEL HOLLIFIELD, KEITH E. HANNU, RYAN GILBERT D/B/A PRO EDGE, E&S CONSTRUCTION, GR, INC. THOMAS

ASHLEY, III and A-Z, INC.,	)
	)
Third-Party Defendants.	)
	)

Defendant JELD-WEN, inc., f/k/a Craftmaster Manufacturing, Inc. d/b/a CMI ("JELD-WEN") submits this memorandum of law in support of its Motion for Summary Judgment as to all claims asserted against JELD-WEN by the Plaintiff, Lismore Village Homeowners Association ("Plaintiff"). Plaintiff's claims are labeled as follows: 1) Negligence / Gross Negligence ("Negligence Claim"), 2) Strict Liability / Products Liability ("Strict Liability Claim"), and 3) Breach of Implied Warranties ("Breach of Warranty Claim") (hereinafter collectively referred to as "Plaintiff's Claims").

I. INTRODUCTION

This is an alleged construction defect and product liability action that was filed on January 25, 2016[1] by Plaintiff, the homeowners association for the horizontal property regime commonly known as Lismore Village, located in Greenville County, South Carolina. Second Am. Compl. ¶¶ 1, 6. The Lismore Village development was constructed during the 2006 – 2012 timeframe and consists of thirteen (13) residential buildings containing a total of seventy-six (76) individual townhome units (the "Property"). Second Am. Compl. ¶ 3; Certificates of Occupancy, copies of which are attached hereto as **Exhibit A**.

Plaintiff has asserted claims against various parties, including the general contractor, various subcontractors, and JELD-WEN, which manufactured the MiraTEC Treated Exterior Composite Trim product ("MiraTEC Trim") alleged to have been installed at the Property by others. Second Am. Compl. ¶ 131. JELD-WEN did not perform any work or repairs at the

[1] Plaintiff's Claims against JELD-WEN were filed on May 3, 2016, in connection with Plaintiff's First Amended Complaint.

Property. *See* Affidavit of Ronald J. Leljedal, ¶ 13, a copy of which is attached hereto as **Exhibit B**.

Summary judgment should be granted in favor of JELD-WEN for the following reasons:[2]

1) Expert testimony is required to establish all of Plaintiff's Claims and, in the absence of any expert testimony critical of JELD-WEN or the MiraTEC Trim, JELD-WEN is entitled to summary judgment. Here, Plaintiff's designated construction expert[3] testified that the MiraTEC Trim is not defective, he had no criticisms of the installation instructions for the MiraTEC Trim, the MiraTEC Trim was not properly installed at the Property, that the improper installation of the MiraTEC Trim was the cause of any alleged damage to the trim itself, that the MiraTEC Trim did not cause or contribute to any alleged damages at the Property, and JELD-WEN was not negligent.

2) The economic loss rule bars Plaintiff's Negligence and Strict Liability Claims because Plaintiff's expert testified that the MiraTEC Trim did not cause or contribute to any alleged damage to other components at the Property.

3) Plaintiff's Breach of Warranty Claim fails because JELD-WEN disclaimed all implied warranties. Plaintiff's Breach of Warranty Claim based on the Implied Warranty of Merchantability also fails because there is no evidence that the MiraTEC Trim was not

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[2] Rule 56 of the South Carolina Rules of Civil Procedure governs JELD-WEN's motion. The South Carolina Court of Appeals has held that, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Mulherin-Howell v. Cobb*, 362 S.C. 588, 596, 608 S.E.2d 587, 592 (S.C. Ct. App. 2005). The Court further stated that:

> Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.
> *Id*.

"[A] 'mere scintilla' of evidence will not preclude summary judgment. The court's inquiry is not whether there is literally no evidence, but whether there is any evidence upon which a jury could properly find a verdict for the party resisting summary judgment." *Disher v. Synthes*, 371 F.Supp.2d 764, 769 (D.S.C. 2005). "Conclusory allegations or denials, without more, will not preclude the granting of a summary judgment motion." *Id.* at 769.

[3] Ross Clements is Plaintiff's designated construction expert. Plaintiff's designated cost expert, Steve Watkins, testified that he was not going to offer any opinions regarding JELD-WEN or the MiraTEC Trim.

merchantable or that it caused or contributed to any of Plaintiff's alleged damages. Plaintiff's Breach of Warranty Claim based on the Implied Warranty of Fitness for a Particular Purpose also fails because there is no evidence JELD-WEN knew or should have known Plaintiff was purchasing the MiraTEC Trim for a particular purpose. Plaintiff's Breach of Warranty Claim also fails because Plaintiff failed to notify JELD-WEN of any alleged breach of warranty within a reasonable time after discovery of the alleged defect.

4) Plaintiff's Negligence Claim also fails because Plaintiff's expert testified that JELD-WEN was not negligent and that the MiraTEC Trim was not the cause of any of the alleged damage to the Property.

5) Plaintiff's Strict Liability Claim also fails because Plaintiff's expert testified that the MiraTEC Trim product is not defective and failed to offer any evidence of a feasible alternative design for the product.

6) Plaintiff's Claims are barred, in part, by the statute of repose because Plaintiff did not assert its claims against JELD-WEN until more than eight years after the date of substantial completion of Buildings 1[4], 3, 5, 8, and 11. Further, the gross negligence exception to the statute of repose does not apply because Plaintiff's expert testified that JELD-WEN was not negligent.

7) Plaintiff's Claims are barred, in part, by the statute of limitations because Plaintiff discovered and was aware of the alleged defects and deficiencies at the Property more than three years prior to the filing of its claims against JELD-WEN.

[4] With the exception of 7 Swade Way.

II. ARGUMENT

A. THE TESTIMONY OF PLAINTIFF'S OWN EXPERTS SHOWS THAT JELD-WEN IS ENTITLED TO SUMMARY JUDGMENT.

1. Expert testimony is required to establish Plaintiff's Claims.

Expert testimony is required in all cases where the subject matter falls outside the realm of ordinary knowledge and understanding of laypersons, or where a factual issue must be resolved with scientific, technical, or other specialized knowledge. *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (S.C. 2010) (acknowledging that expert testimony is necessary in most design defect cases given the complexity of the allegations involved); *Accord Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 735 S.E.2d 650 (2012) (stating that expert testimony is required in design defect cases where the claims are "too complex to be within the ken of the ordinary lay juror" and recognizing cases involving escalators, shopping carts, cars, and computers as requiring expert testimony even though the ordinary lay person uses these products "in some form or fashion almost every day of our lives.").

Here, expert testimony is required because this case involves complex issues that extend far beyond the common knowledge and understanding of the ordinary juror. Specifically, this case concerns the design, manufacture, and installation of an engineered composite wood trim product as well as the proper integration of the exterior trim with other exterior building components in connection with the original construction and subsequent repairs of a multi-family residential development. Accordingly, expert testimony is required to establish Plaintiff's claims.

2. Plaintiff's designated experts, Ross Clements and Steve Watkins, do not have any opinions critical of JELD-WEN or the MiraTEC Trim.

Plaintiff's designated construction expert, Ross Clements, testified that the MiraTEC Trim is not defective, he had no criticisms of the installation instructions for the MiraTEC Trim, the MiraTEC Trim was not properly installed at the Property, that the improper installation of the MiraTEC Trim was the cause of any alleged damage to the trim itself, that the MiraTEC Trim did not cause or contribute to any of the alleged damages, and JELD-WEN was not negligent. The deposition transcript of Ross Clements is attached hereto as **Exhibit C**.

> Clements Depo. 6/8/2017 pp. 18-19 (emphasis added).
> Q: …Do you hold yourself out as an expert in the design or manufacture of composite engineered trim such as MiraTEC?
> **A: I haven't offered opinions related to the MiraTEC trim product itself in this case.**
> **Q: You have not?**
> **A: No.**
> **Q: Do you intend to?**
> **A: At this time, no.** I may do additional research in the future, but at this time I've just documented the existing conditions. I haven't offered opinions about the product itself.
> **Q: Okay. So as we sit here you don't have – you are not opining that there is an issue or a defect with the MiraTEC product?**
> **A: That's correct.**
> Q: Okay. And if what – have you been asked to do any research into that or to look into that by the plaintiff's counsel?
> A: Not – not at this time, no. But it's something I may do in the future, but at this time I haven't researched that.
> Q: Do you have any plans to do that?
> A: Right now, no.
> Q: Okay. Have you ever done any testing of the MiraTEC product?
> A: No.
> **Q: …So as we sit here today, if we were going to try this case tomorrow you would not be offering any opinions that there are any issues with the MiraTEC product in its design, manufacturing, or otherwise, correct?**
> **A: That's right.**

> Clements Depo. 6/8/2017 p. 37 (emphasis added).
> **Q: Would you agree that the MiraTEC trim was installed improperly?**
> **A: Yes.**

Clements Depo. 6/8/2017 pp. 28-30 (emphasis added).

Q: …Let me ask you just a general question. And I may use the term, exterior trim or MiraTEC trim; **but was the MiraTEC trim installed at the Lismore Village property installed properly?**

A: No.

…

Q: Okay. **Would you attribute any damage that you saw to the MiraTEC trim as a result of those installation issues?**

A: Yes.

Q: Do you attribute it to anything else?

A: Not at this time.

Q: Okay. Is it fair to say that it did not appear that the installer of the MiraTEC trim followed the manufacturer's installation instructions either?

A: Yes.

Q: Okay. And they didn't – in addition to not following manufacturer's installation instructions, they did not seem to follow the best practices for the installation of exterior trim at the Lismore Village, correct?

A: Yes.

Q: Is it fair to say that the trim itself did not cause or contribute to any damage to the Lismore Village properties?

A: I believe that's true.

Clements Depo. 6/8/2017 p. 35 (emphasis added).

Q: Would you agree with me that as we sit here you're not aware of anything that JELD-WEN – or I think they're also named as Craftmaster Manufacturing, Incorporated – has done that is negligent with respect to the Lismore property or any products installed thereon?

A: Not to my knowledge.

Q: Do you have any criticisms of the installation instructions of the MiraTEC product?

A: No.

Plaintiff also designed Steve Watkins as its cost expert in this matter. The deposition transcript of Steve Watkins is attached hereto as **Exhibit D**. Watkins testified that he would not be offering any opinions regarding the MiraTEC Trim.

Watkins Depo. 10/17/2018 pp. 92-93 (emphasis added).

Q: My understanding is you are not an expert in composite wood trim products; is that correct?

A: That's correct.

Q: You are **not here to offer any opinions regarding MiraTEC trim product and whether it's defective or not defective or anything of that nature, correct**?

A: **Correct**.

> Q: You haven't done any studying or testing of the MiraTEC product?
> A: Correct.
> ….
> Q: Well, so plaintiff has hired Ross [Clements] as an expert to do his destructive testing. We have deposed him. He has given opinions as to why things were damaged, how they were damaged, why they're going to be fixed. Are you going to defer to him on those issues?
> A: Yes…

Similarly, Glenn Stewart, the designated expert for Eastwood Construction, LLC f/k/a Eastwood Construction Company, Inc. and Eastwood Homes, Inc. (collectively "Eastwood"), which served as the general contractor for the Project, testified that he had no criticisms of the MiraTEC product and that the trim did not cause or contribute to damage at the Property:

> Stewart Depo. 5/19/14 p. 10.
> Q. Okay. Do you have any criticisms of the MiraTEC product?
> A. No.

> G. Stewart Dep. 5/19/2017 p. 43.
> Q: Okay. You'd agree with me that the trim itself has not caused or contributed to any damage at the Lismore properties, correct?
> A: Yes.

The deposition transcript of Glenn Stewart is attached hereto as **Exhibit E**.

In the absence of any expert testimony to establish Plaintiff's Claims, JELD-WEN is entitled to summary judgment.

B. PLAINTIFF'S TORT CLAIMS ARE BARRED BY THE ECONOMIC LOSS RULE.

JELD-WEN is also entitled to summary judgment because Plaintiff's tort claims are barred by the economic loss rule. The economic loss rule has been adopted by South Carolina courts and provides that "there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. In other words, tort liability only lies where there is damage done to other property or personal injury." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009).

In *Sapp*, the plaintiffs filed suit against the defendant, asserting causes of action for negligence, strict liability, breach of warranty, and fraud/misrepresentation arising out of allegedly defective trucks manufactured by the defendant and purchased by plaintiffs. *Id*. The trial court entered summary judgment in favor of the defendant manufacturer, finding that the economic loss rule precluded the Plaintiff's tort claims. *Id*. On appeal, the South Carolina Supreme Court upheld the trial court's ruling, stating:

> We, too, are cautious in permitting negligence actions where there is neither personal injury nor property damage. Imposing liability merely for the creation of risk when there are no actual damages drastically changes the fundamental elements of a tort action, makes any amount of damages entirely speculative, and holds the manufacturer as an insurer against all possible risk of harm.
> …
> The only damage caused by the defect in the trucks was damage to the trucks themselves – purely an economic loss to [plaintiffs]. Therefore, the economic loss rules precludes [plaintiffs'] recovery in tort. *Sapp*, 386 S.C. at 149-50.

Here, Plaintiff's expert, Ross Clements, testified that the MiraTEC Trim did *not* cause or contribute to any of the alleged damage at the Property, let alone to any building components other than the MiraTEC Trim itself:

> Clements Depo. 6/8/2017 pp. 30 (emphasis added).
> **Q: Is it fair to say that the trim itself did not cause or contribute to any damage to the Lismore Village properties?**
> **A: I believe that's true.**

Instead, Ross Clements attributed the alleged damages to the Property to installation issues *unrelated to the MiraTEC Trim itself*:

> Clements Depo. 6/8/2017 p. 45 (emphasis added).
> **Q: And all these installation issues that we've discussed, they could cause and/or contribute to damage to the trim itself, correct?**
> **A: Yes.**
> **Q: And they potentially could cause or contribute to water intrusion in the building unrelated to the trim, correct?**
> **A: Yes.**

Further, Ross Clements testified that he did not have any opinions regarding the MiraTEC Trim and was not opining that there is any issue or defect with the MiraTEC Trim:

> Clements Depo. 6/8/2017 pp. 18-19 (emphasis added).
> Q: …Do you hold yourself out as an expert in the design or manufacture of composite engineered trim such as MiraTEC?
> **A: I haven't offered opinions related to the MiraTEC trim product itself in this case.**
> **Q: You have not?**
> **A: No.**
> **Q: Do you intend to?**
> **A: At this time, no.** I may do additional research in the future, but at this time I've just documented the existing conditions. I haven't offered opinions about the product itself.
> **Q: Okay. So as we sit here you don't have – you are not opining that there is an issue or a defect with the MiraTEC product?**
> **A: That's correct.**

Accordingly, JELD-WEN is entitled to summary judgment as to Plaintiff's tort claims, which are barred by the economic loss rule.

C. BREACH OF WARRANTY CLAIM.

Plaintiff alleges that JELD-WEN breached the implied warranties of merchantability and fitness for a particular purpose. Plaintiff has not alleged that JELD-WEN breached any express warranty. For all of the reasons discussed below, JELD-WEN is entitled to summary judgment on Plaintiff's Breach of Warranty Claim.

1. JELD-WEN disclaimed all implied warranties.

The South Carolina Uniform Commercial Code ("UCC") provides that the implied warranty of merchantability and the implied warranty of fitness for a particular purpose may be excluded. S.C. Code § 36-2-314(1) ("*Unless excluded* or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.") (emphasis added); S.C. Code § 36-2-315 ("Where the seller at the time of

contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is *unless excluded* or modified under the next section [§ 36-2-316] an implied warranty that the goods shall be fit for such purpose.") (emphasis added).

To properly disclaim these implied warranties, the UCC requires the following:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language *must mention merchantability* and in case of a writing *must be conspicuous*, and to exclude or modify any implied warranty of fitness the exclusion *must be by a writing and conspicuous.* Language to exclude the implied warranty of merchantability or of fitness for a particular purpose *must be specific*…
>
> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by *specific language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty*….

S.C. Code § 36-2-316 (2)-(3) (emphasis added).

A purchaser is not entitled to the benefit of an implied warranty where such warranty has been excluded in accordance with the provisions of S.C. Code § 36-2-316. *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 108, 208 S.E.2d 31 (1974).

The express Limited Warranty for the MiraTEC Trim contains the following disclaimer provision (the "Disclaimer"), which excludes all implied warranties:

> **DISCLAIMER OF IMPLIED WARRANTIES & LIMITATION OF REMEDIES**
>
> THE LIMITED WARRANTIES STATE THE ENTIRE LIABILITY OF CMI[5] WITH RESPECT TO THE PRODUCTS COVERED BY THEM. CMI SHALL

[5] Craftmaster Manufacturing, Inc. d/b/a CMI merged into JELD-WEN in 2013 and is no longer in existence. See *Affidavit of Ron Leljedal*, attached hereto as Exhibit B.

> HAVE NO LIABILITY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES. NO PERSON IS AUTHORIZED TO MAKE ANY REPRESENTATION OR WARRANTY ON BEHALF OF CMI EXCEPT AS EXPRESSLY SET FORTH ABOVE, AND ANY SUCH STATEMENT SHALL NOT BE BINDING ON CMI.
>
> EXCEPT AS EXPRESSLY SET FORTH ABOVE, CMI MAKES NO WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE FOREGOING DISCLAIMER OF IMPLIED WARRANTIES SHALL NOT BE APPLICABLE TO SALES SUBJECT TO THE MAGNUSON-MOSS WARRANTY ACT, IN WHICH CASE THE DURATION OF ANY IMPLIED WARRANTIES SHALL BE THE DURATION OF THE LIMITED WARRANTY OR SUCH SHORTER DURATION AS PROVIDED UNDER APPLICABLE STATE LAW. THESE LIMITED WARRANTIES GIVE YOU SPECIFIC LEGAL RIGHTS, AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

See Limited Warranty, attached as Exhibit 2 to the Affidavit of Ronald J. Leljedal, which is attached hereto as Exhibit B.

The Disclaimer effectively disclaims all implied warranties associated with the MiraTEC Trim in accordance with the UCC for the following reasons:

- The Disclaimer is in *writing*;
- The Disclaimer mentions "*merchantability*";
- The Disclaimer is "*conspicuous*"[6] because it contains a heading in a bold contrasting font and a heading in all capital letters which is equal to or greater in size than the surrounding text. Further, the language of the Disclaimer appears in a contrasting font containing all capital letters which calls attention to the language contained therein.

[6] "Conspicuous" is defined to mean "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.... Conspicuous terms include the following: (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language. S.C. Code § 36-1-201(10).

- The Disclaimer *specifically* provides that JELD-WEN makes no other warranty, including the implied warranties of merchantability and fitness for a particular purpose; and

- The Disclaimer contains language which in common understanding calls the buyer's attention to the exclusion of all implied warranties because the heading indicates that it is a disclaimer of implied warranties and contains language which makes clear that there are no implied warranties of any kind.

Further, under the UCC Plaintiff is bound by the Disclaimer regardless of whether Plaintiff is a purchaser of the MiraTEC Trim or as a mere beneficiary[7] of the express Limited Warranty for the MiraTEC Trim. *See* Official Comment 1 to S.C. Code § 36-2-318 ("[t]o the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section.").

Because the Disclaimer effectively disclaims all implied warranties, JELD-WEN is entitled to summary judgment as to Plaintiff's Breach of Warranty Claim.

2. Implied Warranty of Merchantability.

Plaintiff's Breach of Warranty Claim based on the Implied Warranty of Merchantability also fails because there is no evidence that the MiraTEC Trim was not merchantable at the time of sale or that it caused or contributed to any of Plaintiff's alleged damages.

To be "merchantable," goods must be at least such as (a) pass without objection in the trade; (b) in the case of fungible goods, are of fair average quality; (c) are fit for the ordinary purposes for which such goods are used; (d) run of even kind, quality and quantity within each

[7] Beneficiaries are defined to include "any natural person who may be expected to use, consume, or be affected by the goods and whose person or property is damaged by breach of the warranty." S.C. Code § 36-2-318.

unit and among all units involved; and (e) are adequately contained, packaged, and labeled. S.C. Code § 36-2-314(2).

In addition, and pursuant to Official Comment 13 of S.C. Code Ann. § 36-2-314:

> In an action based on breach of warranty, *it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained*. (emphasis added).

Here, Plaintiff's expert did not testify to any defects with the MiraTEC Trim product that would render the product not "merchantable" under the UCC.

> Clements Depo. 6/8/2017 pp. 18-19 (emphasis added).
> Q: …Do you hold yourself out as an expert in the design or manufacture of composite engineered trim such as MiraTEC?
> **A: I haven't offered opinions related to the MiraTEC trim product itself in this case.**
> **Q: You have not?**
> **A: No.**
> **Q: Do you intend to?**
> **A: At this time, no.** I may do additional research in the future, but at this time I've just documented the existing conditions. I haven't offered opinions about the product itself.
> **Q: Okay. So as we sit here you don't have – you are not opining that there is an issue or a defect with the MiraTEC product?**
> **A: That's correct.**
> …
> **Q: …So as we sit here today, if we were going to try this case tomorrow you would not be offering any opinions that there are any issues with the MiraTEC product in its design, manufacturing, or otherwise, correct?**
> **A: That's right.**

Further, Plaintiff's expert testified that the MiraTEC Trim did not cause or contribute to any of Plaintiff's alleged damages:

> Clements Depo. 6/8/2017 p. 30 (emphasis added).
> **Q: Is it fair to say that the trim itself did not cause or contribute to any damage to the Lismore Village properties?**
> **A: I believe that's true.**

3. Implied Warranty of Fitness for a Particular Purpose.

Plaintiff's Breach of Warranty Claim based on the Implied Warranty of Fitness for a Particular Purpose also fails because Plaintiff has failed to establish that JELD-WEN knew or should have known of any particular purpose for which the MiraTEC Trim would be used other than for its ordinary and intended purpose.

S.C. Code § 36-2-315 provides:

> Where the seller at the time of contracting has reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section (Section 36-2-316) and implied warranty that the goods shall be fit for such purpose.

Official Comment 2 to S.C. Code § 36-2-315 states:

> Official Comment 2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

In *Hite v. Ed Smith Lumber Mill, Inc.*, 309 S.C. 185, 420 S.E.2d 860 (S.C. Ct. App. 1992), the Court of Appeals held that there was no implied warranty of fitness for particular purpose where there was no evidence that the manufacturer had any knowledge that the seller was purchasing the product for any particular purpose. The *Hite* Court noted that the buyer did not purchase the product from the manufacturer, the manufacturer had not dealt with the buyer, and that, therefore, the manufacturer could not have been aware of the buyer's particular needs for the product. *Id.*

The Disclaimer included with the MiraTEC Trim expressly provides that "JELD-WEN makes no warranty of any kind, including the implied warranty of fitness for a particular

purpose." Thus, Plaintiff had notice that JELD-WEN made no implied warranties of fitness for a particular purpose regarding the MiraTEC Trim product.

Additionally, Plaintiff has not shown that JELD-WEN had any reason to know of any particular purpose for which the MiraTEC Trim was purchased. Plaintiff has not shown that it purchased the MiraTEC Trim directly from JELD-WEN or that it otherwise had any communications with JELD-WEN at the time the MiraTEC Trim was allegedly purchased.

Plaintiff HOA's 30(b)(6) designee testified that he was not aware of communications between the HOA and JELD-WEN and that Plaintiff was not involved in the selection of the MiraTEC Trim allegedly installed at the Property.

> Falconer Depo. 4/27/2017 p. 44 (emphasis added).
> **Q: Has the HOA ever had any communications with JELD-WEN or Craftmaster Manufacturing?**
> **A: No.**
> **Q: Was the HOA, as far as you know, involved with the selection of materials used at Lismore Village?**
> **A: No.**

The deposition transcript of Richard Falconer is attached hereto as **Exhibit F**.

Rather, the evidence in this case establishes that the MiraTEC Trim was distributed to distributors and dealers as part of JELD-WEN's normal business practice. *See* Affidavit of Ronald J. Leljedal, ¶ 10, Exhibit B. JELD-WEN had no relationship with Plaintiff and did not sell any MiraTEC Trim directly to the Plaintiff or to Eastwood. *See id*. at ¶¶ 11-12. Similar to the manufacturer in the *Hite* case, JELD-WEN did not deal directly with the ultimate purchaser of any MiraTEC Trim installed at the Property and, therefore, could not have been aware of the buyer's intended use for the product.

Further, Plaintiff has not presented any evidence of a particular purpose for which the MiraTEC Trim was allegedly purchased. The intended use for the MiraTEC Trim is set forth in

the Application Instructions for the product, which states that the product is "designed for use in both exterior and interior applications where a nonstructural smooth or textured blemish-free trim product is desired." *See* Application Instructions, attached as Exhibit 1 to Affidavit of Ronald J. Leljedal, a copy of which is attached hereto as Exhibit B. Plaintiff's implied warranty for a particular purpose claim also fails because Plaintiff has not alleged or shown that the MiraTEC Trim product was purchased for any particular purpose other than the product's ordinary purpose.

4. Plaintiff failed to timely notify JELD-WEN of any alleged breach of warranty and is therefore barred from any remedy, including common-law remedies.

Plaintiff's Breach of Warranty Claim also fails because there is no evidence that Plaintiff, or anyone acting on Plaintiff's behalf or at Plaintiff's direction, notified JELD-WEN of any alleged breach of warranty within a reasonable time after discovery of any alleged defect.

The UCC provides that a buyer must notify the seller within a reasonable time after he discovers, or should have discovered, a breach of warranty, or else the buyer is barred from *any* remedy. S.C. Code § 36-2-607(3)(a); *Hitachi Electronic Devices v. Platinum Technologies, Inc.*, 366 S.C. 163, 167-68, 621 S.E.2d 38, 40 (S.C. 2005) ("To revoke acceptance or recover damages, however, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.").

In *Hitachi*, the Supreme Court of South Carolina concluded that the buyer failed to timely notify the seller of an alleged breach of warranty where the buyer waited one year after taking delivery of the goods before returning them to the seller and demanding a refund of the purchase price. Therefore, the Court held that the buyer could not recover from the seller for breach of warranty.

Here, there is no evidence that Plaintiff submitted a warranty claim to JELD-WEN or otherwise notified JELD-WEN of any alleged breach of warranty prior to the initiation of this lawsuit. In fact, Plaintiff's Rule 30(b)(6) designee testified that he was not aware of any warranty claims made to JELD-WEN:

> Falconer Depo. 4/27/2017 p. 44 (emphasis added).
> **Q: …Has the HOA made any warranty claims to JELD-WEN or Craftmaster Manufacturing?**
> **A: Not to my knowledge.**

Similarly, Allen Nason, the Rule 30(b)(6) designee for Eastwood, testified that he was not aware of any warranty claims made to JELD-WEN with respect to the Property:

> Nason Depo. 10/31/2017 p. 201 (emphasis added).
> **Q: …Has Eastwood made any warranty claims to Jeld-Wen?**
> **A: I'm not aware of any.**

The Affidavit of Ronald J. Leljedal also establishes that JELD-WEN did not receive any warranty claims regarding the MiraTEC Trim allegedly installed at the Property. *See* Affidavit of Ronald J. Leljedal, at ¶ 8, attached hereto as Exhibit B.

Under *Hitachi* and the relevant UCC provision, Plaintiff's failure to timely notify JELD-WEN of an alleged breach of warranty bars Plaintiff from pursuing "any remedy" against JELD-WEN. The *Hitachi* court explained that the phrase "any remedy … encompasses all potential remedies for breach of an article 2 contract[,]" including common-law remedies. 366 S.C. at 168-69, 621 S.E.2d at 40-41 (emphasis added). Accordingly, JELD-WEN is entitled to summary judgment on Plaintiff's Breach of Warranty Claim and all other common-law claims, including Plaintiff's Negligence Claim.

5. JELD-WEN's express Limited Warranty is inapplicable and void because the MiraTEC Trim was not properly installed or maintained.

Plaintiff has not alleged that JELD-WEN breached any express warranty with respect to the MiraTEC Trim installed at the Property. However, in the event that this court finds that Plaintiff has asserted a breach of express warranty claim against JELD-WEN, such claim would be precluded by the express language of the Limited Warranty for the MiraTEC Trim because the product was not properly installed or maintained at the Property.

Under South Carolina law, a seller "has the right to limit the warranty given as he sees fit in any manner." *Liquid Carbonic Co. v. Coclin*, 161 S.C. 40, 159 S.E. 461, 463 (S.C. 1931). Further, a product manufacturer is not at fault when users fail to follow the product's instructions. *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (S.C. Ct. App. 1991) (finding that the defects in the roof were caused by the installer's negligence in not following the product's installation instructions and not by any negligence on the part of the manufacturer).

The Limited Warranty and Homeowner Maintenance and Warranty Information for the MiraTEC Trim contains the following limitations and provisions (bold and capitalized in original, emphasis added where italicized and underlined):

> **GENERAL PROVISIONS AND LIMITATIONS**
>
> THE LIMITED WARRANTIES ARE SUBJECT TO THE FOLLOWING GENERAL PROVISIONS AND LIMITATIONS. The *limited warranties are effective only if* there is proper storage, handling, *installation and maintenance* of the Trim in *strict accordance* with the instructions packaged with the particular Trim product and the maintenance instructions printed on the reverse side.
> …
> CMI shall have *no liability for defects or damage resulting from* (a) misuse or abuse, (b) *improper installation*, including, but not limited to, inadequate protection against all sources of moisture within the wall cavity, (c) *lack of proper maintenance*, such as prolonged contact with accumulated water due to failure to maintain caulking, finish coatings, or other normal weather protection …

IMPORTANT HOMEOWNER MAINTENANCE AND WARRANTY INFORMATION

CMI manufactures premium, long lasting, exterior wood composite Trim. It has been engineered to provide years of satisfaction and performance when properly maintained. To ensure compliance with the provisions of the MiraTEC Treated Exterior Composite Trim Limited Warranty (printed on the reverse side) the following Homeowner Maintenance must be performed.

AN ANNUAL INSPECTION OF THE TRIM TO INCLUDE THE FOLLOWING:

1) Condition of Caulk and Sealant: *Loose and cracked caulk or sealant must be removed and replaced with a good quality, polyurethane sealant*. Do not use hard-setting caulk.

…

3) Condition of Painted Trim: MiraTEC Trim is manufactured from wood and is primed. Trim must be painted with an exterior coating designed for use on wood Trim. Periodic washing of factory-finished or field painted Trim with water and mild detergent will remove accumulated dirt. Condition of the paint must be inspected and maintained as noted in the following table.

…

4) Water Drainage/Diversion: Allowing water from roofs and sprinklers to run down the surface of the Trim can cause discoloration and accelerated erosion of the paint. Locate landscape sprinklers so that water will not hit the Trim.

Appropriate action(s) must be taken to remedy any of the above noted conditions or the warranty will be void.

See Limited Warranties and Important Homeowner Maintenance and Warranty Information, attached as Exhibits 2 and 3, respectively, to the Affidavit of Ronald J. Leljedal, which is attached hereto as Exhibit B.

Here, extensive testimony from Plaintiff's own expert demonstrates that the alleged MiraTEC Trim was not properly installed or maintained in accordance with the product's instructions:

Clements Depo. 6/8/2017 pp. 28-29 (emphasis added).

Q: …Let me ask you just a general question. And I may use the term, exterior trim or MiraTEC trim; **but was the MiraTEC trim installed at the Lismore Village property installed properly?**

A: No.

Q: Okay. **And if you could, tell me what were the deficiencies with the installation of the MiraTEC product.** Feel free to review your notes if you need to.

A: **What I recall is it was not installed – the space around the sealant joint space around – between the trim and the windows, it was also not properly flashed on the top side with the Z flashing. And it was not painted on the cut edges. And it was installed in contact with the roof shingles.**

Q: Okay. Would you attribute any damage that you saw to the MiraTEC trim as a result of those installation issues?

A: Yes.

Q: Do you attribute it to anything else?

A: Not at this time.

Q: Okay. Is it fair to say that it did not appear that the installer of the MiraTEC trim followed the manufacturer's installation instructions either?

A: Yes.

Q: Okay. And they didn't – in addition to not following manufacturer's installation instructions, they did not seem to follow the best practices for the installation of exterior trim at the Lismore Village, correct?

A: Yes.

Clements Depo. 6/8/2017 pp. 33-35 (emphasis added).

Q: Okay. When I was out there I saw some of the things that you saw. So, for instance, when they install the trim tight to a window or tight to itself without allowing for a sealant joint, does that create an area that would allow water intrusion into the building?

A: It creates an area where there's an accumulation of water that is allowed to occur in a particular area…

Q: Okay. That's unrelated to the trim though?

A: Yeah. I mean, **there's not a proper sealant joint between the trim and the window.**

Q: Right.

A: Because of the type of window frame the trim is abutted to.

Q: Okay. **Did you see any attempt to install a sealant joint there?**

A: No. There may be some sealant there that's like a caulk, but it's very limited and it's not in all places, and it's just not something that's going to work properly because you can't get a proper sealant joint between the window frame and the trim.

Q: Right. If you were on-site and you had designed that building, would you ever have allowed that construction detail to exist?

A: No.

Clements Depo. 6/8/2017 p. 37 (emphasis added).
Q: Would you agree that the MiraTEC trim was installed improperly?
A: Yes.

Clements Depo. 6/8/2017 p. 38 (emphasis added).
Q: Okay. And in addition I think to not installing it properly, you said it was not properly protected from water via flashing and/or protecting the cut edges, correct?
A: Yes.

Clements Depo. 6/8/2017 pp. 38-40 (emphasis added).
Q: …If you'll see – if you look at that photograph [Depo. Ex. 101], I just want to go through some of the installation issues that may be apparent. If you look to the left between the brick and the MiraTEC trim, **it doesn't look like there's been any attempt to put a sealant joint between the brick and the trim, correct?**
A: That's correct.
Q: And that would be an installation issue –
A: Yes.
Q: – correct? And if you look below, **it looks like the trim is almost sitting on the, it looks like river rock or something that's there, do you see that?**
A: Yes.
Q: And that would be an installation issue as well, correct?
A: Yes.
…
Q: Okay. **And if you look around the windows, it doesn't look like there's any sealant joint between the windows and the trim, correct?**
A: Well, that's correct. There's the integral J channel on the window frame –
Q: Yeah.
A: – **that does not allow you to put a proper sealant joint between the trim and the window frame.**

Clements Depo. 6/8/2017 p. 42 (emphasis added).
Q: …And, see, the trim [Depo. Ex. 102 – photograph] appears to be sitting direct on the concrete there?
A: Yes.
Q: Would that be a violation of the installation instructions?
A: I think so….
Q: I'll represent to you that it is. But would it also be a violation of best practices?
A: Yes.

Clements Depo. 6/8/2017 pp. 42-43 (emphasis added).
Q: …And do you see it's [Depo. Ex. 103 – photograph] **a cut piece of trim, there doesn't appear to be any priming or paint on it, correct?**
A: Right.

Q: And there doesn't appear to be any other effort of any material to try to protect that cut end, correct?
A: Correct.
Q: Is that the type of issue you were talking about earlier when you said there was no effort to prime or paint the cut ends?
A: That's correct.
Q: Okay. And without going through a million pictures, **are these conditions that we're discussing, are they conditions that were pervasive through the Lismore properties?**
A: Yes.

Clements Depo. 6/8/2017 pp. 43-44 (emphasis added).
Q: …Is that [Depo. Ex. 104 – photograph] a picture of the trim sitting on the shingles?
A: Yes.
Q: Okay. And that is also a violation of the manufacturer's installation instructions?
A: Yes.
Q: And best practices?
A: Yes.

Clements Depo. 6/8/2017 p. 44 (emphasis added).
Q: …That's [Depo. Ex. 105 – photograph] a picture of appears to be trim with mulch piled up to it and on top of it. **Again, would that be a violation of either the landscaper's duty or the trim installer?**
A: Yes.

Additionally, Plaintiff's Rule 30(b)(6) designee testified regarding the lack of proper maintenance of the exterior building components at the Property:

Falconer Depo. 4/27/2017 pp. 20-22 (emphasis added).
Q: …[F]air to say that prior to the time you actually undertook the painting, nobody had gone back to inspect the caulk or recaulk the buildings?
A: No.
Q: No, that is not correct or that is correct?
A: Oh, I'm sorry. No, that's correct.
Q: Okay. **Do you-all have any type of maintenance plan now that calls for the periodic inspection of the buildings and the caulk?**
A: For the caulk, no. For building inspection in a general sense, yes. I walk the community several times a week, and I'm looking for anything and everything.
…
Q: Okay. Any background at all in construction or maintenance?
A: No, sir.
Q: So, other than you walking around the property, does the homeowners association have any building inspection protocol?

A: No. Nothing formal.
Q: Okay. Have they ever?
A: No. Not to my knowledge.

Falconer Depo. 4/27/2017 pp. 45-46 (emphasis added).
Q: Okay. And it's – if I'm listening to you correctly, **it sounds like Eastwood didn't do any maintenance or repairs during the time they controlled the board?**
A: We have no record of anything happening.

Falconer Depo. 4/27/2017 pp. 139-140 (emphasis added).
Q: Again it [Depo. Ex. 42 – Newsletter Oct. 2014] acknowledges that there was a lack of maintenance by the former property manager, assumedly the HOA, correct?
A: Yes.
Q: Does that indicate that there was a lack of maintenance by the former property manager?
A: Yes.
Q: And that's factually correct?
A: Yes.
Q: Okay. And is it also the opinion of you that the HOA, because it is their duty, also failed to perform the maintenance required during that time period?
A: From a maintenance standpoint we were doing everything that we thought was necessary to correct the problem.
Q: No. I understand that. But before you-all started doing that, it says: while most of the major catch-up expenses to overcome the lack of maintenance by former property manager, right?
A: Yes.
Q: So that maintenance that was to be done by the property manager is really the responsibility of the HOA. The HOA delegated it to the property manager, correct?
A: Correct.
Q: And therefore that would be a deficiency of the HOA itself, correct?
A: Correct.

Falconer Depo. 4/27/2017 p. 157 (emphasis added).
Q: It [Depo. Ex. 49 – Email correspondence] says: We would prefer to let a property manager do everything, but the result of what the developer did to this community combined with the blindfolded management of our first property manager has made HOA management by any board in this community more difficult and more time consuming than it should be. Do you see that?
A: I do.
Q: And is that referring to the developers and the previous members of the HOA failing to maintain and repair the community?
A: Yes.

Falconer Depo. 4/27/2017 pp. 232-233 (emphasis added).

Q: Okay. All right. Why was there a transition from the property – in 2012, why was there a transition from the property management company being the point of contact for HOA repairs to Joe being the point of contact?

A: Well, there were several reasons. One is we didn't know anything about what was going on. So we wanted to get our hands in it to make sure we understood. **The other was that the community was in disarray, it looked terrible. It didn't look like it was being kept up on any basis, whether it was landscaping or building repair, anything along those lines. The aesthetic quality of the community was not something that people wanted to buy a home in. I mean, it would be hard to convince them because they could tell that upkeep was not where it should be.** So those were two major reasons. The other was that we had no prior records of anything going on, and when we asked HOA Community Management for records, we got no records in return…

Glenn Stewart, Eastwood's designated expert, also testified that he observed evidence of improper installation and a lack of maintenance affecting the exterior building components at the Property:

Stewart Depo. 5/19/17 p. 11-12 (emphasis added)

Q: And in reviewing your report, it's my understanding that you did find that there were some installation issues related to the installation of the trim itself, correct?

A: Essentially my report was a repair recommendation summary. And of those repairs I included the removal of that trim material from the complex, I think it's six of the buildings.

Q: **And the trim removal, my understanding was unrelated to the trim itself but had issues to deal with either an installer who did not do things properly, some other trade that may not have provided weather wrapping underneath it, or failure of the plaintiff to maintain the trim, correct?**

A: **Yes.**

Q: **Any other reason that you're pulling the trim off?**

A: **No.**

Stewart Depo. 5/19/17 p. 14 (emphasis added).

Q: At Lismore did it appear to you even up through the time you did your inspection that there was a lack of proper maintenance on the caulk joints around trim, windows, et cetera?

A: Yes.

Q: Did it appear at Lismore that there was a lack of maintenance with respect to even checking the paint and making sure all the trim was properly painted?

A: There were locations where paint was pealing and things like that, yet.

Pursuant to the express terms of the Limited Warranty for the MiraTEC Trim, JELD-WEN is not liable for any defects or damage resulting from improper installation or maintenance of the MiraTEC Trim. *See* Limited Warranty, attached as Exhibit 2 to Affidavit of Ronald J. Leljedal (stating that JELD-WEN "shall have no liability for defects or damage resulting from … improper installation … [or] lack of proper maintenance"). Accordingly, the express Limited Warranty associated with the MiraTEC Trim is void, and JELD-WEN is entitled to summary judgment on Plaintiff's Breach of Warranty Claim.

D. NEGLIGENCE CLAIM.

JELD-WEN is entitled to summary judgment as to Plaintiff's Negligence Claim because Plaintiff's expert testified that JELD-WEN was not negligent and the MiraTEC Trim was not the cause of any alleged damage to the Property.

1. JELD-WEN did not breach any alleged duty of care.

"Under a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect…the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." *Holst*, 390 S.C. at 36. "Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. It is the failure to exercise slight care." *Etheredge v. Richland School Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275 (2000).

Plaintiff generally alleges that JELD-WEN owed Plaintiff a duty to design and manufacture the MiraTEC Trim to be free of any and all defects and that JELD-WEN breached its duty and was negligent, careless, willful, wanton, and reckless in the design, manufacture,

marketing, distributing and selling of its MiraTEC Trim. Second Am. Compl. ¶¶ 132-133[8]. However, when asked whether he was aware of anything that JELD-WEN has done that is negligent, Plaintiff's Rule 30(b)(6) designee testified as follows:

> Falconer Depo. 4/27/2017 p. 38 (emphasis added).
> Q: **Are you aware of anything that JELD-WEN has done that was negligent or grossly negligent with respect to Lismore Village?**
> A: **I am not.**

Similarly, Plaintiff's designated expert, Ross Clements, also testified that JELD-WEN was not negligent, that he had no criticisms of the installation instructions for the MiraTEC Trim, and that the MiraTEC Trim is not defective:

> Clements Depo. 6/8/2017 p. 35 (emphasis added).
> **Q: Would you agree with me that as we sit here you're not aware of anything that JELD-WEN – or I think they're also named as Craftmaster Manufacturing, Incorporated – has done that is negligent with respect to the Lismore property or any products installed thereon?**
> **A: Not to my knowledge.**
> **Q: Do you have any criticisms of the installation instructions of the MiraTEC product?**
> **A: No.**

> Clements Depo. 6/8/2017 pp. 18-19 (emphasis added).
> **Q: Okay. So as we sit here you don't have – you are not opining that there is an issue or a defect with the MiraTEC product?**
> **A: That's correct.**
> …
> **Q: … So as we sit here today, if we were going to try this case tomorrow you would not be offering any opinions that there are any issues with the MiraTEC product in its design, manufacturing, or otherwise, correct?**
> **A: That's right.**

[8] More specifically, Plaintiff alleges that JELD-WEN was negligent in the following ways: (a) In designing, manufacturing, marketing, distributing, and selling a product that is defective in that it has failed and has allowed water and moisture to continuously intrude into the wall system, thereby significantly damaging component parts of the Project; (b) In developing the exterior trim in a defective manner; (c) In failing to reasonably test the exterior trim to determine if it would perform in accordance with applicable building codes and industry standards; (d) In failing to promulgate appropriate installation instructions in compliance with applicable building codes and industry standards; (e) In failing to appropriately train, instruct and educate the installers of their product; and (f) In failing to use the requisite degree of care and caution that a reasonably prudent manufacturer would have used in designing and manufacturing the exterior trim. Second Am. Compl. ¶ 133.

Furthermore, Plaintiff's expert has not offered any opinion that JELD-WEN failed to test the MiraTEC trim, failed to train, instruct or educate the installers of the MiraTEC trim, or otherwise failed to use the requisite degree of care of a prudent manufacturer in designing and manufacturing its MiraTEC trim:

> Clements Depo. 6/8/2017 pp. 18-19 (emphasis added).
> Q: …Do you hold yourself out as an expert in the design or manufacture of composite engineered trim such as MiraTEC?
> **A: I haven't offered opinions related to the MiraTEC trim product itself in this case.**
> **Q: You have not?**
> **A: No.**
> **Q: Do you intend to?**
> **A: At this time, no.** I may do additional research in the future, but at this time I've just documented the existing conditions. **I haven't offered opinions about the product itself.**
> **Q: Okay. So as we sit here you don't have – you are not opining that there is an issue or a defect with the MiraTEC product?**
> **A: That's correct.**
> …
> **Q: Okay. Have you ever done any testing of the MiraTEC product?**
> **A: No.**
> **Q: …So as we sit here today, if we were going to try this case tomorrow you would not be offering any opinions that there are any issues with the MiraTEC product in its design, manufacturing, or otherwise, correct?**
> **A: That's right.**

2. The MiraTEC Trim did not proximately cause any of the alleged damages to Plaintiff's Property.

JELD-WEN is also entitled to summary judgment as to Plaintiff's Negligence Claim because Plaintiff's expert testified that the MiraTEC Trim did not proximately cause any damage to the Property.

Plaintiff must prove that the alleged defects of the MiraTEC Trim allegedly installed at the Property were the proximate cause of the injury sustained by Plaintiff. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (S.C. Ct. App. 2005). The touchstone of proximate cause in South Carolina is foreseeability; proximate cause requires proof that the

injury would not have occurred but for the defendant's negligence and that the injury was the natural and probable consequence of the complained-of act. *Id*.

Here, Plaintiff's expert testified that the MiraTEC Trim did not cause or contribute to the alleged damage at the Property.

> Clements Depo. 6/8/2017 p. 30 (emphasis added).
> **Q: Is it fair to say that the trim itself did not cause or contribute to any damage to the Lismore Village properties?**
> **A: I believe that's true.**

Further, Plaintiff's expert attributed the alleged damages to the Property to installation issues unrelated to the trim itself. In *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (S.C. Ct. App. 1991), plaintiff homeowner sued a roofer for negligent installation of a roof at plaintiff's house and the roofer filed a third-party complaint alleging negligence and breach of warranty by the supplier of the roofing material. *Id*. The court held that the negligence of the installer, who improperly installed the roofing materials contrary to the manufacturer's instructions, was the proximate cause of the damage to the plaintiff's house. *Id*. The court found that the resulting defects in the roof were not caused by any negligence on the part of the supplier of the roofing materials. *Id*.

Similarly, Plaintiff's experts identified numerous examples of improper installation of the MiraTEC Trim at the Property.

> Clements Depo. 6/8/2017 pp. 28-29 (emphasis added).
> Q: …Let me ask you just a general question. And I may use the term, exterior trim or MiraTEC trim; **but was the MiraTEC trim installed at the Lismore Village property installed properly?**
> **A: No.**
> Q: Okay. **And if you could, tell me what were the deficiencies with the installation of the MiraTEC product.** Feel free to review your notes if you need to.
> A: **What I recall is it was not installed – the space around the sealant joint space around – between the trim and the windows, it was also not properly**

flashed on the top side with the Z flashing. And it was not painted on the cut edges. And it was installed in contact with the roof shingles.
Q: Okay. Would you attribute any damage that you saw to the MiraTEC trim as a result of those installation issues?
A: Yes.
Q: Do you attribute it to anything else?
A: Not at this time.
Q: Okay. Is it fair to say that it did not appear that the installer of the MiraTEC trim followed the manufacturer's installation instructions either?
A: Yes.
Q: Okay. And they didn't – in addition to not following manufacturer's installation instructions, they did not seem to follow the best practices for the installation of exterior trim at the Lismore Village, correct?
A: Yes.

Clements Depo. 6/8/2017 pp. 33-35 (emphasis added).
Q: Okay. When I was out there I saw some of the things that you saw. So, for instance, when they install the trim tight to a window or tight to itself without allowing for a sealant joint, does that create an area that would allow water intrusion into the building?
A: It creates an area where there's an accumulation of water that is allowed to occur in a particular area…
Q: Okay. That's unrelated to the trim though?
A: Yeah. I mean, **there's not a proper sealant joint between the trim and the window.**
Q: Right.
A: Because of the type of window frame the trim is abutted to.
Q: Okay. **Did you see any attempt to install a sealant joint there?**
A: No. There may be some sealant there that's like a caulk, but it's very limited and it's not in all places, and it's just not something that's going to work properly because you can't get a proper sealant joint between the window frame and the trim.
Q: Right. If you were on-site and you had designed that building, would you ever have allowed that construction detail to exist?
A: No.

Clements Depo. 6/8/2017 p. 37 (emphasis added).
Q: Would you agree that the MiraTEC trim was installed improperly?
A: Yes.

Clements Depo. 6/8/2017 p. 38 (emphasis added).
Q: Okay. And in addition I think to not installing it properly, you said it was not properly protected from water via flashing and/or protecting the cut edges, correct?
A: Yes.

Clements Depo. 6/8/2017 pp. 38-40 (emphasis added).
Q: …If you'll see – if you look at that photograph [Depo. Ex. 101], I just want to go through some of the installation issues that may be apparent. If you look to the left between the brick and the MiraTEC trim, **it doesn't look like there's been any attempt to put a sealant joint between the brick and the trim, correct?**
A: That's correct.
Q: And that would be an installation issue –
A: Yes.
Q: – correct? And if you look below, **it looks like the trim is almost sitting on the, it looks like river rock or something that's there, do you see that?**
A: Yes.
Q: And that would be an installation issue as well, correct?
A: Yes.
…
Q: Okay. **And if you look around the windows, it doesn't look like there's any sealant joint between the windows and the trim, correct?**
A: Well, that's correct. There's the integral J channel on the window frame –
Q: Yeah.
A: – **that does not allow you to put a proper sealant joint between the trim and the window frame.**

Clements Depo. 6/8/2017 p. 42 (emphasis added).
Q: …And, see, the trim [Depo. Ex. 102 – photograph] appears to be sitting direct on the concrete there?
A: Yes.
Q: Would that be a violation of the installation instructions?
A: I think so….
Q: I'll represent to you that it is. But would it also be a violation of best practices?
A: Yes.

Clements Depo. 6/8/2017 pp. 42-43 (emphasis added).
Q: …And do you see it's [Depo. Ex. 103 – photograph] **a cut piece of trim, there doesn't appear to be any priming or paint on it, correct?**
A: Right.
Q: And there doesn't appear to be any other effort of any material to try to protect that cut end, correct?
A: Correct.
Q: Is that the type of issue you were talking about earlier when you said there was no effort to prime or paint the cut ends?
A: That's correct.
Q: Okay. And without going through a million pictures, **are these conditions that we're discussing, are they conditions that were pervasive through the Lismore properties?**
A: Yes.

Clements Depo. 6/8/2017 pp. 43-44 (emphasis added).

Q: …Is that [Depo. Ex. 104 – photograph] a picture of the trim sitting on the shingles?
A: Yes.
Q: Okay. And that is also a violation of the manufacturer's installation instructions?
A: Yes.
Q: And best practices?
A: Yes.

Clements Depo. 6/8/2017 p. 44 (emphasis added).

Q: …That's [Depo. Ex. 105 – photograph] a picture of appears to be trim with mulch piled up to it and on top of it. **Again, would that be a violation of either the landscaper's duty or the trim installer?**
A: Yes.

The issue of proximate cause may be decided by the court where the evidence is susceptible to only one inference. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 494 S.E.2d 835 (S.C. Ct. App. 1997). Here, the testimony of Plaintiff's expert is susceptible to only one inference – that JELD-WEN did not proximately cause any alleged damage to Plaintiff or the Property – and the Court can resolve the issue of proximate cause in JELD-WEN's favor at the summary judgment stage.

Because there is no genuine issue of material fact on the issues of duty of care or proximate causation, JELD-WEN is entitled to summary judgment on Plaintiff's Negligence Claim.

E. STRICT LIABILITY CLAIM.

Plaintiff's Strict Liability Claim also fails because Plaintiff has not shown that the MiraTEC Trim is defective or unreasonably dangerous and has failed to show any evidence of an alternative design for the MiraTEC Trim.

1. Plaintiff has not shown that the MiraTEC Trim is defective or unreasonably dangerous.

> [I]n a product liability action based on strict liability where a design defect is alleged, the plaintiff must prove the product, as designed, was in an unreasonably dangerous or defective condition. The focus here is on the condition of the product, without regard to the action of the seller or manufacturer. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539-540, 462 S.E.2d 231 (S.C. Ct. App. 1995).

Here, Plaintiff's expert stated that he was not offering any opinions as to any issues or defects with the MiraTEC Trim product.

> Clements Depo. 6/8/2017 pp. 18-19 (emphasis added).
> **Q: Okay. So as we sit here you don't have – you are not opining that there is an issue or a defect with the MiraTEC product?**
> **A: That's correct.**
> …
> **Q: … So as we sit here today, if we were going to try this case tomorrow you would not be offering any opinions that there are any issues with the MiraTEC product in its design, manufacturing, or otherwise, correct?**
> **A: That's right.**

Accordingly, Plaintiff has not shown that the MiraTEC Trim is defective or unreasonably dangerous.

2. Plaintiff has not presented any evidence of a feasible alternative design for the MiraTEC Trim.

Plaintiff's Strict Liability Claim also fails because Plaintiff has not presented any evidence of a feasible alternative design for the MiraTEC Trim.

"To survive summary judgment, it is crucial that a plaintiff also demonstrate that a feasible, or workable, design alternative exists under the circumstances." *Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 36, 699 S.E.2d 715, 719 (S.C. App. 2010); *see also Holland v. Morbark, Inc.*, 407 S.C. 227, 237, 754 S.E.2d 714, 720 (S.C. App. 2014) ("The requirement of proving a reasonable alternative design in a design defect case is mandatory…plaintiff must present evidence of a reasonable alternative design and will be

required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous.").

In *Holland*, the South Carolina Court of Appeals found that plaintiff's expert presented only conceptual evidence of an alternative design where no actual alternative design was prepared and no testing or feasibility analysis for an alternative design had been performed. *Id*. The Court held that plaintiff failed to provide evidence sufficient to withstand summary judgment, stating that "because a conceptual design is insufficient to establish a reasonable alternative design, we find [plaintiff's] claim for design defect fails as a matter of law." *Id*. at 238.

Here, Plaintiff's expert has not identified an alternative design for the MiraTEC Trim and testified that he does not have any plans to conduct additional research, investigation, or testing regarding the MiraTEC Trim.

> Clements Depo. 6/8/2017 pp. 18-19 (emphasis added).
> Q: …Do you hold yourself out as an expert in the design or manufacture of composite engineered trim such as MiraTEC?
> **A: I haven't offered opinions related to the MiraTEC trim product itself in this case.**
> **Q: You have not?**
> **A: No.**
> **Q: Do you intend to?**
> **A: At this time, no. I may do additional research in the future, but at this time I've just documented the existing conditions. I haven't offered opinions about the product itself.**
> **Q: Okay. So as we sit here you don't have – you are not opining that there is an issue or a defect with the MiraTEC product?**
> **A: That's correct.**
> **Q: Okay. And if what – have you been asked to do any research into that or to look into that by the plaintiff's counsel?**
> **A: Not – not at this time, no. But it's something I may do in the future, but at this time I haven't researched that.**
> **Q: Do you have any plans to do that?**
> **A: Right now, no.**
> **Q: Okay. Have you ever done any testing of the MiraTEC product?**
> **A: No.**

> Q: …So as we sit here today, if we were going to try this case tomorrow you would not be offering any opinions that there are any issues with the MiraTEC product in its design, manufacturing, or otherwise, correct?
> A: That's right.

As discussed above, expert testimony is required in this case to establish any alleged defect in or inherent danger of the MiraTEC Trim as well as any feasible alternative designs for the product because these matters are beyond the common knowledge and understanding of laypersons. In the absence of any expert testimony to show that the MiraTEC Trim is defective or unreasonably dangerous or to establish a feasible alternative design for the product, JELD-WEN is entitled to summary judgment on Plaintiff's Strict Liability Claim.

F. PLAINTIFF'S CLAIMS ARE BARRED, IN PART, BY THE STATUTE OF REPOSE.

The statute of repose applies to "actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property," which includes actions to recover for property damage, economic or monetary loss, actions in contract or in tort, and actions against manufacturers of products and building components used in the construction of an improvement to real property. S.C. Code § 15-3-640; *see also Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001). The MiraTEC Trim at issue in this case was allegedly installed in connection with improvements to real property, so Plaintiff's Claims are subject to the statute of repose.

The current version of the statute of repose bars actions brought more than eight years after substantial completion of an improvement to real property where the date of substantial completion was after July 1, 2005. S.C. Code § 15-3-640. A Certificate of Occupancy constitutes proof of substantial completion under the statute of repose, unless the contractor and owner, by written agreement, establish a different date of substantial completion. *Id.* No party

to this action has produced a written agreement or other evidence establishing a date of substantial completion for any of the buildings or units at issue, other than as set forth in the Certificates of Occupancy, which are attached hereto as Exhibit A. Accordingly, the Certificates of Occupancy establish the date of substantial completion for purposes of determining whether the statute of repose bars any of Plaintiff's Claims. *See Id.*

Here, the Certificates of Occupancy for the buildings and units at issue were all issued after July 1, 2005. Therefore, Plaintiff's Claims against JELD-WEN must have been filed within eight years after the date of substantial completion of the buildings at issue or else they are barred by the statute of repose. S.C. Code § 15-3-640.

Plaintiff's Claims against JELD-WEN were filed on May 3, 2016.[9] Certificates of Occupancy for the following units were issued more than eight (8) years prior to the date Plaintiff's Claims against JELD-WEN were filed: 1 Swade Way (4/23/2007); 3 Swade Way (4/23/2007); 5 Swade Way (4/23/2007); 9 Swade Way (4/6/2007); 11 Swade Way (4/6/2007); 27 Swade Way (8/15/2007); 29 Swade Way (8/23/2007); 30 Swade Way (8/31/2007); 31 Swade Way (8/23/2007); 32 Swade Way (9/20/2007); 33 Swade Way (8/23/2007); 34 Swade Way (7/30/2007); 35 Swade Way (8/23/2007); 36 Swade Way (9/20/2007); 37 Swade Way (8/15/2007); 38 Swade Way (9/20/2007); 40 Swade Way (5/9/2007); 100 Xander Drive (10/22/2007); 102 Xander Drive (10/22/2007); 104 Xander Drive (10/22/2007); 106 Xander Drive (10/22/2007); 108 Xander Drive (10/22/2007); 110 Xander Drive (10/22/2007); 301 Intrepid Court (2/13/2008); 303 Intrepid Court (2/13/2008); 305 Intrepid Court (3/11/2008); 307 Intrepid Court (2/13/2008); 309 Intrepid Court (2/13/2008); 311 Intrepid Court (2/13/2008).[10] The foregoing units correlate to Building Number 1 (with the exception of 7 Swade Way – CO

[9] JELD-WEN was named as a party-defendant in Plaintiff's First Amended Complaint.
[10] The Certificates of Occupancy are attached hereto as Exhibit A.

issued 8/26/2009); Building Number 3; Building Number 5; Building Number 8; and Building Number 11. Accordingly, to the extent Plaintiff's Claims arise out of or relate to the foregoing buildings or units, they are barred by the statute of repose and JELD-WEN is entitled to summary judgment.

1. The gross negligence exception to the statute of repose does not apply because Plaintiff's expert testified that JELD-WEN was not negligent.

The statute of repose is not available as a defense "to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials…in connection with such an improvement … ." S.C. Code § 15-3-670. Plaintiff has not alleged any fraudulent conduct by JELD-WEN, therefore, the fraud exception to the statute of repose does not apply.

However, Plaintiff does allege in its Complaint that JELD-WEN was grossly negligent. Second Am. Compl. ¶¶ 130-135. This bald and conclusory allegation, however, is insufficient to create a genuine issue of material fact. *Disher v. Synthes*, 371 F.Supp.2d 764, 769 (D.S.C. 2005) ("Conclusory allegations or denials, without more, will not preclude the granting of a summary judgment motion"). Further, Plaintiff's own 30(b)(6) designee and designated expert testified that they were not aware of any negligent conduct by JELD-WEN, much less any conduct constituting gross negligence.

> Clements Depo. 6/8/2017 p. 35 (emphasis added).
> **Q: Would you agree with me that as we sit here you're not aware of anything that JELD-WEN – or I think they're also named as Craftmaster Manufacturing, Incorporated – has done that is negligent with respect to the Lismore property or any products installed thereon?**
> **A: Not to my knowledge.**
>
> Falconer Depo. 4/27/2017 p. 38 (emphasis added).
> Q: **Are you aware of anything that JELD-WEN has done that was negligent or grossly negligent with respect to Lismore Village?**
> A: **I am not.**

It necessarily follows that if JELD-WEN was not negligent, then it was not grossly negligent, which is a higher degree of culpability. *See Clark v. S.C. Dep't of Pub. Safety*, 362 S.C. 377, 383, 608 S.E.2d 573, 576–77 (S.C. 2005) (stating that gross negligence is the failure to exercise even slight care).

Further, "while gross negligence is ordinarily a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Etheredge v. Richland School Dist.*, 341 S.C. 307, 310, 534 S.E.2d 275 (S.C. 2000) (citations omitted). The issue of gross negligence can therefore be resolved at the summary judgment stage in JELD-WEN's favor. Accordingly, in light of the testimony of Plaintiff's 30(b)(6) designee and designated expert, and in the absence of any evidence tending to establish that JELD-WEN was grossly negligent, Plaintiff's Claims are barred, in part, by the statute of repose.

G. PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

All of Plaintiff's Claims are subject to the three year statute of limitations. S.C. Code § 15-3-530(1). The discovery rule governs when the statute of limitations period begins to run on Plaintiffs' claims. S.C. Code § 15-3-535. Under the discovery rule, the statute of limitations period begins to run when:

> [A] person knows or by the exercise of reasonable diligence should know that he has a cause of action. The statute starts to run upon discovery of such facts as would have led to the knowledge thereof, if pursued with reasonable diligence. A party has constructive notice if the party knows of facts and circumstances of an injury that would put a person of common knowledge and experience on notice that some right has been invaded or that some claim against another party might exist. Failure of the injured party to comprehend the full extent of damages, however, is immaterial. The date on which discovery should have been made is an objective, not subjective, question. *Barr v. City of Rock Hill*, 330 S.C. 640, 500 S.E.2d 157 (S.C. App. 1998) (emphasis added).

In *Barr*, the plaintiff homeowners brought claims for negligence and breach of implied warranties against the developer and other defendants arising out of the construction and sale of their home. During the time period of 1987 – 1990, the plaintiffs became aware of certain issues with their home when annual termite inspections revealed moisture problems and the inspectors recommended certain repairs. Subsequent inspections and reports made by the City of Rock Hill and a forensic engineer in 1992 revealed additional issues with the plaintiffs' home, including the same moisture issues previously identified in the termite inspection reports during the 1987 – 1990 timeframe. The plaintiffs did not file their action to recover damages for these issues until 1994, more than three (3) years after their discovery of the alleged defects. Based on these facts, the *Barr* court affirmed the trial court's ruling that the statute of limitations precluded the plaintiffs' claims.

> The trial court correctly ruled that the [1987-1990] termite inspection reports advised the Barrs of water and other problems under their house, including the following: standing water, evidence of old decay damage, the need for more ventilation, the need to patch around water and drain lines, and the need to back fill the footers. *The Barrs failed to correct the problems or investigate further to determine the extent of the problems.* Mrs. Barr *admitted that she was aware of the problems that needed repair* but characterized the problems as "nothing of great concern." She stated that she "first realized the magnitude of the problem when she received Forensic's report" in August 1992…Many of the problems listed in both Forensic's and the City's reports [in 1992] were also listed in the termite inspection reports [in 1987-1990]. *If the Barrs had exercised reasonable diligence and investigated the problems noted in the termite inspection reports, they could have realized the magnitude of the problem and brought suit before the statute of limitations ran.* They *failed to act*, however, and let the statute of limitations expire on any claim against the [defendants]. *Id*. at 645-46 (emphasis added).

Here, the testimony of Plaintiff's 30(b)(6) designee shows that various issues contributing to water intrusion at the Property were present since at least 2012, which is more than three years prior to the filing of Plaintiff's Claims against JELD-WEN on May 3, 2016.

R. Falconer Dep. 4/27/2017 pp. 18-19.
Q: How long have you lived at Lismore Village?
A: Five years.
Q: Were those things [water intrusion issues] occurring since the time that you began living at Lismore Village?
A: Yes. Since then, yeah.
Q: And that would have been back in 2012?
A: I moved in there in October of 2011.
Q: Okay.
A: 2012 is when we first began to see staining on the wood from what appeared to be watermarks.
Q: In 2012?
A: In 2012.
Q: Okay. What investigation did the homeowners association do in 2012 to determine what the cause of these water intrusion and wood staining issues were?
A: We didn't do any investigation in that regard. We simply – we have a painting operation. We knew when we moved in that the buildings had never been painted, and some of those buildings at that point were seven years old. So, from a standpoint of building maintenance, we addressed the buildings on the basis of painting, not on the basis of repairing water intrusion.

Further, several documents produced during the course of discovery show that Plaintiff was on notice of installation deficiencies with respect to the exterior trim and other substandard construction issues leading to water intrusion at the Property for more than three years prior to the filing of Plaintiff's Claims against JELD-WEN on May 3, 2016.

For example, Plaintiff contracted with Brian Yarbrough, of Yarborough Construction, to replace some damaged exterior trim on approximately fifteen (15) of the residential units during the August 2012 to December 2012 timeframe. *See* **Exhibit G**. The documents indicate that in connection with these repairs, Plaintiff was aware of damage to the corners of the exterior trim, of exterior trim being in contact with the landscaping, of exterior trim exhibiting elevated moisture levels, mold, and fungus growth, and of water intrusion behind the exterior trim into the OSB. *See id.*

R. Falconer Dep. 4/27/2017 pp. 81-82.
Q: Okay. If you look at this email [Depo. Ex. 27 – Email Correspondence] from – well, let me ask you this: Who is Brian Yarborough?

A: He is the owner of Yarborough. I don't know the exact company name, I think it's Yarborough Construction.
Q: Okay.
A: But he's the vendor that Joe O'Connor was working with in this email.
Q: Okay. At the bottom of this it has a date of September 24th, 2012. It's an email from Joe to Brian. And Joe said he's looked at the remaining units listed on his sheet, and most of them show some signs of water infiltration behind the trim. Most of the damaged areas are on the corners where the trim is mitered together. Do you see that?
A: Yes.
Q: Were you aware of that?
A: I saw a list that was produced. I don't recall exactly that it was in direct relationship to this email because I can't remember seeing this email.
Q: Okay.
A: But I remember seeing a list that addressed the homes that he was working on in that area of the community, so I believe that they're related to each other.
Q: Okay. Was anything ever done to correct the issues that are addressed in this email?
A: Some I believe were. I don't believe they all were.

R. Falconer Dep. 4/27/2017 pp. 87-89.
Q: This is an invoice [Depo. Ex. 29 – Invoice] from Yarborough Construction. It appears dated October 23rd, 2012. It says that he removed and replaced panel trim on six panels of a box bay and removed and replaced deteriorated OSB from behind the panel due to water infiltration and replaced water-damaged MiraTEC trim. Do you see that?
A: I do.
Q: Do you recall that?
A: Yes.
Q: Okay. Can you explain to me what you know about that?
A: My recollection is that it is the worst water-related damage we had observed in the community.
…
Q: Okay. And that was in October of 2012?
A: Yes.
…
Q: And what did the HOA do in response to having that information?
A: We didn't do anything with any other home, if that's what you're getting at. We repaired that issue and paid his bill. And we've had other water damage issues with that home since, but this one is the biggest one that we've encountered at that particular address.

There is also evidence that as early as July 2010 and February 2011, Plaintiff contracted for the removal and replacement of exterior trim due to damage, which was performed by

Quality Builder Services. *See* **Exhibit H**. There is evidence that this same contractor in March 2011 found that paint had peeled away from the exterior trim. *See id*. There is also evidence that this same contactor in December 2011 removed flaked paint and old caulking from exterior trim around the bay windows. *See id*.

There is also evidence from May 2012, July 2012, January 2013, and February 2013 HOA board meeting minutes that Plaintiff was aware of unprimed wood, peeling paint, water leaks, and deficient construction of the exterior building components, including caulking around the windows and doors, based on an exterior repair audit. *See* **Exhibit I**.

> R. Falconer Dep. 4/27/2017 pp. 102-103.
> Q: Okay. If you look down at Number 2 [Depo. Ex. 33 – Executive Session Minutes], it says: Cleaning has uncovered what was already suspected as unprimed wood, peeling paint, clogged gutters, et cetera. Quality workmanship of Eastwood Homes is clearly lacking, and we will suffer the financial hit of correcting much of what we find. Do you see that?
> A: Yes, I do.
> Q: Is that an accurate recitation of what you-all understood at that time?
> A: That's correct.
> Q: And what was done in response to that?
> A: Well, over time since May 16th of 2012, we've made occasional repairs. Most of them are cosmetic repairs, but we've had to patch some active water leaks. But that was essentially how we responded to it.
> Q: Fair to say as of May 16th, at least 2012, you-all already were concerned about the quality of the construction of Eastwood Homes?
> A: Yes.

> R. Falconer Dep. 4/27/2017 pp. 106-107.
> Q: Okay. It [Depo. Ex. 33 – Executive Session Minutes] says next: 10 door risers and 23 window panels have been initially identified as being of substandard workmanship and in need of immediate repair – in immediate need of repair. Do you see that?
> A: Yes.
> Q: Were those repaired?
> A: I don't recall.
> Q: Okay.
> A: I'm not sure.
> Q: But at least as of May 16th, 2012, you were aware of that issue?
> A: Yes.

Q: When you read that, that 10 door risers and 23 window panels are of substandard workmanship and in immediate need of repair, do you see a systemic issue there?
A: I don't believe we recognized it to be that at that point in time.
Q: In retrospect do you think you should have?
A: Yes.

R. Falconer Dep. 4/27/2017 pp. 130-131.
Q: Okay. If you look down at Number 8, it [Depo. Ex. 38 – HOA Meeting Minutes Jan. 17, 2013] says: Stress at window and door caulking is a concern that you may have to take significant action to prevent future water damage. Do you know what exactly was going on or what he was referring to?
A: Well, it gets back to those lists that we've discussed earlier –
Q: Okay.
A: – where he had made lists of homes where he had found damage.
Q: Okay. That was in the summer 2012, right?
A: 2012, yes.
Q: So that was a continuing concern?
A: Yes.

Based on the foregoing, it is undisputed that the Plaintiff was aware of deficient construction and water intrusion issues at least by 2012 and this court should find and conclude that Plaintiff knew, or by the exercise of reasonable diligence should have known, that it had a cause of action for the damages alleged in this case arising from the improper installation of exterior trim and other construction deficiencies at the Property. The fact that Plaintiff did not know or could not have known the full extent of the alleged damages is immaterial. *See Barr, supra*. Accordingly, JELD-WEN is entitled to summary judgment as to all of Plaintiff's Claims, which are barred by the statute of limitations.

III. CONCLUSION

For the reasons asserted herein, JELD-WEN is entitled to summary judgment as to Plaintiff's Claims. Accordingly, JELD-WEN's Motion for Summary Judgment should be granted.

This the 25th day of October, 2018.

s/ Megan M. Stacy

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JELD-WEN, INC. f/k/a CRAFTMASTER MANUFACTURING, INC. d/b/a CMI'S MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS ASSERTED BY PLAINTIFF LISMORE VILLAGE HOMEOWNERS' ASSOCIATION** has been served upon all counsel of record by delivering a copy of the same via electronic mail, and by depositing a hard copy in the United States mail, sufficient postage prepaid, to the parties the discovery or pleading is directed at, addressed as follows:

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This the 25th day of October, 2018.

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