

STATE OF NORTH CAROLINA

COUNTY OF YANCEY

ELIZABETH WALL, ROBERT  
ROMETO,  
PEGGY ROMETO, RAYMOND  
BOURNE, MAURICA BOURNE,  
CALVIN HUNKELE and DOROTHY  
HUNKELE,

Plaintiffs,

and

JAMES D. SINK, RANDALL F.  
HAFER, CYNTHIA N. HAFER,  
RICHARD A. THOMAS AND JAMIE  
M. THOMAS,

Intervenor Plaintiffs,

vs.

MOUNTAIN AIR DEVELOPMENT  
CORPORATION, TYNER  
CONSTRUCTION, INC., MELROSE  
DESIGN GROUP, P.A., f/k/a SCOTT R.  
MELROSE & ASSOCIATES, P.A.,  
PAUL SCHMITT ARCHITECTURAL  
DESIGN STUDIO, PLLC, JOHNSON,  
LASCHOBER & ASSOCIATES, P.C.,  
CAVANAUGH AND ASSOCIATES,  
P.A., YOUNG AND MCQUEEN  
GRADING COMPANY, INC., and  
FROEHLING & ROBERTSON, INC.

Defendants.

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

07 CvS 19

**INTERVENOR COMPLAINT  
(Jury Trial Demanded)**

**COME NOW** James D. Sink, Randall F. Hafer, Cynthia N. Hafer, Richard A. Thomas  
and Jamie M. Thomas (“Intervenor Plaintiffs”), and state their Intervenor Complaint as follows:

1. Plaintiffs Elizabeth Wall, Robert Rometo, Peggy Rometo, Raymond Bourne, Maurica Bourne, Calvin Hunkele and Dorothy Hunkele ("Plaintiffs") in the above-captioned action are unit owners in the Austin View Villas Condominiums.

2. The above-captioned action was filed by Plaintiffs to recover damages as a result of alleged defects in the planning, design, engineering, supervision, inspection and construction of the Austin View Villas Condominiums and a portion of the Mountain Air Country Club golf course which is adjacent to and below the condominiums.

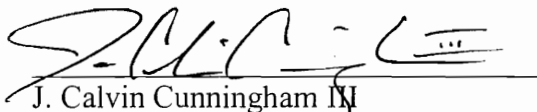
3. Movants also are owners of units in the Austin View Villas Condominiums and are similarly situated to the Plaintiffs named in the above-captioned action.

4. Movants seek to intervene in certain claims alleged in the Complaint in this action on the grounds that the above-captioned action and Movants' claims state common questions of law and fact and permitting Movants to intervene will serve the interests of justice and judicial efficiency.

5. Counsel for the Plaintiffs has expressed his agreement to this Motion and the filing of an Intervenor Complaint.

6. The proposed claims of Movants are set forth in the pleading attached hereto as Exhibit A.

This the 21<sup>st</sup> day of May, 2007.



J. Calvin Cunningham III

NC State Bar No. 27216

*Attorney for Movants and Intervenor Plaintiffs*

*James D. Sink, Randall F. Hafer, Cynthia N. Hafer,*

*Richard A. Thomas and Jamie M. Thomas*

KILPATRICK STOCKTON LLP  
1001 West Fourth Street  
Winston Salem, NC 27101  
(336) 607-7300 (telephone)  
(336) 607-7500 (fax)

STATE OF NORTH CAROLINA

**FILED** IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

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2007 MAY 22 P 1:33 07 Cvs 19

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ROMETO,  
PEGGY ROMETO, RAYMOND  
BOURNE, MAURICA BOURNE,  
CALVIN HUNKELE and DOROTHY  
HUNKELE,

Plaintiffs,

and

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P.A., YOUNG AND MCQUEEN  
GRADING COMPANY, INC., and  
FROEHLING & ROBERTSON, INC.

Defendants.

**MOTION TO INTERVENE**

Pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, James D. Sink, Randall F. Hafer, Cynthia N. Hafer, Richard A. Thomas and Jamie M. Thomas ("Movants") hereby move the court for permission to intervene in the above-captioned action as Intervenor Plaintiffs on the following grounds:

1. Intervenor Plaintiffs bring this action to recover damages they have and will suffer as a result of defects in the planning, design, engineering, supervision, inspection, and construction of (i) condominium units in Buildings C and D of the Austin View Villas (the “Units”), which are part of the Mountain Air development near Burnsville in Yancey County, North Carolina (“Mountain Air”) and (ii) the portion of the Mountain Air Country Club golf course (the “Golf Course”), which is adjacent to and below the Units.

2. As a result of these defects, (i) in 2003, the foundations of the Units began cracking and (ii) in late 2004, the foundations of the Units began and/or continued moving and “sliding” on the side of the mountain upon which the Units had been constructed, causing the foundations, wall structures, floors, and other components of the Units to crack and to deteriorate substantially.

3. As a consequence, the Units became—and remain—completely uninhabitable, and the Intervenor Plaintiffs have been deprived entirely of the use and enjoyment of their Units since January 2005. The defects in the planning, design, engineering, supervision, inspection, and construction of the Units have caused and will cause the Intervenor Plaintiffs to incur substantial expenses, loss of use, and, upon information and belief, permanent loss of value with regard to the damaged Units.

4. Intervenor Plaintiff James D. Sink (“Sink”) is a citizen and resident of Chapel Hill, North Carolina and is the owner of Unit C-1 at the Austin View Villas.

5. Intervenor Plaintiffs Randall F. Hafer and Cynthia N. Hafer (“Hafer”) are citizens and residents of Marietta, Georgia and are the owners of Unit D-3 at the Austin View Villas.

6. Intervenor Plaintiffs Richard A. Thomas and Jamie M. Thomas (“Thomas”) are citizens and residents of Cary, North Carolina and are the owners of Unit D-2 at the Austin View Villas.

7. Upon information and belief, Defendant Mountain Air Development Corporation (“MADC”) is a North Carolina corporation with its principal office and place of business in Yancey County, North Carolina, and was the developer of the Golf Course and the Austin View Villas, in which the Units are located.

8. Upon information and belief, Defendant Tyner Construction, Inc. (“Tyner”) is a North Carolina corporation with its principal office and place of business in Yancey County, North Carolina and was the general contractor for the Units.

9. Upon information and belief, Defendant Melrose Design Group, P.A. (formerly known as Scott R. Melrose & Associates, P.A.) (“Melrose”) is a North Carolina professional architectural and design association with its principal office and place of business in Buncombe County, North Carolina and was responsible for designing the layouts of the Units and a portion of the planning and design work for the Golf Course.

10. Upon information and belief, Defendant Paul Schmitt Architectural Design Studio, PLLC (“Schmitt”) is a North Carolina professional architectural and design corporation with its principal office and place of business in Macon County, North Carolina and was responsible for designing the Units.

11. Upon information and belief, Defendant Johnson, Laschober & Associates, P.C. (“Johnson”) is a Georgia professional engineering design corporation with its principal place of business in Augusta, Georgia which has done and is doing business in North Carolina and was responsible for designing the foundations for the Units.

12. Upon information and belief, Defendant Cavanaugh and Associates, P.A. (“Cavanaugh”) is a North Carolina professional association with its principal office and place of business in Forsyth County, North Carolina and was responsible for a portion of the planning and design work for the Austin View Villas and the adjacent portion of the Golf Course.

13. Upon information and belief, Defendant Young and McQueen Grading Company, Inc. (“Young and McQueen”) is a North Carolina corporation with its principal office and place of business in Yancey County, North Carolina and was the grading contractor for, among other things, the portion of the Golf Course adjacent to and below the Units.

14. Upon information and belief, Defendant Froehling & Robertson, Inc. (“F&R”) is a Virginia professional corporation with its principal place of business in Richmond, Virginia and with an office in Asheville, North Carolina, and was responsible for geotechnical subsurface engineering investigation for Austin View Villas prior to construction of the Units as well as after the foundation of the Units started cracking in 2003.

15. Jurisdiction is proper in this Court pursuant to N.C. Gen. Stat. § 1-75.4.

16. Venue is proper in this Court pursuant to N.C. Gen. Stat. §§ 1-80 and 1-82.

17. In 2002 and 2003, MADC developed the Austin View Villas—a multi-building condominium project in the Mountain Air development in Yancey County, North Carolina. The Austin View Villas, which include the Units that are the subject of this action, were developed and constructed on a steep side of a mountain.

18. To promote the sales of the Units, MADC published written materials, which, among other things, described the construction of the Austin View Villas as follows:

- a. “we have set defined Standards of Performance in order to satisfy you;”
- b. “our ... plans are architecturally set and implemented by a highly qualified construction company;”
- c. “we’re ready to start construction.... Here is how your Mountain Air home will be built:”
  - “The Foundation: ... Footings are installed on approved, bearing soils ... Piers and foundations are erected to carry the load of the house ... The foundation is inspected to verify that it meets all building code requirements....;”

- “[W]e install the foundation ... according to state and local building codes of North Carolina ... The wall structure will vary according to design of the structures and with the building site conditions;”
  - “The foundation of your home has been designed and installed according to the recommendations of an engineer;”
  - “We construct the foundation of your home beginning with an excavation into the earth;”
- d. “We thank you for the trust and confidence ... you have demonstrated by choosing ... [MADC]. By being straightforward with you, you will know what to expect from us before, during and after construction....;”
  - e. “[O]ur contractor, with our approval, obtains all materials and labor incorporated into your home.... This insures quality control which ... gives us a warranty on which we can rely;”
  - f. “The layout has been carefully planned....;”
  - g. “Because of variations in slope ... soil and rock strata conditions ... your foundation may be notably different from your neighbors’ foundation ...;”
  - h. “Our company will build your new home to the quality standards that you see demonstrated in all of our residential construction;”
  - i. “We work in conjunction with the construction company, who inspects every step of construction and is responsible for quality control. In addition ... an engineer or architect conducts a number of inspections at different stages of construction. Your home must pass each inspection before construction continues;”
  - j. “Your home is built through the combined efforts of specialists ... from excavation and foundation through ... finish work ... [i]n order to ensure you the highest possible standard of construction....;”
  - k. “[MADC] ... and Young-McQueen Grading Company have worked many months in advance of your purchase ... by ... blasting, hauling and clearing....;”
  - l. “The contractor building for [MADC] ... has constructed your home with quality materials and the labor of experienced craftsmen. All work is done under our supervision to attain the best possible results for your investment ... once assembled ... quality materials and workmanship have been used in your home;” and
  - m. “[MADC] is proud of all the homes we build ... we strive to create long-lasting value.”

19. MADC delivered copies of sales books containing the above-referenced and other express representations to the Intervenor Plaintiffs prior to their executing contracts to purchase their respective Units.

20. Subsequent to receiving and relying on the above-referenced and other representations from MADC, each of the Intervenor Plaintiffs contracted with MADC for the purchase of their respective Units.

21. MADC prepared each of the sale contracts, which, among other things, provided that:

- a. “[MADC will] locate the unit so as to minimize grading and tree removal and taking into account the existing and resulting geographic and topographic conditions;”
- b. “[MADC] shall contract with a contractor licensed by the State of North Carolina and such other subcontractors as it deems necessary for construction of the Building....;”
- c. “All materials and equipment ... required to complete the Unit for occupancy shall be provided for and securely installed in place....;”
- d. “Construction shall be in accordance with plans and specifications as set forth in ... the Public Offering Statement....;” and
- e. “[MADC] shall cause the erection of the Unit ... consistent with the provisions of N.C.G.S. § 47C-2-109 [the North Carolina Condominium Act].”

22. The sale contracts that MADC prepared also provided that:

- a. “[MADC] agrees that all warranties, express or implied, made by [MADC’s] contractor [and] ... any subcontractor ... shall belong to and are transferred to Purchaser;” and
- b. “[MADC] warrants for a period of one year following closing ... the unit is free of material defects....”

23. Upon information and belief, MADC employed, worked closely with, and/or supervised the following Defendants in developing and constructing the Units: (i) Tyner, the general contractor that constructed the Units, (ii) Melrose, the architect that provided the layouts

for the Units, (iii) Schmitt, the architect that designed the Units and their foundations, (iv) Johnson, the engineer that assisted Schmitt in designing the Units, and (v) F&R, the geotechnical subsurface engineers that, among other things, provided a subsurface report for Austin View Villas prior to construction and advised MADC regarding foundation cracks in the Units in 2003 (collectively, the “Unit Builders”). As represented by MADC, MADC “work[ed] in conjunction with [Tyner].” Moreover, as represented by MADC, it and Tyner worked directly with each of these other Defendants during “every step of construction” so that “all work [was] done under [their] supervision,” and they were “responsible for quality control.” In addition, as represented by MADC, the Units were constructed through the “combined efforts” of all of the Unit Builders “to ensure ... the highest possible standard of construction.”

24. MADC and the Unit Builders constructed the units in 2002 and 2003. Upon information and belief, contrary to MADC’s representations and warranties, MADC and the Unit Builders failed to plan, design, engineer, supervise, inspect, and/or construct the Units in a workmanlike and proper manner and, among other things:

- a. failed to conduct adequate soil borings or other geotechnical investigation of the soil upon which the Units and their foundations were erected;
- b. failed to conduct any preliminary engineering or other analysis of the capacity of the soil and the foundations to carry the load of the Units;
- c. failed to install the footings, foundations, and piers upon soil which was capable of carrying the load of the Units;
- d. failed to install foundations of the Units according to proper design standards or upon recommendations of an engineer which accounted for either the (i) “building site conditions” or (ii) “variations in slope ... soil and rock strata conditions” encountered and expressly anticipated;
- e. failed to “carefully plan” the layout of the Units, or to have the “construction company ... engineer or architect” properly supervise and “inspect” the construction of the Units and their foundations;
- f. failed to install the foundations of the Units according to applicable building codes; and

- g. did not make any independent plan or analysis of the site conditions prior to constructing the Units, but simply re-used existing plans for other sites with minor, superficial adjustments (*i.e.*, they merely “tweaked” the old plans).

25. Hafer took possession of their Unit in May 2003 and Thomas took possession of their Unit in November 2002. Sink took possession of his Unit in or around the same period of time as Hafer and Thomas. As a result of the above-referenced problems and defects, the Units became uninhabitable at the end of the year 2004. The Intervenor Plaintiffs each became aware of defects in their Units on or around the turn of the new year 2005.

26. Upon information and belief, prior to completing the design of or starting construction on the Units and the portion of the Golf Course adjacent to and below the Units, Defendants were on notice that MADC had been advised to retain a geotechnical engineer who could be involved with and participate in all stages of the design, coordination, and construction of the Units and the adjacent portion of the Golf Course. In 2001, MADC employed a geotechnical engineer to make a preliminary evaluation of the soil and geologic conditions in and around the areas on which the Units and the adjacent portion of the Golf Course were to be built. Upon information and belief, the engineer made a written report to MADC, which stated that the topographic and geologic conditions of the soil “will require continuous evaluation” and “continuous monitoring” during construction. Moreover, upon information and belief, the engineer informed MADC in subsequent discussions that it was “important” that a qualified geotechnical engineer be retained for that purpose and prepared a budget outlining the costs of his performing such monitoring/evaluation services.

27. Notwithstanding the engineer’s report and subsequent discussions in 2001, neither MADC nor any of the other Defendants retained a geotechnical engineer to be involved with and participate in all stages of the design, coordination, and construction of the Units and the adjacent portion of the Golf Course. Instead, upon information and belief, F&R was employed

in 2001 to perform a subsurface report for only two of the five buildings at Austin View Villas, which report, among other things, failed (i) to identify the existence of deep colluvial soils or to explain the inherent instability of such soils, particularly following excavation, which permits surface water intrusion, or (ii) to inform or advise MADC or the other Defendants that a slope stability analysis or other appropriate evaluation of the soil and geologic conditions of the site be conducted prior to the start of construction.

28. In 2003, the Units began exhibiting cracks in their foundations. Upon information and belief, MADC employed F&R in 2003 to evaluate and inspect the foundation cracks in the Units, and F&R should have but failed to (i) properly inspect or investigate the geotechnical reasons for the cracks or (ii) inform or advise MADC or the other Defendants that a slope stability analysis or other appropriate evaluation of the soil and geologic conditions of the site be conducted prior to the start of construction.

29. In the summer of 2004, prior to beginning construction on the portion of the Golf Course adjacent to and below the Units, MADC first excavated portions of the mountain below the units in a development called Hemlock Bluffs Condominiums (“Hemlock Bluffs”), which is adjacent to Buildings C and D of the Austin View Villas. Upon information and belief, MADC employed Melrose and Cavanaugh to plan and design the Golf Course and employed Young and McQueen to perform the grading work on the Golf Course (collectively, the “Golf Course Builders”).

30. During the construction of the portion of the Golf Course adjacent to and below the units in Hemlock Bluffs, the Hemlock Bluffs units began moving and sliding. As a result of this moving and sliding, the foundations, wall structures, floors, and other components of the Hemlock Bluffs units cracked and deteriorated, causing substantial damages.

31. Upon information and belief, the problems with the Hemlock Bluffs units were caused by (i) MADC's and the Unit Builders' failure to construct Hemlock Bluffs in accordance with the contract documents and in a workmanlike and proper manner—similar to their failures with respect to the Units, as set forth above—and (ii) MADC's and the Golf Course Builders' failure to properly plan, design, grade, and construct the Golf Course.

32. MADC, the Unit Builders, and the Golf Course Builders knew about problems with and damages to the Hemlock Bluffs units before MADC and the Golf Course Builders began working on the portion of the Golf Course adjacent to and below the Units. In fact, upon information and belief, in August 2004 MADC hired Bunnell-Lammons Engineering, Inc. ("BLE"), a geotechnical engineering company, to analyze and to recommend immediate remedial action with respect to the slope collapse below Hemlock Bluffs. In a letter dated August 20, 2004, BLE repeated its oral recommendations that "no further excavation be made at the toe of the slope," that "a buttress ... of earthen fill approximately 20-25 feet in height and 30-40 feet in width [be] placed at and against the toe of the existing slope. This will serve to stabilize the toe against additional lateral movement," and that "soil supporting the wall foundation on the downhill side of the [Hemlock Bluffs] condominium structure should be stabilized/underpinned." Moreover, in a letter dated September 27, 2004, BLE stated that its initial determination as to the cause of the slope collapse was the combination of (i) the presence of approximately five feet of colluvial soils at the site surface of Hemlock Bluffs and (ii) the removal of the soils at the toe of the slope of the Golf Course below Hemlock Bluffs.

33. Upon information and belief, in September 2004, after the slope failure at Hemlock Bluffs but prior to further construction on the Golf Course adjacent to and below Austin View Villas and Hemlock Bluffs, MADC employed F&R to perform the first slope stability analysis for the site. Upon information and belief, as part of its slope stability analysis,

F&R indicated that the “safety factors” for continuing the construction adjacent to and below the Units were “marginal” but failed to recommend any further evaluation of the stability of the Units prior to continuing work on the Golf Course adjacent to and below the Units or that such work should not be done.

34. During the fall of 2004, despite knowing about the damage to the Hemlock Bluffs units caused by their working on the portion of the Golf Course adjacent to and below Hemlock Bluffs, MADC and the Golf Course Builders began working to extend the Golf Course to the property adjacent to and below the Units. Upon information and belief, MADC employed Melrose and Cavanaugh to plan and design the portion of the Golf Course adjacent to and below the Units and also employed Young and McQueen to perform the grading work on this portion.

35. Consistent with the problems at the Hemlock Bluffs units, when MADC and the Golf Course Builders began working on the portion of the Golf Course adjacent to and below the Units, the Units moved and slid, and their foundations, wall structures, floors, and other components cracked and deteriorated, which resulted in substantial damages.

36. As a result of the damage done to the Units, the Units were uninhabitable in or around late 2004 to early 2005, and the Intervenor Plaintiffs have been unable to occupy and live in their Units since that time.

37. Upon information and belief, before starting their work on the portion of the Golf Course adjacent to and below Hemlock Bluffs, MADC and the Golf Course Builders made no preliminary soil or geotechnical, topographical, engineering, or other analysis to determine the impact that Golf Course construction work might have upon those structures and their foundations.

38. Moreover, despite knowing that their work on the Golf Course caused damage to the Hemlock Bluffs units, MADC and the Golf Course Builders proceeded to work on the

portion of the Golf Course adjacent to and below the Units (i) without having conducted any preliminary analyses or (ii) without conducting any subsequent analyses to determine the relationship between their work and the damages incurred at Hemlock Bluffs and to ascertain what actions were required to avoid similar damages to the Units.

39. Upon information and belief, MADC and the Golf Course Builders accepted full responsibility for the damages caused by their work on the portion of the Golf Course adjacent to and below the Hemlock Bluffs units, repaired those damages, and have restored the Hemlock Bluffs units such that they are now habitable and occupied by their owners. Upon information and belief, in late 2004, MADC and the Golf Course Builders ceased any further construction on the portions of the Golf Course adjacent to and below Hemlock Bluffs and the Units.

40. Since late 2004, the Austin View Villas homeowners association, which is responsible for the “common areas” of the Units, has been engaged in extended efforts to repair the foundations and structures of the Units to make them habitable so that the Intervenor Plaintiffs might be able to occupy their Units. Upon information and belief, MADC alone has agreed to finance these repair efforts.

41. To date, however, the efforts to repair the common areas associated with the Units have not been successful. Moreover, none of the Defendants has attempted to repair, or compensate the Intervenor Plaintiffs for, the damages to their respective Units. As a result, the Intervenor Plaintiffs have been unable to use or to live in their Units since January 2005 and do not know if or when they will ever be able to do so again. Accordingly, the Intervenor Plaintiffs have incurred and will continue to incur substantial expenses associated with their ownership of the Units, which are presently uninhabitable and essentially valueless.

42. Subsequent to late 2004, when their Units became uninhabitable by reason of the events set forth above, MADC represented to the Intervenor Plaintiffs that it would be

responsible for “any direct expense incurred, legally or otherwise, of executing the repairs or recovering the cost of the repairs of the damages from [anyone] ... found to be responsible for causes contributing to the problems” there, and to do so “whether we did anything wrong or not.”

43. Under the North Carolina Condominium Act, if it is determined that MADC or any of the other Defendants violated their express or implied warranties of quality under that Act, as set forth above, MADC and such other Defendants also may be assessed with the Intervenor Plaintiffs’ attorneys fees pursuant to N. C. Gen. Stat. § 47C-4-117 thereof.

44. The actions of the Defendants have caused damages to each of the Intervenor Plaintiffs in excess of \$10,000.

**FIRST CAUSE OF ACTION**  
**(Breach of Contract against MADC)**

45. The allegations of paragraphs 1 through 44 are incorporated by reference and realleged as if fully set forth herein.

46. There were no conditions remaining to be fulfilled by the Intervenor Plaintiffs under their respective sales contracts, and MADC, therefore, was obligated to perform all of its obligations thereunder.

47. MADC has breached the sales contracts by, among other things, failing to plan, design, engineer, supervise, inspect, and construct the Units and the Golf Course in a workmanlike and proper manner.

48. As a result of MADC’s breach of the contract, each of the Intervenor Plaintiffs has been damaged in an amount that is in excess of \$10,000 and will be proven at trial.