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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No.: 2012-213237

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

v.

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

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

And

Of Whom Hutch N Son Construction, Inc. and Upstate Utilities, Inc. are the Respondents.

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SC Court of Appeals Page 1

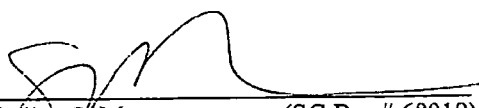
**RESPONDENT HUTCH N SON CONSTRUCTION, INC.'S
MOTION TO STRIKE**

Pursuant to Rules 240, 209, and 210 of the South Carolina Appellate Court Rules, Respondent Hutch N Son Construction, Inc. ("HNS") moves this Court for an order striking the following items from Appellants' Designation of Matter: (1) Item Number 9, which is the general designation without enumerated pages of the entire "Transcript of Proceedings dated September 5, 2012," on the grounds that only 20 pages of the 218-page transcript concern the motions and order on appeal; and (2) Item Number 12, which contains enumerated pages from the "Deposition of Randy Still on August 15, 2012" on the grounds that those deposition pages were never submitted to the circuit court. HNS further requests that this Court strike from Appellants' brief any references to the above-referenced material.

HNS has attempted to consult with counsel for Appellants regarding these issues and has informed counsel for Appellants of its intent to file this motion unless these issues were resolved by agreement. No agreement was reached. Accordingly, HNS respectfully requests, pursuant to Rules 240, 209, and 210, SCACR, that this Court strike the above-referenced items. In support of this Motion and in accordance with Rule 240(c), SCACR, HNS has attached hereto a memorandum of authority and exhibits.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

BY: 

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**ATTORNEYS FOR RESPONDENT
HUTCH N SON CONSTRUCTION, INC.**

Columbia, South Carolina
April 22, 2013.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No.: 2012-213237

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

v.

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

And

Of Whom Hutch N Son Construction, Inc. and Upstate Utilities, Inc. are the Respondents.

**RESPONDENT HUTCH N SON CONSTRUCTION, INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO STRIKE**

Pursuant to Rules 240, 209, and 210 of the South Carolina Appellate Court Rules, Respondent Hutch N Son Construction, Inc. ("HNS") moves this Court for an order striking the following items from Appellants'¹ Designation of Matter: (1) Item Number 9, which is the general designation (without enumerated pages) of the entire "Transcript of Proceedings dated September 5, 2012," (hereinafter the "Transcript") on the grounds that only 20 pages of the 218-page Transcript concern the circuit court decision on appeal; and (2) Item Number 12, which contains enumerated pages from the "Deposition of Randy Still on August 15, 2012" (hereinafter the "Deposition") on the grounds that those pages were never submitted to the circuit court. (See Exhibit A, Appellants' Designation of Matter). HNS further requests that this Court strike from Appellants' brief any references to the above-referenced material and prohibit Appellants from relying on this material in their arguments on appeal.

HNS has attempted to consult with counsel for Appellants regarding these issues and has informed counsel for Appellants of its intent to file this motion unless these

¹ As noted in the Respondent Brief filed by HNS contemporaneously herewith, Rick Thoennes is listed improperly as an Appellant because Thoennes never asserted his own cross-claims against HNS or Upstate in the first instance. (Respondent Brief, p. 5 n.1). The circuit court found in its order granting summary judgment to HNS and Upstate – the decision now on appeal – that "there is not a cross claim by Defendant Rick Thoennes against either Upstate Utilities or HNS." (Respondent Brief, p. 5 n.1). Appellants have not asked the circuit court to reconsider its decision, and Thoennes is not a proper Appellant because there is no decision against him to appeal. For ease of reference in this Memorandum, however, HNS uses the term "Appellants" in the plural but maintains its objection to inclusion of Thoennes in the appeal.

issues were resolved by agreement. (See Exhibit B, March 5, 2013 Correspondence to Ward Law Firm from Gallivan, White & Boyd, P.A). Appellants responded by refusing to amend their Designation or specify pages of the Transcript on which they rely, and they maintain that the above-referenced items are proper for inclusion in the Record on Appeal. (See Exhibit C, March 11, 2013 Correspondence to Gallivan, White & Boyd, P.A. from Ward Law Firm). The South Carolina Appellate Court Rules dictate otherwise.

The South Carolina Supreme Court has made clear that “the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.” *Henning v. Kaye*, 307 S.C. 436, 437-38, 415 S.E.2d 794, 794-95 (1992). It is therefore “incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review,” and neither “substantial compliance” nor “instances of non-compliance” is sufficient. *Henning*, 307 at 437-38; 415 S.E.2d at 794-95.

I. This Court Should Strike Appellants’ Designation Of The Entire September 5, 2012 Transcript That Contains Irrelevant Material And Lacks Any Reference To The Pages On Which Appellants Rely.

It is axiomatic that the Appellants’ Designation of Matter must certify that it contains no “matter which is irrelevant to the appeal,” Rule 209(b),(c), SCACR, and must “set forth with specificity those parts of the transcript . . . which [they] propose[] to include in the record on appeal,” Rule 209(a), SCACR. Appellants’ general designation of the entire Transcript meets neither of these requirements.

First, Appellants have designated 198 pages of the Transcript that are not relevant to the issues on appeal. The circuit court heard oral argument on September 5, 2012 on

all of the motions pending in the case at that time, and the full 218-page Transcript includes the court's consideration of all of those motions. In this appeal, however, the *only* circuit court decision at issue is the grant of summary judgment to HNS and Upstate Utilities, Inc. ("Upstate") on the motions they filed, (*see* Exhibit D, Notice of Appeal), and oral argument on those motions comprises only 20 pages of the Transcript, (*see* Exhibit E, September 25, 2012 Hearing Transcript, pp. 35-55).

It is evident that the court began and concluded its consideration of HNS and Upstate's summary judgment motions within the confines of those 20 pages. (*See* Ex. E, Hrg. Tr. pp. 35-55). The circuit court considered "numerous motions to dismiss and for summary judgment" on the day of the hearing, (Ex. E, Hrg. Tr., p. 35, l. 21 - p. 36, l. 2), but made clear that "each motion will stand on its own," (Ex. E, Hrg. Tr., p. 40, l. 13 - p. 41, l. 6). In fact, the court specifically instructed Appellants' counsel to present a separate argument for each motion to be heard:

Appellants' Counsel: But again, on a logistical issue, I have received many motions for summary judgment against my client on my cross claims including . . . Hutch N Son who would be Marick's direct contractor who they hired . . . I don't know whether you want to hear those at the same time or whether you want to hear them separately, if you want me to address each motion for summary judgment against Marick individually or in some type of a general response? I suppose ---

The Court: **Well, I think each motion will stand on its own really, so I think the better way to do it would be to, as one is heard, then the response be at the same time.**

Appellants' Counsel: Your Honor, to start with --

The Court: Now, when they're joint motions, of course, all parties would be...

(Ex. E, Hrg. Tr., p. 40, l. 13 - p. 41, l. 6)(emphasis added).² Appellants' counsel not only acquiesced to that procedure, but he emphasized his intent to note factual issues by "relat[ing] them to each one of the subcontractors that is bringing the motion." (Ex. E, Hrg. Tr. p. 43, l. 24 - p. 44, l. 3).

Not only did the circuit court instruct the parties to argue HNS and Upstate's motions independent of the other motions it considered that day,³ but the court preliminarily ruled from the bench at the conclusion of HNS and Upstate's summary judgment argument *and permitted counsel for HNS and Upstate to leave the courtroom thereafter*. The circuit court confirmed before concluding argument on the HNS and Upstate summary judgment motions:

The Court: Okay. So is that your cross claim? Is there only one cross claim?

Appellants' Counsel: No, Your Honor. We're going to have a lot of those.

The Court: Okay. All right. Does that let y'all [HNS and Upstate] out of this?

² HNS and Upstate's motions were considered simultaneously because "Upstate Utilities was [HNS's] subcontractor for part of the work that [HNS was] hired by Marick to do, which included the backfill against the units." (Ex. E, Hrg. Tr. p. 47, ll. 8-15). In its motion for summary judgment, HNS specifically incorporated Upstate's summary judgment arguments. (See Exhibit F, Hutch N Son's August 10, 2012 Motion for Summary Judgment). Appellants also filed a summary judgment motion addressing equitable indemnity, (Ex. E, Hrg. Tr. p. 40, ll. 18-21), but conceded at the conclusion of the hearing that the motion was moot, (Ex. E, Hrg. Tr. p. 54, ll. 3-11).

³ This "stand-alone" motion approach made particular sense with respect to HNS and Upstate's summary judgment motions. Unlike many of the other sub-contractors defending against Appellants' cross-claims, the cross-claims brought by Appellants against HNS and Upstate were the only remaining claims against them when their motions were heard – HNS and Upstate had settled claims by the plaintiffs and cross-claims by other co-defendants prior to the hearing. (Ex. E, Hrg. Tr., p. 36, ll. 1-2, 13-15; p. 47, ll. 8-15). That unique posture differentiated the motions filed by HNS and Upstate from the other defendants' motions heard on the same day.

HNS Counsel: I assume that means your motions against us are moot?

Appellants' Counsel: Yes.

(Ex. E, Hrg. Tr. p. 54, ll. 3-11). The trial court asked HNS and Upstate to draft the order ruling in their favor, (Ex. E, Hrg. Tr. p. 55, ll. 11-16), and counsel for HNS and Upstate exited the courtroom when argument on their motions concluded, (Ex. E, Hrg. Tr. p. 55, ll. 11-16). Counsel for HNS and Upstate were not even present for the arguments included in the other pages of the Transcript.

Nevertheless, Appellants inexplicably have designated the entire Transcript for inclusion in the Record on Appeal, in contravention of Rule 209(b),(c), SCACR, and have done so without "set[ting] forth with specificity" any pages on which they rely, in contravention of Rule 209(a)), SCACR. Appellants' Designation contains no reference to particular pages of the Transcript, and Appellants' Initial Brief cites to only one page of the Transcript in a footnote. (*See* Exhibit G, Appellants' Brief, p. 12, n.1). Significantly, that one page cited by Appellants is one of the 20 pages of Transcript containing the circuit court's consideration of HNS and Upstate's summary judgment motions. It is anyone's guess which of the remaining 198 pages Appellants deem pertinent to this appeal, and designation of the entire transcript is unnecessary, confusing, and inappropriate.

Appellants' failure to specify which portions of the Transcript on which they rely, and failure to ensure that the only material designated is relevant to the appeal, contravenes the standards established by the Rules and affirmed by the South Carolina

Supreme Court. Appellants' non-compliant designations, and all references in Appellants' arguments to those non-compliant designations, should be stricken.

II. This Court Also Should Strike Appellants' Separate Designation Of Deposition Pages That Were Never Filed Or Presented To The Circuit Court.

The South Carolina Appellate Court Rules also admonish that "the Designation may only propose to include portions of . . . materials which may be properly included in the Record on Appeal," Rule 209(b), SCACR, and cannot include "matter which was not presented to the lower court or tribunal," Rule 210(c), SCACR. In contravention of these Rules, Appellants have designated specific pages from the Deposition of Randy Still for inclusion in the Record even though those pages were never submitted separately to the circuit court or filed as evidence in the underlying case. (*See* Ex. A, Designation of Matter, No. 12 (identifying pages 163, 164, 164 [sic], 170, 173, and 174); *see also* Ex. G, Appellants' Brief, pp. 13-15).

Appellants' only attempt to present testimony from the Still Deposition to the circuit court was in the form of excerpted quotes imbedded in the body of an opposition memorandum – an opposition memorandum that has been separately designated by Appellants for inclusion in the Record on Appeal. (*See* Ex. A, Designation of Matter, No. 6). Whether that memorandum can be considered on appeal is part of the subject of Respondent Upstate's recent Motion to Dismiss/Motion to Strike, which was filed on April 12, 2013.⁴ Nevertheless, even assuming, *arguendo*, that the opposition

⁴ As HNS notes in its Respondent Brief filed contemporaneously herewith, Appellants' counsel informed the circuit court that at the hearing that he "ha[d] prepared a brief which I have; which I would be more than happy to supplement if the Court requires that to consider these motions." (Ex. E, Hrg. Tr. p. 41, ll. 7-9). When counsel for Upstate informed the court that he had not received the submission and asked when it was sent, Appellants' counsel stated that it went out "[l]ast night." (Ex. E, Hrg. Tr. p. 49,

memorandum was properly designated for inclusion in the Record on Appeal, there is no question that it did not attach the pages from Still's Deposition.⁵ Those deposition pages were not separately filed by Appellants with the circuit court, and Appellants did not once mention the Still Deposition during oral argument on HNS and Upstate's motions. (See Ex. E, Hrg. Tr., pp. 35-55).

Because these deposition pages were never presented to the lower court, they did not and could not have formed the basis for any rulings made by the lower court, from which Appellants now appeal. The plain language of Rule 210(c), SCACR, requires that these matters be excluded from the Record and not considered by this Court. *See also State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 618-19 (Ct. App. 2007) (agreeing with the position taken by the State that the Appellate Court should not consider a co-defendant's written statement because it was not raised to or ruled on by the trial court and, therefore, was not properly before the Appellate Court).

Conclusion

HNS respectfully requests that this Court strike Appellants' irrelevant and unspecified designation of the entire September 5, 2012 Transcript as well as Appellants'

ll. 14-17). According to Appellants' counsel, he emailed the opposition memorandum to the Clerk of Court the evening before the hearing. The memorandum was not filed as part of the circuit court record until March 13, 2013, when Appellants' counsel requested the filing for this appeal. (See Exhibit H, March 11, 2013 Correspondence from Ward Law Firm to Honorable Alexander S. Macaulay; Exhibit I, Appellants' Opposition Memorandum dated September 4, 2012/filed March 13, 2013, Cover Page). These circumstances at least engender uncertainty about submission of the opposition memorandum.

⁵ Appellants addressed multiple sub-contractor motions for summary judgment in the opposition memorandum, and the only evidentiary materials attached thereto relate to motions filed by defendants other than HNS and Upstate. (See Ex. I, Appellants' Opposition Memorandum dated September 4, 2012/filed March 13, 2013, Pg. 1 and Exs. A-C).

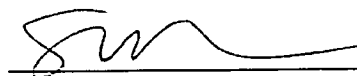
designation of deposition pages that were never presented to the circuit court. HNS requests that Appellants be prohibited from citing to, or relying on, these matters in their briefs and arguments to this Court on appeal.

HNS expressly reserves its right to seek costs at the conclusion of this appeal, pursuant to Rule 222(c), SCACR, to recoup the costs of addressing this irrelevant and non-compliant material.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

BY:


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**ATTORNEYS FOR RESPONDENT
HUTCH N SON CONSTRUCTION, INC.**

Columbia, South Carolina
April 22, 2013.

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
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Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

Of Whom Hutch N Son Construction, Inc., and Upstate Utilities, Inc. are the Respondents.

APPELLANTS' DESIGNATION OF MATTER TO
BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposed the following to be included in the Record on Appeal:

1. Complaint of Stoneledge at Lake Keowee Owners' Association, Inc.;
2. Answer and Cross Claims of Marick Home Builders, LLC;
3. Order Granting Defendants Hutch-N-Son Construction, Inc. and Upstate Utilities, Inc.'s Motions for Summary Judgment;
4. Hutch-N-Son Construction, Inc.'s Notice of Motion and Motion for Summary Judgment;
5. Upstate Utilities, Inc.'s Notice of Motion and Motion for Summary Judgment;
6. Marick Home Builders, LLC's Memorandum in Opposition to Hutch-N-Son Construction, Inc. and Upstate Utilities, Inc.'s Motions for Summary Judgment;
7. Hutch-N-Son Construction, Inc.'s Memorandum in Support of Summary Judgment;
8. Upstate Utilities, Inc.'s Memorandum in Support of Summary Judgment;
9. Transcript of Proceedings dated September 5, 2012;
10. Affidavit of Donny White dated August 23, 2012;
11. Affidavit of Glenn Stewart, M.E., P.E. dated August 20, 2012;
12. Deposition of Randy Still on August 15, 2012, pages 163, 164, 164, 170, 173 and 174l;

I certify that this designation contains no matter which is irrelevant to this appeal.

Jason M. Imhoff (S.C. Bar No. 69355)
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ATTORNEYS FOR APPELLANTS
MARICK HOME BUILDERS, LLC AND
RICK THEONNES

February _____, 2013

EXHIBIT B

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March 5, 2013

VIA E-MAIL TO jimhoff@wardfirm.com

Jason M. Imhoff
The Ward Law Firm, P.A.
Post Office Box 5663
Spartanburg, SC 29304

Re: Stoneledge at Lake Keowee Owners' Association, Inc., *et al.* v. IMK
Development Co., LLC, *et al.*
C.A. No.: 2009-CP-37-0652
Liberty Mutual Claim No.: 22-087512
Travelers Claim No.: B5T9146
GWB File No.: 4435-115

Dear Jason:

As a follow up to our recent conversation, please allow this letter to serve as a request for you to amend your Designation of Matter to be included in the Record of Appeal. The specific issues are as follows:

- 1) Transcript of Proceeding: Pursuant to Rule 209(a), the Designation of Matter shall set forth with specificity those parts of the transcript which are proposed to be part for the Record. Your Designation does not specify which portions of the transcript you wish to include in the Record. As such, please provide the specific page numbers of the Transcript that you propose to include in the Record. Further, Rule 209(b) states that a party shall not include any matter not relevant to the appeal. As we previously discussed, it is Respondents' position that any hearings conducted after the conclusion of the hearing on Respondents' summary judgment motions are not relevant. Thus, it is requested for you to amend your Designation to conform with this rule.
- 2) Deposition of Randy Still: Rule 210(c) provides that the Record on Appeal shall not include matter which was not presented to the lower court. The deposition transcript of Randy Still was never filed with or otherwise presented to the court. As such, it is requested for you to remove this item from your Designation.

Jason M. Imhoff
March 5, 2013
Page 2

- 3) Pleadings referenced in your Designation: You have listed the Complaint and Marick's Answer and Cross Claims in your Designation. As this case involved multiple amended pleadings, please identify with specificity, to include the exact name and date, which pleadings you intended to include in your Designation.

Please let me know your response to these issues no later than the close of business on March 7, 2013.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.



Shelley Sunderman Montague

SSM/ssm

cc: S. Markey Stubbs | mstubbs@brblegal.com

Laura Jordan

From: Charlotte Smith
Sent: Tuesday, March 05, 2013 5:02 PM
To: Jason M. Imhoff; Amanda Steward; Tiffany Pruitt
Cc: Shelley Montague; Laura Jordan; Melissa Urch; Stubbs, Markey
Subject: Stoneledge - Appeal
Attachments: LTR to Imhoff Re DOM.pdf

Importance: High

Jason –

On behalf of Shelley Montague, please find attached hereto a letter to you in the above-referenced appellate matter.

Please let me know if you have any trouble with the attachment.

Thank you.



Gallivan, White & Boyd, P.A.
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EXHIBIT C

THE WARD LAW FIRM, P.A.

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March 11, 2013

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**Re: Stoneledge at Lake Keowee Owners' Association, Inc., et al. vs. IMK
Development Co., LLC, et al. vs. Michael Franz, et al.
Appellate Case No.: 2012-213237**

Dear Shelley:

I am responding to your letter of March 5, 2013. As we discussed, we take a different position than you regarding the Record on Appeal and items to be included. Specifically, in response to your letter we take the following positions:

1) Transcript of Proceeding. As we discussed, we are taking the position that the entire day on September 5, 2012 was spent arguing the same issues and the same law to Judge Macaulay regarding the various subcontractors' Motions for Summary Judgment. As you are aware, Judge Macaulay heard motions all day which involved almost identical facts. After you left, Judge Macaulay continued to hear arguments on the law, including all subcontractors' position that any third party cause of action collapses into equitable indemnity, the standard for unclean hands in an equitable indemnity cause of action, Randy Still's testimony, and other matters relevant to your client's Motion for Summary Judgment as well as all of the other subcontractors. Therefore, we believe that the arguments, submissions, and rulings continuing throughout the day are all relevant to this appeal and are appropriate matters to be considered by the Court of Appeals. Therefore, we stand by our position that the transcript of the entire day is relevant and appropriate for inclusion in the Designation of Matter.

2) Deposition of Randy Still: We believe the portions of Randy Still's deposition and the fact that Randy Still's deposition is still open were pertinent and relevant to this appeal. Additionally, Randy Still's testimony was included in the brief on this matter and is appropriate for inclusion.

3) Pleadings referenced in your Designation: The Complaint that we referenced in our

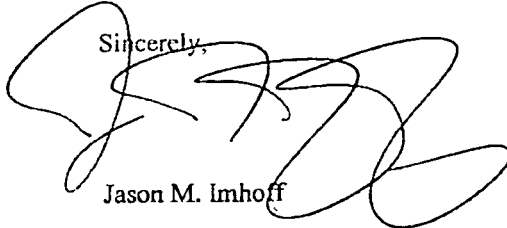
Shelley S. Montague, Esquire
Gallivan, White & Boyd, PA
March 11, 2013
Page 2

Designation is the Third Amended Complaint filed by the Plaintiffs along with Marick's Answer to the Third Amended Complaint and Cross-Claim against numerous subcontractors.

Additionally, I have written the court and requested filed copies of the briefs and matters that we filed. As you are aware, this has been a problem for other subcontractors and parties as the case has grown so large that the Oconee County Clerk of Court apparently has not been able to keep track of documents. I have copied you on my letter to the court requesting that they either provide us a copy of the brief filed, or file the copy that we sent to them.

If you have any questions or concerns, please feel free to give me a call.

Sincerely,

A handwritten signature in black ink, appearing to be "J. Imhoff", written over the word "Sincerely,".

Jason M. Imhoff

JMI/ads
Enclosure

EXHIBIT D

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Case No. 2009-CP-37-652

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

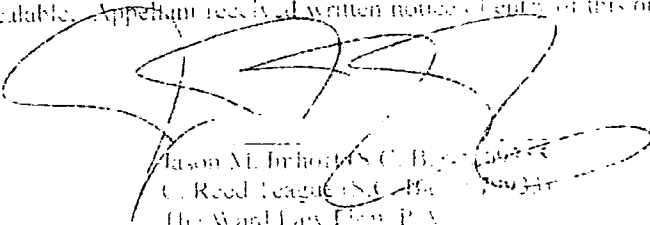
IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Miller Player & Associates, John Ludwig, Clear View Construction, LLC, Michael Franz,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

Of Defendants, Marick Home Builders, LLC and Rick Thoennes Appellants.

Of Defendants, Upstate Utilities, Inc. and Hutch N Son Construction, Inc. Respondents

NOTICE OF APPEAL

Marick Home Builders, LLC and Rick Foreman appeal the order of the Honorable Alexander S. Macaulay dated September 24, 2012 granting summary judgment to the Respondents attached as Exhibit "A". Pursuant to Rule 56, SC RCP, the grant of summary judgment is immediately appealable. Appellant received written notice of entry of this order on September 26, 2012.



Jason M. Inhorn (S.C. Bar # 35062)
C. Reed League (S.C. Bar # 35034)
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P.O. Box 5003
Spartanburg, SC 29304-3188
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ATTORNEYS FOR THE APPELLANTS

October 5, 2012

RESPONDENTS' COUNSEL OF RECORD:

Shelley S. Montague, Esquire
Cullivan White & Boyd, P.A.
PO Box 7368
Columbia, SC 29202
Attorney for Respondent Hutch & Son Construction, Inc.

S. Markey Stubbs, Esquire
Baker Ravenel Beeler
PO Box 8057
Columbia, SC 29202
Attorney for Respondent Upson Builders, Inc.

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF _____

FORM 1

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. _____

1. Name of the person or persons who are the owner or owners of the property: _____

2. State of the property: _____
City or County: _____

For Clerk and Court Office Use Only

3. Name of the person or persons who are the owner or owners of the property: _____

4. State of the property: _____

5. City or County: _____

6. Name of the person or persons who are the owner or owners of the property: _____

7. State of the property: _____
City or County: _____
8. Name of the person or persons who are the owner or owners of the property: _____

9. State of the property: _____
City or County: _____

10. Name of the person or persons who are the owner or owners of the property: _____

STATE OF NEW YORK

County of Albany

IN SENATE

January 12, 1912

SENATE REPORT
ALBANY, N. Y.: JAMES B. HARRIS, STATE
PRINTING OFFICE, 1912.
RECEIVED
JAN 12 1912
ALBANY, N. Y.

SENATE REPORT

OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW YORK
JANUARY 12, 1912
JUDICIAL

STATE OF NEW YORK
JANUARY 12, 1912
ALBANY, N. Y.

ALBANY, N. Y.
JANUARY 12, 1912
ALBANY, N. Y.

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[illegible]

SUMMARY JUDGMENT STANDARD

1. Section 101 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

2. Section 102 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

3. Section 103 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

4. Section 104 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

5. Section 105 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

6. Section 106 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

7. Section 107 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

8. Section 108 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

9. Section 109 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

10. Section 110 of the Administrative Procedure Act provides that the Secretary of the Department of Health and Human Services shall, by rule or regulation, prescribe the general principles and standards which shall govern the conduct of the business of the Department.

The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) for large values of the parameter ϵ . The second part is devoted to the study of the asymptotic behavior of the solutions of the system (1) for small values of the parameter ϵ . The third part is devoted to the study of the asymptotic behavior of the solutions of the system (1) for intermediate values of the parameter ϵ .

13

It is not clear, however, whether the results of this study can be generalized to other populations. The study was conducted in a single, urban, tertiary care hospital in the United States. The study population was predominantly African American, and the majority of the patients were female. The study was limited by the retrospective design, which may have introduced bias. The study was also limited by the lack of a control group. The study was limited by the lack of a control group. The study was limited by the lack of a control group.

The following table shows the results of the regression analysis for the dependent variable *Perceived Social Support*. The independent variables are *Age*, *Gender*, *Marital Status*, *Education*, *Income*, *Health Status*, *Living Arrangements*, *Religious Beliefs*, *Community Involvement*, and *Family Structure*. The table includes the coefficient, standard error, t-value, and p-value for each variable.

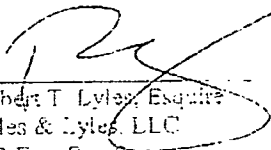
Variable	Coefficient	Standard Error	t-value	p-value
Age	0.02	0.01	1.50	0.14
Gender	0.15	0.08	1.88	0.07
Marital Status	0.30	0.10	3.00	0.00
Education	0.05	0.02	2.50	0.01
Income	0.10	0.03	3.33	0.00
Health Status	0.20	0.05	4.00	0.00
Living Arrangements	0.18	0.07	2.57	0.01
Religious Beliefs	0.08	0.04	2.00	0.05
Community Involvement	0.12	0.06	2.00	0.05
Family Structure	0.05	0.03	1.67	0.10

The regression equation is: $Y = 0.02X_1 + 0.15X_2 + 0.30X_3 + 0.05X_4 + 0.10X_5 + 0.20X_6 + 0.18X_7 + 0.08X_8 + 0.12X_9 + 0.05X_{10}$, where Y is Perceived Social Support and X_1 through X_{10} are the independent variables.

15

attorneys of record. Charles E. Turner, Jr., Esquire, 200 East Broad Street, Suite 250, Greenville, S.C.
29601, Bradford W. Cranshaw, Esquire and Danielle I. Payne, Esquire, Post Office Box 2823,
Columbia, S.C. 29202, and J. Victor McDade, Esquire, Post Office Box 2125, Anderson, S.C. 29622

August 23, 2012



Robert T. Lyles, Esquire
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342 East Bay Street
Post Office Box 773
Charleston, South Carolina 29401
T. 843.577.7730
rtl@lylesfirm.com
Attorneys for Appellant

EXHIBIT E

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

1 happy to do it, Your Honor.

2 THE COURT: Very good. All right. I'll tell you
3 what, and it might help things too, also inasmuch as you'll
4 be submitting it to the Court to satisfy Rule 5. I trust
5 y'all -- if you don't have a website, you all have a list
6 serve or something that -- for this case, so, in other
7 words, you just hit "all" when you transmit it to the
8 Court.

9 MR. IMHOFF: Yes, Your Honor.

10 THE COURT: And that way that should satisfy Rule
11 5. All right. And that will be the case on each unless
12 there's some distinction.

13 And that's Mr. Imu; is that right?

14 MR. IMHOFF: Imhoff, Your Honor.

15 THE COURT: Imhoff. Excuse me. Very good,
16 Mr. Imhoff. So you will do the order denying the
17 bifurcation.

18 All right. What's the next series? We do have
19 motions to dismiss and/or summary judgment, and this is to
20 the contractors?

21 MR. STUBBS: Yes, Your Honor. I'm Markey Stubbs.
22 I represent Upstate Utilities. You have numerous motions
23 to dismiss and for summary judgment before you this
24 morning. However, mine -- and with me is Hutch N Sons has
25 joined in my motion. In this case we're a little bit

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

1 different because we settled with the plaintiff at
2 mediation. We settled with the plaintiff, and after
3 mediation we settled with Medallion. It was filed. It
4 probably hasn't reached your file yet, the agreement and
5 release -- which I circulated by e-mail to everyone --
6 Robert has not had his client yet, but he was agreed to it
7 and they're going to sign it and we're doing that
8 stipulation of dismissal.

9 With respect to the Medallion claims I have the
10 dismissal both as to Hutch N Son and as to Upstate
11 Utilities which has also been forwarded to the Court for
12 filing.

13 So we come in a little bit different situation than
14 most. The only claims against us are claims by Marick who
15 is the general contractor. We were hired by oral contract
16 with Hutch N Sons. We were not hired by Marick. Hutch N
17 Son was hired by contract by Marick. We performed sewer
18 grading, backfill, that type of work only on Phase II. We
19 settled at mediation, we settled with the person who owns
20 some of the other buildings, which was Medallion. Despite
21 our settlement, we still find ourselves in this litigation.

22 We filed a motion for summary judgment which is
23 dated 6/1/12 on its file date. And I reference that motion
24 at page 4, Marick answers to the third amended complaint,
25 and what they've alleged is basically a claim for equitable

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

1 indemnity, paragraph 158. They have alleged breach of
2 contract, not against us, not alleged against Upstate but
3 Hutch N Son and others, paragraph 160, breach of warranty
4 at 172.

5 With respect to each of these claims the damages
6 they seek are simply the damages they are exposed to in
7 this litigation, indemnity damages, which is at paragraphs
8 158, 162, 167, and 174. Marick is not the owner or in
9 possession of any of the buildings that is the subject
10 matter of this litigation. Therefore, despite the fact
11 they call it negligent warranty or contract, these are, in
12 fact, the indemnity claims.

13 Indemnity is that form of compensation in which
14 party liable to pay second for loss of damages the second
15 party incurs to a third. And I have cited Vermeer
16 Carolinas, versus Woodchuck in my brief. Your Honor, the
17 allegations contained in the Complaint determined by the
18 nature of the issues and remedies which are sought. I've
19 cited State versus Yelsen (phonetic), Seebaldt versus First
20 Federal, Walsh versus Evans.

21 The courts use the allegations of the Complaint to
22 determine the actual true nature of the claims. And I've
23 included two circuit court orders and attached them to my
24 memorandum which find that these are just misnamed claims.
25 In other words, negligence may be the basis of it, breach

1 of contract or warranty may be the basis of it, but they
2 are indemnity claims, there is no separate individual
3 damages sought. As the Federal Court in CNB (phonetic)
4 versus Stone (phonetic) stated, nothing more than claim
5 from indemnification from the slight change in the wording.
6 A rose under any other name is still a rose.

7 So what our argument is, is that these are all
8 equitable indemnity claims and as such should be collapsed
9 into one claim which is equitable indemnity.

10 We then addressed the issue of equitable indemnity.
11 We filed separate briefs with respect to liability on
12 equitable indemnity on 8/21/12. Now, the arguments that we
13 have set forth are multiple. The first on is, having paid
14 the plaintiff, we have relieved any liability that Marick
15 may be due for our wrongdoing. The plaintiff has released
16 us and Marick may use that as a shield. Marick may hold it
17 up and say they did it. They are now being sued only for
18 their own acts. If they did not do anything wrong, they
19 cannot be sued. If they did do something wrong, if a jury
20 finds them liable, they are jointly negligent. If they are
21 jointly negligent, there is no right to equitable
22 indemnity. Once again, there is no contractual indemnity
23 alleged or involved in this claim.

24 The affidavit that we filed of Rhett Whitlock
25 actually goes through -- and I'm going to pass up the three

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

1 affidavits I filed with different briefs that are important
2 in this matter -- that set forth the deficiencies and
3 wrongful conduct of Marick that was negligent. As a joint
4 tort-feasor they cannot recover.

5 So in addition to the fact that we had paid and
6 therefore they cannot recover, they are joint tort-feasors
7 and they cannot recover. In addition, under Rock Hill, you
8 have to have a special relationship to recover under
9 equitable indemnity. In Rock Hill they found that when a
10 contractor hired a person who didn't hire the person, it is
11 too attenuous. That is what I have with respect to my
12 client. I was not hired by Marick. I am not a
13 subcontractor of Marick's. Marick can stand and fall on
14 its own claim.

15 To the extent that it is entitled, it can get
16 set-off the money I have paid. In addition, in those
17 claims where reapportionment is found to be appropriate,
18 the rule allows for it to get its apportion's share of
19 set-off under 15-38-15(e).

20 So there's no reason for us to go drug through this
21 litigation. It's simply an ability to bar parties from
22 reaching a settlement. I would acknowledge that if there
23 was a contractual indemnity claim, it would be different,
24 but no such claim can be asserted or can be asserted or
25 exists.

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

1 Thank you.

2 THE COURT: Very good.

3 MR. IMHOFF: Your Honor, again, logistics. I have
4 Shelly Montague, who represents Hutch N Son who --

5 I'm Jason Imhoff again. I apologize.

6 THE COURT: Please. Thank you.

7 MR. IMHOFF: I'd think that everyone did know me.

8 THE COURT: The only thing is we just need the
9 record to reflect who is speaking.

10 MR. IMHOFF: I think I'm going to stand up on every
11 single motion, so I may be well known by the end of the
12 day.

13 But again, on a logistical issue, I have received
14 many motions for summary judgment against my client on my
15 cross claims including Shelly Montague who represents Hutch
16 N Son who would be Marick's direct contractor who they
17 hired.

18 In addition to the motions against me, I have also
19 filed motions for summary judgment on the equitable
20 indemnity claims against them based on their testimony in
21 the case. I don't know whether you want to hear those at
22 the same time or whether you want to hear them separately,
23 if you want me to address each motion for summary judgment
24 against Marick individually or in some type of a general
25 response? I suppose ---

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

1 THE COURT: Well, I think each motion will stand on
2 its own really, so I think the better way to do it would be
3 to, as one is heard, then the response be at the same time.

4 MR. IMHOFF: Your Honor, to start with --

5 THE COURT: Now, when they're joint motions, of
6 course, all parties would be...

7 MR. IMHOFF: I have prepared a brief which I have,
8 which I would be more than happy to supplement if the Court
9 requires that to consider these motions. But to begin with
10 let me address the settlement of Hutch N Son and Upstate
11 Utilities.

12 Mr. Stubbs made a statement that I am completely
13 protected from that issue by that settlement and that, in
14 fact, is not true. There were discussions about that
15 settlement and whether or not a release would preclude the
16 allegations and arguments by plaintiff at trial and the
17 fact is that that release does not; that the work of Hutch
18 N Son's and Upstate Utilities is still alleged to be
19 defective and deficient and continues to be an issue in
20 this case, which my client, Marick, has had to defend and
21 continues to engage in discovery and the litigation and
22 will have to do through trial.

23 So while I will certainly make an argument to you
24 and this Court at trial that I get a set-off or argue to
25 the jury that the culprits for this have already paid the

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

1 plaintiffs and the issue should no longer be considered,
2 that is not fact, that is an argument, and the Court hasn't
3 ruled and certainly the jury has not given a verdict on
4 that.

5 So as to that settlement I would agree that they
6 have consented to settle or have settled with the
7 plaintiff, but I am continuing on behalf of my client to
8 defend those exact allegations. And the allegations in
9 this case are that Hutch N Sons and Upstate moved the grade
10 onto the side of the buildings too high and above the
11 waterproofing. Mr. Goldsmith's client is the waterproofing
12 subcontractor and he has done a very good job at showing
13 that the grade is above the waterproofing and it's not his
14 client's fault, it's the grader's fault. Again, this is an
15 issue that I am having to defend and am continuing to incur
16 expert fees, costs, and litigation defenses, which are all
17 recoverable under an equitable indemnity cause of action.
18 I think there's plenty of case law on that.

19 In regard to the substantive issues in this case,
20 Upstate and Hutch N Sons and frankly all of the
21 subcontractors that are sitting behind me are going to make
22 two arguments to the Court. The first is, either there is
23 no special relationship if they're not Marick's direct
24 subcontractors, or if there is a special relationship
25 Marick has unclean hands and, therefore, as a joint

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

1 . tort-feasor, cannot recover for equitable indemnity.

2 We'd speak to the second issue first. In regard to
3 the unclean hands argument, I think that there is very
4 little question that that is an issue of fact for the jury.
5 The reason that I say that is based on the Fields
6 (phonetic) case which I have highlighted in my brief, which
7 says that a general contractor is not automatically liable
8 for the work of the subcontractors, even if it's defective.
9 And there is an additional steps when it comes to a general
10 contractor, and you have to prove that the general
11 contractor failed in its duty to supervise and oversee the
12 subcontractors.

13 So the obligations per our courts is -- on a
14 general contractor is to supervise and oversee. There is
15 plenty of evidence in this case, which I have put in my
16 brief that Marick was on site, they had a daily
17 superintendent on site, they had a survey company to go out
18 and shoot levels and direct the placements of the grading.
19 There was an architect involved, the architect was involved
20 not only in drawing the plans but was actually on site. My
21 client was overseeing and coordinating this. And there is
22 more than a scintilla of evidence upon which a jury could
23 find that my client, the general contractor, in fact, did
24 perform its supervisory duties. So as to the unclean hands
25 argument, the joint tort-feasor argument, which you will

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

1 hear twenty times today, I think, Your Honor, I think there
2 is a factual issue. And I will try to relate them to each
3 one of the subcontractors that is bringing the motion.

4 But, as you can imagine, with all of the pleadings
5 and all of the motions and all of the depositions that have
6 taken place and the written discovery, there is certainly a
7 scintilla of evidence which would support our position that
8 my client, Marick, did perform its supervisory duties, and
9 you will hear that the rest of the day.

10 As to the second, the lack of a special
11 relationship, you will hear this again a good bit today.
12 There are six or seven subcontractors, I think, that Marick
13 hired directly. Those subcontractors, Your Honor, went out
14 and hired their own subcontractors who hired subcontractors
15 who may have hired more subcontractors.

16 You heard over in the corner here earlier
17 Mr. Terrell state that he is one of fifteen Builders First
18 Source subcontractors. You can imagine how many
19 subcontractors there are.

20 In regard to special relationship and the equitable
21 indemnity, it's an equitable cause of action, which I
22 believe, Your Honor, means that you as the Court and the
23 Judge of this case has greater discretion to find justice
24 with an equitable cause of action. The case that all of
25 the subcontractors site to state that a subcontractor's

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

1 subcontractor doesn't have a special relationship with a
2 utility, I don't think it's applicable in this case.

3 The allegations against Marick are that Marick did
4 not supervise all of the subcontractors. This is the
5 allegation made by plaintiff and made by the subcontractors
6 in their motion.

7 What ultimately could result if Marick, the general
8 contractor, is not allowed to sue under an equitable
9 indemnity cause of action its subcontractor's
10 subcontractors is that the subcontractors' work will cause
11 Marick to be liable; in other words, their poor work will
12 cause Marick to be liable because we didn't catch them
13 doing their work or see them doing their work.

14 Yet Marick wouldn't be able to have any remedy
15 against those subcontractors. And I don't think that's
16 what our Court meant to happen when it decided the utility
17 versus subcontractors' relationship in the case cited by
18 all of these other attorneys. What I think they were
19 trying to say and what I think will be resolved at some
20 point is that that was a different situation than what
21 happens on a building job site.

22 On a building job site our Court has determined
23 that the general contractor is required to supervise. If
24 the general contractor is required to supervise, it has to
25 supervise everyone out there, whether they directly

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

1 contracted with those subcontractors or not.

2 I don't believe that our Court would allow a
3 one-way street where the subcontractor could perform bad
4 work or which the general contractor is liable and give the
5 general contractor no recourse back against that
6 subcontractor which it has an obligation to supervise.

7 So my position on that is I believe the Court would
8 find, ultimately our appellate courts will find, that there
9 is a special relationship on a building site between a
10 general contractor and its subcontractors' subcontractors.

11 THE COURT: You're saying that at this point that
12 issue hasn't been resolved or decided?

13 MR. IMHOFF: No, not -- that's correct, Your Honor.
14 I believe that the cases cited -- I don't believe, I know.
15 The case that is cited is a utility company and a
16 subcontractors' subcontractor. I think that is different
17 from this situation where we are on site every day and have
18 a legal requirement to supervise the subcontractors. And
19 again, I believe because it's an equitable cause of action
20 it gives you wide latitude in deciding what is fair and
21 just. And I would say if I'm going to be liable for your
22 work, because I had to oversee you, then I should have an
23 equitable cause of action against you.

24 So to sum up, and I'm going to do it all day long,
25 I believe there's a factual issue as to whether or not I

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

1 have unclean hands or I'm a joint tort-feasor, and I think
2 that in fairness there is a special relationship for
3 anybody I'm obligated to oversee.

4 Thank you, Your Honor.

5 THE COURT: Well, let's see now. Do you represent
6 Hutch N Son?

7 MS. MONTAGIE: Yes, Your Honor. Shelley Montague.
8 I represent Hutch N Son Construction. We also have a
9 motion for summary judgment. It goes together with Upstate
10 Utilities because Upstate Utilities was our subcontractor
11 for part of the work that we were hired by Marick to do,
12 which included the backfill against the units. Just like
13 with Upstate Utilities, we have settled with the
14 plaintiffs, we have settled with Medallion, so the only
15 claim left against us is Marick's cross claim against us.

16 And just as Mr. Stubbs argues, we believe even
17 though they are separated into different names in the
18 complaint -- I'm sorry, the cross claim, it's all equitable
19 indemnity. Now, Mr. Imhoff made part of this argument easy
20 for me in that he is saying a general contractor has the
21 duty to supervise and the duty inspect the work of the
22 subs.

23 Now, with them having that duty, Upstate Utilities
24 and Hutch N Son are in a much better position to make this
25 argument, I think, than other people. The only allegation

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

1 that's been supported by expert testimony that at all
2 relates to our work is the height of the grade against the
3 unit. We don't agree that we put the grade that high, but
4 we can put that aside now because that's not even the
5 issue. The issue is whether or not Marick is entitled to
6 recover under equitable indemnity, which means he has to be
7 free of fault. That's also something we're all going to
8 agree on. He has to have clean hands.

9 Now, Mr. Imhoff made the comment that Mr. Goldsmith
10 has done a good job of proving that the grade is too high.
11 Mr. Goldsmith is an excellent attorney, but this isn't a
12 hard thing to prove. Anybody in this courtroom can walk up
13 there right now and see where the grade is. It's open,
14 it's obvious, everybody sees it, nonetheless, a general
15 contractor. If it is found to be that the grade is too
16 high against the units and if it is found to be that
17 condition has caused property damage, there is no question
18 of fact that there is at least some fault as to Marick.
19 They had the duty to supervise, they had the duty to
20 inspect. If it was wrong, they should have done something
21 about it. They could see it, it was open and obvious.

22 So regardless of what he may feel like he still has
23 to argue at trial with us out of it, regardless of whatever
24 fault my client may have, he is not free of fault if that
25 condition is found to be wrong.

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

1 THE COURT: All right. Anyone else?

2 MR. STUBBS: Markey Stubbs, Your Honor, and --

3 THE COURT: All right. Anyone else in favor of the
4 motion for summary judgment?

5 MS. MONTAGUE: That's just us, yes, sir.

6 THE COURT: Just the two of you, okay.

7 MR. STUBBS: Your Honor, I wanted to clarify the
8 misstated statements of my statements. The obligation for
9 him to defend against for his own negligence still exists.
10 But the plaintiff having dismissed us gives him a shield
11 with respect to ours. If he has failed to do something, he
12 is the general contractor. He still has to defend for
13 that. The affidavits -- and we do have to file affidavits.
14 He referenced a brief. I never got a brief.

15 When did this brief go out.

16 MR. IMHOFF: Last night.

17 MR. STUBBS: I never got a brief. There was no
18 affidavits filed. I have filed the affidavit of Donny
19 White. The affidavit of -- Donny White is my contractor
20 and he testified that they left it at an appropriate height
21 below grade. Someone like a landscaper and the person who
22 put in the drains -- who I don't know who that is, it
23 wasn't us -- came in after us and they raised it. That has
24 not disputed by anyone in this case. There's no evidence
25 that we did it, other than the allegation that the grade is

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

1 higher. But we have pointed out it was not us.

2 The affidavits of Glenn Stewart (phonetic), an
3 expert, and Rhett Whitlock have been filed with the Court,
4 both of which reflect that we did not do that work, that
5 that would have been a landscaper or a drain person, both
6 of which point out the deficiencies in the very supervision
7 that Mr. Imhoff spoke of regarding defect of his client.

8 Today was the motions for summary judgment. The
9 date to file affidavits in opposition was today. There is
10 nothing in opposition to any of our affidavits. So while I
11 believe we are dismissed, number one, because we have paid
12 and there is no right existing, and I believe he has agreed
13 that all his claims are truly equitable indemnity, however
14 titled, since he didn't argue against it.

15 The bottom line is even if we get to the next
16 stage, we are the only ones who have presented admissible
17 evidence by affidavit which has not been refuted today at
18 this hearing. We have already paid the plaintiffs, we've
19 paid the people who have been injured. This is merely an
20 attempt to hold us captive in this litigation. Thank you.

21 **THE COURT:** All right. Anyone else?

22 (WHEREUPON there was no response.)

23 **THE COURT:** All right. As I understand the motion
24 for summary judgment is on the cross claim; is that
25 correct?

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

1 MS. MONTAGUE: Yes, Your Honor.

2 THE COURT: And that's the only thing that that
3 motion addresses.

4 And the -- Yes, Mr. Imhoff?

5 MR. IMHOFF: Your Honor, did you want to hear from
6 me again?

7 THE COURT: Well, yes, sir. I just want to make
8 sure that I understood what your position is.

9 MR. IMHOFF: I want to make sure some of the
10 evidence that is out there and it is not in the form of
11 affidavits, it's testimony, photographs, and that type of
12 thing. As to whether we supervised and saw it was open and
13 obvious and that type of thing, I think an explanation of
14 how it happened might be necessary.

15 What they did is they went out there and they took
16 the grade and they rough graded it and then they cut in for
17 the foundation, so you have this ten-foot deep hole or
18 whatever it is. The concrete is poured for walls and then
19 the waterproofer or the general contractor comes out and
20 sprays a line on the wall where it needs, where the
21 waterproofing needs to be and where the grade needs to go.

22 So as soon as the grade has pushed back on to that
23 line, you can't see it anymore, it's not open and obvious
24 anymore. The photographs show that it's red fill dirt
25 that's been pushed up back against there versus black fill

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

1 dirt which might be a landscaper or might be decayed mulch.

2 There is certainly a scintilla of evidence that the
3 general contractor, Marick, performed its duty by hiring a
4 surveying company to shoot these levels and make sure the
5 grade was and showing the subcontractors how they were
6 performing their job. I think that there are only a few
7 places out there where it is actually on the stone and that
8 potentially could have happened long since Marick has left.
9 So there is certainly a question of fact as to whether or
10 not it was open and obvious.

11 **MS. MONTAGUE:** Quickly, Your Honor. Shelley
12 Montague for Hutch N Son. Mr. Imhoff is a great lawyer. I
13 wish he wouldn't be so great a witness because I'm not sure
14 I agree completely with what he said. Where the dirt is
15 above the line of the waterproofing is not the top of the
16 wall necessarily, so if it goes to the top of the wall,
17 that's open and obvious and the places where it's above the
18 stone that's open and obvious. We can forget about arguing
19 about where the waterproofing line on the concrete wall is.
20 The experts have opined that there are places where it
21 comes up several inches above, there's a stone veneer
22 clouding on it and it comes up above that. That is open
23 and obvious to a general contractor.

24 **MR. STUBBS:** And, Your Honor, I apologize, but just
25 briefly. There is not one bit of testimony, one affidavit

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

1 or one document presented to the Court that our defendant
2 did this. It is all that they don't know, it could be the
3 landscaper or however they presented evidence it was the
4 landscaper. Nothing has been done to refute that.

5 THE COURT: All right. This -- anything else?
6 (WHEREUPON there was no response.)

7 THE COURT: All right. The issue on the cross
8 claim of course is equitable indemnity; is that correct?

9 MR. IMHOFF: On this one, yes, Your Honor.

10 THE COURT: And of course what is it -- being
11 equity, the principles of equity apply, and one is that to
12 be without fault. And apparently from the argument today
13 that you do recognize that the general contractor has a
14 supervisory responsibility, and that's not only for what it
15 did know, but also what it should have known. And
16 apparently before anything was obscured or no longer above
17 ground, apparently, as it's been argued today, there's
18 no -- or taking the argument in the light most favorable to
19 the general contractor, it was doing its job, and
20 therefore, it should not be found liable. But if it was
21 doing its job, it would have discovered the defect, I guess
22 would be the -- or defective workmanship.

23 All right. I find that under the concept of
24 equitable relief that the equitable indemnity would be
25 denied and the motion for summary judgment granted.

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

1 Who is going to do it, Mr. Stubbs or Ms. Montague?

2 MS. MONTAGUE: We'll fight over it.

3 THE COURT: Okay. So is that your cross claim? Is
4 there only one cross claim?

5 MR. IMHOFF: No, Your Honor. We're going to have a
6 lot of those.

7 THE COURT: Okay. All right. Does that let y'all
8 out of this?

9 MS. MONTAGUE: I assume that means your motions
10 against us are moot?

11 MR. IMHOFF: Yes.

12 MR. STUBBS: Your Honor, if I could have two
13 minutes I can resolve this just in private.

14 THE COURT: I was going to say, let's take a break
15 and then be back.

16 MS. MONTAGUE: Thank you, Your Honor.

17 THE COURT: Let's say a quarter till twelve.

18 (WHEREUPON a recess was observed.)

19 THE COURT: All right. I think somebody came in
20 after we had the sign-up?

21 (WHEREUPON there was an off-the-record discussion.)

22 MR. STUBBS: Just briefly, there is another motion
23 involving a default. With the Court's permission, we're
24 going to postpone that because it will be moot now.

25 THE COURT: Okay. Which one is that now?

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

1 MR. STUBBS: It's the motion to set aside entry of
2 default as to --

3 MR. IMHOFF: -- Frederick Thomas.

4 MR. STUBBS: -- Mr. Thomas.

5 THE COURT: Do you know where it is by any chance?

6 MR. STUBBS: I don't have that list.

7 THE COURT: But it's a motion to set aside?

8 MR. STUBBS: That would be the default.

9 THE COURT: Fifty-five, you said? All right.

10 MR. IMHOFF: Fifty-five. I think we're on three.

11 MR. STUBBS: Your Honor, I have no further motions.

12 THE COURT: Have you and Ms. Montague decided who
13 will do the order?

14 MR. STUBBS: We'll share. Thank you, Your Honor.

15 (WHEREUPON Ms. Montague and Mr. Stubbs left the
16 courtroom at approximately 11:55 a.m.)

17 THE COURT: We're back on the record now in
18 Stoneledge and Lake Keowee versus IMK Development. I think
19 we're down to 11 now, Miller/Player Motion for Summary
20 Judgment. It's a cross claim; is that correct?

21 MOTION FOR SUMMARY JUDGMENT

22 MR. HORTON: Your Honor, Greg Horton for Catoe.

23 THE COURT: All right.

24 MR. HORTON: And I believe that my -- the people
25 ahead of me realized that my motion is very similar to the

EXHIBIT F

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners Assn., Inc. et al.

CASE NO. 2009-CP-27 0552

☐ Plaintiff

IMK Development Co., et al.

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

☒ Defendant

Check box above indicating submitting party

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☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment and Motion to Stay Lost to Utilize Motion for Summary Judgment

Estimated Time Needed: 15 minutes

Court Reporter Type: ☐ YES ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

August 7, 2012

Signature of Attorney for ☐ Plaintiff ☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT

☐ Rule to Show Cause in Child or Spousal Support

(check reason)

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution Rule 69, SCRPC

☐ Proposed order submitted at request of the court or

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

DATE:

CLERK'S VERIFICATION

Collected by: CLP

signature

☒ MOTION FEE COLLECTED: \$25.00

☐ CONTESTED - AMOUNT DUE: _____

RECEIVED
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AUG 10 PM 12:48
CLERK'S OFFICE

4405-15

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

FOR THE TENTH JUDICIAL CIRCUIT

Case Number: 2009-CP-37-0652

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

Plaintiffs,

vs.

IMK Development Co., LLC, Keowee Homeowners LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Integritys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Miller Player & Associates, John Ludwig, Clear View Construction, LLC, Michael Franz, MHC Contractors, Migniel Porras Chenevas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise a/k/a Compton Enterprises, Guter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Murir Hernandez-Aviles, Francisco Vinagones Lopez, Ambrosio Martinez-Ramirez, Ester Moran Montada, Socorro Castillo Montel, Upstate Utilities, Inc., MLC Construction and Homebuilders, Inc., d/b/a MLC Construction, KMAC, Inc. d/b/a KMAC North Carolina, Eufacio Garcia, Everad Jarmanillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry,

Defendants.

HUTCHINSON CONSTRUCTION, INC.'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT AND TO
JOIN UPSTATE UTILITIES, INC.'S
MOTION FOR SUMMARY JUDGMENT

FILED
CLERK OF COURT
JUL 17 2009

TO: ALL COUNSEL AND PARTIES OF RECORD:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for defendant Hensel Son Construction, Inc. ("HNS") will move before the Presiding Judge of the Tenth Judicial Circuit at the Oconee County Courthouse, Walhalla, South Carolina, on the tenth (10th) day after service hereof at 10:00 a.m. or as soon thereafter as counsel may be heard, or at such time and place as may be set by the Court, for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting full summary judgment in favor of defendant HNS as to the claims of Medallion at Keowee, LLC, Marick Home Builders, LLC, Rick Thoennes, Rick Thoennes, III and M Group Construction & Development, LLC.

Defendant Upstate Utilities has filed a Motion for Summary Judgment and a memorandum in support of its motion. HNS craves reference to the grounds set forth in the Upstate Utilities' motion and memorandum to support this motion.

Both HNS and Upstate Utilities have settled with the Plaintiffs. The claims of Medallion at Keowee, LLC, Marick Home Builders, LLC, Rick Thoennes, Rick Thoennes, III and M Group Construction & Development, LLC are claims of indemnity against defendant HNS. The damages sought by the said parties are not injury or damage to and to itself, but alleged injury or damage to the Plaintiffs that are being sought against them. The settlement between defendant Upstate Utilities, HNS and Plaintiffs has extinguished the claims by operation of law. Under the circumstances, the parties are barred by the doctrine of unclean hands as it applies to equitable indemnity. Defendant HNS believes that the claimants in this matter have contributed to the alleged loss in the case and therefore they may not assert a claim for equitable indemnity against defendant HNS.

Therefore, defendant HNS prays for dismissal of all claims by Medallion at Keowee, LLC, Marick Home Builders, LLC, Rick Thoennes, Rick Thoennes, III and M Group Construction & Development, LLC against HNS. Said Motion is based upon the depositions taken in this case.

pleadings filed in this case, rules of Court, and such other matters as may be properly presented to the Court at the time of the Hearing.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

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Columbia, South Carolina

August 7, 2012.

CERTIFICATE OF SERVICE

I, Melissa Lee Urch, an employee of Gallivan, White & Boyd, P.A., pursuant to Rule 5(b)(1), SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **Hutch N Son Construction, Inc.'s Notice of Motion and Motion for Summary Judgment and to Join Upstate Utilities, Inc.'s Motion for Summary Judgment** to the following counsel of record:

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This ____ day of August, 2012
Columbia, SC

By:

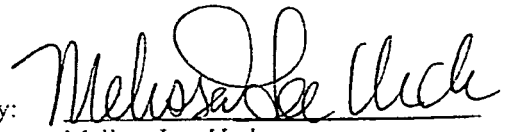

Melissa Lee Urch

EXHIBIT G

Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to -70 (Supp.1995). However, if the jury were to find a party not negligent, then the party would be entitled to equitable indemnification. *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct.App.1990).

We note that the modern trend concerning the right to indemnity is to look to principles of equity. According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 312-13, 476 S.E.2d 708, 710 (Ct. App. 1996)(emphasis added).

The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor.¹ The *Fields*' Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its subcontractors. *Id.* Instead, it must be proven that the general contractor breached a duty of care in providing supervision and oversight.

Based upon the deposition testimony of Randy Still, a question of fact exists concerning whether Marick breached its duty to supervise and provide oversight.

1. UNCLEAN HANDS

The lower court's Order held, "that there is no genuine issue of material fact that Marick has at least some fault for the construction defects alleged." (Order, Page 7.) Thus, the lower

¹ The lower court did not follow the Supreme Court's holding in *Fields* as Judge MaCauley stated at the hearing "if it [Marick] was doing its job, it [Marick] would have discovered the defect, I guess would be the -- or defective workmanship. All right. I find that under the concept of equitable relief that the equitable indemnity would be denied and the motion for summary judgment granted." (September 5, 2012 Hearing Transcript, Page 53:20-25.) Thus, the lower court effectively ruled that indeed the general contractor is automatically liable for the negligence of a subcontractor.

court effectively found as a matter of law in the case, at the summary judgment stage, that Marick has unclean hands.

The Court's holding was in error as Marick did provide evidence that Marick did not breach a duty or obligation.

Deposition of Randy Still (Marick's Memorandum in Opposition to Summary Judgment, Page 7-9.):

Q: ... For clarification, just because there is an item on your scope of repair which you believe needs some modification or repair, does that, in your opinion, mean that Marick, my client, your client, breached any duty or obligation?

A: I don't think so, no.

Q: And, in fact, there are items on your scope of repair for Phase I which Marick did not build?

A: That is correct.

Q: And do you believe that Marick breached any obligation in its—or construction obligations in Phase I?

A: No.

(Still Dep. 163:19 – 164:6.)

Q: And additionally there have been repairs and modifications to Phase II which are now no longer original construction but you've included those in your repair scope as well?

A: That is correct.

Q: But that does not mean, and it is not your opinion that inclusion in your repair scope means or should imply that you believe Marick did something wrong; correct?

A: That is correct.

(Still Dep. 164:9-18.)

Q: Do you believe that Marick violated any obligation, whether it be through a

contract document, manufacturer's installation instructions, code or any other obligation regarding the installation of the low slope roofs in Phase I?

A: No.

(Still Dep. 165:2-7.)

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

A: I think in many cases he has to.

(Still Dep. 170:7-10.)

Q: I may have asked this but let me ask it another way: If Marick did no do any exterior construction in Phase I, do you have an opinion based on the inspections, investigation and your knowledge of the facts and allegations in this case whether Marick violated any code section?

A: I don't see how he could have, because the conditions we found only occurred after extensive destructive testing occurred.

Q: Do you believe that Marick violated any code in the installation of the weather-resistant barrier in Phase II? And I'm specifying Marick. Did Marick violate any code in the installation of the weather-resistant barrier in Phase II?

A: No, I'm not aware he installed any WRB.

(Still Dep. 173:11-25.)

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

A: No.

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

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

Q: Is that a "no"?

A: No.

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

A: No.

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

A: No.

(Still Dep. 174:1:24.)²

Marick's expert Randy Still specifically stated that Marick did not violate any obligation associated with the grading in Phase II. Therefore, Marick presented evidence that it was not at fault for the alleged grading defects or other construction components associated with Phase II construction. Further, Defendant HNS' expert, Glenn Stewart, provided an affidavit which notes observations of defects associated with the grading in Phase II: "The exterior grades at several buildings of the "Project" are located above the foundation walls, above the waterproofing on the foundation walls, and/or above the exterior stone veneer. These deficient conditions are non-compliant with contract documents, design documents, manufacturer's instructions, and/or building code requirements." (Affidavit of Glenn Stewart, ¶ 8.) Thus, HNS's expert specifically notes that there are defects in the work performed by HNS and its subcontractor, Upstate (as HNS and Upstate were the parties performing the grading services). Although Stewart opines that such defective work is present in Phase II, Randy Still provided testimony that Marick did not violate an

² Mr. Still's deposition is still open and he has not finished his testimony. Counsel for Marick went out of turn to briefly ask these questions in preparation for the motions hearings and objected to the

EXHIBIT H

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REED TEAGUE
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Direct No. 864-582-3075

March 11, 2013

The Honorable Alexander S. Macaulay
Tenth Judicial Circuit
PO Drawer 428
Walhalla, SC 29691

Ms. Beverly H. Whitefield
Oconee County Clerk of Court
PO Box 678
Walhalla, SC 29691

Re: *Stoneledge at Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou K. Plourde, Carol C. Pope, Steven B. Taylor, Bettie J. Taylor, Robert White, Individually, and on behalf of all others similarly situated, v. IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion At Keowee, LLC, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc. and Miller/Player & Associates, et al*
CA #: 2009-CP-37-652

Dear Judge McCauley and Ms. Whitefield:

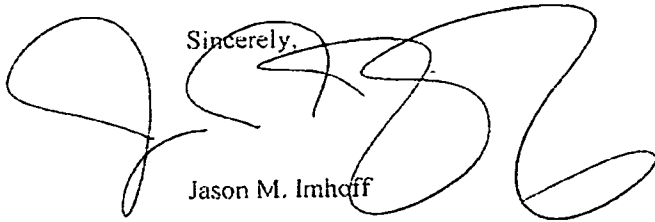
I am writing to request a filed copy of the briefs filed by my clients Marick Home Builders, LLC and Rick Thoennes for the hearings held on September 5, 2012. These briefs were sent via email at 7:38 p.m. on September 4, 2012 and also hand delivered to the Judge at the hearing on September 5, 2012. The ruling on Upstate Utilities, Inc. and Hutch N Sons Construction's Motions for Summary Judgment is presently under appeal and respondent is objecting to inclusion of those documents for failure to produce a filed copy. Therefore, please provide us with a filed copy of those documents at your earliest convenience.

The Honorable Alexander S. Macaulay
Ms. Beverly H. Whitefield
March 11, 2013
Page 2

Alternatively, I am sending an exact duplicate copy of the brief which was handed to Judge Macaulay during the hearing on September 5, 2012. If you are unable to locate the original, please file this copy and return it to me. Hopefully, this will suffice to satisfy Respondent and the Court of Appeal.

If you have any questions or concerns, please feel free to give me a call.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'JMI' followed by a large flourish.

Jason M. Imhoff

JMI/ads

Enclosure

cc: Shelley S. Montague, Esquire
S. Markey Stubbs, Esquire

EXHIBIT I

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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

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

Plaintiffs,

vs.

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

MARICK HOME BUILDERS, LLC AND
RICK THOENNES' MEMORANDUM IN
OPPOSITION TO UPSTATE UTILITIES,
HUTCH N SON CONSTRUCTION,
MILLER/PLAYER & ASSOCIATES,
CLEARVIEW CONSTRUCTION,
BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, CARL CATOE CONSTRUCTION,
TG CONSTRUCTION, ALEJANDRO CRUZ,
HERBERTO ARCOS HERNANDEZ,
MARTIN HERNANDEZ-AVILES,
SOCORRO CASTILLO MONTEL, KMAC,
INC. JOSE NINO, AND VINCENT
MORALES D/B/A MORALES MASONRY'S
MOTION FOR SUMMARY JUDGMENT

A

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20112103



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First Source (Subcontractor).

Project: on all projects for this subcontractor

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

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$2,000,000
 - Personal & Advertising Injury: \$1,000,000
 - Each Occurrence: \$1,000,000
 - Damage to Rented Premises: \$100,000
 - Medical Payments: \$5,000
 - With "Marick Home Builders" as Additional Insured. per endorsement form LA 2002-0505
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 • Fax (864) 232-5504 • 501 Brighton Circle • Simpsonville, SC 29681
marickhomebuilders.com

MARICK

HOME BUILDERS

8. Payment schedule:

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

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see Item 2 for details) - due in office before first payment.

11. Warranty:

One year

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

BY:

BY:

DATE:

10/17/07

DATE:

12/31/07

Rick Thoennes

NAME and TITLE

Deryl Ward

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Builders First Source - Southeast Group, LLC

COMPANY NAME

SE Bender

WITNESSED BY

Subject To Written Changes

B



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

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

Project: on all projects for this subcontractor

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

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

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marickhomebuilders.com



8. Payment schedule:

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

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)

Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

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

BY: [Signature] BY: [Signature] ★
DATE: 10/1/07 DATE: 10-30-07 ★

Rick Thoennes Mike Owner ★
NAME and TITLE NAME and TITLE

Marick Home Builder, LLC. Clervin Const. ★
COMPANY NAME COMPANY NAME

[Signature]
WITNESSED BY

2

10/31/2007 08:28 FAX

10/30/2007 11:00 FAX

002
001/003



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 231-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

10/31/2007 08:28 FAX
10/30/2007 11:00 FAX

0003



8. Payment schedule:

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

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.

11. Warranty:

One year

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

BY: _____

BY: _____

DATE: _____

10/1/07

DATE: _____

10/1/07

Rick Thoennes

NAME and TITLE

Sharon Gower

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Southern Concrete Spec. Inc.

COMPANY NAME

WITNESSED BY

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No.: 2012-213237

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

v.

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

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

And

Of Whom Hutch N Son Construction, Inc. and Upstate Utilities, Inc. are the Respondents.

PROOF OF SERVICE

I, Charlotte Smith, the undersigned employee of Gallivan, White & Boyd, P.A., attorneys for Respondent Hutch N Son Construction, Inc., do hereby certify that I have served a copy of the foregoing **Motion to Strike and Memorandum in Support** thereof in the above-referenced case upon counsel for Appellant and Respondent Upstate Utilities, Inc. via United States Mail, postage prepaid, on this the 22 day of April, 2013, to the following addresses:

Jason M. Imhoff
C. Reed Teague
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304
Counsel for Appellant Marick Homebuilders, LLC

S. Markey Stubbs
Baker Ravenel & Bender, LLP
P.O. Box 8057
Columbia, SC 29202
Counsel for Respondent Upstate Utilities, Inc.

RECEIVED
JUN 06 2013

SC Court of Appeals

Charlotte N. Smith
Charlotte Smith
Assistant to Shelley S. Montague

Columbia, South Carolina