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.

AMENDED INITIAL BRIEF OF RESPONDENT HUTCH N SON CONSTRUCTION, INC.

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INTRODUCTION

The merits of this appeal are not complicated. The underlying circuit court litigation was initiated to resolve the question of who was at fault for allegedly deficient work performed during the construction of the multi-phase townhome development Stoneledge at Lake Keowee (the "Project"). After the townhome owners (and, later, their owners' association) brought suit blaming builder/general contractor Marick Home Builders, LLC ("Marick") and others for the construction deficiencies, Marick then sued its sub-contractors for indemnity. Although numerous contractors and construction defects were implicated in the underlying case, this appeal concerns only one, very specific piece of the global construction: the grading work performed by sub-contractor Upstate Utilities, Inc. ("Upstate") who was retained by sub-contractor Hutch N Son Construction, Inc. ("HNS"). HNS was hired by general contractor Marick.

In simplest terms, this case is a general contractor's failed attempt to seek indemnification from its sub-contractors for improper work that the general contractor should have – and would have – discovered had it properly supervised its job site. Because Marick is at fault for failing to oversee the allegedly deficient work, South Carolina law forbids Marick from recovering in equity from its sub-contractors. The circuit court reached that conclusion and granted summary judgment to HNS and Upstate after considering uncontroverted testimony that Marick improperly supervised the job site, that reasonable supervision of the work would have revealed the deficiencies, and that neither HNS nor Upstate was at fault for the improper work.

Although the substance is straightforward, a critical misstep by Marick has complicated the procedural posture of this case on appeal. Marick has asked this Court to

review the merits of an issue that it conceded to the trial court – a concession recognized in the circuit court's summary judgment order of which Marick never sought reconsideration. The merits of this conceded issue are not preserved for review by this court, and it is against that backdrop that HNS responds to Marick's appellate arguments.

STATEMENT OF THE CASE

This action originated with the May 29, 2009 filing of a proposed class complaint by townhome owners who claimed that Marick and developer IMK Development Co., LLC breached warranties and acted negligently during construction of the Project. Subsequent amended complaints added The Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge") as a plaintiff and Appellant Rick Thoennes ("Thoennes") as a defendant, among others.

On February 7, 2011, Marick brought HNS and Upstate into the action as third-party defendants, along with numerous other sub-contractors who worked on the Project. Marick's third-party claims against HNS were denominated as equitable indemnity, breach of contract, negligence, and breach of warranty claims. HNS answered Marick's third-party complaint on April 29, 2011.

On October 17, 2011, Stoneledge and the other plaintiffs filed a Second Amended Complaint asserting direct claims for breach of warranty and negligence against all of the sub-contractors/third-party defendants originally impleaded by Marick's third-party complaint. The plaintiffs' assertion of direct claims against the impleaded sub-contractors effectively realigned them as first-party defendants in the action.

Marick then filed cross-claims on April 5, 2012 against HNS, Upstate, and the other sub-contractors who were now its co-defendants. Marick's claims against HNS again were styled as equitable indemnity, negligence, breach of contract and breach of warranty claims. In May 2012, HNS and Upstate settled, without admission of wrongdoing, with Stoneledge and the other plaintiffs in the action. In September 2012, HNS and Upstate also settled cross-claims asserted against them by co-defendants

Medallion at Keowee, LLC and Bradford D. Seckinger. Marick's cross-claims were the only remaining claims against HNS and Upstate after the settlements.

HNS and Upstate both moved for summary judgment as to Marick's cross-claims.[1] Upstate filed its motions on June 1, 2012 and August 21, 2012, along with a supporting memorandum, the Affidavit of Donny White, and the Affidavits of Rhett Whitlock. (Upstate Utilities, Inc.'s Notice of Motion and Motion for Summary Judgment, filed June 1, 2012; Upstate Utilities, Inc.'s Notice of Motion and Motion for Summary Judgment as to Equitable Indemnity, filed August 21, 2012; Upstate Utilities, Inc.'s Memorandum in Support of Summary Judgment, filed July 16, 2012; Affidavit of Rhett Whitlock dated March 14, 2012; Affidavit of Rhett Whitlock dated August 9, 2012; Affidavit of Donny White dated August 23, 2012). On August 10, 2012, HNS filed its own motion for summary judgment and also joined in Upstate's motion. (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, filed August 10, 2012). HNS filed a supporting memorandum and the Affidavits of Donny White and Glenn

[1] Although Marick's co-defendant Rick Thoennes is listed as an Appellant challenging the circuit court's grant of summary judgment to HNS and Upstate on the cross-claims, Thoennes never asserted his own cross-claims against HNS or Upstate. As the circuit court observed in its summary judgment order, the caption of Marick's Answer to Plaintiffs' Third Amended Complaint and Cross Claims included both Marick and Thoennes, but the body of the pleading indicated that only Marick asserted the cross-claims. Accordingly, the court observed that "there is not a cross claim by Defendant Rick Thoennes against either Upstate Utilities or HNS." (September 25, 2012 Order, p. 2 n. 1). Neither Marick nor Thoennes asked the circuit court to reconsider its decision. Thoennes is not a proper Appellant because there is no decision against him to appeal.

Stewart.[2] (Hutch N Son Construction, Inc.'s Memorandum in Support of Motion for Summary Judgment, filed September 4, 2012; Affidavit of Donny White dated August 23, 2012; Affidavit of Glenn Stewart, M.E., P.E. dated August 30, 2012).

On September 5, 2012, the circuit court began oral arguments on all of the motions pending in the case at that time, including the motions for summary judgment filed by HNS and Upstate. After hearing argument from counsel for Marick, HNS, and Upstate, the circuit court announced its intended ruling:

> The Court: And of course what is it --- being equity, the principles of equity apply, and one is that to be without fault. And apparently from the argument today that you [Marick] do recognize that the general contractor has a supervisory responsibility, and that's not only for what it did know, but also what it should have known . . . . [T]aking the argument in the light most favorable to the general contractor, it was doing its job, and therefore, it should not be found liable. But if it was doing its job, it would have discovered the defect . . . or defective workmanship.

(Hrg. Tr. p. 53, ll. 10-22). Counsel for HNS and Upstate were charged with drafting the order granting summary judgment. (Hrg. Tr. p. 55, ll. 12-16).

On September 25, 2012, the circuit court filed its written order granting summary judgment against Marick and in favor of HNS and Upstate on the following grounds. First, the court observed that all of Marick's causes of action were, in reality, equitable indemnity claims. (September 25, 2012, Order, p. 3). However, the court recognized Marick's concession of the issue: "When asked by the Court, counsel for Marick acknowledged that equitable indemnification was the only claim at issue." (September

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[2] Although Marick also filed a cross motion for summary judgment addressing the same issues raised by HNS and Upstate's motions, Marick agreed at the conclusion of oral argument that its motion was moot, (Hrg. Tr. p. 54, ll. 9-11), and it is not part of this appeal.

25, 2012, Order, p. 3). Next, the court found that neither Upstate nor HNS caused the construction deficiencies. Third, the court found that Marick was barred from recovery under the doctrine of unclean hands.[3] (September 25, 2012, Order, pp. 3-6). The court found no genuine issue of material fact as to whether Marick had at least some fault for the construction defects alleged because "Marick would have seen the height of the grade prior to the completion of the construction and would have had the opportunity to correct it." (September 25, 2012, Order, pp. 5-6). The court pointed out that "Marick did not submit any affidavits to rebut the Defendants' expert affidavits" opining that Marick's supervision was unreasonable and that the grade defect was open and obvious. Further, the circuit court stated that Marick "acknowledged [at the hearing] that a general contractor has a duty to supervise and inspect the work performed at the construction site." (September 25, 2012, Order, p. 5-7).

Marick did not seek reconsideration of the circuit court's summary judgment order and instead filed its Notice of Appeal on October 5, 2012.

[3] The circuit court's order also addressed the "special relationship" argument presented in Upstate's motion for summary judgment. (Upstate's August 21, 2012, Motion for Summary Judgment). Because this argument relates only to Upstate as the sub-contractor of a sub-contractor, HNS does not address it herein.

STATEMENT OF FACTS

Viewing the facts in the light most favorable to Marick as the non-moving party, the record reveals the following: this lawsuit concerns construction performed at the Project during the second phase of construction ("Phase II"), for which Marick was the general contractor. (Stewart Aff., ¶¶ 6, 9). Marick verbally contracted with HNS to perform the grading work on Phase II of the Project, to include backfilling of the grade against the units and installation of sewer lines and storm drains. (White Aff.). HNS then verbally sub-contracted the backfill work to Upstate. (White Aff.).

Only one deficiency alleged in the underlying action related to the scope of work for which HNS contracted: the exterior grade was constructed too high against the units. HNS does not dispute that the exterior grade at several buildings of the "Project" was too high, (Stewart Aff., ¶ 8), although HNS maintains that neither it nor Upstate was responsible for the deficiencies, (White Aff.).[4]

A consulting engineer retained by HNS, Glenn Stewart, inspected the Project and observed grades located above the foundation, waterproofing, and/or stone veneer, which he opined were "non-compliant with contract documents, design documents, manufacturer's instructions, and/or building code requirements." (Stewart Aff., ¶¶ 6-8). Stewart found that the deficient grades "were open for inspection during construction." (Stewart Aff., ¶ 12).

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[4] As outlined in Section IV., *infra*, HNS and Upstate proffered uncontroverted evidence that the work performed by its sub-contractor Upstate was correct but later modified by other persons and/or entities who performed drainage and landscaping work thereafter. (White Affidavit). HNS maintains that no matter who was responsible for the grade being too high, Marick still should have noticed this condition and taken steps to remedy it.

Marick does not dispute that, as general contractor, it was charged with the responsibility of supervision and oversight of subcontractor work, including that of HNS and Upstate. (Stewart Aff., ¶¶ 9-12; Hrg. Tr. p. 43, ll. 10-15). Stewart opined that the Marick representative who provided "daily supervision of the 'Project' . . . . had insufficient training, expertise, or knowledge to provide competent supervision during the construction of the 'Project' and insufficient supervision was provided." (Stewart Aff. ¶ 12). Both Stewart and Upstate expert Rhett Whitlock also opined that the height of the grade against the units was among the open and obvious conditions that would have been observed and corrected by Marick during reasonable supervision of the job site. (Stewart Aff. ¶ 12; August 9, 2012; Whitlock Aff., pp. 3, 5). Stewart found "[t]he deficient conditions . . . regarding the exterior grade were open for inspection during construction and Marick as the general contractor for the 'Project' should have observed these deficiencies and caused the deficient work to be corrected prior to the completion of the 'Project.'" (Stewart Aff. ¶ 9).

ARGUMENT

I. Marick Cannot Challenge For The First Time On Appeal The Circuit Court's Decision To Collapse All Of Its Cross-Claims Into One Claim For Equitable Indemnity Because Marick Conceded This Issue On Summary Judgment, The Circuit Court Relied On That Concession When Granting Summary Judgment In Favor Of HNS, And Marick Never Asked The Circuit Court To Reconsider That Decision.

Marick cannot appeal the circuit court's decision to collapse its cross-claims into one claim for equitable indemnity because this issue was not preserved: Marick conceded that collapse was appropriate and never sought reconsideration when the circuit court granted summary judgment in reliance on that concession. Marick cannot challenge that decision for the first time on appeal.

A. Marick Conceded The Merits Of The Collapsing Argument In The Circuit Court.

The transcript of oral argument on Upstate and HNS's motions reveals that despite multiple opportunities, Marick never disputed that its cross-claims should be collapsed into one equitable indemnity claim. Although both Upstate and HNS began their arguments by urging the court to collapse the separately-denominated cross-claims in Marick's complaint, (Hrg. Tr. p. 36, l. 24 – p. 38, l. 9; p. 47, ll. 16-19), Marick bypassed that issue altogether and focused on defending the merits of its equitable indemnity claim against the unclean hands and special relationship arguments raised in HNS and Upstate's motions, (Hrg. Tr., p. 42, l. 19 - p. 43, l. 1; p. 45, ll. 3-11). Marick later couched its claim as "an equitable cause of action," (Hrg. Tr. p. 46, ll. 19-21), and never corrected the observation by Upstate's counsel that Marick "has agreed that all his claims are truly equitable indemnity . . . ," (Hrg. Tr. p. 50, ll. 12-13). As final confirmation, the circuit court questioned Marick's counsel before announcing its ruling:

The Court:	All right. The issue on the cross claim of course is equitable indemnity, is that correct?
Marick's Counsel:	On this one, yes, Your Honor.

(Hrg. Tr. p. 53, ll. 7-9).[5]

South Carolina law is clear that "[a] litigant cannot concede an issue at trial and then raise it on appeal." *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011)(citing *Southern Ry. v. Routh,* 161 S.C. 328, 333, 159 S.E. 640, 642 (1930)). Once an issue has been conceded to the circuit court, it is procedurally barred from consideration on appeal. *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995). A concession may be as overt as Marick's in this case, or it may simply be "fail[ure] to properly contest" an issue by only vaguely mentioning it to the circuit court. *Tupper v. Dorchester County*, 326 S.C. 318, 324, 487 S.E.2d 187, 191 (1997). In either case, a conceded issue is not an appealable issue.

Even if Marick takes the position that its concession was inadvertent (although the transcript certainly suggests it was measured), Marick still had ample opportunity to recalibrate its position. Although the circuit court announced at the conclusion of oral argument on September 5, 2012, that it intended to rule against Marick on summary judgment "under the concept of equitable relief," (Hrg. Tr., p. 22, ll. 4-6), the written order was not entered until almost three weeks later, (September 25, 2012, Order). This Court has made clear that "[u]ntil written and entered, the judge retains discretion to

[5] Even Marick's written opposition memorandum fails to mention the collapsing issue. (Marick Home Builders, LLC's Opposition Memorandum dated September 4, 2012/filed March 13, 2013). As outlined in more detail in Footnote 12, *infra*, there are other issues surrounding the submission of this opposition memorandum as well.

change his mind and amend his oral ruling accordingly" even when (as here) the court directed a party's lawyer to prepare a proposed order pursuant to Rule 58(a), SCRCP. *Doe v. Doe,* 324 S.C. 492, 501-502, 478 S.E.2d 854, 859 (Ct. App. 1996). If Marick wanted to retract its concession before the court's ruling was final, it had several weeks to do so. Moreover, even after the order was entered on September 25, 2012, Marick could have – and indeed should have – resolved its challenges to the court's findings by filing a Rule 59(e) motion.

B. The Collapsing Issues Were Not Preserved For Appellate Review Because Marick Failed To File A Rule 59(e) Motion To Reconsider.

To the extent Marick disagreed with the court's finding that Marick "acknowledged that equitable indemnification was the only claim at issue," (September 25, 2012, Order, p. 3), "the proper procedure for correcting factual errors in an order is to file a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP," *Doe,* 324 S.C. at 501-502, 478 S.E.2d at 859. "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993)("We note that Rule 59(e), SCRCP, provides for a motion to alter or amend judgment and preserve the record for appeal."). Only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011)(internal quotations omitted).

This Court has made clear that it "will not consider issues on appeal which have not been preserved for appellate review." *Ulmer v. Ulmer*, 369 S.C. 486, 632 S.E.2d 858

(2006). The issue preservation requirement ensures that the circuit court has the opportunity "to rule properly after it has considered all relevant facts, law, and arguments," *I'on*, 338 S.C. at 422, 526 S.E.2d at 724, and provides this Court "with a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). *See also Myers v. Myers*, 391 S.C. 308, 321, 705 S.E.2d 86, 93 (Ct. App. 2011) (finding that factual error was not preserved for appellate review because the appellant failed to raise any issues regarding the court's factual findings in his Rule 59(e), SCRCP, motion); *Arnal v. Arnal,* 363 S.C. 268, 609 S.E.2d 821 (Ct. App. 2005) (finding wife's failure to raise family court's exclusion of parcel of land from marital estate in a Rule 59(e) motion precluded review of the issue on appeal).

"There is no error preservation exception allowing a party to bypass calling an erroneous ruling to the attention of the tribunal making it before appealing that ruling to a higher court." *Oxner*, 391 S.C. at 134, 705 S.E.2d at 52 (affirming dismissal of the appeal because the appellant failed to move for reconsideration of a *sua sponte* ruling in the circuit court before appealing the ruling and thus "failed to preserve any issue related to that ruling for our appellate review").[6] Recently, this Court emphasized the need for issue preservation even when a litigant disagrees with the circuit court's finding that a

[6] Nor can Marick justify its decision to bypass Rule 59(e) in favor of initiating this appeal by contending that it was unaware of, or surprised by, the circuit court's reliance on its concession. *Pelican*, 311 S.C. at 60, 427 S.E.2d at 675 (rejecting the appellant's assertion that his failure to object in the circuit court was due to the fact that he was unaware until he received the written order that the respondent would be granted a new trial as to damages only if appellant failed to accept the additur). The proposed order (drafted by HNS at the circuit court's request) referenced the concession, and when HNS submitted the proposed order to the circuit court for review, HNS also forwarded a copy to Marick for "review and comment." (*See* September 17, 2012, email from counsel for HNS to circuit court and all counsel of record).

particular argument was not presented for decision (or, in this case, was conceded). In *Caldwell v. Wiquist*, Op. No. 5105 (S.C. Ct. App. filed March 27, 2013) (Shearouse Adv. Sh. No. 14 at 99), this Court found that Wiquist was procedurally barred on appeal from arguing the merits of her contention that evidence of fraud or collusion required reversal of the circuit court's decision. Wiquist failed to seek Rule 59(e) reconsideration of the circuit court's finding that she "ma[de] no allegation of either fraud or collusion as ground for [decision]," and her preservation failure precluded appellate argument. *Id.* Similarly, Marick cannot challenge the merits of the circuit court's decision to collapse its cross-claims because it never sought Rule 59(e) reconsideration when the circuit court found Marick had conceded that issue.

Marick attempts to employ the very strategy repeatedly prohibited by the South Carolina Supreme Court. Marick cannot keep "an ace card up [its] sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give [it] another opportunity to prove [its] case." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724-25.

II. Alternatively, Even If This Court Reaches The Merits Of The Circuit Court's Decision To Collapse Marick's Claims, That Decision Was Proper Because All Of Marick's Cross-Claims Sound In Equitable Indemnity.

Even if this Court reaches the merits of the circuit court's collapsing decision, it was proper for the circuit court to treat all of Marick's cross-claims as equitable indemnity – Marick's breach of warranty, negligence, and breach of contract causes of action were merely equitable indemnity claims by another name. (September 25, 2012, Order, p. 3; *see* Marick's April 5, 2012, Answer and Cross Claims, ¶¶ 158-174). Marick sought no separate damages for its cross-claims – the damages sought were the damages

to which Marick was exposed if plaintiffs were to prevail on their claims against Marick. (Marick's April 5, 2012 Answer and Cross Claims, ¶¶ 158, 162, 167, 174; Hrg. Tr. p. 36, l. 24 – p. 37, l. 12).[7] It is significant that Marick's cross-claims originated as third-party indemnity claims whereby Marick impleaded HNS and Upstate into the action.

It is well-established that "[i]ndemnity is that form of compensation which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolinas, Inc. v. Wood/ChuckChipper Corp.*, 336 S.C. 53, 61, 518 S.E. 2d 301, 305 (Ct. App. 1999); *see also Town of Winnsboro v. Wiedeman – Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E. 2d 500, 502 (Ct. App. 1990). That Marick named its claims "breach of contract," "negligence" and "breach of warranty" is not determinative. Rather, it is the "nature of the issues and remedies which are sought" that reveal the true allegations. *State v. Yelsen Land Co.*, 257 S.C. 401, 403, 185 S.E. 2d 897, 899 (1972); *Seebaldt v. First Federal Sav. & Loan Ass'n.*, 269 S.C. 691, 692; 239 S.E. 2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleader may choose to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E. 546, 548 (1919). Here, all of Marick's claims against HNS and Upstate sought the same damages for which Marick could have been liable to the plaintiffs.[8]

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[7] When HNS and Upstate settled all of the direct claims brought by Stoneledge and the other plaintiffs against them, Marick lost the ability to use HNS and Upstate as a shield, further exposing the true nature of Marick's cross-claims against them.

[8] Marick attempts to justify its assertion of additional claims against HNS by pointing out that it sought attorney fees and costs in addition to indemnification, citing *Addy v. Bolton*, 275 S.C. 28, 183 S.E.2d 708 (1971) in support. (Appellant Amended Initial Brief, pp. 9-10). But *Addy* does not salvage Marick's claims from collapse into

To resolve the procedural quandary presented by indemnity claims in disguise, other courts have collapsed improperly-denominated claims into one indemnity cause of action. *See, e.g.*, HNS Summary Judgment Memorandum, at Ex. C (Order in *Nelson v. John Weiland Home*, 2009-CP-10-6573) and Ex. D (Order in *Kirkland v. Cambridge Bldg. Corp.*, 2006-CP-07-1312). *See also U.S. Fidelity & Guaranty Co. v. Patriot's Point Dev't Auth.*, 788 F. Supp. 880, 881, n.1. (D.S.C. 1992)(rejecting non-settling defendants' argument that their cross-claims against a settling co-defendant were "independent claims" and finding the claims were "nothing more than claims for indemnity" because they would not exist "without plaintiff suing the non-settling defendants"); *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)(finding cross-claims against settling defendants for breach of contract, negligence, and fraud to be "nothing more than claims for contribution or indemnification with a slight change in wording" because "a rose by any other name is still a rose"). It appears that the South Carolina Supreme Court has acknowledged – at least implicitly – that equitable indemnification is the only true

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one claim for indemnity, nor does *Addy* support Marick's assertion that attorney fees and costs in an indemnity action can be sought via concurrent claims for breach of warranty, breach of contract, and negligence. *Addy* answered only the "single question" of whether attorney fees can be recovered **in an indemnity action** "in the absence of an express contract of indemnity." *Addy*, 275 S.C. at 33, 183 S.E.2d at 710. The South Carolina Supreme Court concluded that an indemnitee may recover attorney fees when the wrongdoer's negligence is equitably imputed to the indemnitee by operation of law instead of by contract – provided of course that "no personal fault of the indemnitee has joined in causing the injury." *Addy*, 275 S.C. at 33, 183 S.E.2d at 710. *Addy* does not authorize an indemnitee to bring separate breach of contract and negligence claims alongside its indemnity claim. Rather, the "*Addy* rule" clarified that expenses are recoverable under "[t]he law of equitable indemnification." *Vermeer*, 336 S.C. at 61, 518 S.E.2d at 305. *See also Toomer v. Norfolk S. Ry. Co.*, 344 S.C. 486, 544 S.E.2d 634 (Ct. App. 2001) (citing *Addy* and holding that a special relationship giving rise to equitable indemnity can exist when the at-fault party's negligence or breach of contract causes the non-faulting party to incur attorneys' fees in defending itself).

claim when an indemnitee brings concurrent claims for breach of contract and negligence. In *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 432, 445 S.E.2d 446, 447 (1994), the court addressed only a third-party plaintiff's indemnification claim without recognizing the breach of contract and negligence claims that were also alleged.

There is no reason for this Court to reach the merits of the circuit court's decision to treat all of Marick's cross-claims as one claim for indemnity, but even if it does, that decision was appropriate.

III. The Circuit Court Properly Granted Summary Judgment On Marick's Equitable Indemnity Cross-Claim Because Marick's Unclean Hands Prohibited Recovery.

Summary judgment was warranted in favor of HNS on Marick's sole claim against it for equitable indemnity. South Carolina law is clear that a party can only recover in equitable indemnity if the party is without fault:

> Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him. *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963). This is subject to the proviso that no personal negligence of his own has joined in causing the injury. *Id.*

Vermeer, 336 S.C. at 60-61, 518 S.E. 2d at 305.

Marick was not free of fault, and Marick's unclean hands pretermitted its right to equitable indemnification. As outlined below, Marick conceded that it was obligated to supervise and oversee its sub-contractors, (Hrg. Tr. p. 43, ll. 10-15), and the circuit court had before it uncontroverted testimony from three affiants setting forth Marick's failure to fulfill that duty, (*see* Affidavit of Rhett Whitlock dated March 14, 2012; Affidavit of

Rhett Whitlock dated August 9, 2012; Affidavit of Donny White dated August 23, 2012; Affidavit of Glenn Stewart, M.E., P.E. dated August 30, 2012; *see also* Hrg. Tr. p. 50, ll. 2-7; p. 52, ll. 20-23). Marick failed to produce even a scintilla of evidence that it was entitled to maintain an equitable indemnity claim.

A. The Summary Judgment Standard

Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e), SCRCP; *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). In determining the appropriateness of granting summary judgment, the trial court is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)). Moreover, "[a] party opposing summary judgment must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985)). Where a defendant establishes entitlement to judgment as a matter of law, the court must grant summary judgment. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); *Dyer,* 284 S.C. at 211, 325 S.E.2d at 70. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493-494, 567

S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)).

B. The Record Evidence Establishes That Marick Breached Its Duty Of Supervision.

The evidence before the circuit court on summary judgment established that HNS was due judgment as a matter of law on Marick's equitable indemnity claim: (1) Marick owed a duty to supervise the work of its sub-contractors; (2) Marick provided insufficient supervision during the Project; and (3) reasonable supervision by anyone would have revealed the obvious deficiencies for which Marick seeks indemnity. First, Marick conceded during oral argument that it was obligated to supervise and oversee its sub-contractors, including HNS and Upstate. (Hrg. Tr. p. 43, ll. 10-15).[9] Second, expert testimony provided by consulting engineer Glenn Stewart established that Marick's representative assigned to provide "daily supervision of the 'Project' . . . had insufficient training, expertise, or knowledge to provide competent supervision during the construction of the 'Project' and insufficient supervision was provided." (Stewart Aff. ¶ 12). Third, Stewart and Upstate expert Rhett Whitlock both opined that the height of the grade against the units[10] was among the open and obvious conditions that should have been observed and corrected by Marick had it reasonably supervised the job site. (Stewart

[9] In any event, undisputed expert testimony established that Marick owed this duty. (Stewart Aff. ¶10; August 9, 2012 Whitlock Aff., p. 5).

[10] As noted previously, the only criticism levied by Stoneledge and the other plaintiffs against Marick regarding the work performed by HNS and Upstate is that the grade was too high against the units.

Aff. ¶ 12; August 9, 2012 Whitlock Aff., pp. 3, 5).[11] Stewart found "[t]he deficient conditions... regarding the exterior grade were open for inspection during construction and Marick as the general contractor for the 'Project' should have observed these deficiencies and caused the deficient work to be corrected prior to the completion of the 'Project.'" (Stewart Aff. ¶ 9). Marick was not without fault.

C. Marick's Only Opposition "Evidence" Did Not Address HNS's Arguments.

Although it is axiomatic that a party opposing summary judgment must do more than rely on mere allegations, *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), Marick failed to meet this burden. Marick filed no affidavits, depositions, or other evidentiary material in opposition to the motions filed by HNS and Upstate. Marick cited no evidence during oral argument. Indeed, Marick's only opposition "evidence" consisted of deposition excerpts from the Deposition of Randy Still quoted in the body of a memorandum that Marick emailed to the Clerk of Court on the evening before the hearing.[12] (Marick Home Builders, LLC's Opposition

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[11] As outlined in Section IV., *infra,* HNS has taken the position that it is not responsible for the grade being too high, although under any scenario, Marick still should have noticed this condition and taken steps to correct it.

[12] Ironically, Marick's appellate brief seems to question the validity of its only opposition "evidence." In a footnote of its Appellant Amended Initial Brief, Marick claims that Still's deposition is "still open" and "not finished." (Appellant Amended Initial Brief, p. 15 n.2). If the Still deposition excerpts cited in Marick's memorandum were not reliable or complete, that only further undercuts Marick's position on summary judgment.

In the same footnote, Marick also claims that it "went out of turn" to question Still "in preparation for the motions hearing" and "objected to the timing of the hearings as discovery on this issue was not complete." (Appellant Amended Initial Brief, p. 15 n.2). Marick has neither preserved nor appealed an issue regarding the timing of the circuit court's summary judgment decision. First, Marick raised no such objection to the circuit

Memorandum dated September 4, 2012/filed March 13, 2013, pp. 7-9). Marick failed to file or submit to the circuit court any pages from the Still Deposition, and this Court has prohibited Marick from referencing or citing to the Still Deposition on appeal. (July 10, 2013 Order).[13]

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court in the first instance. The law is well-established that appellate arguments first must "have been fairly and properly raised to the lower court and passed upon by that court.'" *Oxner*, 391 S.C. at 134, 705 S.E.2d at 52 (internal quotations omitted).

It is for good reason that Marick's footnote cites no record support for this "objection" – the transcript of the hearing on HNS and Upstate's motions is devoid of any mention by Marick that a summary judgment ruling would be premature or should be delayed for any other reason. Indeed, Marick argued only the merits of HNS and Upstate's motions at the hearing. It is Marick's burden as Appellant to provide a record sufficient for review of the issues it raises. *Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). *See also Zaman v. S.C. State Bd. of Medical Examiners*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) ("We need not address this issue since there is no record of what, if anything, appellant requested, whether it was refused, and if so, why."); *Benton v. Davis*, 248 S.C. 402, 410, 150 S.E.2d 235, 238-239 (1966) (holding that objections to a jury charge raised at an informal conference but not made a part of the record preserve no issue for appeal). Marick failed to do so here, and any argument that summary judgment was inappropriate because of ongoing discovery was not presented or preserved at the circuit court level.

In any event, Marick did not appeal this issue. The only issues raised by Marick on appeal concern the merits of the circuit court's summary judgment ruling, not the timing of it. (*See* Statement of Issues on Appeal). A passing reference in a footnote that contains no citation to authority is not sufficient to present an issue for appellate consideration. *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 488-489, 732 S.E.2d 205, 213 (Ct. App. 2012).

[13] In response to the Court's July 10, 2013 Order, Marick filed an Amended Initial Brief that continues to rely on the Still Deposition (by citing to the excerpts in its opposition memorandum rather than to the deposition pages directly). (*See* Appellant Amended Initial Brief, pp. 13-15). HNS filed a Motion to Strike on August 2, 2013 that challenges the propriety of Marick's continued reliance on this prohibited testimony, and that motion was still pending as of the date of submission of Respondent's Amended Brief.

1. Even If Considered, Still's Testimony Did Not Address Marick's Duty Of Supervision And Oversight.

Even if Still's testimony is properly considered on appeal, it does not controvert the evidence produced by HNS that Marick breached its duty of supervision as to the scope of work at issue. None of the questions asked of Still in the excerpts relate to Marick's supervision or oversight of HNS or Upstate (or any of its sub-contractors for that matter), and all but one of the questions concern pieces of the construction on which HNS and Upstate did not work at all.[14] The excerpted testimony has nothing to do with Marick's supervision of HNS and Upstate's work – it is a series of "yes" or "no" questions framed to generate approval with the broadest brush of Marick's "installation" and "construction obligations." (*See* excerpts cited in Appellant Amended Initial Brief, pp. 13-15).

While this testimony may address the plaintiffs' claim that the work itself "violated . . . code, manufacturer's installation instructions, design drawings or any other obligation," (Appellant Amended Initial Brief, p. 15), it does not even mention Marick's supervisory duties of HNS, much less establish a genuine issue of material fact. Stewart's opinion that Marick's on-site supervisor was ill-equipped to supervise and,

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[14] Indeed, the only question in the cited colloquy that even relates to the Phase II grading on which HNS and Upstate worked is the following:

> Q: Do you believe Marick violated any code, manufacturer's 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.

(Appellant Amended Initial Brief, p. 15).

indeed, provided "insufficient supervision," (Stewart Aff., ¶ 12), was uncontroverted and warranted summary judgment in favor of HNS. For this reason alone, the circuit court's decision should be affirmed.

2. There Was No Dispute That Reasonable Supervision By Marick Would Have Revealed Such Obvious Deficiencies.

Nor do the Still excerpts, if properly considered on appeal, refute the evidence HNS proffered that reasonable supervision would have revealed the existence of such obvious defects. (Stewart Aff., ¶ 12; August 9, 2012 Whitlock Aff., pp. 3, 5). On appeal, Marick does not even address the open and obvious nature of the deficiencies, opting instead to generally assert that it "met all of its obligations as the general contractor." (Appellant Amended Initial Brief, p. 16). The circuit court specifically found that "Marick would have seen the height of the grade prior to the completion of the construction and would have had the opportunity to correct it," (September 25, 2012 Order, p. 6; Hrg. Tr. p. 47, l. 25; p. 48, ll. 1-21). Marick's vague insistence that it fulfilled Project duties does not address the court's finding that these deficiencies should have been discovered.

The evidence before the circuit court conclusively established that Marick breached its duty because reasonable supervision would have revealed the defects. Marick admitted at the summary judgment hearing that it owed such a duty, (Hrg. Tr. p. 43, ll. 10-15), yet Marick presented no evidence challenging the experts' opinions that reasonable supervision would have revealed obvious deficiencies in those areas Marick admittedly committed to supervise. For this additional reason, the circuit court's grant of summary judgment is due to be affirmed.

Marick attempts to detract from this lack of evidence by citing *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561, 658 S.E.2d 80, 88–89 (2008) for the proposition that a general contractor is not automatically liable for the defective work of its sub-contractors. (Hrg. Tr., p. 43, ll. 3-12; (Marick Home Builders, LLC's Opposition Memorandum dated September 4, 2012/filed March 13, 2013, p. 7). Marick's citation to *Fields* is inapposite. HNS did not argue that Marick was automatically liable for HNS's work. Rather, HNS produced evidence that Marick failed to fulfill its own duty to supervise the work – the same duty recognized by the court in *Fields* as a separate obligation, not automatic liability. *Fields,* 376 S.C. at 561, 658 S.E.2d at 88–89. Marick's mischaracterization of HNS's argument is nothing more than a red herring.

Marick's struggle for evidentiary support is palpable from the hearing transcript. Marick's counsel discussed facts that were not in evidence and repeatedly referred to depositions and photographs that were never presented to the circuit court. (*See* Hrg Tr. p. 43, ll. 3-24 (referring to "evidence" that "a survey company [was sent] to go out and shoot levels and direct the placements of the grading" and an "architect was involved not only in drawing the plans but was actually on site"); p. 44, ll. 4-9 ("But, as you can imagine, with all of the pleadings and all of the motions and all of the depositions that have taken place and the written discovery, there is certainly a scintilla of evidence which would support our position that my client, Marick, did perform its supervisory duties. . . . "); p. 51, ll. 9-14 (referring to "evidence that is out there and it is not in the form of affidavits, it's testimony, photographs, and that type of thing"); p. 52, ll. 2-6, 9-10 ("There is certainly a scintilla of evidence that the general contractor, Marick, performed its duty by hiring a surveying company to shoot these levels and make sure the grade was

and showing the subcontractors how they were performing their jobs . . . . So there is certainly a question of fact as to whether or not it was open and obvious.")). This blatant attempt to substitute arguments of counsel for record evidence was not lost on counsel for HNS, who observed: "I wish [Marick's counsel] wouldn't be so great a witness because I'm not sure I agree completely with what he said." (Hrg. Tr. p. 52, ll. 12-14).

Arguments of counsel are not facts. *See McManus v. Bank of Greenwood,* 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *Bowers v. Bowers,* 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) (emphasizing that arguments of counsel are not evidence); *Gilmore v. Ivey,* 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (holding that circuit court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence). This Court has made clear that it is not sufficient for a litigant to describe evidence to the circuit court; the evidence itself must be presented to satisfy a burden of proof. *Sessions v. Withers*, 327 S.C. 409, 414, 488 S.E.2d 888, 891 (Ct. App. 1997) (disregarding counsel's recitation of deposition testimony that was not presented to the circuit court).

The only evidence even arguably presented in opposition to HNS's motion for summary judgment is the excerpted Still testimony, and it was not enough to overcome summary judgment. The circuit court's decision is due to be affirmed.

IV. The Circuit Court Properly Granted Summary Judgment On Marick's Equitable Indemnity Cross-Claim Because HNS Was Not At Fault.

As this Court has observed, Marick can only maintain a claim for indemnity "against the person whose wrong has thus been imputed [to Marick]." *Vermeer*, 336 S.C. at 60-61, 518 S.E. 2d at 305. Because neither HNS, nor its sub-contractor Upstate, were at fault for the grading deficiencies for which the plaintiffs seek to hold Marick liable, it was not the "wrong" of either HNS or Upstate that has been imputed to Marick. Affirmance is warranted for this independent reason as well.

As the circuit court found, the undisputed evidence established that HNS was not at fault for the construction deficiencies at issue. Upstate President Donny White explained that HNS hired Upstate to perform work on the Project and that he was personally "onsite and inspected much of the work while it was being performed." (White Aff.). According to White, Upstate's work "was performed correctly and backfill was not placed over the wick board." (White Aff.). White observed that other persons "performed drainage and landscaping work after our work was completed" and "changed the grade in some areas allowing the dirt to be higher than the wick board." (White Aff.). White also pointed out that Upstate's work "was inspected by the county and approved by Marick." (White Aff.). In its order granting summary judgment, the circuit court found:

> Defendants Upstate Utilities and HNS have taken the position that they are not responsible for the grade being too high. This position is supported by the Affidavit of Donny White, the president of Upstate Utilities, which was submitted to the Court by counsel for Upstate Utilities. Marick did not file any affidavits to rebut Mr. White's statements.

(Order pp. 5-6).

Marick not only failed to present evidence of HNS's fault at the circuit court level, but it has not appealed the circuit court's finding on this issue. To the extent the circuit court "is deemed to have alternatively ruled [to grant summary judgment on this ground] . . . , this ruling, right or wrong, would require affirmance as [Marick] did not timely dispute this alternative ground." *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 171-172, 714 S.E.2d 869, 878 (2011)(citing *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973) and noting that an unchallenged ruling, right or wrong, becomes the law of the case). Regardless, the undisputed evidence establishing that it was not the wrong of HNS that was imputed to Marick provides an additional sustaining ground on appeal. *See* Rule 220(c), SCACR. Marick's equitable indemnity claim against HNS was directed to the wrong party because HNS was not at fault.

CONCLUSION

Marick is barred from recovering on its only true claim against HNS of equitable indemnity. It was not HNS's wrong that the plaintiffs sought to impute to Marick, and Marick's own failure to supervise contributed to the wrong. The circuit court properly granted summary judgment in HNS's favor, and HNS respectfully requests this Court to affirm.

Respectfully Submitted,

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Columbia, South Carolina
September 20, 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.

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 **Amended Initial Brief Of Respondent Hutch N Son Construction, Inc.** in the above-referenced matter upon counsel for Appellants and Respondent Upstate Utilities, Inc. via United States Mail, postage prepaid, on this the 20 day of September, 2013, to the following addresses:

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