

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, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Miller/Player & 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 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., Upstate Utilities, Inc., Southern Basement, 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 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

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SC Court of Appeals

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

REPLY BRIEF OF APPELLANTS MARICK HOMES BUILDERS, LLC AND RICK
THOENNES TO RESPONDENT HUTCH-N-SON CONSTRUCTION, INC.'S AMENDED
INITIAL BRIEF

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ARGUMENTS

I. Appellants did not stipulate that all cross-claims collapse into one action for equitable indemnity.

Respondent asserts in its Amended Initial Brief that a stipulation was made by Appellants' counsel concerning all pled cross-claims collapsing into one action for equitable indemnity. The Transcript of Proceedings speaks for itself. In the cited portions of the Transcript of Proceedings submitted by Respondent in its Amended Initial Brief, nowhere does counsel for the Appellants state that "I stipulate to all cross-claims collapsing into one action for equitable indemnity."

"A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties or their attorneys and is binding upon those who make them." *McCrea v. City of Georgetown*, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App. 2009).

The Appellants made no concession, agreement or admission. The hearing transcript states as follows:

The Court: All right. The issue on the cross-claim of course is equitable indemnity; is that correct?

Mr. Imhoff: On this one, yes, Your Honor.

(Hrg. Tr. P.53, l. 7-9.)

Appellants assert that Respondent is taking the stated language out of context. In responding to the Court's question, counsel merely agreed that there was a cross-claim concerning equitable indemnity at issue in this case. Mr. Imhoff never stipulated that Appellants were no longer pursuing the other cross-claims filed against Respondent. Further, Appellants submitted a memorandum to the court and all counsel arguing that Appellants' cross-claims do not collapse into one action for equitable indemnity. Throughout oral arguments on the day of

the hearing, counsel for the Appellants argued identical motions to the one at issue in this appeal, and throughout those arguments continued to assert that the cross-claims pled do not collapse into one action for equitable indemnity.

Further, the September 25, 2012 Order states that “Counsel for Marick acknowledged that equitable indemnity was the only claim at issue...” (Sept. 25, 2012 Order P.3). However, in the September 25, 2012 Order, the Court examined law concerning causes of action collapsing into one action for equitable indemnity. *Id.* Thus, if it was a stipulation, there was no need for the Court to examine the law. Appellants have properly appealed the Courts Order and asserted that the cross-claims do not collapse into a single equitable indemnity claim. Thus, the collapsing issue is properly before the Court, as no stipulation was made.

II. Marick Submitted Sufficient Evidence to Create a Genuine Issue of Material Fact.

Throughout Respondent’s Amended Initial Brief, Respondent states that Marick submitted no evidence of Marick meeting its obligation to supervise the grading subcontractors. Said assertion has no merit, as Marick did submit sufficient evidence to create a genuine issue of material fact.

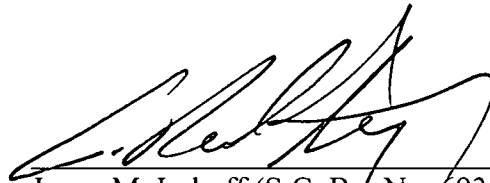
“Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Thomas Sand Co. v. Colonial Pipeline Co.*, 563 S.E.2d 109, 112 (S.C. Ct. App. 2002). In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefore must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997). “In cases applying the

preponderance of the evidence burden of proof, **the non-moving party is only required to submit a mere scintilla of evidence** in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009).

In this case, Marick submitted to the lower court excerpts from Randy Still’s deposition (cited verbatim in Marick’s Memorandum to the Court). The testimony submitted creates a genuine issue of material fact concerning the supervision provided by Marick at Stoneledge. Specifically, Randy Still stated that Marick did not violate any of its obligations concerning the grading performed at Phase II of the project (see: Marick’s Memorandum in Opposition to Summary Judgment, Page 9, citing verbatim Still’s deposition at Page 174:1:24). Thus, by testifying that Marick did not violate any of its obligations concerning the grading construction performed at phase II of Stoneledge, Still has opined that Marick met its obligations to supervise the grading subcontractors. Said evidence refutes the affidavits submitted by Respondent’s experts; thus, Marick submitted a genuine issue of material fact. *Id.* The lower court’s holding was improper and thus should be overturned.

CONCLUSION

For the reasons stated herein, and the reasons set forth in Appellants’ Initial Brief, the lower court’s order should be reversed in full.



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September 26, 2013

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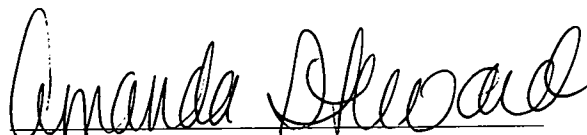
Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellants Marick Homes Builders, LLC and Rick Thoennes to Respondent Hutch N Son Construction, Inc's Amended Initial Brief by depositing a copy of it in the United States Mail, First Class postage prepaid, on September 6, 2013, addressed to Respondents' attorneys of record, Shelley S. Montague, Esquire, P.O. Box 7368 Columbia, SC 29202 (attorney for Hutch N Son Construction, Inc.), and S. Markey Stubbs, Esquire P.O. Box 8057 Columbia, SC 29202 (attorney for Upstate Utilities, Inc.).


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