

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

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

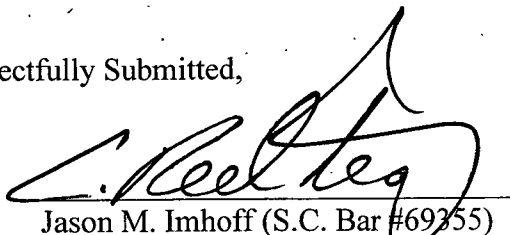
RECEIVED

NOV 07 2013

SC Court of Appeals

FINAL BRIEF OF APPELLANTS

Respectfully Submitted,



Jason M. Imhoff (S.C. Bar #69355)

C. Reed Teague (S.C. Bar #79933)

The Ward Law Firm, P.A.

P.O. Box 5663

Spartanburg, SC 29304-3188

Telephone (864) 582-3075

Facsimile (864) 585-3090

jimhoff@wardfirm.com

Attorneys for Appellant

Spartanburg, SC

RESPONDENTS' COUNSEL OF RECORD:

S. Markey Stubbs

Baker Ravenel & Bender, L.L.P.

Post Office Box 8057

Columbia, SC 29202

Attorney for Respondent Upstate Utilities, Inc.

Shelley S. Montague

Gallivan White & Boyd, P.A.

Post Office Box 7368

Columbia, SC 29202

Attorney for Respondent Hutch N Son's

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	ii
Statement of Issues on Appeal	1
I. Did the Lower Court err in collapsing all pled cross-claims into one claim for equitable indemnification?	
II. Did the Lower Court err in granting the Motions for Summary Judgment filed by Hutch-N-Son Construction, Inc. and Upstate Utilities, Inc. as to Marick Homes Builders, LLC's and Rick Thoennes' cross-claims?	
Statement of the Case	2
Statement of the Facts.....	2
Standard of Review	4
Argument.....	5
I. The lower court erred in collapsing all of Appellants' cross-claims into one claim for equitable indemnification.	
II. The Circuit Court erred in granting HNS's and Upstate's Motions for Summary Judgment concerning Marick's cross-claims for equitable indemnification.	
A. Equitable Indemnification	
1. Unclean Hands	
B. Special Relationship	
Conclusion.....	16

TABLE OF AUTHORITIES

CASES

<i>Addy v. Bolton</i> , 257, S.C. S.E.2d 708 (1971).....	7, 8, 9
<i>Celotex v. Catrett</i> , 477 U.S. 317, 322 (1986).....	4
<i>Fields v. J. Haynes Waters Builders, Inc.</i> , 376 S.C. 545, 561 (2008).....	10, 14
<i>First Gen. Services of Charleston, Inc. v. Miller</i> , 314 S.C. 439, 442, 445 S.E.2d 446, 448, (1994).....	9, 14, 16
<i>Griffin v. Van Norman</i> , 302 S.C. 520, 523, 392 S.E.2d 378, 380 (Ct. App. 1990).....	7, 8, 12
<i>Hancock v. Mid-South Mgmt. Co., Inc.</i> , 673 S.E.2d 801, 803 (S.C. 2009).....	5
<i>Jourdan v. Boggs/Vaughn Contracting, Inc.</i> , 324 S.C. 309, 312-13, 476 S.E. 2d 708, 710 (Ct. App.1996).....	10
<i>Kirkland v. Cambridge Building Corp.</i> , 2009-CP-07-1312.....	6
<i>Nelson v. John Weiland Home</i> , 2009-CP-10-6573.....	6
<i>Rock Hill Telephone Co. v. Global Communications</i> , 363 S.C. 385, 611 S.E.2d 235 (2005).....	14, 15, 16
<i>Rothrock v. Copeland</i> , 305 S.C. 402, 409 S.E.2d 366 (1991).....	5
<i>S.C. National Bank v. Stone</i> , 749 F. Supp. 1419, 1433 (D.S.C. 1990).....	6
<i>Seaboard Air Line R.R. v. Coastal Distributing Co.</i> , 273 F. Supp. 340 (D.S.C. 1967).....	14, 15
<i>Thomas Sand Co. v. Colonial Pipeline Co.</i> , 563 S.E.2d 109, 112 (S.C. Ct. App. 2002)....	4, 5, 14
<i>Tompkins v. Festival Centre Group</i> , 306 S.C. 193, 410 S.E.2d 593 (Ct. App. 1991).....	4
<i>Town of Winnsboro v. Wiedeman-Singleton, Inc.</i> , 303 S.C. 52, 398 S.E.2d 500 (1990).....	7, 8
<i>U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority</i> , 788 F. Supp. 880, 881 (D.S.C.1993).....	6
<i>Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.</i> , 336 S.C 53, 58, 518 S.E.2d 301, 304 (1999) (citations omitted).....	4, 5

<i>William L. Lyon & Associates, Inc. v. Superior Court</i> , 204 Cal. App. 4 th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012).....	8
--	---

COURT RULES

Rule 56(c), SCRCP.....	4
------------------------	---

STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN COLLAPSING ALL PLED CROSS-CLAIMS INTO ONE CLAIM FOR EQUITABLE INDEMNIFICATION?
- II. DID THE LOWER COURT ERR IN GRANTING THE MOTIONS FOR SUMMARY JUDGMENT FILED BY HUTCH-N-SON CONSTRUCTION, INC. AND UPSTATE UTILITIES, INC. AS TO MARICK HOME BUILDERS, LLC AND RICK THOENNES' CROSS-CLAIMS?

STATEMENT OF THE CASE

The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge. Included in Plaintiffs' claims were claims against one of the general contractors affiliated with the project, Marick Home Builders, LLC (hereinafter "Marick"), and claims concerning alleged defective grading against Marick's subcontractor Hutch-N-Son Construction, Inc. (hereinafter "HNS") and a subcontractor hired by HNS, Upstate Utilities, Inc. (hereinafter "Upstate"). As a result of being sued for the alleged defective grading/site work performed by HNS and Upstate, Marick filed cross-claims against all of the subcontractors on the project including HNS and Upstate for indemnity, negligence, breach of contract and breach of warranty.

All of the subcontractors, including HNS and Upstate, filed motions for summary judgment as to Marick's Cross-claims. (R. pp. 334-361.) Arguments were heard all day in the Circuit Court. Notwithstanding Appellants' opposition, the lower court issued an order dated September 24, 2012, granting the motions for summary judgment of HNS and Upstate. (R. pp. 1-9.) The Order was received by Appellants on September 26, 2012 and a Notice of Appeal and Proof of Service was served upon the court and all parties on October 5, 2012.

STATEMENT OF FACTS

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter "Hund"). (R. pp. 10-22.) Hund's complaint alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the project.

Upon information and belief, Stoneledge Owners Association (hereinafter "SOA") took the position that Dr. Hund's Complaint was improper as the SOA was responsible for the exterior of the units. In November of 2009, the owners voted to retain an attorney to represent the SOA and amend the lawsuit to include the SOA and both Phase I and Phase II of the project.

Dr. Hund amended the complaint to add the SOA and additional individual homeowners as Plaintiffs and included new allegations concerning Phase I of the project. (R. pp. 49-76.) Plaintiffs again alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, inadequate installation of building components, improper site work/grading, and undisclosed latent defects.

Stoneledge at Lake Keowee (hereinafter "Stoneledge") is an 80 unit lakefront townhome development located in West Union, South Carolina along the shores of Lake Keowee. Stoneledge was constructed in two separate phases. The general contractor for phase I construction was Bostic Brothers Construction, Inc. (hereinafter "Bostic Brothers"). Following completion of the exterior of all phase I units and completion of a majority of the interiors of all phase I units, Bostic Brothers terminated construction at Stoneledge.

After Bostic Brothers' exit, the remaining unsold units and vacant land was purchased by IMK Development Co., LLC (hereinafter "IMK"). IMK was owned by corporate entities IK and Marick. Once purchased, IMK retained Marick as the general contractor to construct phase II at Stoneledge. Due to Marick's partial ownership of IMK, Plaintiffs' Complaint alleges that Marick was a developer of the project. Plaintiffs have alleged breach of the warranty of habitability among other things, against Marick as a developer.

During construction, Marick subcontracted with HNS to perform grading/site work at the project. HNS then subcontracted with Upstate to assist in performing the grading/site work

at the project. As alleged by Plaintiff and admitted by HNS and Upstate in their affidavits and memorandums to the lower court, there were issues related to the grading at the project. (R. pp. 481-486.)

Plaintiffs hired Construction Science and Engineering (“CSE”) to investigate the conditions at Stoneledge and develop a scope of repair. During work at the project, CSE observed dirt above the proper grade. Marick also retained the services of an expert, Randy Still. As set forth in Marick’s Memorandum in Opposition to HNS’s and Upstate’s Motions for Summary Judgment, Randy Still specifically stated that he did not believe that Marick violated any obligations concerning grading at Stoneledge. (R. pp. 442.)

STANDARD OF REVIEW

Rule 56 of the South Carolina Rules of Civil Procedure provides for judgment as a matter of law where “there is no genuine issue as to any material fact.” S.C. R. Civ. P. 56(c). The purpose of summary judgment is to dispose of factually unsupported claims. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). “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). “Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” *Tompkins v. Festival Centre Group*, 306 S.C. 193, 410 S.E.2d 593 (Ct. App. 1991).

A trial court should not grant a motion for summary judgment when pleadings, depositions, answer to interrogatories, and admissions on file, together with affidavits, if any, show there is a genuine issue as to any material fact. *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 58, 518 S.E.2d 301, 304 (1999) (citations omitted). In

determining whether any triable issue of fact exists, which will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.*

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Vermeer Carolina's, Inc.*, 336 S.C. at 58, 518 S.E.2d at 305. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Id.* Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.*

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991).

“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); *See: Thomas Sand, Co.*, 563 S.E.2d at 112 (on negligence cause of action, “[a]t the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.”)

ARGUMENTS

I. The lower court erred in collapsing all of Appellants cross-claims into one claim for equitable indemnification.

The Circuit Court erred in collapsing Appellants’ cross-claims for breach of warranty, breach of contract, and negligence into one claim for equitable indemnification. Appellants believe this is a matter of first impression for South Carolina appellant courts as the lower court cited no binding case law in support of its holding. In support of its holding, the Court cited two

non-binding district court cases (*U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)) and two non-binding unpublished South Carolina circuit court orders (*Nelson v. John Weiland Home*, 2009-CP-10-6573 (Order by Judge Roger M. Young, October 26, 2011) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006)).

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Appellants assert cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n. 3. However, in this case, even after settlement with HNS and Upstate, Plaintiffs continue to allege defective site/grading work against Marick. Thus, Marick is required to continue litigating claims associated with HNS's and Upstate's defective work. Marick continues to incur attorney fees and costs associated with HNS's and Upstate's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Appellants assert that the federal court holdings should not be persuasive in this matter. Appellants further assert that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Appellants may recover special damages at law under theories of negligence and breach of warranty as to Respondent Upstate and for negligence, breach of warranty and breach of

contract as to Respondent HNS. Appellants' claims for breach of warranty, negligence and breach of contract are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1900) citing *Addy v. Bolton*, 257 S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs' claims arising from the Defendant Subcontractors' tortious conduct (negligent performance of work), breach of warranty (failure to perform work in a workmanlike manner) and breach of contract; thus, Marick properly filed claims for negligence and breach of warranty against Respondent Upstate and for negligence, breach of warranty and breach of contract against Respondent HNS seeking not only "damages

recovered by the Plaintiffs against Marick” but also “reasonable attorney fees and costs” associated with defending the claims. (R. pp. 77-115.) Marick has even better facts than *Addy* for including special damages claims against subcontractors as both HNS and Upstate were sued directly by Plaintiffs for their defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence, breach of contract and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by the subcontractors to Marick constitute separate causes of action which did not arise through Plaintiffs’ relationship to the parties. The Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, separate causes of action for negligence and breach of contract do not collapse into a single indemnity claim. Marick had a contractual relationship and was owed separate duties by the subcontractors it was overseeing to perform the work at issue in this action; if those subcontractors failed to perform the work they were hired to perform properly, they breached duties and contractual obligations owed to Marick and thus should be liable to Marick.

II. The Circuit Court Erred in Granting HNS’s and Upstate’s Motions for Summary Judgment Concerning Marick’s Crossclaim for Equitable Indemnification.

The lower Court order granted summary judgment in favor of Upstate and HNS as to Marick’s Cross-Claim for equitable indemnification based upon the doctrine of unclean hands. The Court did not find that Marick failed to create a genuine issue of material fact. (R. pp. 1-9.)

Thus, Appellants will address the lower court's finding as a matter of law that Marick has unclean hands in this matter and thus is not entitled to equitable indemnification. Further, in relation to Upstate, the Court erred by holding that Upstate had no special relationship with the general contractor Marick.

A. EQUITABLE INDEMNIFICATION

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994). "The right is created by operation of law 'in cases of imputed fault or where some special relationship exists between the first and second parties.'" *Id.* (Internal citation omitted). "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; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury." *Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (Internal citation omitted).

With equitable indemnification, it does not matter that there is no contractual provision for indemnity. "The very nature of equitable indemnification is that a contract for indemnity is unnecessary." *Winnsboro II*, 307 S.C. at 132, 414 S.E.2d at 121. It is true if a jury finds a party negligent, then as an adjudicated tortfeasor equitable indemnity would not be available. *See* South Carolina Uniform 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. *Id.* *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 verbatim quotations of Randy Still's deposition testimony set forth in Marick's Memorandum in Opposition to HNS's and Upstate's Motions for Summary Judgment, a question of fact exists concerning whether Marick breached its duty to supervise and provide oversight. (R. pp. 434-458.)

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." (R. pp. 7.) Thus, the lower 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.

¹ The lower court did not follow the Supreme Court's holding in *Fields* as Judge McCauley 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." (R. pp. 168.) Thus, the lower court effectively ruled that indeed the general contractor is automatically liable for the negligence of a subcontractor.

Marick's Memorandum in Opposition to Summary Judgment, Pages 7-9 specifically cite verbatim Randy Still's deposition testimony (no objection was made by counsel for HNS or Upstate concerning the authenticity of the cited excerpts from Randy Still's deposition):

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.

(R. pp. 440-441.)

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.

(R. pp. 441.)

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.

(R. pp. 441.)

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.

(R. pp. 441-442.)

Q: I may have asked this but let me ask it another way: If Marick did not 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.

(R. pp. 442.)

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.

(R. pp. 442.)²

Marick's expert Randy Still specifically stated that Marick did not violate any obligation associated with the grading in Phase II. (R. pp. 441-442.) 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." (R. pp. 482-483.) 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 obligation it owed at the project, which would include its duty to supervise and oversee (R. pp. 441-442.). Thus, as a general contractor Marick is not automatically liable for deficient work performed by its subcontractors in South Carolina. Marick presented evidence which a reasonable jury could use to determine

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 timing of the hearings as discovery on this issue was not complete.

that Marick met its obligations to supervise and oversee and thus has no fault associated with the grading deficiencies. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008).

Further, Glenn Stewart's Affidavit opines that "Marick provided insufficient supervision of the "Project." (R. pp. 485.) Glenn Stewart's opinion conflicts with Randy Still's opinion, as Still asserted that Marick met all of its obligations as the general contractor. (R. pp. 441-442.) Thus, a reasonable jury could agree with Randy Still, and find HNS and Upstate liable for all defects associated with grading/site work in Phase II. (R. pp. 441-442.) If so, Marick would be adjudged to have clean hands; and thus entitled to indemnification from HNS and Upstate. Marick clearly submitted a scintilla of evidence that Marick did not breach its duty of supervision; thus, summary judgment was granted in error. *Thomas Sand Co.*, 563 S.E.2d at 112. (R. pp. 441-442.)

B. SPECIAL RELATIONSHIP

As set forth in the Order, HNS verbally contracted with Marick to perform grading work on Phase II of the project, to include backfilling of the grade against the townhome units. Thus, as HNS was Marick's direct subcontractor, Marick had a special relationship with HNS, thus entitling Marick to seek equitable indemnification. *First Gen. Servs.*, 314 S.C. at 442, 445 S.E.2d at 448. Once Marick hired HNS as a subcontractor, HNS hired Upstate to perform the work. Thus, Upstate was HNS's direct subcontractor. The lower court held that the relationship between Marick and Upstate was too remote to establish the special relationship required to seek equitable indemnification under South Carolina law citing *Seaboard Air Line R.R. v. Coastal Distributing Co.*, 273 F.Supp. 340 (D.S.C. 1967) and *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005). Appellant asserts that the

lower court's holding was in error, as the relationship between Marick and Upstate was not remote.

The Court erred in finding that Marick had no special relationship with HNS's subcontractor, Upstate, as Marick was responsible to provide direct oversight and supervision to Upstate. Plaintiffs' Complaint alleges that Marick failed to provide proper supervision of the work performed at the property. (R. pp. 49-78.) Upstate was performing the actual work at the project; thus, according to Plaintiffs, Marick was responsible for providing oversight of the work performed by Upstate.

The Court's Order cites *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005) and *Seaboard Air Line R.R. v. Coastal Distributing Co.*, 273 F.Supp. 340 (D.S.C. 1967), as precedence for its determination that the relationship between Upstate and Marick was too remote to warrant Marick's request for equitable indemnity. Marick asserts that a determination concerning a general contractor's right to equitable indemnity from a subcontractor's subcontractor in a construction setting has not been decided by a court in South Carolina.

The facts in *Rock Hill Telephone Co.* involve a utility company that hired an independent contractor to perform installation work for the Utility Company. There are no allegations that the Utility was providing any oversight or guidance to the hired independent contractor. The independent contractor was overseeing the job, hired its own subcontractors to perform the work and provided oversight for those subcontractors. There is nothing in the case indicating that the Utility was overseeing the independent contractor's or the subcontractor's work.

However, in a construction related setting, as is at issue in the present case before the court, the general contractor is responsible for providing oversight and guidance for the entire project. In fact Upstate's Motion for Summary Judgment is partially based upon its assertion that Marick should have better supervised it. Thus, Marick's obligations are different from the obligation of the Utility in *Rock Hill Tele. Co.* If Marick was responsible for guiding and directing Upstate, then a special relationship exists between those parties, thus warranting a right to equitable indemnity.

As stated above, "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994). Thus, if Marick is responsible for providing oversight and guidance on a daily basis for the work performed by Upstate, then a sufficient relationship between the parties exists to obligate Upstate to indemnify Marick for exposing Marick to liability for the deficient work performed by Upstate. Marick has admitted no fault in this action; thus, if a jury determines that Marick has no fault associated with the deficient work performed by Upstate, Marick should be entitled to indemnity. It would be inequitable to allow the subcontractors which were supervised and overseen by Marick; and for which Marick is being sued, to escape liability to Marick while Marick suffers liability at the hands of those subcontractors deficient work.

Thus, Marick respectfully requests that the Court hold that in a construction setting, a general contractor that oversees the project has a special relationship with all subcontractors for which it is required to oversee and direct.

CONCLUSION

For the reasons stated herein, the lower court's order should be reversed.



Jason M. Imhoff (S.C. Bar No. 69355)

C. Reed Teague (S.C. Bar No. 79933)

The Ward Law Firm P.A.

233 South Pine Street

P.O. Box 5663

Spartanburg, SC 29304

Telephone: 864-582-3075

Facsimile: 864-585-3090

ATTORNEYS FOR APPELLANTS

MARICK HOME BUILDERS, LLC AND RICK
THEONNES

November 4, 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, 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,

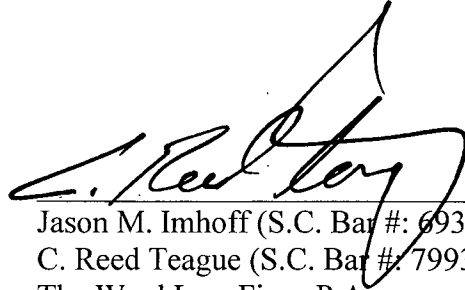
Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Appellants' Final Brief complies with Rule 211(b), SCACR.



Jason M. Imhoff (S.C. Bar #: 69355)

C. Reed Teague (S.C. Bar #: 79933)

The Ward Law Firm, P.A.

P.O. Box 5663

Spartanburg, SC 29304-3188

Telephone (864) 582-3075

Facsimile (864) 585-3090

ATTORNEYS FOR THE APPELLANTS

November 4, 2013
Spartanburg, SC

RESPONDENTS' COUNSEL OF RECORD

S. Markey Stubbs
Baker Ravenel & Bender, L.L.P.
Post office Box 8057
Columbia, SC 29202
Attorneys for Upstate Utilities, Inc.

Shelley S. Montague
Gallivan White & Boyd, P.A.
Post Office Box 7368
Columbia, SC 29202
Attorneys for Hutch N Son's

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

RECEIVED

NOV 07 2013

Appellate Case No.: 2012-213237

SC Court of Appeals

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 Jaramamillo, 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,

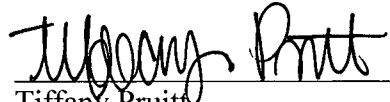
Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants Marick Homes Builders, LLC and Rick Thoennes by depositing a copy of it in the United States Mail, First Class postage prepaid, on November U 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.).


Tiffany Pruitt
Paralegal to Jason M. Imhoff

RESPONDENTS' COUNSEL OF RECORD:

Shelley S. Montague, Esquire
Gallivan White & Boyd, PA
PO Box 7368
Columbia, SC 29202
Attorney for Respondent Hutch N Son Construction, Inc.

S. Markey Stubbs, Esquire
Baker Ravenel Bender
PO Box 8057
Columbia, SC 29202
Attorney for Respondent Upstate Utilities, Inc.