

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

AUG 08 2014

SC Court of Appeals

The Honorable Alexander S. Macaulay

Appellate Case No. 2013-01404

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

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, JOHN LUDWIG, CLEAR VIEW CONSTRUCTION, LLC, MICHAEL FRANZ, MHC CONTRACTORS, MIGUEL PORRAS CHONCOAS, BUILDERS FIRST SOURCE SOUTHEAST GROUP, MIKE GREEN, SOUTHERN CONCRETE SPECIALTIES, CARL COMPTON D/B/A COMPTON ENTERPRIZE A/K/A COMPTON ENTERPRISES, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC, COLEMAN WATERPROOFING, HEYWARD ELECTRICAL SERVICES, INC., TINSLEY ELECTRICAL, LLC, HUTCH N SON CONSTRUCTION, INC., CARL CATOE CONSTRUCTION, INC., T.G. CONSTRUCTION, LLC, DELFINO CONSTRUCTION, FRANCISCO JAVIER ZARATE D/B/A ZARATE CONSTRUCTION, ALEJANDRO AVALOS CRUZ, HERBERTO ACROS HERNANDEZ, MARTIN HERNANDEZ-AVILES, FRANCISCO VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-RAMIREZ, ESTER MORAN MENTADO, SOCORRO CASTILLO MONTEL, UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS, INC., MJG CONSTRUCTION AND HOMEBUILDERS, INC. D/B/A MJG CONSTRUCTION, KMAC, INC., D/B/A KMCA NORTH CAROLINA, 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, DEFENDANTS,

OF DEFENDANTS MARICK HOME BUILDERS, LLC, AND RICK THOENNES.....APPELLANTS,

OF DEFENDANTS, BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALTIES, INC., CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ,..... RESPONDENTS.

**BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC AND SOUTHERN
CONCRETE SPECIALTIES RESPONSE TO APPELLANT'S MOTION TO STRIKE**

Respondents Builders First Source-Southeast Group, LLC, and Southern Concrete Specialties, Inc., hereby respond to Appellant's Motion to Strike reference to Verdict Form filed November 9, 2013. Marick argues that the Verdict Form, in which the Oconee County jury found Marick negligent and its principle, Rick Thoennes, and IMK, (an LLC of which Marick was a member) were both found liable for breach of fiduciary duty, should be stricken from the Record on Appeal on the basis that the form was not considered by the lower Court when it ruled that Marick could not be deemed without fault and therefore was precluded from asserting claims against the Respondents for equitable indemnity (which is the ruling on appeal). Marick's legal support for that request, *Tally v. South Carolina Higher Education Grants Committee*, 298 S.C 483, 347 S.E.2d 99 (1986) (issues may not be raised for the first time on appeal) is inapplicable. The issue of Marick's fault is not being raised for the first time on appeal, since it was the very issue ruled on by the trial judge in equity. This issue was then submitted to the jury which confirmed, legally, the trial court's prior holding that Marick was indeed at fault and therefore had "unclean hands".

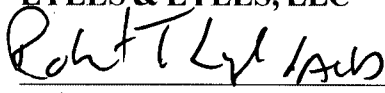
As noted in Respondents' Initial Brief, since the trial judge's finding of "unclean hands" precluding Marick's recovery in equitable indemnity was a holding in equity, the Court of Appeals may view the evidence as it chooses. The finding of the jury on the issue of negligence and breach of fiduciary duty is compelling evidence that can and should be considered by the Court of Appeals. It is a matter of public record and Marick was given a full and complete opportunity to defend its conduct during the course of a trial lasting nearly two weeks.

While the verdict cannot be said to be the "law of the case," since post-trial motions are still pending and an appeal is possible, it is long-established that a factual finding of a jury will not be disturbed unless a review of the record shows there is no evidence which reasonably

supports the jury's findings. *Townes Associates, Ltd., vs. City of Greenville*, 226 S.C. 81, 221 S.E.2d 773 (1976). Coupled with all of the other evidence of fault on the part of Marick, it is clear that in equity, Marick cannot be said to have had "clean hands" that would enable it to pursue a claim for equitable indemnity and the trial judge's ruling on that issue, should be affirmed.

Respondents herein request and Order denying Appellant's Motion to Strike the November 9, 2013 Verdict Form.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

August 7, 2014

Charleston, South Carolina

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OF DEFENDANTS MARICK HOME BUILDERS, LLC, AND RICK THOENNES, APPELLANTS,

OF DEFENDANTS, BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALTIES, INC., CLEAR VIEW CONSTRUCTION, LLC, AND MICHAEL FRANZ,RESPONDENTS.

PROOF OF SERVICE

I certify that I have served the Respondents Builders First Source-Southeast Group, LLC and Southern Concrete Specialties, Inc., Response to Appellant's Motion to Strike on all counsel of record by depositing same in the United States Mail, First Class with sufficient postage affixed thereto, this 7th day of August, 2014, addressed to the following:

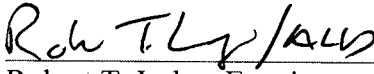
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August 7, 2014

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Stoneledge Appeal - (Marick v. Builders-FirstSource & Southern Concrete)
Appellate Case Number: 2013-01404

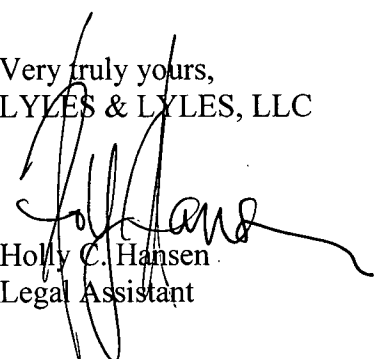
Dear Clerk:

Enclosed you will please find the original and two (7) copies of Respondents Builders First Source-Southeast Group and Southern Concrete Specialties, Inc., Response to Appellant's Motion to Strike for filing with the Court. Please cause the original and six (6) copies to be filed with the court, and return a clocked copy to me in the enclosed, self-addressed, stamped envelope provided for your convenience.

The enclosed documents were provided to all counsel by mail as indicated in the attached Proof of Service.

With kind regards, I remain

Very truly yours,
LYLES & LYLES, LLC



Holly C. Hansen
Legal Assistant

HCH
Enclosures
cc: Counsel of Record