

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS

THE HONORABLE DIANE S. GOODSTEIN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2015-002198
CIVIL ACTION NO. 2012-CP-18-2001

RECEIVED

MAY 27 2016

SC Court of Appeals

R. H. Moore Company, Inc.,

RESPONDENT,

versus

Knight's Precast, Inc.; Tobias & West, LLC;
Eric W. Tobias, P.E.; Dorchester County Water
and Sewer Department; Underground Solutions, Inc.;
B.P. Barber and Associates, Inc. n/k/a URS Corporation;
and Utility Services Authority, LLC;

DEFENDANTS,

Of which Underground Solutions, Inc. is the

APPELLANT.

FINAL REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES IN REPLY	1
ARGUMENT IN REPLY	2
I. The Trial Court's order granting partial summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s counterclaims and/or affirmative defenses is immediately appealable where the order has the effect of striking out a pleading and involves the merits.....	2
II. The Trial Court's grant of summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s counterclaim for unjust enrichment is erroneous as a matter of law because the evidence in the record and the inferences arising therefrom raise genuine issues of material fact on the elements of an unjust enrichment claim and summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.....	4
III. The Trial Court's grant of summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s claim/defense of recoupment was not only based on the fundamental misconception that this claim and/or defense required an expectation of payment, but was also premature where the damages R.H. Moore seeks to recover and the costs Underground Solutions seeks to recoup or offset must be determined from the evidence presented at trial.....	12
CONCLUSION.....	14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Baughman v. Am. Tel. & Tel. Co.,</u> 298 S.C. 127, 378 S.E.2d 599 (1989)	9
<u>Buchwald v. Renco Group,</u> 539 B.R. 31 (S.D.N.Y. 2015)	10
<u>Columbia Wholesale Co. v. Scudder May N.V.,</u> 312 S.C. 259, 440 S.E.2d 129 (1994)	7
<u>Englert, Inc. v. LeafGuard USA, Inc.,</u> 377 S.C. 129, 659 S.E.2d 496 (2008)	11
<u>Fisher v. Shipyard Village Council of Co-Owners, Inc.,</u> 415 S.C. 256, 781 S.E.2d 903 (2016)	4
<u>Houston Med. Testing Servs., Inc. v. Mintzer,</u> 417 S.W.3d 691 (Tex. Ct. App. 2013)	10
<u>Jefferson by Johnson v. Gene's Used Cars, Inc.,</u> 295 S.C. 317, 368 S.E.2d 456 (1988)	3
<u>Johnson v. South Carolina Nat'l Bank,</u> 292 S.C. 51, 354 S.E.2d 895 (1987)	10
<u>Link v. Sch. Dist. of Pickens Cnty.,</u> 302 S.C. 1, 393 S.E.2d 17 (1990)	2
<u>Mortg. Recovery Fund-Riverbend, Ltd. v. Heritage Clipper Riverbend Trust,</u> 327 S.C. 491, 489 S.E.2d 655 (Ct. App. 1997)	8
<u>Myrtle Beach Hosp., Inc. v. City of Myrtle Beach,</u> 341 S.C. 1, 532 S.E.2d 868 (2000)	9
<u>Nauful v. Milligan,</u> 258 S.C. 139, 187 S.E.2d 511 (1972)	2, 3
<u>Ogletree, Deakins, Nash, Smoak & Stewart P.C. v. Albany Steel, Inc.,</u> 243 A.D.2d 877 (N.Y. App. Div. 1997)	9
<u>QHG of Lake City, Inc. v. McCutcheon,</u> 360 S.C. 196, 600 S.E.2d 105 (Ct. App. 2004)	9

<u>Regions Bank v. Wingard Props., Inc.,</u> 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011)	9
<u>Russell v. Ashe Brick Co.,</u> 267 S.C. 640, 230 S.E.2d 814 (1976)	13
<u>Smith v. McClam,</u> 280 S.C. 398, 312 S.E.2d 260 (Ct. App. 1984)	10
<u>Sorin Equip. Co. v. The Firm, Inc.,</u> 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996)	8
<u>Tuloka Affiliates, Inc. v. Moore,</u> 275 S.C. 199, 268 S.E.2d 293 (1980)	13
<u>Utils. Constr. Co. v. Wilson,</u> 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996)	8
<u>Williams Carpet Contractors, Inc. v. Skelly,</u> 400 S.C. 320, 734 S.E.2d 177 (Ct. App. 2012)	7, 8
<u>Wright v. Patrick,</u> 262 S.C. 434, 205 S.E.2d 175 (1974)	10

STATUTES

S.C. CODE ANN. § 14-3-330	2, 3
S.C. CODE ANN. § 29-6-210	7

RULES

Rule 38, SCRCP	8, 9
Rule 39, SCRCP	10

STATEMENT OF ISSUES IN REPLY

- I. The Trial Court's order granting partial summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s counterclaims and/or affirmative defenses is immediately appealable where the order has the effect of striking out a pleading and involves the merits.
- II. The Trial Court's grant of summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s counterclaim for unjust enrichment is erroneous as a matter of law because the evidence in the record and the inferences arising therefrom raise genuine issues of material fact on the elements of an unjust enrichment claim and summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.
- III. The Trial Court's grant of summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s claim/defense of recoupment was not only based on the fundamental misconception that this claim and/or defense required an expectation of payment, but was also premature where the damages R.H. Moore seeks to recover and the costs Underground Solutions seeks to recoup or offset must be determined from the evidence presented at trial.

ARGUMENT IN REPLY

I. The Trial Court's order granting partial summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s counterclaims and/or affirmative defenses is immediately appealable where the order has the effect of striking out a pleading and involves the merits.

Respondent R.H. Moore Company, Inc. ("R.H. Moore") first argues that the Trial Court's order granting partial summary judgment to R.H. Moore on Appellant Underground Solutions, Inc.'s ("Underground Solutions") counterclaims and/or affirmative defenses is not immediately appealable. To the contrary, the Trial Court's order granting partial summary judgment in this case is immediately appealable because the order has the effect of striking out a pleading and it involves the merits. See S.C. CODE ANN. § 14-3-330(1), (2)(c); see also Link v. Sch. Dist. of Pickens Cnty., 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990); Nauful v. Milligan, 258 S.C. 139, 142-43, 187 S.E.2d 511, 512-13 (1972).

Under § 14-3-330, the following types of judgments shall be reviewed upon appeal:

(1) Any intermediate judgment, order or decree in a law case ***involving the merits*** in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; ***provided***, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action (b) grants or refuses a new trial or (c) ***strikes out an answer or any part thereof or any pleadings in any action.***

Id. (bolded emphasis added).

Here, the Trial Court's order granting partial summary judgment to R.H. Moore strikes out the entirety of Underground Solutions' counterclaims and/or affirmative defenses for unjust enrichment and recoupment/offset. The Trial Court's order also "involves the merits" because the order finally determines "some substantial matter forming the whole or a part of some cause of action or defense . . ." Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988) (internal citations omitted). The Trial Court's interlocutory adjudication in this case concludes that the counterclaims and/or affirmative defenses interposed by Underground Solutions fail as a matter of law and thus finally decides the merits of these counterclaims and/or defenses. Nauful, 258 S.C. at 142-43, 187 S.E.2d at 512-13 (holding order granting partial summary judgment on issue of liability alone leaving question of damages open for determination was immediately appealable where order finally decided the merits of every issue in case except that of damages).

Therefore, under both § 14-3-330(1) and (2)(c), the Trial Court's order granting partial summary judgment to R.H. Moore on Underground Solutions' counterclaims and/or affirmative defenses is immediately appealable and reviewable by this Court on appeal.

II. The Trial Court's grant of summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s counterclaim for unjust enrichment is erroneous as a matter of law because the evidence in the record and the inferences arising therefrom raise genuine issues of material fact on the elements of an unjust enrichment claim and summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.

The Trial Court erred in granting summary judgment to R.H. Moore on Underground Solutions' counterclaim for unjust enrichment because the evidence presented by Underground Solutions yields more than one inference on whether it had an expectation of payment for the repair and replacement pipe and services it provided to R.H. Moore. Thus, the evidence is sufficient to survive a summary judgment motion and when viewed in the light most favorable to Underground Solutions, there is at least a scintilla of evidence in the record raising issues of material fact on the elements of its unjust enrichment claim. See Fisher v. Shipyard Village Council of Co-Owners, Inc., 415 S.C. 256, 273-74, 781 S.E.2d 903, 912 (2016) (finding that while there was evidence in the record that the board breached its duty to investigate claims related to windows and doors in condominium development, the trial court's grant of summary judgment to unit co-owners and determination that board breached its duty to investigate as a matter of law was improper where there was at a minimum a scintilla of evidence in the record indicating an issue of material fact that board had not breached its duty).

R.H. Moore repeats its argument made before the Trial Court that Underground Solutions' unjust enrichment claim fails because one witness on behalf of Underground Solutions suggested that Underground Solutions sent the replacement pipe as a gesture of goodwill. R.H. Moore, like the Trial Court, ignores the conflicting evidence in the record as to whether Underground Solutions expected payment, including testimony that

Underground Solutions sent quotes for the repair work to R.H. Moore inferring that Underground Solutions was relying on R.H. Moore for payment, testimony of R.H. Moore's project manager that R.H. Moore was never expressly advised by Underground Solutions that it was going to pay for the repair and replacement work with respect to the pipe failures, and testimony that the manager of construction services for Underground Solutions affirmatively asserted that Underground Solutions had no intention to pay for reinstallation or to pay for the re-drill or removal of the pipe. See Appellant's Brief, pp. 13-14.

In addition, the statements made by Gary Shepherd, Underground Solutions' regional sales manager, that Underground Solutions sent replacement pipe on its own volition to maintain good relations with the Project entities were statements made before anyone was aware that there was no evidence of why the pipe failed and were also made at a time when there was no indication that R.H. Moore intended to sue for damages for the repair and replacement of the pipe. By suing, R.H. Moore rejected the good faith efforts of Underground Solutions to resolve the pipe failure issues.

Despite any argument of R.H. Moore otherwise, this rejection by R.H. Moore of the good faith effort of Underground Solutions to resolve the situation is a change of circumstance which warrants recovery by Underground Solutions of the costs it incurred in repairing and replacing the pipe section failures. When Underground Solutions sent the replacement pipe, that was before it knew it would have to incur litigation costs. The replacement pipe was sent in an effort to avoid litigation. R.H. Moore began litigation proceedings anyway.

There is thus an inference from the evidence that Underground Solutions would have never sent pipe and performed related repair services with no expectation of payment if it knew it was going to be sued. To deprive Underground Solutions the opportunity to recover its losses in this litigation would be unjust, particularly if a jury determines that Underground Solutions is faultless. A fact-finder could find it inequitable for R.H. Moore to be free of all repair and replacement costs even if Underground Solutions is found to have no liability in the litigation R.H. Moore commenced.

In its brief, R.H. Moore does not specifically refute that the Trial Court, at a minimum, erred in granting summary judgment on Underground Solutions' counterclaim for unjust enrichment with respect to the 300 foot section of pipe that failed. R.H. Moore's witness agreed that Underground Solutions was not responsible for the 300 foot pipe section failure which was caused by a bullet hole in the pipe. The witness further agreed that R.H. Moore should most likely reimburse Underground Solutions for the costs incurred in fixing that portion of the pipe. [R.pp. 285, l. 11 – 287, l. 5; Thornton Dep., pp. 80, l. 11- 83, l. 5.] The Trial Court, at the very least, erred in granting summary judgment to R.H. Moore with respect to the 300 foot section of pipe given the admissions of R.H. Moore's own witness.

R.H. Moore additionally argues in its brief that Underground Solutions is not entitled to recover for unjust enrichment because there was no evidence that R.H. Moore was paid by Dorchester County Water and Sewer for the replacement pipe. Whether the owner of the Project ever paid R.H. Moore is irrelevant as to whether R.H. Moore received a benefit from Underground Solutions. R.H. Moore received the replacement

pipe and repair services from Underground Solutions. This pipe was used in the Project, and R.H. Moore received the benefit and value of this replacement pipe and related repair services. R.H. Moore has yet to pay Underground Solutions for this replacement pipe and the related services despite the non-liability of Underground Solutions. Whether R.H. Moore may have a claim against the owner of the Project does not eliminate Underground Solutions' claim for unjust enrichment where it conferred a non-gratuitous benefit on R.H. Moore, R.H. Moore realized some value from that benefit, and it would be inequitable for R.H. Moore to retain the benefit without paying Underground Solutions for its value.

Whether Undergrounds Solutions filed a claim for breach of contract or a claim under S.C. CODE ANN. § 29-6-210 ("Little Miller Act") against R.H. Moore is also immaterial. This State's Supreme Court has held that failure to pursue a mechanic's lien or similar statutory remedy does not bar a recovery for unjust enrichment. Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 263, 440 S.E.2d 129, 131-32 (1994); Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 327-28, 734 S.E.2d 177, 181 (Ct. App. 2012).

In addition, breach of contract and quantum meruit/unjust enrichment claims are alternative remedies, and Underground Solutions can choose to proceed under either theory; it merely cannot recover under both theories. R.H. Moore can raise the defense of an express contract and attempt to prove an express contract if it chooses to do so, but the failure of Underground Solutions to sue R.H. Moore for breach of contract does not preclude its claim for unjust enrichment. Williams Carpet Contractors, Inc., 400 S.C. at 328-29, 734 S.E.2d at 181-82.

Finally, R.H. Moore suggests in a footnote that whether there is a genuine issue of material fact as to Underground Solutions' expectation of payment is of no consequence because a jury cannot determine an unjust enrichment claim which is an equitable concept. This argument is incorrect for several reasons.

First, juries in South Carolina routinely determine whether the elements of an unjust enrichment or quantum meruit claim are met. See Williams Carpet Contractors, Inc., 400 S.C. at 324, 734 S.E.2d at 179 (submission of quantum meruit claim to and award of damages by jury on claim); Sorin Equip. Co. v. The Firm, Inc., 323 S.C. 359, 362, 474 S.E.2d 819, 821 (Ct. App. 1996) (submission of quantum meruit cause of action to jury); Utils. Constr. Co. v. Wilson, 321 S.C. 244, 246, 468 S.E.2d 1, 2 (Ct. App. 1996) (submission of unjust enrichment claim to jury).

Second, Underground Solutions' counterclaim for unjust enrichment seeks the recovery of money for the value of the repair and replacement goods and services it provided. Rule 38 of the South Carolina Rules of Civil Procedure requires that "[i]ssues of fact in an action for the recovery of money . . . must be tried by a jury, unless a jury trial be waived." See also Mortg. Recovery Fund-Riverbend, Ltd. v. Heritage Clipper Riverbend Trust, 327 S.C. 491, 494, 489 S.E.2d 655, 656-57 (Ct. App. 1997) (holding defendant corporation was entitled to jury trial where damages sought by plaintiff against corporation were for excessive management fees; corporation was thus entitled to a jury trial under Rule 38 with respect to the action for money damages).

R.H. Moore demanded a jury trial, and the case has been placed on the jury roster. [R.pp. 10; 19; 633; August 21, 2012 Compl.; Third Am. Compl.; October 19, 2015 e-mail.] Underground Solutions has not waived its right to a jury trial on its counterclaim

for unjust enrichment where “[u]nder Rule 38, a defendant may rely on a plaintiff’s demand for a jury trial.” Baughman v. Am. Tel. & Tel. Co., 298 S.C. 127, 129, 378 S.E.2d 599, 600 (1989). Under Rule 38, Underground Solutions is therefore entitled to have a jury determine the underlying issues of fact with respect to its unjust enrichment claim seeking the recovery of monies it expended on R.H. Moore’s behalf in repairing and replacing the pipe section failures.

Third, while unjust enrichment has been characterized as an equitable remedy, see Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000); Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 256-57, 715 S.E.2d 348, 356 (Ct. App. 2011), Underground Solutions seeks money damages and as such, its claim for unjust enrichment is akin to an action of law even though it is based on a premise that it would be unjust and inequitable for R.H. Moore to retain the value of the repair and replacement goods and services provided by Underground Solutions without paying that value. See QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 207, 600 S.E.2d 105, 110 (Ct. App. 2004) (citing Ogletree, Deakins, Nash, Smoak & Stewart P.C. v. Albany Steel, Inc., 243 A.D.2d 877, 879 (N.Y. App. Div. 1997) (“Plaintiff’s quantum meruit action is essentially an action at law, inasmuch as it seeks money damages in the nature of a breach of contract, notwithstanding that the rationale underlying such causes of action is fairness and equitable principles in a general rather than legal, sense.”) (internal citations omitted)). For this additional reason, determination by a jury of the contested facts underlying the unjust enrichment claim is appropriate.

Fourth, to the extent unjust enrichment is a claim for equitable relief, a jury will already be determining whether Underground Solutions bears any responsibility for the

pipe section failures and the amount of damages, if any, incurred by R.H. Moore. The jury will necessarily have to take into account any costs incurred by Underground Solutions instead of R.H. Moore for the repair and replacement of the pipe section failures. Where issues common to both legal and equitable claims are tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the sitting judge, as trier of the equitable claims. See Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987).

Fifth, even where a claim is equitable in nature, contested issues of fact may be submitted to a jury for determination. Wright v. Patrick, 262 S.C. 434, 205 S.E.2d 175 (1974) (submitting factual questions to jury in equity action for specific performance of oral contract to make will); Smith v. McClam, 280 S.C. 398, 312 S.E.2d 260 (Ct. App. 1984) (submitting factual questions to jury in action to set aside deed); Rule 39(b), (c), SCRPC (providing trial court discretion to order a trial by jury of any issues in case).

Indeed, with respect to unjust enrichment claims, other jurisdictions require that any contested fact issues that bear upon an unjust enrichment or quantum meruit claim be submitted and determined by a jury, with the ultimate question of how much, if any, equitable relief should be awarded to be determined by the trial court. See Buchwald v. Renco Group, 539 B.R. 31, 49 n.3 (S.D.N.Y. 2015) (citing New York state law regarding submission of unjust enrichment claim to jury for determination of the existence of underlying facts necessary to finding unjust enrichment); Houston Med. Testing Servs., Inc. v. Mintzer, 417 S.W.3d 691, 695-96 (Tex. Ct. App. 2013).

Even if the trial court ultimately serves as the fact-finder, summary judgment on Underground Solutions' counterclaim for unjust enrichment was nevertheless improper at

this point in the case. At this stage of the proceedings, the court must merely decide if there is a factual dispute warranting the claim to be determined at trial. Underground Solutions has presented a scintilla of evidence as to whether it is entitled to recover under a theory of unjust enrichment. The Trial Court did not consider the entirety of the deposition testimonies presented on the issue of whether Underground Solutions expected payment for the costs it incurred in repairing and replacing the pipe section failures.

Furthermore, there has not yet been a determination as to whether Underground Solutions is even liable for the pipe section failures and whether it would then be unjust for Underground Solutions to alone bear the costs for the repairs if it is found not liable. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008).

In summary, the evidence in the record and the inferences arising in and from that evidence as to whether Underground Solutions gratuitously or non-gratuitously repaired and replaced the 300 foot and 1900 foot sections of pipe raise a genuine issue of material fact and as such, the Trial Court erred in granting summary judgment to R.H. Moore on Underground Solutions’ counterclaim for unjust enrichment. At a minimum, the Trial Court erred in granting summary judgment to R.H. Moore on Underground Solutions’ counterclaims where R.H. Moore admits Underground Solutions was not at fault for the 300 foot section of pipe that failed and is entitled to the recovery of costs it incurred in repairing the 300 foot section of pipe. Accordingly, Underground Solutions requests this Court to reverse the Trial Court’s grant of summary judgment to R.H. Moore on Underground Solutions’ counterclaim for unjust enrichment.

III. The Trial Court's grant of summary judgment to Respondent R.H. Moore Company, Inc. on Appellant Underground Solutions, Inc.'s claim/defense of recoupment was not only based on the fundamental misconception that this claim and/or defense required an expectation of payment, but was also premature where the damages R.H. Moore seeks to recover and the costs Underground Solutions seeks to recoup or offset must be determined from the evidence presented at trial.

R.H. Moore claims it is only seeking damages for the cost of the re-drill, and it contends the damages it is seeking are not the same damages for which Underground Solutions seeks recoupment. R.H. Moore therefore argues that Underground Solutions does not have a claim or defense for recoupment of the costs Underground Solutions incurred in repairing and replacing the pipe section failures against any damages for which Underground Solutions may be found liable.

The complaint of R.H. Moore, however, purports to seek much more than only the costs of the re-drill. R.H. Moore alleges in the complaint that it has been damaged "in an amount to be determined for the repair, replacement, and correction of [the defective] piping" and seeks actual, incidental, consequential, and special damages relating thereto in an amount to be determined at trial. [R.pp. 23-24; Third Am. Compl., ¶ 19.] Thus, R.H. Moore has sought in its complaint damages for which Underground Solutions may have already paid in its efforts to repair and replace the pipe section failures.

In addition, it is premature for the Trial Court to have ruled upon Underground Solutions' claim/defense of recoupment where evidence has not been presented and a fact finder has not determined the type and amount of damages for which R.H. Moore seeks and the costs Underground Solutions already incurred in repairing and replacing the pipe section failures.

The Trial Court granted summary judgment on the claim/defense of recoupment on the misconception of law that recoupment requires an expectation of payment. Whether or not Underground Solutions expected payment or not for the costs incurred in repairing and replacing the pipe section failures is not an element of a claim or defense for recoupment and offset. If a fact finder determines that Underground Solutions is liable for damages relating to the pipe section failures, then Underground Solutions is entitled to recoup or offset from any award of those damages the amounts it has already paid in repairing and replacing the damaged pipes. See Tuloka Affiliates, Inc. v. Moore, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980) ("A recoupment . . . reduces the plaintiff's claim"); Russell v. Ashe Brick Co., 267 S.C. 640, 230 S.E.2d 814 (1976). These amounts must be determined after the evidence is presented at trial. It is therefore premature at this time to in effect strike Underground Solutions' defense of recoupment and offset. This Court should reverse the Trial Court's grant of summary judgment to R.H. Moore on Underground Solutions' claim or defense for recoupment.

CONCLUSION

For the reasons set forth herein and in the Appellant's Brief, Appellant Underground Solutions, Inc. respectfully requests this Court to reverse the Trial Court's grant of summary judgment to Respondent R.H. Moore Company, Inc. on Underground Solutions' counterclaims and/or defenses for unjust enrichment and recoupment/offset and order that Underground Solutions be entitled to present such claims and/or defenses at trial.

Respectfully submitted,



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May 27, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Reply Brief of Appellant complies
with Rule 211(b), SCACR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant, Underground Solutions, Inc., do hereby certify that I have this date served two copies of the foregoing Final Reply Brief, dated May 27, 2016, by personally depositing copies of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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Date: May 27, 2016.