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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 Appeallants,

And

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

AMENDED RECORD ON APPEAL
Volume II of II

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners' Association, et
al.,
☐ Plaintiff

v.

IMK Development Co., LLC, et al., (Upstate
Utilities, Inc.'s Motion)
☒ Defendant,

IN THE COURT OF COMMON PLEAS

CASE NO.

09-CP-37-0652

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to for Summary Judgment

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Forin Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

May 24, 2012

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

- ☐ EXEMPT; (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached
order.
☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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,

vs.

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., MJG Construction and
Homebuilders, Inc. d/b/a MJG

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

UPSTATE UTILITIES, INC.'S NOTICE OF
MOTION AND MOTION FOR SUMMARY
JUDGMENT

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,)
Defendants,)

TO: JASON M. IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS, LLC, ERIN CULBERTSON, ESQUIRE AND DAVID ALEXANDER, ESQUIRE, ATTORNEYS FOR MEDALLION AT KEOWEE, LLC, AND ROY R. HEMPHILL, ESQUIRE, ATTORNEY FOR RICK THOENNES, RICK THOENNES, III, AND M GROUP CONSTRUCTION & DEVELOPMENT, LLC, ABOVE NAMED:

Defendant Upstate Utilities, Inc., (hereinafter "Upstate"), hereby moves this Court for Summary Judgment as against the claims of Medallion at Keowee, LLC, Marick Home Builders, LLC, and Rick Thoennes, Rick Thoennes, III, and M Group Construction & Development, LLC., pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Defendant Upstate further prays for separate trials, and a non-jury trial pursuant to Rule 39(a) and Rule 42(b). This action arises out of a two-phase construction project involving approximately 80 units hereinafter referred to as Stoneledge A and Stoneledge B. Marick Home Builders served as the general contractor for ground up construction on Phase B. With respect to phase A, Marick served upon information and belief, to perform interior work.

Defendant Upstate was the subcontractor of Defendant Hutch N Son and was involved in the work with respect to grading, water and sewer installation only on Phase B. The plaintiff claims that the grading of Upstate Utilities and Hutch N Son caused or contributed (in some locations) to the grade being higher than the level of the foundation walls leading to possible water intrusion. The plaintiff made other claims as against Upstate relating to drainage or other minor issues. A mediation was

held in this action on May 1, 2, and 3. At mediation, Hutch N Son and Upstate Utilities entered into an agreement to settle with the Plaintiffs and documents are currently being negotiated. The settlement is for release of Hutch N Son and Upstate Utilities of and from any and all claims relating or arising out of their work and any alleged resulting damages resulting therefrom. Marick, Medallion, and Thoennes failed to settle and refused to consent to dismissal of their claims as against Upstate Utilities, Inc. As part of the settlement, Upstate Utilities and Hutch N Son consented to dismissal of their claims as against each other.

Pleading History

The original complaint in this action was filed as against IMK Development Co., LLC, and Marick Home Builders, LLC. on or about May 29, 2009. Plaintiff filed a First Amended Complaint on February 9, 2010. Marick Home Builders, on or about February 4, 2011, filed an Amended Answer and Third-Party Complaint and asserted claims against Hutch N Son Construction, Inc.

The Plaintiff filed a Second Amended Complaint on or about October 7, 2011, asserting claims against numerous parties including Hutch N Son and Upstate Utilities alleging in Paragraph 32 that Hutch N Son provided work for the project including but not limited to grading work and that Upstate Utilities, Inc. provided grading work as a sub-contractor of Hutch N Son. By Answer to the Second Amended Complaint, Hutch N Son asserted a Cross-Claim against Upstate Utilities dated October 20, 2011. Upstate Utilities answered and Cross-Claimed back against Hutch N Son on or about December 14, 2011. On or about December 27, 2011, Hutch N Son responded to the Cross-Claim of Upstate Utilities. On or about October 31, 2011 Medallion answered the Second Amended Complaint and Cross-Claimed against numerous parties, including Upstate Utilities and Hutch N Son, alleging in Paragraph 104 that Hutch N

Son performed work including grading work and at Paragraph 105 that Upstate Utilities performed grading work pursuant to a subcontract with Hutch N Son. Medallion alleges in Paragraph 13 that it purchased seven (7) units in Stoneledge from Defendant Ludwig Corporation and five of those units were in Phase I and the two remaining units were in Phase II. In Paragraph 126, Medallion alleges that the work of Defendant is defective. In Paragraph 127, Medallion alleges that any defective work was not through fault of its own. Paragraph 128, Medallion alleges that if the Plaintiff is awarded damages against Medallion for defective work or deficient services or products, Medallion is entitled to equitable indemnity from all defendants. No contractual indemnity is alleged nor does a special relationship asserted. Medallion thereafter asserts a claim of negligence as to all subcontractors, and breach of warranty as against contractors. On or about November 15, 2011, Hutch N Son answered Medallion's Cross-Claims and Cross-Claims against Upstate on or about November 15, 2011. Upstate Utilities answered the Cross-Claim of Hutch N Son and Cross-Claimed back on December 21, 2011. Defendant Upstate Utilities likewise answered the Cross-Claims of Medallion and Medallion cross-claimed back on or about December 21, 2011.

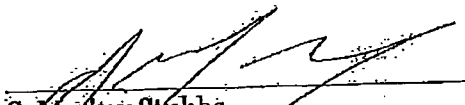
On or about April 3, 2012, Plaintiff filed a Third Amended Summons and Complaint. Counsel for Defendant Hutch N Son and Upstate Utilities agreed to allow their prior pleadings to stand in response to the third amended pleadings as it related to each other. On or about April 9, 2012 Marick and Rick Thoennes filed an answer to Plaintiff's Third Amended Complaint and cross claimed against numerous parties including Upstate Utilities and Hutch N Son asserting claims as to grading work in Paragraphs 146 as to Hutch N Son and Paragraph 148 as to Upstate Utilities. In Paragraph 155 while denying the Plaintiff's Third Amended Complaint allegations, asserts a claim in equitable indemnity in Paragraph 156 as against numerous parties

including Hutch N Son and Upstate Utilities. Marick further asserts claims in breach of contract against Hutch N Son, negligence as to Hutch N Son and Upstate Utilities, claiming warranty as against Hutch N Son and Upstate Utilities.

On April 13, 2012 Defendant Upstate Utilities, Inc answered the Plaintiff's Third Amended Complaint and Cross-Claimed against Marick Home Builders. Defendant Hutch N Son responded to Marick's claims on or about April 24, 2012. Upstate Utilities, Inc. answered the cross-claim of Marick and Thoennes on April 19, 2012 and cross-claimed back.

Having settled with the Plaintiff, the claims of Marick, Medallion, and Rick Thoennes, however alleged, are truly solely claims of indemnity as against Upstate Utilities. The damages sought by each of the above are not injury or damage in and to itself, but alleged injury or damage to the plaintiffs which are being sought as against them. Defendant, having paid these alleged damages for its work and any resulting damage has extinguished and ceased by operation of law the claims. The claimants are being sued for their own or others negligence. Upstate believes that the parties above listed are further barred by the doctrine of unclean hands as is applied to equitable indemnity. Upstate believes the claimants having contributed to the loss in the claim may not assert a claim for equitable indemnity as against this Defendant. Upstate will file a separate motion if the claim of equitable indemnity is deemed to survive but in accordance with Rule 42(b), Defendant is entitled to separate trials and pursuant to Rule 39(a), this separate trial should be tried by the court alone as a claim of equitable indemnity is equitable by nature and there is no right to a jury trial. See Loyola Federal Savings Bank v. Thomasson Properties, 318 S.C. 92, 456 S.E.2d 423 (App Ct.1995).

Defendant therefore prays for dismissal all claims or for separate trials and assignment of this action to non-jury for further motions and trial on the equitable indemnity claim.



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(Our File No. 7603.336)

Columbia, South Carolina

May 24, 2012

7603.3%

318 S.C. 92
Court of Appeals of South Carolina.

LOYOLA FEDERAL SAVINGS BANK, Appellant,

v.

THOMASSON PROPERTIES, a South Carolina
Limited Partnership, Brondus L. Thomasson, and
Thomasson Development Corp., Respondents.

No. 2317. | Submitted Feb. 7,
1995. | Decided March 13, 1995.

In proceeding on indemnity claim, the Circuit Court, Beaufort County, Ellis B. Drow, Jr., Special Judge, denied motion to strike jury demand, and movant appealed. The Court of Appeals, Howell, C.J., held that indemnity was equitable claim as to which there was no right to trial by jury.

Reversed.

Attorneys and Law Firms

**424 *92 R.W. Dibble, Jr. and Rebecca G. Fulmer both
of McNair & Sanford, Columbia, for appellant.

William B. Harvey, III of Harvey & Battsy, Beaufort, for
respondents.

Opinion

HOWELL, Chief Judge:

This is an appeal from an order denying a motion to strike a demand for jury trial. Loyola Federal Savings Bank brought *93 an action for indemnity against the respondents (collectively referred to herein as Thomasson). Thomasson filed an answer demanding a jury trial. Loyola filed a motion to strike the jury trial demand on the ground that its action was purely a matter of equity. The circuit court denied the motion to strike, concluding there were "ample legal issues of fact." Loyola appeals. We reverse.

In 1989, Loyola and Thomasson were named as codefendants in a suit filed by Northhampton Condominium Association, Inc., concerning construction of a condominium project on Fripp Island. Thomasson was the developer of and general contractor for the condominium project, while Loyola provided the construction financing for the project. A settlement of that action was reached between Northhampton, Loyola, and Thomasson. While many of the obligations under

the settlement were imposed on Thomasson, Loyola was required to pay Northhampton \$50,000. By the present action, Loyola seeks to recover that amount, plus legal fees and costs incurred in the litigation, from Thomasson.

I.

[1] [2] [3] [4] Thomasson has a right to a jury trial only if Loyola's claim against Thomasson is legal in nature. If the claim is equitable, there is no right to a jury trial. *Defender Properties, Inc. v. Doby*, 307 S.C. 336, 415 S.E.2d 383 (1992). 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. *Campbell v. Deacon Mfg. Co., Inc.*, 313 S.C. 451, 438 S.E.2d 271 (Ct.App.1993). A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. *Town of Wimsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992). Loyola's indemnity claim is therefore equitable in nature. See *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct.App.1990) ("A cause of action for equitable indemnity is necessarily equitable in nature.") (Gurston, J., dissenting on other grounds).¹ Accordingly, Thomasson is not entitled to a jury trial.

*94 [5] However, Thomasson contends that it is entitled to a jury trial because Loyola's indemnification claim requires a determination of issues which are legal in nature, i.e., Thomasson's own negligence and Loyola's freedom from fault. The fact that Northhampton's claims against Loyola and Thomasson in the underlying action were legal and thus triable by a jury does not change the nature of Loyola's indemnity claim against Thomasson from equitable to legal. Cf. *Pelfrey v. Bank of Green*, 270 S.C. 691, 244 S.E.2d 315 (1978) (shareholders derivative action is equitable and triable by the court even if corporation would have been entitled to jury trial had it brought the action). The trial court therefore erred by refusing to strike Thomasson's jury trial demand.

**425 II.

[6] Loyola also requests that this Court vacate certain factual statements in the order which the trial court characterized as "historical background." The trial court's order is interlocutory, and factual statements unnecessary to the issue addressed in an interlocutory order are not binding at trial, and do not become the law of the case. See *Well v. Well*, 299 S.C. 84, 382 S.E.2d 471 (Ct.App.1989) (the doctrine of

the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication); *Lucius v. DuBose*, 114 S.C. 375, 103 S.E. 759 (1920) (preliminary findings on interlocutory motions bind neither the parties nor the court at the trial on the merits). The only issue before the trial court was the right to a jury trial, which required only a determination of the nature of Loyola's claim. The challenged statements were not relevant to the issue before the court. Therefore, because the statements will have no preclusive effect at trial, we need not vacate them.

Accordingly, for the foregoing reasons, the appealed order is hereby

REVERSED.

CURETON and CONNOR, JJ., concur.

Parallel Citations

456 S.E.2d 423

Footnotes

- 1 We recognize that the Supreme Court utilized the standard of review for a law case in *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983), a case involving indemnification. However, the right to a jury trial was not at issue in *Stuck*, and we do not view the statement as characterizing an indemnity claim as legal.

End of Document

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-37-0652

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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.
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behalf of all others similarly situated

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vs.

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LLC, Medallion at Keowee, LLC, Integrys Keowee
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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., MJG Construction and Homebuilders, Inc.
d/b/a MJG Construction, KMAC of the Carolinas,
Inc., Eufacio Garcia, Everado Jaramillo, Garcia
Parra Insulation, Inc., J&J Construction, Jose Nino,
Jose Manuel Garcia, Eason Construction, Inc., and
Vincent Morales d/b/a Morales Masonry,

Defendants,

CERTIFICATE OF SERVICE

I, Catherine M. Gwyn, employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have served counsel below with **DEFENDANT UPTATE UTILITIES, LLC'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT** to the following via mail and email to Attorneys Imhoff, Culbertson, Alexander, and Hemphill and electronic transmission only to all others:

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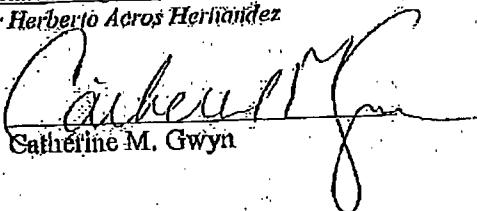
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IMK Development*


Catherine M. Gwyn

May 24, 2012

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners' Association, et
al,

☐ Plaintiff

v.

IMK Development Co., LLC, et al., (Upstate
Utilities, Inc.'s Motion)

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

09-CP-37-0652

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
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e-mail: other:

Defendant's Attorney:
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- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to for Summary Judgment

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

August 20, 2012

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

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,

vs.

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., MJG Construction and
Homebuilders, Inc. d/b/a MJG

UPSTATE UTILITIES, INC.'S NOTICE OF
MOTION AND MOTION FOR SUMMARY
JUDGMENT AS TO EQUITABLE
INDEMNITY

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,)
Defendants,)

TO: JASON M. IMHOFF, ESQUIRE, ATTORNEY FOR MARICK HOME BUILDERS, LLC, ERIN CULBERTSON, ESQUIRE AND DAVID ALEXANDER, ESQUIRE, ATTORNEYS FOR MEDALLION AT KEOWEE, LLC, ABOVE NAMED:

Defendant Upstate Utilities, Inc., (hereinafter "Upstate"), by and through its undersigned counsel, files this Motion subject to its pending motion for summary judgment as to all claims. In the event claims for equitable indemnity survive, Upstate moves for dismissal of the claims of Medallion at Keowee, LLC. on the grounds that there is no special relationship so as to support a claim of indemnity. Upstate moves for dismissal as to the indemnity claims of Marick Home Builders, LLC. on the grounds that they have no special relationship and no right to recover as their negligence has caused and/or contributed to the loss in this action.

Upstate Utilities has previously filed a motion to dismiss all the claims based upon its payment to the Plaintiff for settlement of the Plaintiff's claim. In the event it is determined that the equitable indemnity claims survive dismissal in whole or part, this motion is filed.

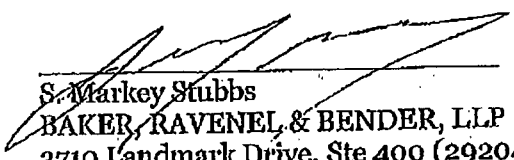
Medallion at Keowee's claim must fail on the grounds that there is no relationship between Medallion and this Defendant. There is no contract nor has one been alleged or provided. The claim asserted stands as a blanket equitable indemnity claim. In order to assert a claim in equitable indemnity, one must establish the special relationship. See Rock Hill Telephone Co. v. Global Communications, 363 S.C. 385, 611 S.E.2d, 235 (S.C. 2005). In this action, as in Rock Hill, the relationship of the parties is an attenuated one. In Rock Hill,

the Utility hired an independent contractor to complete work the independent contractor subcontracted work to a subcontractor. The Court found that the relationship between the Utility and the subcontractor was too attenuous a relationship. The relationship between the parties in the action are even less direct and therefore the claim must be dismissed.

The relationship to Marick is likewise an attenuous one. While it has been determined that a subcontractor and general contractor's relationship are such that they support a claim for equitable indemnity. In this action, Upstate Utilities was a subcontractor of Hutch N Son (Hutch N Son's Answer and cross-claim P.128 and then P.39 of the Third Amended Complaint). There is no contract existing between Upstate Utilities and Marick. Once again, the relationship is too remote to support a claim in equitable indemnity pursuant to Rock Hill Telephone Co., Inc.

Assuming arguendo that a relationship exists, equitable indemnity does not exist as between two tortfeasors. See Atl. Coast Line R.R. Co. v. Whetstone, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963). The most important requirement for finding of equitable indemnity is that a party seeking to be indemnified is adjudicated without fault. See Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp., 336 S.E. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). In this action, it is clear that Marick is at fault for the loss, attached is the Affidavit of A. Rhett Whitlock, Ph.D., P.E. attached hereto as Exhibit A.

Wherefore, Defendant Upstate Utilities prays for summary judgment as to the claims
in equitable indemnity.



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Attorney for Defendant Upstate Utilities, Inc.
(Our File No. 7603.336)

Columbia, South Carolina

August 20 2012

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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,

vs.

IMK Development Co., LLC, Keowee
Townhouses, LLC, Ludwig Corporation,
LLC, SDI Funding, LLC, Medallion at
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Development, LLC, Marick Home
Builders, LLC, Bostic Brothers
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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
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Socorro Castillo Montel, Upstate Utilitles,
Inc., MJG Construction and
Homebuilders, Inc. d/b/a MJG

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

AFFIDAVIT OF
A. RHETT WHITLOCK, Ph.D., P.E.

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,)
Defendants,)

PERSONALLY appeared before me A. Rhett Whitlock, Ph.D., P.E., first being duly sworn, deposes and states that:

I, A. Rhett Whitlock, have personally inspected the conditions and multiple deficiencies of the Stoneledge Condominium buildings and have reviewed reports and documents prepared by others, contract documents, and various design documents. Based on the review of these documents and personal observations, the buildings suffer from numerous defects in the construction including, but not limited to:

1. Roofing:

- a. Missing or improperly installed kick-out flashings
- b. Incorrect and inadequate nailing of roof shingles
- c. Inadequate shingle coverage
- d. Improperly installed roof sheathing
- e. Cut, broken, and altered trusses
- f. Missing roofing underlayment

2. Cedar Siding:

- a. Inadequate nailing
- b. Improper flashing
- c. Improper painting
- d. Inadequate installation for weather protection

3. Adhered Stone Veneer:

- a. Inadequate grouting between units
- b. Poorly adhered units
- c. Exposed and inadequately bedded lath
- d. Inadequate fastening of the lath to the framing
- e. Improper, inadequate, and missing flashing
- f. Inadequate clearances between stone veneer and other surfaces

- g. Incomplete and inadequate weather barrier at columns
 - h. Incomplete and inadequate weather barrier at walls
 - i. Missing and inadequately installed flashing and weather barrier within stone clad columns
4. Decks and Porches:
- a. Inadequate flashing at deck to wall intersections
 - b. Inadequate flashing at intersection with stone clad columns
5. Windows and Doors:
- a. Improper attachment of units and trim
 - b. Improper flashing around windows and at bottom nailing fin
 - c. Improper door pan flashings
 - d. Improper wrapping of window openings
6. Wall Construction:
- a. Improper flashing installation
 - b. Reverse lapped flashings and weather barrier
 - c. Improper weather barrier installation
 - d. Inadequately attached sheathing
 - e. Incomplete fire protection on rated walls

Based on the nature and extent of the defects already observed and documented, it is apparent that most, if not all, were or could have been easily detected during construction. According to the "Standard Form of Agreement Between Owner and Contractor," dated January 30, 2006, between the Owner (IMK Development Co., LLC) and the General Contractor (Marick), Marick was to:

1. From Article 3 – Relationship of the Parties: "... exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision..."
2. From 3.3 Supervision and Construction Procedures: "3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and

procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instruction concerning the matters."

3. From 3.3 Supervision and Construction Procedures: "3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors."
4. From 3.3 Supervision and Construction Procedures: "3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work."
5. From 3.4 Labor and Materials: "3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them."
6. From 3.5 Warranty: "3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective."
7. From 3.9 Superintendent: "3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor."

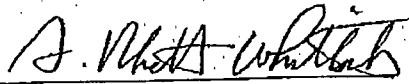
8. Deposition testimony of Mr. Nathan Hornaday revealed that he was the sole supervisor of the construction at Stoneledge, and he did not possess the necessary experience and training to perform the supervisory duties in accordance with the contractual requirements as outlined in Items 1 through 7 listed above or industry standards.

It is also generally accepted in the industry that a General Contractor must provide adequate, skilled, and knowledgeable job-site supervision and has the final responsibility to the owners to insure the work is completed in a workmanlike manner. Stoneledge was not constructed in a workmanlike manner and failed to meet even the minimum standards of quality in numerous aspects of the work as outlined above. Skilled and knowledgeable supervisors should have observed such deficiencies and caused the work to be corrected. The negligence of the General Contractor has resulted in the current owners occupying structures that are defective and not in compliance with the Building Code, manufacturers' instructions, and the contract documents.

I have formulated the following opinions:

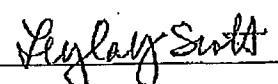
1. The buildings were in many respects not constructed:
 - a. in accordance with the design documents,
 - b. in accordance with manufacturers' instructions and industry standards,
 - c. in accordance with Building Code requirements
2. Due to defects in the design and construction, the buildings have suffered moisture accumulation and damage that is both obvious and concealed. The damage is widespread.
3. The General Contractor, Marick Home Builders, did not provide adequate supervision for the construction of the buildings.
4. The design and construction defects that have led to damage are unrelated to site grading.

FURTHER AFFIANT SAYETH NOT.


A. Rhett Whitlock, Ph.D., P.E.

SWORN to before me this

9th day of August, 2012


Notary Public for Commonwealth of Virginia
Prince William County
My Commission Expires: 10/31/2015



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-37-0652

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,

vs.

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
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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., Rufacio Garcia, Eberado Jaramamillo, Garcia
Parra Insulation, Inc., J&J Construction, Jose Nino,
Jose Manuel Garcia, Eason Construction, Inc., and
Vincent Morales d/b/a Morales Masonry,

Defendants,

CERTIFICATE OF SERVICE

I, Catherine M. Gwyn, employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have served counsel below with **DEFENDANT UPSTATE UTILITIES, LLC'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AS TO EQUITABLE INDEMNITY** to the following via mail and email to Attorneys Imhoff, Culbertson, Alexander, and Hemphill and electronic transmission only to all others:

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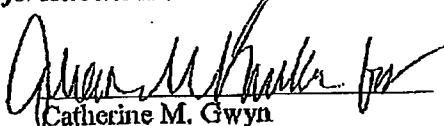
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Catherine M. Gwyn

August 20, 2012

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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,

vs.

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., MJG Construction and
Homebuilders, Inc. d/b/a MJG

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

UPSTATE UTILITIES, INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT

**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,

Defendants,**

Defendant Upstate Utilities, Inc., (hereinafter "Upstate"), previously filed a Motion for Summary Judgment and supplements that Motion for Summary Judgment with the following Memorandum. In this action, as noted in the Motion, in addition to equitable indemnity, Marick and Medallion asserted claims allegedly sounding in negligence and breach of warranty and contract. The claims of Marick and Medallion, however framed, are actually disguised indemnity claims. Without admitting any wrongdoing, this Defendant has settled with the Plaintiffs. The claims other than equitable indemnity are merely disguised claims and should be dismissed. "Indemnity 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/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 305 (Ct. App. 1999). Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 414 S.E.2d 118 (1992).

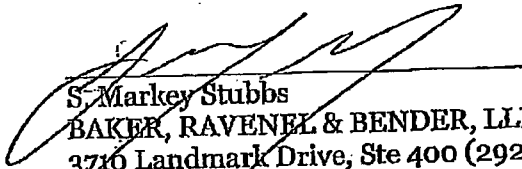
The character of the allegations contained in the complaint is determined by "the nature of the issues and remedies which are sought." State v. Yelsen Land Company, 257 S.C. 401, 403, 185 S.E.2d 897 (1972); Seebaldt v. First Federal Sav. & Loan Ass'n., 269 S.C. 691, 692; 239 S.E.2d 726, 727 (1977). "The 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.2d 546, 548 (1919). Courts use the allegations in the complaint to determine the correct character of the action. See, Seebaldt at 692, 239 S.E.2d, at 727. All of the claims in this action are seeking

the same relief, which is relief from any judgment rendered against them as a pass through from the plaintiff. Each of these claims are contingent upon the outcome of the trial between the defendants and the Plaintiff and there are no assertion of damages actually incurred for personal injury, property damage, or otherwise. The sole claims however titled are for indemnity. As noted by South Carolina Federal District Court, "A rose by any other name is still a rose" and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for indemnification with a slight change in the wording." SCNB v. Stone, 749 F.Supp. 1419, 1433 (D.S.C.1990). The trial courts in South Carolina have likewise granted summary judgment in similar cases finding that the claims couched in terms of indemnity fold into and are absorbed by overreaching causes of action for indemnification. For example, in Nelson v. John Weiland Home, 2009-CP-10-6573 (Exhibit A), Kirkland v. Cambridge Building Corp., 2006-CP-07-1312 (Exhibit B), Newton v. Muir, et al., 2010-CP-08-1759 (Ruled from the bench, July 9, 2012 by The Honorable R. Markley Dennis, Jr.) (Exhibit C, will be supplemented when the order is signed).

Further, courts in other states have come to the same conclusion. See e.g., Dodge Trucks, Inc. v. Wilson, 231 S.E.2d 818 (Ga. Ct. App. 1976); Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248 (Ill. 1983); Warner v. Reagan Buick, Inc., 483 N.W.2d 764 (Neb. 1992); Adkinson v. Int'l Harvester Co., 975 F.2d 208, 216 (5th Cir. 1992).

With respect to the equitable indemnity claim, equitable indemnity is not available to a joint tortfeasor. Equitable indemnity is not available to a claimant who has been found to have been at fault for the underlying acts. In this action, if the defendants are found guilty, they have been found guilty for their own acts as the Plaintiff has settled with this Defendant, thereby removing their alleged derivative liability as it relates to this Defendant's work. Defendant is therefore entitled to summary judgment and in the alternative all claims are

should be dismissed except for the equitable indemnity claim which is a non-jury matter and the case should be separated for trial without a jury.



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(Our File No. 7603.336)

Columbia, South Carolina

July 12, 2012

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Cheryl H. Nelson,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc. and McGee
Brothers Co., Inc.,

Defendants.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc.,

Third-Party Plaintiff,

vs.

Benjamin Mora d/b/a Mora Construction,
Sondles Builders, LLC, Carolina Custom
Security & Sound, Inc., Barr Construction,
Inc., Brancifort Concrete Industries, Inc.,
American Residential Services, LLC d/b/a
American Residential Services of South
Carolina, Inc. f/k/a Atlas Services, Inc. and
Coastline Construction, Inc. f/k/a Coastline
Construction,

Third-Party Defendants

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2009-CP-10-6573

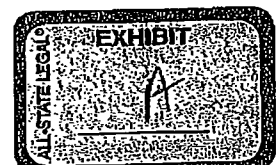
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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

ORDER GRANTING IN PART AND
DENYING IN PART THIRD-PARTY
DEFENDANT AMERICAN
RESIDENTIAL SERVICES OF SOUTH
CAROLINA, INC.'S MOTION FOR
SUMMARY JUDGMENT

This matter came before the Court for a hearing on July 25, 2011, for consideration of
Third-Party Defendant American Residential Services of South Carolina Inc's ("ARS") Motion
for Summary Judgment. Counsel for the parties were present, and this Court entertained and

B



considered oral arguments as well as memorandums of law and affidavits submitted by the parties.

Facts

Plaintiff homeowner brings this suit, filed on October 19, 2009, to recover damages resulting from alleged faulty construction or repair of her home. Defendant Wieland Homes filed a third-party complaint against Third-Party Defendant ARS on December 2, 2010, alleging the work ARS did in installing the HVAC system in 1996 cause or contributed to the Plaintiff's damages. Defendant Wieland Homes brings four causes of action against ARS including 1) indemnity, 2) negligence, 3) breach of warranty, and 4) breach of contract.

ARS contends it is entitled to summary judgment as a matter of law to the claims of negligence, breach of warranty, and breach of contract, because these claims are disguised indemnity claims. It also argues that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes owes no liability to the Plaintiff as a result of ARS's work.

Standard of Review

Summary judgment is only appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Garvin v. Bl-Lo, Inc., 343 S.C. 625, 627, 541 S.E.2d 831, 833 (2001). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id.

Discussion

I. ARS's Motion for Summary Judgment as to the Claims of Negligence, Breach of Warranty and Breach of Contract.

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." Seebalt v. First Fed.

Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Courts may use the allegations in the complaint to determine the correct character of an action. Id. "Indemnity is that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (citations omitted).

In this case, Defendant Wieland Homes' Complaint requests the remedy of "any monies [Wieland Homes] is adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claims." Third-Party Complaint ¶ 160, 170, 164. Because these claims seek to recover the amount Wieland Homes paid to Plaintiffs, rather than personal injury or property damages, the claims are claims for indemnity. Vermeer Carolina's Inc., 336 S.C. at 60, 518 S.E.2d at 305.

This court finds that the causes of action for negligence, breach of warranty, and breach of contract are all disguised indemnity claims and Wieland Homes has failed to state facts sufficient to constitute independent causes of action and therefore Third-Party Defendant ARS is entitled to Summary Judgment as a matter of law.

II. ARS's Motion for Summary Judgment as to the Claim of Indemnity.

Third-Party Defendant ARS contends that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes has failed to present evidence that it is liable to the Plaintiff as a result of ARS's work and because all claims arising out of ARS's work are barred by the applicable three-year statute of limitations.

After thorough review, this Court finds that there is evidence in the record that Plaintiff has been damaged by excessive water and moisture damage in her home and there is a genuine issue of material fact regarding whether ARS's HVAC work contributed to Plaintiff's damage.

Additionally, the Plaintiff's Complaint alleges that the applicable statute of repose does not apply because the conduct is subject to the statutory exception for reckless conduct. S.C. Code Ann. §15-3-670. If the statutory exception applies, then the exception could apply to the work ARS did in installing the HVAC system in 1996.

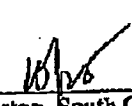
For these reasons, the Third-Party Defendant ARS's Motion for Summary Judgment as to the claim of indemnity is denied.

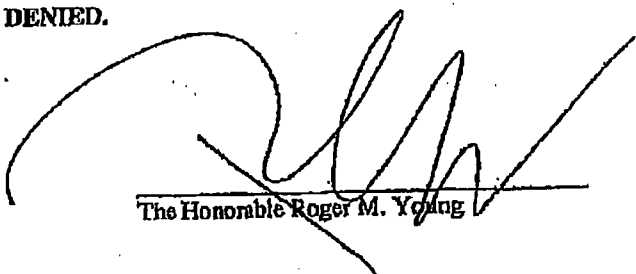
Conclusion

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

- 1) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Negligence, Breach of Warranty, and Breach of Contract is GRANTED.
- 2) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Indemnity is DENIED.

AND IT IS SO ORDERED.


_____, 2011
Charleston, South Carolina.



The Honorable Roger M. Young

(mcm)

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CASE NO. 05-CP-07-1312

Carl T. Kirkland, Mary Alice Kirkland,
Carl T. Kirkland Qualified Personal
Residence Trust and Mary Alice Kirkland
Qualified Residence Trust,

Plaintiffs,

v.

Cambridge Building Corporation, MAJ
Enterprises, Southern Roof and Wood Care
Corp., T.R. Johnson Builders, Inc.,
Figueroa's Exterior Trim & Woodwork,
William Vitto, Susanne T. Sheik,
Lang's Heating & Air Conditioning,
Andersen Windows, Inc., and
Clarence R. Floyd d/b/a Wiggins Iron
and Fence,

Defendants.

Cambridge Building Corp.

Third-Party Plaintiff,

v.

Sto Corp. and Acrocrete, Inc.,

Third-Party Defendants.

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT
OF STO CORP. AND
ACROCRETE, INC.**

This matter is before the Court on the motion of Third-Party Defendants Sto Corp. ("Sto") and Acrocrete, Inc. ("Acrocrete") for summary judgment as to the claims asserted by the Third-Party Plaintiff, Cambridge Building Corporation ("Cambridge"). The case involves the construction of a house on Hilton Head Island, South Carolina, now owned by the Plaintiffs, who bought it in 1997. Cambridge served as general contractor for the house, which was built in 1993 for a previous owner. As originally constructed, the exterior siding of the house was an Exterior Insulation and

CU # 1019



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Finish System ("EIFS"), sometimes referred to as synthetic stucco. It is undisputed that Cambridge's EIFS subcontractor mixed materials sold by two different manufacturers, Acrocrete and Sto, when installing the EIFS on this house.

Plaintiffs, in their Fourth Amended Complaint, assert claims against Cambridge for faulty construction resulting in water damage to the structure.¹ Cambridge's Third-Party Complaint against Sto and Acrocrete contains causes of action for indemnity, negligence and breach of warranty. For the reasons stated below, the Court concludes that summary judgment should be granted.

1. Summary judgment standard.

Rule 56(e) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered forthwith when depositions and other evidence "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." In considering a summary judgment motion, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. The non-moving party, however, can not rest on the mere allegations of its pleadings but must present specific, admissible facts which reasonably create a genuine issue for trial, and the Court need not consider unreasonable inferences from the proffered evidence. *Main v. Corley*, 281 S.C. 525, 526-527, 316 S.E.2d 406, 407 (1984); *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991); *Dickert v Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1992).

¹ As part of a settlement with Sto and Acrocrete, the Plaintiffs amended their Complaint to clarify that they do not allege the remaining defendants, including Cambridge, are liable in any way for supplying a defective product. It is clear that the Plaintiffs' claims against Cambridge relate solely to construction defects, including but not limited to the failure to properly supervise the installation of EIFS.

2. *The negligence and breach of warranty claims.*

The Court concludes as a matter of law that Cambridge's claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action. "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." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Wimsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

Although Cambridge contends otherwise, a fair reading of the language of its third-party complaint reveals that the first and second causes of action for negligence and breach of warranty are, in reality, claims for indemnity. In stating both claims, Cambridge seeks recovery, not for its own independent personal injury or property damage, but merely for the liability it might incur to the Plaintiffs. In stating the negligence cause of action, paragraph 89 of the Third-Party Complaint reads as follows:

If Cambridge is liable to the Plaintiffs in any respect, which is denied, then such liability arose from [Sto and Acrocrete's] breach of the duties described above. Such breaches constitute negligence, and [Sto and Acrocrete] should indemnify Cambridge, in whole or in part, for any liability that may be adjudged against it in the Plaintiffs' favour. (emphasis added).

Likewise, the cause of action for breach of warranty contains virtually identical language seeking reimbursement of any amounts which Cambridge is found to owe to Plaintiffs. The causes of action for negligence and breach of warranty mimic that for

indemnity. These claims not only seek a form of relief that could only be defined as indemnity but also actually use the word "indemnify." Therefore, there can be no doubt that Cambridge's negligence and warranty claims are, essentially, indemnity claims in disguise.

Proof of a breach of warranty or negligence may be relevant for an indemnitee to establish the indemnitor's fault in causing a plaintiff's damages, which is an essential element of a claim for equitable indemnity. Such proof does not support stand-alone claims, however. Thus, to recover against Sto or Acrocrete, Cambridge must still establish the other elements of equitable indemnity. The Supreme Court of South Carolina recognized as much when it observed the following:

The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.

Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992). As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." *SCNB v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

The highest courts in other states have also concluded that a third-party plaintiff's claims for breach of warranty necessarily fold into and are absorbed by an overarching cause of action for indemnification. See *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 820 (Ga. Ct. App. 1976); *aff'd*, 235 S.E.2d 142, 144 (Ga. 1977) (claim couched as

breach of warranty was really one for indemnity); *Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (claims "stated as counts for breach of implied warranty" should be regarded as claims for indemnity); *Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) ("[t]he gravamen of the third party petition is indemnification, and we shall treat [claims titled breach of warranty] as such"); *Adkinson v. International Harvester Co.*, 975 F.2d 208 (5th Cir. 1992) (interpreting third-party claim for breach of warranty as one for indemnity).

Since Cambridge has not alleged or submitted evidence of any damages other than Plaintiffs' potential judgment against it and the costs incurred in defending Plaintiffs' claims, the only viable cause of action against Sto or Acrocrete is one for indemnity.² Therefore, the Court grants summary judgment on the causes of action for negligence and breach of warranty.

3. *Equitable indemnity - lack of a special relationship.*

The Court also concludes as a matter of law that there is no special relationship between Cambridge and Sto or Acrocrete on which to base Cambridge's right to equitable indemnity.³ Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). In order to maintain a claim for equitable indemnity, Cambridge must demonstrate that a special relationship existed between it and Sto or Acrocrete. See *Toomer v. Norfolk Southern Railway Company*, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637, (Ct. App. 2001); see also, *Scott v. Pruehauf Corp.*, 302 S.C. 364, 368, 396 S.E.2d

² To the extent that Cambridge's request to be indemnified "in part" for any liability it incurs to Plaintiffs can be construed as a request for contribution, such request is meritless since any contribution claim was extinguished by Sto and Acrocrete's good faith settlements with the Plaintiffs. S.C. Code § 15-38-50.

³ There was no contract between Cambridge and Sto or Acrocrete so there can be no claim for contractual indemnity; the only applicable legal concept is that of equitable indemnity.

354, 358 (1990) ("[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them").

The South Carolina Supreme Court recently clarified that this special relationship "must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another's wrongdoing." *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, fn. 3 (2005). The Court believes that *Rock Hill* is controlling precedent. Applying its principles to the instant case, it is clear that there is no special relationship between Cambridge and Sto or Acrocrete to support a claim for equitable indemnity. First, in its Third-Party Complaint, Cambridge fails to even allege that any such special relationship exists. Second, any relationship that did exist was even more attenuated than the relationship between the utility and subcontractor in *Rock Hill*, who were separated by just one level - the contractor. Here, Cambridge is separated from any dealings with Sto or Acrocrete by at least two levels - the EIFS subcontractor and the respective distributors of Sto and Acrocrete materials.

Furthermore, the undisputed facts of the case reveal that there was no relationship of any kind between Cambridge and Sto or Acrocrete at the time the house in question was built. The contract between Cambridge and the original owner of the house did not specify any particular manufacturer's products or system and simply called for the use of synthetic stucco or "EIFS" generically. Sto and Acrocrete submitted uncontradicted testimony from Cambridge's construction supervisor that Cambridge was not in the practice of specifying which manufacturer's system to use and generally left it to the

discretion of the EIFS subcontractor. This was confirmed by the uncontradicted testimony of Cambridge's EIFS subcontractor that he had "free reign" to decide which manufacturer's EIFS materials to use on the job. Furthermore, there is no evidence in the record that Cambridge possessed or relied on any Sto or Acrocrete product literature at the time the house was built.

The EIFS subcontractor freely admitted in deposition testimony that he commonly mixed materials from various manufacturers on jobs and did just that in this case with Acrocrete and Sto materials. As pointed out by Sto and Acrocrete, no party or expert witness in the case has been able to determine where Acrocrete materials stop and Sto materials begin. The only evidence in the record on the issue is the uncontradicted testimony of Plaintiffs' expert that the EIFS materials were "hopelessly mixed" and that the EIFS system on the house was a "home-made" system and could not be said to be either an Acrocrete or a Sto system.

There is simply no evidence in the record that Cambridge had any sort of relationship with Sto or Acrocrete on which to base a right of indemnity. As such, Cambridge's claim fails to meet the standard set forth in the *Rock Hill* case, and the Court grants summary judgment on the cause of action for equitable indemnity.

4. *Equitable indemnity - alternative grounds.*

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second is not. [cites omitted]. If the second party is also at fault, he comes to court without equity and has no right to indemnity. [cites omitted]. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."

Vermeer v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 307 (Cl. App. 1999). See *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). It is not enough for Cambridge to prove that the alleged defective design of EIFS contributed, in part, to the moisture damage on the house at issue. Under the established law of equitable indemnity, Cambridge must prove that it was wholly without fault in causing Plaintiffs' damages. See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, 237 fn. 2 (2005).

There is no evidence in the record that Cambridge was wholly without fault. In fact, the only evidence in the record is that Cambridge was at least partly at fault for the water intrusion damage to Plaintiffs' house. Sto and Acrocrete submitted the uncontradicted testimony of Plaintiffs' expert that many of the problems causing the water intrusion were the result of Cambridge's negligence in failing to properly sequence the work of its subcontractors on the project. The expert testified, without rebuttal, that there was no damage on the house caused solely by the alleged defective design of EIFS and that any damage to the house was caused, at least in part, by the improper workmanship of Cambridge and its subcontractors. Cambridge's inability to establish its own lack of fault bars any claim for equitable indemnity. Therefore, Acrocrete and Sto would be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

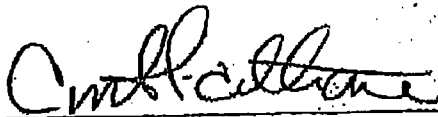
The Court concludes that there is yet another reason summary judgment is proper on the equitable indemnity claim. It is axiomatic that there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Cl. App. 1999). The claims against Cambridge in the Fourth Amended

Complaint all relate to defective construction work, including but not limited to faulty EIFS installation. Plaintiffs do not allege in any way that Cambridge is responsible for supplying a defective product. As a result of the settlement with Acrocrete and Sto, Plaintiffs have removed the EIFS design issue from the case. Therefore, Cambridge can never be held liable to Plaintiffs for something Sto or Acrocrete did. As such, Cambridge is a mere joint tortfeasor with no right to indemnity.

The Court agrees with Sto and Acrocrete's argument that, while Cambridge may defend itself on the grounds that Plaintiffs' damages were caused by the alleged defective design of the EIFS product and not by improper construction work, the right to defend itself and establish its lack of liability does not establish a right to indemnity in favor of Cambridge. Therefore, Acrocrete and Sto would also be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

NOW, THEREFORE, IT IS ORDERED that summary judgment is granted to Sto Corp. and Acrocrete, Inc. on all causes of action in Cambridge's Third-Party Complaint, which is hereby dismissed with prejudice.

AND IT IS SO ORDERED.



Curtis L. Coltrane, Master-in-Equity
and Special Circuit Judge for Beaufort County,
South Carolina

BEAUFORT, SC
May 30, 2006

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-37-0652

Stoneledge at Lake Keowee Owners' Association,
Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W.
Davenport, Michael Furnari, Donna Furnari, Jessy
B. Grasso, Nancy B. 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,

vs.

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 Enterprise 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, Socony Castillo Montel, Upstate Utilities,
Inc., MJG Construction and Homebuilders, Inc.
d/b/a MJG Construction, KMAC of the Carolinas,
Inc., Eufacio Garcia, Everado Jaramillo, Garcia
Parra Insulation, Inc., J&J Construction, Jose Nino,
Jose Manuel Garcia, Eason Construction, Inc., and
Vincent Morales d/b/a Morales Masonry,

Defendants,

CERTIFICATE OF SERVICE

I, Catherine M. Gwyn, employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have served counsel below with **DEFENDANT UPSTATE UTILITIES, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** to the following via U.S. mail and email to Attorney Erin Culbertson and Attorney Jason M. Imhoff and electronic transmission only to all others:

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*Integrays Keowee Development and
IMK Development*

July 12, 2012

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners Assn., Inc. et al.

☐ Plaintiff

v.

IMK Development Co., et al.

☒ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-37-0652

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Check box above indicating submitting party

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☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment and Motion to Join Upstate Utilities Motion for Summary Judgment

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

August 7, 2012

Signature of Attorney for ☐ Plaintiff/ ☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE

CODE: _____

DATE: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

000382

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

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,

vs.

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 Enterprises 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., MJG Construction and Hombuilders, Inc., d/b/a MJG Construction, KMAC, Inc. d/b/a KMAC North Carolina, Eufacio Garcia, Everado Jaramillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry,

Defendants.

**IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT**

Case Number: 2009-CP-37-0652

**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**

TO: ALL COUNSEL AND PARTIES OF RECORD:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for defendant Hutch N Son Construction, Inc. ("HNS") will move before the Presiding Judge of the Tenth Judicial Circuit at the Oconee County Courthouse, Walhalla, South Carolina, on the tenth (10th) day after service hereof at 10:00 a.m. or as soon thereafter as counsel may be heard, or at such time and place as may be set by the Court, for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting full summary judgment in favor of defendant HNS as to the claims of Medallion at Keowee, LLC, Marick Home Builders, LLC, Rich Thoennes, Rick Thoennes, III and M Group Construction & Development, LLC.

Defendant Upstate Utilities has filed a Motion for Summary Judgment and a memorandum in support of its motion. HNS craves reference to the grounds set forth in the Upstate Utilities' motion and memorandum to support this motion.

Both HNS and Upstate Utilities have settled with the Plaintiffs. The claims of Medallion at Keowee, LLC, Marick Home Builders, LLC, Rich Thoennes, Rick Thoennes, III and M Group Construction & Development, LLC are claims of indemnity against defendant HNS. The damages sought by the said parties are not injury or damage in and to itself, but alleged injury or damage to the Plaintiffs that are being sought against them. The settlement between defendants Upstate Utilities, HNS and Plaintiffs has extinguished the claims by operation of law. Further, the parties are barred by the doctrine of unclean hands as it applies to equitable indemnity. Defendant HNS believes that the claimants in this matter have contributed to the alleged loss in the case and therefore they may not assert a claim for equitable indemnity against defendant HNS.

Therefore, defendant HNS prays for dismissal of all claims by Medallion at Keowee, LLC, Marick Home Builders, LLC, Rich Thoennes, Rick Thoennes, III and M Group Construction & Development, LLC against HNS. Said Motion is based upon the depositions taken in this case,

pleadings filed in this case, rules of Court, and such other matters as may be properly presented to the Court at the time of the Hearing.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

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Columbia, South Carolina

August 7, 2012.

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, ET AL. V. IMK DEVELOPMENT, ET AL.
CASE NO.: 2009-CP-37-0652

CERTIFICATE OF SERVICE

I, Melissa Lee Urch, an employee of Gallivan, White & Boyd, P.A., pursuant to Rule 5(b)(1), SCRCF and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **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** to the following counsel of record:

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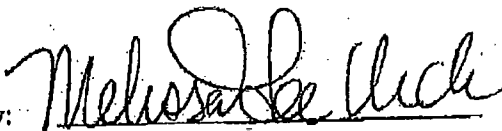
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*Attorneys for Clear View Construction,
LLC*

This _____ day of August, 2012
Columbia, SC

By: 
Melissa Lee Urch

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

THE TENTH JUDICIAL CIRCUIT

CASE NUMBER: 2009-CP-37-0652

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,

vs.

HUTCHINSON'S MEMO IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT

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 Thoernes, M Group Construction and Development, LLC, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders FirstSource Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise 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 Basements, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Heriberto 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 Jaramillo, 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.)

Defendant Hutch N Son Construction, Inc. (hereinafter "HNS") previously filed a Motion for Summary Judgment and hereby supplements that Motion for Summary Judgment with the following Memorandum.

HNS and Upstate Utilities, Inc. (hereinafter "Upstate"), HNS' subcontractor, have already settled with the Plaintiffs without admitting any wrongdoing in this case. At this time, HNS moves for Summary Judgment as to the cross claims filed by Marick Home Builders, LLC (hereinafter "Marick"), Rick Thoennes (hereinafter "Thoennes"), Medallion at Keowee, LLC (hereinafter "Medallion") and Bradford D. Seckinger (hereinafter "Seckinger"). This memorandum will focus on the cross claims asserted by Marick and Thoennes.

FACTS

Stoneledge at Lake Keowee (hereinafter "Stoneledge") is a community of townhomes located on Lake Keowee in Oconee County, South Carolina. The development was built in two phases. Phase I, which lies along the west bank of Lake Keowee, was built by Bostic Brothers Construction between 2002 and 2005, and consists of buildings 1 through 8. Phase II was built on an adjacent peninsula and was constructed by Marick in 2006 and 2007, and consists of

buildings 10 and 14 through 23, as well as the clubhouse. Buildings 9, 11, 12, and 13 were never constructed.

HNS verbally contracted with Marick 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. HNS subcontracted the backfill work to Upstate. The Plaintiffs' experts with Construction Engineering Sciences (hereinafter "CSE") have opined that the grade is too high against the units. (CSE's Expert Report dated November 1, 2010, Page 45). The experts have not opined as to any other deficiency that could be related to the scope of HNS' work.

Nathan Hornaday was Marick's onsite superintendent. In his deposition, Mr. Hornaday admitted to being charged with the responsibility of inspecting the subcontractors' work. His deposition reads as follows:

Q: Would you say that your main function was scheduling and coordinating between the different subs?

A: Yes.

Q: Did you understand that you had any responsibility to inspect their work?

A: Yes, I mean, as far as my -- I was supposed to make sure that they didn't do nothing majorly wrong or cut corners.

(Nathan Hornaday's Deposition Page 40, Lines 24-25 and Page 41, Lines 1-7).

HNS has taken the position that it is not responsible for the grade being too high. (See, e.g., Donny White's Affidavit previously filed by Upstate attached hereto as Exhibit A.)

However, even if the allegation that HNS is responsible for the grade being too high is true, Marick still should have noticed this condition and taken steps to remedy the condition. According to Hornaday's testimony referenced above, Marick had a responsibility to inspect and notice such an open and obvious condition. Glenn Stewart, HNS' expert witness, states in his affidavit that "[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." (See Glenn Stewart's Affidavit ¶ 9 Attached Hereto as Exhibit B.) Taking these facts into consideration, Marick is not without fault in regards to the alleged deficiency concerning the height of the grade against the units.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. The movant must first demonstrate that there is no genuine dispute of material fact. See Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. See Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him, thereby showing that there is a genuine issue for trial. See Miller, 365 S.C. at 220, 225, 616 S.E.2d at 730, 732.

In considering a motion for summary judgment, a court must view the facts in the light most favorable to the non-moving party. While a Plaintiff need only submit a "scintilla of evidence" to avoid summary judgment, see Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (S.C. 2009), the evidence submitted must be material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. See Taylor v. Atlantic Coast Line R. Co., 78 S.C. 552, 59 S.E. 641 (1907) (defining "scintilla of

evidence" as any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror). When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for a jury. See National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581 (1934). Moreover, "a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be *reasonably* possible under the facts.'" Bloom v. Ravoir, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)) (emphasis added). Based on the aforementioned considerations, summary judgment is appropriate in this case.

LEGAL ARGUMENT

I. THE CLAIMS ASSERTED BY MARICK AND THOENNES ARE ALL CLAIMS FOR EQUITABLE INDEMNITY

Marick asserted cross claims of equitable indemnity, negligence, breach of contract and breach of warranty against HNS. Despite how Marick and Thoennes have framed their pleadings, the claims are actually all indemnity claims. As these cross claims seek to recover amounts that Marick may be required to pay to Plaintiffs and costs related thereto, rather than independent damages, they are clearly indemnity claims. "Indemnity 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/Chuck Chipper Corp., 336 S.C. 53, 518 S.E. 2d 301, 305 (Ct. App. 1999). "Town of Winnsboro v. Wiedeman - Singleton, Inc., 303 S.C. 52, 56, 398 S.E. 2d 500, 502 (Ct. App. 1990), aff'd, 414 S.E. 2d 118 (1992).

This issue arose in U.S. Fidelity & Guaranty Co. v. Patriot's Point Development Authority, 788 F. Supp. 880, 881 (D.S.C. 1992). In that case, the non-settling defendants argued

that they had "independent claims" against a settling co-defendant apart from indemnification and contribution. The court disagreed, holding that the claims were "nothing more than claims for indemnity" because they would not exist "without plaintiff suing the non-settling defendants." Id. at n.1. Similarly, in S.C. National Bank v. Stone, 749 F. Supp. 1419 (D.S.C. 1990), the court noted that cross-claims against the settling defendants for breach of contract, negligence, and fraud were "nothing more than claims for contribution or indemnification with a slight change in wording" and that "a rose by any other name is still a rose." Id. at 1433 (emphasis added); see also First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 432, 445 S.E.2d, 446, 447 (1994) (where Third Party Plaintiff alleged causes of action for breach of contract, negligence, and indemnification, Court addressed only indemnification, thereby implicitly acknowledging that the cause of action boiled down to indemnity).

The character of the allegations contained in the complaint is determined by "the nature of the issues and remedies which are sought." State v. Yelsen Land Company, 257 S.C. 401, 403, 185 S.E. 2d 897 (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.2d 546, 548 (1919). Courts use the allegations in the complaint to determine the correct character of the action. See, Seebaldt at 692, 239 S.E.2d, at 727. The trial courts in South Carolina have likewise granted summary judgment in similar cases finding that the claims couched in terms of indemnity fold into and are absorbed by overreaching causes of action for indemnification. (Nelson v. John Weiland Home, 2009-CP-10-6573 Attached Hereto as Exhibit C, Kirkland v. Cambridge Building Corp., 2006-CP-07-1312 Attached Hereto as Exhibit D.).

Because the relief requested under each claim is the same, and because the claims would not exist absent Marick being sued by Plaintiffs, the claims are all for indemnity and cannot be realistically interpreted as anything else.

II. MARICK'S EQUITABLE INDEMNITY CLAIM SHOULD BE DISMISSED
BECAUSE MARICK IS NOT WITHOUT FAULT

According to well established South Carolina case law, a party can only recover from equitable indemnity if the party is without fault. The crucial requirement for supporting equitable indemnity is that "the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E. 2d 301, 307 (Ct. App. 1999). In this action, there is no issue of fact as to the fault of Marick. The only criticism that potentially is related to HNS' work is that the grade is too high against the units. If this allegation is proven, Marick easily would have seen the height of the grade during construction. As explained in Mr. Stewart's Affidavit attached hereto, Marick's failure to adequately supervise the work and to correct the height of the grade proves that Marick is at fault for this alleged construction defect.

CONCLUSION

THEREFORE, because there are no genuine issues of material fact with respect to these issues, HNS is entitled to Summary Judgment as a matter of law as to all of Marick's and Thoennes' cross claims as set forth above.

Signature Page to Follow

GALLIVAN, WHITE & BOYD, P.A.

BY: 

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Attorneys for Defendant Hutch N Son

Columbia, SC
August 30, 2012.

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-97-0662

Stoneledge at Lake Keowee Owners'
Association, Inc., C. Dan Carson, Jeffrey J.
Dauter, 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,

vs.

IMK Development Co., LLC, Keowee
Townhouses, LLC, Ludwig Corporation,
LLC, SDI Funding, LLC, Medallion at
Keowee, LLC, Integritys Keowee
Development, LLC, Marick Home
Builders, LLC, Bostic Brothers
Construction, Inc., Rick Thiennes, Mel
Morris, Joe Bostic, Jeff Bostic, 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
Enterprise a/k/a Compton Enterprises,
Gunter Heating & Air, All Pro Heating,
A/C & Refrigeration, LLC, Coleman
Waterproofing, Hayward Electrical
Services, Inc., Tinsley Electrical, LLC,
Hutch N Son Construction, Inc., Carl Cates
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-Hernandez, Ester Moran-Mentado,
Socorro Castillo Montel, Upstate Utilities,
Inc., MJG Construction and
Homebuilders, Inc. d/b/a MJG

AFFIDAVIT OF
DONNY WHITE

Construction, KMAC of the Carolinas, Inc.,
Eufacio Garcia, Everado Jaramillo,
Garcia Parra Insulation, Inc., J&J
Construction, Jose Nino, Jose Manuel
Garcia, Eason Construction, Inc., and
Vincent Morales d/b/a Morales Masonry,

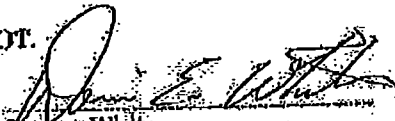
Defendants.

PERSONALLY appeared before me Donny White, first being duly sworn, deposes and states that:

I am the president of Upstate Utilities, Inc. (Upstate) and I was onsite and inspected much of the work while it was being performed. I was present at the inspection of the work with our expert, Rhett Whitlock, who confirmed that he found no error in our work.

I hereby affirm and state, of personal knowledge, that Upstate was not retained by Marick Home Builders, LLC (Marick) or Rick Thoennes (Thoennes). I was retained by Hutch N Son Construction, Inc. (Hutch N Son) to perform work. The work we performed was performed correctly and backfill was not placed over the wick board. Other persons and/or entities performed drainage and landscaping work after our work was completed. These persons or entities changed the grade in some areas allowing the dirt to be higher than the wick board. We performed our contract appropriately and it was inspected by the county and approved by Marick. Our work did not cause or contribute to the complaints alleged by the plaintiff.

FURTHER AFFIANT SAYETH NOT.


Donny White

SWORN to before me this

22nd day of August, 2012

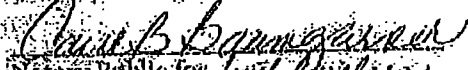

Notary Public for South Carolina
My Commission Expires: 11-24-13

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
THE TENTH JUDICIAL CIRCUIT

CASE NUMBER: 2009-CP-37-0652

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,

vs.

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., 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,

Defendants.

**AFFIDAVIT OF
GLENN STEWART, M.E., P.E.**

PERSONALLY appeared before me, Glenn Stewart, M.E., P.E. and being duly sworn, makes the following statement under oath:

1. I am Glenn Stewart, M.E., P.E.
2. I am currently employed as a consulting engineer with Engineering Design & Testing Corp. in Columbia, South Carolina and have been employed by Engineering Design & Testing Corp. as a consulting engineer since 1993.
3. I am a professional engineer licensed in the State of South Carolina, and have been such since 1991. I am also a licensed professional engineer in several other states.
4. I have a Bachelor of Science in Civil Engineering from North Carolina State University and a Master of Engineering in Civil Engineering from Clemson University.
5. During the course of my professional life I have been involved in the inspection and evaluation of the construction of projects similar to Stoneledge at Lake Keowee. This experience includes, but is not limited to, evaluation for building code compliance, methods of construction, construction materials, damage assessment, and design.
6. I was retained by the Defendant, Hutch-N-Son Construction, to inspect and render opinions regarding alleged construction deficiencies at Phase II of Stoneledge at Lake Keowee ("Project"). The Project consists of several multi-family residential buildings.
7. I have personally visited the "Project" in order to evaluate reported deficiencies. In addition, I have reviewed construction documents, contract documents, reports and documents prepared by others, deposition testimony, and building codes.
8. 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. During the construction, the associated building components would have been open to observation and inspection, and these deficiencies should have been detected during construction.

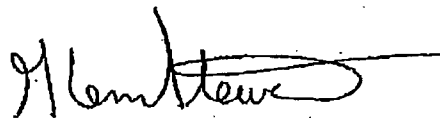
9. The general contractor for Phase II of the "Project" was Marick Home Builders, LLC (Contractor). The "Standard Form of Agreement Between Owner and Contractor", dated January 30, 2006, between the Owner (IMK Development Co., LLC) and the Contractor (Marick), has been reviewed. This document includes the "General Conditions of the Contract for Construction". Selected sections related to the Contractor's responsibilities are summarized below:

- a. Article 3, Titled: Relationship of the Parties: "...exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision..."
- b. Paragraph 3.3.1 of the General Conditions of the Contract for Construction: "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instruction concerning the matters."
- c. Paragraph 3.3.2 of the General Conditions of the Contract for Construction: "The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors,"

- d. Paragraph 3.3.3 of the General Conditions for the Contract for Construction: "The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work."
- e. Paragraph 3.4.3 of the General Conditions for the Contract for Construction: "The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them."
- f. Paragraph 3.5.1 of the General Conditions of the Contract for Construction: "The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required (sic) or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective."
- g. Paragraph 3.9.1 of the General Conditions of the Contract for Construction: "The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor."

10. With Phase II of Stoneledge at Lake Keowee, as with similar construction projects, it is the general contractor's responsibility to provide competent supervision of the construction and the general contractor also has a direct responsibility to the project owner related to the quality of that construction.
11. The transcript from Mr. Hornaday's March 30, 2012 deposition has been reviewed. Mr. Nathan Hornaday provided daily supervision of the "Project" for Marick. (See, e.g., pp. 18, 23, 24, 40, 41, 59, 60, 115, 116, 117 and 118 of the Hornaday deposition.) Mr. Hornaday had insufficient training, expertise, or knowledge to provide competent supervision during the construction of the "Project" and insufficient supervision was provided. (See, e.g., pp. 14, 15, 18, 36, 40, 41, 42, 43, 56, 59, 60, 63, 97, 101, 117, and 118 of the Hornaday deposition.)
12. Marick had a responsibility to supervise the construction and a responsibility for the quality of the construction. Marick provided insufficient supervision of the "Project." The deficient conditions identified in this affidavit related to 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."

Further the Affiant sayeth not.



Glenn Stewart, M.E., P.E.
Consulting Engineering
Engineering Design & Testing Corp.

Sworn to and subscribed before me this the
30 day of August 2012,

Carol B. Kitchen Carol B. Kitchen
Notary Public

My Commission Expires: July 19, 2022

EXHIBIT C

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Cheryl H. Nelson,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc. and McGee
Brothers Co., Inc.,

Defendants.

John Wieland Homes and Neighborhoods
of South Carolina, f/k/a John Wieland
Homes of South Carolina, Inc.,

Third-Party Plaintiff,

vs.

Benjamin Mora d/b/a Mora Construction,
Sondles Builders, LLC, Carolina Custom
Security & Sound, Inc., Barr Construction,
Inc., Branchfort Concrete Industries, Inc.,
American Residential Services, LLC d/b/a
American Residential Services of South
Carolina, Inc. f/k/a Atlas Services, Inc. and
Coastline Construction, Inc. f/k/a Coastline
Construction,

Third-Party Defendants

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2009-CP-10-6573

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2011 OCT 26 PM 12:28

FILED

ORDER GRANTING IN PART AND
DENYING IN PART THIRD-PARTY
DEFENDANT AMERICAN
RESIDENTIAL SERVICES OF SOUTH
CAROLINA, INC.'S MOTION FOR
SUMMARY JUDGMENT

This matter came before the Court for a hearing on July 25, 2011, for consideration of
Third-Party Defendant American Residential Services of South Carolina Inc's ("ARS") Motion
for Summary Judgment. Counsel for the parties were present, and this Court entertained and

B



considered oral arguments as well as memorandums of law and affidavits submitted by the parties.

Facts

Plaintiff homeowner brings this suit, filed on October 19, 2009, to recover damages resulting from alleged faulty construction or repair of her home. Defendant Wisland Homes filed a third-party complaint against Third-Party Defendant ARS on December 2, 2010, alleging the work ARS did in installing the HVAC system in 1996 cause or contributed to the Plaintiff's damages. Defendant Wisland Homes brings four causes of action against ARS including 1) indemnity, 2) negligence, 3) breach of warranty, and 4) breach of contract.

ARS contends it is entitled to summary judgment as a matter of law to the claims of negligence, breach of warranty, and breach of contract, because these claims are disguised indemnity claims. It also argues that it is entitled to summary judgment as to the claim of indemnity because Wisland Homes owes no liability to the Plaintiff as a result of ARS's work.

Standard of Review

Summary judgment is only appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Garvin v. B-I Co., Inc., 343 S.C. 625, 627, 541 S.E.2d 831, 833 (2001). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id.

Discussion

I. ARS's Motion for Summary Judgment as to the Claims of Negligence, Breach of Warranty and Breach of Contract.

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." Seebalt v. First Fed.

Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Courts may use the allegations in the complaint to determine the correct character of an action. Id. "Indemnity is that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Cl. App. 1999) (citations omitted).

In this case, Defendant Wieland Homes' Complaint requests the remedy of "any monies [Wieland Homes] is adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claims." Third-Party Complaint ¶ 160, 170, 164. Because these claims seek to recover the amount Wieland Homes paid to Plaintiffs, rather than personal injury or property damages, the claims are claims for indemnity. Vermeer Carolina's Inc., 336 S.C. at 60, 518 S.E.2d at 305.

This court finds that the causes of action for negligence, breach of warranty, and breach of contract are all disguised indemnity claims and Wieland Homes has failed to state facts sufficient to constitute independent causes of action and therefore Third-Party Defendant ARS is entitled to Summary Judgment as a matter of law.

II. ARS's Motion for Summary Judgment as to the Claim of Indemnity.

Third-Party Defendant ARS contends that it is entitled to summary judgment as to the claim of indemnity because Wieland Homes has failed to present evidence that it is liable to the Plaintiff as a result of ARS's work and because all claims arising out of ARS's work are barred by the applicable three-year statute of limitations.

After thorough review, this Court finds that there is evidence in the record that Plaintiff has been damaged by excessive water and moisture damage in her home and there is a genuine issue of material fact regarding whether ARS's HVAC work contributed to Plaintiff's damage.

Additionally, the Plaintiff's Complaint alleges that the applicable statute of repose does not apply because the conduct is subject to the statutory exception for reckless conduct. S.C. Code Ann. §15-3-670. If the statutory exception applies, then the exception could apply to the work ARS did in installing the HVAC system in 1996.

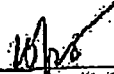
For these reasons, the Third-Party Defendant ARS's Motion for Summary Judgment as to the claim of indemnity is denied.

Conclusion

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

- 1) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Negligence, Breach of Warranty, and Breach of Contract is GRANTED.
- 2) Third-Party Defendant ARS's Motion for Summary Judgment as to the causes of action for Indemnity is DENIED.

AND IT IS SO ORDERED.


2011
Charleston, South Carolina.

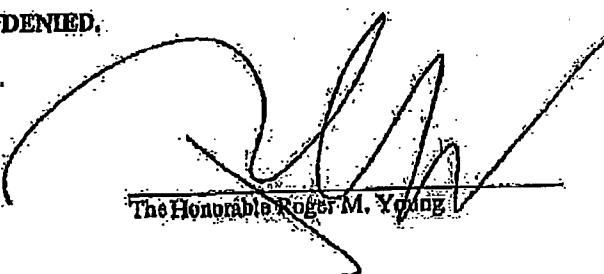

The Honorable Roger M. Young

EXHIBIT D

(mem)

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CASE NO. 05-CP-07-1312

Carl T. Kirkland, Mary Alice Kirkland,
Carl T. Kirkland Qualified Personal
Residence Trust and Mary Alice Kirkland
Qualified Residence Trust,

Plaintiffs,

v.

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT
OF STO CORP. AND
ACROCRETE, INC.

Cambridge Building Corporation, MAJ
Enterprises, Southern Roof and Wood Care
Corp., T.R. Johnson Builders, Inc.,
Figueroa's Exterior Trim & Woodwork,
William Vitto, Susanne T. Shelk,
Lang's Heating & Air Conditioning,
Andersen Windows, Inc., and
Clarence R. Floyd d/b/a Wiggins Iron
and Fence,

Defendants,

Cambridge Building Corp.

Third-Party Plaintiff,

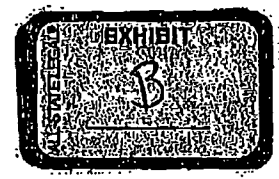
v.

Sto Corp. and Acrocrete, Inc.,

Third-Party Defendants.

This matter is before the Court on the motion of Third-Party Defendants
Sto Corp. ("Sto") and Acrocrete, Inc. ("Acrocrete") for summary judgment as to the
claims asserted by the Third-Party Plaintiff, Cambridge Building Corporation
("Cambridge"). The case involves the construction of a house on Hilton Head Island,
South Carolina, now owned by the Plaintiffs, who bought it in 1997. Cambridge served
as general contractor for the house, which was built in 1993 for a previous owner. As
originally constructed, the exterior siding of the house was an Exterior Insulation and

cul # 1019



Finish System ("EIFS"), sometimes referred to as synthetic stucco. It is undisputed that Cambridge's EIFS subcontractor mixed materials sold by two different manufacturers, Aerocrete and Sto, when installing the EIFS on this house.

Plaintiffs, in their Fourth Amended Complaint, assert claims against Cambridge for faulty construction resulting in water damage to the structure.¹ Cambridge's Third-Party Complaint against Sto and Aerocrete contains causes of action for indemnity, negligence and breach of warranty. For the reasons stated below, the Court concludes that summary judgment should be granted.

1. Summary judgment standard.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered forthwith when depositions and other evidence "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." In considering a summary judgment motion, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. The non-moving party, however, can not rest on the mere allegations of its pleadings but must present specific, admissible facts which reasonably create a genuine issue for trial, and the Court need not consider unreasonable inferences from the proffered evidence. *Main v. Corley*, 281 S.C. 525, 526-527, 316 S.E.2d 406, 407 (1984); *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991); *Dickart v Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Cl. App. 1992).

¹ As part of a settlement with Sto and Aerocrete, the Plaintiffs amended their Complaint to clarify that they do not allege the remaining defendants, including Cambridge, are liable in any way for supplying a defective product. It is clear that the Plaintiffs' claims against Cambridge relate solely to construction defects, including but not limited to the failure to properly supervise the installation of EIFS.

2. *The negligence and breach of warranty claims.*

The Court concludes as a matter of law that Cambridge's claims for negligence and breach of warranty are merely disguised claims for indemnity rather than independent causes of action. "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." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Wilmisboro v. Wlademan-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). See also *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 383, 611 S.E.2d 235 (2005).

Although Cambridge contends otherwise, a fair reading of the language of its third-party complaint reveals that the first and second causes of action for negligence and breach of warranty are, in reality, claims for indemnity. In stating both claims, Cambridge seeks recovery, not for its own independent personal injury or property damage, but merely for the liability it might incur to the Plaintiffs. In stating the negligence cause of action, paragraph 89 of the Third-Party Complaint reads as follows:

If Cambridge is liable to the Plaintiffs in any respect, which is denied, then such liability arose from [Sto and Acrocrete's] breach of the duties described above. Such breaches constitute negligence, and [Sto and Acrocrete] should indemnify Cambridge, in whole or in part, for any liability that may be adjudged against it in the Plaintiffs' favour. (emphasis added).

Likewise, the cause of action for breach of warranty contains virtually identical language seeking reimbursement of any amounts which Cambridge is found to owe to Plaintiffs. The causes of action for negligence and breach of warranty mimic that for

indemnity. These claims not only seek a form of relief that could only be defined as indemnity but also actually use the word "indemnify." Therefore, there can be no doubt that Cambridge's negligence and warranty claims are, essentially, indemnity claims in disguise.

Proof of a breach of warranty or negligence may be relevant for an indemnitee to establish the indemnitor's fault in causing a plaintiff's damages, which is an essential element of a claim for equitable indemnity. Such proof does not support stand-alone claims, however. Thus, to recover against Sto or Astocrete, Cambridge must still establish the other elements of equitable indemnity. The Supreme Court of South Carolina recognized as much when it observed the following:

The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.

Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992). As noted by South Carolina's federal district court, "a rose by any other name is still a rose," and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for ... indemnification with a slight change in wording." *SCNB v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

The highest courts in other states have also concluded that a third-party plaintiff's claims for breach of warranty necessarily fold into and are absorbed by an overarching cause of action for indemnification. See *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 820 (Ga. Ct. App. 1976); *aff'd*, 235 S.E.2d 142, 144 (Ga. 1977) (claim couched as

breach of warranty was really one for indemnity); *Frazier v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (claims "stated as counts for breach of implied warranty" should be regarded as claims for indemnity); *Warner v. Reagan Bulck, Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) ("[t]he gravamen of the third party petition is indemnification, and we shall treat [claims titled breach of warranty] as such"); *Adkinson v. International Harvester Co.*, 975 F.2d 208 (5th Cir. 1992) (interpreting third-party claim for breach of warranty as one for indemnity).

Since Cambridge has not alleged or submitted evidence of any damages other than Plaintiffs' potential judgment against it and the costs incurred in defending Plaintiffs' claims, the only viable cause of action against Sto or Acrocrete is one for indemnity.² Therefore, the Court grants summary judgment on the causes of action for negligence and breach of warranty.

3. Equitable indemnity - lack of a special relationship.

The Court also concludes as a matter of law that there is no special relationship between Cambridge and Sto or Acrocrete on which to base Cambridge's right to equitable indemnity.³ Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Vermear v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). In order to maintain a claim for equitable indemnity, Cambridge must demonstrate that a special relationship existed between it and Sto or Acrocrete. See *Toomer v. Norfolk Southern Railway Company*, 344 S.C. 486, 492-493, 544, S.E.2d 634, 637, (Ct. App. 2001); see also, *Scott v. Fruehauf Corp.*, 302 S.C. 364, 368, 396 S.E.2d

² To the extent that Cambridge's request to be indemnified "in part" for any liability it incurs to Plaintiffs can be construed as a request for contribution, such request is meritorious since any contribution claim was extinguished by Sto and Acrocrete's good faith settlements with the Plaintiffs. S.C. Code § 15-38-50.

³ There was no contract between Cambridge and Sto or Acrocrete so there can be no claim for contractual indemnity; the only applicable legal concept is that of equitable indemnity.

354, 358 (1990) ("[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them").

The South Carolina Supreme Court recently clarified that this special relationship "must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another's wrongdoing." *Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, fn. 3 (2005). The Court believes that *Rock Hill* is controlling precedent. Applying its principles to the instant case, it is clear that there is no special relationship between Cambridge and Sto or Acrocrete to support a claim for equitable indemnity. First, in its Third-Party Complaint, Cambridge fails to even allege that any such special relationship exists. Second, any relationship that did exist was even more attenuated than the relationship between the utility and subcontractor in *Rock Hill*, who were separated by just one level - the contractor. Here, Cambridge is separated from any dealings with Sto or Acrocrete by at least two levels - the HFS subcontractor and the respective distributors of Sto and Acrocrete materials.

Furthermore, the undisputed facts of the case reveal that there was no relationship of any kind between Cambridge and Sto or Acrocrete at the time the house in question was built. The contract between Cambridge and the original owner of the house did not specify any particular manufacturer's products or system and simply called for the use of synthetic stucco or "EFIS" generically. Sto and Acrocrete submitted uncontradicted testimony from Cambridge's construction supervisor that Cambridge was not in the practice of specifying which manufacturer's system to use and generally left it to the

discretion of the EIFS subcontractor. This was confirmed by the uncontradicted testimony of Cambridge's EIFS subcontractor that he had "free reign" to decide which manufacturer's EIFS materials to use on the job. Furthermore, there is no evidence in the record that Cambridge possessed or relied on any Sto or Acrocrete product literature at the time the house was built.

The EIFS subcontractor freely admitted in deposition testimony that he commonly mixed materials from various manufacturers on jobs and did just that in this case with Acrocrete and Sto materials. As pointed out by Sto and Acrocrete, no party or expert witness in the case has been able to determine where Acrocrete materials stop and Sto materials begin. The only evidence in the record on the issue is the uncontradicted testimony of Plaintiffs' expert that the EIFS materials were "hopelessly mixed" and that the EIFS system on the house was a "home-made" system and could not be said to be either an Acrocrete or a Sto system.

There is simply no evidence in the record that Cambridge had any sort of relationship with Sto or Acrocrete on which to base a right of indemnity. As such, Cambridge's claim fails to meet the standard set forth in the *Rock Hill* case, and the Court grants summary judgment on the cause of action for equitable indemnity.

4. *Equitable indemnity - alternative grounds.*

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second is not. [cites omitted]. If the second party is also at fault, he comes to court without equity and has no right to indemnity. [cites omitted]. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."

Vermeer v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). See *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). It is not enough for Cambridge to prove that the alleged defective design of BIFS contributed, in part, to the moisture damage on the house at issue. Under the established law of equitable indemnity, Cambridge must prove that it was wholly without fault in causing Plaintiffs' damages. See also *Rook Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235, 237 fn. 2 (2005).

There is no evidence in the record that Cambridge was wholly without fault. In fact, the only evidence in the record is that Cambridge was at least partly at fault for the water intrusion damage to Plaintiffs' house. Sto and Acrocrete submitted the uncontradicted testimony of Plaintiffs' expert that many of the problems causing the water intrusion were the result of Cambridge's negligence in failing to properly sequence the work of its subcontractors on the project. The expert testified, without rebuttal, that there was no damage on the house caused solely by the alleged defective design of BIFS and that any damage to the house was caused, at least in part, by the improper workmanship of Cambridge and its subcontractors. Cambridge's inability to establish its own lack of fault bars any claim for equitable indemnity. Therefore, Acrocrete and Sto would be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

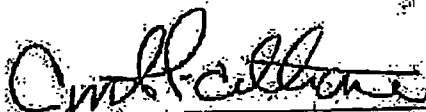
The Court concludes that there is yet another reason summary judgment is proper on the equitable indemnity claim. It is axiomatic that there can be no indemnity among mere joint tortfeasors. *Vermeer v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). The claims against Cambridge in the Fourth Amended

Complaint all relate to defective construction work, including but not limited to faulty EIFS installation. Plaintiffs do not allege in any way that Cambridge is responsible for supplying a defective product. As a result of the settlement with Acrocrete and Sto, Plaintiffs have removed the EIFS design issue from the case. Therefore, Cambridge can never be held liable to Plaintiffs for something Sto or Acrocrete did. As such, Cambridge is a mere joint tortfeasor with no right to indemnity.

The Court agrees with Sto and Acrocrete's argument that, while Cambridge may defend itself on the grounds that Plaintiffs' damages were caused by the alleged defective design of the EIFS product and not by improper construction work, the right to defend itself and establish its lack of liability does not establish a right to indemnity in favor of Cambridge. Therefore, Acrocrete and Sto would also be entitled to summary judgment on this ground alone even if there did exist the requisite special relationship.

NOW, THEREFORE, IT IS ORDERED that summary judgment is granted to Sto Corp. and Acrocrete, Inc. on all causes of action in Cambridge's Third-Party Complaint, which is hereby dismissed with prejudice.

AND IT IS SO ORDERED.


Curtis L. Coltrane, Master-in-Equity
and Special Circuit Judge for Beaufort County,
South Carolina

BEAUFORT, SC
May 30, 2006

(00810156)

CM#949

000421

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

THE TENTH JUDICIAL CIRCUIT

CASE NUMBER: 2009-CP-37-0652

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,)

vs.)

IMK Development Co., LLC, Keowee Townhouses,)
LLC, Ludwig Corporation, LLC, SDI Funding, LLC,)
Medallion at Keowee, LLC, Integrays 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, LLC,)
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 Basements, 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., MIG)
Construction and Homebuilders, Inc. d/b/a MIG)
Construction, KMAC of the Carolinas, Inc., Eufacio)
Garcia, Everado Jaramillo, Garcia Parra Insulation,)

CERTIFICATE OF SERVICE

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.)

The undersigned hereby certifies that Defendant Hutch N Son Construction, Inc.'s Memorandum in Support of its Motion for Summary Judgment was served upon all counsel of record this the 30 day of August, 2012, by electronic mail and/or U.S. Mail as indicated below to each the following addressees:

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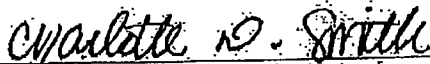
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Legal Assistant to Shelley Sunderman Montague and A. Grayson Smith

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Stoneledge at Lake Keowee Owners'
Association, Inc., et al

Plaintiff,

vs.

Marick Home Builders, LLC et al

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-37-652

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

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Defendant's Attorney:
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E-mail: jimhoff@wardflrm.com Other: _____ m

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: DEFENDANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES' MOTION FOR SUMMARY JUDGMENT AGAINST BOSTIC BROTHERS CONSTRUCTION, CLEAR VIEW CONSTRUCTION, LLC, BUILDERS FIRSTSOURCE SOUTHEAST GROUP, SOUTHERN CONCRETE SPECIALTIES, HUTCH N SON CONSTRUCTION, INC., UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS, INC., CARL CATOE CONSTRUCTION, INC., AND MILLER/PLAYER & ASSOCIATES

Estimated Time Needed: 30 mins

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

August 17, 2012
Date submitted

SECTION III: Motion Fee

☒ PAID AMOUNT: \$

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: \$ _____	
☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

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,

vs.

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.,
MJG CONSTRUCTION AND HOMEBUILDERS, INC.

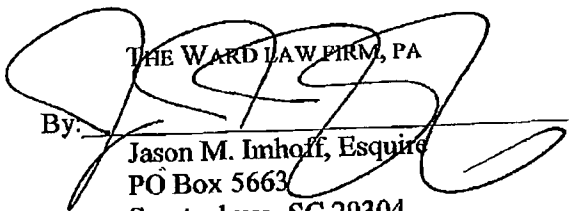
DEFENDANTS MARICK HOME
BUILDERS, LLC AND RICK THOENNES'
MOTION FOR SUMMARY JUDGMENT
AGAINST BOSTIC BROTHERS
CONSTRUCTION, CLEAR VIEW
CONSTRUCTION, LLC, BUILDERS
FIRSTSOURCE SOUTHEAST GROUP,
SOUTHERN CONCRETE SPECIALTIES,
HUTCH N SON CONSTRUCTION, INC.,
UPSTATE UTILITIES, INC., SOUTHERN
BASEMENTS, INC., CARL CATOE
CONSTRUCTION, INC., AND
MILLER/PLAYER & ASSOCIATES

Defendants,

YOU WILL PLEASE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Marick Home Builders, LLC and Rick Thoennes (hereinafter "Marick and Thoennes"), by and through their undersigned attorney, will move, pursuant to Rule 56, SCRCP, before the Court of Common Pleas Oconee County for an Order granting Marick and Thoennes Summary Judgment on the issues of liability against Bostic Brothers Construction, Clear View Construction, LLC, Builders FirstSource Southeast Group, Southern Concrete Specialties, Hutch N Son Construction, Inc., Upstate Utilities, Inc., Southern Basements, Inc., Carl Catoe Construction, Inc., and Miller/Player & Associates.

This motion is supported by the pleadings and other documents on file, applicable case and statutory law, a memorandum of law to be submitted, and any other materials and documents that may be submitted or which this Court finds fit to consider.

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By: 

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And Rick Thoennes

August 17, 2012
Spartanburg, South Carolina

CERTIFICATE OF SERVICE

I, Amanda D. Steward, an employee of The Ward Law Firm, PA, pursuant to Rule 5(b)(1), SCRPC and counsel's regular business practices, do hereby certify that I have this date, electronically mailed a true and correct copy of the **DEFENDANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES' MOTION FOR SUMMARY JUDGMENT AGAINST BOSTIC BROTHERS CONSTRUCTION, CLEAR VIEW CONSTRUCTION, LLC, BUILDERS FIRSTSOURCE SOUTHEAST GROUP, SOUTHERN CONCRETE SPECIALTIES, HUTCH N SON CONSTRUCTION, INC., UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS, INC., CARL CATOE CONSTRUCTION, INC., AND MILLER/PLAYER & ASSOCIATES** to the following counsel of record:

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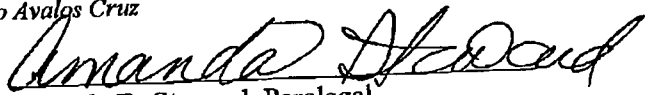
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This 17 day of August, 2012
Spartanburg, SC

By: 
Amanda D. Steward, Paralegal

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

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

Plaintiffs,

vs.

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 ENTERPRISE 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-

MARICK HOME BUILDERS, LLC AND
RICK THOENNES' MEMORANDUM IN
OPPOSITION TO UPSTATE UTILITIES,
HUTCH N SON CONSTRUCTION,
MILLER/PLAYER & ASSOCIATES,
CLEARVIEW CONSTRUCTION,
BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, CARL CATOE CONSTRUCTION,
TG CONSTRUCTION, ALEJANDRO CRUZ,
HERBERTO ARCOS HERNANDEZ,
MARTIN HERNANDEZ-AVILES,
SOCORRO CASTILLO MONTEL, KMAC,
INC. JOSE NINO, AND VINCENT
MORALES D/B/A MORALES MASONRY'S
MOTION FOR SUMMARY JUDGMENT

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2013 FEB 13 PM 1:50

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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,)

Defendants,)

Defendants, Marick Home Builders, LLC (hereinafter "Marick") and Rick Thoennes (hereinafter "Thoennes") (hereinafter both Defendants collectively referred to as "Defendants" "Marick") hereby submit this Memorandum in Opposition to Upstate Utilities, Hutch N Son Construction, Miller/Player & Associates, Clearview Construction, Builders FirstSource-Southeast Group, Carl Catoe Construction, T.G. Construction, Alejandro Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Socorro Castillo Montel, KMAC, Inc., Jose Nino, and Vincent Morales d/b/a Morales Masonry's Motions for Summary Judgment and/or Motions to Dismiss concerning Marick and Rick Thoennes Cross-claims (hereinafter collectively "subcontractors.")

FACTS/PROCEDURAL POSTURE

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter "Hund"). (See Plaintiff's Complaint). 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 and it retained Jim Logan to review its options. In November of 2009, the owners voted to retain Mr. Lyles 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. 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, 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. A majority of the subcontractors and suppliers used by Bostic for phase I construction are different from the subcontractors and suppliers used during phase II construction.

After Bostic Brothers exit, the remaining unsold units and vacant land was purchased by IMK Development Co., LLC (hereinafter "IMK"). Once purchased, Marick Home Builders, LLC (hereinafter "Marick") was retained as the general contractor to construct phase II at Stoneledge. While preparing to begin phase II

construction, Marick also contracted to assist phase I homeowners with repairs and internal construction which was not performed by Bostic Brothers prior to Bostic Brothers departure from the development. Therefore, in reference to phase I, Marick made repairs to units sold by Bostic Brothers and completed some interior construction to phase I units.

Additionally, Marick was the general contractor in charge of phase II construction which began in January 2006. Upon information and belief, most of the subcontractors and suppliers that provided services and supplies to phase II construction were not involved with the construction of phase I.

Prior to completion of phase II, on or about June 13, 2008, Ludwig Corporation, LLC (hereinafter "Ludwig") purchased/acquired all unsold units from IMK Development and Integrys. At that point, Ludwig took over construction and finished phase II. Ludwig also acquired finished units located in phase I. Ludwig took over all general contracting roles previously performed by Marick. Further, after conducting an auction and selling some of the units acquired from IMK/Integrys, Ludwig sold/transferred the remaining unsold units to Medallion at Lake Keowee (hereinafter "Medallion").

Therefore, Phase II involved different subcontractors from phase I, different general contractors (Marick, Ludwig and Medallion rather than Bostic Brothers), different developers, the addition of amenities which were not built during phase I construction, in addition to numerous other differences between the two phases of construction.

STANDARD OF REVIEW

1. Motion to Dismiss

When reviewing a motion to dismiss, the Court must accept all well-pled facts in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *Nemet Chevrolet, LTD. V. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Trulock v. Freach*, 275 F.3d 302, 307 (4th Cir. 2001) and *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). To avoid dismissal, the "complaint must contain sufficient factual matter...[that when]...accepted as true...state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1958 (2007)). To be facially plausible, a complaint must contain factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Nemet Chevrolet, LTD.*, 591 F.3d at 256 (citing *Iqbal*, 129 S.Ct. at 1952). However, this plausibility standard does not necessitate the plaintiff make a showing of the probability of success on the claim asserted. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965). The question to be answered is whether in a light most favorable to the plaintiff, and with every doubt resolved in plaintiff's behalf, the Complaint states any valid claim for relief. *Washington v. Lexington County Jail*, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct.App. 1999).

2. Motion for Summary Judgment

"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 when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston*

Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(e), SCRCF. 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).

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.")

LAW & ANALYSIS

In Defendants Third Amended Answer, Defendants asserted cross-claims for (1) Equitable Indemnification; (2) Breach of Contract; (3) Negligence; and (4) Breach of Warranties. A number of the parties have filed Motions for Summary Judgment and/or to Dismiss Defendants' cross-claims.

THE LAW

1. EQUITABLE INDEMNIFICATION

Subcontractors' Motions to Dismiss and for Summary Judgment of equitable indemnity causes of action should be denied because, at worst, genuine issues of material fact exist regarding Defendants' wrongdoing and subcontractors' contractual obligations. 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. The Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight.

All of the subcontractors prosecuting motions allege that Marick cannot recover under Equitable Indemnity as Marick is not without fault. Specifically, they allege that defense expert Randy Still has admitted fault on behalf of Marick. This is an incorrect twisting of Mr. Still's words. Mr. Still specifically testified that Marick was not at fault and did not breach its obligation of supervision and oversight.

Deposition of Randy Still

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.

(Still Dep. 163:19 -- 164:6.)

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.

(Still Dep. 164:9-18.)

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.

(Still Dep. 165:2-7.)

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.

(Still Dep. 170:7-10.)

Q: I may have asked this but let me ask it another way: If Marick did no 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.

(Still Dep. 173:11-25.)

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.

(Still Dep. 174:1-24.)

While he admitted that Marick as the general contractor has overall responsibility for the construction of the entire project, he did not state that Marick Home Builders was at fault for the failures and code violations at the project for work performed by subcontractors. Instead, he admitted issues at the project, but not that Marick was

responsible. In this case, there is a factual issue as to whether or not Marick breached its obligations of supervision and oversight, as Mr. Still testified that Marick had not breached its standard of supervision and oversight.

Further, as an example of the testimony and as an example of evidence in the case, Southern Concrete's superintendent Jason Carlan admitted that Southern Concrete selected the products for waterproofing, familiarized itself with the manufacturer's installation instructions, installed the waterproofing per manufacturer's installation instructions, showed Nathan Hornaday, Marick's Superintendent, that it was installed in compliance with the manufacturer's installation instructions and Nathan Hornaday inspected Southern Concrete's work to ensure that the waterproofing was installed per manufacturer's installation instructions:

Deposition of Jason Carlan

A: This was the best product out there for what we were doing.

Q: What were you doing?

A: Waterproofing a deck to pour concrete on top of it.

Q: And when you said it met or exceeded what you needed, how was what you need defined?

A: By what details we had on the plans.

Q: And where did those details come from?

A: From the plans.

Q: The Miller/Player plans?

A: The Miller/Player plans.

Q: Did you discuss the product that you were going to use with anyone from Marick?

A: No. Other than what we priced. Our pricing, Polyguard membrane was on there.

(Carlan Dep. 40:1-20.)

Q: And how about any representative of Marick Home Builders? Did they inspect?

A: Yes.

Q: They came and looked at your installation?

A: On more than one occasion, yes.

(Carlan Dep. 46:22 - 47:1.)

Q: So did he ask you questions.

A: Yes.

Q: --- about how it was installed?

A: Oh, yeah.

(Carlan Dep. 47:15-18.)

Q: And is that how you told Nathan it should be done?

A: Yes.

Q: And is that how you told Nathan it was being done?

A: That's how I told Nathan we were doing it and how it needed to be done.

Q: And that Southern Concrete believed it was sufficient?

A: Yes.

(Carlan Dep. 79:25 -- 80:5.)

Q: And did you show Nathan that you were putting the slope in by sloping the concrete?

A: Yes.

Q: And told him that's what you were doing?

A: Yes.

(Carlan Dep. 84:1-5.)

Based upon the above testimony and evidence, it is clear that there is a factual issue concerning whether or not Marick appropriately supervised and oversaw this project. Marick did not perform any of its own construction on the project, and therefore relied on the subcontractors for their knowledge, expertise, experience, and installation. Clearly, there is testimony and evidence that Marick did not breach its standard of supervision and oversight. Based upon the above, there is a question of fact concerning whether or not Marick had fault; thus, the subcontractors' motions for summary judgment as to equitable indemnity and unclean hands should be denied.

a. Indirect subcontractors

The motions of subcontractors without direct contracts with Marick should be dismissed under rules of equity and fairness. Although Marick did not specifically contract with many of its subcontractor's subcontractors, it still allegedly had obligations to supervise and oversee that work. 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.

"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 cases relied upon by the indirect subcontractors establish that our courts do not find a special relationship between remote or independent contractors and general contractors. However, these subcontractors have not produced a case where a general contractor does not have a special relationship with a subcontractor’s subcontractor who he supervises and oversaw on a daily basis. Therefore, this Court should hold that a

subcontractor who is overseen and supervised on a daily basis, has a special relationship with the general contractor; thus, the motions for summary judgment should be denied.

b. Phase I subcontractors

The Phase I subcontractors' motions to dismiss should be denied because the allegations set a scenario under which Marick would have a special relationship or cognizable causes of actions against Phase I subcontractors. Specifically, Plaintiff has alleged that Marick was responsible for the exterior construction in Phase I, although Marick denies that or that it is responsible for all of the construction in Phase I, because it pulled permits and requested Certificates of Occupancy. If Plaintiff is successful in proving that Marick performed general contracting work in Phase I, oversaw the construction of Phase I units or is otherwise liable for Phase I subcontractor work, it would have a special relationship as the general contractor with subcontractors who constructed the exteriors.

Alternatively, Plaintiff has alleged that Marick is in either in a joint venture or is the alter ego of the developer, IMK. If proven at trial, Marick could be liable to Plaintiffs as a developer. Under this scenario, if Marick is found to be the developer, Marick would have viable causes of action against the Phase I subcontractors.

2. CONTRACTUAL INDEMNIFICATION

Marick's cross claims for contractual indemnity and breach of contract should not be dismissed. Marick and Clearview Construction, Southern Concrete, and Builders FirstSource entered into contracts which required these subcontractors to defend, indemnify, and reimburse Marick for damages caused by their individual work. (See attached exhibits). Marick has alleged and prosecuted these claims for contractual

indemnity, and, to date, no party or insurance carrier has agreed to defend or indemnify Marick. The causes of action for breach of contract and contractual indemnity are not disguised as indemnity claims, rather they arise from legitimate negotiation and executed contracts.

The Subcontractors have alleged that the contracts referenced herein do not apply to the project at issue in this case. That allegation is a factual issue which needs to be resolved at the trial of this case by the jury. Marick has alleged and stands by its assertion that the contracts with Builders FirstSource, Clearview Construction and Southern Concrete (many others) for this project are enforceable and apply to the Stoneledge Project. This is true even if they were executed after or during the work. Specifically, Marick alleges that the contracts were executed ex post facto, and executed after work the work was performed. As an example of evidence supporting an ex post facto contract, Southern Concrete's principal testified:

Deposition of Jeffrey Gowder

Q: Do you know if Southern Concrete had any other projects that it was intending to work on for Marick after October of 2007?

A: I do not.

Q: Did Shannon Gowder have full authority to sign contracts on behalf of Southern Concrete?

A: Yes.

(J. Gowder Dep. 55:10-16.)

Based upon that testimony, there was no reason for Southern Concrete to execute an indemnity contract with Marick for any other project, thus creating an issue of fact for the jury to determine whether that indemnity contract applied to Stoneledge.

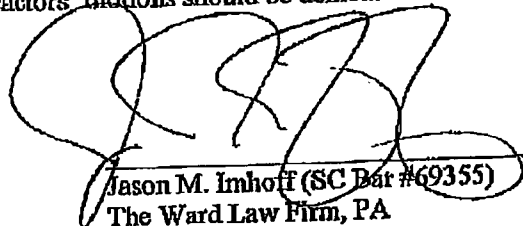
Based upon the above, the breach of contract and contractual indemnity causes of action should not be dismissed as there are issues of material fact to determine the timing and intent of the indemnity contract, which should be left for a jury.

Marick's Licensure

As with the contractual indemnity claims, there is an issue of fact regarding the execution and applicability of the contracts. Marick should not be denied the ability to enforce its contract due to South Carolina Section 40-1137(c), which requires a general contractor to be licensed. Marick, like many other contractors, is licensed through its individuals and/or principals. This is clearly allowed, expected and is not a bar to contractual obligations of the contractor. (See: SC. ST §40-11-230)

Conclusion

For the foregoing reasons, Subcontractors' motions should be denied.



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jimohff@wardfirm.com

*Attorney for Marick Home Builders,
LLC and Rick Thoennes*

September 4th, 2012

Exhibit A

NOV 22 1997 10:10 AM



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First South (Subcontractor).

Project on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/97
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with this agreement):

General Aggregate: \$2,000,000
Products/Completed Operations: \$2,000,000
Personal & Advertising Injury: \$1,000,000
Each Occurrence: \$1,000,000
Damage to Rented Premises: \$100,000
Medical Payments: \$5,000
With "Marick Home Builders" as Additional Insured - per endorsement form
LA 3002-0003

3. Contract amount:
Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

5. Licenses, permits & bonds to be supplied and paid as follows:
As required per job
6. General provisions:
As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
Amount to be determined per job requirements

Office (604) 231-5555 ~ Fax (604) 231-5504 ~ 501 Jackson Circle ~ Simpsonville, SC 29681
unitedcontractors.com

10/10/2007 10:11 AM

0102400

MARICK

HOME BUILDERS

8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date (including quantity, rate and
job contract amount, if applicable)
Completed Form WB and certificate of worker's comp. and general
liability insurance (see item 7 for details) - due in office before first
payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the subcontractor
shall indemnify the Contractor, owner and their agent(s) from and against
claims, damages, losses, expenses and fees arising out of or resulting from
performance of the Subcontractor, but only to the extent of Subcontractor's
negligence or willful misconduct.

BY:

DATE:

BY:

DATE:

Wick Thomas
NAME AND TITLE

Marick Home Builder, LLC
COMPANY NAME

SEBender

WITNESSED BY

Deryl Ward

Senior Attorney

Paikhestad Sauer Southeastern
COMPANY NAME

Subject to Written Changes

Exhibit B



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: _____

BY: Mike Jones *

DATE: 10/1/07

DATE: 10-30-07 *

Rick Thoennes

NAME and TITLE

Mike Jones *

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Clemson Const. *

COMPANY NAME

Kim Weather
WITNESSED BY

Exhibit C

11/31/2007 09:28 FAX

10/30/2007 11:00 FAX

1002
10/30/07



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5555 - Fax (864) 232-5504 - 801 Brixton Circle - Simpsonville, SC 29681
marickhomebuilders.com

10/31/2007 08:28 FAX
10/30/2007 11:00 FAX

0003



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: [Signature] *
DATE: 10/1/07 *
BY: Shannon Gaudet *
DATE: 10/1/07 *
Rick Thoennes *
NAME and TITLE
Marick Home Builder, LLC *
COMPANY NAME
Shannon Gaudet *
NAME and TITLE
Southern Concrete Specs, Inc *
COMPANY NAME
[Signature]
WITNESSED BY

Office (864) 232-5555 ~ Fax (864) 232-8504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

000458

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

Stoneledge at Lake Keowee Owners'
Association, Inc., C. Dan Carson, Jeffrey J.
Dauler, Joan W. Davenport, Michael
Furnari, Donna Furnari, Jessie 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,

vs.

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., MJG Construction and
Homebuilders, Inc. d/b/a MJG

**AGREEMENT AND RELEASE
OF CLAIMS AS TO
UPSTATE UTILITIES, INC. and
HUTCH N SON CONSTRUCTION,
INC.**

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,)
Defendants,)

KNOW ALL MEN BY THESE PRESENTS, that the undersigned:

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 (hereinafter "Releasors"), in consideration of the payment of One Hundred Seventy-Five Thousand and 00/100 (\$175,000.00) Dollars to be paid One Hundred Five Thousand and 00/100 (\$105,000.00) by or on behalf of Upstate Utilities, Inc., and Sixty Thousand and 00/100 (\$60,000.00) to be paid by or on behalf of Hutch N Son Construction, Inc. (Upstate Utilities, Inc. and Hutch N Son Construction, Inc. together hereinafter "Releasees"), the receipt and sufficiency of which is hereby acknowledged, in consideration for the dismissal of all claims as to the Releasees for themselves, their heirs, executors, administrators, successors and assigns, do hereby remise, release, acquit and forever discharge the Releasees, their agents, servants, employees, and insurers, of and from any and all claims raised or which could have been raised or arising out of claims in the litigation on file in the County of Oconee being civil action 2009-CP-37-0652 (hereinafter "Civil Action"), including but not limited to releasing the Releasees, for any claims asserted for alleged defects or deficiencies or negligence with respect to the design, installation, and any resulting damages including but not limited to loss of use arising out or arising from the Releasees' work at Stoneledge at Lake Keowee;

including but not limited to sewer, draining, grading and backfill at the units. The release does not prevent the Releasors from pursuing any claims against other non-settling defendants or entities for their acts or omissions. The undersigned specifically preserves and retains their right to pursue claims as against all the named and non-settling defendants.

This agreement may be executed in parts. All parties to this release consent to the attorneys executing the release on behalf of their respective clients.

Nothing contained in this release shall be construed as an admission by any party of any liability to any person or entity. The plaintiff apportions 50 % of these funds to the loss of use portion of its claim .

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 2012

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

**Stoneledge at Lake Keowee Owners'
Association, Inc., C. Dan Carson, Jeffrey J.
Dauler, Joan W. Davenport, Michael Furnari,
Donna Furnari, Jessie 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,**

By: Donna M. Furnari

Its: PRESIDENT

UPSTATE UTILITIES, INC. and HUTCH N SON CONSTRUCTION, INC.
AGREEMENT AND RELEASE
OF CLAIMS AS TO
CASE NUMBER: 2009-CP-37-0652

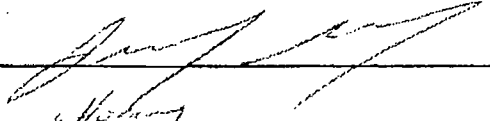
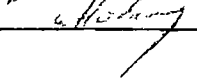
Hutch N Son Construction, Inc.

By:  10/22/12

Its: Attorney

UPSTATE UTILITIES, INC. and HUTCHINSON CONSTRUCTION, INC.
AGREEMENT AND RELEASE
OF CLAIMS AS TO
CASE NUMBER: 2009-CP-37-0652

Upstate Utilities, Inc.

By: 
Its: 

7603.336

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

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,

vs.

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., MJG Construction and
Homebuilders, Inc. d/b/a MJG

AFFIDAVIT OF
A. RHETT WHITLOCK, Ph.D., P.E.

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,)
Defendants,)

PERSONALLY appeared before me A. Rhett Whitlock, Ph.D., P.E., first being duly sworn, deposes and states that:

I have been retained by Upstate Utilities as an expert in this action. (CV attached)

I have attended a site inspection on March 6 and 7, of 2012, and have begun reviewing the numerous documents produced by the Plaintiff in this action.

I have had conversations with the agent of Upstate Utilities, Inc. as to the scope of their work and the methodology of their work. This Affidavit is provided to counsel for Upstate Utilities, Inc. in response to his request for identification of lack of commonality of issues as it relates to Defendant Upstate Utilities, Inc. and is not intended to be a list of all opinions related to my investigation in this matter.

I found in documents produced by the Plaintiff, that it appears that no waterproofing was applied to the basement walls on Phase I. I have determined from conversations with the agent of Upstate Utilities, Inc. that they performed no work during Phase I of the Stoneledge Development but that they did perform some of the backfill work with respect to Phase II at Stoneledge Development. Upstate Utilities placed soil (back fill) against the basement wall up to the height of the insulation board. The insulation board was applied after a waterproofing was applied to the concrete walls. During the investigation, waterproofing was found at all buildings inspected. Upstate Utilities is unaware of the landscaper or person or entity that placed additional soil over the level of the waterproofing and in fact over the level of the later-

installed stone work in some areas. I have not addressed the sufficiency of the waterproofing nor of the effects of utility penetrations of the waterproofing.

In reviewing the documents of the unit owners produced by the plaintiff, there are some units in Phase II that have no complaints regarding alleged water intrusion at the basement areas. It appears there are some units that allege water intrusion at the basement areas, due to additional soil being placed over the work of Upstate Utilities, Inc. and later contractors. The units had repairs consisting of removal of soil down to the existing waterproofing and applying additional waterproofing and re-grading the soil so as not to exceed the additional waterproofing and bringing soil below the grade of the wood framing. There may be residences which have not been repaired and have complaints, but I have not been able to locate with any specificity which units those would be.

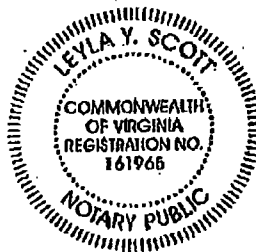
I am continuing review of the documents in preparation for this action and have found to date no deficiency in the work of Upstate Utilities.

FURTHER AFFIANT SAYETH NOT.


A. Rhett Whitlock, Ph.D., P.E.

SWORN to before me this
14th day of March, 2012


Notary Public for Prince William County, Commonwealth of Virginia
My Commission Expires: 10/31/2015



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

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,

vs.

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., MJG Construction and Homebuilders, Inc.
d/b/a MJG Construction, KMAC of the Carolinas,
Inc., Eufacio Garcia, Everado Jaramillo, Garcia
Parra Insulation, Inc., J&J Construction, Jose Nino,
Jose Manuel Garcia, Eason Construction, Inc., and
Vincent Morales d/b/a Morales Masonry,

Defendants,

CERTIFICATE OF SERVICE

I, Catherine M. Gwyn, employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have served counsel below with **AFFIDAVIT OF A. RHETT WHITLOCK, PH.D., P.E.**, to the following email to all counsel of record:

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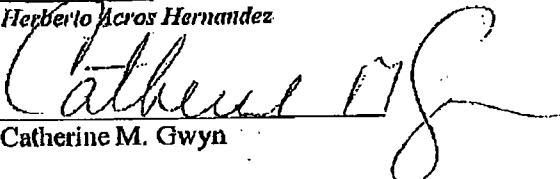
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Greenville, SC 29607
Integrays Keowee Development and IMK Development


Catherine M. Gwyn

August 29, 2012

8/9/12

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

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,

vs.

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., MJG Construction and
Homebuilders, Inc. d/b/a MJG

AFFIDAVIT OF
A. RHETT WHITLOCK, Ph.D., P.E.

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,)

Defendants,

PERSONALLY appeared before me A. Rhett Whitlock, Ph.D., P.E., first being duly sworn, deposes and states that:

I, A. Rhett Whitlock, have personally inspected the conditions and multiple deficiencies of the Stoneledge Condominium buildings and have reviewed reports and documents prepared by others, contract documents, and various design documents. Based on the review of these documents and personal observations, the buildings suffer from numerous defects in the construction including, but not limited to:

1. Roofing:

- a. Missing or improperly installed kick-out flashings
- b. Incorrect and inadequate nailing of roof shingles
- c. Inadequate shingle coverage
- d. Improperly installed roof sheathing
- e. Cut, broken, and altered trusses
- f. Missing roofing underlayment

2. Cedar Siding:

- a. Inadequate nailing
- b. Improper flashing
- c. Improper painting
- d. Inadequate installation for weather protection

3. Adhered Stone Veneer:

- a. Inadequate grouting between units
- b. Poorly adhered units
- c. Exposed and inadequately bedded lath
- d. Inadequate fastening of the lath to the framing
- e. Improper, inadequate, and missing flashing
- f. Inadequate clearances between stone veneer and other surfaces

- g. Incomplete and inadequate weather barrier at columns
- h. Incomplete and inadequate weather barrier at walls
- i. Missing and inadequately installed flashing and weather barrier within stone clad columns

4. Decks and Porches:

- a. Inadequate flashing at deck to wall intersections
- b. Inadequate flashing at intersection with stone clad columns

5. Windows and Doors:

- a. Improper attachment of units and trim
- b. Improper flashing around windows and at bottom nailing fin
- c. Improper door pan flashings
- d. Improper wrapping of window openings

6. Wall Construction:

- a. Improper flashing installation
- b. Reverse lapped flashings and weather barrier
- c. Improper weather barrier installation
- d. Inadequately attached sheathing
- e. Incomplete fire protection on rated walls

Based on the nature and extent of the defects already observed and documented, it is apparent that most, if not all, were or could have been easily detected during construction. According to the "Standard Form of Agreement Between Owner and Contractor," dated January 30, 2006, between the Owner (IMK Development Co., LLC) and the General Contractor (Marick), Marick was to:

1. From Article 3 – Relationship of the Parties: "... exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision..."
2. From 3.3 Supervision and Construction Procedures: "3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and

procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instruction concerning the matters."

3. From 3.3 Supervision and Construction Procedures: "3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors."
4. From 3.3 Supervision and Construction Procedures: "3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work."
5. From 3.4 Labor and Materials: "3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them."
6. From 3.5 Warranty: "3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective."
7. From 3.9 Superintendent: "3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor."

8. Deposition testimony of Mr. Nathan Hornaday revealed that he was the sole supervisor of the construction at Stoneledge, and he did not possess the necessary experience and training to perform the supervisory duties in accordance with the contractual requirements as outlined in Items 1 through 7 listed above or industry standards.

It is also generally accepted in the industry that a General Contractor must provide adequate, skilled, and knowledgeable job-site supervision and has the final responsibility to the owners to insure the work is completed in a workmanlike manner. Stoneledge was not constructed in a workmanlike manner and failed to meet even the minimum standards of quality in numerous aspects of the work as outlined above. Skilled and knowledgeable supervisors should have observed such deficiencies and caused the work to be corrected. The negligence of the General Contractor has resulted in the current owners occupying structures that are defective and not in compliance with the Building Code, manufacturers' instructions, and the contract documents.

I have formulated the following opinions:

1. The buildings were in many respects not constructed:
 - a. in accordance with the design documents,
 - b. in accordance with manufacturers' instructions and industry standards,
 - c. in accordance with Building Code requirements
2. Due to defects in the design and construction, the buildings have suffered moisture accumulation and damage that is both obvious and concealed. The damage is widespread.
3. The General Contractor, Marick Home Builders, did not provide adequate supervision for the construction of the buildings.
4. The design and construction defects that have led to damage are unrelated to site grading.

FURTHER AFFIANT SAYETH NOT.

A. Rhett Whitlock
A. Rhett Whitlock, Ph.D., P.E.

SWORN to before me this
9th day of August, 2012

Leyla Y. Scott
Notary Public for Commonwealth of Virginia
Prince William County
My Commission Expires: 10/31/2015



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-37-0652

)
) 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.
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) 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,
)

) vs.
)

) 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., Rick Thoennes, Mel
) Morris, Joe Bostic, Jeff Bostic, 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
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) Inc., MJG Construction and
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)

AFFIDAVIT OF
DONNY WHITE

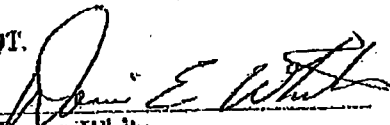
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Construction, Jose Nino, Jose Manuel)
Garcia, Eason Construction, Inc., and)
Vincent Morales d/b/a Morales Masonry,)
Defendants,)

PERSONALLY appeared before me Donny White, first being duly sworn, deposes and states that:

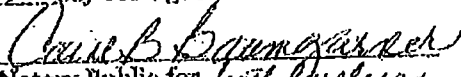
I am the president of Upstate Utilities, Inc. (Upstate) and I was onsite and inspected much of the work while it was being performed. I was present at the inspection of the work with our expert, Rhett Whitlock, who confirmed that he found no error in our work.

I hereby affirm and state, of personal knowledge, that Upstate was not retained by Marick Home Builders, LLC (Marick) or Rick Thoennes (Thoennes). I was retained by Hutch N Son Construction, Inc. (Hutch N Son) to perform work. The work we performed was performed correctly and backfill was not placed over the wick board. Other persons and/or entities performed drainage and landscaping work after our work was completed. These persons or entities changed the grade in some areas allowing the dirt to be higher than the wick board. We performed our contract appropriately and it was inspected by the county and approved by Marick. Our work did not cause or contribute to the complaints alleged by the plaintiff.

FURTHER AFFIANT SAYETH NOT.


Donny White

SWORN to before me this
22nd day of August, 2012


Notary Public for South Carolina
My Commission Expires: 11-24-13

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-37-0652

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) vs.

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) Carl Compton d/b/a Compton Enterprise a/k/a
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) Inc., MJG Construction and Homebuilders, Inc.
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) Patra Insulation, Inc., J&J Construction, Jose Nino,
) Jose Manuel Garcia, Eason Construction, Inc., and
) Vincent Morales d/b/a Morales Masonry,
)

)
) Defendants,
)

CERTIFICATE OF SERVICE

I, Catherine M. Gwyn, employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have served counsel below with **AFFIDAVIT OF DONNY WHITE** to the following email to all counsel of record:

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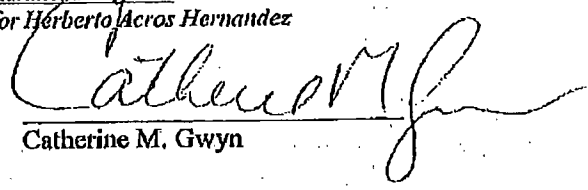
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Integrus Keowee Development and IMK Development


Catherine M. Gwyn

August 29, 2012

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

THE TENTH JUDICIAL CIRCUIT

CASE NUMBER: 2009-CP-37-0652

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 B. 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,

vs.

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, Ambrósio 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 Jaramillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry,

Defendants.

**AFFIDAVIT OF
GLENN STEWART, M.E., P.E.**

PERSONALLY appeared before me, Glenn Stewart, M.E., P.E. and being duly sworn, makes the following statement under oath:

1. I am Glenn Stewart, M.E., P.E.
2. I am currently employed as a consulting engineer with Engineering Design & Testing Corp. in Columbia, South Carolina and have been employed by Engineering Design & Testing Corp. as a consulting engineer since 1993.
3. I am a professional engineer licensed in the State of South Carolina, and have been such since 1991. I am also a licensed professional engineer in several other states.
4. I have a Bachelor of Science in Civil Engineering from North Carolina State University and a Master of Engineering in Civil Engineering from Clemson University.
5. During the course of my professional life I have been involved in the inspection and evaluation of the construction of projects similar to Stoneledge at Lake Keowee. This experience includes, but is not limited to, evaluation for building code compliance, methods of construction, construction materials, damage assessment, and design.
6. I was retained by the Defendant, Hutch-N-Son Construction, to inspect and render opinions regarding alleged construction deficiencies at Phase II of Stoneledge at Lake Keowee ("Project"). The Project consists of several multi-family residential buildings.
7. I have personally visited the "Project" in order to evaluate reported deficiencies. In addition, I have reviewed construction documents, contract documents, reports and documents prepared by others, deposition testimony, and building codes.
8. 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. During the construction, the associated building components would have been open to observation and inspection, and these deficiencies should have been detected during construction.

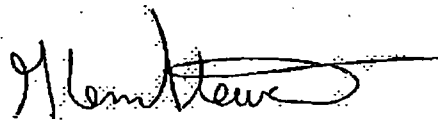
9. The general contractor for Phase II of the "Project" was Marick Home Builders, LLC (Contractor). The "Standard Form of Agreement Between Owner and Contractor", dated January 30, 2006, between the Owner (IMK Development Co., LLC) and the Contractor (Marick), has been reviewed. This document includes the "General Conditions of the Contract for Construction". Selected sections related to the Contractor's responsibilities are summarized below:

- a. Article 3, Titled: Relationship of the Parties: "...exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision..."
- b. Paragraph 3.3.1 of the General Conditions of the Contract for Construction: "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instruction concerning the matters."
- c. Paragraph 3.3.2 of the General Conditions of the Contract for Construction: "The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors."

- d. Paragraph 3.3.3 of the General Conditions for the Contract for Construction: "The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work."
- e. Paragraph 3.4.3 of the General Conditions for the Contract for Construction: "The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them."
- f. Paragraph 3.5.1 of the General Conditions of the Contract for Construction: "The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required (sic) or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective."
- g. Paragraph 3.9.1 of the General Conditions of the Contract for Construction: "The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor."

10. With Phase II of Stoneledge at Lake Keowee, as with similar construction projects, it is the general contractor's responsibility to provide competent supervision of the construction and the general contractor also has a direct responsibility to the project owner related to the quality of that construction.
11. The transcript from Mr. Hornaday's March 30, 2012 deposition has been reviewed. Mr. Nathan Hornaday provided daily supervision of the "Project" for Marick. (See, e.g., pp. 18, 23, 24, 40, 41, 59, 60, 115, 116, 117 and 118 of the Hornaday deposition.) Mr. Hornaday had insufficient training, expertise, or knowledge to provide competent supervision during the construction of the "Project" and insufficient supervision was provided. (See, e.g., pp. 14, 15, 18, 36, 40, 41, 42, 43, 56, 59, 60, 63, 97, 101, 117, and 118 of the Hornaday deposition.)
12. Marick had a responsibility to supervise the construction and a responsibility for the quality of the construction. Marick provided insufficient supervision of the "Project." The deficient conditions identified in this affidavit related to 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."

Further the Affiant sayeth not.



Glenn Stewart, M.E., P.E.
Consulting Engineering
Engineering Design & Testing Corp.

Sworn to and subscribed before me this the
20 day of August 2012.

Joan B Kitchen Carol B Kitchen
Notary Public

My Commission Expires: July 19, 2022

Amanda Steward

From: Charlotte Smith [csmith@gwblawfirm.com]
Sent: Monday, September 17, 2012 4:36 PM
To: amacaulaylc@sccourts.org; amacaulayj@sccourts.org
Cc: Lindsey Demirjian; Robin Smith; Cindy Parks; Kerry Threlkeld; Teresa Williams; Barbara Porter; preconnu@murphygrantland.com; Melissa Urch; Margaret Campbell; Carla McMahon; Judy Snipes; Joseph David; Debbie Lazo; Jade Alderman; Cathy Gwyn; Jilian Kurka; Lindsey Casenhiser; Shannon Henderson; Diane Kuzniar; Tony Delsn; Melissa Steinkraus; Danya B. Friedman; Kim Hopkinson; Cece Boyne; Melinda Bouchillon; Beth Yarbrough; Monica Rasnick; wgeorge@yorlaw.com; emiltcheva@ycrlaw.com; Joan Dunning; Whitney Grainger; Lisa Layton; Jennifer Canaday; Melissa Gregory; amacaulaylc@sccourts.org; Amanda Steward; lburton@oconeesc.com; Michelle Smith; Robert T. Lyles; Cindy Worsham; Ashley Poulnot; Cynthia B. Brown; Becky Briggs; Wallace K. Lightsey; Laura Krebs; Frank Smith; Jared Garreaux; Karen Jandron; Jenny Miles; Frank Mack; Emily Gifford; Dennie Fyfe; Erin Culbertson; Patrick Culbertson; Jason Imhoff; Roy R. Hemphill; Alan Belcher; Connie LeGare; Lawrence B. Orr; Ashley B. Nance; Elizabeth Levin; Sydney Brown; Melissa Nichols; Mike Wilkes; Lindsay Builder; David A. Root; Mason A. Goldsmith; K Jay Anthony; James P. Walsh; John Harjehausen; Shawn T. Pinkston; Ken Jones; Charles G. Blackburn; Ryan Oates; Shelley Montague; Ron Tate; Steven Buckingham; Dana W. Lang; Greg Horton; Duffie Powers; Batten Farrar; Markey Stubbs; Lindsay Terrell; Chris Smith; Paul E. Hammack; Andrew F. Carson; Elizabeth Martineau; Eric Rowell; Drew Williams; Joshua D. Shaw; Chris Lewis; Stephen P. Hughes; Bill Young; Geoffrey Gibbon; G. Thomas Chase; David M. Yokel; William I. Bouton; Robert Wilkins; Ed Buckley; Nick Rivera; J.J. Anderson; Curtis Martin; William B. Woods; Chad Poteat; C Clay. Olson; David D. Ashley; Ann Culbreath; Grayson Smith; Shelley Montague; Melissa Urch
Subject: Stoneledge at Lake Keowee Owner's Association, Inc. et al v. IMK Development Co. LLC , et al - 2009-CP-37-0652

Attachments: Order Granting SJ for Upstate and HNS 9-14-12 (00451228).DOC

Dear Judge Macaulay:

As you will recall, at the hearing on September 5, 2012, you granted Defendants Upstate Utilities' and Hutch N Son's motions for Summary Judgment. Pursuant to your instructions, attached please find a proposed Order for your review. By way of copying all counsel on this email, we are hereby providing the proposed order to them for their review and comment.

Please let me know if I can provide anything further for you.

Best regards,

Shelley Montague

Charlotte Smith
Legal Secretary
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STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

THE TENTH JUDICIAL CIRCUIT

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,)

vs.)

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, LLC, 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 Basements, 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)

CASE NUMBER: 2009-CP-37-0652

**ORDER GRANTING DEFENDANTS
UPSTATE UTILITIES, INC.'S AND
HUTCHINSON CONSTRUCTION,
INC.'S MOTIONS FOR SUMMARY
JUDGMENT**

contract. These cross claims are the only remaining claims against the Defendants. Counsel for Upstate Utilities and HNS took the position at the hearing that all of Marick's causes of action are equitable indemnity claims. This position is supported by case law. See, e.g., U.S. Fidelity & Guaranty Co. v. Patriot's Point Development Authority, 788 F. Supp. 880, 881 (D.S.C. 1992) (stating that the non-settling defendants did not have independent claims apart from indemnification and contribution because the claims were nothing more than claims for indemnity and 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) (holding that the cross-claims against the settling defendants for breach of contract, negligence, and fraud were nothing more than claims for contribution or indemnification with a slight change in wording). The circuit courts in South Carolina have likewise found that claims for negligence, breach of warranty, and breach of contract are absorbed by the equitable indemnification claim. See, Nelson v. John Weiland Home, 2009-CP-10-6573 (unpublished order); Kirkland v. Cambridge Building Corp., 2006-CP-07-1312 (unpublished order). When asked by the Court, counsel for Marick acknowledged that equitable indemnification was the only claim at issue. Thus, this Court finds that Marick's cross claims are all claims for equitable indemnification. Claims for equitable indemnification are nonjury claims.

Upstate Utilities and HNS moved for summary judgment on Marick's equitable indemnity claims on the grounds that they have settled with the Plaintiffs and consequently all of the Plaintiffs' claims against Upstate Utilities and HNS have been released. Also, Upstate Utilities and HNS argued that they are entitled to summary judgment because Marick is barred from recovering because of the doctrine of unclean hands. Upstate Utilities further moved that its relationship with Marick was too remote under South Carolina law to establish a special

relationship for an equitable indemnity claim. See Seaboard Air Line R.R. v. Coastal Distributing Co., 273 F.Supp. 340 (D.S.C. 1967); Rock Hill Telephone Co. v. Global Communications, 363 S.C. 385, 611 S.E.2d. 235 (2005).

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC. The movant must first demonstrate that there is no genuine dispute of material fact. See Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. See Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him, thereby showing that there is a genuine issue for trial. See Miller, 365 S.C. at 220, 225, 616 S.E.2d at 730, 732.

In considering a motion for summary judgment, a court must view the facts in the light most favorable to the non-moving party. While a non-moving party need only submit a scintilla of evidence to avoid summary judgment, the evidence submitted must be material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (S.C. 2009); Taylor v. Atlantic Coast Line R. Co., 78 S.C. 552, 59 S.E. 641 (1907). When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a

question of fact for a jury. See National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581 (1934). Moreover, “a court ‘cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be *reasonably* possible under the facts.’” Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)) (emphasis added).

Based on the aforementioned standards, summary judgment is appropriate in this case.

DISCUSSION

Stoneledge at Lake Keowee (hereinafter “Stoneledge”) is a community of townhomes located on Lake Keowee in Oconee County, South Carolina. The development was built in two phases. Phase I, which lies along the west bank of Lake Keowee, was built by Bostic Brothers Construction between 2002 and 2005, and consists of buildings 1 through 8. Phase II was built on an adjacent peninsula and was constructed by Marick in 2006 and 2007, and consists of buildings 10 and 14 through 23, as well as the clubhouse. Buildings 9, 11, 12, and 13 were never constructed.

HNS verbally contracted with Marick to perform the initial grading work on Phase II of the project, to include backfilling of the grade against the townhome units and installation of sewer lines and storm drains. HNS subcontracted backfill work to Upstate Utilities. There is not a written contract between any of the parties. The Plaintiffs’ experts with Construction Science and Engineering, Inc., have opined that the grade is too high against the units. Marick’s counsel acknowledged that this opinion is the allegation at issue against HNS and Upstate Utilities.

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.

Defendants Upstate Utilities and HNS argued that to the extent the height of the grade is found to be a construction defect that has caused property damage, there is no question of fact that Marick is at fault in regards to this condition. According to well established South Carolina case law, a party can only recover from equitable indemnity if the party is without fault, which is also known as the doctrine of unclean hands. The crucial requirement for supporting equitable indemnity is that "the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E. 2d 301, 307 (Ct. App. 1999). In this action, there is no issue of fact as to whether Marick is at fault. The only criticism potentially related to the Defendants' work is the grade being too high against the townhome units. Assuming this allegation can be proven, 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.

Both Upstate Utilities and HNS submitted memorandums of law and affidavits by their expert witnesses, Rhett Whitlock, Ph.D., P.E., and Glenn Stewart, M.E., P.E. The experts stated in their affidavits that Marick, as the general contractor, had the duty to supervise and inspect the work performed at the construction site. The height of the grade against the units was among the open and obvious conditions that should have been corrected by the general contractor, per the experts' affidavits. Thus, it is the experts' opinion that Marick failed to adequately supervise the work.

Marick did not submit any affidavits to rebut the Defendants' expert affidavits. Also, at the hearing, counsel for Marick acknowledged that a general contractor has a duty to supervise and inspect the work performed at the construction site.

Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds that there is no genuine issue of material fact that Marick has at least some fault for the construction defects alleged. Consequently, the Court finds that Marick cannot recover against Upstate Utilities and HNS because a party has to be free of fault in order to recover under equitable indemnity.

The Court hereby grants Defendants Upstate Utilities' and HNS' Motions for Summary Judgment as to Marick's cross claims against them.

IT IS SO ORDERED.

Walhalla, South Carolina
September _____, 2012.

Judge Alexander S. Macaulay

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March 5, 2013

VIA E-MAIL TO jimhoff@wardfirm.com

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Post Office Box 5663
Spartanburg, SC 29304

Re: Stoneledge at Lake Keowee Owners' Association, Inc., *et al.* v. IMK
Development Co., LLC, *et al.*
C.A. No.: 2009-CP-37-0652
Liberty Mutual Claim No.: 22-087512
Travelers Claim No.: B5T9146
GWB File No.: 4435-115

Dear Jason:

As a follow up to our recent conversation, please allow this letter to serve as a request for you to amend your Designation of Matter to be included in the Record of Appeal. The specific issues are as follows:

- 1) Transcript of Proceeding: Pursuant to Rule 209(a), the Designation of Matter shall set forth with specificity those parts of the transcript which are proposed to be part for the Record. Your Designation does not specify which portions of the transcript you wish to include in the Record. As such, please provide the specific page numbers of the Transcript that you propose to include in the Record. Further, Rule 209(b) states that a party shall not include any matter not relevant to the appeal. As we previously discussed, it is Respondents' position that any hearings conducted after the conclusion of the hearing on Respondents' summary judgment motions are not relevant. Thus, it is requested for you to amend your Designation to conform with this rule.
- 2) Deposition of Randy Still: Rule 210(c) provides that the Record on Appeal shall not include matter which was not presented to the lower court. The deposition transcript of Randy Still was never filed with or otherwise presented to the court. As such, it is requested for you to remove this item from your Designation.

Jason M. Imhoff

March 5, 2013

Page 2

- 3) Pleadings referenced in your Designation: You have listed the Complaint and Marick's Answer and Cross Claims in your Designation. As this case involved multiple amended pleadings, please identify with specificity, to include the exact name and date, which pleadings you intended to include in your Designation.

Please let me know your response to these issues no later than the close of business on March 7, 2013.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.



Shelley Sunderman Montague

SSM/ssm

cc: S. Markey Stubbs | mstubbs@brblegal.com

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March 11, 2013

Shelley S. Montague, Esquire
Gallivan, White & Boyd, PA
PO Box 7368
Columbia, SC 29201

**Re: Stoneledge at Lake Keowee Owners' Association, Inc., et al. vs. IMK
Development Co., LLC, et al. vs. Michael Franz, et al.
Appellate Case No.: 2012-213237**

Dear Shelley:

I am responding to your letter of March 5, 2013. As we discussed, we take a different position than you regarding the Record on Appeal and items to be included. Specifically, in response to your letter we take the following positions:

1) Transcript of Proceeding. As we discussed, we are taking the position that the entire day on September 5, 2012 was spent arguing the same issues and the same law to Judge Macaulay regarding the various subcontractors' Motions for Summary Judgment. As you are aware, Judge Macaulay heard motions all day which involved almost identical facts. After you left, Judge Macaulay continued to hear arguments on the law, including all subcontractors' position that any third party cause of action collapses into equitable indemnity, the standard for unclean hands in an equitable indemnity cause of action, Randy Still's testimony, and other matters relevant to your client's Motion for Summary Judgment as well as all of the other subcontractors. Therefore, we believe that the arguments, submissions, and rulings continuing throughout the day are all relevant to this appeal and are appropriate matters to be considered by the Court of Appeals. Therefore, we stand by our position that the transcript of the entire day is relevant and appropriate for inclusion in the Designation of Matter.

2) Deposition of Randy Still: We believe the portions of Randy Still's deposition and the fact that Randy Still's deposition is still open were pertinent and relevant to this appeal. Additionally, Randy Still's testimony was included in the brief on this matter and is appropriate for inclusion.

3) Pleadings referenced in your Designation: The Complaint that we referenced in our

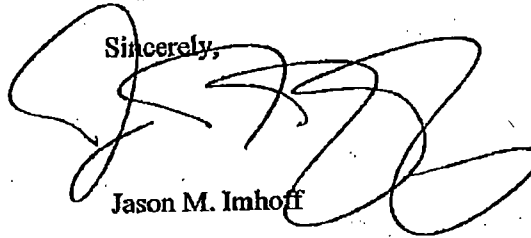
Shelley S. Montague, Esquire
Gallivan, White & Boyd, PA
March 11, 2013
Page 2

Designation is the Third Amended Complaint filed by the Plaintiffs along with Marick's Answer to the Third Amended Complaint and Cross-Claim against numerous subcontractors.

Additionally, I have written the court and requested filed copies of the briefs and matters that we filed. As you are aware, this has been a problem for other subcontractors and parties as the case has grown so large that the Oconee County Clerk of Court apparently has not been able to keep track of documents. I have copied you on my letter to the court requesting that they either provide us a copy of the brief filed, or file the copy that we sent to them.

If you have any questions or concerns, please feel free to give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Imhoff', with a large, stylized flourish extending from the end of the signature.

Jason M. Imhoff

JMI/ads
Enclosure

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March 11, 2013

The Honorable Alexander S. Macaulay
Tenth Judicial Circuit
PO Drawer 428
Walhalla, SC 29691

Ms. Beverly H. Whitefield
Oconee County Clerk of Court
PO Box 678
Walhalla, SC 29691

Re: *Stoneledge at Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessie 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 K. Plourde, Carol C. Pope, Steven B. Taylor, Bettie J. Taylor, Robert White, Individually, and on behalf of all others similarly situated, 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. and Miller/Player & Associates, et al*
CA #: 2009-CP-37-652

Dear Judge McCauley and Ms. Whitefield:

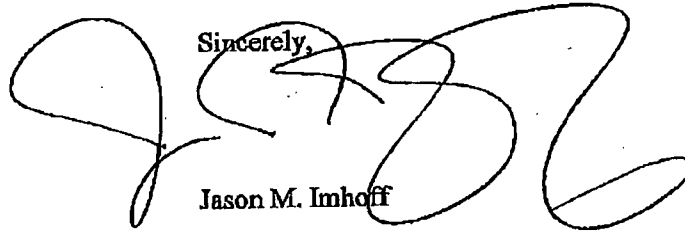
I am writing to request a filed copy of the briefs filed by my clients Marick Home Builders, LLC and Rick Thoennes for the hearings held on September 5, 2012. These briefs were sent via email at 7:38 p.m. on September 4, 2012 and also hand delivered to the Judge at the hearing on September 5, 2012. The ruling on Upstate Utilities, Inc. and Hutch N Sons Construction's Motions for Summary Judgment is presently under appeal and respondent is objecting to inclusion of those documents for failure to produce a filed copy. Therefore, please provide us with a filed copy of those documents at your earliest convenience.

The Honorable Alexander S. Macaulay
Ms. Beverly H. Whitefield
March 11, 2013
Page 2

Alternatively, I am sending an exact duplicate copy of the brief which was handed to Judge Macaulay during the hearing on September 5, 2012. If you are unable to locate the original, please file this copy and return it to me. Hopefully, this will suffice to satisfy Respondent and the Court of Appeal.

If you have any questions or concerns, please feel free to give me a call.

Sincerely,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Jason M. Imhoff

JMI/ads

Enclosure

cc: Shelley S. Montague, Esquire
S. Markey Stubbs, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-37-0652

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,

vs.

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-

MARICK HOME BUILDERS, LLC AND
RICK THOENNES' MEMORANDUM IN
OPPOSITION TO UPSTATE UTILITIES,
HUTCH N SON CONSTRUCTION,
MILLER/PLAYER & ASSOCIATES,
CLEARVIEW CONSTRUCTION,
BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, CARL CATOE CONSTRUCTION,
TG CONSTRUCTION, ALEJANDRO CRUZ,
HERBERTO ARCOS HERNANDEZ,
MARTIN HERNANDEZ-AVILES,
SOCORRO CASTILLO MONTEL, KMAC,
INC. JOSE NINO, AND VINCENT
MORALES D/B/A MORALES MASONRY'S
MOTION FOR SUMMARY JUDGMENT

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., EUPACIO 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,)

Defendants, Marick Home Builders, LLC (hereinafter "Marick") and Rick Thoennes (hereinafter "Thoennes") (hereinafter both Defendants collectively referred to as "Defendants" "Marick") hereby submit this Memorandum in Opposition to Upstate Utilities, Hutch N Son Construction, Miller/Player & Associates, Clearview Construction, Builders FirstSource-Southeast Group, Carl Catoe Construction, T.G. Construction, Alejandro Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Socorro Castillo Montel, KMAC, Inc., Jose Nino, and Vincent Morales d/b/a Morales Masonry's Motions for Summary Judgment and/or Motions to Dismiss concerning Marick and Rick Thoennes Cross-claims (hereinafter collectively "subcontractors.")

FACTS/PROCEDURAL POSTURE

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter "Hund"). (See Plaintiff's Complaint). 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 and it retained Jim Logan to review its options. In November of 2009, the owners voted to retain Mr. Lyles 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. 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, 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. A majority of the subcontractors and suppliers used by Bostic for phase I construction are different from the subcontractors and suppliers used during phase II construction.

After Bostic Brothers exit, the remaining unsold units and vacant land was purchased by IMK Development Co., LLC (hereinafter "IMK"). Once purchased, Marick Home Builders, LLC (hereinafter "Marick") was retained as the general contractor to construct phase II at Stoneledge. While preparing to begin phase II

construction, Marick also contracted to assist phase I homeowners with repairs and internal construction which was not performed by Bostic Brothers prior to Bostic Brothers departure from the development. Therefore, in reference to phase I, Marick made repairs to units sold by Bostic Brothers and completed some interior construction to phase I units.

Additionally, Marick was the general contractor in charge of phase II construction which began in January 2006. Upon information and belief, most of the subcontractors and suppliers that provided services and supplies to phase II construction were not involved with the construction of phase I.

Prior to completion of phase II, on or about June 13, 2008, Ludwig Corporation, LLC (hereinafter "Ludwig") purchased/acquired all unsold units from IMK Development and Integrays. At that point, Ludwig took over construction and finished phase II. Ludwig also acquired finished units located in phase I. Ludwig took over all general contracting roles previously performed by Marick. Further, after conducting an auction and selling some of the units acquired from IMK/Integrays, Ludwig sold/transferred the remaining unsold units to Medallion at Lake Keowee (hereinafter "Medallion").

Therefore, Phase II involved different subcontractors from phase I, different general contractors (Marick, Ludwig and Medallion rather than Bostic Brothers), different developers, the addition of amenities which were not built during phase I construction, in addition to numerous other differences between the two phases of construction.

STANDARD OF REVIEW

1. Motion to Dismiss

When reviewing a motion to dismiss, the Court must accept all well-pled facts in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *Nemet Chevrolet, LTD. V. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Trulock v. Freech*, 275 F.3d 302, 307 (4th Cir. 2001) and *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). To avoid dismissal, the "complaint must contain sufficient factual matter...[that when]...accepted as true...state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1958 (2007)). To be facially plausible, a complaint must contain factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Nemet Chevrolet, LTD.*, 591 F.3d at 256 (citing *Iqbal*, 129 S.Ct. at 1952). However, this plausibility standard does not necessitate the plaintiff make a showing of the probability of success on the claim asserted. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965). The question to be answered is whether in a light most favorable to the plaintiff, and with every doubt resolved in plaintiff's behalf, the Complaint states any valid claim for relief. *Washington v. Lexington County Jail*, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct.App. 1999).

2. Motion for Summary Judgment

"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 when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston*

Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. 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).

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.")

LAW & ANALYSIS

In Defendants Third Amended Answer, Defendants asserted cross-claims for (1) Equitable Indemnification; (2) Breach of Contract; (3) Negligence; and (4) Breach of Warranties. A number of the parties have filed Motions for Summary Judgment and/or to Dismiss Defendants' cross-claims.

THE LAW

1. EQUITABLE INDEMNIFICATION

Subcontractors' Motions to Dismiss and for Summary Judgment of equitable indemnity causes of action should be denied because, at worst, genuine issues of material fact exist regarding Defendants' wrongdoing and subcontractors' contractual obligations. 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. The Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its sub contractors. Instead, it must be proven that the general contractor breached its standard of supervision and oversight.

All of the subcontractors prosecuting motions allege that Marick cannot recover under Equitable Indemnity as Marick is not without fault. Specifically, they allege that defense expert Randy Still has admitted fault on behalf of Marick. This is an incorrect twisting of Mr. Still's words. Mr. Still specifically testified that Marick was not at fault and did not breach its obligation of supervision and oversight.

Deposition of Randy Still

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.

(Still Dep. 163:19 – 164:6.)

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.

(Still Dep. 164:9-18.)

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.

(Still Dep. 165:2-7.)

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.

(Still Dep. 170:7-10.)

Q: I may have asked this but let me ask it another way: If Marick did no 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.

(Still Dep. 173:11-25.)

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.

(Still Dep. 174:1:24.)

While he admitted that Marick as the general contractor has overall responsibility for the construction of the entire project, he did not state that Marick Home Builders was at fault for the failures and code violations at the project for work performed by subcontractors. Instead, he admitted issues at the project, but not that Marick was

responsible. In this case, there is a factual issue as to whether or not Marick breached its obligations of supervision and oversight, as Mr. Still testified that Marick had not breached its standard of supervision and oversight.

Further, as an example of the testimony and as an example of evidence in the case, Southern Concrete's superintendent Jason Carlan admitted that Southern Concrete selected the products for waterproofing, familiarized itself with the manufacturer's installation instructions, installed the waterproofing per manufacturer's installation instructions, showed Nathan Hornaday, Marick's Superintendent, that it was installed in compliance with the manufacturer's installation instructions and Nathan Hornaday inspected Southern Concrete's work to ensure that the waterproofing was installed per manufactures installation instructions:

Deposition of Jason Carlan

A: This was the best product out there for what we were doing.

Q: What were you doing?

A: Waterproofing a deck to pour concrete on top of it.

Q: And when you said it met or exceeded what you needed, how was what you need defined?

A: By what details we had on the plans.

Q: And where did those details come from?

A: From the plans.

Q: The Miller/Player plans?

A: The Miller/Player plans.

Q: Did you discuss the product that you were going to use with anyone from Marick?

A: No. Other than what we priced. Our pricing, Polyguard membrane was on there.

(Carlan Dep. 40:1-20.)

Q: And how about any representative of Marick Home Builders? Did they inspect?

A: Yes.

Q: They came and looked at your installation?

A: On more than one occasion, yes.

(Carlan Dep. 46:22 - 47:1.)

Q: So did he ask you questions.

A: Yes.

Q: --- about how it was installed?

A: Oh, yeah.

(Carlan Dep. 47:15-18.)

Q: And is that how you told Nathan it should be done?

A: Yes.

Q: And is that how you told Nathan it was being done?

A: That's how I told Nathan we were doing it and how it needed to be done.

Q: And that Southern Concrete believed it was sufficient?

A: Yes.

(Carlan Dep. 79:25 - 80:5.)

Q: And did you show Nathan that you were putting the slope in by sloping the concrete?

A: Yes.

Q: And told him that's what you were doing?

A: Yes.

(Carlan Dep. 84:1-5.)

Based upon the above testimony and evidence, it is clear that there is a factual issue concerning whether or not Marick appropriately supervised and oversaw this project. Marick did not perform any of its own construction on the project, and therefore relied on the subcontractors for their knowledge, expertise, experience, and installation. Clearly, there is testimony and evidence that Marick did not breach its standard of supervision and oversight. Based upon the above, there is a question of fact concerning whether or not Marick had fault; thus, the subcontractors' motions for summary judgment as to equitable indemnity and unclean hands should be denied.

a. Indirect subcontractors

The motions of subcontractors without direct contracts with Marick should be dismissed under rules of equity and fairness. Although Marick did not specifically contract with many of its subcontractor's subcontractors, it still allegedly had obligations to supervise and oversee that work. 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.

"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 cases relied upon by the indirect subcontractors establish that our courts do not find a special relationship between remote or independent contractors and general contractors. However, these subcontractors have not produced a case where a general contractor does not have a special relationship with a subcontractor’s subcontractor who he supervises and oversaw on a daily basis. Therefore, this Court should hold that a

subcontractor who is overseen and supervised on a daily basis, has a special relationship with the general contractor; thus, the motions for summary judgment should be denied.

b. Phase I subcontractors

The Phase I subcontractors' motions to dismiss should be denied because the allegations set a scenario under which Marick would have a special relationship or cognizable causes of actions against Phase I subcontractors. Specifically, Plaintiff has alleged that Marick was responsible for the exterior construction in Phase I, although Marick denies that or that it is responsible for all of the construction in Phase I, because it pulled permits and requested Certificates of Occupancy. If Plaintiff is successful in proving that Marick performed general contracting work in Phase I, oversaw the construction of Phase I units or is otherwise liable for Phase I subcontractor work, it would have a special relationship as the general contractor with subcontractors who constructed the exteriors.

Alternatively, Plaintiff has alleged that Marick is in either in a joint venture or is the alter ego of the developer, IMK. If proven at trial, Marick could be liable to Plaintiffs as a developer. Under this scenario, if Marick is found to be the developer, Marick would have viable causes of action against the Phase I subcontractors.

2. CONTRACTUAL INDEMNIFICATION

Marick's cross claims for contractual indemnity and breach of contract should not be dismissed. Marick and Clearview Construction, Southern Concrete, and Builders FirstSource entered into contracts which required these subcontractors to defend, indemnify, and reimburse Marick for damages caused by their individual work. (See attached exhibits). Marick has alleged and prosecuted these claims for contractual

indemnity, and, to date, no party or insurance carrier has agreed to defend or indemnify Marick. The causes of action for breach of contract and contractual indemnity are not disguised as indemnity claims, rather they arise from legitimate negotiation and executed contracts.

The Subcontractors have alleged that the contracts referenced herein do not apply to the project at issue in this case. That allegation is a factual issue which needs to be resolved at the trial of this case by the jury. Marick has alleged and stands by its assertion that the contracts with Builders FirstSource, Clearview Construction and Southern Concrete (many others) for this project are enforceable and apply to the Stoneledge Project. This is true even if they were executed after or during the work. Specifically, Marick alleges that the contracts were executed ex post facto, and executed after work the work was performed. As an example of evidence supporting an ex post facto contract, Southern Concrete's principal testified:

Deposition of Jeffrey Gowder

Q: Do you know if Southern Concrete had any other projects that it was intending to work on for Marick after October of 2007?

A: I do not.

Q: Did Shannon Gowder have full authority to sign contracts on behalf of Southern Concrete?

A: Yes.

(J. Gowder Dep. 55:10-16.)

Based upon that testimony, there was no reason for Southern Concrete to execute an indemnity contract with Marick for any other project, thus creating an issue of fact for the jury to determine whether that indemnity contract applied to Stoneledge.

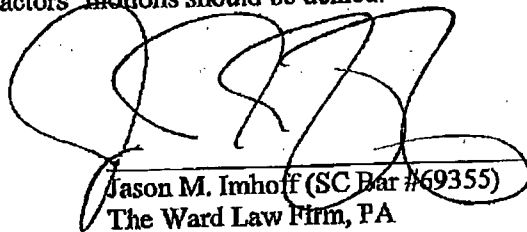
Based upon the above, the breach of contract and contractual indemnity causes of action should not be dismissed as there are issues of material fact to determine the timing and intent of the indemnity contract, which should be left for a jury.

Marick's licensure

As with the contractual indemnity claims, there is an issue of fact regarding the execution and applicability of the contracts. Marick should not be denied the ability to enforce its contract due to South Carolina Section 40-1137(c), which requires a general contractor to be licensed. Marick, like many other contractors, is licensed through its individuals and/or principals. This is clearly allowed, expected and is not a bar to contractual obligations of the contractor. (See: SC. ST §40-11-230)

Conclusion

For the foregoing reasons, Subcontractors' motions should be denied.



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jimohff@wardfirm.com

*Attorney for Marick Home Builders,
LLC and Rick Thoennes*

September 4th, 2012

Exhibit A



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Builders First Source (Subcontractor).

Project on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$2,000,000
 - Personal & Advertising Injury: \$1,000,000
 - Each Occurrence: \$1,000,000
 - Damage to Rented Premises: \$100,000
 - Medical Payments: \$5,000
 - With "Marick Home Builders" as Additional Insured, per endorsement form LA 2002-0005.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
5. Licenses, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

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01003/003



8. Payment schedule:

Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.

9. Completion schedule:

As required per job

10. Documentation required for payment:

Detailed invoice of work completed to date. (Including quantity, rate and
job contract amount, if applicable)

Completed Form WD and certificate of worker's comp. and general
liability insurance (see item 2 for details) - due in office before first
payment.

11. Warranty:

One year

12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor
shall indemnify the Contractor, owner and their agents from and against
claims, damages, losses, expenses and fees arising out of or resulting from
performance of the Subcontractors, but only to the extent of Subcontractor's
negligence or willful misconduct.

BY:

DATE:

10/28/07

BY:

DATE:

Deryl Ward

Senior Attorney

Rick Choennes

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Baldwin First Source Southeast Group, LLC

COMPANY NAME

SE Binder

WITNESSED BY

Subject To Written Changes

Exhibit B



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Clear View Construction (Subcontractor).

Project: on all projects for this subcontractor

The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):
 - Brick and stone labor
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp. and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: _____

DATE: _____

10/1/07

BY: _____

DATE: _____

10-30-07

Rick Thoennes

NAME and TITLE

Mike Owner

NAME and TITLE

Marick Home Builder, LLC.

COMPANY NAME

Clearview Const.

COMPANY NAME

Kim Weaver

WITNESSED BY

Exhibit C

11/31/2007 08:28 FAX
12/30/2007 11:00 FAX

0002
12/01/000



AGREEMENT BETWEEN CONTRACTOR & SUBCONTRACTOR

This agreement is between Marick Home Builders (Contractor) and Southern Concrete Spec. Inc. (Subcontractor).

Project: on all projects for this subcontractor
The Contractor and Subcontractor for the considerations named herein agree as set forth below:

1. Agreement date: 10/1/07
2. Insurance requirements (please send a copy of this section to your insurance agent and ask them to forward a certificate of insurance to Marick with the following criteria):
 - General Aggregate: \$2,000,000
 - Products/Completed Operations: \$ 2,000,000
 - Personal & Advertising Injury: \$ 1,000,000
 - Each Occurrence: \$ 1,000,000
 - Damage to Rented Premises: \$ 100,000
 - Medical Payments: \$ 5,000
 - With "Marick Home Builders" as Additional Insured.
3. Contract amount:
 - Amount to be determined per job requirements
4. Type of work to be done (description of Subcontract work):

Concrete
5. License, permits & bonds to be supplied and paid as follows:
 - As required per job
6. General provisions:
 - As required per job
7. Subcontractors pricing (unit pricing, time and material or other):
 - Amount to be determined per job requirements

Office (864) 232-5355 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681.
marickhomebuilders.com

000525

10/31/2007 08:28 FAX
10/30/2007 11:00 FAX

0003



8. Payment schedule:
Bills received by the 1st of the month will be paid on the 15th.
Bills received by the 15th of the month will be paid on the 30th.
9. Completion schedule:
As required per job
10. Documentation required for payment:
Detailed invoice of work completed to date (including quantity, rate and job contract amount, if applicable)
Completed Form W9 and certificate of worker's comp, and general liability insurance (see item 2 for details) - due in office before first payment.
11. Warranty:
One year
12. Hold Harmless: To the fullest extent permitted by law, the Subcontractor shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

BY: _____

DATE: _____

BY: Melvin Barker *

DATE: 10/11/07 *

Rick Thoenes
NAME and TITLE

Marick Home Builder, LLC.
COMPANY NAME

Kim Weather
WITNESSED BY

Sharon Gauder *
NAME and TITLE

Southern Concrete Spec. Inc. *
COMPANY NAME

Office (864) 232-5555 ~ Fax (864) 232-5504 ~ 501 Brixton Circle ~ Simpsonville, SC 29681
marickhomebuilders.com

000526

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,

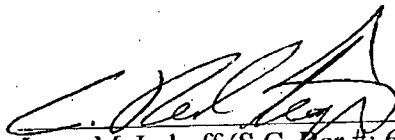
Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

CERTIFICATE OF COUNSEL

The undersigned hereby certified that the Amended Record on appeal contains all material proposed to be included by any of the parties and not any other material.



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

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

The Ward Law Firm, P.A.

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Spartanburg, SC 29304-3188

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Facsimile (864) 585-3090

ATTORNEYS FOR THE APPELLANTS

October
~~September~~ 16, 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

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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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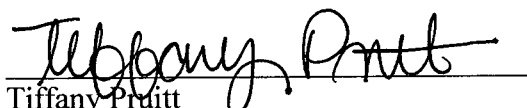
NOV 07 2013

SC Court of Appeals

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

PROOF OF SERVICE

I certify that I have served the Record on Appeal by depositing a copy of it in the United States Mail, First Class postage prepaid, on October 21, 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

November 1, 2013

RESPONDENTS' COUNSEL OF RECORD:

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S. Markey Stubbs, Esquire
Baker Ravenel Bender
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Attorney for Respondent Upstate Utilities, Inc.