

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

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SC Court of Appeals

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, 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 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,

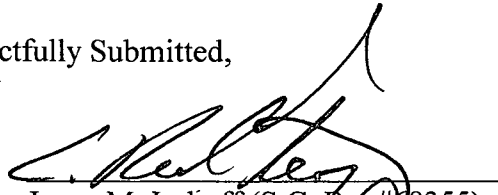
Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

FINAL REPLY BRIEF OF APPELLANTS TO RESPONDENT UPSTATE UTILITIES, INC.

Respectfully Submitted,



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ARGUMENTS

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

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

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

No concession, agreement or admission was made by the Appellants. The hearing transcript states as follows:

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

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

(R. pp. 168.)

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

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

Further, the September 25, 2012 Order states that “Counsel for Marick acknowledged that equitable indemnity was the only claim at issue...” (R. pp. 3.) However, in the September 25, 2012 Order, the Court examined law concerning causes of action collapsing into one action for equitable indemnity. (R. pp. 3-4.) Thus, if it was a stipulation, there was no need for the Court to examine the law. Appellants have properly appealed the Courts Order and asserted that the cross-claims do not collapse into a single equitable indemnity claim. Thus, the collapsing issue is properly before the Court, as no stipulation was made.

II. Appellants’ Memorandum in Opposition to Summary Judgment was properly submitted to the lower court and counsel.

Throughout Respondent’s Initial Brief, it asserts that Appellants failed to submit a memorandum in opposition to summary judgment. Said assertion is not true. Appellants’ Memorandum in Opposition to the Subcontractors’ Motions for Summary Judgment was sent to the court and counsel of record the night before the hearing. (R. pp. 164.) Further, the Court never indicated that it did not receive the memorandum submitted by the Appellants. If the Court had not received the brief, it would have requested a copy when the issue was raised by Respondent’s counsel. The Transcript of Proceedings indicates that reference was made by Mr. Imhoff to the Memorandum on pages 41, 43 and 49. (R. pp. 156, R. pp. 158, R. pp. 164.)

Respondent, having received the Memorandum from Appellants and having listened to

Appellants' counsel discuss the arguments set forth in the Memorandum on the day of the hearing, did not request a second copy of the Memorandum which was readily available on the day of the hearing. Within Marick's and Theonnes' Memorandum in Opposition to Upstate Utilities, Inc.'s Motion for Summary Judgment, Appellants cited verbatim deposition testimony of expert Randy Still. (R. pp. 434-459.) Having received the Memorandum and having knowledge that the Memorandum was submitted to counsel and the Court, Respondent's counsel made no objection concerning the authenticity of the citations of Randy Still's deposition. If Respondent contested the authenticity of the deposition testimony, said objection should have been made at the hearing or in a 59(e) motion.

Respondent has not submitted a case or rule which supports its position that deposition testimony cited verbatim to the Court is not evidence in the case. Further, in its Initial Brief, Appellants cited to Randy Still's deposition testimony as cited verbatim in Marick's Memorandum in Opposition to Summary Judgment submitted to the lower court. (R. pp. 434-459.) This Court did not find that said Memorandum was not part of the record in this case; thus, Appellants' citations in the Initial Brief do not violate this Court's prior order.

CONCLUSION

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



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November 4, 2013

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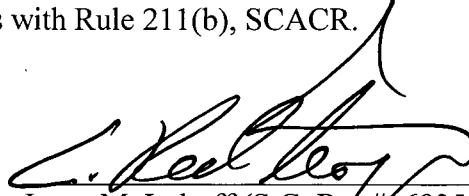
Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Appellants' Final Reply Brief to Respondent Upstate Utilities, Inc. complies with Rule 211(b), SCACR.



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

And

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

PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellants Marick Homes Builders, LLC and Rick Thoennes to Respondent Upstate Utilities, Inc. by depositing a copy of it in the United States Mail, First Class postage prepaid, on November 10, 2013, addressed to Respondents' attorneys of record, Shelley S. Montague, Esquire, P.O. Box 7368 Columbia, SC 29202 (attorney for Hutch N Son Construction, Inc.), and S. Markey Stubbs, Esquire P.O. Box 8057 Columbia, SC 29202 (attorney for Upstate Utilities, Inc.).



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