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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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, Intergrys 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 Enterprise d/b/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 Jaview Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobox 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,

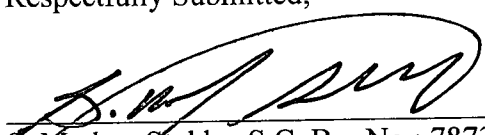
Of Whom Marick Home Builders, LLC and Rick Thoennes . . . . . .Appellants,

And

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

FINAL BRIEF OF RESPONDENT
UPSTATE UTILITIES, INC.

Respectfully Submitted,



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STATEMENT OF THE CASE

This action was instituted by the Plaintiffs in their individual and representative capacities and subsequently through a property owners' association, alleging construction defects at the townhome project in Oconee County known as Stoneledge which consisted two phases of development, Stoneledge I and Stoneledge II. The original Summons and Complaint was filed May 29, 2009. (R. pp. 10-22). Plaintiff amended their pleadings numerous times.

On February 7, 2011, Marick Home Builders, LLC (hereinafter "Marick") brought Hutch N Son Construction, Inc. (hereinafter "HNS") and Upstate Utilities, Inc. (hereinafter "Upstate") into the action as third-party defendants, along with numerous other sub-contractors who worked on the project. Marick's third-party claims against HNS and Upstate were denominated as equitable indemnity, breach of contract, negligence, and breach of warranty claims. (R. pp. 23-48).

On October 17, 2011, Stoneledge and other Plaintiffs filed their Second Amended Complaint asserting direct claims for breach of warranty and negligence against all of the sub-contractors/third-party defendants originally brought into the action by Marick's Third-Party Complaint. The Plaintiffs' assertion of direct claims against these parties realigned them as first-party defendants to the action. On April 3, 2012, the Plaintiffs filed a Third Amended Complaint with claims against Marick. Marick was alleged to be the general contractor of some of the homes in the project. (R. pp. 49-76). Marick filed cross-claims against all of the sub-contractors of the project including HNS and Upstate. Marick captioned its claims as indemnity, negligence, breach of contract and breach of warranty in

their cross-claim on April 5, 2012 against the sub-contractors including HNS and Upstate. (R. pp. 77-115).

In May 2012, HNS and Upstate settled, without admission of wrongdoing, with the Stoneledge plaintiffs in this action. In September 2012, HNS and Upstate also settled cross-claims asserted against them by co-defendants Medallion At Keowee, LLC, and Bradford D. Seckinger. Marick's cross-claims were the sole remaining claims against HNS and Upstate after the settlement.

HNS and Upstate filed motions to collapse the claims of Marick to a single claim in equitable indemnity and for summary judgment on the equitable indemnity claim.[1] Upstate filed its motions on June 1, 2012, and August 21, 2012, along with a supporting memorandum, the Affidavit of Donnie White, and the Affidavits of Rhett Whitlock, Ph.D., P.E. (R. pp. 334-46; R. pp. 347-61; R. pp. 362-81). On August 10, 2012, HNS filed its own Motion for Summary Judgment and also joined in Upstate's Motion for Summary Judgment. (R. pp. 382-88). HNS filed a supporting memorandum and the Affidavits of Donnie White and Glenn Stewart. (R. pp. 389-425). Because of the similarities of issues between HNS and Upstate, their motions were heard together. At the hearing on these motions, the trial court granted the Respondents' motions for summary judgment and requested an order. The court, in announcing its intended ruling, stated:

> And of course what is it – being equity, the principles of equity apply, and one is that to be without fault. And apparently from

[1] Although Marick's co-defendant Rick Thoennes is listed as an Appellant challenging the circuit court's grant of summary judgment to HNS and Upstate on the cross-claims, Thoennes never asserted its own cross-claims against HNS or Upstate within any pleading. As the circuit court observed in its order, the caption of Marick's Answer to the Third Amended Complaint and Cross-Claim included both Marick and Thoennes, but the body of the pleading indicated that only Marick asserted the cross-claims. Accordingly, the court observed that "there is not a cross-claim by Defendant Rick Thoennes against either Upstate Utilities or HNS." (September 25, 2012 Order p. 2 n. 1). Neither Marick nor Thoennes asked the circuit court to reconsider this decision. Thoennes is not a proper Appellant because there is no decision against him to appeal and no motion to alter or amend was sought pursuant to Rule 59(e) SCRCP.

> the argument today that you [Marick] do recognize that the general contractor has a supervisory responsibility, and that's not only for what it did know, but also what it should have known .... [T]aking the argument in the light most favorable to the general contractor, it was doing its job, and therefore, it should not be found liable. But if it was doing its job, it would have discovered the defect...or defective workmanship.

(R. p. 168, lines 10-22). Counsels for HNS and Upstate were charged with drafting the order granting summary judgment. (R. p. 170, lines 12-16). The Court signed the order September 25, 2012. (R. pp. 1-2). No motion for reconsideration pursuant to Rule 59(e) SCRCP was filed by any party. The Order was received by Appellants on September 26, 2012, and Notice of Appeal and Proof of Service was served upon the Court and all parties on October 5, 2012.

STATEMENT OF FACTS

The Plaintiff filed a Third Amended Complaint dated April 3, 2012. Included within the Third Amended Complaint were direct claims against Appellants and direct claims against Respondents. Marick Home Builders, LLC, by answer and cross-claim to the Third Amended Complaint dated April 5, 2012, asserted a cross-claim against Respondents and others asserting that any problems with the project were not the responsibility of Marick but were the fault of the subcontractors against which it sought equitable indemnity. Beginning at Paragraph 159, Marick asserted claims for breach of contract against numerous subcontractors including Respondent HNS but not Respondent Upstate. Beginning at Paragraph 164 Marick asserted claims in negligence against sub-contractors including both HNS and Upstate. Beginning at Paragraph 171, Marick asserted claims in breach of warranty against sub-contractors including both HNS and Upstate. In each of these claims, Marick sought recovery for damages asserted against it for attorney's fees and costs and any

amounts that Marick is compelled to pay as a result of judgment. (R. p. 103, ¶159 – p. 110, ¶174).

Mediation was held on May 1 – 3, 2012, and Respondents settled with the Plaintiff. A specimen copy of the Release agreed to by counsel but not yet signed was presented to the lower court. (R. p. 123, lines 5-8; R. pp. 459-61).

Defendant Upstate, in support of its motion for separate trials and motion and memorandum in opposition to class certification, filed affidavits of Rhett Whitlock, Ph.D., P.E. (R. pp. 464-66; R. pp. 470-75). These affidavits were filed along with the Affidavit of Donnie White. (R. pp. 476-77). All three affidavits were presented to the court at the summary judgment hearing September 5, 2012. (R. p. 153, line 24 – p. 154, line 4). The Affidavit of Glenn Stewart, M.E., P.E., was filed by HNS in its memorandum in support of the motion for summary judgment and HNS joined in the summary judgment motion of Upstate and filed a copy of the Donnie White Affidavit. (R. pp. 481-86). No counter affidavits were filed by Marick. The night before the hearing, Appellant Marick emailed a brief to Respondents which Respondents did not receive before the hearing. (R. p. 164, line 7 – p. 165, line 20). The brief contained no affidavits and no transcripts were attached. That brief was referenced by Appellant at oral argument of the summary judgment motions but was not presented to Respondents or the court at the time of Respondents' hearing. (R. p. 167, line 24 – p. 168, line 4).

Marick was the general contractor with respect to Phase II of Stoneledge. (R. p. 7). Marick verbally contracted with HNS to perform the initial grading work on Phase II of the project. This work included backfilling of the grade against the townhouse units. (R. p. 7). HNS verbally subcontracted at least some backfill work to Upstate Utilities. There are no

written contracts between HNS and Upstate. (R. p. 7). The affidavit of Donnie White stated that the backfill was not placed over the wick board. (R. pp. 476-77). The affidavit further asserted that other persons or entities performed drainage and landscaping work after the grading work was completed and those entitles changed the grade in some areas allowing dirt to be higher than the wick board. (R. pp. 476-77). Donnie White further asserted by affidavit that his grading work did not cause or contribute to the complaints alleged by the Plaintiff. (R. pp. 476-77).

Counsel for Marick acknowledged at the hearing that the general contractor has the duty to supervise and inspect the work of subcontractors. (R. p. 158, lines 13-14; R. p. 160, lines 18-23). The affidavits of Rhett Whitlock addressed the contractual obligations of the general contractor as well as the industry standard which controls the general contractor's obligation, and set forth his opinion that the general contractor was negligent in regard to his supervisory requirements. (R. pp. 464-66; R. pp. 470-75). Glenn Stewart, P.E.'s affidavit, which was filed by HNS, noted in paragraphs 9 and 12 the contractual obligations of the general contractor and determined that Marick provided insufficient supervision for the project and the deficient conditions relating to the grade at some buildings being too high was open and obvious. (R. pp. 481-86, ¶¶ 9, 12). He asserted in paragraph 12 of his affidavit that the general contractor for the "project" should have observed the deficiencies caused the deficient work to be corrected prior to completion of the "project." (R. p. 485, ¶12).

Marick did not dispute that, as a general contractor, it was charged with the responsibility of supervision and oversight of subcontractor's work, including that of HNS and Upstate. (R. p. 158, lines 9-15). In his affidavit, Glenn Stewart opined that the Marick

representative had provided "daily supervision of the 'Project'...had insufficient training, experience, or knowledge to provide competent supervision during the construction of the 'Project' and insufficient supervision was provided." (R. pp. 485, ¶11). Both Stewart and Upstate's expert Rhett Whitlock also opined that the height of the grade against the units was among the open and obvious conditions that would have been observed and corrected by Marick during reasonable supervision of the job site. (R. p. 485, ¶12; R. p. 475, ¶¶3, 5). Stewart found "[t]he deficient conditions...regarding the exterior grade work 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.'" (R. p. 483-84, ¶9).

STANDARD OF REVIEW

Rule 56 of the South Carolina Rules of Civil Procedure provides for judgment as a matter of law where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP Rule 56(c). When reviewing a lower court's grant of summary judgment, the appellate court applies the same standard which governs the trial court: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); see also Miller v. Boomingthaw Mills, Inc., 365 S.C. 204, 616 S.E.2d 722 (Ct. App. 2005). When a party supports its motion for summary judgment with affidavits, the adverse party may not rest on the allegations of its pleadings, but must respond by affidavits or other evidence demonstrating a genuine issue of material fact. See SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 129,

399 S.E.2d 163, 164 (Ct. App. 1990).

ARGUMENTS

I. The Lower Court did not err in collapsing all of Appellant's Cross-Claims into one claim for equitable indemnification.

(a) When the collapsing of the claims was conceded by the appellant.

Appellant's first argument alleges error by the circuit court in collapsing the Breach of contract (as to HNS) breach of warranty, and negligence claims into a claim of equitable indemnity. At the hearing, counsel for Appellant did not argue against the collapsing of the claims, but rather conceded the argument. Counsel for Upstate noted that Appellant had conceded that all of the claims were equitable indemnity claims, stating: "...and I believe he has agreed that all his claims are truly equitable indemnity, however titled, since he did not argue against it." (R. p. 165, lines 12-14).

Appellant, in addition to not arguing against the consolidation of the claims as being truly equitable indemnity, further consented to the same at the hearing:

> **The Court:** All right. This – anything else?
>
> Thereupon there was no response.
>
> **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. p. 53, lines 5-9).

In the Order of the Honorable Alexander S. Macaulay filed September 25, 2012, the circuit court correctly held that:

> 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 non-jury claims.

(R. p. 5).

There were numerous motions, each filed separately. The hearings were separate and at Respondent's hearing the Appellant conceded that as to Respondents the issue was equitable indemnity only. (R. p. 53, lines 5-9). Appellant never argued against the consolidation. A stipulation is an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys and is binding upon those who make them. The Court must accept stipulations as binding upon the parties. Bodkin v. Bodkin, 388 S.C. 203, 694 S.E.2d 230 (Ct.App. 1980); McCrea v. City of Georgetown, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct.App. 2009). The Appellant, having conceded this claim, may not now argue against the circuit court's findings. Because the Appellant stipulated that equitable indemnification is the only claim at issue the trial court properly collapsed all claims and considered only equitable indemnification.

(b) When the Appellant failed to preserve the argument by not arguing against collapsing of the claims in argument, in brief, or by Rule 59(e) SCRCP.

In addition to conceding the collapse of the claims, the Appellant failed to make any argument at the hearing against the consolidation and failed to file a motion for reconsideration under Rule 59(e) SCRCP. The Order correctly held that the motion was conceded. (R. pp. 4-5). The Transcript reveals no argument was made by Appellant to preserve the issue for appeal.

It is an axiomatic rule of law that issues may not be raised for the first time on appeal. Talley v. South Carolina Higher Educ. Grants Comm., 289 S.C. 483, 347 S.E.2d 99 (1986); American Hardware Supply Co., Inc. v. Whitmire, 278 S.C. 607, 300 S.E.2d 289

(1983). To the extent Marick disagreed with the Court's finding that Marick "acknowledged that equitable indemnification was the only claim at issue," (Sept. 25, 2012 Order, p.11), the proper procedure for correcting factual errors in an order is to file a Motion to Alter or Amended Pursuant to Rule 59(e), SCRCP. I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review"). The South Carolina Supreme Court has made clear that courts "will not consider issues on appeal which have not been preserved for appellate review." Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) (citing In The Interest of Michael H., 360 S.C. 540, 546, 602 S.C. 2d 729, 732 (2005)). Marick cannot keep "an ace card up [its] sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give [it] another opportunity to prove [its] case." I'on, L.L.C. at 422, 526 S.E.2d at 724. Because the Appellant failed to properly preserve the issue at trial court level, it cannot raise them before the Court of Appeals.

c. When each claim asserted by the Appellant sought damages only as to indemnity.

Appellant argues the claims should not be collapsed into equitable indemnity and that doing so it is a matter of first impression. It is not in fact a matter of first impression. Pleadings are read and interpreted not by the labels given to them, but by the actual recovery sought. Each of Marick's claims against HNS and Upstate sought the same damages: those for which Marick could be liable to the Plaintiffs and attorneys' fees. (R. pp. 97-110). Such damages are recoverable in equitable indemnity. That Marick named its claims "breach of contract" (as to HNS), "negligence" and "breach of warranty" (as to HNS and Upstate) is

not determinative. "Rather, it is the nature of the issues and remedies which are sought" that reveal the true allegations. State v. Yelsen Land Co., 257 S.C. 401, 403, 185 S.E.2d 897, 898 (1972); see also Seebaldt v. First Fed. 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. 546, 548 (1919). In S.C. Nat. Bank v. Stone, the court noted 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 the wording" and that "a rose by any other name is still a rose." 749 F. Supp. 1419, 1433 (D.S.C. 1990). The review of pleadings for the true meanings of the complaint is not novel under South Carolina law.

The argument of Marick is that "the attorney fees and costs sought by Marick are separate damages from the damages sought by plaintiff; thus, said damages should be recoverable under a separate cause of action plead." (Initial Brief of Appellant). This argument fails to recognize that equitable indemnity allows recovery of both costs and attorneys' fees. In fact, equitable indemnity is the only claim that could support a claim for attorneys' fees. The appellant asserts that the lower court relied upon non-binding lower court decisions. While the circuit court acknowledged the existence of these decisions, it did not assert that its reliance was placed upon them. Furthermore, Appellant failed to object to the presentation of non-binding opinions at argument and failed to raise an objection by S.C. Rule 59(e) SCRCP motion and accordingly any objection is waived. Higgins v. Medical University of South Carolina, 326 S.C. 572, 486 S.E.2d 269 (Ct. App. 1997).

II. The Lower Court properly granted summary judgment against Marick's equitable indemnity cross-claims because Marick's unclean hands prohibited recovery.

Summary judgment was properly awarded in favor of Upstate on Marick's sole claim against it for equitable indemnity. In order to recover in equitable indemnity, the Plaintiff must establish that they were without fault in causing the loss:

> Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him. Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E. 2d 172 (1963). This is subject to the proviso that no personal negligence of his own has joined in the cause in causing the injury.

Vermeer Carolinas, Inc. v. Wood/Chuck Chippers Corp., 336 S.C. 53, 60-61, 518 S.E.2d 301, 305 (Ct. App. 1999).

As noted by the Court, Marick conceded that it had an obligation to supervise and oversee its subcontractors. (R. p. 158, lines 13-24). The trial court had before it two affidavits of Rhett Whitlock, dated March 14, 2012 and August 9, 2012, and an affidavit of Donnie White, dated August 23, 2012, as well as the affidavit of Glenn Stewart, dated August 30, 2012. The affidavits reflected Marick's failure to supervise and identify open and obvious deficiencies during the course of construction. Marick was therefore not without fault and at best was a joint tortfeasor. Assuming, *arguendo,* Respondents were at fault, Appellant would be deemed a joint tortfeasor. See Veermer at 64, 518 S.E.2d at 307.

Upstate presented unrefuted evidence via the affidavit of Donnie White that it was not responsible for the grade being over the wick board and that the work of whoever installed drains and/or landscaping was responsible for dirt over the wick board. (R. pp. 476-77). The affidavits also asserted that Marick should have been aware of that deficiency.

The affidavits of Stewart and Whitlock establish that the height of the grade against the units was an open and obvious condition that should have been observed and corrected by Marick. (R. p. 485, ¶ 12; R. pp. 471-72, ¶¶ 3, 5).

Marick filed no affidavits, depositions, or other evidentiary matters in opposition to the motions filed by HNS and Upstate. Marick's only opposition was raised on appeal, as a citation to a deposition transcript within a brief. The brief was emailed out the night before the hearing and was not received by counsel. The Appellant did not file any depositions with the Court. At oral argument Marick, while making reference to the brief, made no reference to the deposition testimony or affidavits of any person or entity refuting the evidence presented by respondents. As stated in Higgins, *supra*:

> When ruling on motions for summary judgment, the trial judge must consider *all* of the documents and evidence *within the record*, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct.App. 1992); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App. 1986). However, factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists. Gilmore, 290 S.C. 53, 348 S.E.2d, 180.

Higgins v. Medical University of South Carolina, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App 1997). SCRCP Rule 56(c) provides:

> The Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In this action, no depositions were filed with the court. Counsel's selection or interpretation of a deposition not submitted and not argued may not be used at this time to supplement his appeal. Assuming, *arguendo,* that the brief and the quotes should have been considered by

the trial court the sole quote relating to Respondents is found in the Appellant's Initial Brief:

> **Q.** Do you believe Marick violated any code, manufacturer's installation instructions, designs, drawings or any other obligation in the installation of any of the waterproofing, framing, grading or other construction components in Phase II?
>
> **A.** No.

(Amended Initial Brief of Appellant, p. 18). Marick, in its brief, alleges Respondents failed to object to the "authenticity of the cited excerpts." (Amended Initial Brief of Appellant, p. 16). However, Appellant fails to point out that since the quotes were never put before the trial court at the summary judgment hearing with Respondents and never argued by Appellant, Appellant was not in the position to raise such arguments as the arguments were never presented nor addressed by the lower court. Respondents do note that Appellant includes a citation to Randall Still's deposition, despite this Court's Order requiring it to strike any citation to Mr. Still's deposition. (Court of Appeals Order of July 10, 2013, p. 2). Clearly this unfiled deposition, taken well before the Affidavits presented by Respondents for the hearing, does not address Respondents' affidavits. Mr. Still does not address the issues of the work not being open and obvious as asserted by the August 9, 2012 Affidavit of Rhett Whitlock. It is perhaps because Mr. Still could not refute the affidavits that no counter affidavit was filed.

III. Additional sustaining grounds

A. The Appellant failed to counter Upstate Utilities, Inc.'s Affidavit that it was not the party responsible for placing the grade over the wick board.

The undisputed evidence reveals that Upstate was not responsible for placing the grade above the wick board. The Affidavit of Donnie White outlined that HNS hired Upstate to perform work on the project and that Upstate was onsite and inspected much of

the work while it was being performed. (R. pp. 476-77). According to Mr. White's Affidavit, the work was performed correctly and backfill was not placed over the wick board. (R. pp. 476-77). Mr. White further stated under oath that other persons who performed drainage and landscaping work after Upstate's work was completed had changed the grade in some areas allowing the dirt to be higher than the wick board. (R. pp. 476-77). There was no testimony or affidavits presented by Appellant in argument, in brief, or otherwise that refutes Respondent's evidence. In the order granting Summary Judgment, the circuit court found:

> Defendant 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 Donnie 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.

(R. pp. 7-8).

In Richland County v. Palmetto Cablevision, the Supreme Court determined tht an unchallenged ruling, right or wrong, becomes the law of the case. 261 S.C. 222, 199 S.E.2d 168 (1973); see also Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011) (if the appellant failed to exhaust its administrative remedies, the trial court ruling must be affirmed, right or wrong). Therefore, as an additional sustaining ground, this Court should find that Upstate Utilities, Inc. is entitled to summary judgment on the grounds that the affidavits presented establish that there was no liability on the part of Upstate and this was not refuted by Appellant.

B. Appellant has no special relationship with the Respondent so as to support a claim in equitable indemnity.

The Appellant hired HNS to perform work including backfill work. The hiring of HNS was by oral agreement. As such, no written contract exists. Upstate was not hired by Appellant. (R. pp. 476-77). In order to support a claim in equitable indemnity, one must establish a special relationship between the parties that can support such a claim. In this case, Upstate was not a subcontractor to Marick, but was a subcontractor to a subcontractor of Marick.

There are two forms of indemnity: contractual indemnity and indemnity implied in law. Rock Hill Telephone Co., Inc. v. Globe Comm's, Inc., 263 S.C. 363, 611 S.E.2d 235 (2005). Indemnity implied in law is equitable indemnity. Id. at 389, 611 S.E.2d at 237. In this action, the appellant has asserted solely a claim in equitable indemnity. The Court in Rock Hill held that:

> In general, indemnity may be defined as a "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. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 449 (1994). The right to indemnity arises by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." Id. In other words, a right of indemnity exists whenever the relationship between the parties and 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 acts of another in which he does not join." Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1985).

Rock Hill Telephone Co., 363 S.C. at 387, 611 S.E.2d at 332. The court in Rock Hill went on to note that there is no indemnity between joint tortfeasors. Id. at fn. 2. The court in Rock Hill found that there must be a relationship between the entities beyond the relationship established by virtue of the party alleging that he was sued by another party's wrongful conduct. Id. at fn. 3. In that action, Rock Hill Telephone Co. received a permit

from DOT to install underground cables along the highway. Id. at 388, 611 S.E.2d at 236. The utility hired an independent contractor to complete the work. Id. In turn, the independent subcontractor apportioned part of the work to a sub-sub contractor. Id. The Court found that that sub-subcontractor relationship with the utility was too "attenuated" to support a claim in equitable indemnity. Rock Hill, 363 S.C. at 389, 611 S.E.2d at 237. It is the same remote relationship that exists in this case. The Appellant hired HNS to perform work. HNS subcontracted a portion of that work to Upstate. Upstate was not retained by Appellant, and therefore the claim of equitable indemnity must fail as there is no special relationship between Upstate and Marick.

C. The payment by Respondent extinguished claim of Appellant.

In this action, Upstate and HNS settled with the Plaintiff. The Plaintiff, having settled with HNS and Upstate, can only seek recovery from Appellant for Appellant's own acts which caused or contributed to the loss. Appellant is therefore being sued for its own acts and it is either liable or not liable for the breach of its supervisory and oversight actions.

As a joint tortfeasor, Appellant can be held liable, but may not seek an equitable indemnity claim. Veermer, *supra*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). If Appellant prevails against Plaintiffs, they have simply prevailed on a claim against them for their alleged wrongful acts, as the acts of Respondents have been settled. Similarly, if the Plaintiffs prevail against Appellant, it will only be for the damages caused by Appellant's acts as a joint tortfeasor.

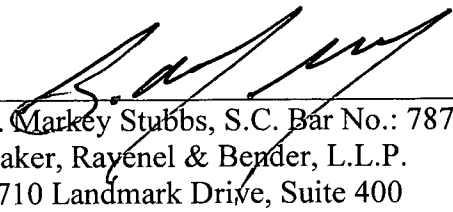
A release which does not release another joint tortfeasor from liability does operate as a release of the master for liability under *respondeat superior* in keeping to the servant responsible. See Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct.App. 2001), rev'd

on other grounds by Andrade v. Johnson, 356 S.C. 238, 588 S.E.2d 588 (citing Seaboard Airline R&R v. Coastal Distrib., 273 F.Supp. 340, 343 (D.S.C. 1967); Wade v. Berkeley Cty., 339 S.C. 513, 529 S.E.2d 743 (Ct.App. 2000)). To the extent the Appellant is being sued for its derivative liability, that liability has been extinguished by Respondents' settlement with the Plaintiff. The Appellant is therefore being sued for its own acts, the Appellant is either liable or not liable for the breach of its supervisory and oversight obligations. As an additional sustaining ground the Court should find that Upstate's settlement with the Plaintiff extinguishes any liability between Respondent Upstate Utilities and Appellant Marick and sustain the lower court's decision granting summary judgment.

CONCLUSION

In this action, the lower court did not err in collapsing the claims of Appellant to a sole claim of equitable indemnity. The Appellant conceded that the claims were in indemnity at argument and failed to preserve at the hearing or by Rule 59(e) motion any argument against the collapse of the claims. The lower court did not err in granting summary judgment on the equitable indemnity claim. The Appellant failed to file any evidence in opposition to the Affidavits filed by Respondents and failed to seek review of the trial court's Order pursuant to Rule 59(e). The lower court's findings should additionally be sustained based upon Appellant's failure to counter Respondent's evidence that it did not perform the work which is alleged to be incorrectly performed. Moreover, the Appellant failed to establish a special relationship with Upstate so as to support a claim in equitable indemnity. The Respondents have settled with the Plaintiff and obtained a release. Such a release extinguishes liability between Respondents and Appellant and any ongoing claim against the Appellant is based upon Appellant's own acts.

Respectfully Submitted,



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Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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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, Intergrys 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 Enterprise d/b/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 Jaview Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobox 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 .....Appellants,

And

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

CERTIFICATE OF COUNSEL

The undersigned counsel affirms that the final brief complies with SCRAP 211(b).

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA

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APPEAL FROM OCONEE COUNTY
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v.

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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, Catherine M. Gwyn, of Baker, Ravenel & Bender, attorneys for Respondent Upstate Utilities, Inc., do hereby certify that I have this 29th day of October 2013 served all counsel of record with copies of **Respondent Upstate Utilities, Inc.'s Final Brief** by mailing said copies by United States Mail, first class postage pre-paid, to said counsel at the following addresses:

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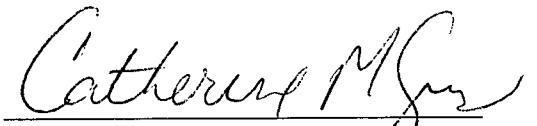

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