

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

RECEIVED

APR 12 2013

Appellate Case No. 2012-213237

SC Court of Appeals

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,

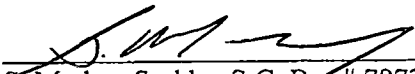
Of Whom Marick Home Builders, LLC and Rick Thoennes . . . Appellants,

And

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

**MOTION TO DISMISS THE APPEAL
OR IN THE ALTERNATIVE MOTION TO STRIKE**

I, S. Markey Stubbs, counsel for Upstate Utilities, Inc. hereby moves the Court in compliance with Rule 240 SCACR for dismissal of the appeal for the inclusion within the Initial Brief of Appellant matters not raised or argued before the Circuit Court and reliance upon materials not filed at or before the motion at the Circuit Court. Respondent, in the alternative, moves to strike from the designation of matter and within the brief any reference to: (1) the transcript of the hearing other than the hearing in which these respondents were present (2) Marick Home Builders, LLC's memorandum in opposition to numerous parties' motion for summary judgment (3) the deposition transcript of Randy Still in accordance with Rule 210 (c) SCACR and Rule 209(b) SCACR. The grounds and exhibits in support of this motion are more fully set forth in the attached Memorandum.


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April 12th, 2012

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

And

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

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR IN THE
ALTERNATIVE MOTION TO STRIKE IN ACCORDANCE WITH
RULE 240 SCACR**

In this action, the Appellant has presented Designation of Matter to be included on the Record on Appeal, attached hereto as Exhibit A. Appellant has filed the Initial Brief attached hereto as Exhibit B. The Brief of Appellant identifies two arguments which are asserted to be the issues on appeal. The first argument alleges error by the Circuit Court in collapsing the breach of warranty, breach of contract, and negligence claims into a claim of equitable indemnity. The record of the hearing as it relates to Respondents' motions is attached hereto as Exhibit C. At the hearing, counsel for Appellant did not argue against the collapsing of the claims, but in fact conceded the argument. Counsel for Upstate Utilities, Inc. 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.”
(Tr.p.18; l.19-20)

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.”

(Tr.p.21; l.13-15)

The Order of the Honorable Alexander S. Macaulay filed September 25, 2012 is attached as Exhibit D. The Circuit Court correctly held in its 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 non-jury claims.” (Exhibit D)

The Appellant did not file a motion for reconsideration pursuant to Rule 59(e) SCRCP.

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. In addition to conceding the argument the Appellant failed to make any argument at the Circuit Court against the consolidation and failed to file a motion for reconsideration under Rule 59(e) SCRCP. The Transcript reveals no argument was made by Appellant (Exhibit C). It is an axiomatic rule of law that issues may not be raised for the first time on appeal. Tally v. South Carolina Higher Education Grants Committee, 289 S.C. 483, 347 S.E.2d 99; American Hardware Supply Company, Inc., v. Whitmire, 278 S.C. 607, 300 S.E.2d 289 (1983). In addition to conceding the argument, Appellant failed to present any argument to the Court below or file a Rule 59(e) SCRCP motion so as to preserve the issue for appeal. See, In Re: Timmerman, 331 S.C. 455, 502 S.E.2d 920 (Ct.App.1998). Respondents in this action should not be required to brief or respond to matters not previously argued, presented and in fact conceded to the Court below.

The Appellant's second argument relates to the grant of summary judgment on the equitable indemnity claim. It is undisputed that respondents filed and presented to the Court the Affidavits of Donnie White, two Affidavits of Rhett Whitlock, Ph.D., P.E. and an Affidavit of Glenn Stewart, M.E., P.E.. The appellant in this action in response to the designation of matters on appeal has identified the deposition of Randy Still on August 15, 2012, pp. 163, 164, 170, 173 and 174] (sic) (Exhibit A). The transcript reveals that the deposition of Randy Still was never presented to the Court or filed with the Court prior to or at the respondent's hearing in this action (Exhibit C). Pursuant to Rule 210(c) SCACR, the record shall not include matter which was not presented to the lower court or tribunal. Appellant has attempted to shoehorn an unfiled deposition into the record in this matter by use of a citation to a brief. Pursuant to Rule 56(c), a grant of summary judgment should be rendered forthwith "...if the pleadings, depositions, answers to interrogatories, and admissions **on file**, together with affidavits, if any, show there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law" (emphasis added). In this action, Appellant failed to file an Affidavit or any deposition and further the record reveals that he did not hand up the brief nor argue the deposition quotes he now asserts at or before the time of Respondent's hearing. The Appellant at the hearing asserted:

"Mr. Imhoff: I have prepared a brief which I have, in which I would be more than happy to supplement if the Court requires that to consider these motions. ... (Tr.p.9; 1.13-15.)

Appellant sent an email with the Brief and no transcripts at 7:38 p.m. the night before the hearing (Exhibit E). Upstate Utilities acknowledged at the hearing it had not received such a brief and further that Respondents were the sole parties who presented admissible evidence at the hearing (Tr.p.17 1.19-Tr.p.18; 1.16). The transcript reveals that counsel for

Respondents were granted summary judgment and directed to draft an order and thereafter left the courtroom at 11:55 a.m. (Tr.p.23; l.18-22). At no time did Appellant hand up the brief or argue the quotations prior to the end of Respondents motion. Counsel has been informed that during subsequent motions with other parties, the brief that relates to numerous parties was handed up to the Court. The Order below noted:

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponents case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. See Regions Bank v. Schnauch, 354 S.C. 648, 660, 582 S.E.2d, 432, 438 (Ct.App.2003) (Exhibit D).

The Circuit Court thereafter cited to the Affidavits presented by Defendants and noted that the Appellant did not submit any affidavits to refute the Defendants' affidavits. While Appellant attempted to generalize that evidence existed, he failed to file any. In Higgins v. Medical University of South Carolina, 326 S.C. 592, 486 S.E.2d, 269 (Ct.App.1997), the Court held:

When ruling on a motion for summary judgment, the trial court must consider *all* of the documents in evidence *within the record* including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits ... however, factual statements of attorneys, whether made during argument or in written briefs or memorandum, ordinarily may not be considered by the Court in determining whether a genuine issue of material fact exists.

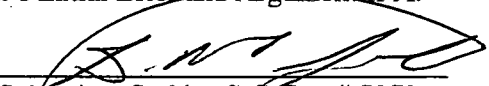
The Appellant did not seek reconsideration of the court's finding pursuant to Rule 59(e) SCRCP and may not argue now the unfilled testimony of Randy Still in this appeal.

The final argument presented by Appellant is sub-argument II B as to special relationship. The Appellant argues that the Court erred in finding that between Upstate Utilities, Inc. and Marick Home Builders, LLC there was not a sufficient special relationship so as to support a claim in equitable indemnity. The order, while pointing out that this

argument was raised, made no finding on this particular issue. While this argument may be appropriate in a reply to an additional sustaining grounds it is inappropriate in the appellant brief (Exhibit D Order).

Respondent therefore prays for dismissal of the appeal due to numerous procedural errors. Tally v. SC Higher Education Tuition Grants Committee, supra.

The Appellant list on the designation of the record a transcript of all motions heard the day of Respondent's hearing. In the event the Court is not inclined to dismiss the entire appeal, Respondent prays that the following items be stricken from the proposed record: (1) Transcript of hearings occurring after Respondents' motion between Appellant and other parties; (2) Deposition of Randy Still designations and (3) Marick Home Builders' memorandum in opposition to numerous parties' motions for summary judgment identified as items 6 and 12 on the Appellant's Designation of Matter for Appeal. That Arguments I, II B be stricken and that any reference or arguments surrounding those items stricken from the record be removed from Appellant's Initial Brief and ~~Argument II A.~~



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Attorneys for Respondent Upstate Utilities, Inc.

April 12, 2013

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And

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

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PROOF OF SERVICE

I, S. Markey Stubbs, attorney for Respondent Upstate Utilities, Inc., do hereby certify that I have this ____th day of April 2013 served all counsel of record with copies of **Notice of Motion and Motion To Dismiss Or In The Alternative Motion To Strike In Accordance With Rule 240 SCACR** by mailing said copies by United States Mail, first class postage pre-paid, to said counsel at the following addresses:

APPELLANT'S COUNSEL OF RECORD:

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C. Reed Teague
The Ward Law Firm, P.A.
Post Office Box 5663
Spartanburg, South Carolina 29304-3188

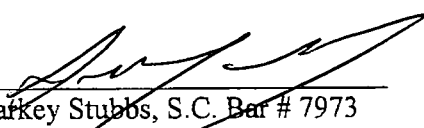
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April 12, 2012



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¹OF COUNSEL

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April 12, 2013

Via Hand Delivery:

The Honorable Jenny Kitchings
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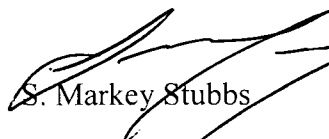
RE: Stoneledge at Lake Keowee Owners' Association, et al v.
IMK, et al.
Appellate Case No. 2012-213237
Our File No.: 7603.336

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of a Respondent Upstate Utilities' Motion to Dismiss the Appeal or in the Alternative Motion to Strike. Please return a stamped copy to me via the courier delivering same. Please also find our firm's check in the amount of \$25.00 to cover the filing fee.

By copy hereof, I am serving the same upon counsel for Appellant and Respondent Hutch N Son Construction, Inc.

Yours truly,


S. Markey Stubbs

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Enclosures

cc: Jason M. Imhoff, Esquire (w/enclosure)
Shelley S. Montague, Esquire (w/enclosure)

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EXHIBIT A

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And

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

APPELLANTS' DESIGNATION OF MATTER TO
BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposed the following to be included in the Record on Appeal:

1. Complaint of Stoneledge at Lake Keowee Owners' Association, Inc.;
2. Answer and Cross Claims of Marick Home Builders, LLC;
3. Order Granting Defendants Hutch-N-Son Construction, Inc. and Upstate Utilities, Inc.'s Motions for Summary Judgment;
4. Hutch-N-Son Construction, Inc.'s Notice of Motion and Motion for Summary Judgment;
5. Upstate Utilities, Inc.'s Notice of Motion and Motion for Summary Judgment;
6. Marick Home Builders, LLC's Memorandum in Opposition to Hutch-N-Son Construction, Inc. and Upstate Utilities, Inc.'s Motions for Summary Judgment;
7. Hutch-N-Son Construction, Inc.'s Memorandum in Support of Summary Judgment;
8. Upstate Utilities, Inc.'s Memorandum in Support of Summary Judgment;
9. Transcript of Proceedings dated September 5, 2012;
10. Affidavit of Donny White dated August 23, 2012;
11. Affidavit of Glenn Stewart, M.E., P.E. dated August 20, 2012;
12. Deposition of Randy Still on August 15, 2012, pages 163, 164, 164, 170, 173 and 174;

I certify that this designation contains no matter which is irrelevant to this appeal.

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our Briefs

W.H. & Aff.

February _____, 2013

EXHIBIT B

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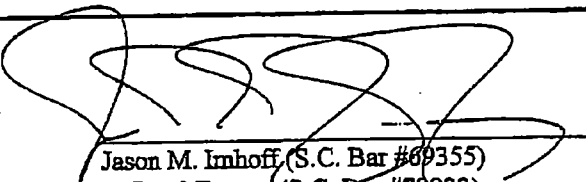
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Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

INITIAL BRIEF OF RESPONDENTS



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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., Bufacio 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.

INITIAL BRIEF OF APPELLANTS MARICK HOMES BUILDERS, LLC AND RICK
THOENNES

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN COLLAPSING ALL PLED CROSS-CLAIMS INTO ONE CLAIM FOR EQUITABLE INDEMNIFICATION?
- II. DID THE LOWER COURT ERR IN GRANTING THE MOTIONS FOR SUMMARY JUDGMENT FILED BY HUTCH-N-SON CONSTRUCTION, INC. AND UPSTATE UTILITIES, INC. AS TO MARICK HOME BUILDERS, LLC AND RICK THOENNES' CROSS-CLAIMS?

STATEMENT OF THE CASE

The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge. Included in Plaintiffs' claims were claims against one of the general contractors affiliated with the project, Marick Home Builders, LLC (hereinafter "Marick"), and claims concerning alleged defective grading against Marick's subcontractor Hutch-N-Son Construction, Inc. (hereinafter "HNS") and a subcontractor hired by HNS, Upstate Utilities, Inc. (hereinafter "Upstate"). As a result of being sued for the alleged defective grading/site work performed by HNS and Upstate, Marick filed cross-claims against all of the subcontractors on the project including HNS and Upstate for indemnity, negligence, breach of contract and breach of warranty.

All of the subcontractors, including HNS and Upstate, filed motions for summary judgment as to Marick's Cross-claims. (Upstate's Motion for Summary Judgment) (HNS's Motion for Summary Judgment). Arguments were heard all day in the Circuit Court. Notwithstanding Appellant's opposition, the lower court issued an order dated September 24, 2012, granting the motions for summary judgment of HNS and Upstate. (Order Granting Summary Judgment.) The Order was received by Appellant on September 26, 2012 and a Notice of Appeal and Proof of Service was served upon the court and all parties on October 5, 2012.

or just that
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STATEMENT OF FACTS

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter "Hund"). (See Plaintiffs' 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. In November of 2009, the owners voted to retain an attorney 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/grading, 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.

After Bostic Brothers' exit, the remaining unsold units and vacant land was purchased by IMK Development Co., LLC (hereinafter "IMK"). IMK was owned by corporate entities IK and Marick. Once purchased, IMK retained Marick as the general contractor to construct phase II at Stoneledge. Due to Marick's partial ownership of IMK, Plaintiffs' Complaint alleges that Marick was a developer of the project. Plaintiffs have alleged breach of the warranty of habitability amounting

other things, against Marick as a developer.

During construction, Marick subcontracted with HNS to perform grading/site work at the project. HNS then subcontracted with Upstate to assist in performing the grading/site work at the project. As alleged by Plaintiff and admitted by HNS and Upstate in their affidavits and memorandums to the lower court, there were issues related to the grading at the project. (Affidavit of Glenn Stewart.).

Plaintiffs hired Construction Science and Engineering ("CSE") to investigate the conditions at Stoneledge and develop a scope of repair. During work at the project, CSE observed dirt above the proper grade. Marick also retained the services of an expert, Randy Still. As set forth in Marick's Memorandum in Opposition to HNS and Upstate's motions, Randy Still specifically stated that he did not believe that Marick violated any obligations concerning grading at Stoneledge. (Randy Still Deposition 174:21-24.)

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." S.C. R. Civ. P. 56(c). The purpose of summary judgment is to dispose of factually unsupported claims. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). "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 in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ." *Tompkins v. Festival Centre Group*, 306 S.C. 193, 410 S.E.2d 593 (Ct. App. 1991).

A trial court should not grant a motion for summary judgment when pleadings, depositions, answer to interrogatories, and admissions on file, together with affidavits, if any, show there is a genuine issue as to any material fact. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 58, 518 S.E.2d 301, 304 (1999) (citations omitted). In determining whether any triable issue of fact exists, which will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.*

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Id.* 336 S.C. at 58, 518 S.E.2d at 305. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Id.* Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.* 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.")

ARGUMENTS

- I. The lower court erred in collapsing all of Appellants cross-claims into one claim for equitable indemnification.

The Circuit Court erred in collapsing Appellants' cross-claims for breach of warranty, breach of contract, and negligence into one claim for equitable indemnification. Appellants believe this is a matter of first impression for South Carolina appellate courts as the lower court cited no binding case law in support of its holding. In support of its holding, the Court cited two non-binding district court cases (*U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)) and two non-binding unpublished South Carolina circuit court orders (*Nelson v. John Weiland Home*, 2009-CP-10-6573 (Order by Judge Roger M. Young, October 26, 2011) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006)).

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Appellants assert cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n. 3. However, in this case, even after settlement with HNS and Upstate, Plaintiffs continue to allege defective site/grading work against Marick. Thus, Marick is required to continue litigating claims associated with HNS and Upstate's defective work. Marick continues to incur attorney fees and costs associated with HNS and Upstate's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Appellants assert that the federal court holdings should not be persuasive in this matter.

Appellants further assert that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Appellants may recover special damages at law under theories of negligence and breach of warranty as to Respondent Upstate and for negligence, breach of warranty and breach of contract as to Respondent HNS. Appellants' claims for breach of warranty, negligence and breach of contract are not disguised indemnity claims. South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1990) citing *Addy v. Bolton*, 257 S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs' claims arising from the Defendant

Subcontractors' tortious conduct (negligent performance of work), breach of warranty (failure to perform work in a workmanlike manner) and breach of contract; thus, Marick properly filed claims for negligence and breach of warranty against Respondent Upstate and for negligence, breach of warranty and breach of contract against Respondent HNS seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (Marick Home Builders, LLC and Rick Thoennes' Answer and Crossclaims to Plaintiffs' Third Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including special damages claims against subcontractors as both HNS and Upstate were sued directly by Plaintiffs' for their defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under negligence, breach of contract and breach of warranty theories. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by the subcontractors to Marick constitute separate causes of action which did not arise through Plaintiffs' relationship to the parties. The Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, separate causes of action for negligence and breach of contract do not collapse into a single indemnity claim. Marick had a contractual relationship and was owed separate duties by the subcontractors it was overseeing to perform the work at issue in this action; if those subcontractors failed to perform the work they were hired to perform properly, they breached

duties and contractual obligations owed to Marick and thus should be liable to Marick.

II. The Circuit Court erred in granting HNS and Upstate's motions for summary judgment concerning Marick's Crossclaim for equitable indemnification.

The lower Court order granted summary judgment in favor of Upstate and HNS as to Marick's Cross-Claim for equitable indemnification based upon the doctrine of unclean hands. The Court did not find that Marick failed to create a genuine issue of material fact. (Order granting summary judgment, Page 3 ¶ 2.) Thus, Appellants will address the lower court's finding as a matter of law that Marick has unclean hands in this matter and thus is not entitled to equitable indemnification. Further, in relation to Upstate, the Court erred by holding that Upstate had no special relationship with the general contractor Marick.

A. EQUITABLE INDEMNIFICATION

"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." *Wimmsboro 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 (Cl.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 (Cl.App. 1996)(emphasis added).

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.¹ The *Fields*' 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 subcontractors. *Id.* Instead, it must be proven that the general contractor breached a duty of care in providing supervision and oversight.

Based upon the deposition testimony of Randy Still, a question of fact exists concerning whether Marick breached its duty to supervise and provide oversight.

1. UNCLEAN HANDS

The lower court's Order held, "that there is no genuine issue of material fact that Marick has at least some fault for the construction defects alleged." (Order, Page 7.) Thus, the lower

¹ The lower court did not follow the Supreme Court's holding in *Fields* as Judge MaCanley stated at the hearing "if it [Marick] was doing its job, it [Marick] would have discovered the defect, I guess would be the -- or defective workmanship. All right. I find that under the concept of equitable relief that the equitable indemnity would be denied and the motion for summary judgment granted." (September 5, 2012 Hearing Transcript, Page 53:20-25.) Thus, the lower court effectively ruled that indeed the general contractor is automatically liable for the negligence of a subcontractor.

court effectively found as a matter of law in the case, at the summary judgment stage, that Marick has unclean hands.

The Court's holding was in error as Marick did provide evidence that Marick did not breach a duty or obligation.

Deposition of Randy Still (Marick's Memorandum in Opposition to Summary Judgment, Page 7-9):

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 not 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.)

Marick's expert Randy Still specifically stated that Marick did not violate any obligation associated with the grading in Phase II. Therefore, Marick presented evidence that it was not at fault for the alleged grading defects or other construction components associated with Phase II construction. Further, Defendant HNS' expert, Glenn Stewart, provided an affidavit which notes observations of defects associated with the grading in Phase II: "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." (Affidavit of Glenn Stewart, ¶ 8.) Thus, HNS's expert specifically notes that there are defects in the work performed by HNS and its subcontractor, Upstate (as HNS and Upstate were the parties performing the grading services). Although Stewart opines that such defective work is present in Phase II, Randy Still provided testimony that Marick did not violate an

2 Mr. Still's deposition is still open and he has not finished his testimony. Counsel for Marick went out of turn to briefly ask these questions in preparation for the motions hearings and objected to the

obligation it owed at the project, which would include its duty to supervise and oversee. Thus, as a general contractor Marick is not automatically liable for deficient work performed by its subcontractors in South Carolina. Marick presented evidence which a reasonable jury could use to determine that Marick met its obligations to supervise and oversee and thus has no fault associated with the grading deficiencies. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008).

Further, Glenn Stewart's Affidavit opines that "Marick provided insufficient supervision of the 'Project.'" (Affidavit of Glenn Stewart, ¶ 12.) Glenn Stewart's opinion conflicts with Randy Still's opinion, as Still asserted that Marick met all of its obligations as the general contractor. Thus, a reasonable jury could agree with Randy Still, and find HNS and Upstate liable for all defects associated with grading/site work in Phase II. If so, Marick would be adjudged to have clean hands; and thus entitled to indemnification from HNS and Upstate. Marick clearly submitted a scintilla of evidence that Marick did not breach its duty of supervision; thus, summary judgment was granted in error. *Thomas Sand, Co.*, 563 S.E.2d at 112.

B. SPECIAL RELATIONSHIP

As set forth in the Order, HNS verbally contracted with Marick to perform grading work on Phase II of the project, to include backfilling of the grade against the townhome units. Thus, as HNS was Marick's direct subcontractor, Marick had a special relationship with HNS, thus entitling Marick to seek equitable indemnification. *First Gen. Servs.*, 314 S.C. at 442, 445 S.E.2d at 448. Once Marick hired HNS as a subcontractor, HNS hired Upstate to perform the work. Thus, Upstate was HNS's direct subcontractor. The lower court held that the relationship between Marick and Upstate was too remote to establish the special relationship required to seek equitable

timing of the hearings as discovery on this issue was not complete.

indemnification under South Carolina law citing *Seaboard Air Line R.R. v. Coastal Distributing Co.*, 273 F.Supp. 340 (D.S.C. 1967) and *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005). Appellant asserts that the lower court's holding was in error, as the relationship between Marick and Upstate was not remote.

The Court erred in finding that Marick had no special relationship with HNS's subcontractor, Upstate, as Marick was responsible to provide direct oversight and supervision to Upstate. Plaintiffs' Complaint alleges that Marick failed to provide proper supervision of the work performed at the property. Upstate was performing the actual work at the project; thus, according to Plaintiffs, Marick was responsible for providing oversight of the work performed by Upstate.

The Court's Order cites *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005) and *Seaboard Air Line R.R. v. Coastal Distributing Co.*, 273 F.Supp. 340 (D.S.C. 1967), as precedence for its determination that the relationship between Upstate and Marick was too remote to warrant Marick's request for equitable indemnity. Marick asserts that a determination concerning a general contractor's right to equitable indemnity from a subcontractor's subcontractor in a construction setting has not been decided by a court in South Carolina.

The facts in *Rock Hill Telephone Co.* involve a utility company that hired an independent contractor to perform installation work for the Utility Company. There are no allegations that the Utility was providing any oversight or guidance to the hired independent contractor. The independent contractor was overseeing the job, hired its own subcontractors to perform the work and provided oversight for those subcontractors. There is nothing in the case indicating that the Utility was overseeing the independent contractor's or the subcontractor's work.

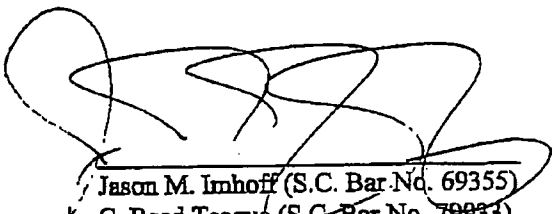
However, in a construction related setting, as is at issue in the present case before the court, the general contractor is responsible for providing oversight and guidance for the entire project. In fact Upstate's Motion for Summary Judgment is partially based upon its assertion that Marick should have better supervised it. Thus, Marick's obligations are different from the obligation of the Utility in *Rock Hill Tele. Co.* If Marick was responsible for guiding and directing Upstate, then a special relationship exists between those parties, thus warranting a right to equitable indemnity.

As stated above, "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). Thus, if Marick is responsible for providing oversight and guidance on a daily basis for the work performed by Upstate, then a sufficient relationship between the parties exists to obligate Upstate to indemnify Marick for exposing Marick to liability for the deficient work performed by Upstate. Marick has admitted no fault in this action; thus, if a jury determines that Marick has no fault associated with the deficient work performed by Upstate, Marick should be entitled to indemnity. 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 deficient work.

Thus, Marick respectfully requests that the Court hold that in a construction setting, a general contractor that oversees the project has a special relationship with all subcontractors for which it is required to oversee and direct.

CONCLUSION

For the reasons stated herein, the lower court's order should be reversed.



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ATTORNEYS FOR APPELLANTS

MARICK HOME BUILDERS, LLC AND RICK
THEONNES

February 19, 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

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.

DMK 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., Enfacio 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, and Miller/Player & Associates, Defendants,

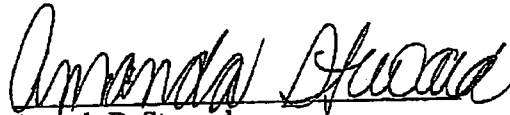
Of Whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And

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

PROOF OF SERVICE

I certify that I have served the Designation of Matter to be included in the Record of Appeal and Initial Brief of Appellants Marick Homes Builders, LLC and Rick Thoennes by depositing a copy of it in the United States Mail, First Class postage prepaid, on February 19, 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.).



Amanda D. Steward
Paralegal to Jason M. Imhoff

February 19, 2013

RESPONDENTS' COUNSEL OF RECORD:

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Attorney for Respondent Upstate Utilities, Inc.

EXHIBIT C

1	State of South Carolina	)	In the Court of Common Pleas
2	County of Oconee	)	Case No: 2009-CP-37-00652
3		)	
4		)	
5	Stoneledge at Lake Keowee Owners'	)	
	Assn, Inc., C. Dan Carson,	)	
6	Jeffrey J. Dauler, Joan W.	)	
	Davenport, Michael Furnari, Donna	)	
7	Furnari, Jessie B. Grasso, Nancy	)	
	E. Grasso, Robert P. Hayes, Lucy	)	
8	H. Hayes, Ty Hix, Jennifer D.	)	
	Hix, Paul W. Hund, III, Ruth E.	)	
9	Isaac, Michael D. Plourde, Mary	)	
	Lou Plourde, Carol C. Pope,	)	
10	Steven B. Taylor, Bette J.	)	
	Taylor, and Robert White,	)	
11	Individually and on behalf of all	)	Transcript of Record
	others similarly situated,	)	
12		)	
	Plaintiffs,	)	
13		)	
14	-vs-	)	
	INK Development Co., LLC, Keowee	)	
15	Townhouses, LLC, Ludwig	)	Motions Hearing before the Honorable
	Corporation, LLC, SDI Funding,	)	Alexander S. Macaulay
16	LLC, Medallion at Keowee, LLC,	)	September 5, 2012
	Bradford D. Seckinger, John	)	Walhalla, SC
17	Ludwig, Larry D. Lollis, William	)	
	C. Cox, Integrays Keowee	)	
18	Development, LLC, Marick Home	)	
	Builders, LLC, M Group	)	
19	Construction and Development,	)	
	LLC, Bostic Brothers	)	
20	Construction, Inc., Rick	)	
	Thoennes, Mel Morris, Joe Bostic,	)	
21	Jeff Bostic, Clear View	)	
	Construction, LLC, Michael Franz,	)	
22	MHC Contractors, Miguel Porras	)	
	Chonocoas, Builders First Source	)	
23	Southeast Group, Mike Green,	)	
	Southern Concrete Specialties,	)	Reported by:
24	Carl Compton d/b/a Compton	)	
	Enterprise a/k/a Compton	)	
25	Enterprises, Gunter Heating &	)	Robin Sue Hild, FCRR, RPR
	Air, All Pro Heating, A/C &	)	10th Circuit Court Reporter

 **COPY**

1	Refrigeration, LLC, Coleman	)
	Waterproofing, Heyward Electrical	)
2	Services, Inc., Tinsley	)
	Electrical, LLC, Hutch N Son	)
3	Construction, Inc., Carl Catoe	)
	Construction, Inc., T.G.	)
4	Construction, LLC, Delfino	)
	Construction, Francisco Javier	)
5	Zarate d/b/a Zarate Construction,	)
	Alejandro Avalos Cruz, Herberto	)
6	Acros Hernandez, Martin	)
	Hernandez-Aviles, Francisco	)
7	Javier Zarate d/b/a Zarate	)
	Construction, Alejandro Avalos	)
8	Cruz, Herberto Acros Hernandez,	)
	Martin Hernandez-Aviles,	)
9	Francisco Villalobos Lopez,	)
	Ambrosio Martinex-Ramirez, Ester	)
10	Moran Mentado, Socorro Castillo	)
	Montel, Upstate Utilities, Inc.,	)
11	Southern Basements, Inc., MJG	)
	Construction and Homebuilders,	)
12	Inc., d/b/a MJG Construction,	)
	KMAC, Inc., d/bb/a KMAC North	)
13	Carolina, Eufacio Garcia, Everado	)
	Jaramillo, Garcia Parra	)
14	Insulation, Inc., J&J	)
	Construction, Jose Nino, Jose	)
15	Manuel Garcia, Eason	)
	Construction, Inc., and Vincent	)
16	Morales d/b/a Morales Masonry,	)
	Miller/Player & Associates,	)
17		)
	— Defendants.	)
18		)
		)
19		)
		)
20		)
		)
21		)
		)
22		)
		)
23		)
		)
24		)
25		)

A P P E A R A N C E S

1	Robert T. Lyles, Esq. For the Plaintiffs	David Yokel, Esq. For KMAC
2		
3	Jason Imhoff, Esq./Reed Teague, Esq. For Marick Home Builders	Alan Belcher, Esq. For Bostic Construction
4		Curt Martin, Esq. For Jose Nino
5	Anne Culbreath, Esq. For Vincente Morales d/b/a Morales Masonry	Drew Williams, Esq. For Martin Hernandez-Aviles
6		
7	Grayson Smith, Esq./Shelley Montague For Hutch N Son Construction	John Harjehausen, Esq. For Heyward Electrical
8	Lindsay Terrell, Esq. For T.G. Construction	Charles Blackburn, Esq. For Tinsley Electric
9		Andrew Carson, Esq. For Alejandro Cruz
10	Greg Horton, Esq./Batten Farrar, Esq. Duffie Powers, Esq./Ron Tate, Esq. For Carl Catoe Construction	
11		Erin Culbertson, Esq. Medallion & Keowee/Seckinger
12	Lawrence B. Orr, Esq. For Miller/Player & Assoc.	
13	Mason A. Goldsmith/Jay Anthony, Esqs. For Southern Concrete Specialties	Ed Buckley, Esq. For Everado Jaramillo
14		Frank Mack, Esq. For SDI Funding
15	Cynthia B. Brown, Esq. For IMK, IK, Bill Cox, and Larry Lollis	
16		
17	Melissa M. Nichols, Esq. For Clear View Construction/Franz	Alan Belcher, Esq. For Bostic Brothers Construction
18	David Root For Mike Green and Builders	
19	FirstSource Southeast Group	Chad E. Poteat, Esq. For Eason Construction
20	Cynthia Buck Brown For IMK Development Co., et al.	Geoff Gibbon, Esq. For Socorro Castillo Montel
21		
22	Eric W. Rowell For Herberto Acros Hernandez	S. Markey Stubbs, Esq. For Upstate Utilities
23	D. Andrew Williams For Martin Hernandez-Aviles	Jason F. Ward For Ester Mentado
24		
25	Roy Hemphill, Esq. For M Group	Jared Garraux For Ludwig Corporation

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MOTIONS TO DISMISS/MOTIONS FOR SUMMARY JUDGEMENT

1 **MR. STUBBS:** Yes, Your Honor. I'm Markey Stubbs.
2
3 I represent Upstate Utilities. You have numerous motions
4 to dismiss and for summary judgment before you this
5 morning. However, mine -- and with me is Hutch N Sons has
6 joined in my motion. In this case we're a little bit
7 different because we settled with the plaintiff at
8 mediation. We settled with the plaintiff, and after
9 mediation we settled with Medallion. It was filed. It
10 probably hasn't reached your file yet, the agreement and
11 release -- which I circulated by e-mail to everyone --
12 Robert has not had his client yet, but he was agreed to it
13 and they're going to sign it and we're doing that
14 stipulation of dismissal.

15 With respect to the Medallion claims I have the
16 dismissal both as to Hutch N Son and as to Upstate
17 Utilities which has also been forwarded to the Court for
18 filing.

19 So we come in a little bit different situation than
20 most. The only claims against us are claims by Marick who
21 is the general contractor. We were hired by oral contract
22 with Hutch N Sons. We were not hired by Marick. Hutch N
23 Son was hired by contract by Marick. We performed sewer
24 grading, backfill, that type of work only on Phase II. We
25 settled at mediation, we settled with the person who owns

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1 some of the other buildings, which was Medallion. Despite
2 our settlement, we still find ourselves in this litigation.

3 We filed a motion for summary judgment which is
4 dated 6/1/12 on its file date. And I reference that motion
5 at page 4, Marick answers to the third amended complaint,
6 and what they've alleged is basically a claim for equitable
7 indemnity, paragraph 158. They have alleged breach of
8 contract, not against us, not alleged against Upstate but
9 Hutch N Son and others, paragraph 160, breach of warranty
10 at 172.

11 With respect to each of these claims the damages
12 they seek are simply the damages they are exposed to in
13 this litigation, indemnity damages, which is at paragraphs
14 158, 162, 167, and 174. Marick is not the owner or in
15 possession of any of the buildings that is the subject
16 matter of this litigation. Therefore, despite the fact
17 they call it negligent warranty or contract, these are, in
18 fact, the indemnity claims.

19 Indemnity is that form of compensation in which
20 party liable to pay second for loss of damages the second
21 party incurs to a third. And I have cited Vermeer
22 Carolinas, versus Woodchuck in my brief. Your Honor, the
23 allegations contained in the Complaint determined by the
24 nature of the issues and remedies which are sought. I've
25 cited State versus Yelsen (phonetic), Seebaldt versus First

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1 Federal, Walsh versus Evans.

2 The courts use the allegations of the Complaint to
3 determine the actual true nature of the claims. And I've
4 included two circuit court orders and attached them to my
5 memorandum which find that these are just misnamed claims.
6 In other words, negligence may be the basis of it, breach
7 of contract or warranty may be the basis of it, but they
8 are indemnity claims, there is no separate individual
9 damages sought. As the Federal Court in CNB (phonetic)
10 versus Stone (phonetic) stated, nothing more than claim
11 from indemnification from the slight change in the wording.
12 A rose under any other name is still a rose.

13 So what our argument is, is that these are all
14 equitable indemnity claims and as such should be collapsed
15 into one claim which is equitable indemnity.

16 We then addressed the issue of equitable indemnity.
17 We filed separate briefs with respect to liability on
18 equitable indemnity on 8/21/12. Now, the arguments that we
19 have set forth are multiple. The first on is, having paid
20 the plaintiff, we have relieved any liability that Marick
21 may be due for our wrongdoing. The plaintiff has released
22 us and Marick may use that as a shield. Marick may hold it
23 up and say they did it. They are now being sued only for
24 their own acts. If they did not do anything wrong, they
25 cannot be sued. If they did do something wrong, if a jury

1 finds them liable, they are jointly negligent. If they are
2 jointly negligent, there is no right to equitable
3 indemnity. Once again, there is no contractual indemnity
4 alleged or involved in this claim.

5 The affidavit that we filed of Rhett Whitlock
6 actually goes through -- and I'm going to pass up the three
7 affidavits I filed with different briefs that are important
8 in this matter -- that set forth the deficiencies and
9 wrongful conduct of Marick that was negligent. As a joint
10 tort-feasor they cannot recover.

11 So in addition to the fact that we had paid and
12 therefore they cannot recover, they are joint tort-feasors
13 and they cannot recover. In addition, under Rock Hill, you
14 have to have a special relationship to recover under
15 equitable indemnity. In Rock Hill they found that when a
16 contractor hired a person who didn't hire the person, it is
17 too attenuated. That is what I have with respect to my
18 client. I was not hired by Marick. I am not a --
19 subcontractor of Marick's. Marick can stand and fall on
20 its own claim.

21 To the extent that it is entitled, it can get --
22 set-off the money I have paid. In addition, in those
23 claims where reapportionment is found to be appropriate,
24 the rule allows for it to get its apportion's share of
25 set-off under 15-38-15(e).

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1 So there's no reason for us to go through this
2 litigation. It's simply an ability to bar parties from
3 reaching a settlement. I would acknowledge that if there
4 was a contractual indemnity claim, it would be different,
5 but no such claim can be asserted or can be asserted or
6 exists.

7 Thank you.

8 THE COURT: Very good.

9 MR. IMHOFF: Your Honor, again, logistics. I have
10 Shelly Montague, who represents Hutch N Son who --

11 I'm Jason Imhoff again. I apologize.

12 THE COURT: Please. Thank you.

13 MR. IMHOFF: I'd think that everyone did know me.

14 THE COURT: The only thing is we just need the
15 record to reflect who is speaking.

16 MR. IMHOFF: I think I'm going to stand up on every
17 single motion, so I may be well known by the end of the
18 day.

19 But again, on a logistical issue, I have received
20 many motions for summary judgment against my client on my
21 cross claims including Shelly Montague who represents Hutch
22 N Son who would be Marick's direct contractor who they
23 hired.

24 In addition to the motions against me, I have also
25 filed motions for summary judgment on the equitable

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1 indemnity claims against them based on their testimony in
2 the case. I don't know whether you want to hear those at
3 the same time or whether you want to hear them separately,
4 if you want me to address each motion for summary judgment
5 against Marick individually or in some type of a general
6 response? I suppose ---

7 THE COURT: Well, I think each motion will stand on
8 its own really, so I think the better way to do it would be
9 to, as one is heard, then the response be at the same time.

10 MR. IMHOFF: Your Honor, to start with --

11 THE COURT: Now, when they're joint motions, of
12 course, all parties would be...

13 MR. IMHOFF: I have prepared a brief which I have,
14 which I would be more than happy to supplement if the Court
15 requires that to consider these motions. But to begin with
16 let me address the settlement of Hutch N Son and Upstate
17 Utilities.

18 Mr. Stubbs made a statement that I am completely
19 protected from that issue by that settlement and that, in
20 fact, is not true. There were discussions about that
21 settlement and whether or not a release would preclude the
22 allegations and arguments by plaintiff at trial and the
23 fact is that that release does not; that the work of Hutch
24 N Son's and Upstate Utilities is still alleged to be
25 defective and deficient and continues to be an issue in

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1 this case, which my client, Marick, has had to defend and
2 continues to engage in discovery and the litigation and
3 will have to do through trial.

4 So while I will certainly make an argument to you
5 and this Court at trial that I get a set-off or argue to
6 the jury that the culprits for this have already paid the
7 plaintiffs and the issue should no longer be considered,
8 that is not fact, that is an argument, and the Court hasn't
9 ruled and certainly the jury has not given a verdict on
10 that.

11 So as to that settlement I would agree that they
12 have consented to settle or have settled with the
13 plaintiff, but I am continuing on behalf of my client to
14 defend those exact allegations. And the allegations in
15 this case are that Hutch N Sons and Upstate moved the grade
16 onto the side of the buildings too high and above the
17 waterproofing. Mr. Goldsmith's client is the waterproofing
18 subcontractor and he has done a very good job at showing
19 that the grade is above the waterproofing and it's not his
20 client's fault, it's the grader's fault. -- Again, this is an
21 issue that I am having to defend and am continuing to incur
22 expert fees, costs, and litigation defenses, which are all
23 recoverable under an equitable indemnity cause of action.
24 I think there's plenty of case law on that.

25 In regard to the substantive issues in this case,

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1 Upstate and Hutch N Sons and frankly all of the
2 subcontractors that are sitting behind me are going to make
3 two arguments to the Court. The first is, either there is
4 no special relationship if they're not Marick's direct
5 subcontractors, or if there is a special relationship
6 Marick has unclean hands and, therefore, as a joint
7 tort-feasor, cannot recover for equitable indemnity.

8 We'd speak to the second issue first. In regard to
9 the unclean hands argument, I think that there is very
10 little question that that is an issue of fact for the jury.
11 The reason that I say that is based on the Fields
12 (phonetic) case which I have highlighted in my brief, which
13 says that a general contractor is not automatically liable
14 for the work of the subcontractors, even if it's defective.
15 And there is an additional steps when it comes to a general
16 contractor, and you have to prove that the general
17 contractor failed in its duty to supervise and oversee the
18 subcontractors.

19 So the obligations per our courts is -- on a
20 general contractor is to supervise and oversee. There is
21 plenty of evidence in this case, which I have put in my
22 brief that Marick was on site, they had a daily
23 superintendent on site, they had a survey company to go out
24 and shoot levels and direct the placements of the grading.
25 There was an architect involved, the architect was involved

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1 not only in drawing the plans but was actually on site. My
2 client was overseeing and coordinating this. And there is
3 more than a scintilla of evidence upon which a jury could
4 find that my client, the general contractor, in fact, did
5 perform its supervisory duties. So as to the unclean hands
6 argument, the joint tort-feasor argument, which you will
7 hear twenty times today, I think, Your Honor, I think there
8 is a factual issue. And I will try to relate them to each
9 one of the subcontractors that is bringing the motion.

10 But, as you can imagine, with all of the pleadings
11 and all of the motions and all of the depositions that have
12 taken place and the written discovery, there is certainly a
13 scintilla of evidence which would support our position that
14 my client, Marick, did perform its supervisory duties, and
15 you will hear that the rest of the day.

16 As to the second, the lack of a special
17 relationship, you will hear this again a good bit today.
18 There are six or seven subcontractors, I think, that Marick
19 hired directly. Those subcontractors, Your Honor, went out
20 and hired their own subcontractors who hired subcontractors
21 who may have hired more subcontractors.

22 You heard over in the corner here earlier
23 Mr. Terrell state that he is one of fifteen Builders First
24 Source subcontractors. You can imagine how many
25 subcontractors there are.

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1 In regard to special relationship and the equitable
2 indemnity, it's an equitable cause of action, which I
3 believe, Your Honor, means that you as the Court and the
4 Judge of this case has greater discretion to find justice
5 with an equitable cause of action. The case that all of
6 the subcontractors site to state that a subcontractor's
7 subcontractor doesn't have a special relationship with a
8 utility, I don't think it's applicable in this case.

9 The allegations against Marick are that Marick did
10 not supervise all of the subcontractors. This is the
11 allegation made by plaintiff and made by the subcontractors
12 in their motion.

13 What ultimately could result if Marick, the general
14 contractor, is not allowed to sue under an equitable
15 indemnity cause of action its subcontractor's
16 subcontractors is that the subcontractors' work will cause
17 Marick to be liable; in other words, their poor work will
18 cause Marick to be liable because we didn't catch them
19 doing their work or see them doing their work.

20 Yet Marick wouldn't be able to have any remedy
21 against those subcontractors. And I don't think that's
22 what our Court meant to happen when it decided the utility
23 versus subcontractors' relationship in the case cited by
24 all of these other attorneys. What I think they were
25 trying to say and what I think will be resolved at some

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1 point is that that was a different situation than what
2 happens on a building job site.

3 On a building job site our Court has determined
4 that the general contractor is required to supervise. If
5 the general contractor is required to supervise, it has to
6 supervise everyone out there, whether they directly
7 contracted with those subcontractors or not.

8 I don't believe that our Court would allow a
9 one-way street where the subcontractor could perform bad
10 work or which the general contractor is liable and give the
11 general contractor no recourse back against that
12 subcontractor which it has an obligation to supervise.

13 So my position on that is I believe the Court would
14 find, ultimately our appellate courts will find, that there
15 is a special relationship on a building site between a
16 general contractor and its subcontractors' subcontractors.

17 THE COURT: You're saying that at this point that
18 issue hasn't been resolved or decided?

19 MR. IMHOFF: No, not -- that's correct, Your Honor.
20 I believe that the cases cited -- I don't believe, I know.
21 The case that is cited is a utility company and a
22 subcontractors' subcontractor. I think that is different
23 from this situation where we are on site every day and have
24 a legal requirement to supervise the subcontractors. -- And
25 again, I believe because it's an equitable cause of action

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1 it gives you wide latitude in deciding what is fair and
2 just. And I would say if I'm going to be liable for your
3 work, because I had to oversee you, then I should have an
4 equitable cause of action against you.

5 So to sum up, and I'm going to do it all day long,
6 I believe there's a factual issue as to whether or not I
7 have unclean hands or I'm a joint tort-feasor, and I think
8 that in fairness there is a special relationship for
9 anybody I'm obligated to oversee.

10 Thank you, Your Honor.

11 THE COURT: Well, let's see now. Do you represent
12 Hutch N Son?

13 MS. MONTAGIE: Yes, Your Honor. Shelley Montague.
14 I represent Hutch N Son Construction. We also have a
15 motion for summary judgment. It goes together with Upstate
16 Utilities because Upstate Utilities was our subcontractor
17 for part of the work that we were hired by Marick to do,
18 which included the backfill against the units. Just like
19 with Upstate Utilities, we have settled with the
20 plaintiffs, we have settled with Medallion, so the only
21 claim left against us is Marick's cross claim against us.

22 And just as Mr. Stubbs argues, we believe even
23 though they are separated into different names in the
24 complaint --- I'm sorry, the cross claim, it's all equitable
25 indemnity. Now, Mr. Imhoff made part of this argument easy

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1 for me in that he is saying a general contractor has the
2 duty to supervise and the duty inspect the work of the
3 subs.

4 Now, with them having that duty, Upstate Utilities
5 and Hutch N Son are in a much better position to make this
6 argument, I think, than other people. The only allegation
7 that's been supported by expert testimony that at all
8 relates to our work is the height of the grade against the
9 unit. We don't agree that we put the grade that high, but
10 we can put that aside now because that's not even the
11 issue. The issue is whether or not Marick is entitled to
12 recover under equitable indemnity, which means he has to be
13 free of fault. That's also something we're all going to
14 agree on. He has to have clean hands.

15 Now, Mr. Imhoff made the comment that Mr. Goldsmith
16 has done a good job of proving that the grade is too high.
17 Mr. Goldsmith is an excellent attorney, but this isn't a
18 hard thing to prove. Anybody in this courtroom can walk up
19 there right now and see where the grade is. It's open,
20 it's obvious, everybody sees it, nonetheless, a general--
21 contractor. If it is found to be that the grade is too
22 high against the units and if it is found to be that
23 condition has caused property damage, there is no question
24 of fact that there is at least some fault as to Marick.
25 They had the duty to supervise, they had the duty to

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1 inspect. If it was wrong, they should have done something
2 about it. They could see it, it was open and obvious.

3 So regardless of what he may feel like he still has
4 to argue at trial with us out of it, regardless of whatever
5 fault my client may have, he is not free of fault if that
6 condition is found to be wrong.

7 THE COURT: All right. Anyone else?

8 MR. STUBBS: Markey Stubbs, Your Honor, and --

9 THE COURT: All right. Anyone else in favor of the
10 motion for summary judgment?

11 MS. MONTAGUE: That's just us, yes, sir.

12 THE COURT: Just the two of you, okay.

13 MR. STUBBS: Your Honor, I wanted to clarify the
14 misstated statements of my statements. The obligation for
15 him to defend against for his own negligence still exists.
16 But the plaintiff having dismissed us gives him a shield
17 with respect to ours. If he has failed to do something, he
18 is the general contractor. He still has to defend for
19 that. The affidavits -- and we do have to file affidavits.
20 He referenced a brief. I never got a brief.

21 When did this brief go out.

22 MR. IMHOFF: Last night.

23 MR. STUBBS: I never got a brief. There was no
24 affidavits filed. I have filed the affidavit of Donny
25 White. The affidavit of -- Donny White is my contractor

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1 and he testified that they left it at an appropriate height
2 below grade. Someone like a landscaper and the person who
3 put in the drains -- who I don't know who that is, it
4 wasn't us -- came in after us and they raised it. That has
5 not disputed by anyone in this case. There's no evidence
6 that we did it, other than the allegation that the grade is
7 higher. But we have pointed out it was not us.

8 The affidavits of Glenn Stewart (phonetic), an
9 expert, and Rhett Whitlock have been filed with the Court,
10 both of which reflect that we did not do that work, that
11 that would have been a landscaper or a drain person, both
12 of which point out the deficiencies in the very supervision
13 that Mr. Imhoff spoke of regarding defect of his client.

14 Today was the motions for summary judgment. The
15 date to file affidavits in opposition was today. There is
16 nothing in opposition to any of our affidavits. So while I
17 believe we are dismissed, number one, because we have paid
18 and there is no right existing, and I believe he has agreed
19 that all his claims are truly equitable indemnity, however
20 titled, since he didn't argue against it.

21 The bottom line is even if we get to the next
22 stage, we are the only ones who have presented admissible
23 evidence by affidavit which has not been refuted today at
24 this hearing. We have already paid the plaintiffs, we've
25 paid the people who have been injured. This is merely an

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1 attempt to hold us captive in this litigation. Thank you.

2 THE COURT: All right. Anyone else?

3 (WHEREUPON there was no response.)

4 THE COURT: All right. As I understand the motion
5 for summary judgment is on the cross claim; is that
6 correct?

7 MS. MONTAGUE: Yes, Your Honor.

8 THE COURT: And that's the only thing that that
9 motion addresses.

10 And the -- Yes, Mr. Imhoff?

11 MR. IMHOFF: Your Honor, did you want to hear from
12 me again?

13 THE COURT: Well, yes, sir. I just want to make
14 sure that I understood what your position is.

15 MR. IMHOFF: I want to make sure some of the
16 evidence that is out there and it is not in the form of
17 affidavits, it's testimony, photographs, and that type of
18 thing.—As to whether we supervised and saw it was open and
19 obvious and that type of thing, I think an explanation of
20 how it happened might be necessary.

21 What they did is they went out there and they took
22 the grade and they rough graded it and then they cut in for
23 the foundation, so you have this ten-foot deep hole or
24 whatever it is. The concrete is poured for walls and then
25 the waterproofer or the general contractor comes out and

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1 sprays a line on the wall where it needs, where the
2 waterproofing needs to be and where the grade needs to go.

3 So as soon as the grade has pushed back on to that
4 line, you can't see it anymore, it's not open and obvious
5 anymore. The photographs show that it's red fill dirt
6 that's been pushed up back against there versus black fill
7 dirt which might be a landscaper or might be decayed mulch.

8 There is certainly a scintilla of evidence that the
9 general contractor, Marick, performed its duty by hiring a
10 surveying company to shoot these levels and make sure the
11 grade was and showing the subcontractors how they were
12 performing their job. I think that there are only a few
13 places out there where it is actually on the stone and that
14 potentially could have happened long since Marick has left.
15 So there is certainly a question of fact as to whether or
16 not it was open and obvious.

17 MS. MONTAGUE: Quickly, Your Honor. Shelley
18 Montague for Hutch N Son. Mr. Imhoff is a great lawyer. I
19 wish he wouldn't be so great a witness because I'm not sure
20 I agree completely with what he said. Where the dirt is
21 above the line of the waterproofing is not the top of the
22 wall necessarily, so if it goes to the top of the wall,
23 that's open and obvious and the places where it's above the
24 stone that's open and obvious. We can forget about arguing
25 about where the waterproofing line on the concrete wall is.

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1 The experts have opined that there are places where it
2 comes up several inches above, there's a stone veneer
3 clouding on it and it comes up above that. That is open
4 and obvious to a general contractor.

5 MR. STUBBS: And, Your Honor, I apologize, but just
6 briefly. There is not one bit of testimony, one affidavit
7 or one document presented to the Court that our defendant
8 did this. It is all that they don't know, it could be the
9 landscaper or however they presented evidence it was the
10 landscaper. Nothing has been done to refute that.

11 THE COURT: All right. This -- anything else?
12 (WHEREUPON there was no response.)

13 THE COURT: All right. The issue on the cross
14 claim of course is equitable indemnity; is that correct?

15 MR. IMHOFF: On this one, yes, Your Honor.

16 THE COURT: And of course what is it -- being
17 equity, the principles of equity apply, and one is that to
18 be without fault. And apparently from the argument today
19 that you do recognize that the general contractor has a
20 supervisory responsibility, and that's not only for what it
21 did know, but also what it should have known. And
22 apparently before anything was obscured or no longer above
23 ground, apparently, as it's been argued today, there's
24 no -- or taking the argument in the light most favorable to
25 the general contractor, it was doing its job, and

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1 therefore, it should not be found liable. But if it was
2 doing its job, it would have discovered the defect, I guess
3 would be the -- or defective workmanship.

4 All right. I find that under the concept of
5 equitable relief that the equitable indemnity would be
6 denied and the motion for summary judgment granted.

7 Who is going to do it, Mr. Stubbs or Ms. Montague?

8 MS. MONTAGUE: We'll fight over it.

9 THE COURT: Okay. So is that your cross claim? Is
10 there only one cross claim?

11 MR. IMHOFF: No, Your Honor. We're going to have a
12 lot of those.

13 THE COURT: Okay. All right. Does that let y'all
14 out of this?

15 MS. MONTAGUE: I assume that means your motions
16 against us are moot?

17 MR. IMHOFF: Yes.

18 MR. STUBBS: Your Honor, if I could have two
19 minutes I can resolve this just in private.

20 THE COURT: I was going to say, let's take a break
21 and then be back.

22 MS. MONTAGUE: Thank you, Your Honor.

23 THE COURT: Let's say a quarter till twelve.

24 (WHEREUPON a recess was observed.)

25 THE COURT: All right. I think somebody came in

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1 after we had the sign-up? .

2 (WHEREUPON there was an off-the-record discussion.)

3 MR. STUBBS: Just briefly, there is another motion
4 involving a default. With the Court's permission, we're
5 going to postpone that because it will be moot now.

6 THE COURT: Okay. Which one is that now?

7 MR. STUBBS: It's the motion to set aside entry of
8 default as to --

9 MR. IMHOFF: -- Frederick Thomas.

10 MR. STUBBS: -- Mr. Thomas.

11 THE COURT: Do you know where it is by any chance?

12 MR. STUBBS: I don't have that list.

13 THE COURT: But it's a motion to set aside?

14 MR. STUBBS: That would be the default.

15 THE COURT: Fifty-five, you said? All right.

16 MR. IMHOFF: Fifty-five. I think we're on three.

17 MR. STUBBS: Your Honor, I have no further motions.

18 THE COURT: Have you and Ms. Montague decided who
19 will do the order?

20 MR. STUBBS: We'll share. Thank you, Your Honor.

21 (WHEREUPON Ms. Montague and Mr. Stubbs left the
22 courtroom at approximately 11:55 a.m.)

23 * * * * * END OF REQUESTED PORTION OF TRANSCRIPT * * * * *

24

25

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF AIKEN)

) CERTIFICATE OF TRANSCRIPTION

3
4
5
6 I, THE UNDERSIGNED, Brenda J. Sigwald, do hereby
7 certify that I transcribed the proceedings in the captioned
8 case that were reported by Robin Sue Hild, Circuit Court
9 Reporter for the State of South Carolina, in the Court of
10 Common Pleas in and for the State of South Carolina on the
11 5th day of September, 2012.

12 I FURTHER CERTIFY that the foregoing pages,
13 numbered 1 through 23, constitute a true, accurate and
14 partial transcript of said hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal at Aiken County, this 16th day of December, 2012.

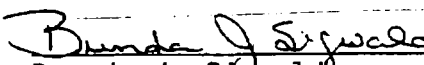
19
20
21 
22 Brenda J. Sigwald,
23 Court Reporter and
24 Notary Public for the
25 State of South Carolina
My commission expires
January 4, 2020

EXHIBIT D

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, Luffy 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 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, 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

2012 SEP 25 PM 1 08

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

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,)
Beverado 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,)

This matter came before the Court on September 5, 2012 by way of Defendants Upstate Utilities, Inc.'s (hereinafter "Upstate Utilities") and Hutch N Son Construction, Inc.'s (hereinafter "HNS") Motions for Summary Judgment as to the cross claims asserted by Marick Home Builders, LLC (hereinafter "Marick").¹ Jason M. Imhoff appeared on behalf of Marick, Markey Stubbs appeared on behalf of Upstate Utilities, and Shelley Montague appeared on behalf of HNS. Counsel for the Defendants Upstate Utilities and HNS moved for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

This litigation involves a dispute regarding the construction of the Stoneledge at Lake Keowee townhomes. The Plaintiffs, which include the unit owners and the home owners association (hereinafter "HOA"), had direct claims against HNS and Upstate Utilities. Both Defendants have settled with the Plaintiffs and those direct claims will be dismissed.²

Marick filed cross claims against Upstate Utilities and HNS alleging equitable indemnity, negligence, and breach of warranties. Marick also alleged a claim against HNS for breach of

¹ The caption of Marick's Answer to Plaintiffs' Third-Amended Complaint and Cross Claims against the subcontractor defendants appears to indicate that the cross claims were being asserted by both Marick and Rick Thoennes. In the body of the cross claims, however, only Marick asserted the claims. Thus, there is not a cross claim by Defendant Rick Thoennes against either Upstate Utilities or HNS.

² Defendants Medallion at Keowee, LLC and Bradford D. Seckinger also cross claimed against HNS and Upstate Utilities. Those claims have been resolved and therefore are not at issue.

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, SORCP. 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 (Cl. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Cl. 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 (Cl. 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

4. (S)

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.

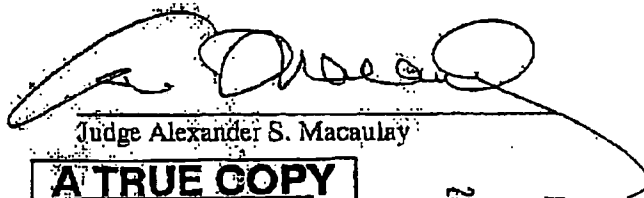
Marick did not submit any affidavits to rebut the Defendants' expert affidavits. Also, at the hearing, counsel for Marick acknowledged that a general contractor has a duty to supervise and inspect the work performed at the construction site.

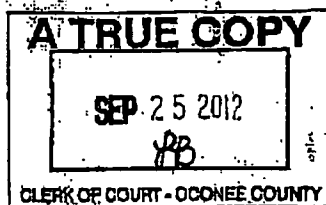
Based on the information presented to the Court and the arguments made by counsel at the hearing, this Court finds that there is no genuine issue of material fact that Marick has at least some fault for the construction defects alleged. Consequently, the Court finds that Marick cannot recover against 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 24, 2012.


Judge Alexander S. Macaulay



FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 SEP 25 PM 1 08

EXHIBIT E

Gwyn, Cathy

From:
Sent:
To:

Amanda Steward <ASteward@wardfirm.com>
Tuesday, September 04, 2012 7:38 PM
Ashley Poulnot; cbrown@hlblegal.com; wlightsey@wyche.com;
fsmith@richardsonplowden.com; jgarraux@richardsonplowden.com;
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mag@elmoregoldsmith.com; janthony@elmoregoldsmith.com;
jwalsh@clarksonwalsh.com; jharjehausen@clarksonwalsh.com; spinkston@hbss.net;
kjones@hbss.net; cblackburn@murphygrantland.com; roates@murphygrantland.com;
smontague@gwblawfirm.com; rtate@gwblawfirm.com; sbuckingham@gwblawfirm.com;
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bfarrar@gwblawfirm.com; Stubbs, Markey; lterrell@clarksonwalsh.com;
csmith@clarksonwalsh.com; phammack@clawsonandstaubes.com;
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erowell@martineauking.com; dwilliams@turnerpadget.com; jshaw@turnerpadget.com;
clewis@tcdg.com; sphughes@hghpa.com; byoung@hghpa.com;
ggibbon@mgclaw.com; tchase@mgclaw.com; dyokel@yokellawfirm.com;
wbouton@wilkinsbouton.com; rwilkins@wilkinsbouton.com; ebuckley@ycrlaw.com;
nriviera@ycrlaw.com; janderson@arlawsc.com; cmartin@arlawsc.com;
bwoods@woodslawsc.com; cep@brownandbrehmer.com;
colson@watsonlawgroup.com; dashley@watsonlawgroup.com;
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rsmith@elmoregoldsmith.com; cparks@clarksonwalsh.com; kerryn@clarksonwalsh.com;
twilliams@hbss.net; bporter@murphygrantland.com; preconnu@murphygrantland.com;
csmith@gwblawfirm.com; murch@gwblawfirm.com; mcampbell@gwblawfirm.com;
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dkuzniar@clawsonandstaubes.com; tdeisn@martineauking.com;
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Mbouchillon@mgclaw.com; byarborough@yokellawfirm.com; mrasnick@ycrlaw.com;
wgeorge@ycrlaw.com; emiltcheva@ycrlaw.com; jdunning@arlawsc.com;
paralegal@woodslawsc.com; Layton@brownandbrehmer.com;
jcanaday@watsonlawgroup.com; mgregory@turnerpadget.com; Robert Lyles; Lisa
Burton

Subject:
Attachments:

Stoneledge
Memo in Support of Marick's MSJ.pdf; Brief in Opposition to Plaintiffs' MSJ.pdf; Brief in
Opposition to Subs MSJ.pdf; Brief in Opposition to Upstate's Applicatin for Entry of
Default.pdf; Letter to COC filing Briefs.pdf

All,

Please find attached Memorandum in Support of Marick's Motion for Summary Judgment, Memorandum in Opposition of Plaintiffs' Motion for Summary Judgment, Memorandum in Opposition to Subcontractors' Motions for Summary Judgment, and Memorandum in Opposition to Upstate Utilities' Application for Entry of Default filed on behalf of Marick. Please let me know if you have any questions or concerns.

I have also copied Ms. Burton on this email.

Thank you,

Amanda Steward
Paralegal to Jason M. Imhoff
(864) 327-3044

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 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-)

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

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, BASON 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. 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), SCRC. 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.

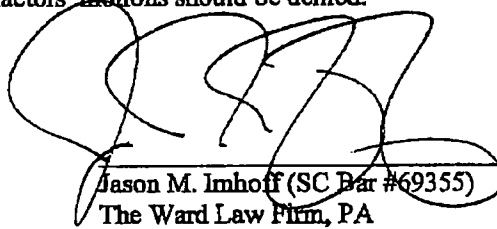
Based upon the above, the breach of contract and contractual indemnity causes of action should not be dismissed as there are issues of material fact to determine the timing and intent of the indemnity contract, which should be left for a jury.

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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September 4th, 2012

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