

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Appellate Case No.: 2012-213237

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Stoneledge At Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bettie J. Taylor, and Robert White, Individually, and on behalf of all others similarly situated, Plaintiffs

v.

IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Miller/Player & Associates, Bradford D. Seckinger, John Ludwig,, William Cox, Larry D. Lollis, Rick Thoennes, M Group Construction and Development, LLC, Mel Morris, Joe Bostic, Jeff Bostic, Clear View Construction, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders FirstSource Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Upstate Utilities, Inc., Southern Basement, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC of the Carolinas, Inc., Eufacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, and Miller/Player & Associates, Defendants,

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

And

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APR 29 2013

**SC COURT OF APPEALS**

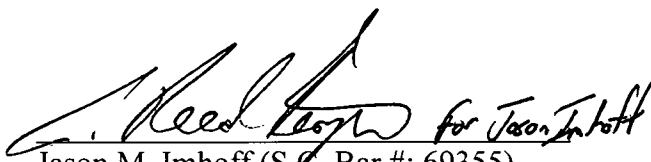
Of Whom Hutch N Son Construction, Inc., and Upstate Utilities, Inc. are the Respondents.

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

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I, Jason M. Imhoff, counsel for Marick Home Builders, LLC and Rick Thoennes hereby move the Court in compliance with Rule 240(e) SCACR for dismissal of Respondents' Motion to Dismiss or in the Alternative Motion to Strike for good faith compliance with Rules 209 and 210 SCACR as set forth in the attached memorandum. Further grounds for this motion are that the motion is frivolous and without merit.



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April 25, 2013

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

And

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

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**MEMORANDUM IN SUPPORT OF RETURN TO UPSTATE UTILITIES, INC.'S  
MOTION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE MOTION  
TO STRIKE**

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Respondent Upstate Utilities, Inc.'s Motion to Dismiss the Appeal or in the alternative, Motion to Strike should be denied because all material included in the Designation of Matter to be included in the Record on Appeal is relevant to and will aid the Appellant Court's proper understanding of the questions involved on appeal. The Appellant Court Rules allow for the inclusion of matters in the Record on Appeal which are relevant and aid the court in establishing a proper understanding of the questions involved on appeal. *Mauro v. Clabaugh*, 299 S.E. 184, 33 S.E. 2d. 244 and SCACR 209, SCACR 210. The materials designated by Appellant to be included in the Record of Appeal meet both criteria and are relevant and necessary for the Appellant Court's understanding of the issues on appeal.

This Appeal arises out of a construction defect lawsuit filed in Oconee County, South Carolina. Plaintiffs in the underlying case brought suit against the general contractor, Marick Home Builders, LLC (hereinafter "Marick") and all of the exterior subcontractors for the project, including Respondents, Hutch N Son Construction, Inc. (hereinafter "HNS") and Upstate Utilities, Inc. (hereinafter "Upstate"). As a result of being sued for the allegedly defective work of all of the exterior subcontractors, 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. On

September 5, 2012, sixty-one (61) motions were scheduled to be heard in the Oconee County Circuit Court, the majority of which were motions for summary judgment filed by Marick's subcontractors on the issues of indemnity, negligence, breach of contract, and breach of warranty. The Court heard arguments regarding Marick's cross-claims for indemnity, negligence, breach of contract, and breach of warranty from 10:00 a.m. until 6:00 p.m. on September 5, 2012. Throughout the day, Marick submitted briefs, transcripts, and arguments to the Judge which were considered cumulatively and were received by and addressed by the Court throughout the day. HNS and Upstate's motion hearing on their Motion for Summary Judgment was but a small portion of the cumulative arguments and material presented to the Court for its analysis of the overall factual, legal, and procedural issues regarding all of the subcontractors' motions for summary judgment, which were legally identical throughout the day.

All of the information submitted to the Court for an understanding of the factual and legal issues presented to the Court on the issues of subcontractor liability to a general contractor in a multi-unit construction defective case should be submitted to the Court pursuant to the standard set forth in *Mauro v. Clabaugh*, 299 S.E. 184, 33 S.E. 2d. 244. In that case, the court specifically requested further information that would aid "proper understanding of the questions involved on appeal and is necessary to our disposition of these questions." *Id* at 246. As stated by the Court of Appeals in *Mauro*, the materials Respondent is attempting to exclude from the Court's consideration are materials that were presented to the lower court and are necessary for a complete understanding of the arguments presented to the Court and the issues on appeal.

Appellants submit that the information presented to the lower court, throughout an entire day of hearings and arguments on the same, are both relevant and necessary for the Appellant Court to understand the issues on appeal. Respondents' position that only the portion of the record on Upstate and HNS's Motion for Summary Judgment should be included in the Record on Appeal is without merit, as the lower court clearly considered arguments on these issues throughout the day; thus, that transcript and evidence should be included in the Record on Appeal.

Respondent's attempt to exclude this information for this Appeal would result in an inefficient use of the judicial system such that identical legal arguments made by numerous parties would need to be repeated and reargued for each motion, despite the lower court's receipt and acknowledgement of numerous legal arguments and its ruling on those legal arguments throughout the course of sixty or more motion hearings concerning essentially the same legal principals. In fact, the lower court heard arguments from counsel for all Defendants with motions for summary judgment and did not take each motion individually. Clearly, at the hearings, the arguments and information were cumulative and carried over from each of the subcontractors' motions.

The Court has continued to schedule and hear the same and similar arguments by numerous subcontractors and, on April 10, 2013, verbally granted/affirmed all but one of the subcontractors' motions for summary judgment based upon the same rulings made as to HNS and Upstate's Motions. As soon as an order is executed by the lower court, those rulings will also be appealed and a motion will be made to consolidate those same rulings of fact and law with this Appeal.

Further, the Respondents argument that Appellant did not submit a brief or deposition testimony to the Judge is false. Respondent admits that a brief was submitted to the lower court and Respondent's counsel via email. It was referred to during the hearings and cited on numerous occasions. That brief, which is identified in the Record on Appeal, included the cited deposition testimony of Randy Still and numerous other deponents. Respondents have not objected to that testimony as incorrectly cited or fraudulent, rather Respondent merely asserts that it simply should not be considered by the Appellate Court. Respondent's argument that neither a brief nor the deposition testimony of Mr. Still was presented to the Court is frivolous, and by Respondent's own admission, said evidence was presented and argued; thus, the Motion should be dismissed.

Finally, Appellant did not stipulate that all causes of action plead collapsed into one cause of action for equitable indemnity, and Respondent cannot accurately cite to the record where that stipulation was made. Instead, Respondent has twisted the record and taken statements out of context.

Respondent argues that the lower court's request for comments and counsel's silence was consent to the stipulation. This is not correct. The lower court was asking for comments from the dozens of members of the gallery of lawyers present that day, not for a stipulation.

Further, the lower court's question about equitable indemnity was not an admission that all causes of action collapse into equitable indemnity, only that there was no breach of contract cause of action with Upstate as it was a subcontractor of HNS, not Marick. Appellant's counsel responded, "On this one, yes, Your Honor", as in, there was

no contractual indemnity claim against Upstate. Therefore, counsel for Marick did not consent to collapsing its claims for breach of warranty and negligence into one action for equitable indemnity, as shown by the appeal of that ruling. Additionally, the Record on Appeal evidences the fact that Marick's counsel argued throughout the day that the causes of action should not collapse into equitable indemnity. Therefore, upon this basis, the Court of Appeals should deny Upstate Utilities' Motion to Dismiss and allow the Appeal to continue with all relevant and necessary information to decide the Appeal.



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ATTORNEYS FOR THE APPELLANTS

April 25, 2013

RESPONDENTS' COUNSEL OF RECORD:

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

And

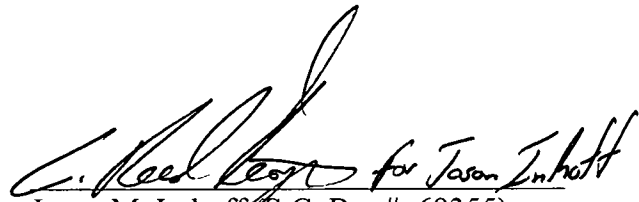
Of Whom Hutch N Son Construction, Inc., and Upstate Utilities, Inc. are the Respondents.

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**PROOF OF SERVICE**

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I certify that I have served the Return to Motion to Dismiss or in the Alternative Motion to Strike by depositing a copy of it in the United States Mail, First Class postage prepaid, on April 25, 2013, addressed to Respondents' attorneys of record, Shelley S. Montague, Esquire, P.O. Box 7368 Columbia, SC 29202 (attorney for Hutch N Son Construction, Inc.), and S. Markey Stubbs, Esquire P.O. Box 8057 Columbia, SC 29202 (attorney for Upstate Utilities, Inc.).



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April 25, 2013

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11639  
Columbia, SC 29211

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

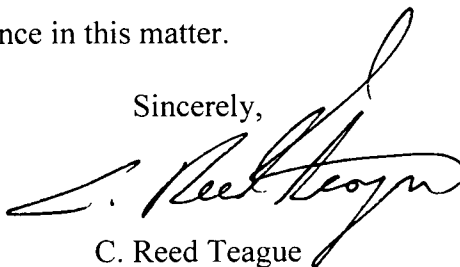
Dear Ms. Kitchings,

Please find enclosed for filing an original and seven (7) copies of a Return to Respondents' Motion to Dismiss or in the Alternative Motion to Strike, Memorandum in Support, and Proof of Service thereof on Respondents' counsel. Please return a stamped copy to me in the enclosed envelope provided. Please also find our firm's check in the amount of \$25.00 to cover the filing fee.

By a copy hereof, I am serving the same upon the Respondents' counsel.

Thank you for your assistance in this matter.

Sincerely,



C. Reed Teague

CRT/ads

Enclosure

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

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APR 29 2013

SC Court of Appeals