

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, Herberito 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,

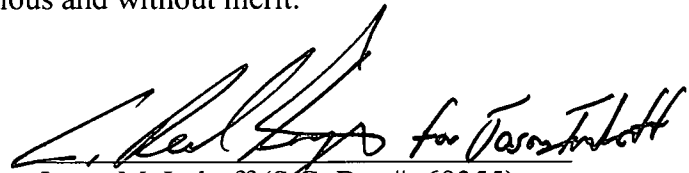
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Of Whom Hutch N Son Construction, Inc., and Upstate Utilities, Inc. are the Respondents.

RETURN TO MOTION TO STRIKE

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 Respondent's Motion to Strike 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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May 2, 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.

**MEMORANDUM IN SUPPORT OF RETURN TO HUTCH N SON
CONSTRUCTION'S MOTION TO STRIKE THE APPEAL**

Respondent Hutch N Son Construction, Inc.'s 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 and the manner in which arguments were conducted. 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 lower 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 lower 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. In fact, the lower court allowed numerous defendants to stand up and join in, without arguing individual motions:

Mr. Martin: Yes, sir. And to the extent that allegation from Marick exists opposing Nino, I would like to adopt the argument put forth by Builders First Source.

The Court: Okay. So you want the cross claim as it relates to equitable indemnification. And your party again?

Mr. Martin: Jose Nino

The Court: That's number 21?

Mr. Martin: Twenty-one, I'm sorry, not 22, Your honor.

The Court: What did Mr. Nino do?

Mr. Martin: Framing for Phase I, sir.

The Court: Very good. All right. So you will be included in whatever the ruling is on equitable indemnification.

Mr. Martin: Thank you, sir.

(Exhibit "A" Hrg.Tr. pg. 91: 1- 6.)

Additionally, despite Respondent's arguments that its motion resolved all causes of action against it, the court clarified itself and explained that it had only been ruling on equitable indemnification issues.

The Court: And his cross claim against you is for equitable indemnification?

Mr. Martin: Yes. Negligence, breach of warranty and indemnification, which I believe - - -

The Court: I'm only addressing right now the equitable indemnification.

(Exhibit "A", Hrg.Tr. pg. 90:4-9.)

Mr. Imhoff: In addition, we have filed a contractual indemnity breach of contract cause of action.

The Court: I'm not addressing that at this point.

(Exhibit "A," Hrg.Tr. pg. 102: 20-22.)

Mr. Imhoff: Your, Honor, are you ruling on all of the cross claims against subcontractors negligence and breach of warranty and breach of contract, contract indemnity, or are you just ruling that - -

The Court: No. Again, the negligence is the thing which I do find it's subsumed by the equitable indemnity. But as far as a contractual obligation on liability, I think, that's going to be something else.

Mr. Imhoff: Just for clarification. So as a rule today as to all my cross claims against subcontractors, you are finding that any pleading of negligence which my client has made against subcontractors- -

The Court: Well, you almost have to have negligence if you're gonna have liability. And that's where the indemnification comes in, that they are negligent, they did something wrong. I say

negligence in the sense they had a duty to do something they didn't do or did it wrong.

Mr. Imhoff: All Right. So the negligence is subsumed, as you say?

The Court: Yes.

Mr. Imhoff: And that's your ruling across the board as to all the subcontractors' cross claims?

The Court: So far - - everything that I've heard so far, yes. I mean, I haven't heard everything. But, I mean, I have to look at each one as it comes.

Mr. Imhoff: I mean, have you made a finding on Marick's breach of workmanlike service warranty claims against my direct subcontractors?

The Court: No. That's contractual.

Mr. Imhoff: On breach of warranty, your honor?

The Court: Yes. I mean, if it's based on the workmanlike covenant that you provide a sound product.

Mr. Imhoff: So you have not made a ruling on that?

The Court: Right.

Mr. Imhoff: All right. So we still have to my direct subcontractors, we have - -

The Court: I think I already said that, haven't I? Whoever was drawing the motions on dismissing of the cross claim based on equitable indemnification, I said it's based on negligence, which is subsumed into the equitable principle. But as far as contractual, that's an entirely different thing. It might be, but I don't know. Okay?

Mr. Imhoff: Thank you.

(Exhibit "A" Hrg.Tr. pg. 127: 3-25, 128:1-22.)

All of the information submitted to the lower court for an understanding of the factual and legal issues presented to the lower court on the issues of subcontractor liability to a general contractor in a multi-unit construction defective case should be submitted to this 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, clarified its rulings, and took arguments cumulatively; thus, that transcript and evidence should be included in the Record on Appeal. Although unusual, the fact is that counsel continued to argue and the Court continued to analyze, clarify, and rule on these issues throughout a full day of motion hearings after Respondent’s counsel chose to leave. All of this information should be submitted to the Appellate Court for its review and understanding of the issues.

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 lower 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 request will be made to consolidate those same rulings of fact and law with this Appeal.

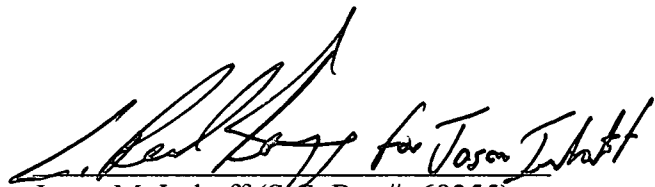
Further, the Respondents argument that Appellant did not submit a brief or deposition testimony to the Judge is false. Respondent admits that a brief was submitted to the lower court and Respondent's counsel via email. It was referred to during the hearings and cited on numerous occasions. That brief, 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 lower court is frivolous, and by Respondent's

own admission, said evidence was presented and argued; thus, this Motion has no merit and 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 HNS's Motion to Strike and allow the Appeal to continue with all relevant and necessary information to decide the Appeal.



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May 2, 2013

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Exhibit A

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 **MR. MARTIN:** Yes, sir. And to the extent that
2 allegation from Marick exists opposing Nino, I would like
3 to adopt the argument put forth by Builders First Source.

4 **THE COURT:** Okay. So you want the cross claim as
5 it relates to equitable indemnification. And your party
6 again?

7 **MR. MARTIN:** Jose Nino.

8 **THE COURT:** That's number 21?

9 **MR. MARTIN:** Twenty-one, I'm sorry, not 22, Your
10 Honor.

11 **THE COURT:** What did Mr. Nino do?

12 **MR. MARTIN:** Framing for Phase I, sir.

13 **THE COURT:** Very good. All right. So you will be
14 included in whatever the ruling is on equitable
15 indemnification.

16 **MR. MARTIN:** Thank you, sir.

17 **THE COURT:** All right. Wait a minute. We have
18 someone else.

19 **MR. YOKEL:** Thank you, sir. Your Honor, In that
20 regard -- I'm with KMAC, David Yokel.

21 **MR. IMHOFF:** Your Honor, before that, Phase I
22 arguments are completely different from Phase II.

23 **THE COURT:** Well, I just denied bifurcation, so I
24 mean --

25 **MR. IMHOFF:** The arguments -- just like setting

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 installation instructions, showing the on-site supervisor
2 how they are going to put the waterproofing in, how it is
3 in compliance with manufacturer's installation
4 instructions, and he comes out and looks at them repeatedly
5 and asks questions and inspects, and then you go out with
6 Randy Still and all of the other experts in this case and
7 you find that, in fact, it was not done that way, and
8 that's a fact.

9 The waterproofing that Mr. Carlin (phonetic)
10 testified was done in a certain manner on these decks was
11 not done in the three or four decks we cut up to look into
12 the way he said it was going to be done and the way we
13 inspected and supervised it and expected it to be done.
14 And that's why I have saved Southern Concrete because I
15 think they are a perfect example of what a jury could hear
16 and what a jury could decide that Marick did everything it
17 could other than literally sit on their workers' shoulders
18 to watch them. And that's the testimony as to Southern
19 Concrete.

20 In addition, we have filed a contractual indemnity
21 breach of contract cause of action.

22 **THE COURT:** I'm not addressing that at this point.

23 **MR. IMHOFF:** But that is as clear of the
24 questioning and evidence that I can think of. There's
25 deposition testimony from Randy Still that we have then

Stoneledge, etc., v. IMK, etc. -- September 5, 2012

1 **THE COURT:** Please.

2 All right. Next?

3 **MR. IMHOFF:** Your Honor, are you ruling on all of
4 the cross claims against subcontractors negligence and
5 breach of warranty and breach of contract, contract
6 indemnity, or are you just ruling that ---

7 **THE COURT:** No. Again, the negligence is the thing
8 which I do find it's subsumed by the equitable indemnity.
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15 **THE COURT:** Well, you almost have to have
16 negligence if you're gonna have liability. And that's
17 where the indemnification comes in, that they are
18 negligent, they did something wrong. I say negligence in
19 the sense they had a duty to do something they didn't do or
20 did it wrong.

21 **MR. IMHOFF:** All right. So the negligence is
22 subsumed, as you say?

23 **THE COURT:** Yes.

24 **MR. IMHOFF:** And that's your ruling across the
25 board as to all the subcontractors' cross claims?

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2 far, yes. I mean, I haven't heard everything. But, I
3 mean, I have to look at each one as it comes.

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9 THE COURT: Yes. I mean, if it's based on the
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11 product.

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19 on negligence, which is subsumed into the equitable
20 principle. But as far as contractual, that's an entirely
21 different thing. It might be, but I don't know. Okay?

22 MR. IMHOFF: Thank you.

23 THE COURT: Next?

24 (WHEREUPON there was discussion off the record.)

25 MR. ORR: Lawrence Orr representing Miller/Player &

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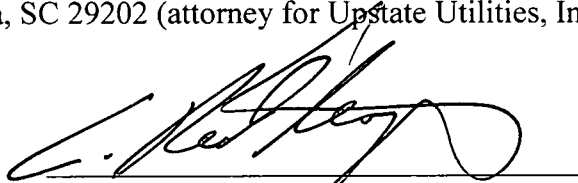
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PROOF OF SERVICE

I certify that I have served the Return to Motion to Strike by depositing a copy of it in the United States Mail, First Class postage prepaid, on May 2, 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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