

THE STATE OF SOUTH CAROLINA
In The SC Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2017-CP-10-05245
Case No. 2017-CP-10-05246
Appellate Case No. 2022-001187

Gary Keisler, individually and as Class Representative,
John Does (1-50) and Jane Does (1-50), Plaintiff,

v.

(See ensuing pages for continued caption)

APPELLANTS' REPLY BRIEF

Brian C. Duffy (SC I.D. No. 16247)
Blake A. McKie (SC I.D. No. 80198)
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
bduffy@duffyandyoung.com
bmckie@duffyandyoung.com
(843) 720-2044

and

Thomas C. Hildebrand, Jr. (SC I.D. No. 2501)
William Greyson Land (SC I.D. No. 104179)
PARKER POE ADAMS & BERSTEIN, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
tomhildebrand@parkerpoe.com
greysonland@parkerpoe.com
(843) 727-2650
Attorneys for Appellants

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., Wheelock Street Real Estate Land Fund, LP, Wheelock Street Investment Management, LLC, RP Falcon Properties, LLC, Residential Partners, LLC, Middlesex Holdings, LLC, WS JWH, LLC, JWC Phoenix, LLC, Bridgemill Land, LLC, Annisquam Development, LLC, JW Land Investment, LLC, JWC Guildford, LLC, OOTB, LLC, Wieland Realty Associates, Inc., John Wieland, individually, Sue Wieland, Lindsey Parker, Robert Parker, Jack Wieland, Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC, John Does (20-50), and Jane Does (41-50), AC Construction, Inc., Scott Parker, individually, Builders FirstSource- Southeast Group, LLC, Muhler, LLC a/k/a The Muhler Company, Inc., YKK (U.S.A.), Inc., Wheelock Street Real Estate Fund II, LP, Wheelock Street Real Estate Fund V, LP, WSREF, NRT, LLC, JW Homes, LLC, JWH RPIV, LLC, RP Falcon Land, LLC, Wieland Realty, LLC, RP Falcon Realty, LLC, Residential Partners IV, LLC, Paul M. Vasquez, Neighborhood Management Associates, Inc., Billie and Antonio Arias a/k/a Antonio Arias Framing Construction, Tru-Don Contracting, Inc., Fine Builders, LLC, Jose Alfredo Sandoval, Chad Larsen d/b/a Chad Larsen Co., Ivan Jose Paiz d/b/a Jose Construction, William B. Angel, East Coast Wall Systems, Inc., Tracyinne Construction a/k/a T&C Construction, LLC, Francisco and Andrea Dacosta d/b/a AAA Coastline, Inc., Jack R. Clark d/b/a Jack Clark Construction, LLC, Alex Welch, Tracy McCuiston d/b/a Mastercraft Interior and Exterior, Universal Forest Products Eastern Division, Inc. a/k/a UFP Eastern Division, Inc., Gonzalo Guerrero, A-Marc, Inc., Emmanuel Kehagis d/b/a Creative Construction, Anthony Kirksey, Polly S. Clark d/b/a Glenn Clark Construction, Benjamin Mora a/k/a Benjamin L. Mora d/b/a Mora Construction f/k/a Mora's Construction and Benjamin Mora Construction, LLC n/k/a Mora Construction, LLC, Daniel L. Rogers d/b/a Rogers Roofing Co., Inc. n/k/a Dan Rogers Roofing, LLC, William C. Mulhern d/b/a Bill's Painting, Mark A. McFarland d/b/a In the Wind, Inc., Harbor Master, Inc., Chad Hood, Kinco Ltd. d/b/a Atrium Companies, Inc. d/b/a Atrium Windows and Doors, Inc. a/k/a HR Windows, The Contractor Yard, Inc., New Construction Drywall Hanger, LLC f/k/a New Construction Drywall Hanger, Inc., Doug Pilcher, and Michael Cassidy, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/ k/a GR Painting, LLC, Jesus Mora a/k/a

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AND

Builders FirstSource-Southeast Group, LLC, Third-Party Plaintiff,

v.

AC Construction, Corp., Third-Party Defendant.

AND

RP Falcon Properties, LLC (f.k.a JW Homes, LLC); RP Falcon Land, LLC (f.k.a. JW Land Investment, LLC); RP Falcon Realty, LLC (f.k.a Wieland Realty, LLC); and Residential Partners, LLC, Third-Party Plaintiffs,

v.

COY-CY Construction; Evans Enterprises; IML Construction, LLC; and Marcus Built, LLC, Third-Party Defendants.

AND

One Hamlin Place Townhome Association, Inc., Plaintiff,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., Wheelock Street Real Estate Land Fund, LP, Wheelock Street Investment Management, LLC, RP Falcon Properties, LLC, Residential Partners, LLC, Middlesex Holdings, LLC, WS JWH, LLC, JWC Phoenix, LLC, Bridgemill Land, LLC, Annisquam Development,

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v.

COY-CY Construction; Evans Enterprises; IML Construction, LLC; and Marcus Built, LLC, Third-Party Defendants,

of which RP Falcon Properties, LLC (f/k/a JW Homes, LLC); RP Falcon Land, LLC (f/k/a JW Land Investment, LLC); RP Falcon Realty, LLC (f/k/a Wieland Realty, LLC); and Residential Partners, LLC are the Appellants,

and George Medina, Jeorge Medina a/k/a JMC Construction, LLC, and All Exteriors Construction, LLC are the Respondents.

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INTRODUCTION

The Court should reject the arguments in the Brief of the Respondents and reverse the decision of the trial court for the following reasons.

First, genuine issues of material fact exist as to whether, and to what extent, RP Falcon Properties, LLC (f/k/a JW Homes, LLC); RP Falcon Land, LLC (f/k/a JW Land Investment, LLC); RP Falcon Realty, LLC (f/k/a Wieland Realty, LLC); and Residential Partners, LLC (“RP Companies”) are entitled to recover indemnity from Respondents for their work at One Hamlin Place. Respondents agree that the RP Companies have standing to assert equitable indemnity claims because “[a] general contractor's relationship with its subcontractor in the residential construction context is sufficient to support the general contractor's right of equitable indemnity against the subcontractor.” *Stoneledge at Lake Keowee v. Clear View Construction, LLC. et al.*, 413 S.C. 615, 776 SE 2d 426 (Ct. App. 2015).

“To recover damages on its equitable indemnity claim, [the general contractor] must prove the following: (1) [the subcontractor] was at fault in causing [the homeowner’s] water intrusion damages; (2) [the general contractor] has no fault for those damages; and (3) [the general contractor] incurred expenses that were necessary to protect its interest in defending against [the homeowner’s] claim.”

Id.

However, Respondents ignore the holding in *Stoneledge*, where the Court of Appeals found as a matter of law, a general contractor does not necessarily share in the fault of defective work put in place by its subcontractors, and therefore, is able to recover from a subcontractor under a claim for equitable indemnity. *Id.*; *see also Fields v. J. Haynes Waters Builders, Inc.* 376 S.C. 545, 560, 658 S.E.2d 80, 89 (2008) (A general contractor is not automatically responsible for the negligence of a subcontractor). Despite conflicting evidence, Respondents incorrectly assert that they have proven fault on the part of RP Companies for the Plaintiffs’ alleged damages.

Second, RP Companies clearly presented a scintilla of evidence warranting a determination by the factfinder on RP Companies' claims for breach of contract, breach of warranty, and negligence against the Respondents.

In sum, RP Companies have demonstrated that in reviewing the record of the trial court and viewing the evidence in the light most favorable to the Appellants, conflicting evidence exists where a factfinder could conclude RP Companies was not at fault. For these reasons, and because the trial court's rulings were improper, this Court should reverse the decision of the trial court and deny Respondents' respective motions for summary judgment.

ARGUMENT

I. A REASONABLE FACTFINDER COULD AND SHOULD CONCLUDE RP COMPANIES HAS NO FAULT FOR THE CLAIMS AT ISSUE.

Respondents agree that the RP Companies, as a general contractor, can pursue an equitable indemnity claim against a subcontractor whose defective work damaged a plaintiff. Respondents improperly conclude, however, that by providing some alleged evidence of fault on the part of the RP Companies, they are somehow absolved of having to defend the RP Companies' claims for equitable indemnity at trial. First, the cited evidence is not probative on this issue. In any event, Respondents ignore the conflicting evidence in the record as to fault for the alleged damages which keeps the claims viable irrespective of some evidence that may support the opposite conclusion.

The expert deposition testimony cited by the Respondents does not establish the duty of a general contractor nor its breach. In addition, the trial court misconstrues the deposition testimony as those experts conceding that the RP Companies share in the fault for the alleged construction defects of the Respondents. In one instance the expert testimony was elicited through a generic, hypothetical question and in another from the testimony of the expert in unrelated cases. The South Carolina Appellate Courts determine the duties owed in this matter, and have unequivocally

stated that a general contractor does not automatically become liable for the negligent acts of its subcontractors. *See Fields v. J. Haynes Waters Builders, Inc.* 376 S.C. 545, 560, 658 S.E.2d 80, 89 (2008)

Nonetheless, RP Companies, much like the general contractor in *Stoneledge*, can prove at trial that they do not necessarily share in the fault of the alleged defective siding installation performed by the Respondents. RP Companies did not self-perform the construction at One Hamlin Phase II. *See* Ex. D in Appellants' Memo. in Opp. to Mot. Summ. Judgment. Instead, subcontractors were paid, such as the Respondents, to perform the construction, including the work at One Hamlin Place claimed to be deficient in this suit. (*Id.* and Ex. C). While the RP Companies deny Plaintiffs' claims, Plaintiffs seek damages from the RP Companies for the Respondents' work at One Hamlin Place. Among other things, JMC Construction, LLC installed the siding at Buildings 5 and 6, while All Exteriors Construction, LLC installed the siding at Buildings 7, 8, 9, 10 and 11. *See* Ex. C in Appellants' Memo. in Opp. to Mot. Summ. Judgment. Plaintiffs contend there are deficiencies with the installation of the siding at those buildings. Specifically, Plaintiffs' experts claim as defective and call for the complete removal and replacement of the siding installed by the Respondents. *See* Memo. in Opp. to Mot. Summ. Judgment 4-6. This evidence is more than enough to satisfy the RP Companies' burden of introducing a "mere scintilla of evidence." *See Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012) ("To withstand a motion for summary judgment 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.").

This factual dispute will not be resolved until trial when Plaintiffs' claims against the RP Companies, and the RP Companies' indemnity claims against its subcontractors, are heard, and resolved. For the Respondent to assert otherwise is simply incorrect and flies in the face of

established case law. Moreover, requiring some greater showing by a cross-claim defendant seeking indemnity would undermine its ability to defend the claims in the first instance.

II. THE FACTFINDER MUST CONSIDER ALL CAUSES OF ACTION.

Respondents assert that RP Companies' claims for breach of contract, breach of warranty, and negligence claims were properly dismissed by the trial court. Contrary to what Respondents argue, the RP Companies specifically addressed this issue in their Initial Brief. RP Companies clearly presented a scintilla of evidence warranting a determination by the factfinder on RP Companies' claims for breach of contract, breach of warranty, and negligence against the Respondents. It is clear from the record that the Respondents performed some of the work the Plaintiffs claim to be deficient. If Plaintiffs successfully prove their allegations and the work the Respondents performed is found to be deficient, they will have breached the implied warranty of workmanlike service, committed negligence in the scope of their work, and will have breached the contract RP Companies intend to prove through a course of dealing and/or a contract implied in law. Competing evidence exists for the factfinder to consider and resolve these claims. Dismissal of these claims was improper.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in RP Companies' Initial Brief, this court should reverse the trial court's granting of Respondents' respective motions for summary judgment.

Signature on following page.

s/ Blake A. McKie

Brian C. Duffy (SC I.D. No. 16247)
Blake A. McKie (SC I.D. No. 80198)
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
bduffy@duffyandyoung.com
bmckie@duffyandyoung.com
(843) 720-2044

and

Thomas C. Hildebrand, Jr. (SC I.D. No. 2501)
William Greyson Land (SC I.D. No. 104179)
PARKER POE ADAMS & BERSTEIN, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
tomhildebrand@parkerpoe.com
greysonland@parkerpoe.com
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Attorneys for Appellants

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PROOF OF SERVICE

Brian C. Duffy (SC I.D. No. 16247)
Blake A. McKie (SC I.D. No. 80198)
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
bduffy@duffyandyoung.com
bmckie@duffyandyoung.com
(843) 720-2044

and

Thomas C. Hildebrand, Jr. (SC I.D. No. 2501)
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PARKER POE ADAMS & BERSTEIN, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
tomhildebrand@parkerpoe.com
greysonland@parkerpoe.com
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Attorneys for Appellants

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., Wheelock Street Real Estate Land Fund, LP, Wheelock Street Investment Management, LLC, RP Falcon Properties, LLC, Residential Partners, LLC, Middlesex Holdings, LLC, WS JWH, LLC, JWC Phoenix, LLC, Bridgemill Land, LLC, Annisquam Development, LLC, JW Land Investment, LLC, JWC Guildford, LLC, OOTB, LLC, Wieland Realty Associates, Inc., John Wieland, individually, Sue Wieland, Lindsey Parker, Robert Parker, Jack Wieland, Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC, John Does (20-50), and Jane Does (41-50), AC Construction, Inc., Scott Parker, individually, Builders FirstSource- Southeast Group, LLC, Muhler, LLC a/k/a The Muhler Company, Inc., YKK (U.S.A.), Inc., Wheelock Street Real Estate Fund II, LP, Wheelock Street Real Estate Fund V, LP, WSREF, NRT, LLC, JW Homes, LLC, JWH RPIV, LLC, RP Falcon Land, LLC, Wieland Realty, LLC, RP Falcon Realty, LLC, Residential Partners IV, LLC, Paul M. Vasquez, Neighborhood Management Associates, Inc., Billie and Antonio Arias a/k/a Antonio Arias Framing Construction, Tru-Don Contracting, Inc., Fine Builders, LLC, Jose Alfredo Sandoval, Chad Larsen d/b/a Chad Larsen Co., Ivan Jose Paiz d/b/a Jose Construction, William B. Angel, East Coast Wall Systems, Inc., Tracynne Construction a/k/a T&C Construction, LLC, Francisco and Andrea Dacosta d/b/a AAA Coastline, Inc., Jack R. Clark d/b/a Jack Clark Construction, LLC, Alex Welch, Tracy McCuiston d/b/a Mastercraft Interior and Exterior, Universal Forest Products Eastern Division, Inc. a/k/a UFP Eastern Division, Inc., Gonzalo Guerrero, A-Marc, Inc., Emmanuel Kehagis d/b/a Creative Construction, Anthony Kirksey, Polly S. Clark d/b/a Glenn Clark Construction, Benjamin Mora a/k/a Benjamin L. Mora d/b/a Mora Construction f/k/a Mora's Construction and Benjamin Mora Construction, LLC n/k/a Mora Construction, LLC, Daniel L. Rogers d/b/a Rogers Roofing Co., Inc. n/k/a Dan Rogers Roofing, LLC, William C. Mulhern d/b/a Bill's Painting, Mark A. McFarland d/b/a In the Wind, Inc., Harbor Master, Inc., Chad Hood, Kinco Ltd. d/b/a Atrium Companies, Inc. d/b/a Atrium Windows and Doors, Inc. a/k/a HR Windows, The Contractor Yard, Inc., New Construction Drywall Hanger, LLC f/k/a New Construction Drywall Hanger, Inc., Doug Pilcher, and Michael Cassidy, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/ k/a GR Painting, LLC, Jesus Mora a/k/a

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and George Medina, George Medina a/k/a JMC Construction, LLC, and All Exteriors Construction, LLC are the Respondents.

I hereby certify that on the 5th day of January, 2023, I have served **APPELLANTS' REPLY BRIEF** on counsel for all parties via email pursuant to Appellate Case No. 2020-000447 (d)(1) to the following addresses:

<p>John C. Hayes, IV, Esquire Nina E. Meola, Esq. Hayes Law Firm, LLC PO Box 22497 Charleston, SC 29413 jhayes@hayeslaw.org nmeola@hayeslaw.org <i>Attorneys for Gary Keisler, et al.</i></p>	<p>I. Keith McCarty, Esq. McCarty Law Firm, PC 768 St. Andrews Blvd. Charleston, SC 29407 ikeithmccarty@gmail.com <i>Attorneys for Gary Keisler, et al.</i></p>
---	--

<p>Chris Adams, Esquire James L. Williams, Esquire Collins & Lacy, PC PO Box 12487 Columbia, SC 29211 cadams@collinsandlacy.com jwilliams@collinsandlacy.com Attorneys for <i>Jeorge Medina, Jeorge Medina a/k/a JMC Construction, Inc., a/k/a JMC Construction, LLC and All Exteriors Construction, LLC</i></p>	<p>Stephen P. Hughes, Esquire Howell, Gibson & Hughes, PA PO Box 40 Beaufort, SC 29901 Sphughes@hgpha.com Attorneys for <i>Builders FirstSource-Southeast Group, LLC</i></p>
<p>Jason A. Daigle, Esquire Clement Rivers, LLP PO Box 993 Charleston, SC 29402 jdaigle@yctrlaw.com Attorneys for <i>Daniel L. Rogers d/b/a Rogers Roofing Co., Inc., n/k/a Dan Rogers Roofing, LLC</i></p>	<p>Kevin W. Mims, Esquire W. Chase McNair, Esquire Luzuriaga Mims, LLP 50 Immigration Street, Suite 200 Charleston, SC 29403 kmims@lmlawllp.com cmcnair@lmlawllp.com Attorneys for <i>AC Construction, Inc.</i></p>
<p>Theodore L. Manos, Esquire Robertson Hollingsworth, et al. 550 King Street, Suite 300 Charleston, SC 29403 tlm@roblaw.net Attorneys for <i>Wieland Defendants and Scott Parker, Doug Pilcher and Michael Cassidy and Neighborhood Management Associates, Inc.</i></p>	<p>Ian W. Freeman, Esquire Walker Gressett Freeman and Linton 66 Hassell Street Charleston, SC 29401 freeman@wgflaw.com Attorney for <i>John Wieland and Middlesex Holdings, LLC</i></p>
<p>James Saxton, Esquire Gordon Rees Scully Mansukhani LLP 40 Calhoun Street, Suite 350 Charleston, SC 29401 jsaxton@grsm.com Attorneys for <i>Paul Vasquez</i></p>	<p>Stephen L. Brown, Esquire Clement Rivers, LLP 25 Calhoun Street, Suite 400 Charleston, SC 29402 sbrown@yctrlaw.com Attorneys for <i>New Construction Drywall Hanger, LLC f/k/a New Construction Drywall Hanger, Inc.</i></p>

<p>C. Clay Olson, Esquire Gordon Rees Scully Mansukhani LLP 40 Calhoun Street, Suite 350 Charleston, SC 29401 colson@grsm.com <i>Attorneys for Marcus Built</i></p>	<p>Robert C. Calamari, Esquire Donna O. Tillis, Esquire Nelson Mullins Riley & Scarborough LLP PO Box 3939 Myrtle Beach, SC 29578 Bob.calamari@nelsonmullins.com Donna.tillis@nelsonmullins.com <i>Attorneys for YKK (USA) Inc</i></p>
<p>Philip Cristaldi, Esquire Jeff Ross, Esquire Ross & Cristaldi, LLC 863 Coleman Blvd., Ste. B Mt. Pleasant, SC 29464 pcristaldi@rclawsc.com jross@rclawsc.com <i>Attorneys for Builders FirstSource-Southeast Group, LLC</i></p>	<p>Arthur C. Pelzer, Esquire Pelzer Law Firm LLC 266 Meeting Street Charleston, SC 29401 arthur@pelzerlawfirm.com <i>Attorneys for IML Construction LLC</i></p>

s/ Blake A. McKie

Brian C. Duffy (SC I.D. No. 16247)
Blake A. McKie (SC I.D. No. 80198)
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
bduffy@duffyandyoung.com
bmckie@duffyandyoung.com
(843) 720-2044

and

Thomas C. Hildebrand, Jr. (SC I.D. No. 2501)
William Greyson Land (SC I.D. No. 104179)
PARKER POE ADAMS & BERSTEIN, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
tomhildebrand@parkerpoe.com
greysonland@parkerpoe.com
(843) 727-2650

Attorneys for Appellants

January 5, 2023
Charleston, South Carolina

DUFFY & YOUNG LLC
96 BROAD STREET, CHARLESTON SC 29401
telephone 843-720-2044 facsimile 843-720-2047
ATTORNEYS AT LAW

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January 5, 2023

VIA EMAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

RE: Gary Keisler, Individually and as Class Representative, et al. v.
RP Falcon Properties, LLC, et al.
Case No. 2017-CP-10-5246

One Hamlin Place Townhome Association, Inc. v.
RP Falcon Properties, LLC, et al.
Case No. 2017-CP-10-5245

Appellate Case No. 2022-001187

Dear Ms. Kitchings:

Attached for filing are Appellants' Reply Brief along with the Proof of Service of same.

By copy of this letter to all counsel of record, we are serving them with a copy of the Reply Brief and Proof of Service.

Thank you for your attention to this matter, and please contact me with any questions.

Very truly yours,



Blake A. McKie

BAM/jvp

Attachments

cc (w/Attachments via email): All counsel of record