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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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' FINAL BRIEF

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J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, Richard Ditullio a/k/a RDT Contracting, LLC, Valencia Medina, and J&R Construction, LLC, a/k/a JJ&R Construction, LLC, Cohen's Drywall Company, LLC, All American Roofing and Construction, LLC, and Leor Construction, LLC, Defendants.

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,

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, George Medina, George 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 J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, Richard Ditullio a/k/a RDT Contracting, LLC, Valencia Medina, and J&R Construction, LLC, a/k/a JJ&R Construction, LLC, Cohen's Drywall Company, LLC, All American Roofing and Construction, LLC, and Leor Construction, LLC, Defendants.

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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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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred when it ignored binding precedent and granted summary judgment in favor of Defendants Jorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., (hereinafter “JMC”) and All Exteriors Construction, LLC (hereinafter “All Exteriors”) as to cross claims and third-party claims made by 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 (hereinafter collectively referred to as “RP Companies”).

STATEMENT OF THE CASE

This appeal arises from the granting of JMC and All Exteriors’ Motions for Summary Judgment in two related actions. In 2017, One Hamlin Place Townhome Association, Inc. brought claims seeking damages against numerous defendants, including the RP Companies for alleged construction defects at the One Hamlin Place townhomes located in Mount Pleasant, South Carolina. Similarly, Gary Keisler, a resident of One Hamlin Place, brought purported class action claims against the RP Companies to which the order granting summary judgment applies.

The complaints were amended several times to add additional parties. The RP Companies answered and asserted cross claims against JMC and third-party claims against All Exteriors. Subsequently, RP Companies answered the various amended complaints and asserted the same cross claims and third-party claims.

RP Companies denied liability and asserted cross claims against JMC and third-party claims against All Exteriors for (1) indemnity; (2) negligence; (3) breach of warranty; and (4) breach of contract. (See Ans. ¶¶ 255, 260, 266, 272, 277, R. pp. 0441 - 0446). Motions for Summary Judgment were filed by JMC and All Exteriors as to these claims on March 3, 2022.

On April 18, 2022, the trial court heard arguments on, and granted, JMC and All Exteriors Motions for Summary Judgment. (See Transcript of Hearing, dated April 18, 2022, R. pp. 1682 - 1698); Form 4 Order Granting Mot. Summ. Judgment, dated April 22, 2022, R. pp. 0001 - 0003;

Order Granting Mot. Summ. Judgment, dated May 10, 2022, R. pp. 0004 - 0016. The RP Companies moved the trial court to reconsider, or in the alternative, for relief under Rule 59(e) of the South Carolina Rules of Civil Procedure. See Mot. Recons., dated May 2, 2022, R. pp. 1128 - 1251 (Keisler); and Mot. Recons., dated May 18, 2022, R. pp. 1539 - 1681 (One Hamlin). On July 28, 2022, the trial court denied the RP Companies' motion to reconsider without a hearing. See Order Den. Mot. Recons., dated July 28, 2022, R. pp. 30, 31. On August 24, 2022, the RP Companies served a notice of appeal of both of the trial court's orders. The RP Companies now seek this Court's reversal of the trial court's decision.

The RP Companies moved this court to amend the caption in this matter on September 7, 2022, and an Order was entered on September 22, 2022, granting the motion and providing the proper caption to be used in this appeal.

FACTS

These construction defect matters arise out of the construction of eleven townhome buildings located in Mount Pleasant, South Carolina known as One Hamlin Place (hereinafter "One Hamlin"). RP Falcon Properties, LLC f/k/a JW Homes, LLC ("JW Homes") served as the general contractor for the construction of buildings five through eleven at One Hamlin Place (hereinafter collectively referred to, for convenience and purposes of this Initial Brief and underlying motions and memoranda only, as "One Hamlin Phase II"). The Certificates of Occupancy ("CO") for One Hamlin Phase II were issued between April 23, 2013 and November 25, 2014 and identify JW Homes or JW Homes, LLC as the contractor. See Ex. A in Appellants' Memo. in Opp. to Mot. Summ. Judgment, R. pp. 0871 – 0896. The COs for Buildings one through four of One Hamlin were issued between August 5, 2009 and April 5, 2012 and identify John

Wieland Homes & Neighborhood of the Carolinas as the contractor. See Ex. B. in Appellants' Memo. In Opp. To Mot. Summ. Judgment, R. pp. 0897 - 0912.

Plaintiffs filed this action against RP Companies¹, among others, alleging deficiencies in the construction of the townhomes at One Hamlin. RP Companies answered the Plaintiffs' complaints in both matters denying liability and filing crossclaims and third-party complaints seeking indemnity from various subcontractors who performed the work at One Hamlin Phase II, alleging that these subcontractors must indemnify RP Companies if and to the extent that RP Companies are found liable to Plaintiffs for damages relating to the subcontractors' work.

JMC was a subcontractor who performed work at Buildings 5 and 6 at One Hamlin Phase II, including, but not limited to, the installation of siding. See Exhibit C in Appellants' Memo. in Opp. to Mot. Summ. Judgment, R. pp. 0913 - 0931. All Exteriors was a subcontractor who performed work at buildings 7 through 11 at One Hamlin Phase II, including, but not limited to, the installation of siding. See Exhibit C in Appellants' Memo. in Opp. to Mot. Summ. Judgment, R. pp. 1083 - 1111.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." When the circuit court grants summary judgment on a question of law, the appellate court reviews the ruling de novo. *Town of Summerville*

¹ Plaintiffs allege a theory of amalgamation against JW Homes and other entities, including the RP Companies, relating to a series of transactions that occurred between 2009 through 2012. Plaintiffs claim that these entities and a number of others are amalgamated and that for purposes of any judgment that may be rendered in favor of the Plaintiffs, these entities should be treated as a single business enterprise. Therefore, while RP Falcon Properties, LLC f/k/a JW Homes, LLC was the general contractor for One Hamlin Phase II, for the purposes of the underlying motions for summary judgment and this appeal, 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 (the "RP Companies") are each entitled to pursue indemnity to the extent that Plaintiffs prove they are amalgamated.

v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT IGNORED BINDING PRECEDENT AND GRANTED SUMMARY JUDGMENT

The trial court erred by ignoring binding South Carolina precedent and the questions of fact inherent in the RP Companies claims for equitable indemnification against JMC and All Exteriors.

The trial court was presented with the issue of whether a general contractor could pursue a claim for equitable indemnity against a subcontractor whose work allegedly caused damage to a homeowner. In the Order on appeal, the trial court decided that the general contractor could not pursue such a claim. This Court, however, had already established that a general contractor may in fact do so. *Stoneledge at Lake Keowee v. Clear View Construction, LLC. et al.*, 413 S.C. 615, 776 SE 2d 426 (Ct. App. 2015).

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.

In *Stoneledge*, the Court of Appeals held that 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).

Genuine issues of material fact exist as to whether, and to what extent, the RP Companies are entitled to recover indemnity from JMC and All Exteriors for their work at One Hamlin Phase II. JW Homes did not self-perform the construction at One Hamlin Phase II. See Ex. D in Appellants’ Memo. in Opp. to Mot. Summ. Judgment, R. pp. 0932 - 0935. Instead, it paid subcontractors, such as JMC and All Exteriors, to perform the construction, including the work at One Hamlin Phase II claimed to be deficient in this suit. (*Id.* and Ex. C R. pp. 0913 – 0931). While the RP Companies deny Plaintiffs’ claims, Plaintiffs seek damages from the RP Companies for JMC and All Exteriors’ work at One Hamlin Phase II. Among other things, JMC installed the siding at Buildings 5 and 6, while All Exteriors installed the siding at Buildings 7, 8, 9, 10 and 11. See Ex. C in Appellants’ Memo. in Opp. to Mot. Summ. Judgment, R. pp. 0913- 0931. 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 JMC and All Exteriors. See Memo. in Opp. to Mot. Summ. Judgment, R. pp. 0863 - 0947. 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.”).

Accordingly, because the 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 JMC and All Exteriors, genuine issues of material fact exist as to whether, and to what extent, the RP Companies can recover indemnity from JMC and All Exteriors. 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 trial court to rule otherwise was improper and in direct conflict with the case law created by this Court as well as the South Carolina Rules of Civil Procedure.

II. APPELLANTS’ OTHER CAUSES OF ACTION WERE IMPROPERLY DISMISSED

If RP Companies prove that they are without fault for the work completed by JMC and All Exteriors, then they are also entitled to have the factfinder hear the other causes of action that have been pled.

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 both JMC and All Exteriors. It is clear from the record that JMC and All Exteriors performed some of the work the Plaintiffs claim to be deficient. If Plaintiffs successfully prove their allegations and the work JMC and All Exteriors performed is found to be deficient, JMC and All Exteriors will have breached the implied warranty of workmanlike service, committed negligence in the scope of their work, and to the extent the RP Companies are able to prove the

existence of a contract through a course of dealing and/or a contract implied in law, they will be in breach of its contract with the RP Companies.

In reviewing the record of the trial court and viewing the evidence in the light most favorable to the Appellants – the record contains conflicting evidence where a factfinder could conclude RP Companies was not at fault. As a result, the trial court’s decision granting summary judgment in favor of the subcontractor was improper and should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court’s Order granting JMC and All Exteriors’ Motions for Summary Judgment.

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February 24, 2023
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CERTIFICATE OF COUNSEL

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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,

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 J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, Richard Ditullio a/k/a RDT Contracting, LLC, Valencia Medina, and J&R Construction, LLC, a/k/a JJ&R Construction, LLC, Cohen's Drywall Company, LLC, All American Roofing and Construction, LLC, and Leor Construction, LLC, Defendants.

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,

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

I, Blake A. McKie, certify that Appellants' Final Brief complies with Rule 211(b).

s/ Blake A. McKie

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