THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Case No.: 2019-CP-04-01942
Appellate Case No.: 2023-001681

RECEIVED
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SC Court of Appeals

Natalie Zitek, individually, and on behalf of all others similarly situated,
Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and, John Doe #1-50,
Defendants,

AND

D.R. Horton, Inc.,
Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J Landscaping & Grading, LLC; AllPro Textures, LLC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc.; a/k/a ACP Concrete, Inc.; A&J Framing, Inc.; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co, Inc.; BKF Builders, Inc.; Builders Designhouse, LLC; BMC East LLC d/b/a Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC, a/k/a Builders Firstsource, Inc,; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc., a/k/a Caryl Mechanicals, Inc.; Cannaday Siding & Gutter, Inc.; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; DOM Group, LLC: Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc., a/k/a Galloway-Bell, Inc. II: Get Floored, LLC; GBS Building Supply; US LBM, LLC, f/k/a GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc., a/k/a Green Pastures of Aiken, LLC; IBS Asset, LLC

d/b/a Blue Ridge Building Products; Installed Building Products, LLC, a/k/a Installed Building Products II LLC; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC: Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC a/k/a Probuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a, Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc, a/k/a Gypsum; Silver Line Building Products Corp.; Dupree Plumbing Co., Inc.; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., and Silver Line Building Products Corporation,

Third-Party Defendants,

Of whom Galloway-Bell, Inc. a/k/a Galloway-Bell, Inc. II is the

Respondent,

AND

D.R. Horton, Inc. is the

Appellant.

FINAL BRIEF OF RESPONDENT

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COUNTER STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT PROPRELY GRANT SUMMARY JUDGMENT AS TO APPELLANT'S CONTRACTUAL INDEMNITY CAUSE OF ACTION?

2. DID THE TRIAL COURT PROPRELY GRANT SUMMARY JUDGMENT AS TO APPELLANT'S BREACH OF CONTRACT CAUSE OF ACTION?

3. DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT AS TO APPELLANT'S REMAINING CAUSES OF ACTION?

STATEMENT OF THE CASE

Plaintiff Natalie Zitek, individually, and on behalf of all others similarly situated ("Plaintiff" or "Zitek"), filed a Complaint against Appellant D.R. Horton, Inc. ("Appellant" or "Horton"), as the developer and general contractor for the Rose Hill subdivision located in Anderson County, South Carolina ("Rose Hill"). Plaintiff's Complaint alleged failures in load-bearing components, exterior cladding systems, and water intrusion via doors, windows, and envelope components.[1] (ROA pp. 59). Plaintiff brought negligence, gross negligence, breach of implied warranty, and violations of the South Carolina Unfair Trade Practices Act claims against Appellant. (ROA pp. 66-69). Plaintiff moved for class certification, which was granted. The class totaled approximately 220 homes.

On March 11, 2021, Appellant brought claims against Respondent[2] by means of third-party complaint. In its Third-Party Complaint, Appellant brought causes of action for contractual

[1] Plaintiff sent a Notice and Opportunity to Cure ("NOC") letter to Appellant on December 11, 2019. This letter contained a statement noting "12. MEP: Inadequate . . . insulation in attics . . ." (NOC Letter at p. 2).

[2] Appellant also brought claims against dozens of other parties. (Amended Answer and Third-Party Complaint at ¶¶ 78–128); (Second Amended Answer and Third-Party Complaint dated February 23, 2022 at ¶¶ 78–128).

indemnification, equitable indemnification, breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness.

On April 21, 2023, during a hearing, Plaintiff's counsel admitted that there were no claims regarding the insulation at Rose Hill. (ROA pp. 972-975). The trial court directed Plaintiff to prepare written stipulations regarding his statements on the record. (ROA pp. 975). Respondent filed a Motion for Summary Judgment on May 1, 2023 (ROA pp. 276-279). Respondent filed its memorandum in support of its motion for summary judgment on July 11, 2023. Plaintiff filed a written stipulation regarding its limitations on claims on July 20, 2023, specifically setting forth that no claims were going forward related to insulation.

On July 20-21, 2023, the trial court heard arguments on the various motions for summary judgment. As requested and conceded by Appellant, the trial court granted Respondent's Motion as to all claims asserted by Appellant except for contractual indemnity. The contractual indemnity claim was taken under advisement. Respondent's motion related to contractual indemnity was granted orally during pre-trial hearings held on September 1, 2023.[3] On September 11, 2023, Appellant filed a Motion to Reconsider the trial court's grant of summary judgment to Respondent.

The trial court issued its written Form 4 Order granting summary judgment on September 27, 2023 (ROA pp. 33-36), and a written Order granting summary judgment prepared by Respondent (ROA pp. 37-41) later the same day. The Form 4 Order did not explain why Respondent's motion was granted, but only noted that it was granted at the pre-trial hearing held

[3] Following its grant of the motion for summary judgment at the September 1, 2023, hearing from the bench, the Trial Court directed counsel for Respondent to prepare an Order granting summary judgment. Counsel was finalizing the Order to send to the Court for review when the Court filed the Form 4 Order granting summary judgment. Respondent promptly provided the Full Order to the Court for consideration, which was signed and filed the same day.

September 1, 2023. The Order prepared by Respondent provides the bases for why the motion was granted, which are, in sum: Plaintiff stipulated that there were no allegations regarding the work of insulation at Rose Hill; Appellant presented no evidence that it incurred any damages resulting from Respondent's work; Appellant's claims under negligence, gross negligence, recklessness, breach of express and implied warranties, and breach of contract were disguised indemnity claims and should be dismissed pursuant to *Stoneledge*[4]; and Appellant's claim under contractual indemnity failed pursuant to *Concord & Cumberland*.[5]

Plaintiff and Appellant settled during the trial of the underlying lawsuit; however, a verdict against Appellant was rendered by a jury for $15,000,000 in favor of Plaintiff on Plaintiff's negligence cause of action against Appellant. (ROA pp. 53-54). The verdict did not include a breakdown as to the scopes of work performed by any subcontractors at Rose Hill. (ROA pp. 53-54).

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the Court of Appeals applies the same standard applied by the trial court under Rule 56(c), *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). A party opposing summary judgment must show more than metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for

[4] Stoneledge at Lake Keowee Owners' Ass'n. Inc. v. Clear View Construction, Inc., 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) and *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 639, 776 S.E.2d 434, 439 (Ct. App. 2015).

[5] *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166, 2018 (holding that contracts purporting to indemnify an indemnitee for its own negligence must be set forth clearly and unequivocally).

trial. Rule 56(c), SCRCP; *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). A "scintilla" of evidence is not enough to overcome a motion for summary judgment. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 461, 892 S.E.2d 297, 300 (2023). While the Court must view all reasonable inferences in the light most favorable to the non-moving party, where "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 517–18, 595 S.E.2d 817, 822 (Ct. App. 2004).

FACTS

On December 17, 2012, Appellant and Respondent entered into the "South Carolina Independent Contractor Agreement" (the "ICA"). (ROA pp. 1039-1045). The ICA included multiple provisions requiring Respondent to indemnify Appellant:

> 10. CONTRACTOR'S INDEMNITY.
>
> 10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT, AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES. SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALITES, LOSSES, ATTORNEYS FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/ OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAV LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR

SET FORTH HEREIN: (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"): (3) ANY NEGLIGENT, CROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/ OR OMISSION OF CONTRACTOR AND/ OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/ OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE INDEMNITY FOR LOSSES CAUSED SOLELY BY FAULT OR NEGLIGENCE OF THE INDEMNITEE. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS. OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR’S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS’ COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ANY AND ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE’S EXCLUSIVE REMEDY. IT IS THE EXPRESS INTENTION OF THE PARTIES THAT CONTRACTOR’S INDEMNITY OBLIGATIONS HEREIN WILL SURVIVE THE TERMINATION OF CONTRACTOR OR THIS AGREEMENT. INDEMNITEE SHALL HAVE THE RIGHT, AT ITS DISCRETION AND CHOOSING, TO DEFEND ANY AND ALL CLAIMS WHICH MAY BE ASSERTED AGAINST IT, AND CONTRACTOR AGREES TO REIMBURSE INDEMNITEE FOR ANY AND ALL EXPENDITURES WHICH INDEMNITEE MAY MAKE OR INCUR ON ACCOUNT OF ANY SUCH CLAIM.

(ROA pp. 1042).

Plaintiff brought class-action claims against Appellant alleging defective construction, among others, and Appellant, in turn, brought claims against its subcontractors—including Respondent. (ROA pp. 55-69); (ROA pp. 86-94). Appellant served as the developer and general contractor for Rose Hill. Respondent was hired to perform limited work at Rose Hill, specifically the installation of insulation. (ROA pp. 1045).

On May 1, 2023, Respondent filed its Motion for Summary Judgment. (ROA pp. 276-279). The grounds for the Motion included arguments under the statute of limitation/repose; *United States v. Spearin*, 248 U.S. 132 (1918); *Concord & Cumberland Horizotal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App 2019), *reh'g denied* (Oct. 19, 2018); *Stoneledge at Lake Keowee Owners' Ass'n. Inc. v. Clear View Construction, Inc.*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) and its progeny; unclean hands; economic loss rule; and the fact that Plaintiff implicated no work performed by Respondent as defective and therefore was not the basis of Plaintiff's claims against Appellant. (ROA pp. 276-279). Respondent's Memorandum in Support was filed on June 11, 2023, and further expanded on the arguments advanced in the Motion. Specifically, Respondent argued in more detail that: (1) its work was not the basis of Plaintiff's claims against Appellant; (2) the contractual indemnity claim failed under public policy; and (3) Appellant had unclean hands. (ROA pp. 348-360). Appellant filed its memorandum in opposition on July 11, 2023, to all Third-Party Defendants' motions for summary judgment, and a Supplemental Memorandum in Opposition to Third-Party Defendants' Motions for Summay Judgment on July 19, 2023. (ROA pp. 280-347); (ROA pp. 414-469).

On July 20, 2023, Plaintiff filed a Stipulation as to Limitation on Claims (the "Stipulation"). In this Stipulation, Plaintiff Natalie Zitek, by and through counsel, stipulated that neither she nor the

Class were making defective construction claims related to the batt and blown insulation.[6] (ROA pp. 471). The trial court began its hearings on the motions for summary judgment the same day, and concluded the hearings on the following day, including Respondent's Motion. (ROA pp. 994-997). During the hearing, Appellant *agreed with Respondent*—Appellant stated "[w]e agree with [Counsel for Respondent] that his motion for summary judgment should be granted as to liability for insulation and the negligence and warranty cause of action[.]" (ROA pp. 995-996). Appellant only requested the trial court not grant Respondent's motion as to its *contractual indemnity* cause of action—it argued there was an "obligation to indemnify and defend" within the contract, triggered "as soon as the cause was brought," which, Appellant alleged, "[Respondent] . . . failed to fulfill." (ROA pp. 996). Appellant requested that the trial court allow its contractual indemnity cause of action to proceed so as to determine whether Respondent had any indemnity and defense obligations or insurance obligations to Appellant, and whether or not Appellant was damaged.[7] (ROA pp. 996). The trial court granted Respondent's motion for summary judgment as to all causes of action except for contractual indemnity, which was taken under advisement. (ROA pp. 996).

At the pre-trial hearing on September 1, 2023, Respondent alerted the trial court that part of its motion was still outstanding. (ROA pp. 1006-1007). Appellant argued that it was entitled to

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[6] In Plaintiff's responses to Respondent's Requests to Admit dated Admit on May 16, 2023, Plaintiff admitted that (1) Plaintiff was not aware of any deficiencies with the insulation installation and (2) Plaintiff had not identified any damages related to insulation. (Plaintiff's Responses to Requests to Admit at p.2). Furthermore, the experts for Plaintiff and Appellant, Dr. Whitlock, Mr. Maddox, Mr. Moore, and Mr. Jones, had all testified that they were not opining on the batt or blown insulation prior to the filing of the Stipulation. (Dr. Whitlock Deposition at p.1553–1560); (Mr. Maddox deposition at p.347); (Mr. Moore deposition at p.611); (Chad Jones deposition at pp.238–240).

[7] Appellant *did not argue* that the indemnity requirement and the defense requirement under the contract were separate and distinct during the hearing on Respondent's motion. (Motions Hearing Transcripts at 154:11–157:2).

attorney's fees and costs under either its contractual indemnity or breach of contract[8] cause of action. (ROA pp. 1012-1013). Judge Sprouse granted Respondent's Motion as to contractual indemnity and directed Respondent to prepare an Order. (ROA pp. 1013). The trial court filed a Form 4 Order on September 27, 2023, noting only that the motion was granted on September 1, 2023, at the pre-trial hearing. (ROA pp. 33-36). The Full Order followed the Form 4 Order shortly thereafter and set forth multiple reasons for granting Respondent's Motion. First, the trial court found that Plaintiff stipulated that no member of the class alleged any defects with Respondent's work, and that Appellant had presented no evidence that it incurred any damages from Respondent's work. (ROA pp.40). The trial court concluded that Respondent could therefore not be found to be negligent, grossly negligent, reckless, or have breached any contracts or warranties, nor could it be compelled to indemnify or defend Appellant. (ROA pp.40). Second, the trial court found that the negligence, gross negligence, breach of warranty, and breach of contract causes of action were merely disguised indemnity claims under *Stoneledge at Lake Keowee Owners' Ass'n. Inc. v. Clear View Construction, Inc*., 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) and *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp*., 413 S.C. 630, 639, 776 S.E.2d 434, 439 (Ct. App. 2015). (ROA pp.40). Third, the trial court found that the provisions in the contract failed to meet the "clear and unequivocal" standard required under *Concord & Cumberland*. (ROA pp.41).

[8] At this point, the breach of contract cause of action had already been dismissed—it was dismissed from the bench during the motions hearing when Appellant only requested its *contractual indemnity claim* not be dismissed.

ARGUMENTS

I. APPELLANT DID NOT PRESERVE ITS ARGUMENTS RELATED TO ANY CAUSE OF ACTION EXCEPT CONTRACTUAL INDEMNITY.[9]

As an initial matter, Appellant references the obligations of Respondent under the ICA to provide insurance and alleged that Respondent "failed to have its insurance company [provide a defense for Appellant or pay its fees and expenses]." This is irrelevant to the appeal and improper. Respondent's (and, by extension, its insurance carrier's) obligations under the additional insured provisions of the contract (the "AI provision") are not at issue in this lawsuit and these arguments should not be considered by this Court. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that issues on appeal must have been raised to and ruled on by the lower court to be preserved for appellate review).

The only issue properly on appeal is whether the trial court erred in granting Respondent's Motion with respect to Appellant's contractual indemnity cause of action. During the hearing on Respondent's Motion, Appellant agreed that Respondent's Motion should be granted and *only* requested the trial court not grant Respondent's Motion with respect to the contractual indemnity cause of action. Appellant now advances an argument that explicitly contradicts its position at trial—that the trial court erred in granting Respondent's motion as it relates to the breach of contract claim. This is improper. *See State v. Benton,* 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (holding an issue that was conceded at trial was unpreserved for appellate review)*; Wilder,* 330 S.C. at 76, 497 S.E.2d at 733; *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503

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[9] Respondent also does not agree that either the Form 4 or Full Order foreclosed Appellant's Rule 59(e), SCRCP, motion. Appellant could have, and should have, asked the Court to rule on its motion to reconsider following the actual signing and entry of the written orders. *See* Rule 203(b)(1), SCACR ("when a timely . . . motion to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."); *see, e.g., Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009) (holding issues raised for the first time in a motion to reconsider are not preserved for review); *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."). Therefore, these arguments should not be considered by this Court on appeal. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *TNS Mills*, 331 S.C. at 617, 503 S.E.2d at 474; *Benton,* 338 S.C. at 156–57, 526 S.E.2d at 231.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO APPELLANT'S CONTRACTUAL INDEMNITY CAUSE OF ACTION.

a. The Trial Court properly applied the clear and unequivocal standard to the ICA.

Concord & Cumberland must apply to the interpretation of the ICA because, contrary to Appellant's assertions, Appellant *was* seeking indemnity for its own negligence. *See id.* The term "own negligence" can be viewed two ways—the sole or concurrent negligence of Appellant. *Concord & Cumberland*, 424 S.C. at 646, 819 S.E.2d at 170 ("the circuit court properly applied the clear and unequivocal standard because it applies whether the general contractor sought indemnification for its sole or concurrent negligence."). Appellant's sole negligence would be areas in which Appellant—and only Appellant—caused injury to Plaintiff; for example, areas in which *only* the general contractor and developer could be (or was) negligent. *See O'Neal v. Carolina Farm Supply, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776, 779 (1983) (defining sole negligence). Appellant's concurrent negligence would be areas where Appellant's sole negligence *combined* with Respondent's sole negligence to create the single harm—for example, where the actions of both Appellant and Respondent caused injury to Plaintiff. *See id.*

The Notice and Opportunity to Cure ("NOC") letter stated, in relevant part:

> This letter is to notify [Appellant] that Natalie and Paul Zitek as well as other owners of [Appellant's] homes within the Rose Hill subdivision in Anderson County, South Carolina ("Rose Hill") intend to proceed with litigation should [Appellant] fail to cure the following improper construction conditions and resulting damages existing at their homes within thirty (30) days from the date of this letter: . . . 12. MEP: . . . improper . . . insulation in attics[.]"

(ROA pp. 1066-1067). The Stipulation stated, in relevant part: "Plaintiff Natalie Zitek, by and through her undersigned counsel, hereby stipulate that she and the Class are not making defective construction claims for the . . . [b]att and blown insulation[.]" (ROA pp. 471). However, it should have been abundantly clear to Appellant that insulation was not at issue in this case prior to the on the record statement by Plaintiff's counsel as well as his written stipulation. No expert witnesses had testified regarding any issue with insulation and Plaintiff's and Appellant's experts all testified that they had not even been asked to look at insulation or offer opinions related to insulation. (ROA pp. 1077-1078); (ROA pp. 1079); (ROA pp. 1080); (ROA pp. 1081). Rather, Appellant continued to refuse to dismiss Respondent from the matter and forced Respondent to file and argue its Motion.

Appellant was seeking indemnification for attorney's fees, costs, and reputational harm,[10] from the time it received the NOC letter with allegations related to insulation, to the time that Plaintiff's counsel stipulated (either verbally or in writing) that insulation was not part of the claims asserted. Appellant, from the time of the NOC letter up until it knew or should have known that there were no claims against the insulation, defended itself from allegations that *Appellant was negligent, grossly negligent, or otherwise at fault for the conditions of the homes at Rose Hill*— Plaintiff only brought claims against Appellant. Thus, in other words, Appellant was seeking indemnification for defending itself from allegations related to its own negligence. Plaintiff's stipulation that the insulation was no longer part of the claims against Appellant was not sufficient

[10] Appellant was not able to produce *any* evidence regarding its alleged reputational harm during discovery or at the summary judgment hearing, and has likewise failed to provide any evidence of reputational harm to this Court. Appellant has again failed to present a genuine issue of material fact—its bald assertion is no more than metaphysical doubt—again showing why summary judgment was properly granted. *Kitchen Planners*, 440 S.C. at 461, 892 S.E.2d at 300. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545; *Ellis*, 358 S.C. at 517–18, 595 S.E.2d at 822.

to preclude the application of *Concord & Cumberland*. Appellant could only either be seeking indemnification from Respondent for Respondent's negligence—of which there was none—or Appellant was seeking indemnification for its negligence or the negligence of others through the use of a broad form indemnity provision. Appellant was, at the end of the day, seeking indemnification for defending itself from the allegations that *it* acted negligently, grossly negligent, or otherwise improperly. Thus, *Concord & Cumberland* must apply to the ICA, and the Trial Court did not err in its application of *Concord & Cumberland* to the ICA.

b. The Trial Court correctly found the ICA failed to meet the requirements under South Carolina law.

A contract purporting to indemnify an indemnitee for the indemnitee's sole negligence is unenforceable. S.C. Code Ann. § 32-2-10. Furthermore, any contract purporting to require indemnity for an indemnitee's concurrent negligence must be set forth clearly and unequivocally. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 649, 819 S.E.2d 166, 172, 2018 ("Based on our reading of *Laurens*, the clear and unequivocal standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent."). Where an indemnity clause purports to provide indemnification for the indemnitee's own negligence, the clause must be strictly construed. *Concord & Cumberland*, 424 S.C. at 647, 819 S.E.2d at 170-71; *see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003). The heightened standard is intentional under South Carolina public policy—"barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care." *Concord & Cumberland*, 424 S.C. at 649, 819 S.E.2d at 171 (*quoting Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 409 S.C. 487, 490–91, 763 S.E.2d 19, 21 (2014)).

Whether the ICA complied with the clear and unequivocal requirement as set forth in *Concord & Cumberland* is relevant in this matter because Appellant is seeking indemnification for the defense of the allegations related to *its own negligence*. *See id*. at 649, 819 S.E.2d at 171. In *Concord & Cumberland*, this Court held the negligence rule[11] was properly applied to the contract between Superior and Muhler, and the contract failed to clearly and unequivocally require Muhler to indemnify Superior for its own negligence. *See id.* at 650, 819 S.E.2d at 172.

Superior brought suit, alleging it was entitled to indemnity from Muhler for a settlement paid related to construction defect litigation. *Id.* Superior argued it was entitled to indemnity for its concurrent negligence. *Id.* at 645, 819 S.E.2d at 169. The circuit court granted Muhler's motion for summary judgment, finding that the 2007 agreement did not clearly and unequivocally require Muhler to indemnify Superior for Superior's own negligence, and, to the extent it required Muhler to "unconditionally" indemnify Superior, the circuit court found that the agreement was unconscionably broad. *Id.* at 645, 819 S.E.2d at 169–70.

This Court strictly construed the contract and held that the circuit court properly applied the clear and unequivocal standard because the negligence rule applied whether Superior sought indemnification for its sole or concurrent negligence. *Id.*, 424 S.C. at 646, 819 S.E.2d at 170. This Court specifically noted that the application of the negligence rule to the contract served the policy purpose of encouraging Superior to act with due care in the future "because the indemnity clause may not shield it from liability." *Id.* This Court examined the phrase in the agreement stating "regardless of whether it is caused in part by a party indemnified hereunder" failed to meet the "clear and unequivocal" standard required. *Id.* at 639, 654, 819 S.E.2d at 174. Rather, that phrase only showed that the parties intended Muhler to provide indemnity for its own negligence even

[11] The negligence rule is synonymous with the clear and unequivocal standard. *See Concord & Cumberland*, 424 S.C. at 649 n.3, 819 S.E.2d at 171 n.3.

where Superior is concurrently negligent. *Id.* Likewise, this Court held that the 2007 Agreement failed to clearly and unequivocally require indemnity for Superior's own negligence even when read in conjunction with the original agreement, and also failed to even include any reference to indemnification of Superior's concurrent negligence. *Id.* at 639, 656, 819 S.E.2d at 176.

Here, like the agreement this Court examined in *Concord & Cumberland*, the ICA fails to clearly and unequivocally require indemnity for Appellant's own negligence. *See id.* at 650, 819 S.E.2d at 172. Appellant is attempting to circumvent South Carolina's public policy for the negligence rule—deterrence of future negligent conduct and the use of broad form indemnity provisions. *See id.* Paragraph 10.1 of the ICA includes a handful of lines that try to bring this all-encompassing indemnity requirement within the bounds of South Carolina law—stating that "to the fullest extent permitted by law," "regardless of whether or not caused in part by indemnitee," and "notwithstanding the foregoing, nothing herein shall require indemnity for the losses caused solely by fault or negligence of the indemnitee." These lines are nowhere near necessary to survive the heightened standard required under *Concord & Cumberland*—this Court already held the language "regardless of whether or not caused in part by a party indemnified hereunder" was insufficient to meet the heightened standard. *See Concord & Cumberland*, 424 S.C. 639, 654, 819 S.E.2d at 174. These few lines specifically contradict the public policy in the application of the negligence rule—deterring future negligent conduct because the indemnitee will know the *indemnification agreement will not save it from liability if it fails to act with due care*. *See Concord & Cumberland*, 424 S.C. at 648-49, 819 S.E.2d at 171. (*quoting Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 490–91, 763 S.E.2d 19, 21 (2014)). In fact, the indemnity provision at issue in the ICA goes much further and is even more unclear than the indemnity provision examined under *Concord & Cumberland.* The ICA *actually requires indemnification for*

intentional actions of the indemnitee—only including a line noting that "nothing shall require indemnity for losses caused solely by fault or negligence of the indemnitee." ICA at ¶ 10.1. Appellant has created the broadest indemnity provision possible in an attempt to escape liability in direct contravention to South Carolina's public policy. *See Concord & Cumberland*, 424 S.C. at 648-49, 819 S.E.2d at 171.

Furthermore, reading Paragraph 10.2 in conjunction with Paragraph 10.1, the ICA becomes even more confusing, unclear, and oppressive.[12] Section 10.2 allows Appellant to seek indemnification for the defense of *any claim* asserted against Appellant: "Indemnitee shall have the right, at its discretion and choosing, to defend *any and all* claims which may be asserted against it and contractor agrees to reimburse indemnitee for *any and all expenditures*[.]" At the very least, this section created impermissible ambiguity as to what Respondent is supposed to indemnify Appellant for—and thus fails under *Concord & Cumberland*—at worst, this section violates South Carolina's prohibition on the indemnification of a general contractor's sole negligence in construction contracts. *See* S.C. Code Ann. § 32-2-10 (prohibiting the indemnification of a party's sole negligence in construction contracts). The indemnity requirements set forth under the ICA therefore fail to meet the requirements of South Carolina law, and the trial court properly granted summary judgment as to Appellant's contractual indemnity claim.

c. If there was no negligence or otherwise defective work by Respondent, then Appellant has no basis to receive indemnity from Respondent.

Even if the provision is enforceable, Respondent committed no wrong regarding its work at Rose Hill and therefore has nothing to indemnify Appellant for. Paragraph 10.1 of the ICA sets

[12] *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 611, 879 S.E.2d 746, 754 (2022) (defining unconscionability as the absence of meaningful choice and terms that are so oppressive no reasonable person would make them and no fair and honest person would accept them). Respondent had no meaningful choice—it was a subcontractor to a national homebuilder. *See id.* Furthermore, the terms forced upon Respondent are so oppressive that no reasonable person would make them and no fair and honest person would accept them—it required Respondent to pay for Appellant's attorney's fees and costs for any and all claims at the sole discretion of Appellant. *See id.*

forth, in relevant part, losses arising out of or attributable to "*a breach of any warranties . . . any negligent, grossly negligent, and/or intentional act or omission of contractor and/or contractor's agents*[.]" By the language of the ICA itself, Appellant is not entitled to indemnity—there was no breach of warranty, negligent, grossly negligent, or intentional act or omission that caused any harm to Appellant. The mere allegations of damage cannot trigger an indemnification provision against a subcontractor—South Carolina public policy would prevent indemnification of Appellant where there has been no wrongdoing by Respondent. *See* S.C. Code Ann § 32-2-10 (prohibiting the indemnification of the contractor's sole negligence in a construction contract); *Concord & Cumberland*, 424 S.C. at 649, 819 S.E.2d at 172 (requiring the indemnification of the contractor's concurrent negligence to be set forth clearly and unequivocally). To require Respondent to indemnify Appellant where its work was stipulated to not be at issue would do nothing more than require Respondent to become Appellant's insurer, which South Carolina has expressly discouraged and limited in the construction context. *See* S.C. Code Ann § 32-2-10; *Concord & Cumberland*, 424 S.C. at 649, 819 S.E.2d at 172.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO APPELLANT'S BREACH OF CONTRACT CAUSE OF ACTION.

Respondent maintains Appellant cannot properly present arguments related to breach of contract on appeal, as discussed within Argument I. However, even if this Court finds that Appellant properly preserved and asserted its arguments, the trial court did not err in granting summary judgment as to Appellant's breach of contract claim as a matter of law. Furthermore, Appellant's argument related to the trial court improperly concluding it was not damaged by Respondent's alleged breach of contract has been abandoned on appeal. *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 656, 780 S.E.2d 263, 275 (2015) (holding claims were not preserved for review where the appellants failed to cite any authority in their arguments on

appeal); *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding the failure to provide arguments or supporting authority for an issue renders it abandoned)*; Carolina Renewal, Inc. v. S.C. DOT*, 385 S.C. 550, 557, 684 S.E.2d 779, 783 (Ct. App. 2009) (holding issues were abandoned on appeal because they were not argued); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Appellant offered no supporting authority and instead, at best, offered conclusory allegations that failed to meet the required standard to properly argue an issue on appeal. *See Hotel & Motel Holdings*, 414 S.C. at 656, 780 S.E.2d at 275; *First Sav. Bank,* 314 S.C. at 363, 444 S.E.2d at 514*; Carolina Renewal*, 385 S.C. at 557, 684 S.E.2d at 783; *State v. Lindsey*, 394 S.C. at 363, 714 S.E.2d at 558. Thus, this Court should not consider Appellant's argument as to this issue. *See Hotel & Motel Holdings*, 414 S.C. at 656, 780 S.E.2d at 275; *First Sav. Bank,* 314 S.C. at 363, 444 S.E.2d at 514*; Carolina Renewal*, 385 S.C. at 557, 684 S.E.2d at 783; *State v. Lindsey*, 394 S.C. at 363, 714 S.E.2d at 558.

a. The trial court properly dismissed Appellant's breach of contract claim because it was a disguised indemnity claim.

Even if this Court finds that Appellant did properly preserve its causes of action related to breach of contract, the trial court did not err in dismissing this claim. In S*toneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. at 639, 776 S.E.2d at 439, this Court held that a general contractor cannot maintain a breach of contract cause of action against its subcontractors that are merely disguised indemnity claims. *Id.* at 639, 776 S.E.2d at 439.

This Court held that the circuit court properly granted summary judgment as to a breach of contract and breach of warranty cross-claims because the claims were not independent causes of action from the indemnity claim. *Id.* In the cross-complaint, Marick alleged, "If [Stoneledge's] allegations are true, . . . [the respondents] have provided defective materials or services in breach

of each of their contracts with Marick. . . . [S]aid breach of contract has resulted or could result in damage to [Stoneledge], which could or will be assessed against Marick." *Id.* at 635-36, 776 S.E.2d at 437.

Here, in Appellant's Third-Party Complaint, Appellant alleged:

> 115. To the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements in failing to construct the Homes in Rose Hill in accordance with contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.
> 116. D.R. Horton is entitled to judgment against Subcontractors for breach of contract plus costs, expenses, attorneys' fees, and other damages associated therewith.

(ROA pp. 93). Appellant did not and could not present any evidence of any independent damage resulting from any alleged improper work at Rose Hill throughout the years of litigation, and only alleged the contract was breached to the extent that the homes in Rose Hill were constructed improperly. (ROA pp. 93). Appellant did not even plead that the contract was breached with regards to anything other than the performance of Respondent's scope of work at Rose Hill. (ROA pp. 93).

Even so, the allegations in Appellant's Third-party Complaint are almost identical to the allegations this Court has ruled to be improper. *See id.* at 635–39, 776 S.E.2d at 437–39. Both the allegations contained in *Stoneledge* and alleged by Appellant here fail to demonstrate the suffering of *its own damages* as a result of any breach of contract by Respondent. *See Id.* at 636, 776 S.E.2d at 437. Just like the damages alleged and examined in *Stoneledge*, Appellant's damages arose *exclusively from having to defend itself*. *See id.* Even now, while Appellant argues it suffered reputational harm, it has failed to both plead this under its breach of contract cause of action and show *any* evidence for it whatsoever—it presented no evidence of this supposed reputational harm throughout the multiple years that this case was pending. *See id.* Even in its Initial Brief, Appellant

continues to point to its damages related to defending itself in the litigation and only offers the conclusory allegation that it suffered reputational harm, without any citation to proof therein. *See Id.* Exactly like the cause of action in *Stoneledge*, without Plaintiff's suit against Appellant, the so called "independent claims" against Respondent would not exist. *See id.* at 673, 776 S.E.2d at 438.

Appellant's failure to properly plead or show any evidence whatsoever that it suffered its own damages related to any breach of contract shows that the trial court did not err in its application of *Stoneledge* and dismissal of Appellant's breach of contract claim because there were no genuine issues of material fact. *See* Rule 56(c), SCRCP; *Kitchen Planners*, 440 S.C. at 461, 892 S.E.2d at 300; *Fleming v. Rose*, 350 S.C. at 493, 567 S.E.2d at 860; *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545; *Ellis*, 358 S.C. at 517–18, 595 S.E.2d at 822.

b. The obligation within the ICA to indemnify and defend is one and the same and is not severable.

Indemnity is a form of compensation where a first party is liable to pay a second party for loss or damage the second party incurs to a third party. *Concord & Cumberland*, 424 S.C. at 646-47, 819 S.E.2d at 170 (*quoting Laurens*, 355 S.C. at 111, 584 S.E.2d at 378-79). The entirety or severability of a contract depends on the intent of the parties. *Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 428 (1980).

Appellant attempts to separate the obligation of defense from the obligation of indemnity within the contract; however, this cannot be done—they are one and the same. Providing a defense for Appellant—or, in this case, paying Appellant for Appellant's costs related to defending itself—is nothing more than indemnification of Appellant. *See id.* Appellant is asking Respondent to pay for the loss or damage Appellant has incurred to a third-party. *See id.* In other words, Appellant is asking for *indemnification* from Respondent without limitation. *See id.*

The ICA itself does not distinguish between the obligations to defend and indemnify.

Paragraph 10.1 of the ICA states:

> Generally, . . . [Respondent] hereby agrees to *hold harmless, indemnify, protect, and defend* [Appellant] . . . from and against any and all demands, claims, actions, causes of action, proceedings, lawsuits, judgments, fines, penalties, losses, attorneys fees, litigation costs, interest, and expenses of any kind . . . regardless of whether or not caused in part by indemnitee. Such losses specifically include, but are in no way limited to losses arising out of or attributable to . . . any negligent, grossly negligent, and/or intentional act and/or omission of the indemnitee related in any way to the work. . . . Indemnitee shall have the right, at its discretion and choosing, to defend any and all claims which may be asserted against it, and [Respondent] agrees to reimburse [Appellant] for any and all expenditures which indemnitee may make or incur on account of any such claim.

(ROA pp. 1042). (emphasis added). Paragraph 10.2 of the ICA states:

> *Indemnitee* shall have the right, at its discretion and choosing, to defend any and all claims which may be asserted against it, and *contractor agrees to reimburse indemnitee* for any and all expenditures which indemnitee may make or incur on account of any such claim.

(ROA pp. 1042).[13] (emphasis added).

Under a plain understanding of the word "indemnity"—Appellant is merely seeking indemnity. *See Concord & Cumberland*, 424 S.C. at 646–47, 819 S.E.2d at 170. Appellant is seeking compensation claiming Respondent is liable to pay Appellant's attorney's fees and costs as a result of defending Plaintiff's lawsuit—a textbook definition of indemnity. *See id.* The paragraphs (10.1 and 10.2) that Appellant argue should be read so as to be totally and completely distinct make no distinction as to each other—Paragraph 10.1 explicitly includes the obligation to defend within the obligation to indemnify. *See Columbia Architectural Group*, 274 S.C. at 641, 266 S.E.2d at 248. Paragraph 10.2 simply restates Paragraph 10.1 and is nothing more than a thinly veiled attempt to circumvent this Court's rulings in the *Stoneledge* cases (holding a general contractor cannot bring claims that are merely "disguised indemnity" claims) and *Concord &*

[13] Respondent maintains that both Paragraphs 10.1 and 10.2 are unenforceable.

Cumberland (applying the negligence rule to the indemnification of a general contractor's own negligence, including both sole and concurrent negligence). *See Concord & Cumberland*, 424 S.C. at 646-47, 819 S.E.2d at 170; *Columbia Architectural Group*, 274 S.C. at 641, 266 S.E.2d at 248; *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 628, 776 S.E.2d 426, 433, (Ct. Ap. 2015).; *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 634, 776 S.E.2d 434, 436, (Ct. App. 2015);

What Appellant is attempting to do is nothing more than turn Respondent into a de-facto insurer—it even uses the same language this Court would apply to insurers—the duty to defend and indemnify. *See, e.g., Sloan Constr. Co. v. Central Nat'l. Ins. Co.*, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) (holding the duty to defend is personal to each *insurer*); *Nationwide Mut. Ins. Co. v. Tate*, 313 S.C. 444, 447, 438 S.E.2d 267, 268 (Ct. App. 1993) (recognizing an insurer's duties to defend and indemnify). The courts of South Carolina and even the South Carolina Legislature have expressly prohibited general contractors from attempting to turn their subcontractors into de-facto insurers for the general contractor and thereby shirking all responsibilities and repercussions—the Supreme Court of South Carolina held that "barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care." *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 490–91, 763 S.E.2d 19, 21 (2014). The South Carolina Legislature passed S.C. Code Ann. § 32-2-10 as an explicit message to the general contractors of South Carolina that continued to attempt to misuse their positions of power in drafting these overbroad and unconscionable provisions purporting to indemnify the general contractor was not tolerated. Appellant believes that Respondent, a subcontractor, is Appellant's insurer, and that South Carolina public policy

allows for this relationship—Appellant is mistaken.

IV. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO APPELLANT'S REMAINING CAUSES OF ACTION.[14]

Finally, the trial court properly dismissed Appellant's equitable indemnification, breach of express warranties, breach of implied warranties, negligence, gross negligence, and recklessness causes of action. Appellant explicitly admitted that the negligence and warranty causes of action should be dismissed. (ROA 995-996). Thus, Appellant now cannot argue that these causes of action were improperly dismissed. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *TNS Mills*, 331 S.C. at 617, 503 S.E.2d at 474; *Benton,* 338 S.C. at 156–57, 526 S.E.2d at 231. It is axiomatic that Appellant could not maintain any causes of action related to breach of warranty, negligence, or gross negligence—Respondent breached no warranty or duty, nor did Respondent cause any damage because of its work at Rose Hill, because Respondent performed no negligent, grossly negligent, or otherwise improper work. Furthermore, the trial court properly granted summary judgment as to these causes of action under *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 639, 776 S.E.2d 434, 439 (Ct. App. 2015) (holding the circuit court properly granted summary judgment on the breach of contract and warranty cross-claims because they were not independent causes of action from the equitable indemnity claim); *Stoneledge at Lake Keowee Owners' Ass'n. Inc. v. Clear View Construction, Inc.*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (holding the circuit court properly granted summary judgment as to the negligence cross-claim because it was not an independent cause of action from the equitable indemnity claim). Appellant failed to show that it could maintain these causes of action independent from Plaintiff's claims against the Appellant—its damages were solely the costs it

[14] While Respondent believes that the heart of Appellant's argument lies with the breach of contract and contractual indemnity causes of action, the remaining causes of action were nonetheless properly dismissed.

incurred defending itself in the lawsuit, and that would be owed to Plaintiff. *See id.* While Appellant included token language that it sufferered "reputational harm" throughout its cross-claims, Appellant failed to present any evidence of this so-called reputational harm throughout the multiple years of litigation. *See id.* Therefore, the trial court did not err in dismissing Appellant's negligence and breach of warranty causes of actions.

Appellant could not maintain a claim under equitable indemnity because of the jury verdict issued against it for negligence related to its actions as general contractor and developer of Rose Hill. *See Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010) (holding the doctrine of unclean hands bars a plaintiff from recovering in equity if the plaintiff committed any misconduct concerning the matter in litigation).

Therefore, for the reasons stated above, Appellant cannot show any genuine issue of material fact and the trial court properly granted summary judgment as to Appellant's claims. *See* Rule 56(c), SCRCP; *Kitchen Planners*, 440 S.C. at 461, 892 S.E.2d at 300; *Fleming v. Rose*, 350 S.C. at 493, 567 S.E.2d at 860; *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545; *Ellis*, 358 S.C. at 517–18, 595 S.E.2d at 822.

Appellant also asks this Court to affirm the ruling of the trial court for any ground appearing in the record, as set forth by Rule 220(c), SCACR.

CONCLUSION

In sum, this Court should affirm the ruling of the trial court because the trial court properly granted summary judgment as to Appellant's contractual indemnity claim under South Carolina public policy; the trial court properly granted summary judgment as to Appellant's breach of contract claim because it was a disguised indemnity claim under *Stoneledge*; and the trial court properly granted summary judgment as to the remaining claims because Appellant admitted the

claims should be dismissed, the claims could not be maintained following the Stipulation, the claims were disguised indemnity claims under *Stoneledge*, and Appellant could not maintain its equitable cause of action pursuant to the doctrine of unclean hands. Appellant had over four years of litigation to provide any evidence regarding Respondent's work and Appellant's alleged damages and failed to show that any improper work or damage resulting thereof independent of its claims for indemnity. Appellant drafted the agreement at issue and has no one to blame but itself for the predicament it is now in.

Respectfully submitted,

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