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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2019-CP-26-03604

Appellate Case No. 2024-000772

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Waterfall Investment and Construction Group, LLC, …… Appellant,

v.

A&E Construction & Maintenance, LLC, Jeronimo Ponce d/b/a JP & Sons Builders, Creative Drafting and Designs, Defendants,

of which Jeronimo Ponce d/b/a JP & Sons Builders is the ……..…….…… Respondent.

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# [INITIAL] REPLY BRIEF OF APPELLANT

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**WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC**
*Attorneys for Appellant*

Kenneth R. Moss, SC Bar No. 15520
Brittany C. Moore, SC Bar No. 102780
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903
Email: KennethMoss@wwpemlaw.com
BrittanyMoore@wwpemlaw.com

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## I. ARGUMENT

The Respondent's Initial Brief does not track the issues analyzed in Waterfall's Initial Brief in the order presented. This results in a lack of logical cohesion from one argument to the next. For purposes of simplicity, however, this Reply addresses the arguments raised by Respondent ("Ponce") in the order set forth in Ponce's Initial Brief.

### A. Waterfall's Claims for Negligence and Breach of Contract Are Not Disguised or Repeated Claims for Equitable Indemnity

Ponce begins with the highly technical claim that the Court should classify Waterfall's causes of action strictly according to the words used in each of the three versions of complaints, which were filed in 2019, 2022, and 2024 respectively. In so arguing, Ponce misconstrues the *Stoneledge* cases. *See Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) ("*Stoneledge I*"), *aff'd in part, rev'd in part, Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co.*, 435 S.C. 176, 866 S.E.2d 577 (2021) ("*Stoneledge II*"). A proper reading of the *Stoneledge* cases clearly reveals that Waterfall's claims against Ponce for negligence and breach of contract are not disguised or repeated claims for equitable indemnity, as Ponce wrongly asserts.

In *Stoneledge*, the general contractor's breach of contract and breach of warranty cross-claims against Stoneledge were wholly contingent on whether the plaintiff HOA prevailed against the general contractor. As a result, the court concluded that the general contractor's cross-claims amounted to "nothing more than claims for equitable indemnity." *Stoneledge I*, 413 S.C. at 637, 776 S.E.2d at 438. Because the general contractor's cross-claims were not independent, stand-alone causes of action, they were not viable. *Id.* Accordingly, the *Stoneledge* cases establish that "a claimant cannot maintain derivative tort or breach of warranty claims arising only from the claimant's potential liability for another party's damages and the claimant's need to defend itself

in litigation; such contingent claims properly lie in indemnity." *Bei-Beach, LLC v. Christman*, 440 S.C. 98, 106, 889 S.E.2d 601, 605 (Ct. App. 2023) (citing *Stoneledge I*, 413 S.C. at 622, 776 S.E.2d at 430; *Stoneledge II*, 413 SC at 637, 776 S.E.2d at 438).

Contrary to Ponce's suggestions, *Stoneledge* does not require the dismissal of Waterfall's negligence and breach-of-contract claims against Ponce. As detailed in Waterfall's Initial Brief, Waterfall can show that "it suffered independent damages as a result of [subcontractor Ponce's] alleged negligence" or breach of contract. *Bei-Beach*, 440 S.C. at 107, 889 S.E.2d at 605. Thus, Waterfall's negligence and breach of contract claims are not duplicative of the equitable indemnity claim and, therefore, should have been allowed to proceed to trial. Nothing in Ponce's Initial Brief or the record of this case leads to a different conclusion.

It may be noted that, as part of its technical argument, Ponce incorrectly relies on the trial court's March 3, 2021 Form 4 Order that partially granted a different subcontractor's motion for summary judgment. (Form 4 Order, filed March 3, 2021, p. 1.) Specifically, this was a Form 4 Order issued by the trial court that briefly (in two short paragraphs) ruled on motions brought by subcontractors Conquering Trades, Inc. and Atlantic Electric Services ("Atlantic Electric"). (Form 4 Order, filed March 3, 2021, p. 1.) The Form 4 Order states that Atlantic Electric filed a Motion to Issue Permanent Stay and to Dismiss and in the Alternative for Summary Judgment. (Form 4 Order, filed March 3, 2021, p. 1; Third-Party Defendant Atlantic Electric Services' Motion filed February 3, 2021.) Citing *Stoneledge II*, but providing no explanation, the Form 4 Order states: "The motion to dismiss [Waterfall's] causes of action for negligence and contribution is granted" as to Atlantic Electric. (Form 4 Order, March 3, 2021, p. 1.)

By its terms, the above referenced Form 4 Order concerned Waterfall's negligence and contribution claims against Atlantic Electric and not Ponce. (Form 4 Order, filed March 3, 2021,

p. 1.) Ponce fails to recite any factual or legal basis to support the contention that the Form 4 Order regarding Atlantic Electric should somehow be extended to cover Waterfall's separate claims against Ponce.

Indeed, as shown by the record evidence, Atlantic Electric and Ponce occupied far different positions in the underlying litigation. During the litigation, Waterfall discovered that the most egregious construction defects in the Smiths' home consisted of deficiencies in Ponce's framing work. (Am. Compl., p. 2; Aff. of David A. Brown ("Brown Aff."), pp. 2–3, ¶ 10.) In addition, unlike Ponce, Atlantic Electric was a party to the Settlement Agreement with the Smiths. (Settlement Agreement, dated December 29, 2022, and filed August 6, 2023, p. 1.) Given Ponce's outright refusal to participate in this settlement as well as the scope and extent of Ponce's deficient framing work on the Smiths' residence, it is evident that Ponce inflicted damages on Waterfall that were completely independent from and extended far beyond any damages that Atlantic Electric may have imposed on Waterfall. (*See* Tr. p. 7, line 9 – p. 9, line 16; Am. Compl., p. 9.) Accordingly, Ponce's reliance on the trial court's Form 4 Order regarding Atlantic Electric is entirely misplaced. The Form 4 Order regarding Atlantic Electric in no way precludes Waterfall from pursuing its appeal of the trial court's Order of summary judgment in Ponce's favor. (Form 4 Order, filed March 3, 2021, p. 1.)

### B. Waterfall Should Be Permitted To Seek Contribution From Ponce

In the event the Court should determine that Waterfall was somehow at fault for the deficient construction work performed by Ponce and, therefore, must be classified as a tortfeasor, Waterfall should be permitted to seek contribution from Ponce. By adopting the Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10, *et seq.*, the South Carolina General Assembly "established that the public policy of South Carolina favors fair apportionment of

liability among joint tortfeasors[.]" *Smith v. Tiffany*, 419 S.C. 548, 570, 799 S.E.2d 479, 491 (2017) (Pleicones, J., dissenting). Because the record evidence clearly shows that Ponce is the most culpable contractor in the entire case, it is only fair that Waterfall obtain reimbursement for Ponce's fair share of the damages that Waterfall paid to the Smiths. (Tr. p. 15, lines 12-20; Brown Aff., p. 3, ¶ 14)

Further, Ponce misconstrues S.C. Code Ann. § 15-38-40. This statute provides:

> (D) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

S.C. Code Ann. § 15-38-40(D) (1976, as amended).

Under subsection (D)(2), an action for contribution may proceed "if the tortfeasor seeking contribution has agreed, *while the action is pending against him,* to discharge the common liability and has within one year after the agreement paid the liability and commenced his contribution action." *Progressive Max Ins. Co. v. Floating Caps, Inc*., 405 S.C. 35, 44, 747 S.E.2d 178, 183 (2013) (emphasis in original). Here, Waterfall agreed to discharge the common liability for defective construction on the Smiths' residence when it executed the Settlement Agreement on December 29, 2022. (Settlement Agreement, R. pp. ___.) Waterfall discharged the total amount of the common liability to the Smiths shortly thereafter. Thus, Waterfall may proceed with its contribution claim against Ponce.

In arguing otherwise, Ponce alleges the statute of limitations pertaining the Smiths' potential claim for negligence against it expired on October 24, 2022, which was roughly two

months before the Smiths executed the Settlement Agreement. (Settlement Agreement, p. 12.) However, the contribution cause of action belongs to Waterfall, and not to the Smiths. Ponce has not cited any legal authority to support its assertion that a prerequisite for Waterfall's contribution claim was that the Smiths' have timely filed a direct negligence against Ponce.

Finally, Ponce's reliance on *Progressive Max* is unavailing. In that case, the underlying tort action brought by Witherspoon was dismissed on May 8, 2007, but Progressive did not execute its settlement agreement with Witherspoon until July 31, 2007. *Progressive Max*, 405 S.C. at 45, 747 S.E.2d at 183. Because the settlement agreement was not effectuated while Witherspoon's tort action was still pending, as required by S.C. Code Ann. § 15-38-40(D)(2), the statute could not preserve for Progressive any right to contribution from a third party, the Silver Dollar. *Id*. Any right to contribution that Progressive may have had against the Silver Dollar "was forever barred once [Witherspoon's underlying tort action] was dismissed on May 8, 2007." *Id.* Thus, the Silver Dollar was entitled to the entry of summary judgment in its favor on Progressive Max's contribution claim. *Id.*

Unlike the situation in *Progressive Max*, the Smiths' lawsuit against Waterfall was still pending at the time Waterfall executed the Settlement Agreement with the Smiths. The pendency of this lawsuit satisfied the requirements of S.C. Code Ann. § 15-38-40(D)(2). Hence, Waterfall's execution of the Settlement Agreement did not function as a bar to Waterfall's right to seek contribution from Ponce. Nothing in *Progressive Max* dictates otherwise.

### C. Waterfall's Negligence Claim Was Timely Filed

S.C. Code Ann. § 15-3-530 "sets forth a three-year statute of limitations for negligence actions. Under the discovery rule, the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of

reasonable diligence." *Cline v. J.E. Faulkner Homes, Inc., et al.*, 359 S.C. 367, 370–71, 597 S.E.2d 27, 29 (Ct. App. 2004).

Ponce incorrectly contends that Waterfall's negligence claim against Ponce was barred by the statute of limitations because the three-year limitations period expired prior to Waterfall's December 29, 2022, execution of its Settlement Agreement with the Smiths. (R. p. __.) This argument is unmeritorious. Waterfall's negligence cause of action against Ponce is in no way based on Waterfall's settlement with the Smiths, nor is it related to Waterfall's purchase of the premises from the Smiths as part of the settlement. (Waterfall's Reply to Defs' Counterclaims and Third-Party Compl., filed October 24, 2019, pp. 12–13; Brown Aff., p. 3, ¶¶ 13–14.)

Instead, Waterfall's negligence claim against Ponce arises from the parties' relationship of general contractor-subcontractor in the construction of the Smiths' residence. Waterfall retained Ponce to function as the framing subcontractor, and Ponce performed the framing work on the Smiths' residence in 2017. On October 24, 2019, Waterfall filed its negligence action against Ponce. (Waterfall's Reply to Defs' Counterclaims and Third-Party Compl., filed October 24, 2019, pp. 12–13; Brown Aff., p. 3, ¶¶ 13–14.) Clearly, this claim was timely filed within the three-year limitations period. For the reasons detailed in Waterfall's Initial Brief, Waterfall's Settlement Agreement with the Smiths had no effect on the continued viability of Waterfall's preexisting negligence claim against Ponce.

### D. Ponce's Initial Brief Fails to Address – And Thereby Concedes – That Waterfall's Claims for Breach of Contract and Breach of Implied Warranty Relate Back to The Filing of The Third-Party Complaint

Waterfall's Initial Brief, Argument part A, provides a detailed analysis as to why Waterfall's claims for breach of contract and breach of implied warranties alleged in the Amended Complaint relate back under Rule 15(c), *SCRCP*, to the date that Waterfall timely filed its Third-

Party Complaint against Ponce. (Appellant's Initial Brief, pp. 6–10; Waterfall Inv. and Constr. Group, LLC's Am. Compl., filed August 21, 2023, pp. 8–9; Waterfall's Reply to Defs' Counterclaims and Third-Party Compl., filed October 24, 2019.) Ponce's Initial Brief is completely devoid of any responsive argument and, indeed, utterly fails to address or even cite either Rule 15 or the legal principle of relation back.

South Carolina courts deem a party's failure to provide arguments or supporting authority for an assertion as an abandonment of the issue. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); *Nienow v. Nienow*, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977). Thus, Ponce's failure to provide any argument or legal authority to rebut Waterfall's detailed argument that the Amended Complaint's claims for breach of contract and breach of implied warranty were timely filed because they relate back to the filing date of Waterfall's Third-Party Complaint against Ponce under Rule 15, *SCRCP*, should be deemed as a concession of the issue. Hence, the trial court's Order granting summary judgment to Ponce on statute of limitations grounds should be reversed. (Order Granting Summ. J. to Jeronimo Ponce d/b/a JP & Sons Builders, filed April 17, 2024, R, pp. __.)

With regard to Ponce's argument going to the merits of Waterfall's breach of contract and breach of implied warranty claims, Ponce incorrectly contends that these claims must be grounded in Waterfall's acquisition of the premises from the Smiths. The language of the Amended Complaint, however, clearly shows that these claims arise out of Ponce's unworkmanlike and defective framing of the Smiths' residence, and not on Waterfall's Settlement Agreement with the Smiths or Waterfall's corollary purchase of the Smiths' property. *See Whitfield Constr. Co. v. Bank of Tokyo Tr. Co.*, 338 S.C. 207, 222–23, 525 S.E.2d 888, 897 (Ct. App. 1999).

### E. Ponce Incorrectly Conflates the Concept of "Fault" With "Responsibility" in Arguing That It Was Entitled To The Entry of Summary Judgment on Waterfall's Equitable Indemnity Claim

As Ponce's Initial Brief implicitly recognizes, the heart of Waterfall's suit against Ponce consists of Waterfall's claim for equitable indemnity from Ponce. In incorrectly arguing that Waterfall is not entitled to equitable indemnity as a matter of law, Ponce wrongly conflates the concept of "fault" with that of a general contractor's "responsibility" for the overall building project.

To prevail on its equitable indemnity claim, Waterfall must not have been at fault for the damages that Ponce inflicted on the Smiths through its defective framing work. *See Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013). In South Carolina, where "a loss is caused by conduct which is wrongful, the common law will apply the fault principle to place the loss on the at fault party." *Snow v. City of Columbia*, 305 S.C. 544, 552, 409 S.E.2d 797, 801 (Ct. App. 1991). By implication, this means that a party is "at fault" when it engages in wrongful conduct that causes another person to suffer a loss.

As a matter of law, where "fault is not involved, the common law ordinarily leaves the shifting of risk to private agreement or statute." *Id.* This means the law generally does not impute liability on a party who is not at fault for the loss another person suffers. *See id.* This is because "imposition of no fault liability, though a well meaning attempt to compensate an injured party, may give rise to unintended consequences, including the refusal of people or public bodies to engage in highly desirable activities." *Id.* at 551–52, 409 S.E.2d at 801; *see also Ravan v. Greenville Cnty.*, 315 S.C. 447, 470, 434 S.E.2d 296, 310 (Ct. App. 1993).

As a matter of policy, it is "highly desirable" for general contractors such as Waterfall to assume financial responsibility to the individual owners of homes or buildings under construction

for the overall soundness of the construction project. *Snow*, *supra*, 305 S.C. at 551, 409 S.E.2d at 801. This public policy would be severely undermined if such general contractors were then legally precluded from obtaining indemnification for the defects or deficiencies in construction solely performed or caused by a particular subcontractor.

Yet this is exactly the inequitable result that Ponce has perpetrated upon Waterfall here. Ponce incorrectly contends that Waterfall "conceded" fault when member-manager David Brown agreed to accept financial responsibility to the Smiths for the deficient construction of the home. At no time, however, did Mr. Brown or anyone else at Waterfall admit that Waterfall did anything wrong with regard to the construction of the Smiths' home. (Brown Aff. pp. 1-4.)

In accordance with the important public policy enunciated in *Snow*, this Court should reject Ponce's contention that Waterfall's acceptance of financial responsibility to the Smiths for the deficient framing work that Ponce performed somehow bars Waterfall from obtaining equitable indemnity from Ponce for the framing defects. *See Ravan*, 315 S.C. at 470, 434 S.E.2d at 310; *Snow*, 305 S.C. at 551-52, 409 S.E.2d at 801. To hold otherwise would severely undercut the public policy that encourages general contractors such as Waterfall to voluntarily assume financial responsibility to homeowners such as the Smiths for the deficient and unworkmanlike construction performed by one or more subcontractors.

This concept was highlighted by the New York Court of Appeals in *Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172, 556 N.Y.S.2d 991, 556 N.E.2d 430 (1990). There, a subcontractor hired another company, who hired employee Brown, to perform work on an office building construction project overseen by a general contractor. Brown was injured when a scaffold collapsed. Brown filed suit against the general contractor, who, in turn, impleaded the subcontractor. The New York Court of Appeals ruled that the general contractor was liable to the

employee under the language of a New York labor statute. However, the court further ruled that the general contractor could obtain indemnification from the subcontractor through enforcement of an indemnification agreement between the general contractor and the subcontractor. *Id.* at 180–81, 556 N.Y.S.2d at 995, 556 N.E.2d at 434.

In reaching this decision, the court rejected the subcontractor's contention that the general contractor's liability to the employee under the labor statute was the legal equivalent of a finding of negligence, which then barred indemnification under the terms of another New York statute. *Id.* This was because liability under the labor statute was not predicated on fault or negligence, but simply allocated responsibility for safety on the general contractor.

In this regard, the court explained that the purpose underlying the labor statute was "to place ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor[.]" *Id.* at 179, 556 N.Y.S.2d at 994, 556 N.E.2d at 433 (internal quotation marks omitted). Hence, "[l]iability is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence. . . . A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence." *Id.* (internal quotations omitted). The court then concluded: "Because there was no evidence of any fault on the part of [the general contractor] in this case, neither the wording nor intent of the statute is violated by allowing it to allocate responsibility for this unexplained accident through an indemnification provision." *Id.* at 180–81, 556 N.Y.S. 2d at 995, 556 N.E.2d at 434.

As *Brown* illustrates, a statute, rule, or common law may impose strict liability on a general contractor for the damages an innocent third party incurs during the course of a building construction project. The imposition of such liability on the general contractor arises as a matter

of public policy and is not in any way dependent on a finding of fault or negligence by the general contractor. It would contravene public policy for a court to then rule that the general contractor is precluded from obtaining indemnification (either contractual or equitable) from the responsible subcontractor. No finding of fault or negligence should be imputed to the general contractor in such cases. *See id.*

For these reasons, both logic and fairness dictate that Waterfall be permitted to obtain equitable indemnification from Ponce for the monetary damages that Waterfall paid to the Smiths but that were caused by Ponce's deficient and unworkmanlike framing work. The fact that Waterfall assumed responsibility to the Smiths for the deficient building construction accorded with public policy. It would equally accord with public policy for Waterfall to be permitted to obtain indemnification from the party who was actually at fault and culpable for the loss, that is, Ponce.

## II. CONCLUSION

For the foregoing reasons as well as for the reasons set forth in the Initial Brief of Appellant, the trial court's Order entered on April 17, 2024, issuing summary judgment in favor of Ponce should be reversed, and the action should be remanded to the trial court for a trial upon the merits.

*[Remainder of page intentionally left blank; signature page follows]*

Respectfully submitted,

**WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC**
*Attorneys for the Appellants*

*s/ Kenneth R. Moss*
Kenneth R. Moss, SC Bar No. 15520
Brittany C. Moore, SC Bar No. 102780
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903
Email: KennethMoss@wwpemlaw.com
BrittanyMoore@wwpemlaw.com

North Myrtle Beach, SC

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**CERTIFICATE OF COUNSEL**

The undersigned certifies this [Initial] Reply Brief of Appellant complies with Rule 208(b)(5), SCACR. The undersigned further certifies this [Initial] Reply Brief of Appellant complies with the Supreme Court's Orders dated August 13, 2007 and April 15, 2014 regarding personal identifiers and sensitive information.

**WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC**
*Attorneys for the Appellants*

*s/ Kenneth R. Moss*
Kenneth R. Moss, SC Bar No. 15520
Brittany C. Moore, SC Bar No. 102780
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903
Email: KennethMoss@wwpemlaw.com
BrittanyMoore@wwpemlaw.com

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of which Jeronimo Ponce d/b/a JP & Sons Builders is the …… Respondent.

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## PROOF OF SERVICE

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I certify that I have served a copy of the *[Initial] Reply Brief of Appellant* and *Proof of Service* of same in the above-captioned matter on the following individuals by electronic filing system, addressed as follows:

Brandon T. Reeser, Esq.
Wilson, Heyward & Reeser
924 Folly Road
P.O. Box 13177
Charleston, SC 29422
*Counsel for Respondent*

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Respectfully submitted,

**WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC**

s/ Kenneth R. Moss
Kenneth R. Moss, SC Bar # 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: (843) 281-9901 / Fax: (843) 281-9903
Email: kennethmoss@wwpemlaw.com
*Attorneys for Appellant*

North Myrtle Beach, SC
October 3, 2024