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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2024-000772

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.*

[FINAL] BRIEF OF APPELLANT

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A. Had the statute of limitations expired as to any of Plaintiff/Appellant Waterfall Investment and Construction Group, LLC's ("Waterfall") causes of action at the time the claims were filed?

B. Could summary judgment be appropriately entered against Waterfall on Waterfall's equitable indemnity claim?

C. Were Waterfall's claims for negligence, breach of contract, and/or contractual indemnity duplicative of its equitable indemnity cause of action?

D. Did Waterfall's execution of a Settlement Agreement and Release with a third party serve to extinguish Waterfall's right to seek contribution from Defendant/ Respondent Jeronimo Ponce d/b/a JP & Sons Builders ("Ponce")?

II. STATEMENT OF THE CASE

This action is before this Court on appeal from an Order of the Horry County Court of Common Pleas, the Honorable William H. Seals, Jr. presiding, in Case No. 2019-CP-26-03604. (R. pp. 12–16; R. pp. 113–20.) Specifically, the action was before the Court of Common Pleas for a hearing on March 11, 2024, upon *Defendant Jeronimo Ponce d/b/a JP & Sons Builders' Motion for Summary Judgment, with attached Exhibit A,* that was filed on August 06, 2023. (R. pp. 127–37.) The Court's Order recited that the Court had considered the Motion filed by Ponce on August 6, 2023, and filed the *Order Granting Defendant Jeronimo Ponce d/b/a JP & Sons Builders' Motion for Summary Judgment* on April 17, 2024. (R. pp. 12–16.) Thus, final judgment is entered on Ponce's behalf, ending this case with prejudice.

Waterfall timely filed a *Notice of Appeal* on May 9, 2024 (R. pp. 113–20); transcripts of the proceedings were ordered and then received on May 28, 2024.

The salient facts established in the record are as follows. In March 2017, Waterfall entered into a contract for the construction of a residence in Horry County, South Carolina for James Daniel Smith, Sr. and Frances Smith (jointly referred to as the "Smiths"). (R. p. 34–39.) Waterfall

contracted with a licensed residential home builder, Mr. Clodfelter, to supervise the construction. (R. p. 148, ¶ 8.) Waterfall also entered into contracts with various subcontractors, including Ponce. Ponce agreed to act as a framing subcontractor on the construction project. (R. p. 104, ¶ 7; R. p. 148, ¶¶ 6–8.)

During the construction of the residence, the Smiths complained about the status and quality of the construction. (R. p. 104, ¶ 8; R. p. 149, ¶ 12.) The Smiths withheld funds due on the construction project, which caused Waterfall to halt construction. (R. p. 104, ¶ 8; R. p. 149, ¶¶ 11–12.)

On June 7, 2019, Waterfall filed a Complaint against the Smiths in the court below for amounts due and owing under the construction contract. (R. pp. 17–21.) On September 9, 2019, the Smiths asserted Counterclaims against Waterfall for numerous construction-related defects concerning the residence and a Third-Party Complaint against Waterfall's principal, David A. Brown and Wife, Lynne Brown. (R. pp. 22–39.) The Counterclaims were for breach of contract, negligence/gross negligence, breach of express warranty, breach of implied warranty, fraud, negligent misrepresentation, and violation of South Carolina Unfair Trade Practices Act. (R. pp. 24–31.) The third-party claims also asserted a violation of the Statute of Elizabeth. (R. pp. 31–32.)

During the course of litigation, Waterfall learned that Ponce failed to perform his framing obligations in a good and workmanlike manner, and that Ponce's defective framing work was the primary source of the action the Smiths brought against Waterfall. (R. p. 104, ¶ 11; R. pp. 148–49, ¶ 10; R. p. 149, ¶ 12.)

On October 24, 2019, Waterfall filed a Third-Party Complaint against Ponce. (R. pp. 40–53.) In that pleading, Waterfall alleged claims for equitable indemnity, negligence, and contribution against Ponce. (R. pp. 49–52.)

On November 18, 2022, Waterfall entered into a mediated Settlement Agreement with the Smiths. (R. pp. 96–102; R. pp. 130–37.) Other subcontractors were part of the settlement; however, Ponce declined to participate in the settlement. (R. pp. 96; R. p. 131.) Under the terms of the settlement, Waterfall was obligated to: (i) repurchase the subject home from the Smiths; (ii) pay the Smiths directly the sum of $225,500.00; and (iii) forego contractual damages in the amount of $180,283.28. (R. p. 149, ¶ 14.)

A written Settlement Agreement and Release was executed by David Brown, as the managing member of Waterfall, and the Smiths on December 29, 2022. (R. pp. 101–02; R. pp. 136–37.) Paragraph 10 of this contract provides, in pertinent part:

> All Settling Parties . . . are hereby releasing the other Settling Parties and their respective employees, former employees, agents, attorneys, insurers, and related parties from all claims and damages arising from the State and Federal Litigation, **yet specifically preserving any and all claims and potential claims that Waterfall, has or may have against Third-Party Defendants Jeronimo Ponce d/b/a JP & Sons Builders ("Ponce")** . . . Ponce . . . will **NOT** be a party to any release relevant to this Settlement Agreement. The Smiths, as part of this Settlement, assign any and all claims and potential claims they have or may have against Ponce to Waterfall as part of this settlement. No Party to this Settlement Agreement is releasing Ponce . . . from any liability or potential liability related to the State Litigation.

(*Emphasis added*.) (R. pp. 97–98; R. pp. 132–33.)

On August 6, 2023, Ponce filed a motion for summary judgment with the trial court. (R. pp. 127–37.) In that motion, Ponce argued that Waterfall's claim for negligence was "nothing more than a disguised and repeated claim for equitable indemnity on the on the basis that there is no enforceable written contract applicable to the work Waterfall allegedly performed on the subject home." (R. p. 128.) In addition, Ponce argued that because the Smiths never asserted any claims against him within three (3) years from the date Waterfall filed its Third-Party Complaint against him, the statute of limitations as to any negligence claim had expired. (R. p. 128.) Ponce also

asserted that Waterfall's contribution claim was improper, as "all claims in this matter" other than Waterfall's claims against Ponce had been settled (R. p. 128), and by the terms of the Settlement Agreement (R. pp. 96–102; R. pp. 130–37), Waterfall's purported liability was not discharged by the Settlement; therefore, Ponce could not be held liable for contribution under S.C. Code § 15-38-20. (R. p. 128.)

On July 5, 2023, Waterfall was granted leave to file an Amended Complaint and filed an Amended Complaint against Ponce that sought to realign the parties and the claims remaining after the mediated settlement. (R. pp. 9–11; R. pp. 103–12.) In addition to the original claims for negligence, equitable indemnity, and contribution that had been brought against Ponce in the original Third-Party Complaint, the Amended Complaint included causes of action against Ponce for breach of contract and breach of implied warranties. (R. pp. 47–52; R. pp. 110–11.) On August 29, 2023, Ponce filed an Answer to the Amended Complaint.

The trial court held a hearing on Ponce's motion for summary judgment on March 11, 2024. (R. pp. 152–74.) On April 17, 2024, the trial court entered an Order granting Ponce's motion for summary judgment. (R. pp. 12–16.) In doing so, the court determined that Ponce's "liability for defective construction arising from work performed at the Smith residence expired prior to [Waterfall's] settlement with the Smiths on November 22, 2022." (R. p. 15.) Thus, the trial court granted Ponce's motion for summary judgment on Waterfall's negligence and breach of warranty claims on statute of limitations grounds. In addition, the court granted Ponce's motion as to Waterfall's breach of contract and contractual indemnity claims on the basis that Waterfall did not produce a written indemnity agreement. (R. p. 15.) Finally, the trial court found that Waterfall "is not fault-free by admission in its representative affidavit[.]" (R. p. 15.) Based on this finding, the trial court granted Ponce's motion as to Waterfall's equitable indemnity claim. (R. p. 15.)

III. STANDARD OF REVIEW

"When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. . . . A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008); *see* Rule 56(c), *South Carolina Rules of Civil Procedure ("SCRCP")*. Like the trial court, the appellate court "will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753, *cert. denied, Catawba Indian Tribe v. South Carolina*, 552 U.S. 888, 128 S. Ct. 256 (2007).

The appellate court reviews questions of law on a de novo basis. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41. On the other hand, questions of fact are subject to "the substantial evidence standard of review." *Brooks v. Benore Logistics Sys.*, 442 S.C. 462, 476, 900 S.E.2d 436 (2024).

"Under the substantial evidence standard of review, [the appellate] court may not substitute its judgment for that of the [trial court] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 81-82, 710 S.E.2d 454, 456 (Ct. App. 2011). The appellate court may also substitute its judgment for that of the trial court if the trial court's factual finding "is clearly erroneous in view of the substantial evidence on the record as a whole[.]" *Brooks*, 442 S.C. at 476 (internal quotation marks omitted). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the [trial court] reached or must have reached in order to justify its action." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

IV. ARGUMENT

A. The Statute of Limitations Applicable to Waterfall's Claims Against Ponce Had Not Expired at the Time Any of the Said Claims Were Filed.

The trial court found that a three-year statute of limitations applied to Waterfall's claims against Ponce. *See* S.C. Code Ann. §§ 15-3-510, *et seq*. Ponce performed the framing work on the Smiths' residence in 2017. On October 24, 2019, Waterfall filed its claims for negligence, equitable indemnity, and contribution against Ponce by way of a Third-Party Complaint. (R. pp. 40–53.) Clearly these claims were timely filed within the three-year limitations period.

Waterfall executed a contract entitled "Settlement Agreement and Release" with the Smiths and other subcontractors on December 29, 2022. (R. pp. 96–102; R. pp. 130–137.) This document expressly states that "any and all claims and potential claims that Waterfall has or may have against [Ponce]" are "specifically preserv[ed]." (R. p. 98; R. p. 133.) The Settlement Agreement and Release further states that Ponce "will **NOT** be a party to any release relevant to this Settlement Agreement. . . . No party to this Settlement Agreement is releasing Ponce . . . from any liability or potential liability related to [the instant] Litigation." (*Emphasis in original*.) (R. p. 98; R. p. 133.)

"The term 'release' has been defined as the 'relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.'" *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007) (quoting 76 C.J.S. *Release* § 2 (1994)). "A release is an agreement providing that a duty owed to the maker of the release is discharged immediately. . . . Whether a particular agreement constitutes a release is to be determined from the intent of the parties." *Ecclesiastes Prod. Ministries, supra* at 492, 649 S.E.2d at 498 (*internal citation omitted*).

Under South Carolina law "[t]he release of one tortfeasor does not constitute a release of others who contributed to the plaintiff's injuries unless the parties intended such a release or the plaintiff received full satisfaction." *Scott v. Fruehauf Corp.*, 302 S.C. 364, 368, 396 S.E.2d 354, 356 (1990). Here, the Settlement Agreement and Release did serve to release Waterfall's claims and potential claims against the subcontractors who were parties to that contract. (R. pp. 97–98, ¶ 10; R. pp. 132–33, ¶ 10.) However, by its express terms, the Settlement and Agreement and Release did not serve to release Waterfall's claims and potential claims against Ponce. (R. pp. 97–98, ¶ 10; R. pp. 132–33, ¶ 10.) Instead, Waterfall expressly preserved the right to pursue all claims and potential claims against Ponce that related to the deficient construction of the Smiths' residence. (R. pp. 97–98, ¶ 10; R. pp. 132–33, ¶ 10.)

In this regard, South Carolina courts have recognized that "[a] release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Prod. Ministries, supra* at 497, 649 S.E.2d at 501. "If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." *Id.* at 499, 649 S.E.2d at 502. In effect, the court must enforce the terms of an unambiguous release agreement as written.

Here, the express language of the Settlement Agreement and Release clearly and unambiguously states that Waterfall is "specifically preserving" "any and all claims and potential claims that Waterfall has or may have against [Ponce]", and that "[n]o party to this Settlement Agreement is releasing Ponce . . . from any liability or potential liability related to [the instant] Litigation." (R. p. 97–98, ¶ 10; R. pp. 132–33, ¶ 10.) This unambiguous contractual language is legally enforceable as written. Thus, Waterfall had the right to pursue all claims against Ponce that were related to Ponce's framing work on the Smiths' home. *See Ecclesiastes Prod. Ministries,* 374 S.C. at 499, 649 S.E.2d at 502.

It is undisputed that Waterfall's Third-Party Complaint against Ponce was timely filed. (R. pp. 40–53.) In that pleading, Waterfall alleged causes of action against Ponce for negligence, equitable indemnity, and contribution. (R. pp. 49–52.) Waterfall did not release these claims against Ponce when it entered into the Settlement Agreement with the Smiths. (R. pp. 96–102; R. pp. 130–37.) *See Louden v. Moragne*, 327 S.C. 465, 467, 486 S.E.2d 525, 526 (Ct. App. 1997) (finding that "the clear language of the release indicates that Louden . . . preserved her right to pursue a tort action against Moragne to establish her entitlement to underinsured motorist benefits. This was a right which existed from the date of the accident and was not 'created' by the terms of the release"); *see also Scott*, *supra* at 368, 396 S.E.2d at 356; *Ecclesiastes Prod. Ministries*, *supra* at 497, 649 S.E.2d at 501.

Instead, through the unambiguous language of the Settlement Agreement, Waterfall preserved its right to continue to pursue its negligence, equitable indemnity, and contribution claims against Ponce. (R. p. 98; R. p. 133.) *See Scott*, 302 S.C. at 368, 396 S.E.2d at 356; *Ecclesiastes Prod. Ministries*, 374 S.C. at 497, 649 S.E.2d at 501; *Louden*, 327 S.C. at 467, 486 S.E.2d at 526. The trial court erred in concluding otherwise and in ruling that such claims were time-barred. *See id.*

Next, it must be determined whether Waterfall had the right to pursue the breach of contract and breach of implied warranty claims alleged against Ponce in the Amended Complaint despite the fact that the Amended Complaint was filed more than three (3) years after Ponce's defective framing took place. (R. pp. 103–112.) This issue is governed by Rule 15(c), *SCRCP*, which provides in relevant part: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."

Rule 15 permits the amendment of a complaint, and subsection (c) allows for that amendment to relate back to the filing of the original complaint so as to render the amended complaint timely for statute of limitations purposes. *Patton v. Miller*, 420 S.C. 471, 496, 804 S.E.2d 252, 265 (2017). The test for relation back under Rule 15(c) is whether claim raised in the amended pleading "arose out of the conduct, transaction or occurrence set forth in the original pleading[ ]." Rule 15(c), *SCRCP*.

"The central requirement here is that the party defending against the new claim have sufficient notice of it, *i.e.*, the new claim must be 'logically related' to the *matters originally pleaded* so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired." *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 222-23, 525 S.E.2d 888, 897 (Ct. App. 1999) (emphasis in original). In *Whitfield Constr.*, the South Carolina Court of Appeals explicated upon this point by stating:

> In federal practice, the factors to determine whether or not a claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading include: (1) whether the party defending against the new claim had notice of it; (2) whether the party seeking to add the new claim will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to the defending party would result if the amendment were to relate back.

Id. at 223, 525 S.E.2d at 897 (citing 3 James Wm. Moore, *Moore's Federal Practice* § 15.19[2] (Daniel R. Coquillette *et al*. eds., 3d ed. 1999).

During the hearing on Ponce's summary judgment motion, Waterfall's counsel explained that the relation back test was easily satisfied here:

> [MS. MOORE:] Your Honor, in 2019, [Ponce] was sued for negligence based on the constructual defects of the home. The breach of contract and the breach of implied warranty are all based on that same occurrence, that same conduct that happened when they were hired to come onto this property and work on this house.

> There's no separate transaction that we're talking about. There's no separate occurrence, it's the same time period.

(R. p. 164, lines 15–22.)

As counsel explained, Waterfall's new claims against Ponce in the Amended Complaint for breach of contract and breach of implied warranty are logically related to the existing claims for negligence, equitable indemnity, and contribution because they all arose out of Ponce's unworkmanlike and defective framing of the Smiths' residence. *See Whitfield Constr.*, 338 S.C. at 222–23, 525 S.E.2d at 897. Once the Third-Party Complaint against Ponce was filed, Ponce was on notice of the basis of the new claims. (R. pp. 40–53.) The claims all rely on the same evidence. *Whitfield Constr.*, 338 S.C. at 223, 525 S.E.2d at 897. Ponce would suffer no unfair surprise if he were required to defend against the additional claims for breach of contract and breach of implied warranty. *See id.*

As the foregoing analysis shows, all of Waterfall's claims against Ponce were timely. Thus, the trial court committed reversible error in entering summary judgment against Waterfall on its negligence and breach of warranty claims on statute of limitations grounds. (R. p. 15.)

B. Summary Judgment Could Not Be Appropriately Entered on Waterfall's Equitable Indemnity Claim

A claim for equitable indemnity arises "'where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees[.]'" *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971). "Whether the right exists depends on the nature of the relationship between the indemnity plaintiff and the party who caused the third party's damages[.]" *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 625, 776 S.E.2d 426, 431 (Ct. App. 2015), *aff'd in part, rev'd in part on other*

grounds, *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co*., 435 S.C. 176, 866 S.E.2d 577 (2021). "The relationship of contractor/subcontractor is a sufficient basis to support a claim of equitable indemnity." *First Gen. Servs. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994).

To recover damages on an equitable indemnity claim, the plaintiff must establish the following elements: (1) the indemnity defendant [here, Ponce] . . . is at fault in causing the damages of the third party [here, the Smiths]; (2) the plaintiff [here, Waterfall] has no fault for those damages; and (3) the plaintiff [here, Waterfall] incurred expenses that were necessary to protect his interest in defending the third party's claim. *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013).

In the present case, the trial court incorrectly entered summary judgment against Waterfall on Waterfall's equitable indemnity claim against Ponce. (R. pp. 12–16.) This ruling was based solely on the trial court's finding that Waterfall had not established the second required element of an equitable indemnity claim, to-wit, that it had no fault for the Smiths' damages. (R. pp. 14–15.)

In this regard, the trial court found that Waterfall "is not fault-free by admission" in the Affidavit of David A. Brown ("Mr. Brown"). (R. pp. 14–15.) Mr. Brown is the principal and managing member of Waterfall. His Affidavit was filed with the trial court on March 7, 2024, in support of Waterfall's opposition to Ponce's motion for summary judgment. (R. pp. 147–51.) According to the trial court, in pages 1–4 of his Affidavit, Mr. Brown "concedes [Waterfall's] role in constructing the subject residence and responsibility as a joint tortfeasor[.]" (R. p. 14.)

Contrary to the trial court's findings, Mr. Brown's Affidavit does not admit that Waterfall was at fault for any defects in the construction of the Smiths' residence. (R. pp. 147–51.) Instead, Paragraph 9 of the Affidavit explains:

> **While my company and I were not negligent in the construction**, as we had hired licensed professionals whom we had prior relationships and experience with, as the contractor pulling the permit and contracting with the Smiths my company was ultimately responsible for the defective work undertaken by the Defendant. **Basically my company became liable due to the breaches of contract and duties by others.**

(*Emphasis added*; R. p. 148, ¶ 9.)

Affidavit Paragraph 12 further provides: "I later learned that defective construction attributable to [Ponce] became the primary source of the disputes that my company had with the Smiths." (R. p. 149, ¶ 12.) In Paragraph 19, Mr. Brown opines: "I am informed and believe that my company, [Waterfall], was forced to pay far more in damages than is equitable because [Ponce] refused to contribute financially to any settlement" with the Smiths. (R. p. 150, ¶ 19.)

At the hearing on Ponce's summary judgment motion (R. pp. 152–74), Waterfall's counsel clarified any doubt concerning the meaning of Mr. Brown's Affidavit. Counsel explained that Waterfall "has not admitted fault in any of the construction defects. There's been no finding of fault on [Waterfall] as far as the construction defects." (R. p. 161, lines 19–21.) Waterfall's counsel further stated:

> So, Your Honor, seeing as [Waterfall] has not admitted fault, there's been no one to determine that he [Waterfall] was at fault. He [Waterfall] hired the subcontractor [Ponce] to do the work; they screwed up. He [Waterfall] hired a contractor to oversee it; he was not on-site. It – a jury could find that he [Waterfall] was not at-fault.

(R. p. 162, lines 20–24.)

In ruling otherwise, the trial court appears to have misconstrued Waterfall's acceptance of financial responsibility to the Smiths (R. p. 149, ¶ 14), the homeowners who had contracted for the building of the residence, by treating it as a concession of fault. However, this acceptance of financial responsibility by Waterfall to the homeowners is exactly what the principle of indemnity

is intended to address and compensate. Further, this acceptance of financial responsibility by Waterfall to the homeowners is in keeping with sound public policy.

In the leading case of *Addy*, the South Carolina Supreme Court explained: "Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him[.]" *Addy*, 257 S.C. at 34, 183 S.E.2d at 710. "The right is created by operation of law 'in cases of imputed fault or where some special relationship exists between the first and second parties.'" *First Gen. Svcs*., 314 S.C. at 442, 445 S.E.2d at 448. As stated above, the relationship of general contractor and subcontractor is a sufficient basis to support a claim of equitable indemnity. *Id.* at 443, 445 S.E.2d at 448.

Here, Waterfall was compelled to pay damages to the Smiths solely because of negligence imputed to Waterfall as a matter of law arising from the contractor-subcontractor relationship between Waterfall and Ponce. However, there is no evidence that Waterfall itself committed any negligent act that contributed to the defective construction of the Smiths' residence. *See id.* ("At this stage of the litigation, it has not been established that First General was negligent as to the restoration of the interior contents. Should that be proven, indemnification would not be allowed."). Hence, this is the exact circumstance in which an equitable indemnification action arises against the actual wrongdoer. *See id.*

At most, a question of fact exists on the issue as to whether Waterfall bears any fault for the Smiths' damages. Summary judgment cannot be appropriately entered when "there is conflicting evidence of who is at fault in causing [the Smiths'] damage[.]" *Reed v. Big W GS, LLC*, 2016 U.S. Dist. LEXIS 66425, at *31 (D.S.C. May 20, 2016).

In *Stoneledge*, the court found that based on the evidence in the record, it could not say as a matter of law that the general contractor was at fault for any construction defects. *Stoneledge*,

413 S.C. at 626, 776 S.E.2d at 432. Instead, the court found that "the evidence is conflicting, and viewing the evidence in the light most favorable to [the general contractor], the record contains evidence a factfinder could reasonably find supports the conclusion [the general contractor] was not at fault." *Id.* Consequently, summary judgment could not be appropriately entered, and the action was required to be remanded for a trial. *Id.*

For the same reasons, it must be concluded that the trial court erred in entering summary judgment in favor of Ponce on Waterfall's equitable indemnity claim. (R. pp. 14–15.) At most, the evidence in the record is conflicting as to whether Waterfall was in any way at fault for the defective framing within the Smiths' home, especially since Ponce was the framing subcontractor. (R. pp. 148, ¶¶ 6–7.) Viewing the evidence in the light most favorable to Waterfall, as the law requires, a factfinder could reasonably find that Waterfall was not at fault. *See id.* Consequently, a question of material fact exists on this issue which may only be appropriately resolved by the factfinder at trial. *See id.* It could not be conclusively resolved in Ponce's favor on a legal motion for summary judgment. *See id.*

C. Waterfall's Claims for Negligence, Breach of Contract, and/or Contractual Indemnity Were Not Repeated Causes of Action for Equitable Indemnity

The other basis on which Ponce moved for summary judgment was that Waterfall's other claims, including its claim for negligence, was simply a repeated cause of action for indemnity. (R. p. 14; R. p. 128.) The trial court agreed and granted summary judgment on Waterfall's claims for breach of contract and contractual indemnity on the grounds that Waterfall did not produce a written contract in opposition to Ponce's summary judgment motion. (R. pp. 14–15.)

Ponce incorrectly relied on *Stoneledge* to support the proposition that only a written contract will suffice to differentiate a claim for equitable indemnity from one for negligence,

breach of contract, or contractual indemnity. *Stoneledge*, however, is easily distinguishable from the present case.

In *Stoneledge*, Marick, a general contractor, filed cross-claims against a subcontractor for breach of contract, breach of warranty, and equitable indemnity. The trial court entered summary judgment on the breach of contract and breach of warranty claims on the grounds that these claims were not separate causes of action from the equitable indemnity claim. *Stoneledge*, 413 S.C. at 636, 776 S.E.2d at 437. In affirming this ruling, the Court of Appeals found that Marick's own allegations showed that "it did not sustain its own damages as a result of any breach of contract or breach of warranty by the [subcontractor]. Rather, the allegations show Stoneledge is the party that suffered damages, and Marick's injuries arose exclusively from having to defend itself in Stoneledge's lawsuit." *Id.* Further, "[w]hen pressed at oral argument, Marick's counsel could not identify any damages it claimed in this lawsuit that did not arise exclusively from the claims made by Stoneledge." *Id.*

In contrast to *Stoneledge*, Waterfall sustained significant damages outside of the claims that the Smiths made against it. Specifically, Ponce's defective framing work seriously damaged Waterfall's business and business reputation. (R. p. 109, ¶ 35.) Ponce's defective framing work also seriously damaged Waterfall in that it rendered Waterfall unable to collect its contract balance. (R. p. 108, ¶ 33.) Waterfall's counsel addressed this point during the hearing on Ponce's summary judgment motion. (R. p. 158, line 9 – p. 160, line 16.)

At a minimum, it should be concluded that a question of material fact exists on this issue. The trial court could not appropriately determine as a matter of law that Waterfall's claims for negligence, breach of contract, and breach of implied warranty are duplicative of its claim for equitable indemnity. The issue must be left to factfinder to resolve upon a trial of the merits.

D. Waterfall's Settlement Agreement with the Smith's Did Not Extinguish Its Right to Seek Contributions from Ponce

In arguing that Waterfall does not have the right to seek contribution from him, Ponce incorrectly relied on S.C. Code Ann. § 15-38-20(D), which states: "A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable."

This statute was intended to prevent double liability and to prevent an injured person "from obtaining a double recovery for the damage he sustained[.]" *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). It is "almost universally held that there can be only one satisfaction for an injury or wrong." *Id.* (internal quotation marks omitted).

Here, there is no danger of the Smiths obtaining a double recovery for the damage to their residence. The Smiths never pursued any direct action against Ponce. The Settlement Agreement between Waterfall and the Smiths fully discharged Ponce's liability for the framing defects on the Smith's residence to anyone in the world with the exception of Waterfall. The applicable statutes of limitation of certainly run as to any direct action against Ponce by the Smiths.

It should be emphasized that Ponce is literally the most culpable party in the entire case. Out of all subcontractors, Ponce was one whose work was most deficient and unworkmanlike. Despite this, Ponce failed and refused to contribute anything financially to the settlement. (R. p. 150, ¶¶ 18–19; R. p. 166, lines 12–16.) As a matter of policy, Ponce should not be permitted to twist the meaning of S.C. Code Ann. § 15-38-20(D) and to use the statute as a shield to wholly avoid liability for his significantly defective work.

V. CONCLUSION

For the foregoing reasons, 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.

Respectfully submitted,

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North Myrtle Beach, SC
October 22, 2024

CERTIFICATE OF COUNSEL

The undersigned certifies this [Final] Brief of Appellant complies with Rule 211(b) of the *South Carolina Appellate Court Rules*. The undersigned further certifies this [Final] Brief of Appellant complies with the Supreme Court's Orders dated August 13, 2007 and April 15, 2014 regarding personal identifiers and sensitive information.

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