THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Appellate Case No: 2013-001403

Stoneledge At Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, Individually and on Behalf of All others similarly situated.....Plaintiffs

IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Miller/Player & Associates, John Ludwig, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC of the Carolinas, Inc., Eufacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry/Player & Associates, ...Defendants

Of Defendants, Marick Home Builders, LLC and Rick Thoennes .....Appellants,

Of Defendants, Clear View Construction, LLC and Michael Franz.....Respondents

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INITIAL BRIEF OF APPELLANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES

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STATEMENT OF THE CASE

The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge (hereinafter "Stoneledge" or "Project"). Included in Plaintiffs' numerous claims were claims against one of the general contractors affiliated with the Project, Marick Home Builders, LLC, and its affiliated member Rick Thoennes (hereinafter collectively referred to as "Marick"), and claims concerning alleged defective stone installation and a failure to install flashing claim against Marick's subcontractor Clear View Construction, LLC and its owner Michael Franz (hereinafter collectively referred to as "Clear View").

Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Only Phase II of Stoneledge is the subject of this Appeal. As a result of being sued for the alleged defective stone masonry performed by Clear View, Marick filed cross-claims against all stonemasons that performed work on the project which included Clear View for indemnity, negligence, breach of contract and breach of warranty (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third Amended Complaint, April 5, 2012).

Numerous subcontractors, including Clear View, filed motions for summary judgment as to Marick's cross-claims. (Clear View Construction, LLC and Michael Franz's Motion for Summary Judgment.) On September 5, 2012, arguments were heard all day on arguments concerning collapse and equitable indemnity by the lower court. Notwithstanding Appellants' opposition, the lower court issued an order dated January 11, 2013, and filed on January 14, 2013, granting Clear View's Motion for Summary Judgment concerning Marick's cross-claims for negligence and equitable indemnification. (January 11, 2013 Order Granting Summary

Judgment.) In a separate order which is currently before this Court in a separate appeal, the Court granted Clear View's Motion for Summary Judgment concerning Marick's cross-claims for breach of contract and breach of warranty.

Following receipt of the January 11, 2013 Order, which was filed on January 14, 2013, Marick promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to South Carolina Rule Civil Procedure, Rule 59(e). (Marick and Thoennes' Motion for Reconsideration.) The 59(e) Motion was timely served and filed on January 24, 2013. The 59(e) Motion stated that the rulings set forth in the lower court's January 11, 2013 Order were not consistent with South Carolina law. The lower court conducted a hearing on said Motion on April 10, 2013. The lower court denied Marick's 59(e) Motion by way of Order dated May 21, 2013, and filed May 22, 2013. (May 21, 2013 Order Denying Marick's Motion for Reconsideration.)

The time having been tolled by the SCRCP 59(e) Motion filed by Marick, a Notice of Appeal dated June 6, 2013 was timely filed with the Court appealing the lower court's Order dated May 21, 2013 upholding the lower court's January 11, 2013 Order granting summary judgment. (June 6, 2013 Notice of Appeal, January 11, 2013 Order, and May 21, 2013 Order.) The Order was received by Appellants on or about May 23, 2013 and a Notice of Appeal and Proof of Service was served upon the Court and all parties on June 6, 2013.

STATEMENT OF FACTS

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter "Hund"). Hund's Complaint alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the project.

Upon information and belief, Stoneledge Owners Association (hereinafter "SOA") took the position that Dr. Hund's Complaint was improper as the SOA was responsible for the exterior of the units. In November of 2009, the owners voted to retain an attorney to represent the SOA and amend the lawsuit to include the SOA and both Phase I and Phase II of the project.

Dr. Hund amended the Complaint to add the SOA and additional individual homeowners as Plaintiffs and included new allegations concerning Phase I of the Project. Plaintiffs again alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, inadequate installation of building components, improper site work/grading, improper stone application and undisclosed latent defects. (Third Amended Complaint.)

Stoneledge at Lake Keowee is an 80-unit lakefront townhome development located in West Union, South Carolina along the shores of Lake Keowee. Stoneledge was constructed in two separate phases. The general contractor for Phase I construction was Bostic Brothers Construction, Inc. (hereinafter "Bostic Brothers"). Following completion of the exterior of all Phase I units and completion of a majority of the interiors of all Phase I units, Bostic Brothers terminated construction at Stoneledge.

After Bostic Brothers' exit, the remaining unsold units and vacant land was purchased by IMK Development Co., LLC (hereinafter "IMK"). IMK was owned by corporate entities IK and Marick. Once purchased, IMK retained Marick as the general contractor to construct Phase II at Stoneledge.

During construction, Marick subcontracted with Clear View to perform brick and stone labor at Phase II of the Project. (October 1, 2007 Contract.) Marick did not supply or install any of the stone at Phase II of the Project; all of the stonework was performed by

subcontractors which included Clear View. It was alleged in Plaintiffs' Third Amended Complaint that work performed by Clear View was deficient; thus, Marick and Clear View were sued by Plaintiffs for those deficiencies. (Third Amended Complaint.) Plaintiffs supported their allegations by submitting testimony of an expert witness. Plaintiffs hired Construction Science and Engineering ("CSE") to investigate the conditions at Stoneledge and to develop a scope of repair. Plaintiffs' expert, Derrick Hodgin, testified that there are defects associated with the stone application at Phase II of the Project (see: Hodgin's Dep. (Day 2) at 87:15 – 88:11, 89:22-25, 127:13-17, 133:4-12, 153:12-22, and 165:22 – 167:3).

Marick also retained the services of an expert, Randy Still. As stated earlier, Marick was the general contractor and provided no construction related labor associated with actual construction of the Project; Marick only provided supervision (see: Rick Thoennes Dep. at 36:17-22 and Randy Still Dep. at 172:21-24). Thus, the only function that Marick served (as the general contractor) was to hire subcontractors, schedule construction and provide supervision. As discussed below, Marick submitted evidence to refute the allegations made by Plaintiffs that Marick was responsible for the alleged deficient work performed by Clear View. Marick further submitted evidence that it provided supervision at the Project.

STANDARD OF REVIEW

Rule 56 of the South Carolina Rules of Civil Procedure provides for judgment as a matter of law where "there is no genuine issue as to any material fact." S.C. R. Civ. P. 56(c). The purpose of summary judgment is to dispose of factually unsupported claims. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Thomas Sand Co. v. Colonial Pipeline Co.*, 563 S.E.2d 109, 112 (S.C. Ct. App.

2002). "Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ." *Tompkins v. Festival Centre Group*, 306 S.C. 193, 410 S.E.2d 593 (Ct. App. 1991).

A trial court should not grant a motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is a genuine issue as to any material fact. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 58, 518 S.E.2d 301, 304 (1999) (citations omitted). In determining whether any triable issue of fact exists, which will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.*

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Vermeer Carolina's, Inc.*, 336 S.C. at 58, 518 S.E.2d at 305. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Id.* Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.*

If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland,* 305 S.C. 402, 409 S.E.2d 366 (1991).

"In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009); *See: Thomas Sand, Co.*, 563 S.E.2d at 112 (on negligence cause of action, "[a]t the summary

judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.")

"Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). We explained in *Elam* that 'there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.' *Id.* at 22, 602 S.E.2d at 779. Indeed, 'it is inherently unfair to disallow such an opportunity.'" *Home Med. Sys., Inc. v. S. Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

ARGUMENT

I. The Lower Court Erred in Collapsing Appellants' Cross-Claim for Negligence into One Claim for Equitable Indemnity.

The Circuit Court erred in collapsing Appellants' cross-claim for negligence into one claim for equitable indemnification. Appellants believe this is a matter of first impression for South Carolina appellant courts as the lower court cited (in the January 11, 2013 Order Granting Summary Judgment) no binding case law in support of its holding. In support of its holding, the lower court cited two non-binding district court cases *(U.S. Fidelity & Guarantee Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880, 881 (D.S.C. 1992) and *S.C. National Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990)) and two non-binding unpublished South Carolina circuit court orders (*Nelson v. John Weiland Home*, 2009-CP-10-6573 (Order by Judge Roger M. Young, October 26, 2011) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006).

The cases of *U.S. Fidelity & Guarantee Co.* and *S.C. National Bank* are both securities law cases which Appellants assert cannot be properly compared with construction litigation and the general contractor/subcontractor relationship. Additionally, in *U.S. Fidelity & Guarantee Co.*, there was an order in place removing all claims by Plaintiff against the non-settling Defendants which could give rise to the indemnity sought from the settling parties. 788 F. Supp. 880, 883, n. 3. However, in this case, Clear View has not settled with Plaintiffs, and Plaintiffs continue to pursue allegations of defective stonework against Marick. Marick continues to incur attorney fees and costs associated with Clear View's failure to perform duties and breach of contract with Marick. Attorney fees and costs are damages separate from Plaintiffs' alleged damages; thus, Marick's alleged damages are separate from those requested by Plaintiffs.

Appellants assert that the referenced federal court cases should not be persuasive in this matter, and further that the non-binding circuit court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed by this Court.

Appellants may recover special damages at law under a theory of negligence against Respondents. Specifically, here, Clear View and Marick entered into a Contract which created a specific duty upon Clear View to perform the stonework at Phase II of the Project (October 1, 2007 Contract). South Carolina law is well settled that special damages arising from another's wrongful conduct are recoverable at law. South Carolina courts have held:

> if 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 expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered. We further held that recovery may be had at law in the form of special damages, or in equity in the form of equitable indemnity.

Griffin v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (1900) citing *Addy v. Bolton*, 257, S.C. S.E.2d 708 (1971).

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs' claims arising from the Respondent Subcontractor's tortious conduct (negligent performance of work); thus, Marick properly filed a claim for negligence against Respondents seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims which arise out of Clear Views faulty work. (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third Amended Complaint ¶ 170, April 5, 2012.) Marick has even better facts than *Addy* for including special damages claims against a subcontractor, as Clear View was sued directly by Plaintiffs for defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under a negligence standard. The attorney fees and costs sought by Marick are separate damages from the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate cause of action pled.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by the subcontractors to Marick

constitute separate causes of action which did not arise through Plaintiffs' relationship to the parties. The Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, separate causes of action for negligence and breach of contract do not collapse into a single indemnity claim. Marick had a contractual relationship with Clear View and was owed separate duties by the subcontractor it was overseeing to perform the work at issue in this action; if the subcontractor failed to perform the work it was hired to perform properly, it breached duties and contractual obligations owed to Marick and thus should be liable to Marick. (October 1, 2007 Contract.)

II. The Lower Court Erred in Granting Clear View's Motion for Summary Judgment Concerning Marick's Cross-Claim for Equitable Indemnity and Further Erred in Failing to Withdraw the Ruling Upon Marick's Motion for Reconsideration.

The lower court's Order granted summary judgment in favor of Clear View as to Marick's Cross-Claim for equitable indemnification based upon the doctrine of unclean hands. (January 11, 2013 Order Granting Summary Judgment.) The lower court further upheld the January 11, 2013 Order when it denied Marick's Motion for Reconsideration. (May 22, 2013 Order.) The Court found that Marick failed to create a genuine issue of material fact. (January 11, 2013 Order and May 22, 2013 Order.) Thus, Appellants will address the lower court's errant finding that as a matter of law Marick had unclean hands in this matter and thus is not entitled to equitable indemnification.

A. Equitable Indemnity

The Court's January 11, 2013 Order which was upheld by the lower court's May 22, 2013 Order, held that Marick's equitable indemnity claim failed because Marick cannot be adjudged without fault. The lower court's holdings were wrong and should be reversed. Based

on the testimony presented in this case, Marick has presented evidence that it was not at fault for the alleged defective stone installation at the Project. Said evidence creates a genuine issue of material fact for which a jury should weigh and impose fault, not the court.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994). "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.'" *Id.* (Internal citation omitted). "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; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury." *Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (Internal citation omitted).

> With equitable indemnification, it does not matter that there is no contractual provision for indemnity. "The very nature of equitable indemnification is that a contract for indemnity is unnecessary." *Winnsboro II,* 307 S.C. at 132, 414 S.E.2d at 121. It is true if a jury finds a party negligent, then as an adjudicated tortfeasor equitable indemnity would not be available. *See* South Carolina Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to -70 (Supp.1995). However, if the jury were to find a party not negligent, then the party would be entitled to equitable indemnification. *Griffin v. Van Norman,* 302 S.C. 520, 397 S.E.2d 378 (Ct.App.1990).
>
> We note that the modern trend concerning the right to indemnity is to look to principles of equity. <u>According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.</u>

Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 312-13, 476 S.E.2d 708, 710 (Ct. App. 1996) (emphasis added).

The South Carolina Supreme Court in *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561 (2008), held that a general contractor is not automatically responsible for the negligence of a subcontractor.[1] The *Fields'* Court imposed a duty on a general contractor only to use due care in supervising a subcontractor. *Id.* *Fields* stands for the proposition that a general contractor is not automatically liable for the work of its subcontractors. *Id.* Instead, it must be proven that the general contractor breached a duty of care in providing supervision and oversight.

As further evidence that Marick is entitled to indemnity from Clear View for Clear View's deficient work, Clear View agreed to indemnify Marick in a signed contract. (October 1, 2007 Contract.)

1. Unclean Hands

The lower court held as follows: "Clear View Defendants are entitled to summary judgment on Marick's equitable indemnity claims because Marick cannot be adjudged without fault." (January 11, 2013 Order at P. 5.) Thus, the lower court effectively found as a matter of law in the case, at the summary judgment stage, that Marick had unclean hands.

Plaintiffs' expert, Derrick Hodgin, testified that there are defects associated with the stone application at Phase II of the Project (see: Hodgin's Dep. (Day 2) at 87:15 – 88:11, 89:22-25, 127:13-17, 133:4-12, 153:12-22, and 165:22 – 167:3). In Hodgin's opinion, the stone was not applied in accordance with the manufacturer's instructions, the stone was improperly installed below grade, the stone was improperly installed in contact with abutting concrete and the stone was not adhered to the base properly. *Id.* Further, Hodgin testified that the flashing and

[1] The lower court did not follow the Supreme Court's holding in *Fields* as Judge McCauley stated at the hearing "if it [Marick] was doing its job, it [Marick] would have discovered the defect, I guess would be the - - or defective workmanship. All right. I find that under the concept of equitable relief that the equitable indemnity would be denied and the motion for summary judgment granted." (September 5, 2012 Hearing Transcript, Page 53:20-25.) Thus, the lower court effectively ruled that indeed the general contractor is automatically liable for the negligence of a subcontractor.

weather resistant barrier applied in connection with the stone was installed improperly or inadequately (see: Hodgin's Dep. (Day 2) at 81:14 – 83:11, 87:15 – 88:11, 91:12 – 92:7, 96:20 – 97:7, 107:3-10, 108:11 – 109:1, 123:18 -124:20, and 126:4-17). As a result of the alleged improper stonework, Hodgin opined that it is necessary to remove all stone in Phase II to remediate the problems (see: Hodgin Dep. (Day 2) at 105:23 – 106:2).

As stated earlier, Marick was the general contractor and provided no construction related labor associated with actual construction of the Project; Marick only provided supervision. (Rick Thoennes Dep. at 36:17-22 and Randy Still Dep. at 172:21-24.) Thus, the only function that Marick served (as the general contractor) was to hire subcontractors, schedule construction and provide supervision. Evidence of supervision at the Project creates a question of fact concerning Marick's fault.

Rick Thoennes, one of the owners of Marick Home Builders, testified that Marick had a superintendent at the Project supervising the subcontractors and scheduling construction (Thoennes Dep. at 30:17-19.) Thoennes testified that Nathan Hornaday was employed by Marick to serve as the superintendent responsible for providing supervision at the Project. (Thoennes Dep. at 31:6-12.) In addition to Hornaday's supervision and oversight, Thoennes visited the project weekly to oversee construction. (Thoennes Dep. at 131:8-132:3.) Further, Thoennes had daily communications with Hornaday concerning construction of the Project. (Thoennes Dep. at 176:4-6.) According to Thoennes, during construction, Nathan Hornaday provided supervision on site at Stoneledge 10-12 hours per day. (Thoennes Dep. at 176:23 - 177:4.) Thoennes further stated that on several occasions, Hornaday contacted separate subcontractors to discuss construction related issues noticed during Hornaday's inspections of work performed by subcontractors. (Thoennes Dep. at 224:18 – 225:7, 244.)

Hornaday also testified that he provided supervision at the Project. (Hornaday Dep. at 18:15-16.)

> Q: Did you ever see something that caused you to say to a sub, 'wait a minute, I don't like the way you're doing that"?
>
> A: I did.
>
> Q: And was it corrected to your satisfaction?
>
> A: Yes.

(Hornaday Dep. at 19:21 – 20:1.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision was provided to the subcontractors at the Project.

In addition to Marick's representatives' testimony, Clear View's own expert, Drew Wilkie, admits that Hornaday provided supervision at the project:

> Q: Do you have any idea what amount of supervision and direction was given to Clear View?
>
> A: Based on some of the testimony I've read, I believe Mr. Hornaday, there was some supervision provided and I think he was - - Mr. Hornaday was in a role of providing for that supervision.

(Drew Wilkie Dep. at 153:1-6.)

Mr. Wilkie further admitted that some of the alleged defects associated with the stone may not have been noticeable to the general contractor at the time of construction. (Wilkie Dep. at 165:9 – 168:2.) Thus, if the alleged defects to the stone were not noticeable during construction, but only became noticeable over time, there is no way the general contractor could have prevented the alleged damage/defects to the stone.

Additionally, Marick's expert, Randy Still, testified that a general contractor relies on the subcontractors that they will perform their craft appropriately. (Still Dep. at 84 – 85.) Mr. Still stated further:

> Q: In your experience and education and in your work, do you hold the opinion that a general contractor is always liable for all defects in construction which were performed by subcontractors?
>
> A: I think what I have found is the term "liable" is a legal term and my belief is that the general contractor can rely on the subcontractors who have the specialty crafts and knowledge to perform their work correctly.
>
> Q: Is it fair to say that in many cases a subcontractor is in fact more experienced and better qualified to perform their particular trade than a general contractor?
>
> A: Yes.
>
> Q: Is that because they have specialized over the years in that particular area and have focused their education and experience in that area?
>
> A: Yes, and they've performed the work and they know what works and what doesn't work.
>
> Q: In your opinion is it fair – is it acceptable for a general contractor to rely on that experience and education of a subcontractor in a particular trade?
>
> A: I think in many cases he has to.
>
> Q: Would you agree that obviously a general contractor cannot see every nail which is driven or every board which is installed?
>
> A: Yes.
>
> Q: Would you agree that he must, out of necessity, rely on a subcontractor's experience and knowledge and compliance with good building practices and the code?
>
> A: Yes.

(Still Dep. at 169:12 – 170: 18.)

Mr. Still further testified:

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the stone installation in Phase II?

A: No.

Q: Do you believe Marick violated any code, manufacturers' installation instructions, design drawings or any other obligation in the installation of any of the waterproofing, framing, grading, or other construction components in Phase II?

A: No.

(Still Dep. 174:13:24.)

Thus, in South Carolina, the non-moving party is merely required to present a mere scintilla of evidence to survive summary judgment, and certainly, the fact that Marick's representatives testified that supervision was provided at the Project, that Clear View's expert testified that "some supervision" was provided by Marick, that Marick's expert, Randy Still, testified Marick had a right to rely on the expertise of the subcontractors and that Marick violated no obligation as it related to the stone installation at Phase II of the Project, presents more than a scintilla of evidence that Marick supervised and was not at fault for the alleged damages associated with the stone application at Stoneledge. Based upon these facts, Marick submitted a genuine issue of material fact concerning the supervision Marick provided the subcontractors; thus, the lower court's Order should be reversed and remanded.

CONCLUSION

For the reasons stated herein, the lower court's order should be reversed and remanded.

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January 16, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Appellate Case No: 2013-001403

Stoneledge At Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, Individually and on Behalf of All others similarly situated.....Plaintiffs

IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Miller/Player & Associates, John Ludwig, Clear View Construction, LLC, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC of the Carolinas, Inc., Eufacio Garcia, Everado Jarmamillo, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry/Player & Associates, ...Defendants

Of Defendants, Marick Home Builders, LLC and Rick Thoennes .....Appellants,

Of Defendants, Clear View Construction, LLC and Michael Franz.....Respondents

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants Marick Home Builders, LLC and Rick Thoennes on Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on January 16, 2014, addressed to Respondents' attorneys of record, Michael B.T. Wilkes, Esquire and Lindsay L. Builder, Esquire, 127 Dunbar Street, Suite 200 Spartanburg, SC 29306 (attorney for Clear View Construction, LLC and Michael Franz.

Amanda Steward

Amanda D. Steward
Paralegal to Jason M. Imhoff

January 16, 2014

RESPONDENTS' COUNSEL OF RECORD:

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