

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

Appellate Case No. 2013-001401

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 Arcos 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 ThoennesAppellants,

Of Defendants, Builders FirstSource—Southeast Group, Carl Catoe Construction, Inc. and Catoe's Subcontractors T.G. Construction, LLC, Martin Hernandez-Aviles, Ester Moran Mentado, Herberto Arcos Hernandez, Francisco Javier Zarate d/b/a Zarate Construction ("Zarate Construction"), Alejandro Avalos Cruz, Francisco Villalobos Lopez, and Socorro Castillo Montel.....Respondents

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Lower Court err in granting the Motions for Summary Judgment/Motions to Dismiss filed by Respondents as to Marick Home Builders, LLC's and Rick Thoennes' Cross-Claims for Equitable Indemnity and Denying Marick Home Builders, LLC's and Rick Thoennes' Motion for Reconsideration?

- II. Did the Lower Court err in Collapsing Appellants' Cross-Claims Against Respondents for Negligence and Breach of Warranty Into One Claim for Equitable Indemnification?

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”). Marick contracted directly with Respondent Builders First Source—Southeast Group (hereinafter “BFS”) to supply building materials for the Project and to construct and install the framing, decks, doors, siding and windows to the buildings. (October 31, 2007 Contract.) Once Marick subcontracted this portion of the work to BFS, BFS in turn, subcontracted the labor portion of its work to Respondent Carl Catoe Construction, Inc. (hereinafter “Catoe”). (Carl Catoe Dep. at 45-47.) Catoe then hired the following subcontractors (all Respondents in this action) to perform the construction labor at the Project: T.G. Construction, LLC, Martin Hernandez-Aviles, Ester Moran Mentado, Herberto Arcos Hernandez, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Francisco Villalobos Lopez, and Socorro Castillo Montel (hereinafter collectively referred to as the “Catoe Subcontractors”).

Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Only Phase II of construction is at issue in this Appeal. As a result of being sued for the alleged defective and/or improper building supplies and alleged defective construction associated with decks, framing, doors, siding and windows, Marick filed cross-claims against all parties responsible for supplying building materials and performing the construction related services set forth above, which included all of the Respondents, for indemnity, negligence, and

breach of warranty (Marick Home Builders, LLC and Rick Thoennes' Answer and Cross-claims to Plaintiffs' Third Amended Complaint, April 5, 2012).¹

All of the Respondents filed motions for summary judgment and/or motions to dismiss as to Marick's cross-claims.² (Respondents' Motions for Summary Judgment/Motions to Dismiss.) On September 5, 2012, arguments concerning Respondents' Motions were heard all day by the lower court. Notwithstanding Appellants' opposition, the lower court issued an Order dated January 11, 2013, and filed on January 14, 2013, granting Catoe and the Catoe Subcontractors' Motions to Dismiss/Motions for Summary Judgment concerning Marick's cross-claims for negligence, breach of warranty and equitable indemnification and granted BFS's Motion for Summary Judgment as to Marick's cross-claims for negligence and indemnity. (January 11, 2013 Order Granting Summary Judgment.).

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 The South Carolina Rules 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 Court's January 11, 2013 Order were not consistent with South Carolina law. The Court conducted a hearing on this Motion on April 10, 2013. The 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 Court's Order dated

¹ Although Marick filed additional cross-claims for breach of warranty and breach of contract against BFS, those issues were decided in a separate order and are presently before the Court in a separate appeal.

² If the particular respondent was not represented, Respondent Catoe filed a Motion for Summary Judgment on behalf of all of its subcontractors.

May 21, 2013 upholding the 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 were 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"). (See: Plaintiffs' Complaint.) 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, the 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.

Stoneledge at Lake Keowee (hereinafter "Stoneledge") 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.

Marick did not perform the construction labor at the Project; subcontractors performed all of the construction labor. Marick contracted directly with BFS for BFS to provide materials for the Project and to install the framing, decks, doors, siding and windows (October 1, 2007 Contract) (Terry Rosamond Dep. at 61:14-24). As further proof that a contract existed between Marick and BFS, BFS 30(b)(6) designee, Terry Rosamond, testified that BFS contracted directly with Marick (see: Rosamond Dep. at 15:14-19). BFS then subcontracted with Carl Catoe Construction, Inc. (hereinafter "Catoe") to perform the construction related labor and installation services (see: Carl Catoe Dep. at 45-47). Catoe then subcontracted the labor and installation services out to the Catoe Subcontractors. Thus, BFS supplied materials for the Project and provided oversight and supervision to Catoe and Catoe's Subcontractors. Then, Catoe subcontracted all of the construction labor to the Catoe Subcontractors. Thus, Marick did not supply any of the materials to the Project and did not perform any construction labor at the Project. Further, other than supplying building materials for the Project, BFS subcontracted out all of the work it agreed to perform (other than supplying materials); thus, BFS's only role concerning labor was to provide oversight and guidance to Catoe and the Catoe Subcontractors. Further, since Catoe subcontracted all of the labor out to the Catoe Subcontractors, its only function was to provide guidance and oversight to Catoe Subcontractors. It was alleged in

Plaintiffs' Third Amended Complaint that work performed and or building materials supplied by BFS, Catoe and the Catoe Subcontractors was deficient; thus, Marick, BFS, Catoe and the Catoe Subcontractors were sued by Plaintiffs for those alleged deficiencies.

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 develop a scope of repair. Plaintiffs' expert, Derrick Hodgin, testified that there are defects associated with the work BFS, Catoe and the Catoe Subcontractors performed at the Project. Hodgin further testified that BFS supplied defective and/or improper building supplies which were used to construct the buildings.

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 at Stoneledge; 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 site supervision. As discussed below, Marick submitted evidence to refute the allegations made by Plaintiffs that Marick was responsible for the alleged deficient work performed and defective/improper building materials supplied by the Respondents. Marick further submitted evidence that it provided supervision at the Project.

STANDARDS OF REVIEW

This Appeal involves standards of review for summary judgment, motion to dismiss, and motion for reconsideration.

SUMMARY JUDGMENT

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.”)

MOTION TO DISMISS

When reviewing a motion to dismiss, the Court must accept all well-pled facts in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *Nemet Chevrolet, LTD. V. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Trulock v. Freech*, 275 F.3d 302, 307 (4th Cir. 2001) and *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). To avoid dismissal, the “complaint must contain sufficient factual matter...[that when]...accepted as true...state[s] a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1958 (2007)). To be facially plausible, a complaint must contain factual content that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Nemet Chevrolet, LTD.*, 591 F.3d at 256 (citing *Iqbal*, 129 S.Ct. at 1952). However, this plausibility standard does not necessitate the plaintiff make a showing of the probability of success on the claim asserted. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965). The question to be answered is whether in a light most favorable to the plaintiff, and with every doubt resolved in plaintiff’s behalf, the Complaint

states any valid claim for relief. *Washington v. Lexington County Jail*, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct.App. 1999).

MOTION FOR RECONSIDERATION

“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).

ARGUMENTS

I. The Lower Court Erred by Granting the Motions for Summary Judgment filed by Respondents as to Marick Home Builders, LLC's and Rick Thoennes' cross-claim for Equitable Indemnity and Denying Marick Home Builders, LLC's and Rick Thoennes' Motion for Reconsideration.

The lower court's Order granted summary judgment in favor of BFS, Catoe and the Catoe Subcontractors 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 lower 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 has unclean hands in this matter and thus is not entitled to equitable indemnification.

A. Equitable Indemnity

The lower 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. Based on the testimony presented in this case, Marick has presented evidence that it was not at fault for the alleged defective construction work and defective/improper building materials utilized to construct the buildings. 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. 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.

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. 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.

The lower court held as follows: "Under the undisputed facts of this case, Marick has unclean hands and cannot be adjudged without fault." (January 11, 2013 Order at P. 6.) Thus, at the summary judgment stage, the lower court found that Marick had unclean hands. In order to be entitled to equitable indemnity a party must have no fault. Further, if the parties are not obligated to each other contractually, a party seeking equitable indemnity against another must establish a "special relationship" which entitles a party to said indemnity. In this case, BFS was Marick's direct subcontractor, as established by the October 31, 2007 Contract and the testimony of its 30(b)(6) designee Terry Roseman. (Rosamond Dep. at 15:14-19.) However, Marick did not have a contract with Catoe or the Catoe Subcontractors and the lower court erred in holding that Marick had no special relationship with Catoe and the Catoe Subcontractors.

- 1. Marick Submitted Sufficient Evidence to the Court to Create a Genuine Issue of Material Fact for a Jury to Determine that in Fact Marick had no fault for the Alleged Defective Work Performed by BFS, Catoe and the Catoe Subcontractors.**

Sufficient evidence was submitted to the lower court concerning the ordinary care used by Marick in providing supervision and oversight to the subcontractors; thus, summary judgment was improper.

Plaintiffs' expert, Derrick Hodgin, testified that there are alleged defects associated with the wood-siding installation and failure to apply appropriate flashing and weather resistant barrier to the structures at Phase II of the Project. (Hodgin Dep. (Day 1) at 38:22-39:3, 97:1 – 98:12, 104:2-7, 113:16-25 and Hodgin Dep. (Day 2) at 16:14 – 18:25, 24:5-14, 25:18 – 26:12, 49:20 – 50:18.) Hodgin also testified that the house wrap applied by the Catoe Subcontractors did not integrate properly with the flashing. (Hodgin Dep. (Day 2) at 20:21 – 21:5.) Further, Hodgin testified that the siding fasteners installed by the Catoe Subcontractors had improper spacing which could result in future damage. (Hodgin Dep. (Day 2) at 63:5 – 64:16.) Additionally, Hodgin opined that the flashing applied between the windows and the stone was inadequate and that flashing associated with windows throughout Phase II was inadequate. (Hodgin Dep. (Day 2) at 108:11 – 109:1, 195:1-6.) Among other things, Hodgin located the following deficiencies which correlate with work performed by the Catoe Subcontractors: improper flashing of doors, improper construction of exterior balconies and damage to balconies. (Hodgin Dep. (Day 2) at 151:14-21, 211:9 – 213:9, and 224:9 – 228:4.)

In addition to Mr. Hodgin's testimony, Catoe's expert, William Cary, testified that he noticed work performed by the Catoe Subcontractors that was not proper and construction performed by the Catoe Subcontractors that deviated from the plans and specifications. (William Cary Dep. at 127:13 – 128:2, 101:19 – 102:3, 113:14-17, 144:2-9, 146:7-19, and 147:24-148:5.)

As stated earlier, Marick was the general contractor and provided no construction related labor associated with actual construction of the Project; Marick only provided site 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 and provide supervision. Further, BFS and Catoe were responsible for providing supervision and oversight to the Catoe Subcontractors. (Rosamond Dep. at 37:6-14.)

Rick Thoennes, one of the owners of Marick Home Builders, LLC, 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 of 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), and 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 at the Project. In addition to Marick's representatives' testimony, Carl Catoe testified that Marick provided supervision and oversight at the Project.

A: There was a question about the offsets, what happened there. Was this rated? Was this a two-hour wall? Was this a one-hour wall? Is this - - has it got to go horizontal? Does it continue? How far does it continue? Different things like that.

Q: And who provided you with the direction that you used to build those conditions?

A: Nathan.

Q: So that came directly from Marick?

A: Yes.

(Catoe Dep. at 90:21-25.)

Catoe further testified that when he needed additional plans to perform his work, he would ask Nathan and Nathan would provide him additional plans to follow. (Catoe Dep. at 159:20 – 160:6.) Thus, Carl Catoe testified that Marick provided supervision, oversight and guidance concerning construction of the Project. Additionally, Catoe's expert, William Cary, testified that Marick provided supervision and guidance to Catoe when issues arose concerning the plans and specifications. (William Cary Dep. at 152:6-16.)

Thus, the record of this case contains evidence presented by representatives of Marick that supervision and oversight was provided at the Project. In addition to Marick's representatives' testimony, Terry Rosamond (BFS 30(b)(6) designee) testified that Marick provided supervision and oversight at the Project. (Rosamond Dep. at 48:23 – 49:6.) Rosamond further testified that he had no evidence that Marick was negligent in its performance of its duties

at Stoneledge. (Rosamond Dep. at 53:11-17.) Rosamond also provided the following testimony concerning BFS's supervision of the work performed by its subcontractors:

Q: In general, if there was a deviation from the architectural drawings that was required, how would you expect a BFS subcontractor to deal with that?

A: In general, the subcontractor should notify our person on site if there's something different than the plans or needs to be done. Then we normally would take that to our contract - - contact for the general contractor, in this case Marick's guy. We would say something like, "This is not working in the field. There needs to be a change. Tell us what we would do from there." That's the general way sequencing works.

Q: How about if the, again speaking generally, if the change came from the general contractor, would he be expected to communicate directly with the subcontractor or would he go through BFS?

A: He's expected to go through BFS.

(Rosamond Dep. at 63:12 – 64:3.)

Rosamond further testified that if BFS did not have sufficient plans and specifications to perform the work, it would request additional detail and even stop work if it or its subcontractors were not provided sufficient detail. (Rosamond Dep. at 84:13 – 85:13.) There is nothing in the record to indicate that BFS stopped work due to insufficient plans, specifications, or guidance.

Thus, based on the testimony provided by BFS, Marick was required to go through BFS's supervisor when coordinating changes to construction being performed by BFS's subcontractors. Thus, if BFS was not relaying the appropriate information to its subcontractors and/or was not providing proper supervision to its subcontractors, Marick should be indemnified by BFS. Further, since BFS continued work at the Project, according to Mr. Rosamond, it had enough supervision and specifications to complete the work properly.

Additionally, Marick's expert, Randy Still, testified that a general contractor has a right to rely on the subcontractors' representations 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 installation of any of the waterproofing, framing, grading, or other construction components in Phase II?

A: No.

(Still Dep. 174:18:24.)

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 representatives and experts testifying on behalf of Appellants and Respondents testified that Marick provided guidance and oversight at the Project, presents more than a scintilla of evidence that Marick used ordinary care in providing supervision to the subcontractors and was not at fault for the alleged damages associated with the work performed by the Catoe Subcontractors and the building materials supplied by BFS. Based upon these facts, a jury should determine fault, not the court.

2. Special Relationship

BFS was Marick's direct subcontractor. (October 31, 2007 Contract.) BFS subcontracted with Catoe who in turn hired the Catoe Subcontractors to perform the construction labor. Due to the supervision which Marick was required to provide Catoe and the Catoe Subcontractors, Marick had a special relationship with said parties entitling it to equitable indemnification. *First Gen. Servs.*, 314 S.C. at 442, 445 S.E.2d at 448.

The lower court held that the relationship between Marick and Catoe/Catoe Subcontractors was too remote to establish the special relationship required to seek equitable indemnification under South Carolina law citing *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

The lower court erred in finding that Marick had no special relationship with Catoe and the Catoe Subcontractors, as Marick had an obligation as the general contractor to provide

oversight and supervision to Catoe and the Catoe Subcontractors. Plaintiffs' Complaint alleges that Marick failed to provide proper supervision of the work performed at the Property. The Catoe Subcontractors were performing the actual labor at the Project under the direction of Catoe, BFS and Marick; thus, according to Plaintiffs, Marick was responsible for providing oversight of the work performed by Catoe and its subcontractors.

The lower court's Order cites *Rock Hill Telephone Co. v. Global Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005), as precedence for its determination that the relationship between Catoe/Catoe Subcontractors and Marick was too remote to warrant Marick's request for equitable indemnity (January 11, 2013 Order). Marick asserts that a determination concerning a general contractor's right to equitable indemnity from a subcontractor's subcontractor in a construction setting has not been decided by a court in South Carolina.

The facts in *Rock Hill Telephone Co.* involve a utility company that hired an independent contractor to perform installation work for the Utility Company. There are no allegations that the Utility was providing any oversight or guidance to the hired independent contractor. The independent contractor was overseeing the job, hired its own subcontractors to perform the work and provided oversight for those subcontractors. There are no facts in *Rock Hill Telephone Co.* case indicating that the Utility was overseeing the independent contractor's or the subcontractor's work.

However, in a construction related setting, as is at issue in the present case before the Court, the general contractor has an obligation to use ordinary care in providing oversight and supervision at the Project. Thus, Marick's obligations are different from the obligation of the Utility in *Rock Hill Tele. Co.* If Marick was responsible for guiding and directing Catoe and

the Catoe Subcontractors, then a special relationship exists between those parties, thus warranting a right to equitable indemnity.

As stated above, “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). Thus, if Marick is responsible for providing oversight and guidance on a daily basis for the work performed by Catoe and the Catoe Subcontractors, then a sufficient relationship exists between the parties to obligate Catoe and the Catoe Subcontractors to indemnify Marick for exposing Marick to liability for the deficient work performed.

Marick has not admitted fault in this action; thus, if a jury determines that Marick has no fault associated with the deficient work performed by Catoe and the Catoe Subcontractors, Marick should be entitled to indemnity. It would be inequitable to allow the subcontractors which were supervised and overseen by Marick, and for which Marick is being sued, to escape liability to Marick while Marick suffers liability at the hands of those subcontractors’ deficient work.

Thus, Marick respectfully requests that the Court hold that in a construction setting, a general contractor that oversees the Project has a special relationship with all subcontractors for which it is required to oversee and supervise.

II. The Lower Court Erred in Collapsing Appellants’ Cross-Claims for Negligence and Breach of Warranty into One Claim for Equitable Indemnity.

The lower court erred in collapsing Appellants’ cross-claims for negligence and breach of warranty into one claim for equitable indemnification (pursuant to a Motion to Dismiss).³

³ As noted earlier, the lower court dismissed Appellants’ action for negligence against BFS and the negligence and breach of warranty actions against Catoe and the Catoe Subcontractors. Appellants causes of action for breach of warranty and breach of contract filed against BFS were addressed in a separate order.

Appellants believe this is a matter of first impression for South Carolina appellate 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, Plaintiffs continue to pursue allegations against Marick for the defective work allegedly performed by Catoe, the Catoe Subcontractors and BFS. Marick continues to incur attorney fees and costs associated with BFS, Catoe and the Catoe Subcontractors' failure to perform duties owed to 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. Appellants further assert 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 theories of negligence and breach of warranty against Respondents. 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).

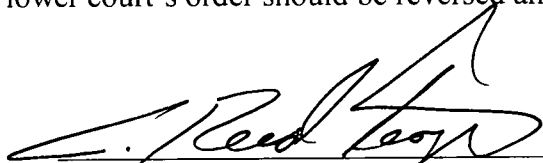
In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina 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 Subcontractors' tortious conduct (negligent performance of work and breach of warranty); thus, Marick properly filed claims for negligence and breach of warranty against BFS, Catoe and the Catoe Subcontractors seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (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 BFS, Catoe and the Catoe Subcontractors were 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 causes of action pled.

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

Appellate Case No. 2013-001401

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 Arcos 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 ThoennesAppellants,

Of Defendants, Builders FirstSource—Southeast Group, Carl Catoe Construction, Inc. and Catoe's Subcontractors T.G. Construction, LLC, Martin Hernandez-Aviles, Ester Moran Mentado, Herberto Arcos Hernandez, Francisco Javier Zarate d/b/a Zarate Construction ("Zarate Construction"), Alejandro Avalos Cruz, Francisco Villalobos Lopez, and Socorro Castillo Montel.....Respondents

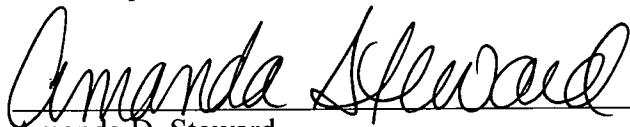
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SC Court of Appeals

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I certify that I have served the Designation of Matter 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, Ronald G. Tate, Jr., Esquire, PO Box 10589, Greenville, SC 29603 (attorney for Carl Catoe Construction, Inc.), Dana W. Lang, Esquire, PO Box 999, Charleston, SC, 29402 (attorney for Carl Catoe Construction, Inc.), K. Lindsay Terrell, Esquire, 1164 Woodruff Road, Greenville, SC, 29607 (attorneys for TG Construction, LLC), D. Andrew Williams, Esquire, PO Box 1473, Columbia, SC 29202 (attorneys for Martin Hernandez-Aviles), Steven P. Hughes, Esquire, PO Box 40, Beaufort, SC 29901 (attorneys for Ester Moran Mentado), Elizabeth Martineau, PO Box 31188, Charlotte, NC 28231 (attorneys for Herberito Acros Hernandez), Finley B. Clarke, Esquire, PO Box 1865, Florence, SC 29503 (attorneys for Francisco Javier Zarate d/b/a Zarate Construction, Paul E. Hammack, Esquire, 223 West Stone Avenue, Suite 100, Greenville, SC, 29609 (attorney for Alejandro Avalos Cruz), Christopher G. Lewis, Esquire 22 South Park Square, Suite 800, Asheville, NC, 28801 (attorneys for Francisco Villalobos Lopez), Robert T. Lyles, Jr., Esquire, PO Box 773, Charleston, SC 29401 (attorneys for Respondents Plaintiffs) and Geoffrey Gibbon, Esquire, PO Box 2980, Greenville, SC, 29602 (attorneys for Socorro Castillo Montel).


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January 16, 2014

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