THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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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 whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And Clear View Construction, LLC, and Michael Franz are the Respondents,

Bostic Construction, Inc., Third Party Plaintiffs,

v.

Southern Stone, Inc., and Buck Smith Construction, Third Party Defendants.

INITIAL BRIEF OF RESPONDENTS CLEAR VIEW CONSTRUCTION, LLC, AND MICHAEL FRANZ

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NOTE REGARDING SUBMISSION OF SINGLE BRIEF

Respondents Clear View Construction, LLC and Michael Franz ("Respondents") respectfully submit this Brief in Appellate Case Number 2013-001403 ("Case 1403") and Appellate Case Number 2013-001404 ("Case 1404"). Case 1403 and Case 1404 concern two Circuit Court orders issued as to "Defendants Clear View Construction LLC and Michael Franz's Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC and Rick Thoennes" (hereinafter "Respondents' Motion for Summary Judgment"). After granting Respondents' Motion for Summary Judgment, the Circuit Court issued two separate orders: (1) "Order Granting Defendants Clear View Construction, LLC and Michael Franz's Motion for Summary Judgment as to the Cross-Claims of Marick Home Builders, LLC for Negligence and Equitable Indemnification" (hereinafter "Negligence and Equitable Indemnification Order"), which is the subject of Case 1403; and (2) "Order Granting Defendants Builders FirstSource—Southeast Group, LLC, Southern Concrete Specialties, Inc., Clear View Construction, LLC, and Michael Franz as to the Cross-Claims of Marick Home Builders, LLC for Breach of Contract and Breach of Warranty" (hereinafter "Breach of Contract and Breach of Warranty Order"), which is the subject of Case 1404 (collectively, the "Orders"). As explained further below, the Orders share the common holdings that all of Appellants' cross-claims are claims for equitable indemnity regardless of how they were styled, and that Respondents are entitled to summary judgment on Appellants' claims for equitable indemnity because Appellants cannot be adjudged without fault. Because Case 1403 and Case 1404 share common issues on appeal, in the interest of judicial economy, Respondents respectfully submit this single Brief for both cases. In addition to the common issues on appeal,

Respondents' Brief also addresses the limited additional holdings unique to each of the Orders.

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STATEMENT OF ISSUES ON APPEAL

I. Whether The Circuit Court Correctly Held That Appellants' Cross-Claims For Negligence, Breach Of Warranty, And Breach Of Contract Are Claims For Equitable Indemnity.

II. Whether The Circuit Court Correctly Held That All Of Appellants' Cross-Claims For Equitable Indemnity Must Fail Because Appellant Marick Cannot Be Adjudged Without Fault.

III. Whether The Circuit Court Correctly Held That Appellant Marick Has No Viable Claim For Contractual Indemnity Against Respondents.

IV. Whether The Circuit Court Correctly Held That Respondent Michael Franz Was Entitled To Summary Judgment on Appellant Marick's Cross-Claims On The Additional Ground Of Lack Of Special Relationship.

STATEMENT OF THE CASE

This matter concerns Phase II of the Stoneledge at Lake Keowee townhome community located on Lake Keowee in Oconee County, South Carolina (the "Project"). The Project consists of units numbered 41-43 and 55-94, and was constructed by general contractor Appellant Marick Home Builders, LLC ("Marick). Appellant Rick Thoennes is an affiliated member of Marick. (Pls.' Third Am. Compl. ¶¶ 19, 22.)

The Plaintiffs in the underlying state court action are the Stoneledge at Lake Keowee Owners' Association, Inc., and individual owners of townhomes located at Stoneledge (collectively, "Plaintiffs"). (Pls.' Third Am. Compl. ¶¶ 1-3.) Plaintiffs sued Appellants, Respondents, and numerous other entities involved in the development and construction of the Project alleging that construction and design defects exist in the townhomes at the Project, leading to water intrusion which has damaged and deteriorated the building components of the units (Pls.' Third Am. Compl ¶¶ 18-19, 25-26, 62.)

Respondent Clear View Construction, LLC ("Clear View"), provided services related to stonework on the Project. (Clear View Answer to Third Am. Compl. ¶ 25.)

Respondent Michael Franz ("Franz") was a member of Clear View prior to its dissolution on March 10, 2009. (Clear View and Franz are referenced collectively herein as "Respondents"). Clear View performed work on the Project from July 2006 through August 2007, as evidenced by the copies of Clear View Project invoices. (*See* Respondents' Br. in Supp. of Summ. J., Ex. "2".) No evidence exists that Franz performed any stone installation or other construction services on the Project, either in his individual capacity or in furtherance of Clear View's services on the Project. (Negligence and Equitable Indemnification Order 8.)

Marick asserted cross-claims against Respondents titled equitable indemnity, breach of contract, negligence, and breach of warranty. (Appellants' Answer to Pls.' Third Am. Compl. ¶¶ 134-174.)[1] Despite the individual styling of these four claims as separate cross-claims, Marick's alleges only that it could be exposed to liability to Plaintiffs' claims by Respondents' alleged acts and omissions, and the sole damages Marick seeks are its potential liability to Plaintiffs and associated attorneys' fees and costs. (Appellants' Answer to Pls.' Third Am. Compl. ¶¶ 158, 162, 169-170, and 174.)

As to Marick's breach of contract claim, Marick produced during discovery a contract between Marick and Clear View dated October 1, 2007 (the "Contract"), which Appellants contend applied to Clear View's Project work and supports Marick's contract breach allegations against Clear View. (Appellants' Supp. Memo. in Opp. to Resp'ts'

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[1] Appellants' Answer to Plaintiffs' Third Amended Complaint and Cross-Claims appears to indicate that cross-claims were asserted by both Marick and Thoennes. Only Marick asserted cross-claims against Respondents. (Appellants' Answer to Pls.' Third Am. Compl.; *see also* Negligence and Equitable Indemnification Order 2.) Appellant Thoennes has never asserted cross-claims against Respondents; however, to the extent Thoennes claims he asserted claims against Respondents, the Negligence and Equitable Indemnification Order applies fully to such claims. (*See* Negligence and Equitable Indemnification Order 2; *see also* Appellants' Answer to Third Am. Compl. ¶¶ 134-174.)

Mot. for Summ. J.) However, Clear View's Project invoices demonstrate that the Contract post-dates all work performed by Clear View on the Project. Appellants have produced no evidence that the Contract was supported by consideration or that it applies to the Project. Marick's breach of contract claim also does not allege a legally binding contract with Clear View containing the contractual indemnification provisions it seeks to enforce. (Appellants' Answer to Pls.' Third Am. Compl. ¶¶ 160-163.) Additionally, Marick had no contractor's license during Project construction. (*See* Breach of Contract and Breach of Warranty Order; *see also* Mem. in Support of Carl Catoe Construction, Inc.'s Mot. to Dismiss as to Marick Home Builder, LLC's Claims, dated August 30, 2012.)

Regarding Marick's negligence and warranty claims, Appellants engaged professional engineer Randy Still ("Still") to assess construction issues at the Project. Still admitted that Marick, as the general contractor, bears the overall responsibility for the Project's construction. (R. Still Dep. 87:3-7, August 15, 2012.) Still further admitted that in least in some areas of construction, Marick violated the applicable building code. (R. Still Dep. 89:4-11, August 15, 2012.) Moreover, Thoennes, as Marick's corporate designee, testified that Marick was the permit holder for the Project, and therefore was the party responsible for compliance with the building code. (R. Thoennes Dep. 81:2-4) Respondents' retained professional engineer, J. Drew Wilkie, also testified to the general contractor's overall responsibility for the Project and for coordinating the work of subcontractors. (D. Wilkie Dep. 205:2-206:1)

Respondents moved for summary judgment on Marick's cross-claims on August 24, 2012, arguing that Marick's cross-claims for breach of contract, negligence, and

breach of warranty are equitable indemnity claims, and that Marick cannot recover on its equitable indemnity claims (*See* Respondents' Notice and Mot. for Summ. J.) On September 5, 2012, the Circuit Court heard arguments concerning Respondents' Motion for Summary Judgment. On January 11, 2013, the Circuit Court issued the Negligence and Equitable Indemnification Order and Breach of Contract and Breach of Warranty Order, which together granted Respondents summary judgment on all of Marick's cross-claims. Appellants subsequently moved for reconsideration. (Appellants' Mot. to Alter or Amend. J.) The Circuit Court conducted a hearing on Appellants' motion for reconsideration on April 10, 2013. On May 21, 2013, the Circuit Court issued Orders denying Appellants' motion for reconsideration. (Orders Denying Apps.' Mtn. to Alter or Amend. J.)

ARGUMENTS

I. The Circuit Court Correctly Held That Appellant Marick's Negligence, Breach Of Contract, and Breach of Warranty Claims Are Equitable Indemnification Claims.

The Circuit Court properly found that Marick's negligence, breach of contract, and breach of warranty claims (hereinafter "separately styled claims") are claims for equitable indemnity, because the allegations and remedies sought in Marick's separately styled claims characterize the claims as hallmark indemnity claims.

A. Standard of Review.

In reviewing the trial court's grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. In deciding a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party; however, a court "cannot ignore facts unfavorable to that party and must determine whether a ruling for the party opposing the motion would be reasonable under the facts of the case." *Bloom v. Ravoria*, 399 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by "pointing out to the court that there is an absence of evidence to support the nonmoving party's case." *Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing there is a genuine issue for trial." Rule 56(e), SCRCP.

"Under Rule 59(f), SCRCP, a Rule 59(e) motion may in the discretion of the court be determined on the briefs filed by the parties without oral argument." *Pollard v. City of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). The decision to grant or deny such motions will be reviewed for an abuse of discretion. *Id.*

B. Marick's Separately Styled Claims against Respondents are Disguised Indemnity Claims.

Marick's cross-claim for Equitable Indemnity alleges that if Plaintiffs are entitled to judgment against Marick, then Marick is entitled to recovery against Respondents.

(Breach of Contract and Breach of Warranty Order, 6; *see also* Appellants' Answer to the Third Am. Compl. ¶¶ 154-158.)

1. Nature of Indemnity.

Although Marick has asserted additional claims against Respondents for negligence, breach of contract and breach of warranty, these separately styled claims all are, in substance, equitable indemnity claims. "Indemnity is that form of compensation in which a first party [here, allegedly, Respondents] is liable to pay a second party [here, Marick] for a loss or damage the second party incurs to a third party [here, the Plaintiffs in the underlying action]." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)); *see also Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 611 S.E.2d 235 (2005).

2. Determining the Character of Claims.

South Carolina law dictates that the character of an action is determined by the allegations contained in the complaint, specifically, "the nature of the issues and remedies which are sought." *State v. Yelsen Land Co.*, 257 S.C. 401, 403, 185 S.E.2d 897, 898 (1972); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Further, courts may use the allegations in the complaint to determine the correct character

of an action. *See Seebaldt*, 269 S.C. at 692, 239 S.E.2d at 727 ("the character of an action is primarily determined by the allegations contained in the complaint").

3. Marick's Separately Styled Claims are All Claims for Equitable Indemnity.

Marick's separately styled claims are subsumed by its equitable indemnification claim, because "the allegations and remedies sought by both actions stem directly from the potential liability [Marick] could face for the damages claimed by Plaintiffs." (Negligence and Equitable Indemnification Order, 4; Breach of Contract and Breach of Warranty Order, 6.) Marick makes no allegations concerning independent personal or property damage allegedly suffered because of Respondents' actions. Marick has advanced no argument to refute the fact that despite the individual styling of its separate cross-claims, the only damages it seeks arise from its potential exposure to Plaintiffs' claims. (*See* Appellants' Answer to Pls.' Third Am. Compl. ¶¶ 158, 162, 169-170, and 174.)

In sum, because Marick's equitable indemnification claim and separately styled claims all seek recovery from Respondents if Marick is found liable to Plaintiffs, they are properly characterized as equitable indemnity claims.

4. The Circuit Court's Decision as to the Nature of Marick's Claims is Properly Supported by Authority.

In properly finding that Marick's separately styled claims are subsumed by its equitable indemnity claim, the Circuit Court relied on *U.S. Fidelity & Guaranty 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). Contrary to Appellants' argument on appeal, these cases apply directly to the facts of the case at bar. While they

are not construction defect cases, they involve the judicial process of considering the allegations and damages pleaded in determining the nature of an action, which process South Carolina courts upheld in *Walsh* and its progeny, *infra*. *See U.S. Fidelity & Guaranty Co.,* 788 F. Supp. at 881 (stating that the non-settling defendants have independent claims apart from indemnification and contribution, because the claims were nothing more than claims for indemnity, and because they would not exist without the plaintiff's suing the non-settling defendants); *S.C. National Bank*, 749 F. Supp. at 1433 (holding that the cross-claims against the settling defendants for breach of contract, negligence, and fraud were claims for contribution or indemnification, albeit with a slight change in wording).

The Circuit Court's ruling as to Marick's separately styled claims also comports with recent rulings by other South Carolina courts. *Nelson v. John Weiland Homes*, 2009-CP-10-6573 (unpublished order) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (unpublished order) are construction defect cases in which the party asserting multiple cross-claims sought to recover from a co-defendant its potential exposure for the plaintiff's claims, not independent damages. (Memo in Supp. of Carl Catoe Construction, Inc.'s Mot. to Dismiss as to Marick Home Builder's Claims, Ex's "A" and "B".) In *Nelson*, Judge Roger M. Young found that all of the contractor's negligence, breach of warranty, and breach of contract claims against the HVAC system subcontractor were disguised indemnity claims because the contractor sought to recover the contractor's liability to the plaintiff homeowner, not independent injury or property damages. Likewise, in *Kirkland*, Judge Curtis L. Coltrane found that the contractor's negligence and breach of warranty claims against a material supplier were merely

disguised indemnity claims because the contractor sought to recover solely its potential liability to the plaintiff homeowner. The relief sought in both *Nelson* and *Kirkland* was identical to what Marick seeks in each and every one of its cross-claims.

In this case, if Plaintiffs had not sued Marick, Marick would have no claims to assert against Clear View for its own independent injury or property damage. Appellants have failed to address or advance any argument as to how the allegations and remedies sought by Marick's separately styled claims differ from to its equitable indemnity claim, other than arguing that attorneys' fees and costs constitute "special damages." As discussed herein, however, such "special damages" clearly stem from the potential liability Marick could face for the damages claimed by Plaintiffs, and therefore do not constitute independent bases for recovery.[2]

The Circuit Court's ruling is also consistent with decisions of the highest courts in other states dismissing disguised indemnity claims. *See, e.g., Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 821 (Ga. Ct. App. 1976) (stating "regardless of what [Plaintiff] may name [his claim], it is an action for contribution and indemnity"), *aff'd.* 235 S.E.2d 142, 144 (Ga. 1977); *Frazer v. A.E. Munstennan. Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (observing that, although the claims were "stated as counts for breach of implied warranty, they should be regarded as claims for indemnity"); *Warner v. Reagan Buick. Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) (noting that although the third-party plaintiff made claims for breach of contract, "[t]he gravamen of the third-party petition is indemnification, and we shall treat it as such").

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[2] This argument is addressed fully in § B (3), supra.

5. Appellants' "Special Damages" Argument is Without Merit

In addition to recognizing Marick's separately styled claims as disguised indemnity claims, the Circuit Court correctly held that the attorneys' fees and costs sought by Marick's separately styled claims are directly related to Marick's defending against potential liability it could face for Plaintiffs' claims. Appellants' argument that the lower court erred because Marick may recover special damages at law under a theory of negligence lacks merit. Appellants seek to classify attorneys' fees and costs as damages separate from damages sought by Plaintiffs, and therefore recoverable under a separate cause of action. (Appellants' Initial Brief in Case 1403, 8-9.) As explained above, Marick's argument ignores the fact that the attorneys' fees and costs it characterizes as "special damages" are sought in conjunction with "all damages Plaintiffs may recover against Marick," because "should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result of [Respondents' negligence.]" (Appellants' Answer to Pls.' Third Am. Compl. ¶ 169.) The attorneys' fees and costs Marick seeks are classic derivative indemnity damages based upon damages it alleges it will incur defending Plaintiffs' claims against it. Despite Marick's alleging these "special damages" under its claim styled as negligence, they are not special damages stemming from a separate "duty" owed to Marick by Clear View. Instead, the attorneys' fees and costs Marick has pled stem from the potential exposure to Plaintiffs' claims Marick alleges it faces because of Clear View's Project work.

Significantly, Appellants' "special damages" argument is based on the Contract Appellants allege created a specific duty owed to Marick by Clear View. (Appellants' Initial Brief in Case 1403, at 8.) As a preliminary matter, Marick has not met its burden

of establishing that the Contract is a binding contract for the Project consisting of an offer, acceptance, and valuable consideration. *See Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 655 (Ct. App. 2010) (stating the requirements for contract formation); *Sauner*, 354 S.C. at 406, 581 S.E.2d at 166; *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) (stating that the party claiming relief under a contract has the burden of establishing the contract). "In South Carolina, the formation of a contract is governed by well-settled principles. Quite simply, '[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.' *See Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993), citing *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984). "In general, valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." *See* 30 S.C. Jur. Contracts § 13, citing *J.C. White Lumber Co., Inc. v. Allen*, 306 S.C. 183, 410 S.E.2d 588 (Ct. App. 1991); *Sanchez v. Tilley*, 285 S.C. 449, 330 S.E.2d 319 (Ct. App. 1985). A promise by a party to do that which it has already legally obligated itself to do is not a valid consideration. *See City of Spartanburg v. Spartan Villa*, 273 S.C. 1, 5, 253 S.E.2d 501, 503 (1978). "Consideration that is wholly past is not valuable consideration." *Future Group, II v. Nationsbank*, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996).

Appellants have offered no evidence that the Contract applied to the Project or would otherwise be enforceable in this matter. Likewise, Appellants have offered no evidence to contradict the record evidence showing that Clear View completed all its

Project work by August 2007, and was paid solely for the work it performed, all of which work pre-dates the Contract. (*See* Clear View's Br. in Supp. of Mot. for Summ. J., Ex. "2.") The Circuit Court correctly found that Marick's failure to produce evidence that the Contract was supported by consideration is fatal to Marick's burden of establishing that the Contract applied to the Project. (Breach of Contract and Breach of Warranty Order, 8-9.)

Further, evidence exists that Marick had no contractor's license during the Project's construction, and is therefore prohibited from enforcing any contract terms as a matter of law. *See* S.C. Code Ann. § 40-11-370. South Carolina Code Section 40-11-30 provides that "[n]o entity. . . may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." If a commercial contractor performs work without a license, it "may not bring an action either at law or in equity to enforce the provisions of a contract." S.C. Code Ann. § 40-11-370(C). The same prohibition exists as to residential home builders. *See* S.C. Code Ann. § 40-59-30. Even if the Contract did apply to the Project — which Respondents deny and Appellants have not proved — South Carolina's plainly worded statutes prohibit Marick from enforcing the Contract to create a duty owed by Clear View to Marick.

Assuming, *arguendo*, that the Contract does create a legal duty from which Appellant Marick could recover attorneys' fees and costs spent defending against claims arising from Clear View's allegedly faulty work, Appellants' reliance on *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), and its progeny for the contention that "recovery

may be had at law in the form of special damages" does not create reversible error in the Circuit Court's Orders. (*See* Appellants' Initial Br. in Case 1403, 8; Appellants' Initial Br. in Case 1404, 11.) As detailed above, Marick's claims against Respondents all seek the classic indemnity remedies of what Marick "may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue." (*See, e.g.,* Appellants' Answer to Pls.' Third Am. Compl. ¶ 169.) Appellants fail in their attempt to classify attorneys' fees and costs as separate special damages, and not indemnity damages, because the authorities Appellants cite in support of this argument are all classic equitable indemnity cases. *See Griffin v. Van Norman*, 302 S.C. 520, 527, 392 S.E.2d 378, 382 (Ct. App. 1990) (affirming the judgment of the circuit court awarding the respondent her settlement costs as equitable indemnity)); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (affirming the award of attorneys' fees on the theory of special damages and equitable indemnity); *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971) (holding that in the absence of an express contract of indemnity between the parties, if no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered under an action for an implied contract to indemnify).

Appellants' final argument in support of reversal of the Circuit Court's finding, under the California case *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315 (2012), also lacks merit. (Appellants' Initial Br. in Case 1404, 10.) *William L. Lyon* involves vastly different facts and legal issues from the case at bar, in that it concerns fiduciary duties and separate contractual agreements between a broker

and the buyers and sellers of residential real estate. *See id.*, 204 Cal. App. 4th at 1300. Following the sale of a house with undisclosed concealed water damage in which the broker represented both the buyers and sellers under separate contracts, the buyers sued the sellers and the broker for negligence, breach of fiduciary duty, breach of contract, fraud, and negligent non-disclosure of defects. *Id.* The sellers, in turn, asserted cross-claims for indemnity, negligence, breach of fiduciary duty, and breach of contract against the broker. *Id.* The trial court denied the broker's motion for summary judgment on statute of limitations grounds as to both the buyer's and seller's claims against the broker. *Id.* The broker appealed and the appellate court considered whether all of the sellers' cross-claims against the broker were dependent on the buyer's claims, or arose from an independent duty owed to the sellers by the broker. *See id.*, 204 Cal. App. 4th at 1302.

In holding that the sellers' cross-claims in addition to indemnity were not merely disguised indemnity claims, the appellate court instructed that "disguised indemnity claims are causes of action purporting to state direct claims but which, in fact, seek to recover derivative damages." *Id.*, 204 Cal. App. 4th at 1315 (citing *Gackstetter v. Frawley*, 135 Cal. App. 4th 1257, 1274 (2006). The Court found the sellers' additional claims for negligence, breach of fiduciary duty, and breach of contract were not disguised indemnity claims, because they were not "merely derivative of the [buyers'] claims against the [broker]." *Id.* The court reasoned that the sellers' additional causes of action against the broker "[did] not arise under the buyer-broker agreement or from the duties owed as the buyers' broker to the [buyers] . . . [but] out of the duties owed to the [sellers] as clients of [the broker] in their own right. Consequently, the [additional claims to

indemnity] alleged by the [sellers] against the [broker] are not derivative of claims by the [buyers] and therefore not disguised indemnity claims." *Id.*

Appellants' reliance on *William L. Lyon* is misplaced, because Marick's separately styled claims still would be derivative indemnity claims under California law. California uses the same standard to determine the character of a cause of action as South Carolina law dictates in *Evans* and its progeny cited above, specifically, that it is the substance of the claim that determines whether it is a claim for indemnity. *See William L. Lyon*, 204 Cal. App. 4th at 1315, *citing Gackstetter* 135 Cal. App. 4th at 1274. A review of *Gackstetter* establishes that Marick's separately styled claims would be considered derivative disguised indemnity claims under California law. In *Gackstetter*, trust beneficiaries sued the trustee and the attorney who created the trust following an improper land transfer and mismanagement by the trustee. *See Gackstetter,* 135 Cal. App. 4th at 1274. The trustee brought cross-claims against the attorney for breach of fiduciary duty, fraud, negligent misrepresentation, implied indemnity, and equitable indemnity on a comparative fault basis. *See id.* at 1265. Much like how all of Marick's claims against Respondents share common allegations and remedies sought, each of the *Gackstetter* trustee's claims against the attorney shared the common language that the attorney "knew or should have known that [trustee] would be sued and subject to possible civil and criminal liability for his trust management under the supervision of [the attorney]." *Id.* at 1275.

The California court found that all of the trustee's claims against the attorney (other than his indemnity claims) were derivative disguised indemnity claims, because each of those claims was based on alleged damages the trustee suffered as a result of

claims by the trust beneficiaries. *Id.* In other words, both the attorney's and trustee's acts and omissions were directed at and damaged the trust beneficiaries. *Id.* Because the trustee claimed that his liability to the beneficiaries was caused by the attorney under each cause of action, the California court determined that all of the trustee's claims were derivative indemnity claims, and that "moreover, [trustee's] claim for his attorney fees is considered 'a form of implied equitable indemnity.'" *Id.*

In this case, like in *Gackstetter*, each alleged act or omission performed by both Appellants and Respondents occurred during construction of the Project, and therefore, to the extent such actions are alleged to be tortious, would be directed at and damage the Plaintiffs. Just as the *Gackstetter* trustee claimed he was exposed to liability and expense to the beneficiaries because of the attorney's action, Marick seeks to recover its potential liability, and attorneys' fees and costs spent defending against said liability, to Plaintiffs arising out of Respondents' alleged acts or omissions. Therefore, under *Gackstetter*, Marick's separately styled claims would be derivative indemnity claims in California. More importantly, as shown above, Marick's separately styled claims are claims for equitable indemnity under South Carolina law.

For each of these reasons, the Circuit Court properly found that Marick's separately styled claims are subsumed by its equitable indemnification claim. This Court should affirm the Circuit Court's decision, because Appellants' contentions and arguments do alter the fact that Marick's cross-claims all seek indemnity from Respondents for potential liability Marick could face for Plaintiffs' claims, and for the attorneys' fees and costs associated with defending itself from Plaintiffs' claims.

II. The Circuit Court Correctly Found That Marick's Cross-Claims For Equitable Indemnity Must Fail Because Marick Cannot Be Adjudged Without Fault.

The Circuit Court correctly entered summary judgment in Respondents' favor because the deposition testimony in the record, and Plaintiffs' allegations in this matter, clearly show that should Plaintiffs' prove their allegations against Appellants and Respondents, Marick would be partially at fault for the damages due to its role as the general contractor for Phase II construction. Because Marick cannot be adjudged without fault as to any judgment that might be entered in Plaintiffs' favor, Marick cannot recover on its indemnity claims as a matter of law.

A. The General Contractor's Duties.

The record evidence establishes that Marick was the permit holder on the Project, that building code violations occurred at the Project, and that Marick was ultimately responsible for the Project's construction. These facts provide ample support for the Circuit Court's finding that, should Plaintiffs prove their allegations, Marick cannot be found to be completely without fault for the damages. (Negligence and Equitable Indemnification Order, 7; Breach of Contract and Breach of Warranty Order, 7.)

1. Supervision and Coordination of Subcontractors.

Appellants argue that the Circuit Court's findings were in error because Appellants have presented evidence that Marick was not at fault for the alleged defective stone installation at the Project. (Appellants' Initial Br. in Case 1403, 11.) Appellants argue that Marick, as the general contractor, provided no construction-related labor associated with the Project's actual construction, and solely provided construction scheduling and supervision. (Appellants' Initial Br. in Case 1403, 13.) Appellants

contend that there is evidence of supervision performed by Appellants in the record that creates a genuine issue of material fact as to whether Marick can be found at fault under *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008). (Appellants' Initial Br. in Case 1403, 13.)

Appellants incorrectly contend that "*Fields* stands for the proposition that a general contractor is not automatically liable for the work of its subcontractors." (Appellants' Initial Br. in Case 1403, at 12.) *Fields* concerned the propriety of jury charges in a construction defect case in which the homeowner argued the trial court should have charged that a general contractor is "automatically responsible" for the negligence of a subcontractor, which the trial court determined "seems more like strict liability than negligence." *Fields,* 376 S.C. at 560-561, 658 S.E.2d at 88. The *Fields* Court held that the trial court did not err in charging the jury that "a builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such **supervision to see that work is done in conformity with the applicable building code**." *Id.* 376 S.C. at 560, 658 S.E.2d at 88 (emphasis added). Appellants' reliance on *Fields* is misplaced because the Circuit Court did not find that Marick would automatically be at fault for alleged subcontractor negligence, if such were proven. On the contrary, the Circuit Court's finding of Marick's fault based on building code violations in the record is supported by the contractor's standard of care set forth in *Fields. Id.*

2. Supervision to Ensure Compliance with the Building Code

The Circuit Court found that the record contains sufficient evidence from Appellants' own expert that Marick bore ultimate responsibility for construction of the

Project, and that building code violations existed on the Project. (Negligence and Equitable Indemnification Order, 6 ; Clear View's Br. in Supp. of Summ. J., 4-5; R. Still Dep. 89:4-11, August 15, 2012.)

In addition to its role supervising and coordinating construction, Marick was also the sole permit holder on the Project. (Negligence and Equitable Indemnification Order, 6.) As the permit holder, Marick was "solely responsible for noncompliance with any applicable [building] codes." (Memo in Supp. of Carl Catoe Construction, Inc.'s Mot. Dismiss as to Marick Home Builder's Claims, Ex. "C" ("Representative Building Permit and Application from Oconee County").)

Appellants' argument that a material issue of fact exists because there is evidence in the record that Marick performed supervision lacks merit. Marick's own representatives testified that they were on the site ten to twelve hours a day providing supervision and inspections of subcontractor work, yet there is still evidence of building code violations on the Project. (Appellants' Initial Br. In Case 1403, 13-14.) Marick's attempt to divorce itself from the actual construction labor is immaterial to the trial court's decision. As Clear View's expert Drew Wilkie testified, in the construction industry there are two ends of the spectrum in a contractor-subcontractor relationship. One end is a full service subcontractor who performs its work without supervision from the contractor. (D. Wilkie Dep. 20:7-10.) On the other end is a subcontractor who performs labor only, while the contractor directs the work, and provides the materials, coordination and supervision. (D.Wilkie Dep. p. 20:10-17.) By Appellants' own admission, Clear View was not a full service subcontractor, but was a labor subcontractor performing work at the direction and under the supervision of Marick. (Appellants'

Initial Br. in Case 1403, 13.) Therefore, to the extent Plaintiffs prove their allegations of defective work, Marick cannot be without fault, given the role it performed coordinating and supervising Clear View and the other Project subcontractors.

3. Appellants' Argument that Marick did not Self-Perform Any Work at the Project Likewise Fails to Provide This Court Grounds for Reversal.

Also insufficient to establish reversible error is Appellants' argument that Marick did not self-perform any work at the Project, and therefore cannot be adjudged to be at fault for Plaintiffs' damages. Appellants base this argument on expert Randy Still's testimony that, as the general contractor, Marick relied on its subcontractors to perform their crafts appropriately, and that Marick itself did not violate any building codes or contract documents. (Appellants' Initial Br. in Case 1403, 15-16.) Notably, Appellants omit the portion of Still's testimony directly following his thoughts on the contractor to subcontractor relationship, where Still states that he would expect "that a general contractor would at least confirm to his satisfaction that the subcontractor [is] complying with the contract documents." (R. Still Dep. 86:2-7, August 15, 2012.) Still's complete testimony demonstrates that he agrees that Marick, as the general contractor, should have adequately supervised Project construction so as to ensure its subcontractors did not deviate from the contract documents and applicable building code.

Void also is Appellants' argument that Still's testimony that Marick did not violate the building code creates a material question of fact. (Appellants' Initial Br. in Case 1403, 16.) Directly following the portion of Still's testimony cited by Marick, Still explains that the reason he said Marick did not violate any code or contract document was because Marick did not "self-perform" any of the construction. (R. Still Dep. at

175:17-176:10, August 15, 2012.) The uncontroverted fact that Marick technically did not self-perform any Project construction, but provided supervision and coordination only, does not novate Still's opinion that Marick had a duty to ensure that its subcontractors complied with the Project documents and building codes in constructing the Project. Thus, the portions of Still's testimony cited in Appellants' argument do not create a question of fact as to whether Marick could be entirely without fault for Plaintiffs' damages if proven.

For each of these reasons, the Circuit Court properly found that the evidence in the record creates no genuine issue a material fact as to whether Marick could not be found without fault, should Plaintiffs prove their claims.

III. The Circuit Court Correctly Held That Marick Has No Viable Claim For Contractual Indemnity Against Respondents.

The Circuit Court correctly found that Marick has no viable claim for contractual indemnity, because Marick cannot prove the existence of a contract providing for indemnity between Marick and Respondents that applies to the Project. As discussed above, Appellants' averment that the Contract provides an additional basis for the Circuit Court's reversal lacks merit. Appellants have presented no record evidence supporting for Appellants' contention that the Contract applied to the Project. Furthermore, Appellants did not plead a claim for contractual indemnity, or even mention in their claim styled "Breach of Contract" that a contract between the parties contained an indemnification clause. (Appellants' Answer to the Pls.' Third Am. Compl. ¶¶ 159-161.) The Circuit Court properly found that based upon the evidence in the record, Marick has not met its burden of proving that the Contract applied to the Project and was enforceable.

IV. The Circuit Court Correctly Held That Respondent Franz Is Entitled To Summary Judgment On Marick's Cross-Claims On The Additional Ground Of Lack Of Special Relationship.

The Circuit Court correctly found that Franz is entitled to summary judgment based on the additional basis of lack of a special relationship between Marick and Franz. (Negligence and Equitable Indemnification Order, 7-8.) Although Appellants' Brief advances no argument as to why this finding was in error, this issue was nonetheless properly decided by the Circuit Court. (*See* Appellants' Initial Br. in Case 1403.)

"The right of equitable indemnity arises out of the relationship between the indemnity plaintiff and the indemnity defendant." *Inglese v. Beal*, No. 2012-208307, 2013 WL 1830834, at *4 (S.C. App. May 1, 2013). "[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." *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983).

In order for a special relationship to exist that supports an equitable indemnity claim, the parties' affiliation must be "sufficient" to allow the indemnification plaintiff to recover its attorney fees and costs for defending the negligence of the indemnification defendant. *Town of Winnsboro.*, 307 S.C. at 130-31, 414 S.E.2d at 120; *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994) (holding that the relationship between a contractor and subcontractor supports an equitable indemnification claim). South Carolina courts' examination of special relationships in other contexts demonstrates that to constitute a special relationship, the parties must have a temporally direct and definable association. *See Tommy L. Griffin*

Plumbing & Heating Co. v. Jordan, Jones & Goulding, 320 S.C. 49, 55-56, 463 S.E.2d 85, 89 (1995) (holding engineer retained by project owner to exercise oversight and control over the project general contractor had bid and was constructing per engineer's plans had special relationship with general contractor and thus owed contractor duty to avoid negligently designing and supervising project); *Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hospital*, 344 S.C. 433, 544 S.E.2d 838, 842 (2001) (holding special conditions in architect's contract with project owner governing review and approval of subcontractor pay applications could give rise to special relationship between architect and subcontractors and resulting duty of care to subcontractors to ensure project payment); *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986) (holding consultant retained by Savannah ports authority to prepare factual report comparing ports of Savannah and Charleston owed a duty to Charleston ports authority, as Savannah's direct competitor and the subject of the consultant's comparative analysis, to report accurate and objective factual data). No special relationship for equitable indemnity purposes exists if the parties' association is attenuated, remote or distant. *Rock Hill*, 363 S.C. at 390, 611 S.E.2d at 237.

The Circuit Court correctly found that there was no evidence in the record that Franz performed any stone installation or construction related activities on the Project; therefore, Franz had no subcontractor relationship with Marick. (Negligence and Equitable Indemnification Order, 8.) Marick has introduced no evidence that Franz's involvement in the Project consisted of anything other than being a member of Clear

View. (Clear View's Brief Support Summ. J., 3.)[3] Given the complete lack of record evidence that Franz had a subcontractor relationship in his individual capacity with Marick, the Circuit Court properly found that, pursuant to *Rock Hill*, 363 S.C. at 390, 611 S.E.2d at 237, there was no special relationship sufficient to maintain an action for equitable indemnity between the parties. The Circuit Court's decision in this regard is further supported by S.C. Code § 33-44-303(a) (1976), which states that "the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." Appellants have produced no evidence showing that Marick's cross-claim allegations against Franz arise from his independent actions. Instead, Marick seeks to impose liability upon Franz solely because he was a member of Clear View. Because Marick has no basis for its cross-claims against Franz, the Circuit Court correctly granted summary judgment in Respondents' favor.

CONCLUSION

The Circuit Court properly held that Marick's negligence, breach of contract, and breach of warranty claims are claims for equitable indemnity. The allegations and remedies sought by a claim determine the character of an action under South Carolina law, and as pleaded, Marick's cross-claims all seek to recover the classic indemnity remedy of Marick's potential liability to Plaintiffs.

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[3] Respondents note that to the extent Appellants argue there is a complete absence of any evidence in the record regarding Franz's Project involvement, Appellants could have chosen during the course of this case's multi-year discovery period to notice the deposition of Respondents.

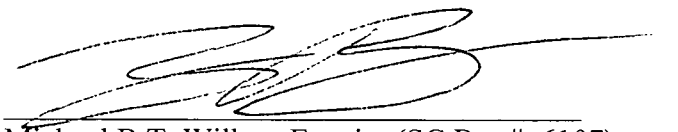
Additionally, the Circuit Court properly granted summary judgment to Respondents on Marick's equitable indemnification claims, because the record evidence establishes that should Plaintiffs prove their claims, Marick cannot be adjudged without fault. The ruling conforms to the paramount requirement of equitable indemnity that there can be no indemnity between joint tortfeasors.

Further, and although Marick did not plead a claim for contractual indemnity, the Circuit Court correctly found that Respondents are entitled to summary judgment on Marick's alleged claim for contractual indemnity. This is because Marick has not established that there is a valid and enforceable contract between Marick and Respondents.

Lastly, the Circuit Court properly found that Franz is entitled to summary judgment on all of Marick's cross-claims on the additional basis that there is no special relationship between Marick and Franz.

For each of these reasons, Respondents respectfully request that this Court affirm the Circuit Court's Orders granting Respondents' Motion for Summary Judgment on Appellant Marick's cross-claims for negligence, breach of contract, breach of warranty, and equitable indemnification. Respondents further request an award of the costs of this appeal, including attorneys' fees, and such other and further relief as the Court deems just and proper.

Respectfully submitted,



March 25, 2014

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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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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 whom Marick Home Builders, LLC and Rick Thoennes are the Appellants,

And Builders First Source-Southeast Group, Southern Concrete Specialties, Inc., Clear View Construction, LLC, and Michael Franz are the Respondents,

Bostic Construction, Inc., Third Party Plaintiffs,

v.

Southern Stone, Inc., and Buck Smith Construction, Third Party Defendants.

PROOF OF SERVICE

I certify that I have served the *Initial Brief of Respondents Clear View Construction, LLC and Michael Franz* on Appellants by depositing a copy of it in the Unites States Mail, First Class postage prepaid, on March 25, 2014, addressed to Appellants' attorneys of record, Jason M. Imhoff, Esquire and C. Reed Teague, Esquire, PO Box 5663, Spartanburg, SC, 29304 (attorneys for Marick Home Builders, LLC and Rick Thoennes), and the following counsel of record:

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