

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. 2013-001404

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, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, 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, Herberito Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., Southern Basements, Inc., MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC, Inc., d/b/a KMAC North Carolina, Eufacio Garcia, Everado Jaramillio, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, Miller/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.

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SC Court of Appeals

FINAL BRIEF OF APPELLANTS MARICK HOME BUILDERS, LLC AND RICK
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STATEMENT OF ISSUES ON APPEAL

- I. Did the Lower Court Err by Collapsing Appellants' Cross-Claims for Breach of Contract and Breach of Warranty into One Claim for Equitable Indemnity and by Failing to Grant Appellants' Motion for Reconsideration?

STATEMENT OF THE CASE

The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge (hereinafter “Stoneledge” or “Project”). Included in Plaintiffs’ numerous claims were claims against one of the general contractors affiliated with the Project, Marick Home Builders, LLC, and its affiliated member Rick Thoennes (hereinafter collectively referred to as “Marick”), and claims concerning alleged defective brick and stone installation and labor performed by Respondent subcontractor Clear View Construction, LLC and its owner Michael Franz (hereinafter collectively referred to as “Clear View”), alleged defective construction and allegedly supplying defective building materials utilized to construct the buildings by Respondent subcontractor Builders First Source—Southeast Group, LLC (hereinafter “BFS”), and alleged defective concrete installation and defective waterproofing as performed by Respondent subcontractor Southern Concrete Specialties, Inc. (hereinafter “Southern Concrete”). BFS, Clear View and Southern Concrete contracted directly with Marick. (R. pp 1287-1288; R. pp 1291-1292; R. pp 1289-1290.)

Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Only Phase II of Stoneledge is the subject of this Appeal. As a result of being sued for the alleged defective stone mason work performed by Clear View, defective concrete installation and defective waterproofing application performed by Southern Concrete, and for the use of defective/improper building materials supplied by BFS and defective construction/installation concerning the framing, decks, siding and windows performed by BFS and its subcontractors, Marick filed cross-claims against the Respondents that performed work on the Project for indemnity, negligence, breach of contract and breach of warranty. (R. pp 69-

107.) This Appeal refers solely to the cross-claims for breach of contract and breach of warranty filed against each Respondent.¹

Clear View, BFS and Southern Concrete filed motions for summary judgment as to Marick's cross-claims. (R. pp 653-660; R. pp 633-640; R. pp 714-720.) On September 5, 2012, arguments concerning said Motions and Motions filed by other parties not subject to this Appeal 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 Clear View, BFS, and Southern Concrete summary judgment as to Marick's cross-claims for breach of contract and breach of warranty. (R. pp 1-11.) By separate orders which are currently before this Court in separate appeals, the lower court granted Clear View's and BFS's Motions for Summary Judgment concerning Marick's cross-claims for negligence and equitable indemnity.

Following receipt of the January 11, 2013 Order, which was filed on January 14, 2013, Marick promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to South Carolina Rule Civil Procedure, Rule 59(e). (R. pp 894-901.) 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. (R. pp 23-27.)

The time having been tolled by the SCRCPP 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 May 21, 2013 upholding the Court's January 11, 2013 Order granting summary judgment. (R. pp

¹ The lower court's Order signed January 11, 2013 and filed January 14, 2013, on page 3 stated that a separate order found that Southern Concrete was entitled to judgment as a matter of law as to Marick's causes of action for negligence and equitable indemnity; however, a separate order was never entered by the lower court granting said relief to Southern Concrete. Thus, Marick's causes of action for negligence and equitable indemnity are presently viable causes of action before the lower court.

1-11; R. pp 23-27.) The Order was received by the Appellants on or about May 23, 2013 and a Notice of Appeal and Proof of Service was filed with the Court and served upon 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"). (R. pp 28-40.) Hund's Complaint alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the Project.

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

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

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

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

During construction, Marick subcontracted with Clear View to perform brick and stone labor at Phase II of the Project. (R. pp 1289-1290.) Marick did not supply or install any of the stone at Phase II of the Project; all of the stonework was performed by subcontractors which included Clear View. It was alleged in Plaintiffs' Third Amended Complaint that work performed by Clear View was deficient; thus, Marick and Clear View were sued by Plaintiffs for those deficiencies. 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 stone application at Phase II of the Project. (R. pp 565-567; R. p 580; R. p 581; R. p 583; R. pp 584-586.)

During construction, Marick subcontracted with Southern Concrete to perform the concrete work at Phase II of the Project which included installing waterproofing to the concrete. (R. pp 1291-1292.) Marick did not supply or install any of the concrete or waterproofing at Phase II of the Project; all of the concrete work was performed by Southern Concrete or other subcontractors. Plaintiffs' Third Amended Complaint alleged that work performed by Southern Concrete was deficient; thus, Marick and Southern Concrete were sued by Plaintiffs for said alleged deficiencies. Marick performed no labor at the Project, only supervision for of its subcontractors. Jason Carlan, Southern Concrete's 30(b)(6) designee, testified that Marick provided supervision and oversight at the Project. (R. pp 603-604; R. pp

606-607; R. pp 611-612.) Carlan further testified that he told Nathan and Marick that work performed by Southern Concrete was performed in accordance with manufacturer's instructions. (R. pp 608-609.)

Marick further contracted directly with Respondent BFS for BFS to supply materials to the Project and to install the framing, decks, doors, siding and windows. (R. pp 1287-1288.) (R. p 537.) 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. (R. p 532.) BFS then subcontracted with Carl Catoe Construction, Inc. (hereinafter "Catoe") to perform the construction related labor and installation services. (R. pp 527-530.) Catoe then subcontracted the labor and installation services out to the numerous other subcontractors which are referred to as the Catoe Subcontractors. Thus, BFS was a supplier of materials for the Project and it provided oversight and supervision for Catoe and the Catoe's 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 to the Project, BFS subcontracted out all of the work it agreed to perform; thus, BFS's only role concerning labor was to provide oversight and guidance to Catoe and the 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 said allegations by submitting testimony of an expert witness. Plaintiffs' expert, Derrick Hodgin, testified that there are defects associated with the work BFS, Catoe and the Catoe Subcontractors performed at the Project.²

² 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

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. (R. p 517; R. p 620.) Thus, Marick's only function (as the general contractor) was to hire subcontractors, schedule construction and to use ordinary care in providing supervision to the subcontractors. As discussed below, Marick submitted evidence to refute the allegations made by Plaintiffs that Marick was responsible for the deficient work performed by Clear View, BFS and Southern Concrete. Marick further submitted evidence that it used ordinary care in providing supervision at the Project.

Marick further submitted evidence that each Respondent entered into binding contracts with Marick and agreed to hold Marick harmless for any liability Marick incurred as a result of the Respondents' work. (R. pp 1287-1288; R. pp 1291-1292; R. pp 1289-1290.)

STANDARD OF REVIEW

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

Project. (R. pp 542-543; R. pp 544-545; R. p 547; R. pp 550-552; R. pp 555-559.) Hodgin also testified that the house wrap applied by the Catoe Subcontractors did not integrate properly with the flashing. (R. pp 553-554.) Further, Hodgin testified that the siding fasteners installed by the Catoe Subcontractors had improper spacing which could result in future damage. (R. pp R. pp 560-561.) 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. (R. pp 575-576; R. p 587.) 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. (R. p 582; R. pp 588-595.) All of the work performed by the Catoe Subcontractors was work BFS contracted with Marick to perform.

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

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

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

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

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

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

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

ARGUMENT

I. The Lower Court Erred by Collapsing Appellants’ Cross-Claims for Breach of Contract and Breach of Warranty into One Claim for Equitable Indemnity and by Failing to Grant Appellants’ Motion for Reconsideration.

Appellants believe this issue is a matter of first impression for South Carolina appellant courts as the lower court cited (R. pp 1-11) no binding case law in support of its holding. In support of its holding, the lower court cited two non-binding federal 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) (*unpublished order*) and *Kirkland v. Cambridge Building Corp.*, 2006-CP-07-1312 (Order by Judge Curtis L. Coltrane, May 30, 2006) (*unpublished order*)).

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

Appellants assert that the referenced federal court orders should not be persuasive in this matter and that the non-binding lower court holdings in *Nelson* and *Kirkland* were erroneous and thus should not be followed. Appellants may recover special damages at law under a theory of breach of warranty and breach of contract from the Respondents.

Specifically, here, each Respondent and Marick entered into separate Contracts which created a specific duty upon each Respondent to perform specific work: (1) Clear View contracted to perform stonework at Phase II of the Project (R. pp 1289-1290); Southern Concrete contracted to perform concrete work at Phase II of the Project (R. pp 1291-1292); and BFS contracted to supply materials and perform construction labor at Phase II of the Project (R. pp

1287-1288). 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' alleged tortious conduct (deficient construction work); thus, Marick properly filed claims for breach of warranty and breach of contract against Respondents seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (R. pp 69-107.) Marick has even better facts than *Addy* for including special damages claims against a subcontractor, as Clear View, BFS and Southern Concrete 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 breach of warranty or negligence standard and pursuant to the Contracts entered into between the parties. 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.

Other jurisdictions have addressed the disguised indemnity issue presently before the Court. The contractual obligations and other duties owed by the subcontractors to Marick constitute separate causes of action which did not arise through Plaintiffs' relationship to the parties. The Court in *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1315, 139 Cal Rptr. 670, 685-686 (2012), held specifically that when a cross-claimant is owed separate contractual obligations and duties from a party, a separate cause of action for breach of contract does not collapse into a single indemnity claim. Marick had a contractual relationship with each Respondent and was owed separate duties by the subcontractors it was overseeing to perform the work at issue in this action; if the subcontractor failed to perform the work it was hired to perform properly, it breached duties and contractual obligations owed to Marick and thus should be liable to Marick. (R. pp 1289-1290, R. pp 1291-1292, and R. pp 1287-1288.)

Breach of Contract

As noted above, the Court collapsed Marick's cause of action for breach of contract into an equitable indemnity claim. Marick's claims for equitable indemnity filed against BFS and Clear View were dismissed by separate orders which are presently before this Court in separate appeals. The lower court failed to consider that each Respondent entered into binding Contracts

with Marick, which created contractual obligations to indemnify Marick; and said obligations are not equitable.

“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. A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally.” *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 451, 453-54, 438 S.E.2d 271, 272 (Ct. App. 1993) (internal citations omitted). “Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties.” *Rock Hill Tel. Co., Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005). “The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.” *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

Each Contract signed by a representative of each Respondent provided the following “Hold Harmless” Provision:

Hold Harmless: To the fullest extent permitted by law, the Subcontractor [BFS, Clear View and Southern Concrete] shall indemnify the Contractor, owner and their agent(s) from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors.

(R. pp 1287-1288, R. pp 1291-1292, and R. pp 1289-1290.) Thus, BFS, Clear View and Southern Concrete each agreed to indemnify Marick for “claims, damages, losses and expenses” incurred by Marick as a result of the Respondents' deficient work. By failing to indemnify Marick for the alleged faulty work that each performed at Stoneledge, BFS, Southern Concrete and Clear View have breached the “Hold Harmless” Provision of the Contracts.

Clear View and Southern Concrete did not present evidence that the Contracts they signed on October 1, 2007 were not applicable to the work each performed for Marick at Stoneledge. Further, BFS's 30(b)(6) designee, Terry Rosamond, testified that BFS entered into a Contract with Marick to perform the work it performed at Stoneledge. (R. p 532.) Thus, the lower court's holding was erroneous, as at the least, a question of fact existed concerning the Respondents' contractual obligations to indemnify Marick and the Respondents' breach of the Contracts for failing to abide by the "Hold Harmless" Provision of the Contracts.

Due to the "Hold Harmless" Provisions of each Contract entered into by BFS, Southern Concrete and Clear View, Marick's cross-claim for breach of contract is a separate and distinct cause of action different from equitable indemnity. The lower court cited *S. Carolina Nat. Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990), stating that "a rose by any other name is still a rose" for the proposition that Marick's cross-claim for breach of contract is nothing more than an equitable indemnity claim. However, as is evident from the noted Contracts, the "Hold Harmless" Provision set forth in each Contract establishes a separate and distinct claim, and thus should be viewed separately from the equitable indemnity claim. A major distinction between the contractual cause of action and the equitable cause of action is that Marick's contributing fault has no bearing on Marick's right to seek indemnity pursuant to the "Hold Harmless" Provisions of the Contracts. Thus, a party's breach of a specific contractual provision should be determined based upon the terms of the contract and not subsumed by a single claim for equitable indemnity. *Rock Hill Tel. Co.*, 363 S.C. 385, 611 S.E.2d 235 (2005).


Since Marick's cross-claim for breach of contract is not an equitable claim, whether or not Marick has unclean hands is not a determinative factor; rather, the Contracts set forth a completely separate contractual indemnity claim. Thus, the Contracts should be construed in

accordance with the terms. Therefore, due to the legal costs and expenses incurred by Marick as a result of this litigation and the continued potential liability for which Marick has been subjected, the jury should decide if BFS, Southern Concrete and Clear View owe damages to Marick pursuant to the terms of the Contracts.

Appellants further note that neither of the unpublished South Carolina Circuit Court Orders, *Nelson v. John Wieland Homes*, 2009-CP-10-6573 (Order of Young, J.) and *Kirkland v. Cambridge Building Corp.*, 2005-CP-07-1312 (Order of Coltrane, J.), relied upon by the lower court involved separate and distinct contractual "Hold Harmless" Provisions entered into between the parties. The South Carolina circuit court holdings do not discuss whether or not a separate and distinct contractual claim would be subsumed by an associated equitable indemnity claim. Thus, the lower court's merger of the wholly separate contractual claim into a single equitable indemnity claim was clearly improper.

CONCLUSION

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


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October 10, 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. 2013-001404

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, Bradford D. Seckinger, John Ludwig, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, M Group Construction and Development, LLC, Bostic Brothers Construction, Inc., Rick Thoennes, Mel Morris, Joe Bostic, Jeff Bostic, 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, Herberito Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate Utilities, Inc., Southern Basements, Inc., MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC, Inc., d/b/a KMAC North Carolina, Eufacio Garcia, Everado Jarmamillio, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, Miller/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

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Appellants' Final Brief complies with Rule 211(b), SCACR.



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SC Court of Appeals

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

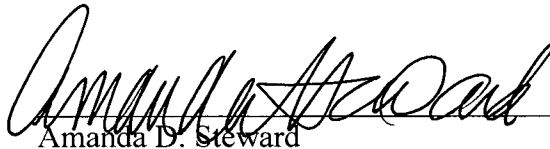
Bostic Construction, Inc., Third Party Plaintiffs,

v.

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

PROOF OF SERVICE

I, Amanda D. Steward, certify that I have served Appellants Marick Home Builders, LLC and Rick Thoennes' Final Brief by depositing a copy of it in the United States Mail, First Class postage prepaid, on October 14, 2014, addressed to Respondents' attorneys of record, Michael B.T. Wilkes, Esquire and Ellen S. Cheek, Esquire, 127 Dunbar Street, Suite 200 Spartanburg, SC 29306 (attorney for Clear View Construction, LLC and Michael Franz), Mason A. Goldsmith, Esquire, PO Box 1887, Greenville, SC, 29602 (attorney for Southern Concrete Specialties), Robert T. Lyles, Jr., Esquire, PO Box 773, Charleston, SC, 29401 (attorneys for Plaintiffs) and David A. Root, Esquire, PO Box 13897, Charleston, SC, 29422 (attorney for Builders FirstSource)



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October 14, 2014

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