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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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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 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 VincentMorales d/b/a Morales Masonry/Player &Associates.....Defendants

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

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 CastilloMontel.....Respondents.

FINAL BRIEF OF RESPONDENTS BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, CARL CATOE CONSTRUCTION, INC.,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

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STATEMENT OF THE CASE

Stoneledge at Lake Keowee ("Stoneledge" or the "Project") is a townhome community located along the shores of Lake Keowee in Oconee County. The Project consists of nineteen (19) residential buildings, representing eighty (80) individual units and a clubhouse.

The Project was developed in two phases. Phase I was built during 2003-2004 and consists of eight (8) buildings representing thirty-seven (37) individual units. At that time, the primary developer was Keowee Townhouses, LLC and the general contractor was Bostic Brothers Construction, Inc. Phase II was built during 2006-2007 and consists of eleven (11) residential buildings representing forty-three (43) units. At that time, the developer was IMK Development Co., LLC, The Appellant, Marick Home Builders, LLC, (Appellant hereinafter shall be referred to as "Marick") was the general contractor for Phase II.

Marick hired Respondent BFS (hereinafter "BFS") to perform the following scope of work on Phase II: (1) exterior and interior framing; (2) trusses; (3) prefabricated stairs; (4) deck and column framing; (5) decorative arches; (6) gypsum wallboard; (7) some exterior sheathing; (8)gypsum fire walls; (9)Tyvek building wrap; (10) windows and associated flashing; (11) exterior doors and associated flashing; (12) screen porch framing; and (13) balcony railings. BFS hired the Respondent Catoeto perform that scope of work. Catoe then hired the Respondents who worked under Catoe (Catoe and its subcontractors shall be referred to herein collectively as "Catoe").Catoe completed their work on the Project in January 2007.

This lawsuit was instituted on May 29, 2009. *See* Complaint. It is a construction defect lawsuit brought on behalf of the homeowners and homeowners' association at Stoneledge. The plaintiffs sued Marick and Respondents, among many others, alleging negligence and breach of warranty causes of action. *See* April 3, 2012 Third Amended Complaint (R. pp. 17-44). Marick

then instituted cross-claims for negligence, breach of warranty and equitable indemnity against Respondents and many other defendants. *See* April 5, 2012 Cross-Claim (R. pp. 45-83). Respondents denied the cross-claims asserted by Marick. *See* Answer to Cross-Claim (R. pp. 84-101).

All of the cross-claim defendants, including Respondents, filed motions to dismiss and motions for summary judgment as to Marick's cross-claims. *See* Respondents August 23, 2012 Motion and Memorandum in Support (R. pp. 646-665). In the motions to dismiss, Respondents contended that Marick's breach of warranty and negligence claims were merely disguised claims for equitable indemnity. In the motions for summary judgment, Respondents contended that there was no genuine issue of material fact on the equitable indemnification cross-claims. On September 5, 2012, the trial court heard Respondents' motions. However, Marick conceded its' position on Respondents' motion to dismiss, leaving only the motions for summary judgment as to equitable indemnification.

On January 11, 2013, the trial court issued an order granting Respondents' motions to dismiss and motions for summary judgment, along with the motions filed by all of the other cross-claim defendants. *See* January 11, 2013 Order (R. pp. 1-11). On or about January 24, 2013, Marick filed a Motion for Reconsideration under Rule 59(e), SCRCP. *See* Motion for Reconsideration (R. pp. 802-809). The trial court conducted a hearing on this motion on April 10, 2013. On May 21, 2013, the trial court denied Marick's motion for reconsideration. *See* Order dated May 21, 2013 (R. pp. 12-16).

Marick filed and served a Notice of Appeal on June 6, 2013.

STATEMENT OF FACTS

Marick served as general contractor on Phase II of the Project, and applied for and received a building permit. *See Building Permit and Application from Oconee County* (R. pp 1027-1028). As the permit holder, Marick was "solely responsible" for compliance with the building code. *Id.*Further, Marick was required to provide supervision to and coordination of the Project. Marick's Brief at 6 (R. pp 817); Randy Still Tr. 87: 3-7 (R. pp. 638).

Marick hired Nathan Hornaday to serve as its supervisor on the Project. Hornaday Tr. at 18: 8-16 (R. pp. 620). In that capacity, Hornaday supervised the work being performed by subcontractors. *Id.* at 18: 15-16 (R. pp. 620). In fact, Hornaday had never supervised subcontractors prior to his work on the Project. *Id.* at 18: 23-25 (R. pp. 620).

Despite his role as supervisor for Marick, Hornaday did not know which building code was applicable to the construction of Stoneledge Phase II. *Id.* at 97: 8-13. He did not ensure that the subcontractors' work was consistent with industry standards or compliant with the building code. *Id.* at 113: 9-12; 61: 2-8.

Thus, despite Marick's argument that it was responsible for supervision only, it appears that its own supervisor did not engage in any supervision. It is also uncontroverted that Marick failed to ensure compliance with the building code as required in the building permit.

STANDARD OF REVIEW

A. Rule 12(b)(6), SCRCP

As set forth above, the Court entered an order dismissing Marick's claims for negligence and breach of warranty pursuant to Rule 12(b)(6), *SCRCP*. A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6) motion must be bottomed and premised solely upon the allegations set forth by the plaintiff. *Berry v.*

McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). The motion will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief. *Toussaint v. Ham*,292 S.C. 415, 357 S.E.2d 8 (1987).Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001).

B. Rule 56, SCRCP

A motion for summary judgment shall be granted "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 a judgment as a matter of law.Rule 56(c), *SCRCP*.Marick's focus on this "scintilla of evidence" standard is misplaced. A party opposing a summary judgment motion on an indemnification claim, has a two-fold burden. First, Marick must establish that a genuine issue of material fact exists regarding its lack of liability. Second, Marick must establish a genuine issue of material fact regarding the moving party's liability. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999).Here, the Circuit Court, ruling on the issue of equitable indemnity, found that Marick was not without fault, and was thereby precluded from recovery against Respondents in equitable indemnity. On an appeal of a matter of equity, the appellate court may take its own view of the evidence. *See*, *McCain v G.L. Brightharp*, 399 SC 240, 730 S.E.2d 916 (Ct. App. 2012)

ARGUMENT

I. THE LOWER COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO APPELLANT'S CROSS-CLAIM FOR EQUITABLE INDEMNITY.

Equitable indemnity cases involve a fact pattern in which the first party (the indemnitor) is at fault, but the second party (the indemnitee) is not. *Town of Winnsboro v. Wiedeman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990), *aff'd*,307 S.C. 128, 414 S.E.2d 118 (1992)(Winnsboro II). If the second party is also at fault, he comes to court without equity and has no right to indemnity. *Id.*The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified be free of fault. *Myrtle Beach Pipeline Corp. v. Emerson Electric,* 843 F Supp 102) (DCSC 1993). Further, "[i]n order to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established."*Toomer v. Norfolk S. Ry. Co.*, 344 S.C. 486, 492, 544 S.E.2d 634, 637 (Ct. App. 2001).

A. THERE EXISTS NO SPECIAL RELATIONSHIP BETWEEN APPELLANT AND CATOE.

Catoe was not a subcontractor to Marick. Rather, Catoe and its subcontractors were sub-subcontractors or sub-sub-subcontractors to Marick. As such, the "special relationship" required to permit Marick's claim for equitable indemnity did not exist between Marick and Catoe.

In order to claim equitable indemnity, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing. *Rock Hill Tel. Co. v. Globe Comm'n, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005) The trial court properly relied on *Rock Hill Tel. Co.* in holding that "a remote or distant independent contractor [such as Catoe] does not have a special relationship with an upstream party." Order at 8 (R. pp. 11) *citing Rock Hill Tel. Co.*, 363 S.C. at 390, 611

S.E.2d at 237. In the present case, Marick did not hire Catoe. Rather, Marick hired BFS which in turn hired Catoeto perform certain work on the Project. This is the same remote or distant relationship that the *Rock Hill Tel. Co.*court determined was not a "special relationship" that would support a claim for equitable indemnity.

In its brief, Marick argues that this case is distinguishable from *Rock Hill Tel. Co.* Because Marick "was responsible for providing oversight of the work performed by Catoe and its Subcontractors. "Marick's Brief at 8 (R. pp. 817). Rather, Marick was responsible for oversight of the Project and its only direct or "special relationship" was with BFS. Indeed, in its' own brief, Marick cites testimony confirming that any instructions from Marick to Catoe were not to be made directly, but rather, through BFS. Marick's Brief at 8 (citing testimony of Terry Rosamond, BFS' Rule 30(b)(6) witness)(R. pp. 817). There is no evidence of direct supervision by Marick of the Catoe. Therefore, by definition, the Catoe are remote contractors and have no special relationship with Marick, the upstream party. For this reason, the Court correctly determined that this case falls squarely within the guidance provided by *Rock Hill Tel. Co.*

Marick cites *First Gen. Servs. v. Miller* for the proposition that a contractor and subcontractor have a special relationship warranting the imposition of equitable indemnity. *SeeFirst Gen. Servs. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) ("We hold that the relationship of contractor/subcontractor is a sufficient basis to support a claim of equitable indemnification."). However, as noted, the relationship between Marick and Catoe is not a relationship of contractor/subcontractor. The contractor/subcontractor relationship is in issue for most, if not all, the cases in which the appellate courts in South Carolina have found that a special relationship exists. *See Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983) (holding purchaser of defective vehicle was entitled to indemnification from

seller where purchaser was sued by a third party for an accident caused by the defective condition); *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971) (holding landlord entitled to indemnification from general contractor for damage contractor caused to tenant's property); *Griffin v. Van Norman*,302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990) (holding house vendor entitled to indemnification from exterminator for settlement reached with purchaser where vendor had no knowledge that exterminator's wood infestation report issued to seller was false). Indeed, the United States District Court for the District of South Carolina has held that even a contractual relationship does not automatically give rise to a special relationship where there are no special or unique circumstances justifying such a finding. *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1065 (D.S.C. 1993).

Nevertheless, Marick argues that despite the lack of a contractual relationship, it had a special relationship with Catoe because of its duty to provide oversight and supervision to the Project. Marick's Brief at 8 (R. pp. 816-817). Marick is trying to have its cake and eat it too. On one hand, Marick argues its duty to actively supervise created a special relationship, but on the other, Marick argues that it is not responsible for poor quality work.*Id.*at 9. (R. pp. 785-786) If Marick is not responsible for the work of Catoe, then there exists no relationship between the parties and equitable indemnity is inappropriate. If Marick actively supervised that work, then Marick shares some degree of fault in the result, as discussed below, and is therefore not entitled to equitable indemnity.

In sum, there is no South Carolina precedent supporting a finding of a special relationship in this factual context, and Marick is unable to provide any precedent from any jurisdiction supporting its position. On the contrary, the *Rock Hill Tel. Co.* case is directly on point, and in that case the Supreme Court of South Carolina determined that no special relationship existed

between the parties. In the absence of the requisite special relationship, there can be no equitable indemnity. For this reason, the trial court's order must be affirmed.

B. THE FACTS ESTABLISH THAT MARICK IS NOT FREE FROM FAULT.

The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified must be adjudged to be without fault. *Vermeer Carolina's, Inc.,* 336 S.C. at 63, 518 S.E.2d at 307.As noted above, Marick must establish that a genuine issue of material fact exists regarding its own lack of fault, however, the facts conclusively establish the opposite.

1. Marick Breached Its Duties Under The Applicable Building Code.

The building code in effect at the time of construction provides that it is "unlawful for any person, firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code." 2003 International Residential Code §R113.1. Marick acknowledged this obligation as on the building permit application, Marick agreed to be "solely responsible" for compliance with the building code. *See Building Permit and Application from Oconee County.* (R. pp. 1027-1028)

It is not disputed that Phase II of Stoneledge contains numerous conditions which are violation of the building code. Marick's own expert, Randy Still of H2L Consulting, confirmed that it was Marick's role to ensure and confirm that any subcontractors were complying with the applicable building code and contract documents.

> Q. As a design professional in South Carolina would it be your expectation that a general contractor would at least confirm to his satisfaction that the subcontractor [is] complying with the contract documents:
>
> A. I would think so.

Q. Is it your expectation as a licensed design professional in South Carolina that a general contractor would insure his subcontractor's compliance with applicable manufacturer or industry standards in the performance of his work.

A. I would think so but it would also be in compliance with the design documents too because there may be interpretations by the design professional that would incorporate components differently.

Still Tr. at 86: 2-16 (R. pp. 637). Mr. Still further testified that the general contractor's role is the overall responsibility for the construction of the entire project.*Id.* at 87: 3-7 (R. pp. 638). Most importantly, Mr. Still testified on at least two separate occasions that Marick itself violated the applicable building code:

Q. Do you acknowledge that at least in some respects that we have discussed today as the general contractor on the project, Marick Home Builders violated the applicable building code?

A. I would agree with you that there are components that have sustained damage at those isolated areas we've talked about that now appear to be a code violation because of failure.

Id. at 89: 4-11 (R. pp. 639).

Q. So you would acknowledge that as the general contractor on the project Marick Home Builders failed to comply with the building code?

A. At the time we looked at it, yes.

Id. at 92:25 – 93:3 (R. pp. 640).[1]

Because it was Marick's sole responsibility to ensure compliance with the building code, and Marick's own expert admitted that Marick failed to comply with the building code, the trial court properly concluded that there is no genuine issue of material fact regarding whether Marick is without fault and is precluded from recovery from Respondents in equitable indemnity.

2. Marick is at fault because it admittedly failed to properly supervise the Project.

[1]Marick's admitted violations of the Oconee County Building Code constitute negligence per se, and therefore fault. *Dropkin v. Beachwalk Villas Condo. Ass'n*, 373 S.C. 360. 644 S.E.2d 808 (Ct. App. 2007).

Marick was also charged with the responsibility to supervise its subcontractors. This was admitted by Marick. However, the evidence established that Marick failed to supervise in a manner that comports with the applicable standard of care.

In its brief, Marick claims that summary judgment was inappropriate simply because it provided guidance and oversight at the Project.[2] Marick must demonstrate a genuine issue of material fact regarding its lack of fault. The mere fact that it provided supervision is irrelevant – it must demonstrate that it provided that supervision without fault. However, according to the testimony of its supervising employee, Marick did not know the information necessary to provide supervision, did not have a duty to supervise, and did not,in fact, provide supervision.

Marick's Project supervisor was Nathan Hornaday who provided Project supervision on site for 10-12 hours per day. Thoennes Tr. at 176:23 – 177:4 (R. pp. 564-565). However, Hornaday had never been licensed as a contractor, had never framed a multi-family project, had never installed siding or cultured stone like that used at Stoneledge, and had no experience supervising subcontractors. Hornaday Tr. at 18: 8-16 (R. pp. 620); 18: 23-25 (R. pp. 620). Furthermore, he did not know which building code was applicable and did not understand that Marick was responsible for discharging the duties required by South Carolina law, the building permit application or the applicable building code. He testified as follows:

> Q. Well, you never read the code, is that right?
>
> A. Right.
>
> [Objection omitted]

[2] "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 Marick 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 [Respondents] and the building materials supplied by BFS Respondents" Marick's Brief at 6 (R. pp. 782).

Q. And you don't know what code was even applicable to the construction of Phase II?

A. No.

Hornaday Tr. at 97: 3-10. (Motion cites 97:8-13)

Q. The question is, did [Marick] supervise the work of its subcontractors to ensure that the work was consistent with industry standards?

A. As far as I know, no.

Hornaday Tr. at 113: 9-12.

Q. And would a supervisor on a construction project be responsible for ensuring that the subcontractor's work complies with the applicable building code?

A. No. That's what the inspections were for. The building code – the building inspector would come out and they would inspect every part of everything.

Hornaday Tr. at 61: 2-8.

3. Supervision and Coordination of Subcontractors.

Marick argues that the Circuit Court's findings were in error because Marick has presented evidence that Marick was not at fault for the alleged defective stone installation at the Project. (Marick's Initial Br. In Case 1401, 11.)Marick argues that they, as the general contractor, provided no construction-related labor associated with the Projects' actual construction, and solely provided construction scheduling and supervision. (Marick's Initial Br. In Case 1401, 13.) Marick contends that there is evidence of supervision performed by Marick in the records 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). (Marick's Initial Br. In Case 1401, 13.)

Marick incorrectly contends that "*Fields* stands for the proposition that a general contractor is not automatically liable for the work of its subcontractors." (Marick's Initial Br. In Case 1401, 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). Marick's 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.*

The issue is not whether or not there exists a scintilla of evidence that Marick provided supervision, because clearly it did. The issue is whether there is any question as to the sufficiency or adequacy of that supervision. Based on the testimony of its own expert and Mr. Hornaday, together with the admittedly faulty work, it is clear that there is no genuine issue of fact as to Marick's share in that fault. As such, the trial court properly held that "[Marick] cannot be adjudged without fault for building code violations, to the extent the jury determines they exist." Order at p. 7 (R. pp. 10).

II. THE LOWER COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS AS TO MARICK'S CROSS-CLAIM FOR NEGLIGENCE AND BREACH OF WARRANTY.

The trial court correctly dismissed Marick's cross-claims for negligence and breach of warranty against Respondents for two reasons. First, Marick conceded that the claims should be dismissed. Second, the court concluded the negligence and breach of warranty claims asserted by Marick are merely disguised claims for equitable indemnity and must be dismissed.

A. MARICK CONCEDED THAT THE NEGLIGENCE AND WARRANTY CLAIMS SHOULD BE DISMISSED AND HAS THEREFORE WAIVED THE RIGHT TO APPEAL THE ISSUE.

At the hearing on Respondents' motions to dismiss, Marick's attorney unequivocally conceded the negligence and breach of warranty claims against Respondents:

> One other thing. I think I can clarify something. Mr. Horton asked me earlier whether or not I was conceding the negligence and warranty cause of action as to his client, Mack [sic]. And I said yes . . .

9/5/12 Hearing Tr. at 114: 5-8 (R. pp. 315).

The trial court confirmed that Marick had conceded the issue in its January 11, 2013 Order:

> At the September hearing, counsel for [Marick] conceded that the negligence and breach of warranty claims against [Respondents] should be dismissed, leaving equitable indemnity as the only remaining claim against those parties.

Order at pp. 2-3 (R. pp. 5-6).

It is settled law that "an issue conceded in the trial court cannot be argued on appeal."*State v. Rios*, 388 S.C. 335, 341-342 (S.C. Ct. App. 2010) *citing State v. Jackson*, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005) (appellant waived any argument he had when he acquiesced the next morning and stated he would ask witness if he had administered a polygraph and "leave it at that"); *State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding that when an appellant acquiesces to the trial court's limitation of cross-examination, he cannot complain on appeal); *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal). Therefore, Marick is

precluded from appealing the lower court's order dismissing its negligence and breach of warranty claims against Respondents.

B. MARICK'S NEGLIGENCE AND BREACH OF WARRANTY CLAIMS ARE MERELY DISGUISED CLAIMS FOR EQUITABLE INDEMNIFICATION.

Marick's negligence and breach of warranty claims against Respondents are simply disguised indemnity claims. Marick's cross-claim for breach of warranty against Respondents seek nothing more than indemnification:

> Should Plaintiffs prevail on their claims, Appellant will be damaged as a direct and proximate result of the above named parties breach of their express and/or implied warranties; as a result, Appellant is informed and believes that it is entitled to recover from [Respondents] such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

Marick's Answer to Plaintiffs' Third Amended Complaint & Cross-claims, ¶ 174 (R. pp. 78). Similarly, Marick's cross-claim for negligence states:

> Should Plaintiff's prevail on their claims, Appellant will be damaged as a direct and proximate result of [Respondents] negligence; as a result, Appellant is informed and believe that it is entitled to recover from [Respondents] such as it may incur legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

Id. at ¶ 169.) (R. pp. 75)

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought."*State v. Yelsen Land Co.*, 257 S.C. 401, 403 (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). Courts may use the allegations in the complaint to determine the correct character of an action.

SeeSeebaldt, 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.").

The character of Marick's negligence and breach of warranty cross-claims is clear from the very wording of the pleading. Marick seeks to be reimbursed for damages associated with Plaintiffs' claims which Marick contends flow from Respondents' conduct. This fits the clear definition of "indemnify."*Black's Law Dictionary 837 (9th ed. 2009*("To reimburse (another) for a loss suffered because of a third party's or one's own act or default."). As noted by the United States District Court for the District of South Carolina, "a rose by any other name is still a rose" and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for . . . indemnification with a slight change in wording."*SCNB v. Stone*, 749 F.Supp. 1419, 1433 (D.S.C. 1990); *see also United States Fidelity & Guaranty Comp. v. Patriot's Point Dev. Auth.*, 788 F.Supp. 880 (D.S.C. 1992).

Further, Appellate courts in other states, in similar cases, have also concluded that a cross-claim or third-party claim couched in terms of indemnity folds into and is absorbed by an overarching cause of action for indemnification. *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.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983) (observing that, although the claims were "stated as countsg for breach of implied warranty," they could 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 [buyer's] third party petition is indemnification, and we shall treat it as such"); *Adkinson v. Int'l*

Harvester Co., 975 F.2d 208, 216 (5th Cir. 1992) (treating third-party plaintiff's claim for breach of warranty as one for indemnity) (internal citations omitted).

Marick argues that recovery of litigation expenses may be had at law in the form of special damages or in equity under a theory of equitable indemnification. In so arguing, Marick cites *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). The *Addy* court clearly held that reimbursement for expenses is in the nature of indemnification:

> Based upon the foregoing authorities we conclude that in actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and 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 as part of the damages and expenses.

Id. at 34, 183 S.E.2d at 710. This language clearly refers to a right of indemnity and not an independent cause of action, regardless of the label used. Likewise, the case of *Griffin v. Van Norman*, also cited by Marick, involved recovery of settlement proceeds paid by an innocent homeowner in a lawsuit brought against that homeowner and the at-fault exterminator who provided a faulty home inspection. *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990). The Court of Appeals held that "[w]here, as here, the person seeking indemnity was exonerated at trial from all liability, indemnity is allowed."*Id.* at 524, 397 S.E.2d 378, 380. It further held that "[i]t was this freedom from any fault that created the equity in Home Seller's favor and entitled him to equitable indemnity."*Id.* at527, 397 S.E.2d at 382.

Marick seeks recovery from Respondents for damages Marick has or will have to pay to a third party. Regardless of the cause of action pled, such claims are in the nature of equitable indemnity, and Marick has no other claims for recovery against Respondents. As such, the trial court properly dismissed Marick's disguised indemnity claims for negligence and breach of warranty.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court affirm the trial court's order dated January 14, 2013 granting the motion for Summary Judgment of BFS and Southern Concrete, as well as the order denying Marick's Motion for Reconsideration and to Alter Judgment, dated May 21, 2013.

Respectfully submitted,

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November 25, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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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 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 VincentMorales d/b/a Morales Masonry/Player &Associates.....Defendants

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

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 CastilloMontel.....Respondents.

Bostic Construction, Inc., Third Party Plaintiffs,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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January 22, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

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SC Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ALEXANDER S. MACAULAY

APPELLATE CASE NO. 2013-01401

Stoneledge At Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, And Robert White, Individually And On Behalf Of All Others Similarly Situated.....PLAINTIFFS

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

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

Of Defendants, 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.

Bostic Construction, Inc., Third Party Plaintiffs,

v.

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

PROOF OF SERVICE

I hereby certify that I have served the Final Brief of Respondents Respondents Carl Catoe Construction, Inc., Builders FirstSource-Southeast Group, 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 on all counsel of record by delivering same by depositing a copy of it in the United States Mail, First Class postage prepaid, this 25th day of November, 2014 addressed to the following:

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