

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Appellate Case No. 2013-001404

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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, Herberto 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,

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

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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.<sup>1</sup>

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 SCRCP 59(e) Motion filed by Marick, a Notice of Appeal dated June 6, 2013, was timely filed with the Court appealing the Court's Order dated May 21, 2013 upholding the Court's January 11, 2013 Order granting summary judgment. (R. pp

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<sup>1</sup> 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 29<sup>th</sup>, 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.<sup>2</sup>

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<sup>2</sup> 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.

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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 (1990) 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. 4<sup>th</sup> 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).

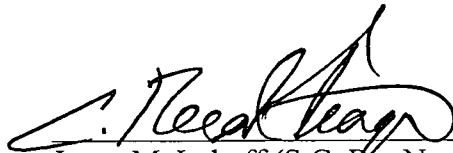
Since Marick's cross-claim for breach of contract is not an equitable claim, whether or not Marick has unclean hands is not a determinative factor; rather, the Contracts set forth a completely separate contractual indemnity claim. Thus, the Contracts should be construed in

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

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Appellate Case No. 2013-001404

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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, Herberto 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.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY  
Court of Common Pleas

The Honorable Alexander S. Macaulay

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,

v.

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., SOUTHERN BASEMENTS, INC., MJG CONSTRUCTION AND HOMEBUILDERS, INC. D/B/A MJG CONSTRUCTION, KMAC, INC., D/B/A KMCA NORTH CAROLINA, 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, .....DEFENDANTS,

OF DEFENDANTS: MARICK HOME BUILDERS, LLC, AND RICK THOENNES.....APPELLANTS,

OF DEFENDANTS: BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALTIES, INC., CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ, .....RESPONDENTS.

**FINAL BRIEF OF RESPONDENTS BUILDERS FIRSTSOURCE-  
SOUTHEAST GROUP AND SOUTHERN CONCRETE SPECIALTIES, INC.**

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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.

This lawsuit was instituted on May 29, 2009. *See* Complaint (R. pp. 28-40). It is a construction defect lawsuit brought on behalf of the homeowners and homeowners’ association at Stoneledge. The plaintiffs sued Appellant (hereinafter “Marick) and Respondents, (who will hereinafter be referred to as “BFS” and “Southern Concrete”) among many others, alleging negligence and breach of warranty causes of action. *See* April 3, 2012 Third Amended Complaint (R. pp. 41-68). 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. 69-107). Respondents denied the cross-claims asserted by Marick. *See* Answer to Cross-Claim (R. pp. 108-126).

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. 633-640). In the motions to dismiss, Respondents contend that Marick’s breach of warranty and negligence claims were merely disguised claims for equitable indemnity. In the motion 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 14, 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 14, 2013 Order (R. pp. 3-14). On or about January 23, 2013, Marick filed a Motion for Reconsideration under Rule 59(e), SCRCP. *See* Motion for Reconsideration (R. pp. 894-901). 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. 23-27).

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

#### STATEMENT OF FACTS

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, was the general contractor for Phase II.

Marick hired 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. Marick hired Southern Concrete to perform certain concrete work which was primarily assisted with the balconies and decks. Respondents completed their work on the Project in January 2007.

In its complaint, Marick asserted claims against BFS and Southern Concrete for equitable indemnity, negligence and breach of contract. *See* Third Amended Complaint (R. pp. 41-68). Marick did not assert a claim for contractual indemnity, nor did Marick allege the existence of a written contract between it and either BFS or Southern Concrete.

As reflected in other briefs submitted to the Court, the evidence in circuit court established that Marick was, not free from fault with respect to the deficiencies giving rise to the claim. On that basis, the circuit court ruled that Marick could not recover against either BFS or Southern Concrete in equitable indemnity. *See* Order dated January 14, 2013 (R. pp. 3-14). It should be noted that Marick was adjudicated negligent in a two-week trial of the Phase I aspect of this case. *See* Verdict Form filed November 8, 2013 (R. pp. 1293-1294).

Marick's remaining claim, for breach of contract and negligence, are the subject of this appeal.

#### **STANDARD OF REVIEW**

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Rule 56, *SCRCP*. The movant must first demonstrate that there is no genuine dispute of material fact. *See Miller v. Blumenthal Mills, Inc.*, 336 S.C. 204, 220, 616 S.E.2d 181 (Ct. App. 2005)(citing *McCall v. State FarmMut. Auto. Inc. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct, App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *See Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct, App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence

of specific facts from which the finder of fact could reasonably find for him, thereby showing that there is a genuine issue for trial. *See Miller*, 365 S.C. at 220, 225, 616 S.E.2d at 730, 732.

When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for a jury. *See National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co.*, 173 S.C. 1,174 S.E. 581 (1934). Moreover, “a court ‘cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be *reasonably* possible under the facts.*Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing *Hopson v. Clary*,321 S.C. 312, 314, 468 S.E.2d, 305, 307 (Ct. App. 1996).(emphasis added).

### ARGUMENT<sup>1</sup>

#### **I. THE LOWER COURT DID NOT ERR IN GRANTING RESPONDENT’S MOTION TO DISMISS AS TO APPELLANT’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 BFS and Southern Concreteby concluding that the negligence and breach of warranty claims asserted by Marick are merely disguised claims for equitable indemnity and must be dismissed.

#### **A. Marick’s Negligence and Breach of Warranty Claims Are Merely Disguised Claims For Equitable Indemnification.**

Marick’s negligence and breach of warranty claims against BFS and Southern Concrete 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

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<sup>1</sup> BFS and Southern Concrete adopt all relevant portions of the Initial Brief of Respondent Clear View Construction and Michael Franz.

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. 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.).

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. *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.")

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 (9<sup>th</sup> 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)*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)(stating "regardless of what [Plaintiff] may name [his claim], it is an action for contribution and indemnity"), (observing that, although the claims were "stated as counts 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) 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.* at 527, 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.

**B. Marick Has No Claims For Contractual Indemnity**

Nowhere in its Answer and Cross-Claims does Marick allege an entitlement to contractual indemnity. Rather, Marick’s Breach of Contract cause of action is premised on the notion that if Plaintiffs’ allegations are proven true, then BFS and Southern Concrete provided defective materials or services in breach of their contract with Marick (Marick’s Answer to the Third Amended Complaint ¶161), and such actions have “resulted or could result in damage to Plaintiff, which could or will be assessed against Marick.” (*Id.* ¶162.) There is no mention of a contract

between it and BFS, Clear View, or Southern Concrete which contains contractual indemnification provisions which it is attempting to enforce.

Further, to the extent Marick argues that it does have contracts with these parties that contain indemnification provisions, it has offered no evidence that the contracts applied to the Project or would otherwise be enforceable in this matter.<sup>2</sup> Finally, Marick has presented no evidence to rebut evidence demonstrating that such contracts were not supported by consideration. The documents in questions were signed after the subcontractors completed their work and Marick appears to have paid the subcontractors only for the work performed.<sup>3</sup>

In its brief, Marick suggests that the October, 2007 contracts between it and BFS and Southern Concrete were discussed in depositions. This is disingenuous at best. Marick did not refer to those contracts in any of its complaints nor did Marick get any party to admit the existence of those contracts, or their applicability to work at Stoneledge, at those depositions. For example, Marick cites the testimony of Terry Rosamond from BFS as supporting its contention that the October, 2007 contract related to the Stoneledge project (R. pp. 531-540). In fact, the testimony, elicited by counsel for Southern Concrete, was as follows:

Q: Can you tell me what the scope of your, if you know it – and I can understand that some of these questions are maybe better be put to Mr. Greene so just let me know if that's the case. Can you tell me what the scope of the contract with Marick was?

A: My understanding from the review of the documents, our scope was to provide turnkey framing, installation of

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<sup>2</sup> The Court made note in its Order of January 14, 2013 that Marick's claim for Equitable Indemnity was disposed of by separate order, based primarily on Marick's inability to show that it was without fault as to the relevant construction deficiencies at the project.

<sup>3</sup> Marick submitted a Supplemental Memorandum in Opposition to their Motion, which included BFS, Southern Concrete and Clear View's "contracts" with Marick. While Marick argued a "hold harmless" provision in these contracts should apply, the Court notes that Marick provided no support evidence for the application of these documents to the Stoneledge Project and that they do not postdate the work performed by BFS, Southern Concrete and Clear View.

exterior doors and windows and also the exterior siding and trim work. And the framing consisted of the walls, floor to roof systems, anything to do with the framing.

There is no mention of the contract dated October, 2007 in that deposition. Further, Marick offered no proof in the form of affidavits, or otherwise, establishing that any October 2007 agreement was applicable to the work at Stoneledge by BFS or Southern Concrete.

For the foregoing reasons, Marick's arguments relative to breach of contract and for contractual indemnity, even based on the 2007 agreement, must fail.

### 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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October 28, 2014  
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY  
Court of Common Pleas

The Honorable Alexander S. Macaulay

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,

v.

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 ENTERPRISE 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., SOUTHERN BASEMENTS, INC., MJG CONSTRUCTION AND HOMEBUILDERS, INC. D/B/A MJG CONSTRUCTION, KMAC, INC., D/B/A KMCA NORTH CAROLINA, 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..... DEFENDANTS,

OF DEFENDANTS MARICK HOME BUILDERS, LLC, AND RICK THOENNES.....APPELLANTS,

OF DEFENDANTS, BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALTIES, INC., CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ.....RESPONDENTS.

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**PROOF OF SERVICE**

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I certify that I have served the RESPONDENTS BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALITIES, INC.S FINAL BRIEF on all counsel of record by delivering electronically, or in the alternative by depositing a copy of it in the United States Mail, First Class postage prepaid, this 29<sup>th</sup> day of October, 2014, addressed to the following:

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COPY

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Case No.: 2013-001404

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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

v.

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.

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**FINAL BRIEF OF RESPONDENTS  
CLEAR VIEW CONSTRUCTION, LLC, AND MICHAEL FRANZ**

---

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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. (R. pp. 49-50, ¶¶ 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"). (R. pp. 44-45, ¶¶ 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 (R. p. 48-49, ¶¶ 18-19; R. pp. 50-51, ¶¶ 25-26; R. p. 58, ¶ 62.)

Respondent Clear View Construction, LLC ("Clear View"), provided services related to stonework on the Project. (R. pp. 146-147, ¶ 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* R. pp. 674-692.) 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. (R. p. 991.)

Marick asserted cross-claims against Respondents titled equitable indemnity, breach of contract, negligence, and breach of warranty. (R. pp. 89-102, ¶¶ 134-174.)<sup>1</sup> 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. (R. p. 95, ¶ 158; R. p. 96, ¶ 162; R. pp. 99-100, ¶¶ 169-170; R. p. 102, ¶ 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. (R. pp. 876-881.) However, Clear View's Project invoices demonstrate that the Contract post-dates all work performed by Clear View on

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<sup>1</sup> 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. (R. pp. 71-105; *see also* R. p. 985.) 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* R. p. 985; R. pp. 89-102, ¶¶ 134-174.)

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. (R. pp. 95-96, ¶¶ 160-163.) Additionally, Marick had no contractor's license during Project construction. (See R. pp. 1-2; see also R. pp. 746-754.)

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. p. 616, lines 3-7.) Still further admitted that in least in some areas of construction, Marick violated the applicable building code. (R. p. 617, lines 4-11.) 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. 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. (R. p. 631, lines 2-25; R. p. 632, line 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 R. pp. 655-657.) 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. (R. pp. 896-898.) 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. (R. pp. 23-27.)

## ARGUMENT

### **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), SCRPC. *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), SCRPC. 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), SCRCF.

“Under Rule 59(f), SCRCF, 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. (R. pp. 1-11; *see also* R. pp. 93-95, ¶¶ 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. (R. p. 987; R. p. 8.) 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 R. p. 95, ¶ 158; R. p. 96, ¶ 162; R. pp. 99-100, ¶¶ 169-170; R. p. 102, ¶ 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. (R. p. 755-771.) 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.<sup>2</sup>

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<sup>2</sup> This argument is addressed fully in § B (3), supra.

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").

**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.]" (R. pp.

99-100, ¶ 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 R. pp. 674-692.) 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. (R. pp. 10-11.)

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.*, R. pp. 99-100.) 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. 4<sup>th</sup> 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. 4<sup>th</sup> 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. 4<sup>th</sup> 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. 4<sup>th</sup> at 1315 (citing *Gackstetter v.*

*Frawley*, 135 Cal. App. 4<sup>th</sup> 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. 4<sup>th</sup> at 1315, citing *Gackstetter* 135 Cal. App. 4<sup>th</sup> 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. 4<sup>th</sup> 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. (R. p. 990; R. p. 9.)

**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. (R. p. 989; R. pp. 664-665; R. p. 617, lines 4-11.)

In addition to its role supervising and coordinating construction, Marick was also the sole permit holder on the Project. (R. p. 989.) As the permit holder, Marick was "solely responsible for noncompliance with any applicable [building] codes." (R. pp. 773-774.)

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. (R. p. 625, lines 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. (R. p. 625, lines 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." 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. p. 622, lines 17-25; R. p. 623, lines 1-10.) 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. (R. pp. 95-96, ¶¶ 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. (R. pp. 990-991.) 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*, 403 S.C. 290, 298-99, 742 S.E.2d 687, 691 (Ct. App. 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. (R. p. 991.) Marick has

introduced no evidence that Franz's involvement in the Project consisted of anything other than being a member of Clear View. (R. p. 663.)<sup>3</sup> 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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<sup>3</sup> 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,

October 9, 2014



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Construction, LLC, and Michael Franz*

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Case No.: 2013-001404

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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

v.

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.

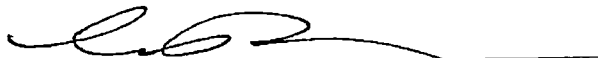
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**CERTIFICATE OF COUNSEL**

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I certify that the *Final Brief of Respondents Clear View Construction, LLC, and Michael Franz* served under Rule 211 of the South Carolina Appellate Court Rules complies with the requirements of subpart (b) of Rule 211.

October 9, 2014



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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

v.

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.

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**PROOF OF SERVICE**

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I certify that I have served the *Final 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 October 9, 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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