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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Alexander S. Macaulay

Appellate Case No. 2015-002106

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, 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, 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 HERANDEZ-AVILES, FRANCISCO 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 PETITIONERS,

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.

RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29401
*Attorney for Respondents Builders FirstSource-
Southeast Group & Southern Concrete Specialties,
Inc. (Respondents)*

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STATEMENT OF THE FACTS

In addition to the procedural history of the case, and many of the facts contained in the Petition filed by Petitioner Marick Home Builders, LLC (referred to herein as “Marick”), the Court should be aware of the following facts:

This matter was filed on May 29, 2009. By order dated August 28, 2013, the trial judge bifurcated the case for purposes of trial. The first part went to trial on October 28, 2013 and involved the buildings in Phase I. That trial ended on November 8, 2013 when the jury returned a verdict in favor of Stoneledge at Lake Keowee Owners’ Association, Inc. (referred to herein as “Stoneledge”) against Marick on all of the causes of action asserted against Marick, including Breach of Warranty, Negligence, and Breach of Fiduciary Duty. The jury awarded Stoneledge \$5,000,000. After set-offs were allocated for sums received by Stoneledge from settling subcontractors for Phase I, that award was reduced to \$2,144,088.23. Marick has appealed that verdict rather than pay it (Appellate Case No. 2015-000392).

The trial related to the buildings in Phase II (on which the subcontractor in the appeal worked) is scheduled to begin on May 2, 2016. As noted at oral arguments held on June 2, 2015 before the Court of Appeals, the Respondents, Builders FirstSource-Southeast Group (“BFS”), Southern Concrete Specialties, Inc. (“Southern Concrete”), and Clear View Construction, LLC (“Clear View”), have settled the claims filed against them by Stoneledge.

In its recitation of the facts, Marick concludes that it "only provided supervision" (Brief page 11) and that it submitted evidence that it exercised ordinary care in doing so. That is largely immaterial and is also not true. It is undisputed that Marick secured the building permit from Oconee County, thereby becoming obligated not merely to supervise subcontractors but to ensure that the construction at the project was in conformance with the applicable building codes and

ordinances in effect. The building permit is dated June 9, 2005. While Marick now implies that it's obligations were limited to supervision, it had no authority to unilaterally delegate code compliance obligations to its subcontractors. There is certainly no evidence that anyone, much less the people of Oconee County or Stoneledge, the party grievously injured by the building code violations at the project, agreed to the abrogation of Marick's legal obligations. There was likewise no evidence that Stoneledge waived or otherwise limited Marick's implied warranties or duties with respect to its assumption of the role of general contractor for the project. In sum, as the general contractor for the project, more was expected of Marick, by Stoneledge and by law, than simply "supervision".

Marick also suggests in the facts that it had written contracts with BFS, Southern Concrete, and Clear View with respect to their work at Stoneledge. This is an allegation that is not supported by the record. As fully briefed, argued, and found by the trial court and the Court of Appeals, the only written contracts between Marick and any of the Respondents are in the form of an agreement between Marick and BFS dated October 1, 2007 and one between Marick and Clear View dated October 30, 2007. (Note that these dates were well after the permit was pulled for Marick's work at Stoneledge.) Neither of those agreements references the Stoneledge project, or any other project for that matter. Clear View, the exterior stone-cladding sub, offered testimony stating that its work was complete at Stoneledge before August 30, 2007 (R. pp. 000674-000692), and BFS offered testimony that the agreement did not relate to the Stoneledge work (Judge Macaulay's Order R. pp. 000010).

As noted in the order of the trial court and in the Court of Appeals' opinion, in response to the Respondent's summary judgment motions Marick submitted the referenced agreements in a supplemental filing but failed to offer and testimony that those contracts applied to the work at

Stoneledge. Importantly, Marick did not refer to those agreements or their applicability to the Stoneledge project in its pleadings at any stage. Because of that, the trial court, and the Court of Appeals, found that the provisions of the contract did not apply and Marick had no contractual indemnity rights against BFS or Clear View.

Finally, in their pleadings, Marick asserted the following claims, and only the following claims, against all of its subcontractors and suppliers:

Equitable Indemnity

155. Assuming the allegations of Plaintiffs' Third Amended Complaint are true, ... [The subcontractors] have breached their duties to Plaintiffs and Marick, and as a result of that breach, Plaintiffs and Marick have or will be damaged...
156. [I]f Plaintiffs are awarded damages against Marick Home Builders for the defective or deficient work, services, and/or products provided, ... [I]t is entitled to equitable indemnity from said contractors, subcontractors, and design professionals.
157. Marick alleges the damages, if any, sustained by the Plaintiffs in this case were a direct and proximate result of the actions of [the subcontractors].
158. [I]f Plaintiffs are entitled to recovery by judgment or otherwise against it, Marick is entitled to equitable indemnity. ... Marick further alleges that it should be reimbursed and indemnified for the cost of the action, including, but not limited to, attorney's fees and costs incurred in the defense.

Breach of Contract

161. If the Plaintiffs' allegations are true, ... contractors and subcontractors have provided defective materials or services in breach of each of their contracts with Marick.
162. If the Plaintiffs' allegations are true, ... [S]aid breach of contract has resulted or could result in damage to Plaintiff, which could or will be assessed against Marick.
163. If the Plaintiffs' allegations are true, ... Marick is informed and believes it is entitled to judgment against each contractor or subcontractor for actual damages, together with attorney's fees, and interest thereon.

Negligence

- 169. Should Plaintiffs prevail on their claims, Marick will be damaged as a direct and proximate result...[S]uch as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.
- 170. Marick is entitled to recover against each jointly and severally any and all damages recovered by the Plaintiffs against Marick, including reasonable attorneys' fees and costs.

Breach of Warranties

- 174. Should Plaintiffs prevail on their claims, Marick will be damages as a direct and proximate result of the above named parties' breach of their express and/or implied warranties; as a result, Marick is informed and believes that it is entitled to recover...[A]s it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

The court should note that the referenced claims were asserted against not only the Respondents but also against the architect and every single one of Marick's subcontractors, as well as their sub-subs, and sub-sub-subs, with whom it is not even alleged that Marick had contractual relations.

ARGUMENTS

I. The Petition for Writ of Certiorari does not raise reasons of the character that would support the grant of the Writ.

While admittedly not exhaustive, in Rule 241(b), SCACR, sets forth the following:

(b) ...The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered.

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Marick lists four arguments in support of its Petition. Marick contends that one of those arguments, which Marick refers to as the collapsing of causes of action into the equitable indemnity claim, presents a novel issue. Marick makes no such allusion or argument with respect to any of the other arguments upon which it seeks Certiorari and none of them fit within the reasons stated in Rule 241(b). Marick does not even argue that the trial court or the Court of Appeals misconstrued or misapplied the existing law. Marick simply disagrees with the trial court and the Court of Appeals and asks the Supreme Court for relief. Thus, Certiorari should be denied because disagreement with the trial court and Court of Appeals is not a reason which justifies the grant of Certiorari.

II. The Collapsing of Marick's Causes of Action Into Equitable Indemnity is the Result of Marick's Pleading.

Marick argues that the Court of Appeals erred by disregarding what it called the “causes of action” it asserted against all other defendants and holding that all of those causes are fundamentally equitable indemnity claims. This is not the result of a mistake in interpreting or applying the law by the Court of Appeals, however. The result in the trial court and the Court of Appeals was compelled by Marick’s pleadings.

In essence and expressly, in each of its claims against every other party to the suit other than the Plaintiffs, Marick articulated an equitable indemnity claim. Marick’s pleadings make it clear that it sought recovery against the Respondents for any sums the Plaintiffs secured against

Marick. It also sought to recover the attorneys fees and other costs associated with its defense of this action. By definition, that is equitable indemnity as defined and discussed by *Addy v Bolton*¹.

At no time did Marick plead or argue in response to the motions for summary judgment that it had incurred damages other than the costs associated with satisfying a judgment obtained against Marick by Plaintiffs and the defense of the Plaintiffs' claim against it.

If Marick had claims for breach of contract, breach of warranty, or negligence against any of the other parties, it should have pled them specifically. Instead, Marick re-stated the same allegations of entitlement to relief and merely called them by different names. The ruling of the trial court and the Court of Appeals is absolutely correct based upon the manner in which Marick pled the case.

III. In asking for Writ of Certiorari Marick Misstates the Effect of the Court of Appeals Opinion.

Marick incorrectly interprets and applies the Court of Appeals opinion in many respects. When read in proper context, the Court of Appeals' opinion does not have any of the legal effects Marick suggests.

First, Marick argues that the effect of the Court of Appeals' opinion limits a contractor's rights to pursue claims other than for indemnity against subcontractors when a defect claim has been asserted. That is simply not true and the Court of Appeals did not hold that. Rather it held that Marick had failed to assert anything other than an equitable indemnity claim.

Second, Marick asserts that the Court of Appeals' ruling precludes a general contractor from recovering against subcontractors on the basis that subcontractors performed defective work.

¹ Marick's reliance on *Addy v. Bolton* throughout the proceedings is curious since, as quoted by the Court of Appeals, *Addy v. Bolton* is the seminal case for equitable indemnity. As such, *Addy* offers no support for Marick's non-equitable indemnity positions in connection with this case.

This is a gross misreading of the Court of Appeals' opinion and nothing could be further from the truth. For example, equitable indemnity allows a general contractor to recover against subcontractors for their defective work in the event the general contractor is found liable for those defects and is without fault. Further, the law is abundantly clear that general contractors are completely free to contract with subcontractors for risk transfer in the form of enforceable indemnity obligations. South Carolina law is particularly favorable for general contractors in that it is the only law circumventing a general contractor's right to contract for indemnity from subcontractors is the limitation in South Carolina that a contract may not require a subcontractor pay a general contractor indemnity for the general contractor's *sole* negligence, §32-2-10, *S.C. Code, Ann.* To the extent Marick is unable to transfer its risks for shoddy construction to the subcontractors in this case, it is the result of Marick's own failure to enter into valid contracts with enforceable and meaningful risk transfer obligations flowing to Marick from the subcontractors.

Third, Marick contends that the Court of Appeals' ruling allows subcontractors to avoid exposure for their defective work, which is also wrong. As noted earlier, a general contractor is always free to impose risk transfer obligations on its subcontractors in the course of good contracting and may even do so in equity when it does not share in the fault. Marick may also assert warranty, negligence, or contract claims against subcontractors for defectively performed work as long as those claims can be and are properly articulated. Nothing in the Court of Appeals' opinion holds or even suggests otherwise.

Further, Marick's argument that the Court of Appeals opinion paves the way for subcontractors to avoid responsibility for defective work is breathtaking in this case because it fails to acknowledge that in this very case, the subcontractors it seeks to sue have settled with

Stoneledge. Far from avoiding responsibility for their defective work, the subcontractors have paid Stoneledge significant sums of money in response to the claims of defective workmanship for which they may have been liable. It is Marick that has obstinately done everything in its power to avoid responsibility for the defective work it performed or allowed to be performed and which Marick, as the general contractor, allowed to be put into the stream of commerce. More than six (6) years after the filing of this case, Marick and its insurance carriers have refused to make repairs to the project (despite repeated and numerous demands that they do so) and have refused to make meaningful offers to settle this case or satisfy the judgment Stoneledge obtained against Marick more than two (2) years ago. Instead, Marick has appealed every one of the many adverse rulings and verdicts against it (Marick has filed a total of five (5) appeals associated with this case). It is the height of disingenuousness for Marick to complain that the Court of Appeals has somehow enabled at-fault subcontractors to unfairly escape the responsibility for their defective work. The subcontractors in this case have done their part while Marick alone has managed to avoid responsibility for the defective work at Stoneledge, at least to this point.

CONCLUSION

For the foregoing reasons, Marick's request that this court grant Certiorari should be denied.

Respectfully submitted,

LYLES & LYLES, LLC

By:



Robert T. Lyles, Esquire

S. C. Bar #10299

342 East Bay Street

Post Office Box 773 (29402)

Charleston, South Carolina 29401

T: 843.577.7730

F: 843.577.7172

Email: rtl@lylesfirm.com

COUNSEL FOR RESPONDENTS

December 9, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
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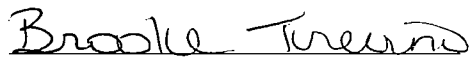
SOUTHERN STONE, INC. AND BUCK SMITH CONSTRUCTION, THIRD PARTY DEFENDANTS.

PROOF OF SERVICE

I certify that I have served the Respondents' Response to Petition for Writ of Certiorari 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 9th day of December, 2015, addressed to the following:

Jason M. Imhoff, Esquire
Carl Reed Teague, Esquire
The Ward Law Firm, P.A.
Post Office Box 5663
Spartanburg, S.C. 29304
jimhoff@wardfirm.com
*Attorneys for Marick Home
Builders, LLC & Rick
Thoennes*

LYLES & LYLES, LLC

By: 
Brooke Trevino, Paralegal