THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No. 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,

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 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

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PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 19, 2015.

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November 3, 2015

QUESTIONS PRESENTED

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?

a. Are equitable indemnity and causes of action for breach of contract and/or breach of warranty mutually exclusive such that they cannot exist in favor of the same party based upon the same facts?

b. Do causes of action require different damages to co-exist, such that alleging damages under equitable indemnity precludes recovery of those damages for any other cause of action?

c. Does the filing of a complaint preclude defendant from asserting any other cross claims or third party claims for any causes of action other than equitable indemnity?

II. Did the appellate court err in finding that no contract existed?

III. Did the appellate court err by finding that the pleadings did not set forth causes of action for breach of contract and breach of warranty?

IV. Did the appellate court err by ruling that attorney's fees and costs are not separate damages?

STATEMENT OF THE CASE

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

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

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

Clear View, BFS and Southern Concrete filed motions for summary judgment as to Marick's cross-claims. (R. pp 653-660; R. pp 633-640; R. pp 714-720.) On September 5, 2012, arguments concerning said Motions and Motions filed by other parties not subject to this Appeal were heard all day by the lower court. Notwithstanding Appellants' opposition, the lower court issued an Order dated January 11, 2013, and filed on January 14, 2013, granting Clear View, BFS, and Southern Concrete summary judgment as to Marick's cross-claims for breach of contract and breach of warranty. (R. pp 1-11.) By separate orders which are currently before this Court in separate appeals, the lower court granted Clear View's and BFS's Motions for Summary Judgment concerning Marick's cross-claims for negligence and equitable indemnity.

Following receipt of the January 11, 2013 Order, which was filed on January 14, 2013, Marick promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to South Carolina Rule Civil Procedure, Rule 59(e). (R. pp 894-901.) The 59(e) Motion was timely served and filed on January 24, 2013. The 59(e) Motion stated that the rulings set forth in the Court's January 11, 2013 Order were not consistent with South Carolina law. The Court conducted a hearing on this Motion on April 10, 2013. The Court denied Marick's 59(e) Motion by way of Order dated May 21, 2013, and filed May 22, 2013. (R. pp 23-27.)

The time having been tolled by the 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

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

1-11; R. pp 23-27.) The Order was received by the Appellants on or about May 23, 2013 and a Notice of Appeal and Proof of Service was filed with the Court and served upon all parties on June 6, 2013. The Court of Appeals affirmed the Order on August 19, 2015. A Request for rehearing was filed on September 2, 2015 and denied on September 14, 2015.

STATEMENT OF FACTS

This case was originally filed May 29th, 2009 by named Plaintiff Paul H. Hund, III, M.D. (hereinafter "Hund"). (R. pp 28-40.) Hund's Complaint alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the Project.

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

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

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

Phase I units and completion of a majority of the interiors of all Phase I units, Bostic Brothers terminated construction at Stoneledge.

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

During construction, Marick subcontracted with Clear View to perform brick and stone labor at Phase II of the Project. (R. pp 1289-1290.) Marick did not supply or install any of the stone at Phase II of the Project; all of the stonework was performed by subcontractors which included Clear View. It was alleged in Plaintiffs' Third Amended Complaint that work performed by Clear View was deficient; thus, Marick and Clear View were sued by Plaintiffs for those deficiencies. Plaintiffs supported their allegations by submitting testimony of an expert witness. Plaintiffs hired Construction Science and Engineering ("CSE") to investigate the conditions at Stoneledge and develop a scope of repair. Plaintiffs' expert, Derrick Hodgin, testified that there are defects associated with the stone application at Phase II of the Project. (R. pp 565-567; R. p 580; R. p 581; R. p 583; R. pp 584-586.)

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

supervision for of its subcontractors. Jason Carlan, Southern Concrete's 30(b)(6) designee, testified that Marick provided supervision and oversight at the Project. (R. pp 603-604; R. pp 606-607; R. pp 611-612.) Carlan further testified that he told Nathan and Marick that work performed by Southern Concrete was performed in accordance with manufacturer's instructions. (R. pp 608-609.)

Marick further contracted directly with Respondent BFS for BFS to supply materials to the Project and to install the framing, decks, doors, siding and windows. (R. pp 1287-1288.) (R. p 537.) As further proof that a contract existed between Marick and BFS, BFS 30(b)(6) designee, Terry Rosamond, testified that BFS contracted directly with Marick. (R. p 532.) BFS then subcontracted with Carl Catoe Construction, Inc. (hereinafter "Catoe") to perform the construction related labor and installation services. (R. pp 527-530.) Catoe then subcontracted the labor and installation services out to the numerous other subcontractors which are referred to as the Catoe Subcontractors. Thus, BFS was a supplier of materials for the Project and it provided oversight and supervision for Catoe and the Catoe's Subcontractors. Thus, Marick did not supply any of the materials to the Project and did not perform any construction labor at the Project. Further, other than supplying building materials to the Project, BFS subcontracted out all of the work it agreed to perform; thus, BFS's only role concerning labor was to provide oversight and guidance to Catoe and the Catoe Subcontractors. It was alleged in Plaintiffs' Third Amended Complaint that work performed and or building materials supplied by BFS, Catoe and the Catoe Subcontractors was deficient; thus, Marick, BFS, Catoe and the Catoe Subcontractors were sued by Plaintiffs for those alleged deficiencies. Plaintiffs supported said allegations by submitting testimony of an expert witness. Plaintiffs' expert, Derrick Hodgin,

testified that there are defects associated with the work BFS, Catoe and the Catoe Subcontractors performed at the Project.[2]

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.*

2 Plaintiffs' expert, Derrick Hodgin, testified that there are alleged defects associated with the wood-siding installation and failure to apply appropriate flashing and weather resistant barrier to the structures at Phase II of the 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.

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. 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

Equitable indemnity, breach of contract, and breach of warranty causes of action are not mutually exclusive as ruled by the Appellate court. The Appellate court found that if identical damages are alleged in breach of contract, breach of warranty, and equitable indemnity causes of action all causes of action except equitable indemnity are dismissed. Appellants believe this issue is a matter of first impression for South Carolina appellant courts as neither the lower court nor appellate court cited (R. pp 1-11) binding case law in support of their holding. Additionally, the ruling is devastating and unfair for the general contractors in the state.

It is error for the courts of the state to restrict all general contractors in the state solely to a cause of action for equitable indemnity against its subcontractors The consequences of this

reasoning is that valid, enforceable and supported causes of action timely alleged and litigated will be tossed out in favor of a cause of action which prevents recovery amongst joint tortfeasors and will be nearly impossible to successfully prosecute in a typical general contractor-subcontractor dispute.

Breach of warranty, negligence, and breach of contract are each separate causes of action with unique and individual elements and defenses. If a valid cause of action exists under an alternative theory from equitable indemnity and is supportable there is no valid argument for collapsing all causes of action into equitable indemnity. Conversely, collapsing supportable causes of action into equitable indemnity will make it nearly impossible for general contractors to recover from the entities that actually performed the allegedly defective work because there will always be an allegation of improper supervision.

It is important to note that the Appellate court did not find that the causes of action for breach of warranty or breach of contract in all cases could not stand on their own or meet the elements for proper litigation. Rather, the Court found that breach of contract and warranty had similar damages to equitable indemnity and therefore must be dismissed.

Additionally, the existence or nonexistence of causes of action for breach of contract, negligence, breach of warranty, and equitable indemnity should not be contingent on the procedural posture of the litigation. The appellate court erred by finding the procedural posture of the case determined the viable cause of actions by finding that had the plaintiffs not sued the defendants, the independent claims would not exist. This is not necessarily true.

The procedural posture of this case is that the Plaintiff chose to sue the defendants, but that fact alone does not obviate the subcontractor's obligations to the general contractor for defective work. It has not been argued, nor could it, that the general contractor did not have

viable causes of action against the subcontractors if a lawsuit had not been filed. The general contractor could have immediately sued each of the subcontractors upon receipt of a demand letter and report from the community regarding defective construction related to the subcontractors. The general contractor could have sued the subcontractors based upon a warranty claim, an LLR complaint, or simply because the contractor was made aware of defective construction performed by the subcontractor and wanted it fixed. There can be no argument that had the contractor fixed the allegations of the Plaintiff, the general contractor would not have viable causes of action for negligence, breach of warranty, and breach of contract - assuming one exists. Therefore, this ruling that the available causes of action is contingent upon "first to sue" seems arbitrary and unfair. It seems erroneous to limit independent and supportable causes of action based upon the happenstance or fortuity of the procedural posture of the case – or the general contractor's finances and ability to repair. Instead, the contractor's avenues to recover against the at-fault subcontractors should be based upon the existence of warranties, duties, and contracts and not be limited by fortuity of the manner in which the issue began.

Specifically, in this case, Plaintiffs alleged $16,000,000 in necessary repairs. Marick had been out of business for years due to the economic downturn, but could not have performed or financed the repair had it been active. The appellate court's ruling results in Marick being limited to an equitable indemnity cause of action which will be vigorously resisted with arguments of joint tortfeasor status for failure to supervise and likely unrecoverable simply because it was sued by the homewoners. The result is that subcontractors may settle out cheap or simply litigate equitable indemnity because they do not have to defend breaches of contract, duty, and warranty.

On a larger scale, the ruling will and has allowed subcontractors to avoid liability for their defective work knowing that a general contractor is limited to a cause of action for equitable indemnity which is dubious at best. This present state of the law is limiting subcontractors' participation and involvement in settlements or repairs and unnecessarily and unfairly places the lion's share of the liability and risk upon a general contractor who originally relied upon its subcontractor's representations and work. This is a novel question of law, one that is and will have a substantial effect on the construction litigation, and one that needs to be reconsidered.

II. The Appellate Court erred by finding no contract existed

The Appellate court erred by finding no contract existed when clearly, at the very least, a verbal contract existed between the subcontractors and the general contractor on this multi-year multi-million dollar project. Additionally, contracts were submitted that showed a contractual relationship between the parties including contractual indemnity. 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). 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.

There was at least a scintilla of evidence that these contracts governed the relationship between the parties. Although evidence was offered showing that the work predated the contracts, no evidence was submitted that the contracts absolutely did not govern the parties' relationship at the Stoneledge project but were signed later as a prerequisite to receiving payment for work. At the very least a scintilla of evidence existed that should require submission of the issue to the jury for its determination of whether or not the contracts governed the work at the Stoneledge project.

III. The Appellate Court erred by finding that the pleadings did not set forth causes of action for Breach of Contract and Breach of Warranty

The Appellate court erred in determining that the complaint only alleged a cause of action for equitable indemnity. The answer and cross claim included separate causes of action titled Breach of Contract and Breach of Warranty and plead elements of both of those causes of action. Pleadings and construction of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." S.C. Nat'l Bank v. Joyner, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct.App.1986). Further, "Pleadings are to be liberally construed 'to do substantial justice to all parties.' " Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000) (quoting Rule 8(f), SCRCP). See also Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573-74, 743 S.E.2d 778, 785 (2013). The Appellate court's use of the pleadings to exclude causes of action, which included causes of action for breach of contract and breach of warranty, was erroneous as they were intended to inform the subcontractors of Appellant's legal and factual positions.

IV. The Appellate Court erred by ruling that attorneys fees and costs are not separate damages

Marick should be allowed to recover attorneys' fees and costs under a breach of warranty and/or a breach of contract cause of action. Attorney's fees and costs should be separate damages from those alleged by homeowners.

In *Addy v. Bolton*, the defendant owner of a building was sued by its tenant when the building caught on fire. The owner of the building then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owners] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).

The facts in *Addy* are similar to the facts of this case. Like the building owner in *Addy*, Marick is forced to defend itself from the Plaintiffs' claims arising from the Respondent Subcontractors' alleged tortious conduct (deficient construction work); thus, Marick properly filed claims for breach of warranty and breach of contract against Respondents seeking not only "damages recovered by the Plaintiffs against Marick" but also "reasonable attorney fees and costs" associated with defending the claims. (R. pp 69-107.) Marick has even better facts than *Addy* for including special damages claims against a subcontractor, as Clear View, BFS and Southern Concrete were sued directly by Plaintiffs for defective work. Thus, the *Addy* rule, followed in *Griffin* and *Town of Winnsboro*, allows Marick to recover special damages at law under a breach of warranty or negligence standard and pursuant to the Contracts entered into between the parties. The attorney fees and costs sought by Marick are separate damages from

the damages sought by Plaintiffs; thus, said damages should be recoverable under the separate causes of action pled.

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

CONCLUSION

For the reasons stated herein, the appellate court's Order should be reversed.

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Attorney for Appellants Marick Home Builders, LLC and Rick Thoennes

November 4, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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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,

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

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PROOF OF SERVICE

I, Amanda D. Steward, certify that I have served Appellants Marick Home Builders, LLC and Rick Thoennes' Petition for a Writ of Certiorari by depositing a copy of it in the United States Mail, First Class postage prepaid, on November ____, 2015, addressed to Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, PO Box 773, Charleston, SC, 29401 (attorneys for Respondents).

Amanda D. Steward
Paralegal to Jason M Imhoff

November 4, 2015

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