THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002001
Trial Court Case No. 2015-CP-26-07275

RECEIVED
May 12 2020
SC Court of Appeals

BEI-Beach, LLC, ... Plaintiff,

v.

Mashburn Christman, JV, Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc., and McCrory Construction Company, LLC, ... Defendants,

Mashburn Christman, JV, ...Third-Party Plaintiff,

v.

Wallcraft Construction, Inc.; Alpha Insulation & Waterproofing, Inc.; Baker Roofing, Inc.; Collins & Wright, Inc.; Liberty Mutual Insurance Company; Old Republic Surety Company; Hartford Fire Insurance Co.; Travelers Casualty and Surety Company of America; The Muhler Company, Inc., and Companion Property and Casualty Insurance Company, ...Third-Party Defendants,

Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc., ...Third-Party Plaintiff,

v.

Spann Roofing & Sheet Metal, Inc.; Travelers Casualty and Surety Company of America; Strickland Waterproofing Company; Merchants Bonding Company; Everest Reinsurance Company; Wallcraft Construction, Inc., Old Republic Insurance Company; Madison Construction Group, Inc.; Worthington Integrated Building Systems; McDowell Commercial Construction, LLC; Jollay

Masonry; National Fire Insurance Company of Hartford; R.J. Kenney Associates, Inc.; Antunovich Associates; TG Construction, LLC; Luis Trim Work; Nora Del Carmen Laos, Nora Del Carmon Lagos d/b/a Luis Trim Work; and Ovation Custom Trim, LLC, ...Third-Party Defendants,

McCrory Construction Company, LLC, ...Third-Party Plaintiff,

v.

Collins & Wright; Baker Roofing; Glasstech Inc.; Palmetto State Roofing and Sheet Metal; Strickland Waterproofing; Maiday, Inc.; and Atlas Drywall & Acoustics, Inc., ...Third-Party Defendants,

Spann Roofing & Sheet Metal, Inc., ...Fourth-Party Plaintiff,

v.

Coastal Commercial Roofing Co., Inc., and Daniel Kniffen d/b/a East Coast Improvements, ...Fourth-Party Defendants,

Wallcraft Construction, Inc., ...Fourth-Party Plaintiff,

v.

Vienamin Petresku d/b/a BT Construction, LLC, ... Fourth-Party Defendant,

of which

Lend Lease (US) Construction Inc., f/k/a Bovis Lend Lease, Inc., is the ....Appellant,

and

Antunovich Associates, Inc., is the ....Respondent.

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court properly dismiss Appellant Lend Lease's third-party causes of action for negligence and breach of warranty on grounds that that Lend Lease's pleadings demonstrate that those claims are not independent of Plaintiff's claims against Lend Lease, and thus are nothing more than claims for equitable indemnity?

II. Did the circuit court properly find that South Carolina does not recognize "business reputation" damages as being recoverable in an action for negligence or breach of warranty, and that even if such damages were recognized in this state, Lend Lease failed to submit any evidence establishing any "business reputation" damages it allegedly suffered as a direct result of any act or omission by Respondent Antunovich, and therefore lacks any independent cause of action against it for negligence or breach of warranty?

STATEMENT OF THE CASE

This appeal arises out of a construction defect case involving buildings A2, A3, A4, A5, A6, A7, and A8 of The Market Common multi-use development in Myrtle Beach, South Carolina (the "Project"), which is currently owned by Plaintiff BEI-Beach, LLC ("BEI"). Appellant Lend Lease (US) Construction Inc., f/k/a Bovis Lend Lease, Inc. ("Lend Lease") was the general contractor for Project buildings A6, A7, and A8. (Am. Third-Party Compl. 11.) Respondent Antunovich Associates, Inc. ("Antunovich") served as the Project architect by contract with the developer, which later sold the Project to BEI. (*See* Am. Third-Party Compl.)

In October 2015, BEI sued Lend Lease and the other two general contractors which built the Project, alleging various construction defects and violations of building codes and industry standards. (*See* Amend. Compl. 4-8.) Lend Lease, in turn, filed an Amended Third-Party Complaint against Antunovich, Antunovich's principal, and several subcontractors, alleging

various design deficiencies and subcontractor errors. Against Antunovich, Lend Lease asserted claims for Contribution, "Negligence/Gross Negligence/Recklessness," Equitable Indemnity, and Breach of Warranty of Plans and Specifications. (Am. Third-Party Compl. 13, 16-18, 19-22.) [1]

Lend Lease's Amended Third-Party Complaint alleges that Lend Lease has been subjected to BEI's suit as a result of the Third-Party Defendants' alleged acts and omissions, and that:

> [t]he damages to Lend Lease included [sic] the cost and fees, including attorney's fees, associated with the investigations and defense of the Plaintiffs [sic] claims, as well as special and consequential damages, including injury and damage to Lend Lease's business reputation and the liability for the damage to the Project building[.]

(Am. Third-Party Compl. 13.)

Lend Lease's claim for equitable indemnity alleges:

> To the extent, if any, that Lend Lease is held liable to the Plaintiff . . . such liability would be a direct and proximate result of the acts, omissions, negligence/gross negligence, recklessness, and/or representations of the Third-Party Defendants, which have damaged Lend Lease as Lend Lease has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.
>
> Lend Lease is entitled to full indemnification from the Third-Party Defendants for any liability Lend Lease is found to have to the Plaintiff, and Lend Lease is entitled to damages for the Third-Party Defendants [sic] acts, omissions, recklessness and gross negligence, entitling Lend Lease to recover from the Third-Party Defendants its attorney's fees, costs and other expenses incurred in defending this action.

(Am. Third-Party Compl. 21.)

Lend Lease's causes of action for negligence and breach of warranty against Antunovich and the other Third-Party Defendants also allege that Lend Lease has sustained damages as a result

[1] Lend Lease's claims against Antunovich's principal, Joe Antunovich, FAIA, were dismissed via a consent order dated September 25, 2017. (*See* Consent Order Resolving Mot. Dismiss 2.)

of the acts and omissions of those parties. Specifically, Lend Lease's negligence cause of action alleges:

> As a result of the Third-Party Defendants [sic] gross negligence and recklessness, Lend Lease has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling the Plaintiff's claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

(Am. Third-Party Compl. 18.) Likewise, the breach of warranty claim asserts:

> As a result of [Antunovich's] breaches of warranty of plans and specifications, Lend Lease has incurred, and will continue to incur actual damages in the amount of any money adjudged to be owed to the Plaintiff by Lend Lease, or which Lend Lease must pay Plaintiff in settlement of the Plaintiffs' [sic] claims, plus the costs associated with investigating the Plaintiffs' [sic] claims and defending this action. In addition, Lend Lease has incurred and will continue to incur special and consequential damages, including damage to its business reputation, in an amount to be proven at trial.

(Am. Third-Party Compl. 22.)

Lend Lease's prayer for judgment reiterates that Lend Lease seeks to recover damages on its third-party claims in "the amount of any settlement paid by Lend Lease to the Plaintiff or judgement rendered against Lend Lease in favor of the Plaintiff and all attorney's fees and cost incurred by Lend Lease as a result of this action." (Am. Third-Party Compl., 23-24.)

On October 19, 2017, Antunovich moved for partial summary judgment as to Lend Lease's third-party claims against it for contribution, negligence, and breach of warranty. (*See* Mot. Partial Summ. J.) On November 21, 2019, The Honorable William H. Seals, Jr., granted Antunovich's motion for partial summary judgment, finding that Lend Lease's contribution claim is premature, and that Lend Lease's claims for negligence and breach of warranty are "merely disguised equitable indemnity claims," which must be dismissed pursuant to *Stoneledge at Lake Keowee*

Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (hereinafter, "*Stoneledge v. Clear View*"), and *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders Firstsource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (hereinafter, "*Stoneledge v. Builders Firstsource*") (collectively, the "*Stoneledge* cases"). (Order Granting Mot. Partial Summ. J. 4-5.) The circuit court reasoned:

> As in Stoneledge, Lend Lease has not shown that it has suffered its own damages as a result of Antunovich's alleged negligence or breach of warrant. Rather, Lend Lease's allegations and prayer for relief show damages and claims that have arisen exclusively from having to defend itself in this lawsuit, perhaps including a judgment to BEI for which its seeks indemnity. Lend Lease's negligence and breach of warranty claims are not independent of Lend Lease's equitable indemnity claim; in substance, they are nothing more than equitable indemnity claims, and must therefore be dismissed.

(Order Granting Mot. Partial Summ. J. 5.)

The circuit court also rejected Lend Lease's argument that its negligence and breach of warranty claims allege damages to its business and business reputation that are independent of the claims asserted against Lend Lease by BEI, and that this "business reputation" damages claim is separate and distinct from its indemnity claims. (Order Granting Mot. Partial Summ. J. 5-6.) The lower court noted that Lend Lease cited no legal authority for its proposition that "business reputation" damages are recoverable in an action for negligence or breach of warranty, and found no such authority itself. (Order Granting Mot. Partial Summ. J. 5.) Further, the court found that Lend Lease had presented no admissible evidence that it had incurred any such damages. (Order Granting Mot. Partial Summ. J. 5-6.) The court therefore held that Lend Lease's alleged "business reputation" damages claim does not support an independent cause of action by Lend Lease against Antunovich for negligence or breach of warranty.

On November 26, 2019, Lend Lease filed a motion for reconsideration as to its negligence and breach of warranty claims, but did not seek reconsideration of the dismissal of its contribution claim. (Mot. Reconsid.). On December 3, 2019, Judge Seals notified the parties via email that he was denying Lend Lease's motion for reconsideration, and the circuit court's formal order denying that motion was entered on January 6, 2020. (*See* Order Denying Mot. Reconsid.). Lend Lease initiated this appeal on December 3, 2019. (Notice of Appeal.)

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When the circuit court grants summary judgment on a question of law, the ruling is reviewed de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). When reviewing a summary judgment decision based on a question of fact, the appellate court must determine whether any triable issues of fact exist, and must view the evidence and all reasonable inferences "in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The appellate court will reverse a grant of summary judgment "only where there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

This appeal presents the question of whether the circuit court properly interpreted Lend Lease's causes of action against Antunovich for negligence and breach of warranty as being claims for equitable indemnity. "The character of an action is primarily determined by the allegations contained in the complaint." *Stoneledge*, 413 S.C. at 621, 776 S.E.2d at 429, *quoting Seebaldt v.*

First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Thus, as to the construction of Lend Lease's pleadings and the nature of the claims asserted therein, this appeal presents a question of law, and the lower court's decision is to be reviewed de novo. *Id.*; *see also Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

This appeal also raises questions as to Lend Lease's contention that its alleged "business reputation" damages do not arise exclusively from its potential liability to BEI, and that such damages therefore support independent causes of action for negligence and breach of warranty. Whether South Carolina recognizes a certain type of damages is a question of law. *See, e.g., Chestnut v. AVX Corp.*, 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015) (explaining that whether South Carolina will recognize "stigma damages" in an environmental negligence suit "raises a novel question of law"). Accordingly, the circuit court's finding that "business reputation" damages are not recognized in this state as being recoverable in actions for negligence and breach of warranty must be reviewed de novo. *See Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n*, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019) ("As to questions of law, this court's standard of review is de novo.").

In contrast, the trial court's additional finding that Lend Lease has presented no admissible evidence that it has incurred any "business reputation" damages to support any allegedly direct claims against Antunovich involves a question of fact. Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of at least one element essential to the party's case, and on which that party will bear the burden of proof at trial. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991). Thus, if this Court determines as a matter of law that South Carolina recognizes "business reputation" damages as being recoverable in actions for negligence and breach of warranty, it must view any evidence regarding

Lend Lease's alleged business reputation damages in Lend Lease's favor and determine whether any triable issues of fact exist. *Fleming*, 350 S.C. at 493, 567 S.E.2d at 860.

ARGUMENT

I. The Circuit Court Correctly Held That Lend Lease's Causes Of Action For Negligence And Breach Of Warranty Are Equitable Indemnity Claims That Are Not Viable As Independent Causes Of Action.

The circuit court properly granted summary judgment as to Lend Lease's claims for negligence and breach of warranty, because Lend Lease's pleadings reveal that those claims are derivative of BEI's claims against it, and thus are not separate causes of action from Lend Lease's equitable indemnity claim.

A. Applicable law.

Under South Carolina law, a claimant cannot maintain tort or contract breach claims that arise only when the claimant faces potential liability for another party's damages and must defend itself in litigation, because such causes of action are not independent and are merely claims for equitable indemnity. *Stoneledge v. Clear View*, 413 S.C. at 622, 776 S.E.2d at 430; *Stoneledge v. Builders Firstsource*, 413 S.C. at 637, 776 S.E.2d at 438. The South Carolina Court of Appeals squarely addressed this issue in the *Stoneledge* cases, and the Court's analysis and findings in those cases is directly applicable to and determinative of the primary issue raised in this appeal, which is whether Lend Lease's causes of action against Antunovich for negligence and breach of warranty are derivative of BEI's claims against Lend Lease, and therefore were properly dismissed. Employing the *Stoneledge* analysis in this case reveals that Lend Lease's negligence and breach of warranty claims are nothing more than equitable indemnity claims, and that the circuit court properly granted summary judgment in Antunovich's favor on those causes of action.

In the *Stoneledge* cases, a homeowners' association ("Stoneledge") sued a general contractor ("Marick") and its subcontractors for construction defects in a townhome complex. *Stoneledge v. Clear View*, 413 S.C. at 618, 776 S.E.2d at 428; *Stoneledge v. Builders Firstsource*, 413 S.C. at 633, 776 S.E.2d at 436. Marick, in turn, filed cross-claims against its subcontractors for equitable indemnity, negligence, breach of contract, and breach of warranty. *Stoneledge v. Clear View*, 413 S.C. at 619, 776 S.E.2d at 428; *Stoneledge v. Builders Firstsource*, 413 S.C. at 634, 776 S.E.2d at 436. When some of the cross-claim defendants moved for summary judgment on Marick's cross-claims, the circuit court granted the motion, finding that Marick's claims for negligence, breach of contract, and breach of warranty were actually claims for equitable indemnity. *Stoneledge v. Clear View*, 413 S.C. at 619, 776 S.E.2d at 428-29; *Stoneledge v. Builders Firstsource*, 413 S.C. at 634, 776 S.E.2d at 436-437. The circuit court explained that because those causes of action all stemmed from the potential liability Marick could face for the damages claimed by Stoneledge, and because Marick was not alleging personal injury or property damage as to itself, the claims in question were derivative claims for equitable indemnity. *Id.*

The Court of Appeals upheld the circuit court's grant of summary judgment on Marick's causes of action for negligence, breach of contract, and breach of warranty, because the damages elements of those claims were not independent from Marick's equitable indemnity cross-claims. *Stoneledge v. Clear View*, 413 S.C. at 619, 776 S.E.2d at 428; *Stoneledge v. Builders Firstsource*, 413 S.C. at 634, 776 S.E.2d at 436. The Court explained that Marick's allegations demonstrated that it did not sustain its own damages as a result of any negligence, breach of contract, or breach of warranty by the movants; instead, Stoneledge was the party that suffered damages, so "Marick's injuries arose exclusively from having to defend itself" in Stoneledge's lawsuit. *Stoneledge v.*

Clear View, 413 S.C. at 621, 776 S.E.2d at 429; *Stoneledge v. Builders Firstsource*, 413 S.C. at 636, 776 S.E.2d at 437.

B. The *Stoneledge* Analysis Reveals that Lend Lease's Claims for Negligence and Breach of Warranty are Equitable Indemnity Claims that were Properly Dismissed.

The circuit court properly granted summary judgment in Antunovich's favor on Lend Lease's causes of action for negligence and breach of warranty, because an analysis of those claims under the *Stoneledge* cases shows that they are equitable indemnity claims that are derivative of BEI's claims against Lend Lease, and are not independent causes of action on which Lend Lease can recover.

In its Amended Third-Party Complaint, Lend Lease alleges the following to support its claims for negligence and breach of warranty, respectively:

> As a result of the Third-Party Defendants [sic] gross negligence and recklessness, Lend Lease has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling the Plaintiff's claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.
>
> As a result of [Antunovich's] breaches of warranty of plans and specifications, Lend Lease has incurred, and will continue to incur actual damages in the amount of any money adjudged to be owed to the Plaintiff by Lend Lease, or which Lend Lease must pay Plaintiff in settlement of the Plaintiffs' [sic] claims, plus the costs associated with investigating the Plaintiffs' [sic] claims and defending this action. In addition, Lend Lease has incurred and will continue to incur special and consequential damages, including damage to its business reputation, in an amount to be proven at trial.

(Am. Third-Party Compl. 13, 22.)

Lend Lease's Third-Party Complaint further explains that the damages to which it has been or may be subjected because of the Third-Party Defendants' alleged acts and omissions include

"the costs, expenses, attorneys' fees and liabilities" associated with BEI's suit, and specifies as follows:

> The damages to Lend Lease included [sic] the cost and fees, including attorney's fees, associated with the investigations and defense of the Plaintiffs [sic] claims, as well as special and consequential damages, including injury and damage to Lend Lease's business reputation and the liability for the damage to the Project building, which, according to Plaintiffs' [sic] allegations, include deterioration and failure of the building structure and systems due to the acts and omissions of the Third-Party Defendants, which combined to result in consequential damage to non-defective building components and other property.

(Am. Third-Party Compl. 13.)

The *Stoneledge* cases instruct that the question of whether Lend Lease's negligence and breach of warranty claims are separate from its equitable indemnity claim requires the Court to examine the character of the claims asserted. *See Stoneledge v. Clear View*, 413 S.C. at 620-21, 776 S.E.2d at 429; *Stoneledge v. Builders Firstsource*, 413 S.C. at 635, 776 S.E.2d at 437. "The character of an action is not to be determined by the terminology which the pleader may choose to give it. On the contrary, [it] is fixed by the events which the pleaders have recited[.]" *Walsh v. Evans*, 112 S.C. 131, 136, 99 S.E.2d 546, 548 (1919). Therefore, to determine the true and proper nature of Lend Lease's claims, one must look to the "nature of the issues and the remedies which are sought," as opposed to merely their nomenclature. *State v. Yelsen Land Co.*, 257 S.C. 401, 403, 185 S.E.2d 897, 898 (1972); *see also Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692-93, 239, S.E.2d 726, 727 (1977).

An examination of Lend Lease's Amended Third-Party Complaint reveals that its purported causes of action for negligence and breach of warranty essentially mirror its claim for equitable indemnity, with nothing more than a slight change in wording. Lend Lease's allegations demonstrate that it did not sustain its own damages as a result of any negligence or breach of

warranty by Antunovich, and that instead, BEI is the only party that suffered damages. Lend Lease's claimed damages consist exclusively of its potential liability to BEI, of costs and expenses it has incurred from having to defend itself in this lawsuit, and of alleged damages to its "business reputation," which are not recognized by this state as being recoverable in actions for negligence or contract breach and which are unsupported by any record evidence. Lend Lease's negligence and breach of warranty claims thus are not independent from its equitable indemnity claim, and were properly dismissed per the *Stoneledge* cases.

C. Lend Lease's Argument that *Tommy L. Griffin* Renders the Grant of Summary Judgment Against it Erroneous Lacks Merit.

Lend Lease's argument that *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) ("*Griffin*") allows it to maintain its negligence and breach of warranty claims against Antunovich in this case should be rejected. This is because while *Griffin* recognizes that the relationship between a contractor and design professional can form the basis of a duty on which an equitable indemnity claim may be asserted, *Griffin* does not hold, as Lend Lease argues, that a contractor owed such a duty can maintain tort and contract claims against a design professional without having suffered direct damages that could support such independent claims.

Lend Lease contends that because *Griffin* recognizes that design professionals may owe a non-contractual duty to a general contractor not to negligently design or supervise a project, and that because Lend Lease has alleged that Antunovich breached a duty of care owed to Lend Lease, then its negligence and warranty claims against Antunovich "independently survive under the law of South Carolina in the absence of a contractual relationship." (Appellant's Initial Br. 5-6.) According to Lend Lease, the circuit court's grant of partial summary judgment to Antunovich

should be reversed because it ignores *Griffin* and "effectively ruled that Antunovich owes no duty to Lendlease." (Appellant's Initial Br. 6-7.)

Lend Lease's argument confuses the relevance of *Griffin* to the present case and improperly deems that case's recognition of a design professional's ability to owe a contractor a non-contractual duty as being determinative of the present issue on appeal. It also ignores the fact that in *Griffin*, the contractor sustained injuries that were independent of the damages the plaintiff in that case sought to recover against the contractor, and that arose from acts the design professional allegedly committed over and above having designed the project at issue. As explained below, *Griffin*'s nexus to the present action is that it identifies the duty on which Lend Lease's cause of action for equitable indemnity is based. That *Griffin* recognizes a potential duty between Lend Lease and Antunovich does not, however, mean that Lend Lease may avoid application of the *Stoneledge* principle, which requires the dismissal of causes of action that are not independent of a claimant's equitable indemnity claim. Therefore, *Griffin* does not protect Lend Lease's negligence and warranty claims from dismissal on grounds that they are disguised indemnity claims.

A claim for equitable indemnity arises "if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another," and if "no personal fault of the indemnitee has joined in causing the injury[.]" *Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (internal citation omitted). In order for a party to maintain an equitable indemnity claim, there must be "a sufficient relationship" between the claimant and the party against which it seeks to recover. *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 132, 414 S.E.2d 118, 121 (1992). "A sufficient relationship exists when the at-fault party's

negligence or breach of contract is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct." *Id.*

Griffin held that a special relationship sufficient to create an extra-contractual duty of care, and therefore to support an equitable indemnity claim, can exist between a general contractor and a design professional. *See* 320 S.C. at 55, 463 S.E.2d at 89. Importantly, the claimant general contractor in *Griffin* alleged various acts the defendant engineer allegedly committed directly against the contractor during the course of the project at issue, in addition to seeking indemnity for damage the plaintiff in that case sought to recover from the contractor. As explained in *Griffin*:

> [General contractor] brought this action claiming Engineer wrongfully closed the job for nearly a month due to false allegations of OSHA violations, Engineer made demands of [general contractor] which were not in the contract, Engineer wrote a disparaging letter to [general contractor's] bonding company, Engineer erroneously interpreted the contract to the County and [general contractor], and Engineer's false interpretations of the contract required [general contractor] to hire an expert to interpret the contract between [general contractor] and the County. … County refused to compensate [general contractor] for costs incurred by [general contractor] as a result of Engineer's acts.

Id. at 51-52, 463 S.E.2d at 86-87. It is the special relationship and attendant duty that *Griffin* recognizes can exist between a design professional and a general contractor that forms the basis of Lend Lease's equitable indemnity claim against Antunovich. If courts of this state did not recognize that a duty to indemnify can arise from that relationship, Lend Lease could not seek equitable indemnity against Antunovich. *See Town of Winnsboro*, 307 S.C. at 132, 414 S.E.2d at 121 (explaining that attorney's fees and costs attributable solely to the negligence of an at-fault party may be recovered by a non-negligent party "when there is a sufficient relationship between the two defendants"). In this case, however, Lend Lease contends only that Antunovich created deficient plans and specifications from which its claimed damages flow; Lend Lease has not

alleged or submitted proof that because of Antunovich, it has suffered any damages independent of those caused by BEI's suit against Lend Lease.

The circuit court's grant of summary judgment as to Lend Lease's negligence and warranty claims thus did not ignore or misapply *Griffin*, because it did not deny or defeat Lend Lease's ability to maintain its equitable indemnity claim against Antunovich. Instead, the circuit court held that Lend Lease's negligence and warranty claims fail as a matter of law because Lend Lease – having grounds for asserting an equitable indemnity claim against Antunovich based on the architect's duty recognized in *Griffin* – then pled these claims against Antunovich as derivative claims that seek the same relief sought in its equitable indemnity cause of action. It is the derivative nature of Lend Lease's negligence and warranty claims and the proper application of the *Stoneledge* cases to those claims that prompted the circuit court to grant Antunovich summary judgment with respect to them. The circuit court's ruling in that regard was proper, and should be affirmed.

D. Lend Lease's Argument that the *Stoneledge* Cases do not Govern this Action Because Antunovich is a Design Professional and not a Subcontractor Fails.

The fact that the *Stoneledge* cases so directly govern the issue on appeal and so clearly support the circuit court's grant of partial summary judgment in Antunovich's favor makes noteworthy the fact that Lend Lease does not mention those cases until page 11 of its 14-page brief, and also causes Lend Lease's argument against those cases' application to fail.

Lend Lease submits that the *Stoneledge* cases are inapposite because those decisions arose "out of the relationship between a general contractor and subcontractor, not the special relationship between [sic] that exists between a Contractor and an Architect." (Appellant's Initial Br. 11.) Lend Lease argues that this distinction between the role of Antunovich as the architect of the subject Project and the role of the subcontractors that were sued by the general contractor in the *Stoneledge*

cases "is significant" and makes the legal principles in those cases inapplicable in this action. (Appellant's Initial Br. 11.) Lend Lease also argues that because the general contractor in *Stoneledge* contracted with and paid its subcontractors to perform work for the project owner, and because Lend Lease did not contract with or pay Antunovich to perform its project work for the project owner, Lend Lease's claims against Antunovich for negligence and breach of warranty are not derivative of BEI's claims against Lend Lease. (Appellant's Initial Br. 12.)

Lend Lease also repeats its argument that because *Griffin* expressly holds that a contractor can sue an architect directly for breach of an implied warranty of plans and specifications, its claims against Antunovich arise out of an independent duty to Lend Lease that does not flow through or involve the Project owner or any subcontractor, and that those claims thus stand "separate and distinct" from BEI's claims against Lend Lease. (*See* Appellant's Initial Br. 11-12.) According to Lend Lease, if its negligence and warranty claims against Antunovich were dismissed as being merely derivative claims, that would mean "the legal theory of breach of warranty of plans" that the Supreme Court of South Carolina recognized in *Griffin* "would not exist." (Appellant's Initial Br. 11.)

Lend Lease's attempt to distinguish the present appeal from the *Stoneledge* cases lacks merit. The principle applied in the *Stoneledge* cases – i.e., that a claimant seeking to recover damages incurred as a result of being sued by a plaintiff cannot maintain tort or contract breach claims against another party that are derivative of its equitable indemnity claim – is not dependent on the professional affiliations or identities of the claimant and the defendant, or on whether the claimant contracted with or paid monies to the defendant to perform work for the plaintiff. Instead, the *Stoneledge* principle applies so long as the claimant's allegations demonstrate that its damages result only from its potential liability to the plaintiff and from the expenses and harms incurred in

defending itself against the plaintiff's claims. *See Stoneledge v. Clear View*, 413 S.C. at 621, 776 S.E.2d at 429, and *Stoneledge v. Builders Firstsource*, 413 S.C. at 637, 776 S.E.2d at 438. In such instance – as in the present case – any tort or contract breach claim through which the claimant seeks such damages is derivative of its equitable indemnity claim, and should be dismissed as a matter of law. *Id.*

Further, and as discussed fully above, the *Stoneledge* cases do not conflict with or ignore *Griffin*'s holding that a contractor may be able to maintain an implied warranty claim against a design professional with which it lacks contractual privity. Instead, the *Stoneledge* principle is properly applied – as it was by the circuit court in this case – when a party which has a legal basis to maintain an equitable indemnity claim also pleads tort or contract claims that are derivative of that same cause of action. The fact that Lend Lease's equitable indemnity claim is based on the special relationship between a contractor and design professional that *Griffin* recognizes can exist does not spare Lend Lease's claims for negligence and breach of warranty from dismissal under *Stoneledge* on the basis that they seek damages that arise exclusively from the claims asserted against Lend Lease by BEI. Lend Lease's arguments to the contrary are not supported by law and should be rejected.

E. Lend Lease's Argument that it has Incurred Actual Damages that Render its Negligence and Warranty Claims Independent is Incorrect.

Also unavailing is Lend Lease's argument that its causes of action for negligence and breach of warranty are not disguised indemnity claims because Lend Lease has alleged "damages independent from those sought against Lendlease by the Plaintiff." (Appellant's Initial Br. 7, 12.) As discussed below, Lend Lease's Initial Brief of Appellant identifies three categories of alleged "direct damages" that it contends convert its derivative claims for equitable indemnity into independent claims for negligence and breach of warranty. Those three categories can be generally

described as being window costs, expert fees, and "business reputation" damages. This Section I.E of this brief explains the reasons why each of these categories of damages is not independent of the damages Lend Lease seeks to recover through its equitable indemnity claim. Section II of this brief, below, discusses the merits of the circuit court's additional findings specific to Lend Lease's claimed "business reputation" damages.

In support of its argument that it has pled "direct damages" that spare its negligence and warranty breach claims from dismissal, Lend Lease submits in its Initial Brief of Appellant that its "representatives are expected to testify that Lendlease has incurred the following actual damages:"

> [1] Cost of windows purchased by Lendlease that do not meet required wind load requirements, which are now recommended for removal and replacement;
>
> [2] Investigative fees paid to [Lend Lease's expert,] Richard H. Moore, P.E., to analyze the project documents and determine whether the windows specified and approved by Antunovich meet applicable building code requirements at the time of construction;
>
> [3] Loss of business revenues as a result of pending construction defect claim[.]

(*See* Appellant's Initial Br. 7-8.)

As an initial matter, Lend Lease's assertion regarding what its "representatives are expected to testify" does not constitute record evidence in this case and therefore cannot properly be considered on appeal. *See S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("This Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true. Likewise, counsel is prohibited from embodying in their briefs any fact which does not appear in the record."). What the record in this case does reflect is that over two years passed between Antunovich's filing its Motion for Partial Summary Judgment on October 19, 2017, and

the circuit court's hearing that motion on October 30, 2019. (*See* Mot. Partial Summ. J. and Mot. Partial Summ. J. Hr'g Tr. 1.) Over that two year period, Lend Lease failed to generate any admissible evidence regarding what it now claims to be "actual damages," either through deposition testimony, affidavits, or otherwise. Lend Lease's statements in its appellate brief regarding what evidence it expects to generate in the future are insufficient to defeat a motion for summary judgment and do not constitute evidence proper for this Court's consideration. Thus, even when the evidence in this case is viewed in Lend Lease's favor, these unsupported declarations cannot establish triable issues of fact that would disturb the entry of summary judgment in Antunovich's favor on this question. Rule 56, SCRCP.

Further, South Carolina law instructs that all of the recognized types of damages that Lend Lease has pled in its Amended Third-Party Complaint and now attempts to characterize as "direct" damages are, in fact, types of damages which can be claimed exclusively through an equitable indemnity claim. As explained in *Town of Winnsboro*, 307 S.C. at 130, 414 S.E.2d at 120: "The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence." *Town of Winnsboro*, 307 S.C. at 130, 414 S.E.2d at 120. Damages recoverable in equitable indemnity thus fall into two categories: (1) damages that result from the claimant's potential liability to the plaintiff in the lawsuit at issue; and (2) expenses resulting from the claimant's having been sued by that plaintiff. *See id.* Thus, in order to assert damages that are separate and distinct from an equitable indemnity claim, a claimant must demonstrate that it sustained injuries because of the defendant's breach of duty in tort or contract, and must identify damages that it suffered directly as a result of that breach, and that did not arise exclusively from

its having to defend itself in the plaintiff's lawsuit. *See Stoneledge v. Clear View*, 413 S.C. at 621, 776 S.E.2d at 429, and *Stoneledge v. Builders Firstsource*, 413 S.C. at 637, 776 S.E.2d at 438.

Lend Lease's own pleading reflects that all of its claimed damages are costs and expenses to which Lend Lease has been subjected as a result of BEI's suit against it, and that such damages include the very same items Lend Lease now attempts to characterize as being independent of BEI's suit. (*See* Am. Third-Party Compl. 13.) Specifically, Lend Lease's Amended Third-Party Complaint alleges that the damages Lend Lease faces as a result of BEI's suit include "the cost and fees, including attorney's fees, associated with the investigations and defense of the Plaintiffs [sic] claims, as well as special and consequential damages, including injury and damage to Lend Lease's business reputation and the liability for the damage to the Project building[.]" (Am. Third-Party Compl. 13.) Having specifically pled that its damages are injuries it has incurred from having to defend itself in BEI's lawsuit, Lend Lease should not now be heard to argue that those damages do not arise exclusively from the claims made against it by BEI.

In addition to these reasons, Lend Lease's argument that it has alleged "direct damages" that render its claims against Antunovich independent from its equitable indemnity claim fails because the three categories of damages Lend Lease has itemized in its Initial Brief of Appellant do not constitute direct damages that it has suffered for reasons other than having been sued by BEI in this lawsuit.

1. Lend Lease has no direct claim for window replacement damages because it cannot incur such a loss as a result of negligence or warranty breach by Antunovich.

Lend Lease's alleged window-related damages cannot support any independent claim for negligence or breach of warranty against Antunovich.

Lend Lease's initial appellate brief describes this first category of alleged "direct" damages as being financial loss Lend Lease claims it may suffer because it purchased the original Project windows, and because those windows now have been "recommended for removal and replacement." Lend Lease attempts to describe this category of alleged damages in terms of the cost that Lend Lease originally incurred to install windows in the subject Project. However, reduced to its essence, this language describes a claim by Lend Lease against Antunovich for BEI's cost of any replacement windows that may need to be installed in the Project, if replacement windows are required as a result of this lawsuit.

As a primary matter, Lend Lease can incur no such loss as a result of any alleged negligent design or breach of warranty of plans by Antunovich; so this category of claimed damages cannot support even Lend Lease's equitable indemnity claim, much less create an independent claim for negligence or breach of warranty. This is because in *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 61, 63 L. Ed. 166 (1918), the United States Supreme Court held that "if [a] contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." As applied to the present case, the *Spearin* doctrine dictates that BEI cannot recover against Lend Lease for damages arising from project elements that Lend Lease constructed in accordance with the plans and specifications that the Project owner warranted to it. Thus, if Lend Lease built the Project's windows in accordance with Antunovich's plans and specifications and those design materials were deficient as to window design or specifications, then BEI's claim against Lend Lease based on that alleged deficiency would fail. Lend Lease therefore cannot sustain any window replacement cost damages resulting from such an alleged deficiency that it could then seek to recover from Antunovich through equitable indemnity.

Lend Lease also cannot assert any direct claim against Antunovich for window replacement costs. Application of the *Spearin* doctrine results in only one circumstance under which Lend Lease could be held liable for replacing windows at the Project, which is if BEI proves its construction defect claims against Lend Lease and obtains a judgment that requires Lend Lease to pay that expense. In that instance, Lend Lease will have suffered damages, but only to the extent caused by its own fault, because as explained above, Lend Lease cannot be liable for damages caused by defects in Antunovich's design under *Spearin*. Likewise, if the jury exonerates Lend Lease from BEI's claims, then Lend Lease will not incur any costs to replace windows at the Project, nor will it "lose" the value of the windows that originally were installed at the Project. In sum, the window replacement costs Lend Lease seeks to characterize as direct damages flowing from Antunovich's alleged negligence and warranty breach do not support Lend Lease's position that it holds independent claims against Antunovich for negligence or breach of warranty.

2. Lend Lease's expert-related damages are not independent because they result from Lend Lease's having to defend itself against BEI's claims.

Also lacking merit is Lend Lease's claim that it has direct claims against Antunovich for fees Lend Lease has paid its expert for work performed in this case. Any such fees are not "direct" damages recoverable against Antunovich through a negligence or breach of warranty claim. Instead, they are costs and expenses of litigation which are classic equitable indemnity damages. *See Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120. "The principle of equitable indemnity including attorney fees and costs is not new to American law," nor is the fact that such costs include other expenses a party incurs due to being involved in litigation as a result of alleged wrongful acts of another. *Id.* Had BEI not sued Lend Lease and alleged defects in the Project's construction, and had Lend Lease not been forced to defend itself against those allegations, Lend Lease would have had no reason to retain or pay Mr. Moore "to analyze the project documents and determine

whether the windows specified and approved by Antunovich meet applicable building code requirements at the time of construction." (*See* Appellant's Initial Br. 7-8.) Lend Lease lacks any direct or independent basis for seeking such recovery from Antunovich.

3. Lend Lease's alleged business-related damages also are not direct, because they arise from Lend Lease's having been sued by BEI.

Even if South Carolina recognized claims for "business reputation" damages in tort and contract breach actions, which it does not, Lend Lease's attempt to categorize its claim for "[l]oss of business revenues as a result of pending construction defect claim" as "direct damages" also fails as a matter of law. Lend Lease ignores the fact that its own description of these alleged damages ties them directly to BEI's "pending construction defect claim," and that its Amended Third-Party Complaint includes alleged business-related items among the damages Lend Lease claims to have been subjected because of BEI's suit against it. (*See* Appellant's Initial Br. 7; Appellant's Am. Third-Party Compl. 13.) If and to the extent that Lend Lease has suffered loss to its "business reputation" as a result of having been sued in this case, any such damages – again, like attorney's fees and expert costs – would result from the fact that BEI asserted claims against it, and Lend Lease has had to defend itself in this litigation. Lend Lease cannot properly characterize its alleged "business reputation" damages as being "separate and distinct from any claim Plaintiff has against Lendlease or any claim for recovery that Plaintiff has against Lendlease" (see Appellant's Initial Br. 10); so its claim to any such damages cannot properly spare its negligence and breach of warranty claims from dismissal.

F. Lend Lease's Argument Regarding the Economic Loss Rule is Irrelevant Because Antunovich has not Asserted or Argued that Rule as a Defense, nor does it form the Basis of the Summary Judgment Order.

Lend Lease's discussion regarding the economic loss rule (*see* Appellant's Initial Br. 8) does not relate to any issue on appeal and should be disregarded. Antunovich has not asserted the

economic loss rule as a defense to Lend Lease's third-party claims against it, nor did the circuit court rely on or discuss that rule in entering partial summary judgment in Antunovich's favor. (*See* Order Granting Mot. Partial Summ. J.)

II. The Circuit Court Properly Found That South Carolina Does Not Recognize "Business Reputation" Damages As Being Recoverable In An Action For Negligence Or Breach Of Warranty, And That Even If Such Damages Were Recoverable, Lend Lease Failed To Submit Any Evidence Establishing That It Incurred Any Such Damages As A Direct Result Of Antunovich's Alleged Acts Or Omissions.

The circuit court also properly granted summary judgment as to Lend Lease's causes of action for negligence and breach of warranty over Lend Lease's objection that it has suffered direct damages to its "business reputation" that render those claims separate and distinct from its indemnity claim. In addition to correctly finding that such damages are not recognized by South Carolina courts as being recoverable in actions for negligence or breach of warranty, the circuit court also held that Lend Lease has failed to present any admissible evidence that it has incurred any "business reputation" damages. Lend Lease's Initial Brief of Appellant does not address this portion of the circuit court's Order granting partial summary judgment in Antunovich's favor. However, for the reasons discussed below, the circuit court's ruling on this issue was proper and should be upheld.

A. "Business Reputation" Damages are not Recoverable in Actions for Negligence or Breach of Warranty.

Lend Lease's allegation that it has incurred "special and consequential damages, including damage to its business and business reputation," (Am. Third-Party Compl. 13), cannot convert its derivative claims into independent tort or contract breach claims, because courts of this state do not recognize "business reputation" damages as being recoverable in actions for negligence and breach of warranty. As the circuit court found in rejecting Lend Lease's argument in this regard, "Lend Lease cites no South Carolina legal authority for the proposition that it may recover

'business reputation' damages in a negligence or breach of implied warranty cause of action, and the Court finds no such authority." (Order Granting Mot. Partial Summ. J. 5.)

Lend Lease's appellate brief likewise offers no case decision supporting its argument that intangible harm to a business' reputation is remediable in negligence and breach of warranty suits. Lend Lease certainly can identify no authority suggesting that a contractor that has been sued by a project owner and has incurred damages from defending itself can create independent tort or contract breach claims against a third party architect by alleging that the architect's design of the project on which the suit is based damaged the contractor's business reputation. Accordingly, the circuit court's grant of partial summary judgment to Antunovich on this question should be upheld.

B. No Record Evidence Exists to Support Lend Lease's Claim to "Business Reputation" Damages.

Even if South Carolina courts were to recognize injury to "business reputation" as a recoverable element of damage in a negligence or breach of warranty claim – which they do not – the circuit court's grant of partial summary judgment to Antunovich on such claims by Lend Lease still should be upheld. This is because the record includes no evidence supporting Lend Lease's claim that its business reputation has been damaged or devalued in any sense, much less as an alleged direct result of Antunovich's design work at the Project.

A party seeking to recover on claims of negligence or breach of warranty of plans and specifications must establish, among other things, the claim element of damages. *See Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011) (setting forth elements of negligence claim); *Hill v. Polar Pantries*, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951) (recognizing claim for implied warranty of fitness of plans and specifications). If the claimant fails to establish the existence of damages or any other element essential to its case, there

is no genuine issue of material fact; and summary judgment is appropriately entered against it. Rule 56, SCRCP.

In this case, the trial court properly entered summary judgment as to Lend Lease's claim that it suffered "reputation damages" as a direct result of acts and omissions of Antunovich on the additional ground that Lend Lease has not produced any evidence that it has incurred such damages. As stated above, Lend Lease had over two years between the date Antunovich moved for partial summary judgment and the hearing on that motion to generate admissible evidence regarding any alleged "business reputation" damages. The fact that it did not do so, and that no evidence of any such damages exists in the case record, formed the basis of the circuit court's finding that "Lend Lease has presented no admissible evidence that it has incurred 'business reputation' damages." (Order Granting Antunovich's Mot. Partial Summ. J. 5-6.) This fact also should support a decision by this Court to uphold the circuit court's ruling.

CONCLUSION

The circuit court properly granted summary judgment in Antunovich's favor as to Lend Lease's causes of action for negligence and breach of warranty, because Lend Lease's pleadings reveal that those claims are derivative of BEI's claims against it, and thus are nothing more than claims for equitable indemnity. The circuit court also properly rejected Lend Lease's argument that it has asserted direct claims for "business reputation" damages that support independent claims for negligence and breach of warranty. This is because such damages are not recognized in South Carolina as being recoverable damages in negligence or breach of warranty actions, and that even if such damages were recoverable, no record evidence supports Lend Lease's claim that it incurred any such injuries as a direct result of any alleged acts or omissions by Antunovich. The circuit

court's order granting summary judgment in Antunovich's favor as to Lend Lease's causes of action for negligence and breach of warranty therefore should be upheld.

May 12, 2020

s/ J. Alexander Joyner
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
May 12 2020
SC Court of Appeals

APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002001
Trial Court Case No. 2015-CP-26-07275

BEI-Beach, LLC, ... Plaintiff,

v.

Mashburn Christman, JV, Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc., and McCrory Construction Company, LLC, ... Defendants,

Mashburn Christman, JV, ...Third-Party Plaintiff,

v.

Wallcraft Construction, Inc.; Alpha Insulation & Waterproofing, Inc.; Baker Roofing, Inc.; Collins & Wright, Inc.; Liberty Mutual Insurance Company; Old Republic Surety Company; Hartford Fire Insurance Co.; Travelers Casualty and Surety Company of America; The Muhler Company, Inc., and Companion Property and Casualty Insurance Company, ...Third-Party Defendants,

Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc., ...Third-Party Plaintiff,

v.

Spann Roofing & Sheet Metal, Inc.; Travelers Casualty and Surety Company of America; Strickland Waterproofing Company; Merchants Bonding Company; Everest Reinsurance Company; Wallcraft Construction, Inc., Old Republic Insurance Company; Madison Construction Group, Inc.; Worthington Integrated Building Systems; McDowell Commercial Construction, LLC; Jollay

Masonry; National Fire Insurance Company of Hartford; R.J. Kenney Associates, Inc.; Antunovich Associates; TG Construction, LLC; Luis Trim Work; Nora Del Carmen Laos, Nora Del Carmon Lagos d/b/a Luis Trim Work; and Ovation Custom Trim, LLC, ... Third-Party Defendants,

McCrory Construction Company, LLC, ... Third-Party Plaintiff,

v.

Collins & Wright; Baker Roofing; Glasstech Inc.; Palmetto State Roofing and Sheet Metal; Strickland Waterproofing; Maiday, Inc.; and Atlas Drywall & Acoustics, Inc., ... Third Party Defendants,

Spann Roofing & Sheet Metal, Inc., ... Fourth-Party Plaintiff,

v.

Coastal Commercial Roofing Co., Inc., and Daniel Kniffen d/b/a East Coast Improvements, ... Fourth-Party Defendants,

Wallcraft Construction, Inc., ... Fourth-Party Plaintiff,

v.

Vienamin Petresku d/b/a BT Construction, LLC, ... Fourth-Party Defendant,

of which Lend Lease (US) Construction Inc., f/k/a Bovis Lend Lease, Inc., is the .... Appellant,

and

Antunovich Associates, Inc., is the .... Respondent.

PROOF OF SERVICE

I certify that I have served a copy of ***Respondent's Initial Brief*** and ***Designation of Matter to be Included in Record on Appeal*** on the following counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on **May 12, 2020.**

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