The Supreme Court of South Carolina

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N O T I C E

In the Matter of Edwin Donald Givens

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 16, 2015, beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

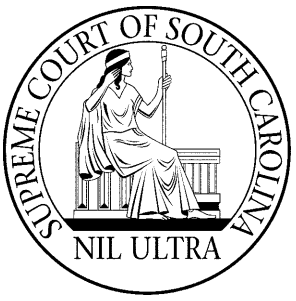
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Albert V. Smith, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 13, 2015

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
August 19, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

2014-002739 - The City of Columbia v. Haiyan Lin Pending

2015-000038 - The State v. Anthony Jackson Pending

2015-000172 - William Thompson v. Jon Ozmint Pending

PETITIONS FOR REHEARING

27545 - The State v. Christopher Broadnax Pending

27546 - The State v. Rushan Counts Pending

27552 - The State v. Robert Palmer Pending

27552 - The State v. Julia Gorman Pending

2015-MO-033 - The State v. Christopher Ryan Whitehead Denied 8/5/2015

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc.	Granted 08/12/15
5254-State v. Leslie Parvin	Pending
5295-Edward Freiburger v. State	Pending
5322-State v. Daniel D. Griffin	Pending
5324-State v. Charles A. Cain	Pending
5326-Denise Wright v. PRG	Pending
5328-Matthew S. McAlhaney v. Richard K. McElveen	Pending
5331-State v. Thomas Stewart	Pending
5332-State v. Kareem S. Harry	Pending
5333-Yancey Roof v. Kenneth A. Steele	Pending
5335-Norman J. Hayes v. State	Pending
5336-Philip Flexon v. PHC-Jasper, Inc.	Pending
2015-UP-169-Hollander v. The Irrevocable Trust Est. by James Brown	Pending
2015-UP-245-Melissa Jean Marks v. Old South Mortgage	Pending
2015-UP-266-State v. Gary Eugene Lott	Pending
2015-UP-273-State v. Bryan M. Holder	Pending
2015-UP-275-State v. David Eugene Rosier, Jr.	Pending
2015-UP-279-Mary Ruff v. Samuel Nunez	Pending
2015-UP-280-State v. Calvin J. Pompey	Pending
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Pending
2015-UP-301-State v. William J. Thomas, Jr.	Pending

2015-UP-303-Charleston Cty. Assessor v. LMP	Pending
2015-UP-304-Robert K. Marshall v. City of Rock Hill	Pending
2015-UP-305-Tanya Bennet v. Lexington Medical Center	Pending
2015-UP-306-Ned Gregory v. Howell Jackson Gregory	Pending
2015-UP-307-Allcare Medical v. Ahava Hospice	Pending
2015-UP-310-State v. Christopher Miller	Pending
2015-UP-311-State v. Marty Baggett	Pending
2015-UP-313-John T. Lucas v. The Bristol Condominium	Pending
2015-UP-314-Student No. 1 John Doe v. Board of Trustees	Pending
2015-UP-316-S.C. Second Injury Fund v. Sompo Japan Ins.	Pending
2015-UP-320-American Community Bank v. Michael R. Brown	Pending
2015-UP-325-Tilbros, Inc. v. Cherokee County	Pending
2015-UP-327-State v. Shawn Justin Burris	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Pending
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending
2015-UP-339-LeAndra Lewis v. L.B. Dynasty d/b/a Boom Boom Room	Pending
2015-UP-344-Robert Duncan McCall v. State	Pending
2015-UP-345-State v. Steve Young	Pending
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending
2015-UP-351-Elite Construction v. Doris Tummillo	Pending

2015-UP-353-Selene RMOF v. Melissa Furmanchik	Pending
2015-UP-354-In re: Estate of Sylvia J. Reagan (Shelly v. Becker)	Pending
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-358-Thomas Osborne v. State	Pending
2015-UP-359-In the matter of the Estate of Alice Shaw-Baker	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-362-State v. Martin D. Floyd	Pending
2015-UP-364-Andrew Ballard v. Tim Roberson	Pending
2015-UP-365-State v. Ahmad Jamal Wilkins	Pending
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending
2015-UP-372-State v. Sheldon Lamar Kelly	Pending
2015-UP-376-Ron Orlosky v. The Law Office of Jay Mullinax	Pending
2015-UP-377-Long Grove at Seaside v. Long Grover Property Owners	Pending
2015-UP-378-State v. James Allen Johnson	Pending
2015-UP-384-Robert C. Schivera v. C. Russell Keep, III	Pending
2015-UP-388-Joann Wright v. William Enos	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley	Pending
5231-Centennial Casualty v. Western Surety	Pending
5247-State v. Henry Haygood	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5278-State v. Daniel D'Angelo Jackson	Pending

5279-Stephen Brock v. Town of Mt. Pleasant	Pending
5286-State v. Graham F. Douglas	Pending
5291-Samuel Rose v. JJS Trucking	Pending
5297-Trident Medical Center v. SCDHEC	Pending
5298-George Thomas v. 5 Star	Pending
5299-SC Public Interest Foundation v. SCDOT	Pending
5301-State v. Andrew T. Looper	Pending
5302-State v. Marvin B. Green	Pending
5303-State v. Conrad Lamont Slocumb	Pending
5307-George Ferguson v. Amerco/U-Haul	Pending
5308-Henton Clemmons v. Lowe's Home Centers	Pending
5309-Bluffton Towne Center v. Beth Ann Gilleland-Prince	Pending
5312-R. C. Frederick Hanold, III v. Watson's Orchard POA	Pending
5313-State v. Raheem D. King	Pending
5314-State v. Walter M. Bash	Pending
5315-Paige Johnson v. Sam English Grading	Pending
5317-Michael Gonzales v. State	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-430-Cashman Properties v. WNL Properties	Pending
2014-UP-436-Jekeithlyn Ross v. Jimmy Ross	Pending
2014-UP-446-State v. Ubaldo Garcia, Jr.	Pending

2014-UP-470-State v. Jon Wynn Jarrard, Sr.	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending
2015-UP-041-Nathalie Davaut v. USC	Pending
2015-UP-042-Yancey Env. v. Richardson Plowden	Pending
2015-UP-050-Puniyani v. Avni Grocers	Pending
2015-UP-051-Chaudhari v. S.C. Uninsured Employer's Fund	Pending
2015-UP-059-In the matter of the estate of Willie Rogers Deas	Pending
2015-UP-065-Glenda Couram v. Lula Davis	Pending
2015-UP-066-State v. James Scofield	Pending
2015-UP-067-Ex parte: Tony Megna	Pending
2015-UP-068-Joseph Mickle v. Boyd Brothers	Pending
2015-UP-071-Michael A. Hough v. State	Pending
2015-UP-072-Silvester v. Spring Valley Country Club	Pending
2015-UP-074-State v. Akeem Smith	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-102-SCDCA v. Entera Holdings	Pending
2015-UP-107-Roger R. Riemann v. Palmetto Gems	Pending
2015-UP-110-Deutsche Bank v. Cora B. Wilks	Pending
2015-UP-111-Ronald Jarmuth v. International Club	Pending
2015-UP-115-State v. William Pou	Pending
2015-UP-119-Denica Powell v. Petsmart	Pending

2015-UP-126-First National Bank v. James T. Callihan	Pending
2015-UP-127-T.B. Patterson v. Justo Ortega	Pending
2015-UP-138-Kennedy Funding, Inc. v. Pawleys Island North	Pending
2015-UP-139-Jane Doe v. Boy Scout Troop 292	Pending
2015-UP-141-Gregory Ulbrich v. Richard Ulbrich	Pending
2015-UP-146-Joseph Sun v. Olesya Matyushevsky	Pending
2015-UP-152-Capital Bank v. Charles Moore	Pending
2015-UP-155-Ashlie Outing v. Velmetria Weeks	Pending
2015-UP-164-Lend Lease v. Allsouth Electrical	Pending
2015-UP-167-Cynthia Griffis v. Cherry Hill Estates	Pending
2015-UP-174-Tommy S. Adams v. State	Pending
2015-UP-176-Charles Ray Dean v. State	Pending
2015-UP-178-State v. Antwon M. Baker, Jr.	Pending
2015-UP-191-Carmen Latrice Rice v. State	Pending
2015-UP-201-James W. Trexler v. The Associated Press	Pending
2015-UP-203-The Callawassie Island v. Arthur Applegate	Pending
2015-UP-204-Robert Spigner v. SCDPPPS	Pending
2015-UP-205-Tri-County Dev. v. Chris Pierce (2)	Pending
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending
2015-UP-212-State v. Jabari Linnen	Pending

2015-UP-228-State v. John Edward Haynes	Pending
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending
2015-UP-249-Elizabeth Crotty v. Windjammer Village	Pending
2015-UP-256-State v. John F. Kennedy	Pending
2015-UP-259-Danny Abrams v. City of Newberry	Pending
2015-UP-262-State v. Erick Arroyo	Pending
2015-UP-281-SCDSS v. Trilicia White	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Charles Monroe Harris, Petitioner.

Appellate Case No. 2014-001236

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 27564
Heard June 3, 2015 – Filed August 19, 2015

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' decision affirming the trial court's denial of petitioner's motion for a directed

verdict on the charge of criminal solicitation of a minor. *State v. Harris*, Op. No. 2014-UP-160 (S.C. Ct. App. filed April 2, 2014). The issue in this case is whether the State presented sufficient evidence to withstand petitioner's directed verdict motion. We affirm.

Facts

At trial, the State presented evidence that over the course of two days, petitioner engaged in an online chatroom session with "Amy," whom he believed to be a thirteen year-old girl. However, Amy was an online persona created by Officer Casey Bowling of the Oconee County Sheriff's Office, a member of the Internet Crimes Against Children task force.

The transcripts of the chatroom sessions reveal petitioner asked Amy if she wanted to have sex and that petitioner arranged for a time and place for them to meet. Officer Bowling testified that to his knowledge, petitioner never traveled to meet Amy. He also testified that while petitioner was in custody he gave a statement to the police wherein he admitted he made a mistake in asking Amy to have sex with him, but also that he was sorry and his intentions were "just to teach her a lesson." Officer Bowling further testified petitioner told police he thought he was communicating with a thirteen year-old girl. Officer Bowling was the State's only witness at trial.

Petitioner's motion for a directed verdict was denied by the trial court. Petitioner was convicted of criminal solicitation of a minor.

On appeal, petitioner argued the trial court erred in denying his motion for a directed verdict. The Court of Appeals affirmed pursuant to Rule 220(b), SCACR.

Issue

> Did the Court of Appeals err in affirming the trial court's denial of petitioner's directed verdict motion?

Law/Analysis

Petitioner argues the Court of Appeals erred in affirming the trial court's denial of his directed verdict motion. Specifically, petitioner argues something more is required beyond communication with a minor to complete the crime of criminal solicitation of a minor. We disagree.

"When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011).

S. C. Code Ann. § 16-15-342 provides,

> A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

S.C. Code Ann. § 16-15-342(A) (Supp. 2014).

Petitioner argues something more than communication with the minor is required to complete the offense of criminal solicitation of a minor. We hold the offense is complete when the defendant knowingly contacts or communicates with the minor, or a person he believes to be a minor, with the intent to entice her to engage in sexual activity. *See generally State v. Gaines*, 380 S.C. 23, 667 S.E.2d 728 (2008) (finding the defendant's directed verdict motion on the charge of criminal solicitation of a minor was properly denied because the State presented evidence that the defendant communicated with a person whom he believed to be a minor with the intent of enticing her to participate in sexual activity, and § 16-15-342 required nothing more). We agree with the Court of Appeals that the trial court properly denied petitioner's directed verdict motion because the State presented direct evidence that petitioner communicated with a person he believed to be a minor with the intent to entice her to engage in sexual activity. Further, petitioner's statement that he only meant to teach Amy "a lesson" created a jury question

whether petitioner had the requisite intent[1] to entice Amy to engage in sexual activity.

The Court of Appeals' decision is **AFFIRMED**.

TOAL, C.J., BEATTY, HEARN, JJ., and Acting Justice Alison Renee Lee concur.

[1] During oral argument, petitioner cited *Morissette v. United States*, 342 U.S. 246 (1952), and *Elonis v. United States*, __ U.S. __, 135 S.Ct. 2001, __L.Ed. __ (2015), to support his argument that § 16-15-342 is a strict liability offense that dispenses with the requirement of criminal intent. However, § 16-15-342 has an express *mens rea* element of purpose or intent of enticing a minor to engage in sexual activity. This requires a jury to determine beyond a reasonable doubt whether the defendant possessed the requisite criminal intent. *See Morissette* at 274 ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."). Accordingly, § 16-15-342 is not a strict liability offense.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Brittany Johnson, Respondent.

Appellate Case No. 2013-002027

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27565
Heard March 4, 2015 – Filed August 19, 2015

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Brendon Jackson McDonald, all of Columbia, and Solicitor Jimmy A. Richardson II, of Conway, for Petitioner.

Appellate Defender Benjamin John Tripp, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State appeals the court of appeals' decision reversing Respondent Brittany Johnson's conviction for murder and remanding the case for a new trial. We reverse the decision of the court of appeals.

FACTUAL/PROCEDURAL HISTORY

On July 2, 2008, Brittany Johnson was arrested in Darlington County by United States Marshals for the shooting death of Monica Burroughs (the victim), which occurred on June 24, 2008, in Horry County.[1] Following her apprehension and initial incarceration in the Darlington County Detention Center, Johnson was transferred to the Conway Police Department in Horry County.

At trial, the State sought to introduce a videotaped recording of the police's interrogation of Respondent after she was arrested, and the court held a *Jackson v. Denno*[2] hearing to assess the voluntariness of the statement.

At the hearing, the State called Officer John King, who testified he and another officer interviewed Respondent at the Conway Police Department after she was arrested. King testified that the interview lasted approximately thirty minutes, and the videotape represented the extent of his interaction with Respondent. King testified that Respondent did not appear to be under the influence of alcohol or drugs when she gave her statement or to suffer from any mental or physical condition that would impair her ability to understand the questions; did not request a break from questioning, either to use the restroom or make a telephone call; and did not request anything to eat or drink. Further, King testified that he neither threatened Respondent, nor made any promises to her during the interrogation.

King explained that he orally advised Respondent of her rights pursuant to

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[1] Respondent, then seventeen years old, attacked the unarmed victim while the victim was seated in a friend's vehicle, "pistol-whipped" her, and ultimately shot her. Two witnesses confirmed the events of the shooting. In her statement to police, Respondent described a series of confrontations with the victim in the lead-up to the shooting.

[2] 378 U.S. 368 (1964).

Miranda v. Arizona,[3] and provided Respondent with an advisement of rights form that also listed the *Miranda* warnings. Specifically, King testified that he advised Respondent: (1) that she had a right to remain silent; (2) that anything she said could be used against her in court; (3) that she had a right to an attorney; (4) that if she could not afford an attorney, one would be provided for her prior to any questioning; and (5) that if she decided to make a statement, she had the right to stop speaking to police at any time. King testified that Respondent waived her rights orally and also by initialing and signing the form provided to her.

King further testified that he specifically asked Respondent if she desired to have an attorney present during the questioning, and Respondent replied, "no," and otherwise did not invoke her right to counsel during the interview.

Defense counsel called Respondent to testify. Contrary to King's testimony, Respondent testified that she was neither advised of her rights when she was arrested in Darlington County, nor when she was "booked" into jail at the Darlington County Detention Center, where she waited to be transferred to Horry County. However, Respondent testified that she repeatedly asked for an attorney:

> Q. At any point did you ask for an attorney?
>
> A. Yes, sir . . . . [T]he first time I asked for an attorney was . . . while I was being signed over by whoever [sic] that Marshal was . . . . that signed my paperwork.
>
> Q. And who did you ask, the Marshal or the people who were waiting to get you?
>
> A. The Marshal because at the time I was in, like, a partition where it's locked on both sides while he did my fingerprints and . . . . signed some paperwork to hand me back over to them.[4]

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[3] 384 U.S. 436 (1966).

[4] Respondent could not recall any identifying features or names of the arresting officers or the two officers who transferred her to Horry County.

Q. Okay. And when you asked this . . . gentleman, what specifically did you say regarding an attorney as best you can recall?

A. I just asked him was I going to need an attorney.

Q. Okay. You asked if you were going to need an attorney?

A. Uh-huh.

Q. Okay. And what did the Marshal say?

A. He was pretty sure I would.

Q. Okay. And after that did you ever ask anyone regarding receiving legal assistance?

A. Yes, sir.

Q. Okay. And tell the Court about that. When and what were the circumstances under which you made that request?

A. When we got back to Conway, upon entering the . . . police department . . . , I thought . . . I would just be, like, booked in and then put in jail but when I got there and they opened up the door to the interview room and when I went in there, I realized what was going on, and I said, "I need an attorney for this, don't I?"

Q. Uh-huh.

A. And I said, "I need an attorney for this."

Q. All right.

A. And their response was, "The Judge will . . . take care of that. When you get downtown, he issues a warrant."

Q. Uh-huh.

A. And that was the end of that.

Q. So, you said, "I need an attorney for this."

. . . .

Q. And once you received that response, once you requested an attorney and were told that the Judge would take care of it later, did you believe you had the right at that point to not answer any questions?

A. I was under the impression that it was okay. It was okay to talk.

During cross-examination, the State sought to discredit Respondent's testimony by eliciting testimony that she was experienced with the criminal justice system and had been represented by counsel in the past in the juvenile justice system. In addition, Respondent acknowledged that despite understanding her rights, she wished to waive them at that time, and further confirmed the recorded statement displayed her telling officers that she wished to waive her rights.

Based on this testimony, the trial court determined "beyond a reasonable doubt . . . that the confession or statement obtained by the defendant was freely and voluntarily given and that the same was given without duress, without coercion and without undue influence and without any threats, inducements or hope of reward." Moreover, the trial court found that Respondent,

> in compliance with *Miranda v. Arizona*[,] was advised of her constitutional rights; that is, the right to have an attorney present with her during the interview and the interrogation; that the Court would appoint an attorney for her if she was without funds to employ one without cost to her; that she had the right to remain silent; that she had the right to terminate after the interrogation at any time and not to answer any questions and that anything the defendant said could be used against her as evidenced in this case.

Finally, the trial court found that Respondent "knowingly[] understood these rights and intelligently waived such rights under the Fifth Amendment to remain silent and to have counsel present with her at the interview and interrogation," that "the decision to make the statement was a product of the defendant's own unfettered will," and that Respondent "had the capacity to comprehend the meaning and effects of waiving her constitutional rights." Therefore, the trial court found that the statement, if offered during trial, would be admitted into evidence.

Defense counsel objected to the ruling, explaining that it was "uncontradicted" that Respondent specifically said "I need an attorney for this" to a member of law enforcement, and therefore, the interviewing officers had no legal right to question Respondent "unless and until [Respondent] indicate[d] that [she] wish[ed] to speak." Consequently, defense counsel argued that the statement should not be admitted into evidence because Respondent invoked her right to counsel. On the other hand, the State argued that there was no evidence—other than Respondent's own testimony—that Respondent invoked her right to counsel, emphasizing Respondent's subsequent waiver of her rights and the videotaped interview in which she never invoked her right to counsel.

The trial court concluded that Respondent's testimony regarding her invocation of her right to counsel was "simply not plausible in that with Officer King she had ample opportunity to express her desire for . . . an attorney . . . , indicated not only on Mr. King's testimony but on the video itself," and therefore, his ruling regarding the voluntariness of Respondent's statement would remain in effect.

The State subsequently introduced Respondent's videotaped statement at trial over defense counsel's objection.[5] In her recorded statement, Respondent admitted she hit the victim with a gun before shooting her. The jury ultimately found Respondent guilty of murder, and the trial court sentenced her to thirty years' imprisonment.

Respondent appealed to the court of appeals. On appeal, she argued, *inter*

[5] The testimony surrounding the voluntariness of Respondent's statement that the jury heard was similar to the testimony adduced at the *Jackson v. Denno* hearing.

alia, that the trial court erred in admitting her statement to police into evidence after she invoked her right to counsel. Specifically, Respondent, citing *Edwards v. Arizona*, 451 U.S. 477 (1981), argued that because she allegedly invoked her right to counsel while in custody, the trial court—despite finding her testimony "not plausible"—erred in finding she knowingly, freely and voluntarily, waived her *Miranda* rights as required in a pretrial *Jackson v. Denno* hearing.

Without discussion, the court of appeals reversed and remanded Respondent's conviction, finding the trial court erred in admitting Respondent's statement to police. *See State v. Johnson*, No. 2013-UP-288 (S.C. Ct. App. June 26, 2013) (citing *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) ("If a suspect invokes her right to counsel, police interrogation must cease unless the suspect herself initiates further communication with police."); *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) (noting the State has the burden to prove a defendant validly waived his *Miranda* rights); *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) (noting the trial court must make an affirmative finding that there was no violation of *Miranda* during a *Jackson v. Denno* hearing before admitting a statement into evidence).

On appeal, the State asserts that the court of appeals (1) applied an incorrect appellate standard of review in assessing the trial judge's factual findings, (2) erred in reversing the trial court's ruling where Respondent was not being interrogated when she inquired about counsel and did not unequivocally invoke her right to counsel, and (3) failed to consider if Respondent was prejudiced by the admission of the evidence.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citation omitted); *see also State v. Kelly*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." (citation omitted)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded

in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

LAW/ANALYSIS

With respect to the dispositive issue on appeal, the State asks this Court to reverse the decision of the court of appeals because the trial court, as the preliminary fact-finder in a pre-trial evidentiary hearing, determined that Respondent's testimony was not credible, and the court of appeals was required under the applicable standard of review to accept this finding unless unsupported by the evidence. On the other hand, Respondent argues the trial court abused its discretion by employing a rule that responding to police questioning without an attorney precludes the possibility that a defendant requested an attorney before the questioning.

When analyzing a criminal defendant's invocation of her right to counsel, a trial court must make two separate inquiries:

> First, courts must determine whether the accused actually invoked his right to counsel. *See, e.g.*, *Edwards v. Arizona*, 451 U.S., at 484–85 (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); *Miranda v. Arizona*, 384 U.S. at 444–45 (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. *Edwards v. Arizona*, 451 U.S. at 485, 486, n.9.

Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam).

Because the trial court found Respondent's testimony that she actually invoked her right to counsel was "simply not plausible"—or lacked credibility—

Petitioner cannot satisfy the first prong of the inquiry.[6]

Credibility findings are treated as factual findings, and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record. *See, e.g., State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) (stating that in preliminary evidentiary matters, appellate court review is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record). Moreover, it is well-established under South Carolina law that credibility determinations are entitled to great deference. *See, e.g., State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 333 (1998) (Toal, J., dissenting) ("On appeal, [the appellate court is] to ascertain whether the trial court abused its discretion in admitting the evidence. Our task is not to engage in a de novo review of the evidence. Nor are we to usurp the authority of the trial court by attempting to judge the credibility of witnesses. The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity." (citations omitted)); *Sumpter v. State*, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994) ("Because the trial court's findings . . . rest largely on his evaluation of demeanor and credibility, those findings are given great deference.").

Here, the trial court's finding that Respondent lacked credibility is supported by the record. Not only did the trial court find that Respondent's testimony was not credible in assessing Respondent's actual demeanor on the witness stand, we note that Respondent could not recall with much specificity where or to whom she invoked her right to counsel, and fumbled in her responses as to whether her request was unequivocal. *Cf. State v. Stephenson*, 878 S.W.2d 530, 547 (Tenn. 1994) (finding the trial court did not err when it found defendant's testimony that he requested counsel was not credible); *Thomas v. State*, 738 S.E.2d 571, 574 (Ga. 2013) (affirming the trial court's ruling that testimony by the accused during a

[6] If an accused invokes her right to counsel, she may only be questioned thereafter in the presence of counsel, and her responses to further questioning outside the presence of counsel are admissible only if she initiates further questioning and then knowingly and intelligently waives her previously invoked right to counsel. *See, e.g., Smith v. Illinois*, 469 U.S. at 94–99. Here, the State admits that if the Court found Respondent clearly and unequivocally invoked her right to counsel, then the subsequent statement to police would have been inadmissible.

Jackson v. Denno hearing that he invoked his right to counsel both before and during his interview was not credible). Further, there is no requirement under the law that the trial court must believe a criminal defendant's version of events. *See State v. Boone*, 228 S.C. 438, 444, 90 S.E.2d 640, 643 (1955), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (stating that when deciding preliminary questions of admissibility, the trial court is "not bound to accept as true the defendant's testimony" (citation omitted)); *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) ("The fact that testimony is not contradicted directly does not render it undisputed." (citation omitted)). The practical effect of the trial court's finding that Respondent lacked credibility is that no invocation (either equivocal or unequivocal) occurred, as there was no other evidence that Respondent invoked her right to counsel prior to giving her statement.

Because the effect of the credibility finding is that Respondent did not unequivocally invoke her right to counsel, we further uphold the trial court's finding that Respondent's statement was voluntary. *See Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) ("Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement.") (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979))).[7]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is

REVERSED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[7] We need not reach the issues of whether Respondent was subjected to custodial interrogation when she allegedly invoked her right to counsel and whether Respondent was prejudiced by the trial court's admission of the videotape at trial because the credibility issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 355 S.C. 598, 578 S.E.2d 591 (1999).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Clear View Construction, LLC, 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, 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., Vincent Morales d/b/a Morales Masonry, and Miller/Player & Associates, Defendants,

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

And

Clear View Construction, LLC and Michael Franz are Respondents.

Appellate Case No. 2013-001403

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5343
Heard March 5, 2015 – Filed August 19, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jason Michael Imhoff and Carl Reed Teague, The Ward Law Firm, PA, both of Spartanburg, for Appellants.

Robert T. Lyles, Jr., Lyles & Lyles, LLC, of Charleston, and Michael B.T. Wilkes and Ellen S. Cheek, Wilkes Law Firm, PA, both of Spartanburg, all for Respondents.

FEW, C.J.: Marick Home Builders, LLC served as one of several general contractors for the construction of townhomes known as Stoneledge at Lake Keowee. The Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge") brought suit against Marick and others alleging construction defects in the townhomes. The circuit court granted summary judgment against Marick on its cross-claim for negligence, finding "Marick's negligence claim is a claim for equitable indemnity." The circuit court also found Marick's fault required summary judgment on its equitable indemnity claim. We affirm the court's ruling that Marick did not have a separate claim for negligence. However, we find Marick presented a question of fact on its equitable indemnity claim. We reverse the summary judgment on that issue and remand for trial on the equitable indemnity claim.

I. Facts and Procedural History

IMK Development Company developed a lakefront community known as Stoneledge at Lake Keowee. IMK hired Marick as a general contractor for the construction of townhomes in the community, and Marick subcontracted with Clear View Construction, LLC to perform stonework. Rick Thoennes is the principal of Marick.

In 2012, Stoneledge brought this lawsuit seeking damages resulting from construction defects that allowed water into the townhomes. Two of the construction defects alleged by Stoneledge related to the stonework performed by Clear View—"installation of stone below grade and complete lack of flashing at the water table at intersections of differing building components." Marick denied liability and brought cross-claims for equitable indemnity, negligence, breach of contract, and breach of warranty. The cross-claim defendants included the respondents Clear View and Michael Franz—Clear View's owner.

Clear View and Franz filed a motion for summary judgment on all of Marick's cross-claims, which the circuit court granted. The court ruled "Marick's negligence claim is a claim for equitable indemnity," explaining "the allegations and remedies sought by both actions stem directly from the potential liability [Marick] could face for the damages claimed by [Stoneledge]."

The court then considered the only remaining cross-claim against Clear View and Franz—equitable indemnity—and granted summary judgment. The court's decision was premised on its finding that Marick "cannot be adjudged without fault" because it failed to discover building code violations that resulted, in part, from Clear View's faulty installation of stone and failure to install flashing. Based on Marick's fault for not discovering these building code violations, the court concluded Marick's cross-claim "for equitable indemnity must fail."

The court addressed Marick's claims for breach of contract and breach of warranty in a separate order not at issue in this appeal. Marick filed a motion under Rule 59(e), SCRCP, which the circuit court denied.

II. Summary Judgment

Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." When the circuit court grants summary judgment on a question of law, we review the ruling de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

A. Negligence Claim

First, Marick argues its negligence cross-claim is a separate cause of action from its equitable indemnity claim, and thus, the circuit court erred in granting summary judgment.[1] We disagree.

[1] We address in this opinion only the circuit court's decision to grant summary judgment on the negligence cross-claim. We address the circuit court's ruling on the breach of contract and breach of warranty cross-claims in a separate appeal.

"The character of an action is primarily determined by the allegations contained in the complaint." *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). The issue Marick raises—whether the circuit court properly interpreted its claim for negligence as a claim for equitable indemnity—requires us to construe its cross-complaint, and thus presents a question of law. *See Monteith v. Harby*, 190 S.C. 453, 455, 3 S.E.2d 250, 250 (1939) ("The construction of a pleading involves a matter of law."). We therefore review the circuit court's ruling de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; *see also Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008) (stating appellate courts review questions of law de novo).

In its cross-complaint, Marick alleged Clear View's negligence caused Marick "to incur attorneys' fees, costs, and face potential liability to [Stoneledge]." The cross-complaint also stated, "Should [Stoneledge] prevail on [its] claims, Marick . . . is entitled to recover . . . legal fees and costs or [any amount it is] ordered to pay to [Stoneledge]." Marick's allegations demonstrate it did not sustain its own damages as a result of any negligence by the respondents. Rather, the allegations show Stoneledge is the party that suffered damages, and Marick's injuries arose exclusively from having to defend itself in Stoneledge's lawsuit. Consequently, the damages Marick seeks to recover resulted only from its potential liability to Stoneledge and from the expenses it incurred defending itself. When pressed at oral argument, Marick's counsel could not identify any damages it claimed in this lawsuit that did not arise exclusively from the claims made by Stoneledge.[2]

To support the finding that Marick's negligence cross-claim was actually a claim for equitable indemnity, the circuit court relied on two federal district court cases—*South Carolina National Bank v. Stone*, 749 F. Supp. 1419 (D.S.C. 1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880 (D.S.C. 1992) (*USF&G*). In *Stone*, the defendants asserted cross-claims for breach of contract, negligence, and fraud against co-

[2] Counsel made several arguments that Marick suffered damages independent of those arising from the claims made by Stoneledge. However, we have carefully examined the record, particularly Marick's cross-complaint, and we find Marick did not allege any damages except those it suffered exclusively as a result of potential liability to Stoneledge. As for any damages Thoennes contends he sustained independent of the Stoneledge claim, see section II. B. of this opinion.

defendants that settled with the plaintiffs. 749 F. Supp. at 1432-33. The district court barred the non-settling defendants from asserting these cross-claims against the settling defendants because it found they were not independent causes of action. 749 F. Supp. at 1433. The court explained the cross-claims arose only if the non-settling defendants were liable to the plaintiffs, and "these purported causes of action are nothing more than claims for . . . indemnification with a slight change in wording." *Id.*

Similarly, in *USF&G*, the defendants argued they had "independent claims" against a co-defendant in addition to their claim for indemnification. 788 F. Supp. at 881 n.1. The district court barred the defendants from bringing these claims, finding "without [the] plaintiffs suing the . . . defendants[,] the 'independent claims' . . . would not exist," and thus "these claims are really nothing more than claims for indemnity." *Id.*

We agree with *Stone* and *USF&G* and find the reasoning in those decisions applies to this case. Under Marick's own allegations, its negligence cross-claim arose only when it faced potential liability for Stoneledge's damages and incurred fees and costs defending against Stoneledge's lawsuit. Marick's negligence cross-claim is nothing more than a claim for equitable indemnity.

Marick argues *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), supports the argument that it may recover from the respondents under a negligence theory independent of its claim for equitable indemnity. *Addy* is one of the seminal cases in South Carolina on the theory of equitable indemnity. *See Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992) (stating, "This Court has long recognized the principle of equitable indemnification," and citing *Addy*). We agree *Addy* controls this case to the extent it shows Marick may assert a claim for equitable indemnity against a negligent co-defendant. *See Addy*, 257 S.C. at 33, 183 S.E.2d at 709 (stating "where the wrongful act of the defendant has involved the plaintiff in litigation with others . . . as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages"); *see also McCoy v. Greenwave Enters., Inc.*, 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) ("In cases of . . . equitable indemnification, 'reasonable attorney['s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.'" (second alteration in original) (quoting *Addy*, 257 S.C. at 33, 183 S.E.2d at 710)).

However, we do not read *Addy* to support Marick's separate negligence claim against Clear View. First, the only claim made by the *Addy* appellants was for indemnity. *See* 257 S.C. at 31, 183 S.E.2d at 709 ("The appellants also [in addition to their answer] filed a cross action against the respondent demanding judgment in an amount equal to any judgment which may be rendered against them in favor of the Addys, together with the costs of the action and attorney fees for defending such."); 257 S.C. at 32, 183 S.E.2d at 709 (stating "the appellants contend . . . [an indemnity] contract was created by operation of law and under such an implied contract of indemnity they are entitled to recover from the respondent the fees paid their attorneys in the successful defense of this action"); 257 S.C. at 32-33, 183 S.E.2d at 709 ("We think this appeal can be disposed of by a determination of the single question of whether the appellants . . . are entitled to recover their costs and attorneys' fees incurred in the successful defense of this action under an implied contract, or because they were put to the necessity of defending themselves against the lessees' claim by the tortious conduct of the contractor . . . ."); 257 S.C. at 33, 183 S.E.2d at 709 (stating "the [appellants] seek to recover from the contractor the attorneys' fees incurred by them in defending themselves against the claim asserted by the tenants"). Second, the only theory of recovery the supreme court addressed in *Addy* was indemnity.

Finally, *Addy* is distinguishable from this case on the question of whether Marick may assert a claim for negligence. In *Addy*, the appellants suffered their own damages as a direct result of the contractor's conduct—independent of having to defend the lawsuit against them. As the supreme court explained, "the appellants . . . are the owners of a store building," and the dispute arose after "the appellants engaged . . . a general contractor . . . to make . . . needed repairs" to the building. 257 S.C. at 31, 183 S.E.2d at 708. "In making the necessary repairs the [contractor] used an oxygen acetylene torch for the purpose of welding certain steel beams in the building. This welding operation started a fire in [the] building . . . ." *Id.* Thus, to the extent *Addy* allowed a direct claim for negligence against the contractor, the claim would have been based on damages to the building that the *Addy* appellants suffered directly as a result of the fire. Unlike in this case, therefore, the *Addy* appellants did suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit.

We find the circuit court properly granted summary judgment on Marick's negligence cross-claim because it is not an independent cause of action from

Marick's equitable indemnity claim. The court correctly ruled that the only potential claim for the damages Marick incurred defending against Stoneledge's lawsuit is for equitable indemnity.

B. Thoennes's Appeal

In addition to the reasons set forth above, we affirm summary judgment as to Thoennes's negligence cross-claim because we find he presented no issues preserved for appeal. The circuit court found only Marick—not Thoennes—asserted cross-claims against the respondents. Thoennes did not file a Rule 59(e), SCRCP, motion to contest this finding and did not raise the finding as an issue on appeal or argue it in his brief. *See Ness v. Eckerd Corp.*, 350 S.C. 399, 403-04, 566 S.E.2d 193, 196 (Ct. App. 2002) ("If a trial judge grants relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." (citation and internal quotation marks omitted)); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

C. Equitable Indemnity

We find the circuit court erred in granting summary judgment on the merits of Marick's equitable indemnity cross-claim because Marick presented a question of fact as to whether it was at fault for the alleged construction defects.

An equitable indemnity claim may arise when a third party (Stoneledge) makes a claim against the indemnity plaintiff (Marick) for damages the third party sustained as a result of another party's tortious conduct. *See Addy*, 257 S.C. at 33, 183 S.E.2d at 709 (stating an indemnity plaintiff may recover damages for equitable indemnity "where the wrongful act of the [indemnity] defendant has involved the [indemnity] plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest" (citation omitted)). The right of indemnity allows the indemnity plaintiff to recover the necessary expenses it incurred defending itself against the third party's claim. *Id.* Whether the right exists depends on the nature of the relationship between the indemnity plaintiff and the party who caused the third party's damages—Marick's subcontractor Clear View. *See Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (stating "a right of indemnity exists whenever the

relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other"). A general contractor's relationship with its subcontractor in the residential construction context is sufficient to support the general contractor's right of equitable indemnity against the subcontractor. *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994); *see generally McCoy*, 408 S.C. at 359, 360-61, 759 S.E.2d at 138 (stating "to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established," and giving examples, including the relationship of residential contractor/subcontractor (citation and internal quotation mark omitted)).

To recover damages on its equitable indemnity claim, Marick must prove the following: (1) Clear View was at fault in causing Stoneledge's water intrusion damages; (2) Marick has no fault for those damages; and (3) Marick incurred expenses that were necessary to protect its interest in defending against Stoneledge's claim. *See Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013) (stating the elements of equitable indemnity); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011) (same); *see also Addy*, 257 S.C. at 33, 183 S.E.2d at 709-10 (describing the requirements for proving equitable indemnity).

The circuit court granted summary judgment because it found no genuine issue as to the second element—that Marick must have been without fault in causing Stoneledge's damages. *See Meacher*, 392 S.C. at 486, 709 S.E.2d at 74 ("The most important requirement for . . . equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." (citation omitted)); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999) ("[T]here can be no [equitable] indemnity among mere joint tortfeasors."). Under this element, Marick cannot recover for equitable indemnity if it had any fault in causing Stoneledge's damages. We have carefully examined the record in this case, and we cannot say as a matter of law Marick is at fault. Rather, we find the evidence is conflicting, and viewing the evidence in the light most favorable to Marick, the record contains evidence a factfinder could reasonably find supports the conclusion Marick was not at fault. Because of this conflicting evidence, the equitable indemnity cause of action must be remanded for a trial.

III. Conclusion

The circuit court's order granting summary judgment is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for trial.

THOMAS, J., concurs.

LOCKEMY, J., concurring in part and dissenting in part: I respectfully concur in part and dissent in part. I agree with the majority that the trial court erred in granting summary judgment on Marick's cross-claim for equitable indemnity. I disagree, however, with the majority that summary judgment was proper on Marick's negligence cross-claim. I believe *Addy v. Bolton*[3] and its progeny support Marick's theory of recovery of attorney's fees and costs as "special damages" under a negligence action. Therefore, I would reverse the trial court's grant of summary judgment on the negligence cross-claim and remand for further proceedings.

In *Addy*, Thomason contracted to make repairs for a retail building owned by the Boltons and leased to the Addys. 257 S.C. at 31, 183 S.E.2d at 708. During the repairs, Thomason set fire to the building damaging the Addys' goods. *Id.* The Addys sued the Boltons and Thomason, alleging the Boltons were negligent in engaging unskillful agents to make the repairs. *Id.* Thus, the Boltons were sued for their own negligence, not vicariously for the negligence of another party. The Boltons cross-claimed against Thomason for indemnity from any judgment that might be recovered plus attorney's fees incurred in defending the action. *Id.* at 31, 183 S.E.2d at 709. At trial, the jury returned a verdict against Thomason only, and the Boltons were exonerated from all liability. *Id.* at 32, 183 S.E.2d at 709. The trial court, however, refused to award indemnity and granted a directed verdict against the Boltons on their cross-claim. *Id.* The Boltons appealed and our supreme court reversed, basing its decisions on two alternative holdings. *See id.* at 33, 183 S.E.2d at 709 ("The weight of authority sustains [the Boltons'] 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 Addys'] claim by the tortious conduct of [Thomason], or by his breach of contract." (emphasis added)). First, it found the Boltons could recover attorney's fees incurred in the

[3] 257 S.C. 28, 183 S.E.2d 708 (1971).

action because they were forced to defend themselves against the Addys' claim by the tortious conduct of Thomason. *Id.* Specifically, the court held,

> [W]here the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorney['s] fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. In order to recover attorney['s] fees under this principle, the plaintiff must show: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of [the] defendant's tortious conduct; (2) that the dispute was with a third party—not with the defendant; and (3) that the plaintiff incurred attorney['s] fees connected with that dispute. If the attorney['s] fees were incurred as a result of a breach of contract between plaintiff and defendant, the defendant will be deemed to have contemplated that his breach might cause plaintiff to seek legal services in his dispute with the third party.

Id. at 33, 183 S.E.2d at 709-10 (internal quotation marks omitted); *see also* Restatement (Second) of Torts § 914 (1979) ("One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.").

Alternatively, the *Addy* court found that, on the facts of the case, the Boltons could also recover expenses incurred in the litigation under the theory of equitable indemnity. 257 S.C. at 33-34, 183 S.E.2d at 710; *see also Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 59, 398 S.E.2d 500, 504 (Ct. App. 1990), *aff'd by* 307 S.C. 128, 414 S.E.2d 118 (1992). Because the jury exonerated the Boltons of any fault for the Addys' injuries, equity required Thomason, the at-fault party, to indemnify them as a matter of law. *Addy*, 257 S.C. at 34, 183 S.E.2d at 710.

In the present case, the trial court granted summary judgment on Marick's negligence cross-claim against Clear View, finding it was merely a disguised claim for equitable indemnification. I believe the trial court erred because *Addy* specifically allows the recovery of attorney's fees and costs "*at law in the form of special damages, or* in equity in the form of equitable indemnity." *Griffin v. Van Norman*, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990) (stating that in *Addy*, the supreme court "held that recovery may be had *at law in the form of special damages, or* in equity in the form of equitable indemnity" (emphasis added)). Here, as in *Addy*, "the wrongful act of [Clear View] has involved [Marick] in litigation with [Stoneledge]" such that it has made it necessary for Marick "to incur expense to protect [its] interest." Specifically, Stoneledge sued Marick and Clear View based on allegations that Clear View's stone work was deficient, which Clear View has admitted. As a result of the underlying action, Marick has incurred expenses, including attorney's fees, in an attempt to protect itself from liability to Stoneledge. Thus, *Addy* supports Marick's attempt to recover attorney's fees and costs as "special damages" arising from Clear View's tortious conduct.

Admittedly, the cases Marick cites in its brief do not involve the recovery of "special damages" under an independent cause of action for negligence. For example, in *Town of Winnsboro*, Turner-Murphy, the party awarded attorney's fees, argued on appeal "that it [wa]s entitled to recover its attorney's fees as an element of special damage arising directly from Specialty's breach of contract *or, alternatively*, under the principle of equitable indemnity." 303 S.C. at 55, 398 S.E.2d at 502 (emphasis added). This court agreed, finding *Addy* "clearly supports the position of Turner-Murphy" and "hold[ing] that the judgment of the circuit court may be affirmed *both* on the theory of special damages *and* on the theory of equitable indemnity." (emphasis added)). *Id.* at 59, 398 S.E.2d at 504. Thus, although *Town of Winnsboro* involved the recovery of attorney's fees and costs as "special damages" arising from a breach of contract, it stands for the proposition that a party can recover these damages *at law* independent of a claim for equitable indemnity.

I see no reason to allow recovery of attorney's fees and costs as "special damages" in a breach of contract action, yet deny it under a negligence cause of action. The plain language of *Addy* makes clear that attorney's fees and costs incurred by Marick in defending itself against Stoneledge's claim "should be treated as the *legal consequences* of the original wrongful act and may be recovered as

damages." Notably, nothing in *Addy* or any other controlling authority[4] precludes Marick from recovering these damages under a negligence theory. *Addy* did not limit the recovery of these damages to breach of contract actions alone. 257 S.C. at 33, 183 S.E.2d at 709 (stating that to recover attorney's fees and costs under the theory of special damages, "the plaintiff must show . . . that [he became] involved in a legal dispute *either* because of a breach of contract by the defendant *or because of [the] defendant's tortious conduct*" (emphasis added)); *see also id.* at 33, 183 S.E.2d at 710 ("*If* the attorney['s] fees were incurred as a result of a breach of contract between plaintiff and defendant, the defendant will be deemed to have contemplated that his breach might cause plaintiff to seek legal services in his dispute with the third party." (emphasis added)). Although the concept of "special damages" generally arises in breach of contract actions, these damages can also arise in tort. *See* 11 S.C. Jur. *Damages* § 4 (1992) ("*In a tort action*, special damages must be the direct consequence of the illegal act done, and flowing from it . . . ." (emphasis added) (internal quotation marks omitted)).

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[4] In finding Marick's negligence cross-claim was merely a disguised claim for equitable indemnification, the circuit court and the majority rely on two federal district court cases—*South Carolina National Bank v. Stone*, 749 F. Supp. 1419 (D.S.C. 1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880 (D.S.C. 1992). I find these cases unpersuasive for several reasons. First, federal district court decisions are not binding on this court. *See Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 209, 731 S.E.2d 324, 326 (Ct. App. 2012). Next, I question the applicability of these cases because they involved federal securities law, which, unlike the present general contractor and subcontractor context, have policies that disfavor indemnification. *See Stone*, 749 F. Supp. at 1429; *Patriot's Point Dev. Auth.*, 788 F. Supp. at 882 n.2. Most importantly, these decisions conflict with the holding in *Addy*—a decision of our supreme court that we must follow. *See Town of Winnsboro*, 303 S.C. at 60-61, 398 S.E.2d at 505 ("Of course, the rule in *Addy*, as a decision of the [s]upreme [c]ourt, must prevail.").

Based on the foregoing, I would reverse the circuit court's grant of summary judgment on Marick's negligence cross-claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Builders FirstSource-Southeast Group, 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, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises, Gunter Heating & Air, All Pro Heating, A/C & Refrigeration, LLC, Coleman Waterproofing, Heyward Electrical Services, Inc., Tinsley Electrical, LLC, Hutch N Son Construction, Inc., Carl Catoe Construction, Inc., T.G. Construction, LLC, Delfino Construction, Francisco Javier Zarate d/b/a Zarate Construction, Alejandro Avalos Cruz, Herberto Acros Hernandez, Martin Hernandez-Aviles, Francisco Villalobos Lopez, Ambrosio Martinez-Ramirez, Ester Moran Mentado, Socorro Castillo Montel, Upstate

Utilities, Inc., Southern Basements, Inc., MJG Construction and Homebuilders, Inc. d/b/a MJG Construction, KMAC, Inc., d/b/a KMAC North Carolina, Eufacio Garcia, Everado Jarmamillio, Garcia Parra Insulation, Inc., J&J Construction, Jose Nino, Jose Manuel Garcia, Eason Construction, Inc., and Vincent Morales d/b/a Morales Masonry, Miller/Player & Associates, Defendants,

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

And Builders FirstSource-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.

Appellate Case No. 2013-001404

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5344
Heard June 4, 2015 – Filed August 19, 2015

AFFIRMED

Jason Michael Imhoff and Carl Reed Teague, The Ward Law Firm, PA, both of Spartanburg, for Appellants.

Robert T. Lyles, Jr., Lyles & Lyles, LLC, of Charleston, for all Respondents;

David A. Root, Kernodle Root & Coleman, of Charleston, for Respondent Builders FirstSource;

Mason A. Goldsmith, Elmore Goldsmith, PA, of Greenville, for Respondent Southern Concrete Specialties;

Michael B.T. Wilkes and Ellen S. Cheek, Wilkes Law Firm, PA, both of Spartanburg, for Respondents Clear View Construction, LLC, and Michael Franz.

FEW, C.J.: Marick Home Builders, LLC served as one of several general contractors for the construction of townhomes known as Stoneledge at Lake Keowee. The Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge") brought suit against Marick and others alleging construction defects in the townhomes. The circuit court granted summary judgment against Marick on its cross-claims for breach of contract and breach of warranty, finding these claims were "merely disguised . . . claims for equitable indemnity and are not viable as alternative causes of action." We affirm.

I. Facts and Procedural History

IMK Development Company developed a lakefront community known as Stoneledge at Lake Keowee. IMK hired Marick as a general contractor for the construction of townhomes in the community. Marick subcontracted with Builders FirstSource-Southeast Group, Southern Concrete Specialties, Inc., Clear View Construction, LLC, and others. Rick Thoennes is the principal of Marick.

In 2012, Stoneledge brought this lawsuit seeking damages resulting from construction defects that allowed water into the townhomes. Marick denied liability and brought cross-claims for breach of contract (including a claim for

contractual indemnity), breach of warranty, negligence, and equitable indemnity. The cross-claim defendants included the respondents Builders FirstSource, Southern Concrete, Clear View and Michael Franz—Clear View's owner.

The respondents filed motions for summary judgment on all of Marick's cross-claims, which the circuit court granted. The circuit court found Marick's breach of contract and breach of warranty claims were "merely disguised . . . claims for equitable indemnity." The court explained the claims "stem from the potential liability Marick faces from the claims brought against it by [Stoneledge]" because "Marick is not alleging personal injury or property damage as to it[self]."

The court addressed Marick's claims for negligence and equitable indemnity in a separate order not at issue in this appeal. Marick filed a motion under Rule 59(e), SCRCP, which the circuit court denied.

II. Summary Judgment

Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." When the circuit court grants summary judgment on a question of law, we review the ruling de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

A. Breach of Contract and Warranty Claims

Marick argues its cross-claims for breach of contract and breach of warranty are separate causes of action from its equitable indemnity claim, and thus, the circuit court erred in granting summary judgment.[1] We disagree.

"The character of an action is primarily determined by the allegations contained in the complaint." *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). The issue Marick raises—whether the circuit court properly interpreted its claims for breach of contract and breach of warranty as one claim for equitable indemnity—requires us to construe its cross-complaint, and thus presents a question of law. *See Monteith v. Harby*, 190 S.C. 453, 455, 3 S.E.2d 250, 250 (1939) ("The construction of a pleading involves a matter of law."). We therefore review the circuit court's ruling de novo. *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41; *see also Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008) (stating appellate courts review questions of law de novo).

In its cross-complaint, Marick alleged the following to support its claims for breach of contract and breach of warranty, respectively:

> If [Stoneledge's] allegations are true, . . . [the respondents] have provided defective materials or services in breach of each of their contracts with Marick. . . . [S]aid breach of contract has resulted or could result in damage to [Stoneledge], which could or will be assessed against Marick.
>
> If [Stoneledge's] allegations are true . . . , [the respondents] breached their express and/or implied warranties. . . . Should [Stoneledge] prevail on [its] claims, Marick will be damaged as a direct and proximate result of [the respondents'] breach of their express and/or implied warranties.

[1] We address in this opinion only the circuit court's decision to grant summary judgment on the breach of contract and breach of warranty cross-claims. We address the circuit court's ruling on the negligence cross-claim in a separate appeal.

Marick's allegations demonstrate it did not sustain its own damages as a result of any breach of contract or breach of warranty by the respondents. Rather, the allegations show Stoneledge is the party that suffered damages, and Marick's injuries arose exclusively from having to defend itself in Stoneledge's lawsuit. Consequently, the damages Marick seeks to recover resulted only from its potential liability to Stoneledge and from the expenses Marick incurred defending itself. When pressed at oral argument, Marick's counsel could not identify any damages it claimed in this lawsuit that did not arise exclusively from the claims made by Stoneledge.[2]

To support the finding that Marick's breach of contract and breach of warranty cross-claims were actually claims for equitable indemnity, the circuit court relied on two federal district court cases—*South Carolina National Bank v. Stone*, 749 F. Supp. 1419 (D.S.C. 1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880 (D.S.C. 1992) (*USF&G*). In *Stone*, the defendants asserted cross-claims for breach of contract, negligence, and fraud against co-defendants that settled with the plaintiffs. 749 F. Supp. at 1432-33. The district court barred the non-settling defendants from asserting these cross-claims against the settling defendants because it found they were not independent causes of action. 749 F. Supp. at 1433. The court explained the cross-claims arose only if the non-settling defendants were liable to the plaintiffs, and "these purported causes of action are nothing more than claims for . . . indemnification with a slight change in wording." *Id.*

Similarly, in *USF&G*, the defendants argued they had "independent claims" against a co-defendant in addition to their claim for indemnification. 788 F. Supp. at 881 n.1. The district court barred the defendants from bringing these claims, finding "without [the] plaintiffs suing the . . . defendants[,] the 'independent claims' . . . would not exist," and thus "these claims are really nothing more than claims for indemnity." *Id.*

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[2] Counsel made several arguments that Marick suffered damages independent of those arising from the claims made by Stoneledge. However, we have carefully examined the record, particularly Marick's cross-complaint, and we find Marick did not allege any damages except those it suffered exclusively as a result of potential liability to Stoneledge. As for any damages Thoennes contends he sustained independent of the Stoneledge claim, see section II. C. of this opinion.

We agree with *Stone* and *USF&G* and find the reasoning in those decisions applies to this case. Under Marick's own allegations, its cross-claims arose only when it faced potential liability for Stoneledge's damages and incurred fees and costs defending against Stoneledge's lawsuit. Marick's breach of contract and breach of warranty cross-claims are nothing more than claims for equitable indemnity.

Marick argues *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), supports the argument that it may recover from the respondents under a breach of contract theory independent of its claim for equitable indemnity. *Addy* is one of the seminal cases in South Carolina on the theory of equitable indemnity. *See Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992) (stating, "This Court has long recognized the principle of equitable indemnification," and citing *Addy*). We agree *Addy* controls this case to the extent it shows Marick may assert a claim for equitable indemnity against the respondents. *See Addy*, 257 S.C. at 33, 183 S.E.2d at 709 (stating "where the wrongful act of the defendant has involved the plaintiff in litigation with others . . . as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages"); *see also McCoy v. Greenwave Enter., Inc.*, 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) ("In cases of . . . equitable indemnification, 'reasonable attorney['s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.'" (second alteration in original) (quoting *Addy*, 257 S.C. at 33, 183 S.E.2d at 710)).

However, we do not read *Addy* to support Marick's separate claim for breach of contract. First, the only claim made by the *Addy* appellants was for indemnity. *See* 257 S.C. at 31, 183 S.E.2d at 709 ("The appellants also [in addition to their answer] filed a cross action against the respondent demanding judgment in an amount equal to any judgment which may be rendered against them in favor of the Addys, together with the costs of the action and attorney fees for defending such."); 257 S.C. at 32, 183 S.E.2d at 709 (stating "the appellants contend . . . [an indemnity] contract was created by operation of law and under such an implied contract of indemnity they are entitled to recover from the respondent the fees paid their attorneys in the successful defense of this action"); 257 S.C. at 32-33, 183 S.E.2d at 709 ("We think this appeal can be disposed of by a determination of the single question of whether the appellants . . . are entitled to recover their costs and attorneys' fees incurred in the successful defense of this action under an implied

contract, or because they were put to the necessity of defending themselves against the lessees' claim by the tortious conduct of the contractor . . . ."); [3] 257 S.C. at 33, 183 S.E.2d at 709 (stating "the [appellants] seek to recover from the contractor the attorneys' fees incurred by them in defending themselves against the claim asserted by the tenants"). Second, the only theory of recovery the supreme court addressed in *Addy* was indemnity.

Finally, *Addy* is distinguishable from this case on the question of whether Marick may assert a claim for breach of contract. In *Addy*, the appellants suffered their own damages as a direct result of the contractor's conduct—independent of having to defend the lawsuit against them. As the supreme court explained, "the appellants . . . are the owners of a store building," and the dispute arose after "the appellants engaged . . . a general contractor . . . to make . . . needed repairs" to the building. 257 S.C. at 31, 183 S.E.2d at 708. "In making the necessary repairs the [contractor] used an oxygen acetylene torch for the purpose of welding certain steel beams in the building. This welding operation started a fire in [the] building . . . ." *Id.* Thus, to the extent *Addy* allowed a direct claim for breach of contract against the contractor, the claim would have been based on damages to the building that the *Addy* appellants suffered directly as a result of the fire. Unlike in this case, therefore, the *Addy* appellants did suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit.

We find the circuit court properly granted summary judgment on Marick's breach of contract and breach of warranty cross-claims because they are not independent causes of action from Marick's equitable indemnity claim.

B. Contractual Indemnity

Marick also argues it has a right of contractual indemnity against the respondents, and the circuit court erred in granting summary judgment on that claim. We disagree.

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[3] This passage continues, "or by his breach of contract," words which appear in one other place in the opinion. 257 S.C. at 33, 183 S.E.2d at 709. However, the supreme court was not referring with these words to the appellants' right to recover for breach of contract, but to the contractor's conduct being a breach of the contract resulting in the fire.

Marick contends it had contracts with the respondents that provided, "Subcontractor shall indemnify the Contractor . . . from and against claims, damages, losses, expenses and fees arising out of or resulting from performance of the Subcontractors." However, the circuit court found Marick "offered no evidence that the contracts applied to the [Stoneledge] Project." In particular, the court found as a matter of law the contracts were executed in October 2007—after all respondents completed their work on the Stoneledge project.

The record supports the circuit court's finding. The only contracts in the record are dated either October 1 or October 31, 2007. Clear View submitted invoices to Marick showing Clear View received final payment for its work on the Stoneledge project before August 30, 2007. Builders FirstSource and Southern Concrete presented evidence they completed their work on the Stoneledge project in June 2007. A witness for Builders FirstSource testified the contract dated October 1, 2007 was not "the contract that governed the work" on the Stoneledge project "because it was signed after" Builders FirstSource finished its work on the project. The circuit court also noted the contracts do not state they govern the Stoneledge project.

In the face of this evidence, Marick was obligated to present evidence demonstrating a question of fact exists as to whether the contracts applied to the respondents' work on the Stoneledge project.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRCP; *see also Lord v. D & J Enters., Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) ("Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991))); *Sides v. Greenville Hosp. Sys.*, 362

S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004) ("Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." (citing *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545)).

The circuit court found Marick made no such showing, stating "to the extent Marick argues that it does have contracts with [the respondents] that contain indemnification provisions, it has offered no evidence that the contracts applied to the [Stoneledge] Project."

On appeal, Marick relies on one piece of evidence to support its position: the deposition testimony of a witness Builders FirstSource designated under Rule 30(b)(6), SCRCP. When the witness was asked whether there were "[a]ny contracts between you and any person or entity relating . . . to the [Stoneledge] project?" the witness answered, "My understanding, we had two contracts; one was [with a subcontractor], and the other one was with Marick Builders. They were our only two contracts in the project." Marick asserts this evidence creates a question of fact "concerning the Respondents' contractual obligations to indemnify Marick and [their] breach of the Contracts for failing to abide by the 'Hold Harmless' Provision of the Contracts." We disagree.

First, the testimony does not contain specific facts showing a genuine issue for trial. In particular, because the witness did not identify any writing expressing the contract, his testimony would not support a finding that the "contract" is the same one, or even in the same form, as the one Marick presented from October 2007. Thus, the testimony would not support a finding that a contract applicable to Builders FirstSource's work on the Stoneledge project contained an indemnity provision. It certainly does not support a finding that Southern Concrete or Clear View had a contract applicable to the Stoneledge project containing an indemnity provision. We find this evidence does not establish the existence of a genuine issue of material fact. *See Town of Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166 ("[I]t is not sufficient for a party to create . . . an issue of fact that is not genuine.").

Second, we question the admissibility of the testimony. The mere existence of a contract does not indicate whether the contract contains an indemnity provision. This witness's testimony creates an issue of fact for trial only to the extent it proves the content of the contract—specifically that it contained an indemnity provision. However, Rule 1002 of the South Carolina Rules of Evidence provides, "To prove

the content of a writing, recording, or photograph, the original writing, recording, or photograph is required . . . ." Thus, the witness's testimony—without reference to a specific writing—is inadmissible to prove the contract contained an indemnity provision.

We find the circuit court correctly granted summary judgment on Marick's contractual indemnity claim. Because we affirm the circuit court's ruling as explained above, it is not necessary to address the other reasons the court gave for granting summary judgment on this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when the court's resolution of the issues it does address are dispositive of the appeal).

C. Thoennes's Appeal

In addition to the reasons set forth above, we affirm summary judgment as to Thoennes's breach of contract and breach of warranty cross-claims because we find he presented no issues preserved for appeal. The circuit court found only Marick—not Thoennes—asserted cross-claims against the respondents. Thoennes did not file a Rule 59(e), SCRCP, motion to contest this finding and did not raise the finding as an issue on appeal or argue it in his brief. *See Ness v. Eckerd Corp.*, 350 S.C. 399, 403-04, 566 S.E.2d 193, 196 (Ct. App. 2002) ("If a trial judge grants relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." (citation and internal quotation marks omitted)); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

III. Conclusion

The circuit court's order granting summary judgment is **AFFIRMED**.

HUFF and WILLIAMS, JJ., concur.