

Construction Law Digests
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Chapter 13. Negligence

[References](#)

§ 13:1. Duty of care

West's Key Number Digest

West's Key Number Digest, Negligence  210 to 222

Builder was not automatically responsible for negligence of subcontractor. Owners bought home clad with a synthetic stucco material known as an exterior insulation and finish system (E.I.F.S.). About two years later, owners determined that defective installation of the E.I.F.S. was allowing moisture to enter the home which was damaging the structure. Owners sued builder for negligence, breach of express warranties, breach of the implied warranty of workmanlike service, and strict liability. The trial court granted builder a directed verdict as to the express warranty and strict liability claims, and the jury awarded owners \$6,000 in damages on the claims for negligence and breach of the implied warranty of workmanlike service. **AFFIRMED.** Owners argued that, in South Carolina, a general contractor is "automatically responsible" for the negligence of a subcontractor. Owners acknowledged, however, that the trial court correctly instructed the jury that builder was required to exercise only the degree of care reasonably expected in the industry in constructing and supervising the construction of owners' home. **HELD:** Owners' assertion of "automatic liability" is more appropriate to their claim for breach of the implied warranty of workmanlike service. In constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is free of latent defects. This warranty extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder for a reasonable period after the home's construction. Regarding owners' negligence claim, though, builder owed owners a duty to exercise that reasonable degree of skill possessed by members of the building occupation, and to exercise reasonable care and adequate supervision to ensure that work was done in conformity with applicable building codes and in good and workmanlike manner. Builder was not automatically liable for the defective installation of the E.I.F.S. by his subcontractor. [Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 \(2008\)](#). [John L. McCants](#), a shareholder in the law firm of [Ellis Lawhorne & Sims, P.A. in Columbia, S.C.](#), and counsel at trial and in the appeal for builder J. Haynes Waters Builders, provides the following comment:

The underlying facts in the *Fields* case are typical of those made in E.I.F.S. litigation. The defects alleged in E.I.F.S. litigation are that the installation and/or design of the E.I.F.S. are a cause for water damage to sheathing or other building materials behind the E.I.F.S. Because the E.I.F.S.s are proprietary exterior cladding systems, litigation usually includes a manufacturer of the particular system. The general allegations against a manufacturer are that the design of the E.I.F.S. does not provide a means to drain water, thereby trapping water which deteriorates the sheathing and substrate. Because an E.I.F.S. is usually constructed or installed on site, litigation involves the general contractor and the installer. The general allegations against a contractor are that the E.I.F.S. is not installed in accordance with manufacturer's directions or that the contractor did not supervise its E.I.F.S. installer, thereby allowing water to get behind the system and deteriorate the sheathing and substrate. The various allegations above were all made in the *Fields* case against the general contractor, J. Haynes Waters Builders, Inc., the manufacturer and the

installer. Of some note, the heightened awareness of water intrusion damages to E.I.F.S. buildings and the ensuing litigation are likely a cause in an increase in the construction defect litigation for other types of building claddings.

Various legal theories are used in E.I.F.S. litigation. Negligence law may apply to the builder of a new house. [*Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730, 736 \(S.C. 1989\)](#). In *Kennedy*, the South Carolina Supreme Court held, in part, that: "A builder may be liable to a home buyer in tort despite the fact that the buyer suffered only 'economic losses' where: (1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; or (3) the builder has constructed housing that he knows or should know will pose serious risks of physical harm." [*Id.* at 738](#).

The South Carolina Supreme Court stated that it was not necessary for an owner to show physical property damage or personal injury to recover in tort and can recover for economic losses. *Id.* at 737 ("A builder is no less blameworthy in such case where lady luck has smiled on him and no physical harm has yet occurred."). Negligence law does not apply (or the "economic loss" rule does apply) where the duties between the parties are created solely by contract. *Id.* at 736. The latter limitation is rarely applicable in construction defect litigation, including the *Fields* case, because the construction industry has numerous industry standards and a building code is likely applicable. Further, the Court negated the need for an owner to show privity of contract, so a subsequent purchaser of a house has legal recourse against the general contractor of a house.

Express and implied warranties are regularly alleged in E.I.F.S. litigation and were pled by the owners in the *Fields* case. There are two distinct implied warranties recognized by South Carolina law. First, the implied warranty of habitability arises or springs from the sale of a new home. [*Kennedy v. Columbia*, 84 S.E.2d 730; see also *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715, 717 \(1986\)](#) ("the implied warranty of habitability has its roots in the execution of a contract for sale."). Prior to the *Fields* jury trial, a judge dismissed the owners' implied warranty of habitability cause of action on the basis that J. Haynes Waters Builders, Inc. only constructed the house--it did not sell the house to the original owners.

Second, South Carolina law recognizes an implied warranty of workmanlike service that attaches to a builder's new construction. [*Kennedy v. Columbia*, 384 S.E.2d at 736](#) ("a builder who contracts to construct a dwelling impliedly warrants that the work will be performed in a careful, diligent, workmanlike manner"). The warranty is distinct from the implied warranty of habitability. [*Kennedy v. Columbia*, 384 S.E.2d at 736](#). The warranty has its roots partly in the earlier South Carolina Supreme Court decision [*Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885, 888 \(S.C. 1951\)](#). The Supreme Court stated therein that: "It seems to be well settled that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use... ."

In *Fields*, the trial court charged the jury on the implied warranty of workmanlike service law. Finally, E.I.F.S. litigation involves the application of product liability law (e.g., statutory strict liability) too; however, the South Carolina Supreme Court in *Fields* limited the application relative to contractors.

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