THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge
Case No. 2018-CP-26-00307

Appellate Case No. 2023-001132

Wedgewood Condominium Association, ... Respondent

vs.

Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as successor by merger to Centex Construction Company, Inc. and Centex Construction, LLC; Crescent Engineering, Inc., Defendants.

OF WHICH:
Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as successor by merger to Centex Construction Company, Inc. and Centex Construction, LLC, are..... Appellants

and

Centex Homes, a Nevada General Partnership, Third Party Plaintiff

v.

Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; Frank Harris d/b/a Frank Harris Construction a/k/a F. Harris Construction a/k/a Harris Drywall; Builders First Source–South East Group, LLC; Stock Building Supply, LLC f/k/a Stock Building Supply, Inc. f/k/a Carolina Builders Corporation; Michael D. Brownlee d/b/a Carolina Drywall & Interiors; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc. a/k/a Carolina Drywall Contractors, Inc.; Roof Doctor of the Carolinas, Inc.; John D. Frazier d/b/a and/or a/k/a Roof Doctor and/or Roof Doctor of the Carolinas and/or Roof Doctor of the Carolinas, Inc.; Steven Bosch d/b/a The Roofer Man; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Martin Mata d/b/a Martin Masonry, Inc.; Martin Masonry, Inc.; BR Brick & Masonry, Inc.; BR Brick & Masonry, LP f/k/a BR Brick & Masonry, Inc.; Unicon Concrete, LLC; Seno's Cleaning Services; Rice Planter Carpets, Inc. n/k/a Creative Touch Interiors, Inc., Floors, Inc. Successor by Merger to Rice Planter Carpets, Inc.; Carpets By Kendall, Inc.; Reliable Floor

Systems, Inc.; TNT Painting; Paint with Pride a/k/a Painting with Pride; William Evans d/b/a Top Notch Painters; Morningstar Consultants Inc.; MI Windows and Doors, LLC; Michael Dawson d/b/a Michael Dawson Construction, and Inc.; Vereen Concrete Co. Inc.; AK Construction Inc. a/k/a AK Framing and Siding Co.; and AK United, Inc. f/k/a AK Construction Inc., Third Party Defendants.

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V. IS THE MASTER DEED OF WEDGEWOOD CONDOMINIUM ASSOCIATION, SPECIFICALLY SECTION 3.6, AN ADDITIONAL SUSTAINING GROUND TO AFFIRM THIS JUDGMENT?

STATEMENT OF THE CASE.[1]

Wedgewood Condominium Association filed this construction defect case against Centex Homes on January 18, 2018. Centex Homes in turn answered the Complaint and brought third-party claims against all the subcontractors who worked on the Wedgewood Condominium construction project. Centex raised a myriad of defenses including the statute of repose, the statute of limitations and third party claims against the subcontractors. The case was tried to a jury and prior to the trial Centex Homes settled all of its third party claims against the subcontractors in a secret settlement hearing which was put on the record during the Wedgewood trial. (R. pp. 1685-1688). Counsel for Wedgewood was not allowed to attend the settlement hearing and has never been told about the settlement terms. The trial started on May 22, 2023 and ended on May 26, 2023 with a verdict for the Plaintiff in the amount of $6,750,000.00 actual damages. The jury declined to award punitive damages.[2] Thereafter, the trial judge heard Centex's motion for new trial on June 14, 2023 and denied that motion. However, the trial judge granted Centex's motion to deposit the verdict ($6,750,000.00) plus accrued interest to date into the Horry County Clerk of Court of Court's office. On July 14, 2023 Wedgewood Condominium Association timely appealed the Court's Order allowing Centex to deposit the verdict of $6,750,000.00 plus interest into the Clerk of Court. Centex timely filed its notice of appeal as to the verdict on July 13, 2023. The appeal of Centex as to the verdict and the appeal of Wedgewood as to the deposit of the judgment amount into the Clerk of Court have not been

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[1]Respondent has provided its own counterstatement of the case since Appellant's statement of the case does not comply with SCACR 208 which provides that a statement of the case shall contain a concise history of the proceedings…and shall contain as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court…; the date of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of service of the notice of appeal; and the date of and description of such orders…that may have affected the appeal or may throw light upon the questions involved in the appeal.

[2] See Plaintiff's Punitive Damages Exhibit 1, Request for Admissions which showed in 2018 Centex had homebuilding revenues of $10 Billion. (R. p. 2681).

consolidated and are the subject of two separate appeals before this Court. Respondent asserts that this Court should consolidate both appeals for disposition.

STANDARD OF REVIEW

A. An Appellant must preserve all errors for this Court to properly review them.

The standard of review in this case involves two separate and distinct principles: -- error preservation and deference to the decision of a jury. In South Carolina there are four basic requirements for error preservation before this Court. They are as follows:

- The issue must be raised and ruled upon by the trial court.[3]
- The issue must be raised by the appellant.
- The issue must be raised in a timely manner.
- The issue must be raised with specificity.

To preserve any issue for appellate review, the issue must have been raised to and ruled upon by the trial court. *Whaley v. CSX Transportation, Inc.*, 362 S.C. 456, 609 S.E.2d 286, 290 (2005).

Further, to preserve for appeal the introduction of improper evidence or a jury charge, counsel must make a contemporaneous objection to the introduction of such matter or matters and state all basis upon which the matter is objectionable. To warrant reversal, a trial judge's refusal to give a requested charge to the jury must be both erroneous and prejudicial. *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298, 303 (2002).

To consider issues raised in a directed verdict motion after the plaintiff's case the motion must be renewed at the close of all evidence. *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 148 S.E.2d 153 (1966).

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[3] The record shows the trial court did not rule on Defendants' motion for directed verdict as to the Statute of Repose and that the Statute of Limitations was not even presented by Centex at the directed verdict stage. The jury charge claims were never raised by Centex after the jury was charged. (R. pp. 1563-1564; p. 1603, lines 23-25; p. 1683, line 20).

If the court make rulings which are not on the record, counsel must make sure the ruling becomes part of the lower court record. An objection made during off-the-record conferences which is not a part of the record does not preserve the question for review. *State v. Fletcher*, 363 S.C. 221, 609 S.E.2d 572, 591 (Ct. App. 2005). Failure to preserve a ground for appeal is fatal and that issue will not be considered by the Court. As will be seen below, Centex failed to preserve each issue it has appealed in this case, and, thus, the verdict should be affirmed.

B. Jury verdicts are given great deference by the South Carolina Appellate Courts.

In regard to cases tried at law by a jury, the standard of review for appeal is restricted to corrections of law only. *Felder v. Kmart Corp.*, 297 S.C. 446, 377 S.E.2d 332. 333 (1989). Jury verdicts are to be given substantial deference and will be upheld if there is any evidence to sustain the findings implicit in the jury's verdict. *Burns v. Universal Health Services*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004). Our state Supreme Court has stated:

> The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors. One is entitled to the constitutional privilege of the fair judgment of a jury rather than that of the Court....

Brabham v. S. Asphalt Haulers, Inc., 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953).

For these reasons, "It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 SC. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2002). Specifically, "[c]ourts must sustain verdicts when a logical reason for reconciling them can be found. A jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention." Id. At 234, 432 (internal quotations and citations omitted).

Further, in evaluating a jury verdict, the evidence and all inferences from the evidence must be viewed in the light most favorable to the party that prevailed before the jury -- in this case the Wedgewood Condominium Association. See *Elders v. Parker*, 286 S.C. 228, 230, 332 S.E.2d 563,

565 (Ct. App. 1985) ("On appeal of a jury verdict, the evidence and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondent. [The Court's] review is limited to determining if there is any evidence which reasonably tends to support the verdict.").

In sum, in South Carolina an appellate court must uphold a jury verdict if it is possible to recognize its various features. *Camden v. Hilton*, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004).

In light of the standard of review in this case, Respondent now addresses the facts elicited at trial and the applicable law. Centex's appeal can be boiled down to three arguments: (1) the statute of limitations; (2) the statute of repose; (3) an erroneous jury charge. A review of Centex's arguments and applying the standard of review mandates the jury verdict be affirmed by this Court.

ARGUMENT

I. THE TESTIMONY AT TRIAL IN THIS CASE SUPPORTS THE VERDICT OF THE JURY.

A civil jury trial was commenced May 26 – May 30, 2023 in the Horry County Court of Common Pleas. In order to understand the nature of this appeal and the response by Wedgewood, a short history of Centex and its involvement with the Barefoot Resort is necessary. For purposes of this appeal, Centex means all of the Defendants including Centex Homes, a Nevada General Partnership, Balfour Beatty Construction, LLC as successor by merger to Centex Construction Company, Inc. and Centex Construction, LLC.

In early 2001 Centex purchased acreage located near North Myrtle Beach, South Carolina. Centex's master plan was to build multiple neighborhoods of multi-family condominium units on the property and collectively call it Barefoot Resort. It was to be an all-encompassing upscale resort and planned community including golf courses, swimming pools and other recreational amenities. Centex mailed brochures to thousands of prospective homeowners in which it heralded its Barefoot Resort properties as a carefully planned 2,300 acre residential golf community of uncompromising quality.

(R. p. 798; Ex. 1 R. p 2202). Centex marketed to its prospective buyers that it is one of the nations' largest and most successful homebuilders and that it is a major residential developer providing an extraordinary selection of outstanding neighborhoods within Barefoot Resort. Centex also told the prospective buyers that it placed a high priority on satisfaction and that every home built was backed by what it calls "Centex Certainty." (Ex. 1 R. p 2208) Centex stated in its brochures that the homebuyer could be confident that when he or she invested in a dream, it's not just likely to come true, it's a certainty. (Ex. 1 R. p. 2208).

Wedgewood Condominiums was the first condominium association to be built at the Barefoot Resort complex. Eventually Centex built as part of Barefoot Resort, the Cypress Bend Condominium Association, the Willow Bend Condominium Association, the Clearwater Bay Condominium Association, the Havens Condominium Association, the Greenbrier Condominium Association, the Woodlands Condominium Association, the Tanglewood Condominium Association, the River Crossing Condominium Association and the Edgewater Condominium Association. Significant defective construction problems were discovered throughout the Barefoot Resort, and Centex was eventually sued in the Horry County Court of Common Pleas by Cypress Bend Condominium Association, Willow Bend Condominium Association, Clearwater Bay Condominium Association, Havens Condominium Association, Woodlands Condominium Association, Tanglewood Condominium Association, River Crossing Condominium Association, Greenbrier Condominium Association and Edgewater Condominium Association. (Court's Ex. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10; R. pp. 1968-2201).

Of those pending cases, the *Edgewater* case was resolved with a confidential settlement; (Court's Ex. 9). *Willow Bend* and *Clearwater* were settled at arbitration trials; (Court's Ex. 3, 4; R. pp. 1992, 2019). *Cypress Bend* was a confidential settlement (Court's Ex. 2; R. p 1970); and the

Havens and *River Crossing* cases are pending trial in Horry County. (Court's Ex. 5, 8; R. pp. 2034, 2115). The *Greenbrier Condominium Association* case was tried to verdict and settled on appeal.[4] What stands out in all this litigation is that the promise that Centex made in its brochures of a Centex "Certainty" was false and that each of the lawsuits filed against Centex and its related entities revealed numerous similar building code violations throughout the Barefoot Resort, including violations of construction industry standards and failure to construct the condominium and/or multi-family dwellings pursuant to standard manufacturing specifications.

Centex contested liability and damages at trial despite its experts admitting defects. Wedgewood alleged a multitude of construction defects and in its closing argument requested the jury award $9,376,719.85. The jury awarded Wedgewood $6,750,000.00 on a single cause of action for gross negligence against Centex but found for Centex as to Wedgwood's claim for punitive damages. All other causes of action were voluntarily dismissed by Wedgewood prior to submitting the case to the jury.

A. Randall Spencer Testimony.

The trial of the Plaintiff's case involved testimony from three witnesses. The first witness was Randall Spencer, a 75-year old man who was one of the original purchasers of a condominium at Wedgwood (R. p. 793; p. 798, line 4). Spencer testified that he had been shown maps and brochures at the Centex sales center (R. p. 798, lines 9-25; p. 803); and that one of the brochures from Centex was actually of the Wedgewood Condominium Association (R. p. 800, lines 17-25; p. 803). The testimony elicited was that the brochure and the sales pitch presented to Spencer was that of a

[4] Respondent attempted to offer evidence of these other construction cases, but the court denied this request. (Court's Ex. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10; R. pp. 1968-2201). See *Magnolia North v. Heritage Communities*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) (evidence of defects at other construction projects owned by Defendant admissible).

prestigious first class community with quality homes (R. p. 801, lines 1-18); and that his home would be a first quality and top quality home (R. p. 801, lines 15-18).

Spencer served on the Board of Directors for Wedgewood Condominium Association for approximately twenty-one years. (R. p. 803, line 17). He testified he had a fiduciary duty to the owners and that the Association Board of Directors met four times a year. (R. p. 804, lines 1-8). Spencer also testified that the role of the Board of Directors was to pay the bills and make sure that the necessary maintenance was performed (R. p. 804, lines 14-15). He described during his testimony that he and the Board of Directors had a duty to maintain the property and to represent the best interest of all homeowners. (R. p. 806, lines 5-6; p. 807, lines 1-5).[5]

Spencer also testified that to his knowledge Centex never turned over the homeowners' association to the homeowners (R. p. 809, lines 1-10); and that Centex didn't relinquish Developer rights to the homeowners (R. p. 809, lines 20-24). Spencer repeatedly described the Board's duties as being required to maintain the condominium association and to review and approve the expenditures along with getting bids for any repairs and/or maintenance (R. p. 835, lines 7-25; p. 837, lines 14-18).

Spencer also offered testimony that the Board was unaware of any construction defects until 2016 (R. p. 838, lines 23-28; p. 839, lines 1-7). He learned in 2016 that the construction issues which the Association was having were not normal and that the issues included many different construction defects across multiple buildings and it was necessary to hire an attorney (R. p. 839, lines 2-9, lines 11-18). Spencer said that it was only after Ross Clements, a forensic architect, was hired to investigate

[5] Centex argues at great length that the Association had a deficit in its operating fund (Def. Ex. 80, R. p. 2779), that a reserve study showed outdoor carpets would need replacing, and that painting of the buildings was necessary (Def. Ex. 105, R. p. 2796). All of this documentary evidence was explained by Spencer in his testimony that the Board maintained the property diligently which created a factual issue for the jury.

all the buildings that hidden systemic construction issues were revealed to the Board in all nine buildings. (R. p. 842, lines 1-22).

Spencer repeatedly testified that the only issues he was aware of were maintenance issues and that those issues were dealt with at every meeting the Board had and that most of the issues were routine maintenance (R. p. 876, lines 1-25). He also stated that carpet repairs, removing of a post and rail post, along with removing exterior trim and installing new ceilings, were all maintenance issues (R. p. 879, lines 11-18).

Spencer was cross examined and identified exhibits regarding maintenance that had been performed at Wedgewood. (R. p. 873, lines 13-18). Those included Defendants' Exhibit 72 which was minutes of the Board of Directors meeting on August 9, 2013. Those minutes describe some damage done to waterproofing by a carpet installer. (Ex. 72, R. p. 2770).

Time after time during Spencer's direct and cross examination, he stated that the repairs that were done were "routine maintenance" (R. p. 876, lines 17-18; p. 879, lines 11-15). Centex's counsel repeatedly asked him the same question about the condition of Wedgewood and Spencer's answer was "we always act on maintenance issues at a meeting" (R. p. 888, lines 23-24); that the Board members talked on an as-needed basis and that there was no need in his opinion to have a protocol for caulking every window (R. p. 879, line 12; p. 889, lines 19-20); that the Wedgewood Board of Directors fixed what we needed to fix (R. p. 891, line 19); painted what we needed to paint (R. p. 891, line 17); and painted the trim as needed (R. p. 891, lines 11-12).

Spencer was also questioned about a Board meeting which occurred on October 28, 2006, in which the property manager recommended that someone look at the windows. Spencer replied he thought that was an offhanded comment and that there was no need to hire an engineer (R. p. 906, lines 15-18). In context with that same line of cross-examination Spencer stated, "The first time I

knew of original construction defects was in 2016." (R. p. 908, line 20). Spencer went on to state that the Board did not know of any construction defects in 2007, 2011, 2013 or 2014 and that the invoices presented by Defendant's counsel were only for routine maintenance issues at Wedgewood (R. p. 911, lines 1-5). Centex offered no contra testimony to contest Spencer's testimony during the trial.

B. Ross Clements Testimony.

Wedgewood Condominium Association offered Ross Clements, who was qualified as a forensic architect by the Court having been licensed in South Carolina, North Carolina, Tennessee and Georgia. (R. p. 914, lines 1-5; p. 915, lines 1-3) . Clements testified that over several years he had visited the Wedgewood Condominium Association site and to his recollection had personally spent 31 days there investigating and inspecting the Wedgewood project. (R. p. 919, line 23; p. 920, lines 7-8). He also stated that he prepared lengthy reports and informed the Board that he found original construction defects (R. p. 920, lines 21-22). His investigation started in 2016 and included destructive testing, taking off exterior cladding, brick, lap siding and fiber cement siding (R p. 916, line 14; p. 917, lines 8-10; p. 917, line 25; p. 918, lines 1-5). Clements prepared a comprehensive PowerPoint for trial (Ex. 3, R. pp. 2279-2582) in which he described the Wedgewood Condominium Association as being 9 buildings, 3 stories tall (R. p. 921, line 16) with 111 individual condominiums affected (R. p. 921, line 21), which were built in 2000-2001 (R. p. 922, lines 4-5).

Clements proceeded to explain the PowerPoint to the jury (R. p. 1048) which was admitted into evidence by agreement (R. p. 1048, lines 8-9). He testified he used the applicable building codes, the 1997 standard building code[6] and the 1995 energy code (R. p. 943, lines 9-14); and that he also looked to see if the as-built condominiums were built in conformity with manufacturers' instructions

[6] Plaintiff introduced an Ordinance of the City of North Myrtle Beach into evidence as Plaintiff's Exhibit 6 adopting the 1997 Standard Building Code. (R. p. 1187; Ex. 6, R. p. 2613).

and construction industry standards which are detailed on pages 13-14 of Exhibit 3. (R. p. 943, lines 13-15) (R. pp. 2292-2293).

Clements' 305 page PowerPoint was methodically shown to the jury and includes over 253 pictures and numerous citations regarding the defective construction. (R. p. 1048). Clements then proceeded to testify about the original construction defects which violated building codes, manufacturing specifications and construction industry standards. (R. p. 1048, lines 22-25; p. 1049, lines 1-15). Rather than recount Clements' extensive trial testimony (R. pp. 945-1091) in this brief, Wedgewood has prepared the following charts which summarize his thorough and comprehensive investigation and trial testimony.

1. CLEMENTS' TESTIMONY AS TO WEDGEWOOD CONSTRUCTION DEFECTS

		PLAINTIFF'S EXHIBIT 3 (R. Vol. V pp. 2279 – Vol. VI pp. 2582)		
I.	APPLICABLE BUILDING CODES	pp. 2292-2293	Building Codes Manufacturers' Instructions Industry Standards	
II.	FINDINGS		Construction Defects	Photos
	(1) Exterior Walls	pp. 2295-2326	Yes	26
	(A) Weather Resistant Barrier	pp. 2295-2326	Yes	25
	(B) Cladding & trim	pp. 2326-2336	Yes	9
	(C) Brick Veneer	pp. 2337-2357	Yes	17
	(2) Roofs			
	(A) Underlayment	pp. 2358-2363	Yes	5
	(B) Shingle attachment	pp. 2364-2371	Yes	8
	(C) Shingle starter strip	pp. 2372-2376	Yes	4
	(D) sheet metal fascia	pp. 2378-2384	Yes	7
	(3) Walkways			
	(A) Fire protection	pp. 2386-2391	Yes	7
	(B) Waterproofing	pp. 2392-2414	Yes	23
	(4) Stairs	pp. 2415-2420	Yes	5
	(5) Attics			
	(A) Framing connections	pp. 2421-2435	Yes	15

	(B) Truss & window framing (C) Fire protection	pp. 2436-2450 pp. 2451-2455	Yes Yes	15 5
	(6) Shear Walls (A) Framing attachment (B) Sheathing attachment	 pp. 2456-2462 pp. 2463-2470	 Yes Yes	 6 7
	(7) Floor/Ceiling assemblies (A) Tenant/separation walls	 pp. 2471-2475	 Yes	 5
	(8) Accessibility	pp. 2476-2488	Yes	12
	(9) Vapor Barrier	pp. 2489-2497	Yes	8
	(10) Window Installation (A) Improper flashing (B) Improper mulling	 pp. 2499-2519 pp. 2521-2535	 Yes Yes	 19 15

Clements also reviewed the findings of the Centex experts as he was present at all the test cuts/investigations performed at Wedgewood by them. The following chart details his testimony at the trial that many of the same defects he found during destructive testing were verified by the photos the Centex experts or subcontractors took during their investigation. (Plaintiff's Ex. 3, R. pp. 2536-2581).

2. CENTEX EXPERTS PHOTOS REVIEWED BY CLEMENTS

		PLAINTIFF'S EXHIBIT 3	VERIFIED DEFECTS BY BOTH EXPERTS	PHOTOS OF DEFECTS
1.	Destructive testing	p. 2536	X	X
2.	Water damage behind windows	pp. 2537-2545	X	X
3.	Flashing not lapped with walls	pp. 2546-2548	X	X
4.	Water intrusion behind brick	pp. 2549-2554	X	X
5.	Brick ties not used	pp. 2555-2557	X	X
6.	Moisture behind siding/trim	pp. 2558-2573	X	X
7.	Vapor barrier walls	pp. 2574-2575	X	X
8.	Morningstar original construction report	pp. 2576-2580	X	X
9.	Repair Summary	p. 2581	X	X

Further, Clements' trial testimony is best summarized on the last page of his PowerPoint (Plaintiff's Exhibit 3, R. p. 2581) wherein he opined that the original Wedgewood construction defects were violations of applicable building codes, generally accepted construction industry standards and manufacturers' specifications. Clements also found original defective construction which resulted in hidden damage within the exterior walls of buildings (R. p. 1033, lines 17-20.). Based on Clements' testimony and other evidence and testimony presented, the court properly sent the case to the jury for decision. (R. pp. 945-1091).

While not admitted into evidence by the Court, Clements developed a chart of the similar construction defects he found at Clearwater Bay, Willow Bend and Wedgewood.[7] The construction defects were of the same type at all three condominium associations. (R. pp. 1009-1011; p. 1044, lines 4-24; p. 1045, lines 17-24; p. 1046, lines 1-25). (Court's Ex. 1,; R. p. 1968).

Finally, on cross-examination, Clements replied he "didn't think anyone could reasonably think he would go from a gap described in a window to the full investigation I was hired to do" (R. p. 1090, lines 20-23); and that he didn't see any evidence that would have been correlated from the Board of Directors meetings to a full investigation like he was hired to do. (R. p. 1091, lines 8-13).

C. Robert Gallagher Testimony.

Wedgewood also offered Robert Gallagher, a South Carolina licensed unlimited general contractor who stated he was hired to provide an estimate for Wedgewood construction defects as per the Clements investigation. He was qualified as an expert witness (R. p. 1141, lines 24-25; p. 1142, lines 1-4). His 24-page repair estimate was offered into evidence as Plaintiff's Exhibit 4. (R. pp. 2584-2607). (R. p. 1147, lines 24-25; p. 1148, lines 1-25). Gallagher then proceeded to explain his

[7] Clements had been the forensic architect for the Willow Bend and Clearwater Bay Condominium Associations cases.

repair estimate in detail to the jury. Gallagher testified the total amount to repair all the construction defects based on his written calculations and testimony was $9,376,719.85. (R. p. 1173, lines 3-6).

D. Jeremy Martin Testimony.

The Defendants offered as their first witness, Jeremy Martin, a Centex employee in Myrtle Beach who had been a field manager and was now an area construction manager (R. p. 1229, lines 18-19). Martin admitted Centex was the general contractor (R. p. 1236, line 23); that Centex had 28 divisions in 28 states (R. p. 1276, lines 13-18); that unlicensed subcontractors worked on the Wedgewood job including AK Construction and BR Brick[8] (R. p. 1279, lines 11-15); that no one knew what was behind the walls of the condominium association (R. p. 1286, line 21); that there were defects (R. p. 1286, lines 23-24; p. 1287, lines 3-6); that Centex was responsible for any defects (R. p. 1287, lines 14-25; p. 1288, lines 1-25); that some issues in the buildings were missed (R. p. 1288, lines 6-8); and that the pictures presented during trial showed building code violations (R. p. 1283, lines 24-25). Essentially Martin admitted to the jury that numerous construction defects were found at Wedgewood. (R. pp. 1287-1288).

E. Robert Carter Testimony.

Centex also offered a forensic engineer, Robert Carter, who was qualified and testified that he was the founder of H2L Consulting Engineers and a licensed South Carolina engineer (R. p. 1307, lines 1-10); that he would not hire unlicensed contractors on his job (R. p. 1415, lines 8-15); that he had worked for Centex since 2016 and that he performed expert services and construction evaluations on the following Barefoot Resort projects which were constructed by Centex: River Crossing, Havens, Greenbrier, Tanglewood, Woodlands, Willow Bend, Clearwater Bay and Wedgewood (R.

[8] These two unlicensed subcontractors were named as third-party defendants by Centex and settled their claims in a secret settlement proceeding during trial.

p. 1425, lines 13-25; p. 1426, lines 1-9).[9] The inference from this portion of his testimony to the jury was that other Barefoot projects had similar construction defects.

On cross examination by Wedgewood's counsel, Carter discussed a vapor barrier which Centex's contractors had incorrectly constructed inside the wall cavity in all of the Wedgewood condominium buildings. An email between Carter and his partner Lewis was discussed including whether or not the vapor barrier had caused deterioration inside the wall cavity at Wedgewood (R. p. 1441, lines 3-9). The email, which was entered into evidence as Exhibit 9, was written by Lewis who commented that the vapor barriers inside the Wedgewood condominiums walls could be a very big deal and very expensive (R. p.1441, line 13). A portion of Exhibit 9 by Defendants' expert, Skip Lewis, is particularly damning. (R. p. 2670). It states:

> The "someone" would need to be determined by legal minds.
>
> For buildings that were built this way, the only fix of which I am aware involves removal of all interior GWB on exterior wood stud walls, removal of the vapor barrier material, and repair of damaged studs/sheathing....a costly affair.
>
> The reason I bring this up is that some of the photos I have seen of brick veneer which, as reported by others, allegedly separated from the sheathing because of a failure to engage brick ties. Where the picture is taken, there is also deterioration of OSB. I suspect the real reason for veneer wall detachment is likely that sheathing has deteriorated from moisture in the stud cavity resulting from the interior side polyethylene vapor barrier and the inability of sheathing to provide an anchor for the corrugated ties.
>
> This, in my judgment, is a very big deal and needs to be discussed with counsel asap....before we issue any reports. It is quite possible that recurring high humidity levels inside the stud cavities is a root cause of all or most of the weather related issues being found at the exterior wall coverings. Repairs to correct would be expensive and disruptive. Work theoretically could be done from inside, or outside. For the earlier ones on which I was involved, we did repair work from the outside. (R. p. 2670).

[9] Significantly, Respondents wanted to introduce evidence of similar defects at other Centex projects, but the trial court denied this request. (R. p. 1009). Ultimately some of this evidence was admitted.

During Carter's trial testimony, he candidly admitted the following construction defects existed at Wedgewood:

- mulling was incorrectly installed and was a construction defect (R. p. 1464, lines 21-25).
- siding was not nailed per Hardie board manufacturing standards (R. p. 1465, line 14);
- builder should always follow manufacturer specs (R. p. 1468, line 11);
- fasteners were not applied according to the manufacturer's specifications (R. p. 1468, line 13);
- inadequate wall flashing violates the building code as does the window mulling (R. p. 1470, lines 17-18);
- construction of window mulling were building code violations (R. p. 1470, line 23);
- no lag screws for earthquake protection (R. p. 1472, line 6);
- no weep holes which is good industry practice (R. p. 1472, lines 1-9);
- brick ties did not meet building code requirements (R. p. 1473, lines 3-5);
- the vapor barrier shouldn't be on the inside of the walls, it was not good practice (R. p. 1473, line 8);
- no weep holes in the brick walls along a soldier course[10] (R. p. 1474, line 13);
- underlayment was not overlapped on the roof eaves (R. p. 1476, lines 12-15);
- underlayment not properly applied on the roof was a building code violation (R. p. 1477, lines 1-24);
- failure to properly apply the underlayment on roofs is found everywhere (R. p. 1477, lines 20-23);
- the roofs were not built to manufacturing specifications (R. p. 1478, lines 1-12);
- the shingles were not applied properly as per the manufacturer's instructions (R. p. 1478, lines 10-16);
- improper starter shingle strips violated manufacturer's specifications (R. p. 1478, lines 19-25; p. 1479, lines 22-25);
- sheet metal fasteners were insufficient (R. p. 1479, lines 22-24);
- improper drip flashing around the columns (R. p. 1480, lines 1-4);
- there was a 38 percent failure rate on the staircase regarding the risers (R. p. 1480, lines 18-21);
- 1,150 staircase treads in Wedgewood violated the building code (R. p. 1480, lines 22-25);
- the handicap ramp violated the ADA [Americans with Disabilities Act] as there were no handrails (R. p. 1481, lines 1-23);
- the concrete ramp violated the ADA, it was too steep and exceeded good practice (R. p. 1482, line 5);
- the concrete walkway was lower than the level of the concrete slab and required two risers be installed. This practice violates the building code (R. p. 1482, line 25; p. 1483, line 1);

[10] A soldier course of brick is one in which brick are laid standing on end with the narrow edge facing out. This type of course is used for decorative effects.

- forty percent of the OSB around certain windows needed repairs (R. p. 1483, lines 7-11).

Carter reluctantly admitted on cross examination that he saw similar construction defects in all nine Wedgewood buildings including code violations, construction industry standards violations and manufacturing specification violations (R. p. 1484, lines 4-11). Carter said: "I think we have gone through that during this trial a number of times" (R. p. 1484, lines 10-11); and that it was ultimately Centex's responsibility whether the contractors were unlicensed or licensed.[11] (R. p. 1487, lines 1-25; p. 1488, lines 1-3). Carter offered his recommended repairs to Wedgewood in Exhibit 108 (R. p. 1375) which effectively set up a factual issue among the experts for the jury to decide what damages were caused by Centex.

F. L. G. Lewis Testimony.

The next witness offered was L. G. Lewis, a structural engineer who is a principal of H2L (R. p. 1492, line 17; p. 1494, lines 1-11). Lewis's recommendations included getting an engineer to compare the truss data sheets (R. p. 1505, lines 9-13) and that he was looking at possible repair to the trusses. His opinion was there were no problems with the vapor barrier that had been installed by Centex at Wedgewood (R. p. 1511, lines 9-14; p.1528, lines 20-25; p. 1529, lines 1-25) even though he had written the vapor barrier email to Carter (Ex. 9, R. p. 2670) which was directly contra to his testimony in court. Lewis identified Exhibit 9 which he wrote and read aloud to the jury: "For buildings that were built this way, the only fix of which I'm aware involves removal of all interior GWB on exterior wood stud walls, removal of vapor barrier material, and repair of damaged studs, sheathing…a costly affair." (R. p 1530, pp. 21-25; p. 1531, lines 1-10).

[11] Carter also said he would not hire unlicensed contractors to work on his project (R. p. 1415, lines 8-13).

G. Steve Watkins Testimony.

Centex also called Steve Watkins, who was hired as its estimator/general contractor (R. p. 1536, line 22). Watkins admitted that he had performed destructive testing for both Centex and Wedgewood (R. p. 1538, lines 14-18). He was provided a scope of work requested by Centex experts which included estimates for roof work, fascia wrapping, repair to 34 windows, some attic lateral bracing, to fix some gaps in fireproofing, to correct exterior walls and ramps along with risers, and stair handrails. His total estimate for repairs for construction defects was $384,963.94. (R. p. 1547, lines 1-6).

On cross examination Watkins testified that he was not hired to discover building code defects at Wedgewood, nor was he hired to look at any construction industry standard violations (R. p. 1547, lines 18-24; p. 1548, lines 1-5). Watkins admitted while on site that he saw building code defects and violations of construction industry standards and manufacturing specifications at Wedgewood, he just didn't list them (R. p. 1550, lines 19-25; p. 1551, lines 1-15). He also stated his authorization was to only estimate the scope of work as provided by Centex's expert, Carter. Watkins testified on cross examination that he wanted to make sure that Wedgewood's counsel was not referring to other Barefoot properties he had looked at in the past (R. p. 1552).[12] Finally, Watkins testified he had performed destructive testing for the homeowners prior to being hired by Centex, but he did not prepare any estimate for the homeowners. (R. p. 1556, lines 12-21).

H. Centex's Motion for a Directed Verdict.

On the fourth day of the trial, after the close of the testimony, counsel for Centex moved for a directed verdict on a single ground. Centex counsel stated as follows:

[12] Watkins had been a witness in every single construction defect case in the Barefoot Resorts. He has either performed expert services or acted at the direction of other experts.

> Mr. Hildebrand: The Defendant would move for a directed verdict as to all of the causes of action on the basis of the Statute of Repose. The Statute of Repose bars the claims beyond 13 years and it bars all claims. We talked about it yesterday, the statute could not be --, I think the legislature worded it -- (R. p. 1563, lines 20-25; p. 1564, line 1).
>
> Mr. Hildebrand: Yes, ma'am. So I think that under that, the only cause of action that they have on a claim, potentially, would be gross negligence. So – and -- I think that bars punitive damages. It says the only claim is for gross negligence. (R. p. 1564, lines 5-10).[13]

Centex's counsel then continued discussing his motion with the court. The discussion between Centex's counsel, Wedgewood's counsel and the Court continues from transcript page 904 through 944 (R. pp. 1563-1603) with no ruling by the Court on Centex's motion for a directed verdict under the Statute of Repose. At page 944 (R. p. 1603), after the trial judge did not rule on Centex's motion, its counsel said:

> Mr. Hildebrand: I'll tell you what, I'll agree with him. I'll do the Statute of Repose and the preamble. (R. p. 1603, lines 23-25).[14]

No other discussion takes place, nor did the Court make a ruling on the directed motion based on the Statute of Repose, and counsel for Centex never moved for a directed verdict on the Statute of Limitations. Further, Centex's counsel never requested a specific ruling by the Court on its motion for a directed verdict on the Statute of Repose. The Court never granted or denied the directed verdict motion and Centex's counsel never asked again for a ruling which is required by South Carolina law. Ultimately the case was submitted to the jury on a single cause of action for gross negligence. No mention was made by Centex's counsel of the statute of limitations argument – or any other ground for directed verdict which means those other alleged errors were never preserved for review by this

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[13] In fact, the Court noted that Centex's experts admitted simple negligence (R. p. 1574, lines 1-9). The Court stated: "So you have to admitted negligence – no question." (R. p. 1574, lines 24-25).

[14] Centex's counsel waived his motion for directed verdict by these statements to the Court.

Court. (R. p. 1563, lines 20-25). Centex's counsel waived the Statute of Repose and Statute of Limitations defenses by failing to raise them and obtain a definitive ruling by the trial court.

II. CENTEX FAILED TO PRESERVE ALL THE ERRORS IT NOW APPEALS.

The transcript of record clearly reveals that Centex did not make a motion for directed verdict on the Statute of Limitations, nor did Centex obtain a ruling by the Court on its motion for directed verdict in regard to the Statute of Repose. (R. pp. 1563-1606). South Carolina law requires counsel to repeatedly request a ruling to preserve it for this Court to consider it. *State v. Fletcher*, 363 S.C. 221, 609 S.E.2d 572, 591 (Ct. App. 2005); *Creech v. South Carolina Wildlife and Marine Resources Dept.*, 328 S.C. 24, 491 S.E.2d 571 (1997) (All issues must be raised and ruled upon by the trial judge).

In South Carolina there are four requirements for error preservation on appeal. They are:

1. The issue must be raised by the appellant.
2. The issue must be raised in a timely manner.
3. The issue must be raised with specificity.
4. The issue must be raised and ruled upon by the trial court.

Here, Centex raised the Statute of Repose in its directed verdict motion but did not raise the Statute of Limitations. (R. pp. 1563-1606). As to the Statute or Repose, it was raised timely and with some specificity, but was never ruled on by the trial court and ultimately waived by Centex's counsel. (R. p. 1603, lines 1-25). As to the Statute of Limitations, it can be found nowhere in Centex's motion for directed verdict and as a result this issue is not properly preserved for review by this Court. In South Carolina, preserving issues for appellate review is a fundamental and necessary requirement for appellate review. South Carolina appellate courts have never recognized the plain error rule. *Kennedy v. S.C.. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (S.C. 2001).

In South Carolina, to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court. If an issue is not ruled on, counsel must continually request a ruling. This is the only way to preserve an issue for appellate review. Here, Centex raised only one issue, the Statute of Repose, and failed to raise the Statute of Limitations in its directed verdict motion. (R. p. 1563, lines 1-25; p. 1564, line 1) As Chief Judge Alex Sanders so aptly stated about error preservation: "Appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). Centex did not ask the trial court for a ruling on the Statute of Repose and did not argue the Statute of Limitations, thus, those matters have been abandoned.

It is axiomatic that to consider any issue on appeal and to have it reviewed, it must be raised in the directed verdict motion after a party's case has closed and it must be renewed at the close of all the evidence and ruled on by the Court. This Centex did not do at trial. See *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 148 S.E.2d 153 (1966); *Whaley v. CSX Transportation, Inc.*, 362 S.C. 456, 609 S.E.2d 286, 290 (2005).

A timely and proper directed verdict motion is essential to any appeal based on the sufficiency of the evidence to support the jury's verdict. *Barber v. Citizens & Southern National Bank*, 268 S.C. 16, 231 S.E.2d 295 (1977). On appeal to this Court, Centex is limited to the specific grounds raised at trial. *Connolly v. People's Life Ins. Co. of SC*, 299 S.C. 348, 384 S.E.2d 738 (1989). The failure to state and argue specific grounds at trial is not excused because earlier comments by the trial court indicated it may deny the motion. The trial court must in fact deny the motion on the record. *Sierra v. Skelton*, 307 S.C. 217, 414 S.E. 169 (Ct. App. 1991). Trial counsel must insist on putting the grounds for a directed verdict motion on the record and obtain a ruling by the trial court. *Vaughn v. City of Anderson*, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 1989). If the trial judge mentions new issues

or grounds in ruling on a directed verdict motion, a party must specifically raise the new matter to the trial court in an order to raise it on appeal. *Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 64 S.E.2d 253 (1951).

In sum, Centex' entire argument about the Statute of Limitations was never preserved for the record because it was never properly raised at the directed verdict motion stage of the trial. As to the Statute of Repose motion which Centex made (R. p. 1563), the trial court never ruled on it and Centex's counsel never specifically requested a ruling nor received one prior to the case being submitted to the jury. Thus, without a ruling on the record by the trial court, Centex is prohibited from raising the Statute of Repose or Statute of Limitations as a ground for appeal.

III. CENTEX DID NOT OBJECT TO THE JURY CHARGE AND FAILED TO PRESERVE ITS ARGUMENT.

The trial court, after going over the jury charge with counsel for both parties, was asked by Plaintiff's counsel to charge the following: "I charge you that you may consider whether a subcontractor is unlicensed in reaching a decision." The Court: "No, that's not appropriate. It is a comment on the facts, and I'm not charging it. (R. p. 1592, line 11).

Thereafter the trial court charged the jury the law of the case. (R. pp. 1663-1682). After the jury was excused, the Court then asked: "Any questions or additions to charge from the Plaintiff?" (R. p. 1683, lines 1-3).

> Mr. Connell: I think a spoilation of evidence charge is acceptable based on the defendant's argument about the one building code document that they had. Everything else was lost, but they have the one. And the other thing is you just sent back 15.
>
> The Court: Oh, I know that. They go back there until I bring the three out, and then we send them for deliberations. When someone goes in with all the evidence, the three come out.
>
> Mr. Connell: Are you going to hold them in another room or ask them –

The Court: I'm going to release them. I'm going to release them. I think this jury will come to a verdict.

Mr. Connell: Okay. Thank you, ma'am.

Mr. Hildebrand: Nothing from the Defendant. (R. p. 1683, line 20).

Centex now objects to the jury charge and argues that the trial judge should have charged the contractor licensing statute. It is well settled in South Carolina that the failure to object to a jury charge after the charge has been read to the jury is a waiver and does not preserve this alleged error for review. If Centex's counsel wanted to object to an instruction to the jury, he must have done so before the jury retired to consider its verdict or the objection is waived. See *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 232 S.E.2d 728 (1977) (A party who fails to call error to attention of trial judge at conclusion of charge and in the absence of jury cannot later complain.). Failure to object to a charge makes it the law of the case. *Crocker v. Barr*, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988), overruled on other grounds by *Crocker v. Barr*, 305 S.C. 406, 409 S.E.2d 368 (1991). See also *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) (Where there is no objection to a jury charge, it is the law of the case.); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) (Failure to object to an improper jury instruction leaves issue unpreserved for appeal); *State v. Johnson*, 315 S.C. 485, 445 S.E. 2d 637 (1994) (Johnson failed to object to the jury charge on circumstantial evidence; therefore, any issue on whether it violates due process was not preserved for appeal.).

In sum, in order to properly object to a jury instruction, Centex's counsel must have timely stated which portion of the instruction is objectionable and must specify the grounds for his objection prior to jury deliberation. See *Bellamy v. Payne,* 304 S.C. 179, 403 S.E.2d 326 (Ct. App. 1991); Rule 51, SCRCP. Rule 20, SCRCP.

In this case, Centex's counsel made no objection after the jury was charged and cannot now for the first time on appeal argue the trial court made an error. The trial court must be given the opportunity to correct any errors. Centex clearly failed to preserve the alleged error, and even if it had preserved the error, any error was harmless as jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading did not constitute reversible error. *Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994); *Roberts v. Hunter*, 310 S.C. 364, 426 S.E.2d 797 (1993) (a jury charge which is substantially correct and adequately covers the law does not require reversal).

In conclusion, Centex failed to timely object to the jury charge and as a result waived its objection and thus failed to preserve the error for review by this Court.

IV. IF THE STATUTE OF LIMITATIONS WAS PROPERLY RAISED AND PRESERVED BY APPELLANTS, IT WAS AN ISSUE FOR THE JURY.

South Carolina's appellate courts have consistently held the question of when a statute of limitations begins to run is one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000). ("[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve.") Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. The presence of conflicting testimony regarding the time discovery should have occurred necessarily requires the jury's resolution. *Brown v. Finger*, 24 0 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it...and, where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

In this case, assuming *arguendo* that the statute of limitations argument was properly preserved (it was not), the evidence presented by Randall Spencer, one of the original purchasers of a condominium at Wedgewood and a Board member, is enlightening. Spencer had served on the

Board of Wedgewood Condominium Association for over twenty-one years and repeatedly testified that the only issues he was aware of in his twenty-one years were maintenance issues and those issues were dealt with at every meeting the Board had and most of the issues were routine maintenance. (R. p. 876, lines 1-25). Spencer's answer both on direct and cross examination was "If there is maintenance issues, and there always are, we act on those maintenance issues" (R. p. 888, lines 23-24). He further testified that the Wedgewood Board of Directors fixed what we needed to fix; painted where we needed to paint; and painted the trim as needed. (R. p. 891, lines 11-20). Finally, on cross-examination, Spencer stated that the first time he and the Board knew of the original construction defects was in 2016, (R. p. 908, lines 17-20).

In that same vein, Ross Clements, Wedgewood Condominium Association's forensic architect, stated: "I don't think anyone would reasonably think you would go from a small gap being described at a window and that would be translated into a full investigation the way – like what I was hired to do." (R. p. 1090, lines 20-23). And that he (Clements) didn't see any evidence that would have been correlated for the Board of Director's meetings to the full investigation that he was hired to do. (R. p. 1091, lines 8-13). Clements' extensive and detailed testimony described hidden defects such as rotten wood, roof decks not protected, shingles not adequate, framing and sheathing damage, life safety issues at the staircases throughout the buildings, guardrail post defects, inadequate framing in attics, shear walls not designed per engineering plans, floor assemblies that were never waterproofed, vapor barriers improperly installed and life and safety issues at ramps that were too steep and had no handrails. (R. pp. 945-1091).

Clements' testimony, along with the admissions at trial from Defendants' own expert, Robert Carter, that there were hidden building code violations, clearly presented a jury issue of whether the

statute of limitations had run and it was thus for the jury to decide if the statute had run on Wedgewood.

See *Stoneledge at Lake Keowee Owners' Assoc. v.. IMK Development* Co., LLC, 435 S.C. 176, 866 S.E.2d 577, 578 (2021), where the court explicitly acknowledged that although defendants in that case may have had a colorable argument as to the running of the statute of limitations, this Court nonetheless affirmed the jury's verdict.[15] ("Application of both the basic three-year limitations period and the discovery rule in any given case can present factual issues for a jury to resolve. ...[We are constrained by our standard of review and conclude that under the facts of this case, there was a jury issue as to whether the statute of limitations had expired by the time the action was commenced against [the defendant]"). In *Stoneledge*, the jury found in favor of the homeowners after the trial court denied defendants' motion for directed verdict based on the statute of limitations.

Here, it is undisputed in the transcript of record that Centex made no such directed verdict motion as to the Statute of Limitations at the close of the evidence. Further, Wedgewood's argument is the very same argument Centex made in another Barefoot case to United States District Court Judge Wooten. See *Centex Homes v. S.C. State Plastering*, Case No. 4:08-cv-2495-TLW, 2010 WL 2998519 (D.S.C. July 27, 2010). Significantly, that case involved the Edgewater Condominium Association which is one of the condominium projects that Centex was sued for in the Barefoot Landing project. After Centex settled *Edgewood*, it brought a construction defect lawsuit against South Carolina State Plastering, LLC, Carolina Drywall & Interior, Inc. and Ferst Plastering, Inc. for monies paid to Edgewater HOA for construction defects. Ferst, Carolina Drywall and South Carolina State Plastering promptly moved for summary judgment based on the statute of limitations. Allegedly, the buildings were completed in 2001 and 2002. While Centex and its employees

[15] In *Stoneledge*, the developer made a motion for directed verdict based on the statute of limitations. In this case, Centex did not do so.

discovered water damage in two of the buildings in 2006, it did not bring suit until 2008, some six to seven years after the buildings were completed. Centex and its attorneys argued vigorously against the statute of limitations. Centex cited the case of *Santee Portland Cement Co. v. Daniel Int'l. Corp.*, 384 S.E.2d 693 (1989). In *Santee* plaintiff had a cement storage complex installed in 1965 but didn't discover latent defects until 1980 when a storage bin collapsed killing two people. Apparently latent steel reinforcement rods had been improperly spaced and tied together. The defendants moved for summary judgment. The South Carolina Supreme Court concluded that the evidence introduced at trial went to the reasonableness of plaintiff's action which was an issue to be decided by a jury.

Of additional significance is that the same lawyers who represented Centex as a plaintiff in *Centex Homes v. S.C. State Plastering*, Case No. 4:08-cv-2495-TLW, 2010 WL 2998519 (D.S.C. July 27, 2010) argued in this case that the statute of limitations has expired. A party cannot take a position in direct conflict with one taken in related litigation. Judicial estoppel precludes Centex from doing so in this case as unquestionably it had multiple pending Barefoot Resort construction lawsuits with the same legal issues at stake. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997) (A party who asserts a position may not change it because its interests have changed.). Respondent asserts this in an additional sustaining ground to affirm the verdict.

The *Stoneledge* case has recently been followed by *Walbeck v. The I'On Company, LLC*, 426 S.C. 494, 827 S.E. 2d 348 (2023) in which the Supreme Court of South Carolina has reiterated that the statute of limitations defenses are generally issues for the jury to decide. In *Walbeck*, the Supreme Court stated: "While the jury certainly could have accepted the 2005 date argued by developers, and ultimately embraced by the court of appeals, we believe the jury's contrary finding is supported by the evidence."

This is the case here based on Spencer and Clements' testimony, coupled with Defendant Centex's experts, Carter, Lewis, and its employee, Jeremy Martin, who all testified and agreed there were hidden building code violations, along with violations of construction industry standards and manufacturer specifications at Wedgewood. Under these circumstances and because of the voluminous testimony, this Court should first deny Centex's appeal as to the statute of limitations because it was not properly preserved; and, if it was properly preserved, there was substantial documentary evidence (more than a preponderance) and testimony to support Wedgewood's contention that the statute of limitations had not run.

V. IF THE STATUTE OF REPOSE WAS PROPERLY RAISED AND PRESERVED, IT WAS AN ISSUE FOR THE JURY.

Centex spends part of its brief arguing that South Carolina Statute of Repose had run on Wedgewood Condominium Association. As the Court is aware, S.C. Code § 15-3-640 commonly known as the Statute of Repose provides in pertinent part:

> "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement...." [16]

The Statute of Repose has several notable and significant exceptions including S.C. Code § 15-3-670(a) which specifically excludes claims for fraud, gross negligence or recklessness and effectively lifts and suspends any time limit for bringing a claim if fraud, gross negligence or recklessness can be proven to the satisfaction of a jury.

Here, only one cause of action was submitted to the jury under S.C. Code § 15-3-670(a) and the jury found gross negligence. While it is true that building code violations are not per se gross negligence, a jury in South Carolina may consider building code violations as evidence of gross

[16] The Statute of Repose in this case was 13 years and later amended to 8 years. S.C. Code Ann. § 15-3-640 (2005).

negligence. See S.C. Code § 15-3-670(b) (for the purpose of subsection (a), the violation of a building code of a jurisdiction or political subdivision does not constitute per se fraud, gross negligence or recklessness, but this type of violation may be admissible as evidence of fraud, negligence, gross negligence or recklessness.). Thus, based on the voluminous testimony of Clements, Carter, Wakins, Lewis, Martin and Spencer, the jury properly found Centex failed to exercise slight care. *Clyburn v. Sumter County Sch. District No.* 17, 317 S.C. 50, 451 S.E.2d 885 (1994). Our Courts have held since at least 1935 that it is always for the jury to determine whether a party has been reckless, willful or wanton. See *Ralls v. Saleeby*, 178 S.C. 431, 182 S.E.2d 750 (1935), cited by *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993).

Clements, Carter and Lewis, along with a Centex employee, Jeremy Martin, all testified and agreed that violations of building codes, manufacturing specifications and construction industry standards caused original construction defects at Wedgewood. In fact, on cross examination Centex's own expert, Carter, candidly admitted there were building code violations. (R. p. 1484, lines 1-25). All of this testimony and documentary evidence was submitted to the jury and it certainly was justified in finding Centex was reckless and grossly negligent in its construction of Wedgewood.

Assuming Appellants have properly preserved their arguments, they now argue that Wedgewood's case went to the jury based solely on evidence of building code violations only. Appellants' argument is not supported by the voluminous record. Clements described a litany of construction defects including violations of construction industry specifications and manufacturers' instructions. Plaintiff's crave reference to Plaintiff's Exhibit 3, Clements' 305 page PowerPoint presentation. (R. pp. 2279-2583). The testimony of Clements is direct evidence of Centex's willfulness and recklessness.

Further, Appellants cite *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869, 872 (Ct. App. 1986) as authority for their appeal. This argument is illusory at best. In *Kincaid*, this Court affirmed a jury verdict despite an erroneous charge because evidence of the adoption of the building code by the local authority had not been presented. In this case Centex admitted the City of North Myrtle Beach had adopted the 1997 building code (Ordinance, Plaintiff's Ex. 6, R. p. 2613). This evidence along with Clements' extensive testimony of violations of manufacturing specifications and industry construction standards was clearly "the other facts" the *Kincaid* Court had in mind when it affirmed the verdict of the jury. The "scant care standard" the Appellants propose was obviously met here with extensive evidence of violations of generally accepted construction practices and violations of manufacturing specifications at trial – all of which shows the recklessness of Centex in its construction practices. Further, Centex did not object to the trial court's jury charges on gross negligence and cannot do so now.

Finally, it is ironic that Appellants cite *Chapman v. City of Virginia Beach*, 475 S.E.2d 798 (Va. 1996), a case in which the Virginia Supreme Court reversed the trial court for setting aside a jury verdict based on gross negligence. In *Chapman*, the court held: "Whether gross negligence has been established is usually a matter of fact to be decided by a jury." This is of course the same standard approved by this Court along with the time honored rule a favorable jury verdict is entitled to great deference on appeal.

VI. THE WEDGEWOOD MASTER DEED IS AN ADDITIONAL SUSTAINING GROUND IF THE STATUTE OF LIMITATIONS DEFENSE WAS PRESERVED FOR REVIEW.

In this case, the developer Centex Homes has alleged that the three-year statute of limitations has run against the Wedgewood Condominium Association (COA) and, as a result, the COA's construction defect case against Centex Homes (Centex) should be dismissed. However, because

Centex failed to provide a written assignment in accordance with paragraph 3.6 of the Wedgewood Master Deed, (1) Centex continues to warranty the common elements and (2) Centex retains the duty/liability for the repair or replacement of the common elements.

Here, Centex created the COA and, as such, Centex has "to turn over control of the association to the members other than the developer." Restatement (Third) of Property (Servitudes) § 6.19(2) (2000); *see also Concerned Dunes W. Residents v. Ga.-Pacific Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) (developer has duty "to turn over common areas that are not substandard and that are in good repair"). Centex's duty to turn over control of the Association to the COA includes an assignment that is imbedded in paragraph 3.6 of the Wedgewood Master Deed. Per the Master Deed, the turnover was supposed to take place in 2005, at the latest.

In paragraph 3.6 of the Wedgewood Master Deed, Centex expressly warrants to repair or replace any portions of the common area which are defective as to material or workmanship. While paragraph 3.6 states that the warranty is a one-year warranty from the date of completion of construction, paragraph 3.6 provides a "trigger" that must take place before the express warranty expires. **Per paragraph 3.6, that "trigger" is the written assignment by Centex.**

The written assignment as specified in Paragraph 3.6 is as follows: "At the end of the one (1) year warranty period referred to hereinabove in this Section 3.6, the Developer will assign to the Association in writing all of its rights, claims, causes of action and demands which it has or which may thereafter accrue against all other people who may be responsible for the design and/or construction of the Common Area." However, both Centex and the COA have stated that the "trigger," the written assignment, was never provided to the COA. (Spencer testimony, R. p. 809, lines 1-10, 20-24).

Based on the above, because Centex never provided the written assignment to the COA in

accordance with paragraph 3.6, Centex's express warranty to the COA has not expired and Centex continues to warranty the common elements. *See* Restatement (Second) of Contracts § 230(1) (1981) ("[I]f under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs); *S'holder Representative Servs. LLC v. Shire US Holdings, Inc.*, No. 2017-0863-KSJM, 2020 Del. Ch. LEXIS 315, at *45 (Del. Ch. Oct. 12, 2020) (where a contractual obligation is subject to what the Restatement (Second) of Contracts § 230 refers to as an event that terminates a duty, "that obligation exists unless it is extinguished by the occurrence of a contractually specified event. In that situation, the party seeking to avoid a finding of breach bears the burden of proving that the event has occurred and its obligation was extinguished." (footnote omitted)). Therefore, the statute of limitations has not run against the COA and Centex is responsible for the repair or replacement of the construction deficiencies as identified by the COA and is an additional sustaining ground to affirm the verdict.

Additionally, paragraph 3.6 makes it clear that Centex contemplated that it would surrender control to the homeowner-controlled COA and then the homeowner-controlled COA would be responsible for the repairs or replacement of the common elements including, but not limited to, the right to sue other parties for construction defects. Specifically, paragraph 3.6 states, "the Developer will assign to the Association in writing all of its rights, claims, causes of action and demands which it has or which may thereafter accrue against all other people who may be responsible for the design and/or construction of the Common Area." In other words, after the one-year warranty period **and** the written assignment from Centex to the COA, only then would Centex transfer its continuing duty/liability to repair or replace the common elements to the homeowner-controlled COA, including through litigation if necessary. However, as stated above, the "trigger" to transfer liability to the COA, the written assignment, was never initiated by Centex. Instead, Centex sued the subcontractors

and settled with them in a secret settlement during this trial. The transcript reveals the following:

> Mr. DesChamps: I want to put on the record and establish before the return of the jury verdict that Centex Homes has reached separate settlements, confidential settlements, with each of the third-party defendants that I'm about to name. (R. p. 1685, lines 3-17).

DesChamps then proceeded to list each subcontractor who settled with Centex prior to trial. (R. p. 1685, line 25; p. 1686, lines 1-25; p. 1687, lines 1-25).

Based on the above, because Centex never provided the written assignment to the COA in accordance with paragraph 3.6, Centex continues to retain the liability to repair or replace the common elements including the right to sue or take other action against "other people." *See, e.g., Richland Cty. v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002). In that case, the county sued to compel a landlord and tenant of commercial property to comply with the county's zoning ordinance requiring a screening between commercial properties and residential areas. The defendants argued that the county's suit was barred by the statute of limitations and the equitable doctrines of estoppel and laches because they had failed to comply with the ordinance in excess of the statutory period. Finding no South Carolina authority on point, the court of appeals looked to other jurisdictions for guidance and found that "[i]f the duty or obligation sought to be enforced is continuing in its character, time runs against plaintiff, not from its creation, but from its repudiation or breach." *Id.* at 95, 567 S.E.2d at 263 (quoting *Bors v. McGowan*, 159 Neb. 790, 797, 68 N.W.2d 596, 601 (1955)). In *Kaiser*, the defendants had a continuing duty to comply with the zoning ordinance, so the county's action was not time-barred. *Id.*

Here, Centex failed to effect the assignment and thereby trigger the termination of the warranty and its duty/liability to repair the common elements, including through the right to sue other people that was not transferred to the COA. Centex thus maintained its duty/liability through the period when the COA discovered that the common elements were not in good repair. Therefore, the

statute of limitations has not run against the COA and Centex is responsible for the repair or replacement of the construction deficiencies as identified by the COA.

VII. AS AN ADDITIONAL SUSTAINING GROUND, THE JURY'S DECISION ON DAMAGES IS ENTITLED TO GREAT DEFERENCE.

The verdict was $6,750,000.00 actual damages. Wedgewood's counsel requested $9,376,719.85 in his closing argument. (R. p. 1630, lines 16-22). It is obvious the jury reduced or discounted some of Wedgewood's claims in reaching its verdict. A jury award in South Carolina as to damages is entitled to great deference. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). In this case, Centex failed to preserve all its objections on appeal. As a result, the jury was left with a decision on damages, especially since all the experts agreed there was damage at Wedgewood. The jury could choose any damage amount from $384,963.94 (Watkins testimony) to $9,376,719.85 (Gallagher's testimony). The verdict was a very reasonable sum of $6,750,000.00 actual damages and was based on the evidence and testimony heard at trial. Obviously, the jury gave Centex a discount of $2,626,719.85 and the jury was absolutely entitled to make this decision and it was in their discretion to do so.

South Carolina law requires a jury alone determine all issues of fact including the proper amount of damages. *Johnson v. Phillips*, 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993), rev'd in part on other grounds, 318 S.C. 453, 458 S.E.2d 427 (1995); *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964). Wedgewood urges the Court to defer to the jury on damages as an additional sustaining ground since the verdict is most reasonable and less than the amount requested at trial. Further, the jury declined to award punitive damages which is yet another sign the verdict was reasonable and not the result of passion, prejudice or caprice. (Jury verdict form on punitive damages.) (R. p. 21).

CONCLUSION

For the reasons set forth above, Wedgewood requests the Court affirm the jury's verdict and remand the case to the circuit court.

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April 16, 2024

Attorneys for Respondent Wedgewood Condominium Association

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge
Case No. 2018-CP-26-00307

Appellate Case No. 2023-001132

Wedgewood Condominium Association, ... Respondent

vs.

Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as successor by merger to Centex Construction Company, Inc. and Centex Construction, LLC; Crescent Engineering, Inc., Defendants.

OF WHICH:
Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as successor by merger to Centex Construction Company, Inc. and Centex Construction, LLC, are..... Appellants

and

Centex Homes, a Nevada General Partnership, Third Party Plaintiff

v.

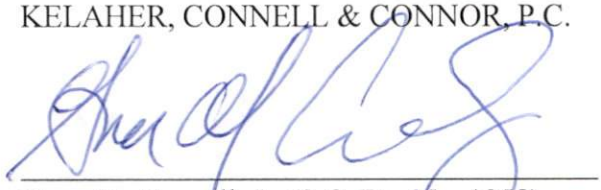
Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; Frank Harris d/b/a Frank Harris Construction a/k/a F. Harris Construction a/k/a Harris Drywall; Builders First Source–South East Group, LLC; Stock Building Supply, LLC f/k/a Stock Building Supply, Inc. f/k/a Carolina Builders Corporation; Michael D. Brownlee d/b/a Carolina Drywall & Interiors; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc. a/k/a Carolina Drywall Contractors, Inc.; Roof Doctor of the Carolinas, Inc.; John D. Frazier d/b/a and/or a/k/a Roof Doctor and/or Roof Doctor of the Carolinas and/or Roof Doctor of the Carolinas, Inc.; Steven Bosch d/b/a The Roofer Man; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Martin Mata d/b/a Martin Masonry, Inc.; Martin Masonry, Inc.; BR Brick & Masonry, Inc.; BR Brick & Masonry, LP f/k/a BR Brick & Masonry, Inc.; Unicon Concrete, LLC; Seno's Cleaning Services; Rice Planter Carpets, Inc. n/k/a Creative Touch Interiors, Inc., Floors, Inc. Successor by Merger to Rice Planter Carpets, Inc.; Carpets By Kendall, Inc.; Reliable Floor

Systems, Inc.; TNT Painting; Paint with Pride a/k/a Painting with Pride; William Evans d/b/a Top Notch Painters; Morningstar Consultants Inc.; MI Windows and Doors, LLC; Michael Dawson d/b/a Michael Dawson Construction, and Inc.; Vereen Concrete Co. Inc.; AK Construction Inc. a/k/a AK Framing and Siding Co.; and AK United, Inc. f/k/a AK Construction Inc., Third Party Defendants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Final Brief of Respondent** complies with Rule 211(b) SCACR.

KELAHER, CONNELL & CONNOR, P.C.



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April 16, 2024

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