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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2005-CP-26-0044
Appellate Case No. 2012-212048

Magnolia North Property Owners' Association, Inc., ... Respondent,

v.

Heritage Communities, Inc., Heritage Magnolia North, Inc. and Buildstar Corporation, ... Petitioners.

Brief of Petitioner

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Statement of Issues

I. **Was it error to expand South Carolina's unique "amalgamation of interests" theory to ignore the status of the three Petitioners as separate corporations when each had observed corporate formalities, and where there was no evidence of misrepresentation or fraud regarding their status or confusion caused by Petitioners?**

II. **Was it error to affirm the trial court's instructions to the jury that it had a duty to award punitive damages?**

III. **Was it error to affirm the directed verdict against all three Petitioners when there was evidence that one or more of them did not proximately cause part or all of the construction deficiencies in question and when one or more of them may not have been liable for part or all of the verdict?**

Statement of the Case and Facts[1]

This is an appeal of a construction defect case involving the Magnolia North Horizontal Property Regime ("Magnolia North") in Myrtle Beach. Heritage Communities, Inc. ("HCI") was Magnolia North's overall developer, Heritage Magnolia North, Inc. ("HMN") was the project specific developer for Magnolia North, and Buildstar Corporation ("Buildstar") was the general contractor for the Magnolia North project. (R. 956, 2019-24, 2029-33; App. 972, 2043-48, 2053-57). HCI is the parent corporation of both HMN and Buildstar. (R. 2021-24, 2029; App. 2045-48; 2053). This action was filed on May 28, 2003, by the Magnolia North Property Owners' Association ("POA") seeking to recover repair costs related to alleged defective conditions at Magnolia North. (R. 19; App. 25). The POA operative Complaint contained the following claims: (1) negligence against HCI, HMN, and Buildstar; (2) breach of express warranty against HCI; (3) breach of the implied warranty of workmanlike service against Buildstar; and (4) breach of fiduciary duty against HCI and HMN. (R. 25; App. 45).

It is Petitioners' position that both liability and damages were disputed at trial. The evidence at trial established that Buildstar was the general contractor at Magnolia North and that all construction work was performed entirely by third party subcontractors. (R. 2021-2022, 2074-2075; App. 2045-46, 2098-99). Evidence was submitted refuting the contention that Buildstar, as opposed to the subcontractors who actually performed the construction, caused the defective conditions. (R. 727-837; App. 738-846). Evidence was also submitted regarding the extent of the alleged defects. Id.

[1] HCI, HMN and Buildstar combine the Statement of the Case and the Statement of the Facts to eliminate repetition emanating from overlap of the procedural history with the facts of the case for ease of reference.

With respect to the ABTCO trim, both Petitioners' and Respondent's witnesses testified that the product is now known to be unsuitable in this environment, but the defective nature of this product was unknown at the time Magnolia North was constructed, and there was no deviation from the manufacturer's standards for its installation at Magnolia North. (R. 280, 367, 515, 529, 732-733, 808; 2077; App. 286, 373, 527, 541, 741B-42, 817, 2101). Additionally, numerous property owners at Magnolia North testified they had no issues with defective construction or that any issues they had were already remedied. (R. 694-696, 703-706, 711-716, 718-720, 723, 725-726; App. 705-07, 714-17, 722-27, 729-31, 734, 736-37).

The evidence at trial with regard to the relationship among Petitioners HCI, HMN and Buildstar established that each was properly formed as a separate South Carolina corporation and that they operated as separate entities with distinct purposes. (R. 2023, 2030; App. 2047-54). Buildstar was the general contractor, HMN was the site specific developer for Magnolia North, and HCI was the overall developer and parent corporation for HMN and Buildstar. (R. 2021-2024; App. 2045-48). While there was evidence that the three entities shared officers, directors and office space, there was no evidence offered of any confusion caused by Petitioners, fraud, or other inequitable conduct with regard to the operation of these distinct entities. (R. 2019-2020, 2021-2024, 2033-2034; App. 2043-44, 2045-48, 2057-58).

At the close of Respondent's case, the trial court ruled that HCI, HMN and Buildstar were "amalgamated" and were to be treated as one and the same – effectively stripping them of their separate corporate forms. (R. 660-76; App. 671-687). As a result of the trial court's amalgamation ruling, the jury was instructed that "all three of the

defendants shall be treated as one for determining any liability." (R. 1045, 956; App. 1061, 972). The trial court also granted Petitioners a directed verdict on the express warranty claim. (R. 692; App. 703).

At the close of all evidence, the trial court granted the Respondents directed verdicts as to the implied warranty of workmanlike service claims. (R. 1040; App. 1056). At that same time, the trial court granted Respondents' motion for directed verdict against the now "amalgamated" Petitioners on the negligence claims. (R. 1384-93; App. 1386-1405). This ruling by the trial court that "the condominiums were negligently constructed" did not separately address each of the specific defective conditions alleged, but rather operated as a blanket verdict finding that HCI, HMN and Buildstar were negligent as to ***all*** of the alleged defective conditions.

During jury instructions, with regard to punitive damages, the trial court charged the jury as follows:

> Accordingly, if you should find that the Plaintiff is entitled to recover punitive damages in addition to actual damages, ***it would be your duty to include such damages in your verdict*** and award such an amount as you may deem reasonable and proper in light of the facts and circumstances.

(R. 971-972; App. 987-88) (emphasis added). HCI, HMN and Buildstar objected to this as violating their respective due process rights. (R. 1046-1050, 975; App. 1062-66, 991).

The jury awarded $6,500,000.00 in actual damages and $2,000,000.00 in punitive damages. (R. 16; App. 22). After the trial court granted a set off, the total combined judgment was $4,471,178.31, and this judgment applied equally to HCI, HMN and Buildstar due to the "amalgamation" ruling. (R. 6; App. 12).

HCI, HMN and Buildstar timely sought review by the Court of Appeals. The Court of Appeals affirmed the trial court in Opinion 4943. HCI, HMN and Buildstar filed a timely petition for rehearing and rehearing *en banc*, which was denied by the Court of Appeals' Order dated April 20, 2012. This Court granted HCI's, HMN's and Buildstar's petition for a writ of certiorari on certain issues on June 26, 2014.

Argument

I. The Court of Appeals and trial court misapplied the "amalgamation of interests" theory in contravention of longstanding South Carolina law respecting the separateness of different corporate entities which requires a clear finding of injustice or unfairness to justify disregarding separate corporate forms.

The evidence at trial established that HCI, HMN and Buildstar were properly formed as separate South Carolina corporations and that each operated as a separate entity with a distinct purpose. (R. 956, 2019-24, 2029-33; App. 972, 2043-48, 2053-57). While these separate entities shared officers, directors and office space, there was no evidence that any one of them failed to follow the corporate formalities, or that there was any misrepresentation or inequitable conduct regarding their operation as separate corporate entities. (R. 2001, 2019-24, 2033; App. 2025, 2043-54, 2057). At the close of Respondents' evidence, the trial court nevertheless held that HCI, HMN and Buildstar were "amalgamated" and thus would be treated as one. (R. 1384-85; App. 1396-97). Specifically, the trial court based its ruling on the following findings:

> Well I find as a matter of law that the facts in this case closely parallel with the facts in the Kincaid case, the Kincaid case and that the piercing of the corporate veil issue raised in the Sherwood, not Sherwood, Mid-South Mortgage v. Sherwood Development Corporation, the piercing the corporate veil ruling in the amalgamation ruling in that case and the analysis applied in that case is inapplicable to that in this case, that the corporate officers here in the same place, the entities were so intertwined that they should be amalgamated, that the corporate interest amalgamation

> should be ordered in this case because the evidence has revealed an amalgamation of the corporate interest, the entities, and activities so as to blur the legal distinction between the corporation and their activities. I think that's pointed out through Mr. Hardester's testimony as well as the evidence in the case and that's the order of the Court.

(R. 675-76; App. 686-87). This ruling was not based on any finding that there was any confusion, inequitable conduct, or fraud in the operation of these three distinct entities.

The application of the "amalgamation" theory under these circumstances ignores basic tenets of corporate law that permit the corporate form to be disregarded only in limited circumstances not presented here. If allowed to stand, this amalgamation ruling creates a slippery slope leading to a new form of corporate veil piercing – if corporations share officers, offices and common ownership, then their corporate separateness may be ignored based upon an individual fact-finder's subjective perception that they shared common goals or purposes.

A. The "amalgamation of interests" or "blurred identity" theory does not apply because there was neither misrepresentation nor third-party confusion.

South Carolina's unique "amalgamation of interests" or "blurred identity" theory[2] is an equitable theory, and thus the appellate court's scope of review is broad. Mid-South Mgmt Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 604-05, 649 S.E.2d 135, 144 (Ct. App. 2007). Aside from the Court of Appeals' opinion here, South Carolina courts had referenced this theory only a few times.[3]

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[2] Petitioners have found no cases in any other jurisdictions that have discussed a theory by these names in the context of disregarding corporate form.

[3] One such reference is in Schenk v. National Healthcare, Inc., 322 S.C. 316, 319, 471 S.E.2d 736, 737 (1996), in a footnote. The South Carolina Supreme Court in Kennedy v. Columbia Lumber and Manufacturing Company, Inc., 299 S.C. 335, 384 S.E.2d 730 (1989), alluded to the "blurring of legal distinction" theory in a lender liability situation. In Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011) the Court

The first case in South Carolina addressing the "amalgamation of interests" theory was Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). Kincaid involved three sister corporations, all owned by the same individual shareholders, that were involved in developing, building, and marketing a subdivision. Id. The marketing company tried to deny liability for faulty construction performed by its sister corporation, asserting that it was merely the marketing company. This argument was rejected and the trial court held that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." Id., 289 S.C. at 96, 344 S.E.2d at 874.

In Kincaid, the Court of Appeals affirmed the trial court's ruling, noting that the three corporations shared the same officers, directors, and corporate offices. Id. ***Additionally***, however, the Court of Appeals focused on evidence in which the marketing company identified itself as the "project developer" who would remedy construction defects. Indeed, the marketing company's letterhead indicated it was "[a] Development, Construction, Sales, and Property Management Company." Id. Moreover, there was evidence that the plaintiffs in Kincaid were confused by these representations with respect to which company was doing what. Thus, while the sharing of officers, directors and corporate offices were factors considered, the Kincaid Court's affirmance of the amalgamation ruling was also critically based on the finding that the marketing company had, ***through affirmative misrepresentations to the plaintiffs*** in the case, blurred the legal distinction between it and its sister corporations. Id.

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of Appeals applied this theory under a virtually identical set of facts to this case. This Court granted a writ of certiorari in the Pope matter at the same time as it did in this matter.

Subsequently, in Mid-South Mgmt Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007), the Court of Appeals again addressed the "amalgamation of interests theory," reiterating the significance of the existence of confusion as to the separate nature of the corporate entities. Specifically, in Mid-South, the Court of Appeals refused to apply the "amalgamation of interests" theory where there was no evidence in the record that anyone had confused the subsidiary with its parent company. Id., 374 S.C. at 605, 649 S.E.2d at 145.

The Court of Appeals opinion here treats "amalgamation" as a distinct legal theory separate and apart from other methods of "piercing the corporate veil" and not subject to the same limitations as the other methods. This is incorrect and represents an unwelcome and improper dilution of the law of corporate separateness in South Carolina. "Piercing the corporate veil" is the common phrase used to describe the procedure where a court determines grounds exist to disregard the corporate form of a party. Drury Dev. Corp. v. Foundation Ins. Co., 380 S.C. 97, 101 n.1, 668 S.E.2d 798, 800 n.1 (2008). While the *remedy* of disregarding the corporate form may result from several different theories, such as traditional piercing of the corporate veil, the alter ego theory, the instrumentality rule, or the amalgamation of interests theory, certain limitations ***always*** apply to such theories. Specifically, the disregarding of the corporate form has always been limited to situations were there is some fraud, wrong or fundamental unfairness that justifies this drastic remedy. Drury, 380 S.C. at 101-02, 668 S.E.2d at 800; Oskin v. Johnson, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012) (referring to the alter-ego theory as a method of piercing the corporate veil and refusing to apply it in the absence of fraud, injustice, or the contravention of public policy); Jones v. Enter. Leasing Co., 383 S.C.

259, 267-68, 678 S.E.2d 819, 824 (Ct. App. 2009) (requiring a showing that retention of corporate form would promote fraud, wrong or injustice before applying alter-ego theory); Colleton Cty. Taxpayers Ass'n v. Colleton Cty. Sch. Dist., 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (holding that alter-ego theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice); Wilson v. Friedberg, 323 S.C. 248, 257, 473 S.E.2d 854, 859 (Ct. App. 1996) (noting that the instrumentality rule does not apply unless the retention of separate corporate personalities would promote fraud, wrong or injustice).

As is illustrated above, this requirement is equally applicable to amalgamation. The Kincaid Court based its amalgamation ruling, in part, on ***evidence that the plaintiffs had been misled*** as to the roles of the different corporate entities. Kincaid, 289 S.C. at 96, 344 S.E.2d at 874. The Mid-South Court clearly imposed this requirement by refusing to apply amalgamation ***because there was no evidence of confusion*** on the part of the plaintiffs as to the differing corporations and therefore, no fundamental unfairness justifying disregarding the corporate forms. Mid-South, 374 S.C. at 605-06, 649 S.E.2d at 145.

In this case, the evidence established that HCI, HMN and Buildstar were properly formed as separate South Carolina corporations and that each operated as a separate entity with a distinct purpose. (R. 956, 2019-24, 2029-33; App. p. 972, 2043-48, 2053-57). There was ***no evidence*** that any one of them used their separate corporate status as an unfair device to achieve an inequitable result, or that there was any confusion, inequitable conduct, or misrepresentation in the separate operations of these three entities. Moreover, neither the trial court nor the Court of Appeals based their

amalgamation rulings on any such finding. Thus, the complete disregarding of their separate corporate forms was improper, whether through "amalgamation," or any other theory.

The creation of affiliated corporations to limit liability while pursuing common goals is well within the law and a common practice. No South Carolina Court has previously held corporations liable for each other's acts or obligations merely because of centralized control, mutual purposes, and shared offices; rather, the corporate form has been disregarded ***only where retention of separate corporate personalities would promote fraud, wrong or injustice, or contravenes public policy***. Drury, 380 S.C. at 101, 668 S.E.2d at 800.

The Texas Supreme Court case of SSP Partners v. Gladstrong Investments Corp., 275 S.W.3d 444 (Tex. 2008), illustrates how, whatever the procedural theory used, a finding of "injustice" or "inequity" is a prerequisite to a court disregarding the corporate form. The SSP Court addressed, and ultimately rejected, a theory developing in Texas' lower courts called "the single business enterprise" theory. This theory provided that when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each corporation may be held liable for debts incurred in pursuit of that business purpose. Id. at 450. Under Texas lower courts' "single business enterprise" theory, the courts considered factors such as: common employees; common offices; centralized accounting; payment of wages by one entity to the other's employees; and services rendered by one entity's employees on behalf of the other entity. Id. at 450-51. The SSP Court noted that, unlike theories such as "piercing the corporate veil" and "alter ego," the "single business enterprise" theory as had

developed in the Texas trial courts ***did not include the requirement that the corporate form be used as an unfair device to achieve an inequitable result***. Id. at 451-52. Noting this anomaly, the Texas Supreme Court ***expressly rejected*** the "**single business enterprise theory**" as a basis for imposing liability despite the corporate structure. Id. at 455. Specifically, the SSP Court held

> Creation of affiliated corporations to limit liability while pursing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each others obligations merely because of centralized control, mutual purposes, and shared finances. **There must also be evidence of abuse . . . injustice and inequity.** By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are . . . references for the kinds of abuse, specifically identified, that the corporate structure should not shield – fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. **Such abuse is necessary before disregarding the existence of a corporation as a separate entity.** Any other rule would seriously compromise what we have called a "bedrock principle of corporate law" – that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's liabilities.

Id. (emphasis added). In the past, South Carolina has followed these same established principles.

South Carolina's jurisprudence has been clear that, regardless of the theory used, the corporate form may be disregarded only where retention of separate corporate identities would promote fraud, wrong, or injustice or contravene public policy. Drury, 380 S.C. at 101-02, 668 S.E.2d at 800; see also Oskin, 400 S.C. at 400, 735 S.E.2d at 465; Colleton Cty. Taxpayers Ass'n, 371 S.C. at 237, 638 S.E.2d at 692; Jones, 383 S.C. at 267-68, 678 S.E.2d at 824; Wilson, 323 S.C. at 257, 473 S.E.2d at 859. As there was no evidence of such, here the trial courts' "amalgamation" ruling was error, and should have been reversed by the Court of Appeals.

In addition to conflicting with South Carolina's longstanding law with regard to piercing the corporate veil and other mechanisms for disregarding the corporate form, the "amalgamation" ruling in this case is also directly inconsistent with the provisions of the South Carolina Code which provide for the formation of separate legal entities. For example, the Uniform Limited Liability Company Act of 1996, S.C. Code Ann. §§ 33-44-101 *et seq.*, allows for the formation of South Carolina Limited Liability Companies ("LLCs"). LLCs are "a legal entity distinct from its members." S.C. Code Ann. § 33-44-201.[4] Additionally, except as otherwise provided within the Code, the members of an LLC are "not personally liable for a debt, obligation, or liability of the company . . . ." S.C. Code Ann. § 33-44-303(a). Thus, a single person or persons may form LLCs for any lawful purpose, and the separate LLCs are treated under our law as separate entities from each other and from their members with respect to liability. Under the "amalgamation" ruling in this matter, a court could ignore the separate status of such LLCs merely because they have the same members, use the same office space, and employ the same people. Such an outcome eviscerates the South Carolina Code's provision allowing the creation and governing of such entities.

Hence, as recognized previously in South Carolina case law and as affirmed by statutes passed by the General Assembly, the corporate form may be disregarded only where retention of separate corporate personalities would promote fraud, wrong, or injustice or contravene public policy. Here there was no such evidence. Additionally,

[4] A single member LLC is not a separate legal entity for purposes of South Carolina ***tax law***. S.C. Code Ann. § 12-2-25. Otherwise, a single member LLC is to be treated as a separate legal entity from its member.

there was no evidence or finding of any confusion cause by these separate entities that would amount to fraud or injustice justifying stripping them of their separate status.

B. The requirements for "piercing the corporate veil" must be met in order for a Court to disregard the corporate form.

It is a well-settled tenet that "a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears." Drury, 380 S.C. at 101, 668 S.E.2d at 800. Only when the corporate entity is used to "protect fraud, justify wrong, or defeat public policy" will it be disregarded, thereby "piercing the corporate veil." Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984). The phrase "piercing the corporate veil" refers to the remedy applied when a court permits the corporate form to be disregarded. Drury, 380 S.C. at 101 n.1, 668 S.E.2d at 800 n.1. Several rationales may serve as the basis for a party obtaining such equitable relief. See id. (explaining that the "alter ego" doctrine is merely a theory or means of obtaining the procedural relief of piercing the corporate veil). Whatever the theory, including "amalgamation," there are limitations on the remedy of corporate veil piecing.

In South Carolina, the analysis of whether a corporate veil should be pierced is a two-pronged test. Drury, 380 S.C. at 102, 668 S.E.2d at 800. The first prong is an eight-factor analysis[5] that examines the observance of corporate formalities. Sturkie, 280 S.C. at 457, 313 S.E.2d at 318. "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." Dumas v. InfoSafe Corp.,

[5] The eight factors are: (1) capitalization of the corporation; (2) observation of corporate formalities; (3) payment of dividends; (4) solvency of the corporation; (5) whether corporate funds were siphoned by a dominant shareholder; (6) whether other officers or directors are functioning; (7) maintenance of corporate records; and (8) whether the corporation is a facade for operations of a dominant shareholder. Wilson, 323 S.C. at 252, 473 S.E.2d at 856.

320 S.C. 188, 192, 463 S.E.2d 641, 644 (Ct. App. 1995). The second prong of the analysis requires an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the individual. Id.

The trial court and the Court of Appeals erred in ignoring this two-pronged analysis in this case. Respondent did not meet the traditional test outlined in Sturkie. There was insufficient evidence respecting the eight factors of the first prong. There was also no evidence of, nor a finding by the trial court of, any injustice or fundamental unfairness if the corporate form were not disregarded.

Gwyn Hardester, the only representative of the Heritage entities who testified at trial, stated that if a property owner had a problem such as a window leak, they would contact HCI directly. (R. 2031; App. 2055). This corresponds with the provisions in HCI's warranty manual. (R. 1481; App. 1499). None of the property owners who testified at trial gave any indication of any confusion regarding the separate Heritage entities. Further, evidence was introduced that one of the reasons that the entities were established as separate corporations was to facilitate each business containing "its own expenses and oversight as it applied to property management, construction cost allocation, et cetera." (R. 2030; App. 2054). Rather than support the wholesale disregarding of the separate corporate forms, this purpose was wholly proper. As was stated by the court in SSP Partners, the use of affiliated but separate corporate entities for such purposes "lies firmly within the law and is commonplace." SSP Partners, 275 S.W.3d at 445 (holding that it is "bedrock principle of corporate law -- that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations").

The amalgamation ruling resulted in significant unfair prejudice to HCI, HMN and Buildstar. Respondents were relieved of their burden of establishing the existence of all elements of the claims against each separate entity.[6] Additionally, the ruling suggested to the jury that HCI, HMN and Buildstar had each engaged in some form of misconduct and were deserving of being stripped of their separate corporate entity status. Most significantly, the amalgamation ruling opened the door for the application of punitive damages against all *three* Petitioners without the requirement that Respondents prove by clear and convincing evidence that each separate Petitioner deserved such punishment. Further, certain claims (*e.g.*, the breach of fiduciary duty claim) supporting punitive damages, while made only against HRI and HMN, were wrongly sent to the jury as to all of the Petitioners by virtue of the amalgamation ruling. Lastly, despite the fact that Respondents only sued Buildstar for breach of the implied warranty of workmanlike service, the trial court amalgamated the Petitioners, then granted the Respondents a directed verdict against them all on that cause of action. Because of this amalgamation ruling error, HCI, HMN and Buildstar should be granted a new trial.

[6] For example, in the context of construction litigation, this Court has held that each defendant's individualized standard of care must be addressed. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 560-61, 658 S.E.2d 80, 88 (2008) (holding that a general contractor is not automatically liable where a subcontractor performs negligent work, but rather the general contractors individualized standard of case must be addressed). No individualized determinations were ever made in this case as to the standards of care applicable respectively to HCI, HMN, and Buildstar. Hence, through the erroneous "amalgamation" ruling, Respondent was improperly relieved of establishing the elements of its claims.

II. The instruction to the jury that they had a duty to award punitive damages if they found Plaintiff was entitled to such damages was erroneous and requires a new trial.

In charging the jury as to punitive damages, the trial court gave the following instruction over Petitioners' objection:

> Accordingly, if you should find that the Plaintiff is entitled to recover punitive damages in addition to actual damages, ***it would be your duty to include such damages*** in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances.

(R. 971-72, 975, 1046-47; App. 987-88, 991, 1062-63) (emphasis added). Such an instruction to the jury that it had a ***duty*** to award punitive damages violated Petitioners' due process rights and was in error.

An erroneous jury instruction should result in a reversal where the trial court abused its discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. Id.; Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). Additionally, "[a] trial court must charge the current and correct law." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). An erroneous jury charge is grounds for reversal where the appellant can demonstrate error and prejudice. Cole, 378 S.C. at 405, 663 S.E.2d at 33. Here, the trial court's instruction indicating that punitive damage may be **mandatory** was an incorrect statement of the current law and constituted error resulting in clear prejudice to Petitioners and, therefore, warrants the grant of a new trial.

The trial court and the Court of Appeals upheld the propriety of this charge based the cases of Broom v. Southeastern Highway Contracting Co., Inc., 291 S.C. 93, 98-99, 352 S.E.2d 302, 305 (Ct. App. 1986) and Sample v. Gulf Ref. Co., 183 S.C. 399, 191

S.E. 209 (1937). In Broom, the Court of Appeals stated: "[i]n South Carolina, unlike most jurisdictions [22 Am.Jur.2d *Damages* § 240 n. 15 at 328 (1965)], the award of punitive damages does not rest in the discretion of the jury but is recoverable as a matter of right." Id. The Sample Court held that it was not error to instruct a jury that it had a duty to award punitive damages if it found the plaintiff's rights "had been consciously, willfully, and recklessly violated." Sample, 183 S.C. at 410, 191 S.E. at 214.

The justification used by South Carolina's courts for the mandatory imposition of punitive damages and the lack of any discretion granted to the jury upon a finding of "entitlement" (*i.e.*, justification) is that "[p]unitive damages have now come, however, to be generally, though not universally, regarded not only as punishment for wrong, but as vindication of a private right." Beaudrot v. Southern Ry., 69 S.C. 160, 165, 48 S.E. 106, 107 (1904). This "vindication of a private right" has been described as compensatory in part. Griffin v. Southern Ry., 65 S.C. 112, 127, 43 S.E. 445, 447 (1903) (holding that "it may be said that [punitive] damages in a measure compensate or satisfy for the willfulness with which the private right was invaded . . . .").

Recently, this Court stated of punitive damages that they "serve at least three important purposes: punishment of the defendant's reckless, willful, wanton or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful invasion of the plaintiff's private rights." O'Neil v. Smith, 388 S.C. 246, 252, 695 S.E.2d 531, 534 (2010). The case of Clark v. Cantrell, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000), echoed the century-old view that "[p]unitive damages have now come, however, to be generally, though not universally, regarded not only as punishment for wrong, but as vindication of a private right."

However, far from being "generally regarded," the view that the "vindication of a private right" purpose of punitive damages requires making them ***mandatory*** in certain circumstances is unique to South Carolina and conflicts with modern constitutional jurisprudence regarding punitive damages.

In the period since the 1986 decision of the Court of Appeals in Broom and the present, the United States Supreme Court has addressed the due process implications of punitive damages awards. In Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), the Court stated that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." Id. at 18. The United States Supreme Court then made clear it a post-judgment review of the constitutionality of any punitive damages award is mandated. Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 418 (1994). To this end the Court established guideposts for trial courts to use to evaluate the constitutionality of a due process award, see BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996), expressed its concerns over the lack of protections given to civil defendants regarding punitive damages, see State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003), and adopted a *de novo* standard of review for appellate review of the trial court's determination of constitutionality, see Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001). With regard to the ***review*** of punitive damages awards, the South Carolina Supreme Court's jurisprudence is now in accord. See Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009) (establishing modern South Carolina punitive damages review procedures consistent with Gore, Cooper Industries, and Campbell). This Court

should now make clear that South Carolina's jury instructions respecting punitive damages are also in accord with modern constitutional principles.

Throughout the United States Supreme Court's modern jurisprudence regarding punitive damages, it has reinforced its approval of state systems that afford the jury latitude to determine the appropriateness of punitive damages so long as they were "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence," Gore at 568, and punitive damage jury instructions which provided the jury with an opportunity to conduct an "individualized assessment of appropriate deterrence and retribution." Haslip at 20.

However, an instruction to the jury that punitive damages may be ***mandatory*** fails to satisfy minimal due process requirements. In Smith v. Wade, 461 U.S. 30 (1983), the Supreme Court held that it is a "key feature of punitive damages – that they are ***never awarded as of right***, no matter how egregious the defendant's conduct." Id. at 52 (emphasis added). Rather, "[i]f the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such and award." Id. The Wade Court further explained the reasoning behind this rule:

> Compensatory damages, by contrast are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. ... To make its punitive award, the jury was required to find not only that [the defendant's] conduct met the recklessness threshold (a question of ultimate fact), but *also* that his conduct merited a punitive award ... in addition to the compensatory award (a discretionary moral judgment).

Id. (emphasis in original).

Thus, a jury's decision with regard to punitive damages involves three determinations. First, the jury makes a factual determination as to liability and compensatory damages. Second, where an elevated culpability threshold applies for punitive damages, the jury makes a factual determination as to whether the defendant's conduct meets that threshold. Finally, where these two factual determinations are made in the plaintiff's favor, the jury engages in a discretionary moral judgment as to whether punitive damages are warranted, and if so, the proper amount of such punitive damages. Following an award of punitive damages, the court then reviews the constitutionality of that award.

In Cooper Industries, the U.S. Supreme Court reiterated the distinction between the compensatory and punitive damages set forth in Wade. Specifically, the Court held that these two types of damages "serve distinct purposes," with compensatory damages "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct, and punitive damages "operat[ing] as 'private fines' intended to punish the defendant and to deter future wrongdoing." Cooper Indus., 532 U.S. at 432. "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its ***moral condemnation***." Id. (emphasis added).

South Carolina's outdated view that punitive damages are recoverable as a matter of right conflicts with the United States Supreme Court's modern jurisprudence outlining the distinctive purposes and considerations relating to compensatory and punitive damages. Under Broom, and the cases on which the Broom Court relies, the jury makes the factual determination of whether the threshold for punitive damages has been met. If

it so finds, the jury is then ***required*** to award punitive damages of some amount. The jury is denied the ability to make a ***discretionary moral judgment*** as to the appropriateness of such an award as outlined in Wade. Rather, outdated South Carolina law ***imposes*** upon the jury the "moral condemnation" (as outlined in Cooper Indus.) justifying a punitive damages award, without regard to whether the jury actually feels such "moral condemnation" and without regard to whether the jury feels that a punitive damages award is justified and necessary. This Court should overrule Broom and like cases in this regard.

South Carolina's view that it is not within the discretion of the jury whether to award punitive damages where the jury finds the requisite level of culpable conduct is in stark contrast to virtually every other jurisdiction in this country.[7] See 22 Am. Jur. 2d

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[7] A review of other jurisdictions shows that the universal rule is that, even where the standard for punitive damages has been met, the amount of such damages **and whether to award them** remains within the discretion of the fact finder. Henderson v. Alabama Power Co., 627 So. 2d 878, 887 (Ala. 1993) abrogated on other grounds by Ex parte Apicella, 809 So. 2d 865 (Ala. 2001) ("The cases hold that punitive damages are not recoverable as a matter of right, but their imposition is *discretionary with the jury*[.]" (emphasis in original)); Haskins v. Shelden, 558 P.2d 487, 494 (Alaska 1976) ("[T]he award of punitive damages is discretionary with the trier of fact."); Puz v. McDonald, 680 P.2d 213, 214 (Ariz. Ct. App. 1984) ("We believe that the public interest in deterring wanton, reckless or wilfully injurious conduct is best served by leaving the award of punitive damages to the discretion of the trier of fact . . . ."); Toney v. Haskins, 644 S.W.2d 622, 628 (Ark. App. 1983) ("Exemplary damages are not recoverable as a matter of right . . . ."); Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141 (Cal. 1979) (stating that the determination of whether to assess punitive damages and in what amount are left to the discretion of the jury); Ballow v. PHICO Ins. Co., 878 P.2d 672, 682 (Colo. 1994) ("[A] punitive damages award remains at the discretion of the trier of fact."); Freeman v. Alamo Mgmt. Co., 607 A.2d 370, 373 (Conn. 1992) ("As courts have uniformly held, no plaintiff has a right to punitive damages . . . ."); Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970) (stating that it is within the jury's "discretion and province to award reasonable punitive damages"); Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978) ("[T]he jury has the discretion whether or not to award punitive damages . . . ."); Bonds v. Powl, 230 S.E.2d 133, 135 (Ga. 1976) ("It is always exclusively a question for the jury to determine when punitive or exemplary damages should be allowed . . . .");

Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 839 P.2d 10, 36 (Haw. 1992) ("Award or denial of punitive damages is within the sound discretion of the trier of fact."); Boise Dodge, Inc. v. Clark, 453 P.2d 551, 557 (Idaho 1969) ("The assessment of punitive damages, like the assessment of all damages, is in the first instance for the discretion of the jury."); Winters v. Greeley, 545 N.E.2d 422, 428 (Ill. App. 3d 1989) ("[P]unitive damages are never awarded as a matter of right."); Cheatham v. Pohle, 789 N.E.2d 467, 472 (Ind. 2003) ("[T]he trier of fact is not required to award punitive damages even if the facts that might justify an award are found."); Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d 612, 617 (Iowa 1991) ("The allowance of an award of punitive damages is not a matter of right and rests with the factfinder."); Smith v. Printup, 866 P.2d 985, 992 (Kan. 1993) ("Punitive damages are not awarded to a plaintiff as a matter of right . . . ."); Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993) ("The jury's decision as to whether to award punitive damages remains discretionary because the nature of punitive damages is such that the decision is always a matter within the jury's discretion."); McFarland v. Justiss Oil Co., Inc., 526 So. 2d 1206, 1214 (La. Ct. App. 1988) ("The decision, then, whether or not to award punitive damages, and the amount of such damages, if they are to be awarded, rests within the sound discretion of the trier of fact."); Hanover Ins. Co. v. Hayward, 464 A.2d 156, 158 (Me. 1983) ("The award of punitive damages, when available in Maine, is within the sound discretion of the fact finder . . . ."); Philip Morris Inc. v. Angeletti, 752 A.2d 200, 246 (Md. 2000) ("[E]ven where the evidence warrants punitive damages, it is within the sound discretion of the trier of fact to award or deny such damages."); Pinshaw v. Metro. Dist. Comm'n, 524 N.E.2d 1351, 1358 (Mass. 1988) ("The award of punitive damages is a discretionary moral judgment . . . ." (internal quotation omitted)); Orth v. Featherly, 49 N.W. 640, 642 (Mich. 1891) (stating that the jury may give punitive damages); Huebsch v. Larson, 191 N.W.2d 433, 435 (Minn. 1971) ("It is well settled that in actions of this type whether exemplary damages shall be allowed rests in the discretion of the jury . . . ."); Hurst v. Sw. Mississippi Legal Servs. Corp., 708 So. 2d 1347, 1350 (Miss. 1998) ("The award of punitive damages, along with the amount of such, are within the discretion of the trier of fact."); City of Harrisonville v. McCall Serv. Stations, 2014 Mo. App. LEXIS 192, at *61 (Mo. Ct. App. Feb. 25, 2014) ("Punitive damages are never allowable as a matter of right and their award lies wholly within the discretion of the trier of fact."); Emmerson v. Walker, 236 P.3d 598, 606 (Mt. 2010) ("[P]unitive damages rest within the trier of fact's discretion . . . ."); Evans v. Dean Witter Reynolds, Inc., 5 P.3d 1043, 1052 (Nev. 2000) ("A plaintiff is never entitled to punitive damages as a matter of right."); Daigle v. City of Portsmouth, 534 A.2d 689, 704 (N.H. 1987) (instructing the jury that they could award punitive damages if they chose to do so); Leimgruber v. Claridge Associates, Ltd., 375 A.2d 652, 655 (N.J. 1977) ("The decision to award exemplary damages and the amount thereof rests within the sound discretion of the trier of fact."); Peters Corp. v. New Mexico Banquest Investors Corp., 188 P.3d 1185, 1197 (N.M. 2008) ("Punitive damages . . . are not awarded as a matter of right, but lie within the sound discretion of the [trial] court."); Lyke v. Anderson, 147 A.D.2d 18, 28 (N.Y. 1989) ("Under any view of the law, punitive damages are not mandatory."); Maint. Equip. Co., Inc. v. Godley Builders, 420 S.E.2d 199, 203 (N.C. Ct. App. 1992) ("[P]unitive damages are not recoverable as a matter of right . . . ."); Landseidel v.

Damages § 550 (2003) ("[T]he decision whether to award exemplary or punitive damages rests in the discretion of the jury or the court as trier of fact. ***Because the decision is discretionary, the trier of fact is not required to award punitive damages, even if it finds that the defendant's acts were oppressive or malicious or the evidence otherwise warrants punitive damages.***") (emphasis added); accord Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. at 18-20 (approving jury instruction from Alabama wherein jury charged that it had the ***discretion whether*** to award punitive damages).

The Court of Appeals in this matter incorrectly concluded that the modern United States Supreme Court jurisprudence is limited to only the ***review*** of punitive damages awards and that it is within the discretion of the states to ***mandate*** punitive damages.

Culeman, 181 N.W. 593, 595 (N.D. 1921) ("Punitive damages are largely in the discretion of the jury . . . ."); Ott v. Marion Plaza, 1987 Ohio App. LEXIS 8545, at *30 (Ohio Ct. App. Aug. 31, 1987) ("In Ohio punitive damages are not recoverable in any case as a matter of right; their allowance is discretionary with the jury."); Sides v. John Cordes, Inc., 981 P.2d 301, 305 n.10 (O.K. 1999) ("[W]hether to allow or deny punitive damages and their amount, if any [] is left to the discretion of the trier of fact . . . ."); Huffman & Wright Logging Co. v. Wade, 857 P.2d 101, 118 (Or. 1993) (describing appropriate jury instructions stating punitive damages are discretionary); J.J. DeLuca Co., Inc. v. Toll Naval Associates, 56 A.3d 402, 416 (Pa. Super. Ct. 2012) ("[T]he decision to award punitive damages, and the amount, is within the discretion of the fact-finder."); Cady v. IMC Mortgage Co., 862 A.2d 202, 220 (R.I. 2004) ("[I]t is in the discretion of the trier of fact to determine whether and to what extent punitive damages should be awarded."); Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801, 808 (S.D. 1996) (approving of jury instructions that accurately restated the law in stating that the assessment of punitive damages was never mandatory); Seminole Pipeline Co. v. Broad Leaf Partners, Inc., 979 S.W.2d 730, 758 (Tex. App. 1998) (stating that punitive damages are not a matter of right); Bennett v. Huish, 155 P.3d 917, 924 (Ut. 2007) ("Whether punitive damages [should be] awarded is generally a question of fact within the sound discretion of the [fact finder] . . . ."); DeYoung v. Ruggiero, 971 A.2d 627, 638 (Vt. 2009) ("We also emphasize that the jury still retains full discretion to award any amount of punitive damages to plaintiffs, including none at all."); Ferguson v. Brockwell, 39 Va. Cir. 68 (Va. Cir. 1995) ("[P]unitive damages are never mandatory."); Peters v. Rivers Edge Mining, Inc., 680 S.E.2d 791, 816 n.21 (W. Va. 2009) (stating that jury instruction that punitive damages were never mandatory was correct); Wangen v. Ford Motor Co., 294 N.W.2d 437, 458 (Wis. 1980) ("The assessment of punitive damages lies entirely in the discretion of the jury, not in any right of the one wronged." (quotation omitted)).

This is incorrect. While it is true that states enjoy broad discretion in ***authorizing*** and ***limiting*** permissible punitive damages awards, this does not equate to the ability to ***mandate*** such awards. Cooper Indus., 532 U.S. at 433 (holding that states enjoy broad discretion in authorizing and limiting permissible punitive damages awards); Gore, 517 U.S. at 568 (holding that states "have considerable flexibility in determining the level of punitive damages *that they will* ***allow***") (emphasis added). However, "[d]espite the broad discretion that States possess with respect to the imposition of . . . punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion." Cooper Indus., at 432.

The impropriety of a rule that would ***require*** the imposition of punitive damages becomes evident when the inconsistencies created by such a rule are considered. For example, it would be impermissible for a trial court, through a *nisi additur* motion, to increase a jury's punitive damages award.[8] If the trial court cannot increase a punitive damages award it believes is deficient, it likewise cannot require a jury to award punitive damages in the first place. In either case, the trial court would be infringing on the province of the jury. If it is within the jury's discretion to award $1.00 of punitive damages, it should be equally within their power to award none at all.

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[8] There are no cases in South Carolina where *additur* has been applied to punitive damages. In the limited instances where this issue has been addressed by other states' courts, it has been consistently **rejected**. Stern Enters. v. Plaza Theaters I & II, 664 N.E.2d 981 (Ohio Ct. App. 1995) (refusing to allow *additur* of punitive damages, noting that the plaintiff cited no support and that there was no Ohio authority granting *additur* of punitive damages); Bozeman v. Busby, 639 So.2d 501 (Ala. 1994) (holding that portion of state statute which purported to allow the court to increase a jury's award of punitive damages is unconstitutional); Mogilevsky v. American Std. Ins. Co., 322 N.W.2d 700 (Wis. Ct. App. 1982) (holding that there was no basis in Wisconsin statutory or case law to support *additur* for punitive damages).

Additionally, because a judicial evaluation of a jury's punitive damages award is constitutionally necessary, it logically follows that a punitive damages award is under no circumstances mandatory. It is nonsensical that a jury be instructed that it is ***required*** to award punitive damages, only to have this mandated award subsequently reviewed and potentially reduced or overturned in its entirety. This creates the distinct possibility that a jury will issue a punitive damages award it did not find appropriate based solely on the court's instruction that it was required to do so, and the trial court would then have to set it aside as "suspect." Campbell at 419. Rather, the jury should have the discretion to deny a punitive damages award it feels is unwarranted, thus possibly obviating the need for further review by the court. Only after the jury has made both the factual and moral determinations warranting a punitive damages award is further constitutional review by the trial court or the appellate courts necessary.

In addition, there are real and substantial practical issues relating to an award of punitive damages. Punitive damages awards regularly receive wide and immediate publicity. Such awards can and do negatively effect the credit, reputation, and business operations of both individual and corporate defendants. While post-verdict constitutional review is one means of protection, the discretion of the jury in the first instance as to whether to make such an award at all must be the first consideration. In this case, by instructing the jury that it had a ***duty*** to award punitive damages, the jury was improperly relieved of that discretion and HCI's, HMN's, and Buildstar's rights to substantive due process were violated. The jury instruction is erroneous, and a new trial is thus warranted.

III. The grant of directed verdict in favor of Respondents as to the entirety of the negligence and implied warranty of workmanlike service claims was in error because there was evidence that the Petitioners were either not negligent or were not the proximate cause of all the construction deficiencies at issue, and the jury may have awarded punitive damages against a defendant who may not have been liable but for the amalgamation ruling.

The trial court erroneously granted Respondent's motion for a directed verdict as to the entirety of the negligence claims against all of the Petitioners. The stated basis for this ruling was: 1) the defense witnesses acknowledged the existence of construction defects; and 2) the "representation of counsel" that Petitioners were responsible and intended to engage in repairs. (R. 1031-32; App. 1047-48). This ruling was error and a new trial must be ordered.

"In ruling on motions for a directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. S.C. Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "[I]f there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for consideration." Wright v. Gilbert, 227 S.C. 334, 337, 88 S.E.2d 72, 74 (1955).

A. There was evidence at trial that Petitioners were not negligent and were not the cause of at least some of the allegedly defective conditions at Magnolia North.

In this suit, Respondent alleged ***numerous, and different, defective conditions*** at Magnolia North, i.e., improper trim installation, improper masonry work, improper sheathing, improper installation of decks, and improper installation of windows.

Petitioners presented evidence that, when viewed in a light most favorable to Petitioners, warranted the denial of directed verdict. The grant of Respondent's directed verdict motion improperly resulted in the jury being told that Petitioners, who had been "amalgamated" into one entity, were responsible for each and every defective condition, and removed from their hands the numerous factual determinations that they should have been required to make before liability for every defect was imposed on any of the Petitioners.

For example, one of the clearly disputed issues related to the use of ABTCO trim throughout the project. Respondents' contention was that this trim was improperly installed and that it was an inherently defective product. (R. 280, 732, 785; App. 286, 741B, 794). However, the testimony at trial showed that this specific type of trim was commonly used in this manner "up and down the coast" at the time of construction and that it was not known at that time that it was an inappropriate product. (R. 395-96, 2077; App. 401-02, 2101). To the contrary, ABTCO trim was specifically marketed for such use by a reputable manufacturer, and there was no deviation from the manufacturer's installation standards. (R. 732, 807-08; App. 741B, 816-17). The lower courts erred in holding that this was not sufficient evidence to submit the issue regarding this defect and negligence specification to the jury. Clearly, Petitioners put in "some evidence" that they were not negligent respecting this alleged defect and its corresponding damage. Hence, directed verdict should have been denied as to this specification of negligence.

There was ample testimony regarding other disputed factual issues relating to alleged construction defects, including the following:

- Testimony that deficient work by subcontractors occurs even where an architect performs contract administration on a project and that it is

speculation that contract administration would have avoided the defective conditions (R. 220, 223-24; App. 230, 233-34);

- Testimony from Respondents' expert acknowledging that areas of the trim appear to be fine (R. 403-04; App. 409-10);
- Testimony that it was common to ***not*** have a separate contract administration firm oversee the work of subcontractors (R. 545; App. 557);
- Testimony that the wall system in the buildings' attics met the building code requirements (R. 773-74; App. 782-83);
- Testimony that ***whoever subsequently installed the carpeting on the walkways cut the waterproofing*** during installation of the carpets (R. 898; App. 907);
- Testimony that mortar always gets into the cavity of a building and that the existence of such mortar in the cavity is not a code violation or a violation of any industry standard (R. 414; App. 420);
- Testimony that there was no evidence of damage related to the trim in covered areas (R. 741; App. 750);
- Testimony that there was no evidence of defects in the large expanses where no test cut was performed (R. 735; App. 744);
- Testimony that where balconies were subsequently screened in by individual owners, ***the weatherproofing had been penetrated*** in some locations (R. 762; App. 771).

The grant of directed verdict as to the ***entirety*** of the negligence and warranty of workmanlike service claims resulted in each of the above defects disputes being conclusively determined by the court in Respondents' favor, and against ***all*** of the Petitioners (because of amalgamation). This was error, as the trial court should have tailored any directed verdict so that it was limited to solely those issues, if any, where there was no factual dispute or conflicting evidence. See Guffey v. Columbia/Colleton Regional Hosp., Inc. 364 S.C. 158, 164-165, 612 S.E.2d 695, 698 (2005) (stating that a directed verdict may be granted as to one of many specifications of negligence if there is no evidence to support one of the specifications). The issues regarding the existence and cause of these defects were for the jury to decide.

Further, there was no evidence that Buildstar breached its standard of care as the general contractor. The evidence in the record established that Buildstar did not engage

in actual construction; instead, all construction was performed by subcontractors. (R. 2074-75; App. 2098-99). A general contractor is not "automatically" liable for the negligent work of subcontractors. Fields, 376 S.C. at 560-61, 658 S.E.2d at 88. Rather, a general contractor must only exercise the degree of care reasonably expected in the industry in constructing and supervising the construction of the home. Id. Respondent did not establish that Buildstar failed to properly supervise the subcontractors under this standard. At trial Respondent focused on the fact that Buildstar did not utilize a separate entity to perform contract administration services supervising and inspecting the work of the subcontractors. However, it was acknowledged throughout the trial that such contract administration is not required, and its existence does not guarantee proper construction. (R. 220, 223-224, 545, 770; App. 230, 233-34, 557, 779). Viewing the evidence in a light most favorable to Petitioners, the trial court should also have denied the directed verdict motion on this basis.

Significantly, because HCI, HMN, and Buildstar were improperly grouped together as one entity, they were also denied the necessary requirement that the trial court make independent determinations as to whether directed verdict on the issue of negligence was appropriate as to *each* individual Petitioner. Thus, in addition to the directed verdict being improper based on the existence of evidence supporting Petitioners, the denial of individual determinations that resulted from the amalgamation ruling requires that a new trial be granted to Petitioners. Further, the directed verdict against all Petitioners for breach of the implied warranty of workmanlike service, when this claim was only asserted against Buildstar, was error. Finally, the jury awarded punitive damages. Such damages could have been awarded based on the breach of

fiduciary duty claim, which was not even asserted by Respondents against Buildstar at all, but which nevertheless went to the jury as a basis for liability against Buildstar because of the amalgamation ruling.

B. Neither Petitioners nor their counsel conceded liability as to the negligence and implied warranty of workmanlike service claims and counsel's statements did not constitute judicial admissions.

The Court of Appeals erred in finding that "during opening arguments, [Petitioners'] counsel conceded liability." (App. 2308). This "concession" was based on an acknowledgement in the opening statement by Petitioners' counsel that some defective conditions existed at Magnolia North, coupled with the fact that Petitioners also offered alternative damages evidence. It was entirely permissible for Petitioners to defend this action by, among other things, challenging proximate causation while simultaneously challenging and offering alternative computations of Respondents' damages. MacFarlane v. Manly, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980) (stating that defendants have the right to plead alternative or inconsistent defenses). Additionally, Petitioners' trial counsel specifically refuted the contention that Petitioners were conceding liability or damages during the trial. During the directed verdict argument, the trial court posed the question "[s]o are you contending that you have not conceded liability to some extent?" and Petitioners' counsel responded:

> "Judge, I, I think that I have tried to walk that line as tightly as I could, but, I believe, your Honor, at the end whether or not there was reasonable care . . . with regard to a general, if they hire a sub they have to use reasonable care. What is reasonable?

(R. 1032-33; App. 1048-49).

A judicial admission is an admission made in court by a person's attorney for the purpose of being used as a substitute for the regular legal evidence of the facts at trial.

Black's Law Dictionary 48 (6th ed. 1990). South Carolina's courts have acknowledged the common view that judicial admissions must be clear, deliberate, unequivocal statements of fact, not conclusions of law or expressions of opinion. Lytle v. Reagan, 256 S.C. 269, 274, 182 S.E.2d 302, 305 (1971).[9] The statements of Petitioners' counsel[10] at best acknowledged that ***some defective*** conditions existed at Magnolia North, and that the cost of repairing them was in dispute. He did not admit Petitioners were negligent, or that Petitioners caused some (and certainly not ***all***) of those defective conditions. Petitioners offered evidence at trial on the issue of causation which would have allowed the jury to conclude that at least some of the defective conditions were the result of Respondents' negligence, the negligence of subcontractors, or the result of defective materials for which Petitioners were not responsible. (R. 220, 223-24, 403-04, 414, 545, 735, 741, 762, 773-74, 898; App. 230, 233-34, 409-10, 420, 557, 744, 750, 771, 782-83, 907).

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[9] Other states have held that statements such as those of Petitioners' counsel in this case do not constitute judicial admissions of liability. Zitzmann v. Miller, 551 N.E.2d 707, 709-10 (Ill. App. 1990) (holding that defense counsel's statement of the value of plaintiff's damages was not a judicial admission when considering the circumstances of the case and the context of the comment); Hayes v. Xerox Corp., 718 P.2d 929, 932-33 (Alaska 1986) (holding that defense counsel's statement that defendant owed plaintiff a lot of money, but the amount owed was for the jury to decide, was merely opinion, and not the clear, deliberate and unequivocal statements of fact necessary for a judicial admission).

[10] As has been clearly stated by the South Carolina Supreme Court "[t]he contention that the statements of counsel are in effect testimony or evidence simply ignores reality and would substitute for it a figment of the imagination. Every trial judge knows as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual views...." Harper v. Bolton, 239 S.C. 541, 561-62, 124 S.E.2d 54, 64 (1962); see also Brown v. State, 383 S.C. 506, 517-18, 680 S.E.2d 909, 915 (2009) (noting that statements of counsel are not to be considered as evidence).

Additionally, Petitioners offered evidence at trial that some of the defective conditions were caused by the Property Owners' Association or the individual owners ***subsequent*** to the construction. Specifically, and by way of example, there was testimony that during a ***subsequent*** repair of the walkway carpeting, whoever performed that repair cut through the waterproofing and failed to repair the waterproofing damage. (R. 897-98; App. 906-07). Additionally, with respect to water damage on balconies, there was testimony that, where the balconies were ***subsequently*** screened-in by individual owners, the weatherproofing had been penetrated in that process. (R. 762-63; App. 771-72). The statements of Petitioners' counsel and the testimony of Petitioners' witnesses regarding ***certain defective conditions*** and the estimated costs to remedy them are certainly ***not*** an admission of liability as to ***all of the specifications of negligence or all of the allegedly defective conditions***.

Despite Petitioners actively contesting these issues at the trial and producing evidence supporting their position, the trial court's grant of directed verdict erroneously established ***all*** of the defect disputes, including the clearly contested ones, in Respondents' favor. At the directed verdict stage, this issue should have been viewed in a light most favorable to Petitioners, which should have resulted in it being left to the jury for determination. Further, the trial court's amalgamation ruling meant that each of the Petitioners had a directed verdict for liability for negligence made against ***all*** of them as to ***all*** defects pled by Respondents. This was clear error. Hence, Petitioners should be granted a new trial.

Conclusion

Based on the foregoing, this Court should reverse the Court of Appeals and grant Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation a new trial.

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August 27, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2005-CP-26-0044
Appellate Case No. 2012-212048

Magnolia North Property Owners' Association, Inc., ... Respondent,

v.

Heritage Communities, Inc., Heritage Magnolia North, Inc. and Buildstar Corporation, ... Petitioners.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioners, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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Brief of Petitioners

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