

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 15 2014

APPEAL FROM Horry County
Court of Common Pleas

S.C. Supreme Court

Clifton Newman, Circuit Court Judge

Case No. 2005-CP-26-3289
Appellate Case No.: 2012-206066

Tony L. Pope and Lynn S. Pope, Individually and
Representing as a Class All Unit Owners for Riverwalk At
Arrowhead Country Club Horizontal Property Regime, Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.
and Buildstar Corporation, Petitioners.

Case # 2003-CP-26-7169

Riverwalk At Arrowhead Country Club Property Owners'
Association, Inc., Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.,
and Buildstar Corporation, Petitioners.

RESPONDENTS' BRIEF

John P. Henry
Philip C. Thompson
Thompson & Henry, P.A.
P.O. Box 1740
Conway, South Carolina 29528
843-248-5741
Attorneys for the Respondents

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF ISSUES ON APPEAL.....	viii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	4
ARGUMENTS.....	7
I. THE COURT OF APPEALS CORRECTLY UPHELD THE TRIAL COURT’S APPLICATION OF THE “AMALGAMATION OF CORPORATE INTERESTS AND IDENTITY” THEORY TO DETERMINE THAT HCI, HRI AND BUILDSTAR WERE ONE AND THE SAME FOR PURPOSES OF LIABILITY.	7
A. THE “AMALGAMATION OF CORPORATE INTERESTS AND IDENTITY” THEORY IS AN EQUITABLE THEORY TO PLACE LIABILITY WHERE IN EQUITY IT SHOULD BE PLACED.	7
B. THE “AMALGAMATION OF INTEREST AND IDENTITY THEORY” OR “BLURRED CORPORATE IDENTITY THEORY” WAS PROPERLY APPLIED BY THE TRIAL JUDGE AND PROPERLY UPHELD BY THE COURT OF APPEALS.	14
C. THE COURT OF APPEALS WAS CORRECT IN FINDING PETITIONERS FAILED TO PRESERVE THEIR “PIERCING THE CORPORATE VEIL” ARGUMENT WHICH WAS NEVER RULED ON BY THE TRIAL JUDGE..	23
D. PETITIONERS FAILED TO PRESERVE FOR APPEAL THEIR ISSUE OF A REQUIREMENT OF A FINDING OF WRONGDOING BEFORE AMALGAMATING THE CORPORATE ENTITIES.	24
E. THE COURT CAN SUSTAIN THE RULING OF AMALGAMATION ON SEVERAL THEORIES APPEARING IN THE RECORD. THE ELEMENT OF WRONGDOING, INJUSTICE OR INEQUITABLE CONDUCT IS PRESENT.	25

II.	THE COURT OF APPEALS WAS CORRECT IN UPHOLDING THE TRIAL COURTS GRANTING A DIRECTED VERDICT ON NEGLIGENCE LEAVING PROXIMATE CAUSE AND DAMAGES TO THE JURY.	31
	A. PETITIONERS CONCEDED LIABILITY AND REPRESENTED TO THE JURY THAT THE ISSUE IN THE CASE WAS THE AMOUNT OF DAMAGES REQUIRED TO FIX THE DEFECTIVE CONSTRUCTION AND THAT RESPONDENTS WERE ENTITLED TO A VERDICT.	32
	B. THE PETITIONERS' EXPERT WITNESSES ACKNOWLEDGED THE PERVASIVE CONSTRUCTION DEFECTS ALLEGED BY THE RESPONDENTS; THE ONLY ISSUE LEFT FOR THE JURY WAS PROXIMATE CAUSE AND THE EXTENT OF THE DAMAGES.	35
III.	THIS COURT SHOULD AFFIRM THE COURT OF APPEALS IN THE HOMEOWNERS' ACTION AND THE POPE CLASS ACTION ON THE ADDITIONAL SUSTAINING GROUND THAT PETITIONERS FAILED TO APPEAL ALL CAUSES OF ACTION WHICH WERE INCLUDED IN THE GENERAL VERDICT.	39
	CONCLUSION	42

TABLE OF AUTHORITIES

CASES

<u><i>Bowoto v. Chevron Texaco Corp.</i></u> 312 F. Supp. 2d 1229 (N.D. Cal. 2004)	12
<u><i>Bultman v. Barber</i></u> , 277 S.C. 5, 281 S.E.2d 791 (1981)	32
<u><i>Castleberry v. Bransum</i></u> , 721 S.W.2d 270 (Tex. 1986).....	29
<u><i>Camelot Carpets, Ltd. v. Metro Distributing Company</i></u> , 607 S.W.2d 746 (Mo. App. 1980)	27
<u><i>Clarke Auto Co. v. Fyffe</i></u> , 124 Ind. App. 222, 116 N.E.2d 532 (1954)	22
<u><i>Claytor v. General Motors Corp.</i></u> , 277 S.C. 259, 286 S.E.2d 129 (1982)	38
<u><i>Colleton County Taxpayers Association v. School District of Colleton County</i></u> , 371 S.C. 224, 638 S.E.2d 685 (2006)	30
<u><i>Collins v. Bisson Moving and Storage, Inc.</i></u> , 332 S.C. 290, 504 S.E.2d 347 (S.C. App. 1998).....	34
<u><i>Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.</i></u> , 349 S.C. 251, 562 S.E.2d 633 (2002)	39
<u><i>Creech v. S.C. Wildlife and Marine Resources Dep't</i></u> , 328 S.C. 24, 491 S.E.2d 571 (1997)	32
<u><i>CSX Transp., Inc. V. McBride</i></u> , 131 S. Ct. 2630, 180 L. Ed. 637 (2011).....	36
<u><i>Drury Dev. Corp. v. Foundation Ins. Co.</i></u> , 380 S.C. 97, 668 S.E.2d 798 (2008)	9

<u><i>Eden United, Inc. v. Short,</i></u> 573 N.E.2d 920 (Ind. App. 1991)	25
<u><i>Fort & Turner Enterprises, Inc. v. Scrocca,</i></u> 195 Ga. App. 554, 394 S.E.2d 364 (1990).....	23
<u><i>Foster v. Taylor,</i></u> 210 S.C. 324, 42 S.E.2d 531 (1947)	25
<u><i>Gladden v. Boykin,</i></u> 402 S.C. 140, 739 S.E.2d 882 (2013)	12, 24
<u><i>Glenn v. Wagner,</i></u> 67 N.C. App. 563, 313 S.E.2d 832 (1984) reversed on other grounds, 313 N.C. 450, 329 S.E.2d 326 (1985)	28
<u><i>Gordon v. Rothburg,</i></u> 213 S.C. 492, 50 S.E.2d 202 (1948)	35
<u><i>Green v. Champion Ins. Co.,</i></u> 577 So.2d 249 (La. App. 1991).....	28
<u><i>Guffey v. Columbia/Colleton Regional Hospital, Inc.,</i></u> 364 S.C. 158, 612 S.E.2d 695 (2005)	37
<u><i>Horton v. City of Columbia,</i></u> 408 S.C. 27, 757 S.E.2d 537 (S.C. App. 2014).....	41
<u><i>Kennedy v. Columbia Lumber and Mfg. Co., Inc.,</i></u> 299 S.C. 335, 384 S.E.2d 730 (1989)	7, 8, 9, 11, 25, 35
<u><i>Kincaid v. Landing Development Corp.,</i></u> 289 S.C. 89, 344 S.E.2d 869 (S.C. App. 1986).....	9, 10, 11, 14, 17, 23, 38
<u><i>Kirkman v. Parex, Inc.,</i></u> 369 S.C. 477, 632 S.E.2d 854 (2006)	39
<u><i>Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.,</i></u> 483 F.2d 1098 (5 th Cir 1973)	30, 31

<u>Lane v. Trenholm Bldg. Co.</u> , 267 S.C. 497, 229 S.E.2d 728 (1976)	7, 39
<u>Long v. Carolina Banking Co., Inc.</u> , 190 S.C. 367, 3 S.E.2d 46 (1939)	10, 26
<u>Magnolia North Property Owners' Association v. Heritage Communities, Inc.</u> , 397 S.C. 348, 725 S.E.2d 112 (S.C. App. 2012).....	13
<u>Mazloom v. Mazloom</u> , 382 S.C. 307, 675 S.E.2d 746 (S.C. App. 2009).....	39
<u>McNight v. South Carolina Department of Corrections</u> , 285 S.C. 380, 684 S.E.2d 566 (S.C. App. 2009).....	36
<u>Mellen v. Lane</u> , 377 S.C. 261, 659 S.E.2d 236 (S.C. App. 2008).....	36
<u>Morehead v. First Piedmont Bank and Trust Co.</u> , 273 S.C. 356, 256 S.E.2d 414 (1979)	25
<u>Oliver v. Pinnacle Homes, Inc.</u> , 769 N.E.2d 1188 (Ind. App. 2002)	19
<u>Peoples Federal Savings & Loan Ass'n. v. Myrtle Beach Golf and Yacht Club</u> , 310 S.C. 132, 425 S.E.2d 764 (S.C. App. 1992).....	30
<u>Pilot Title Ins. Co. v. Northwestern Bank</u> , 11 N.C. App. 444, 181 S.E.2d 799 (1971).....	11
<u>Pope v. Heritage Communities, Inc.</u> , 395 S.C. 404, 717 S.E.2d 765 (S.C. App. 2011).....	3
<u>Raptis v. Alexander</u> , 104 Vt. 203, 158 A. 73 (1932).....	35
<u>Roche v. South Carolina Alcoholic Beverage Control Commission</u> , 263 S.C. 451, 211 S.E.2d 243 (1975)	24
<u>Rutledge v. Dodenhoff</u> , 254 S.C. 407, 175 S.E.2d 792 (1970)	7, 40

<u><i>S.S.P. Partners v. Gladstrong Investments Corp.</i></u> , 275 S.W.3d 444 (Tex. 2008).....	29
<u><i>Smith v. McLeod Distributing, Inc.</i></u> , 744 N.E.2d 459 (Ind. App. 2000)	19, 20, 22, 27
<u><i>Smoak v. Liebherr-America, Inc.</i></u> , 281 S.C. 420, 315 S.E.2d 116 (1984)	40
<u><i>SSI Medicaid Services, Inc. v. Cox</i></u> , 301 S.C. 493, 392 S.E.2d 789 (1990)	24
<u><i>State v. Broad River Power Company</i></u> , 157 S.C. 1, 153 S.E. 537 (1929)	11, 12, 23, 26
<u><i>Strange v. S.C. Dep't of Highways & Pub. Transp.</i></u> , 314 S.C. 427, 445 S.E.2d 439 (1994)	32
<u><i>Sturkie v. Sifly</i></u> , 280 S.C. 453, 313 S.E.2d 316 (S.C. App. 1984).....	14
<u><i>Thomas Sand Co. v. Colonial Pipeline Co.</i></u> , 349 S.C. 402, 563 S.E.2d 109 (S.C. App. 2002).....	37
<u><i>Todd v. South Carolina Farm Bureau Mut. Ins. Co.</i></u> , 287 S.C. 190, 336 S.E.2d 472 (1958)	40
<u><i>Young v. Charleston & W.C. Ry Co.</i></u> , 229 S.C. 580, 93 S.E.2d 866 (1956).	38

OTHER AUTHORITIES

<u><i>Phillips L. McWilliams, Magnolia North v. Heritage Communities: The South Carolina Court of Appeals End Run Around the Necessity of Equitable Jurisdiction When Disregarding the Corporate Form</i></u> , 64 S.C. L. Rev., 825-847 (2003).....	13
--	----

STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S RULING THAT THE PETITIONERS WERE AMALGAMATED BECAUSE OF THEIR CONDUCT, ACTIVITIES AND REPRESENTATIONS IN REGARD TO THE CONSTRUCTION AND SALE OF THE RIVERWALK CONDOMINIUM BUILDINGS?
- II. DID THE COURT OF APPEALS ERR WHEN IT UPHELD THE TRIAL COURT'S GRANTING RESPONDENTS A DIRECTED VERDICT AS TO THE NEGLIGENCE CLAIMS IN BOTH ACTIONS IN LIGHT OF THE FACT THAT PETITIONERS CONCEDED VIOLATIONS OF BUILDING CODES AND INDUSTRY STANDARDS AND PETITIONER'S TRIAL COUNSEL REPRESENTED TO THE JURY THAT RESPONDENTS WERE ENTITLED TO A VERDICT OF \$2,518,196.48?
- III. SHOULD THE COURT SUSTAIN THE RIVERWALK POA GENERAL VERDICT AND THE POPE CLASS ACTION GENERAL VERDICT SINCE PETITIONERS FAILED TO APPEAL ALL CAUSES OF ACTION?

STATEMENT OF THE CASE

This appeal involves two construction defects cases which arise from the construction of the buildings comprising Riverwalk at Arrowhead Country Club Horizontal Property Regime (“Riverwalk”) near Myrtle Beach, South Carolina. Heritage Communities, Inc. (“HCI”) was the overall developer; Heritage Riverwalk, Inc. (“HRI”) was the site specific developer; and Buildstar Corporation (“Buildstar”) was the general contractor for the Riverwalk project. (“Petitioners”) HCI is the parent corporation of both HRI and Buildstar.

Riverwalk at Arrowhead Country Club Property Owners’ Association v. Heritage Communities, Inc. et al., C/A No. 2003-CP-26-7169 (the “POA Action”), was filed on December 8, 2003, by the Riverwalk Property Owners’ Association (“POA”), seeking to recover repair costs related to construction defects in the Riverwalk development. (R. pp. 60-71). In addition to the POA action, a putative class action, Pope, et al. v. Heritage Communities, Inc. et al., C/A No. 2005-CP-26-3289 (the “Pope Class Action”) was filed June 23, 2005, by unit owners Tony and Lynn Pope on behalf of the owners at Riverwalk seeking to recover damages for the loss of use of the property during the time the units will be closed for repairs. (R. pp. 72-89). The operative complaint in the POA Action is the Fourth Amended Complaint filed on August 3, 2006. (R. pp. 90-103). The operative complaint in the Pope Class action is the Third Amended Complaint filed on July 22, 2008. (R. pp. 104-123). These actions were consolidated for trial. These operative complaints each asserted numerous claims against the Heritage entities including negligence, breach of implied warranty of workmanlike service, breach of warranty of habitability and breach of fiduciary duty.

The POA Action and the Pope Class Action were consolidated for trial and a jury trial commenced on January 5, 2009, and concluded on January 15, 2009. Prior to trial, the Petitioners and Respondents stipulated that the 1994 and 1997 Standard Building Codes were applicable to the construction of the Riverwalk condominium buildings. At the close of Respondents' case Petitioners moved for a directed verdict as to all of the claims. (R. p. 823, line 23-p. 864, line 1). The trial court directed a verdict for HCI on the express warranty claim and for Buildstar on the warranty of workmanlike service claim, and declined to direct a verdict as to the remaining claims. (R. p. 0862, line 22-p. 0863, line 7). At the close of the evidence, both Petitioners and Respondents moved for a directed verdict. (R. p. 1352, line 12- p. 1393, line 20). The trial court denied all of Petitioners' motions, but granted Respondents' motion for directed verdict on negligence leaving proximate cause and damages to the jury. (R. p. 1384, line 20-p. 1393, line 20). Respondents' Motion for a Directed Verdict on the breach of fiduciary duty claim was denied. (R. p. 1388, lines 16-24). Additionally, the trial court ruled that the Petitioners were "amalgamated" such that they were to be treated as one and the same and the actions of any one of the Petitioners applied to the others. (R. p. 1384, line 20-p. 1385, line 13).

Following the directed verdict motions at the close of trial, the only issues remaining for jury determination in the POA Action were the claims for breach of warranty of habitability and breach of fiduciary duty, and proximate cause and damages under the negligence claim. In the Pope Class Action, the remaining issues were the claim for breach of warranty of habitability and proximate cause and damages under the negligence claim. On January 15, 2009, the jury returned general verdicts for the Respondents in both actions. As to the POA Action, the jury found for Petitioners on the breach of the warranty of

habitability claim but returned a general verdict on negligence and breach of fiduciary duty in the amount of \$4,250,000.00 and punitive damages in the amount of \$250,000.00. (R. pp. 52-53). As to the Pope Class Action, the jury returned a general verdict on breach of warranty of habitability and negligence in the amount of \$250,000.00 actual damages and \$750,000.00 punitive damages. (R. pp. 58-59). The total verdict of both actions was \$5,500,000.00.

On January 26, 2009, Petitioners filed post-trial motions seeking judgment notwithstanding the verdict, new trial pursuant to the thirteenth juror doctrine, new trial absolute, new trial *nisi remittitur*, review of the punitive damages, and a setoff based upon a settlement involving the other defendants in the underlying actions. (R. pp. 1920-1932). A hearing on post-trial motions and review of the Gamble factors as to punitive damages was held on February 24, 2009, and on April 14, 2009, the trial court issued an Order denying Petitioners' post-trial motions; setting forth findings after review of the Gamble factors; upholding the punitive damages award; and granting a setoff against the combined judgment amount making the total combined judgment amount \$4,471,178.31. (R. pp. 42-47).

HCI, HRI and Buildstar timely appealed and the Court of Appeals affirmed in Opinion 4888.* HCI, HRI and Buildstar timely filed a petition for rehearing which was denied. This Court granted HCI's, HRI's and Buildstar's Petition for Writ of Certiorari on certain issues on June 26, 2014.

* Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (S.C. App. 2011)

STATEMENT OF THE FACTS

The Riverwalk condominium project consists of nineteen (19) buildings and 228 condominium units which are located near Myrtle Beach, South Carolina. Construction, promotion and sale were handled through three corporations, namely: Heritage Communities, Inc. (“HCI”) which was the parent corporation; Heritage Riverwalk, Inc., (“HRI”) which was the site specific developer and actually conveyed the condominiums; and Buildstar, Inc. which was the general contractor but performed no construction itself. HRI was the site specific developer that held title to the property. It had no employees but sold the units through sales agents leased from another company. It was a subsidiary of HCI and was operated with oversight by the chief operating (“COO”) officer of HCI. Buildstar was the general contractor. It did no construction except through subcontractors who were overseen by HCI’s CEO, Roger Van Wie. All of the corporations had the same shareholders, officers and directors; were located in the same office; were provided centralized accounting by HCI; were controlled by the HCI, CEO; and all had the same telephone number. The Trial Judge determined that for purposes of liability, HCI, HRI and Buildstar were to be considered one and the same.

Construction began on the Riverwalk project on June 30, 1997, and was complete by the end of 1999. Prior to or simultaneously with the development of the Riverwalk project, HCI had already developed, or was in the process of developing, other condominium projects, being Magnolia Place, Magnolia North, Avian Forest, Azalea Lakes, The Gardens at Cypress Bay and Heatherstone. (R. p. 707, line 22-p. 708, line 8). All but Heatherstone were located in or around the Myrtle Beach area. All of the projects

suffered from similar construction deficiencies. (R. p. 250, line 20-p. 251, line 4; R. p. 478, line 15-p. 479, line 1).

The POA and Pope Class asserted numerous construction deficiencies which were violations of the standard building code, good construction practices and industry standards. (R. pp. 90-123). These deficiencies resulted in water intrusion causing rot, deterioration and other damages. (R. p 410, line 6-p. 464, line 5). The POA also asserted a cause of action for breach of fiduciary duty alleging that Heritage willfully, wantonly and recklessly breached their fiduciary duty by turning over the common elements to the homeowners in a defective and deteriorated condition. (R. pp. 90-103). The Pope class asserted that the condominiums would be required to be closed for repairs and that the class was entitled to compensation for their loss of use of their condominiums for the time during which repairs were being made.

At the commencement of the jury trial, Petitioners' trial counsel made it clear to the jury in his opening statement that the case was one not of liability, but of the extent of Respondents' alleged damages. He stated to the jury that:

...the real issue in this case is what is it going to cost to fix condominiums out at Riverwalk, and that is the central issue and what we deny, as Mr. Henry has raised in the pleadings, is that the costs out at Riverwalk are going to cost over 8.6 million dollars.... We submit that the cost estimates that we will put before you are the real and true costs for fixing the issues out there at Riverwalk.

(R. p. 211, line 17-p. 212, line 5).

Respondents' expert, Drew Brown, testified to many construction deficiencies amounting to code violations, violations of industry standards and violations of good construction practices. (R. p. 413, line 14-p. 477, line 8). Petitioners' expert, Mr. Alan

Campbell, agreed with the Respondents' expert on the numerous building code violations, violations of industry standards and good construction practices but disagreed with the extent. (R. p. 1069, line 19-p. 1078, line 9). On behalf of the Petitioners, Mr. Campbell provided a scope to repair the deficiencies. Based on this scope, Mr. Steve Watkins, Petitioners' repair expert, estimated that the cost to repair was \$2,391,619.00. (R. p. 1164, line 13-p. 1165, line 6). Respondents' expert, Mr. Drew Brown developed a scope of repair (R. p. 479, lines 10-18). Based on that scope, Respondents' estimator, Mr. Albert Best, estimated that it would cost \$8,511,425.00 to repair all of the deficiencies at Riverwalk. (R. p. 736, line 23-p. 737, line 9). In addition, Respondents presented costs of repairs previously made by the POA to correct some of the deficiencies in the amount of \$126,577.48. (R. p. 262, line 8-p. 264, line 1).

At the end of all the evidence the trial Judge directed a verdict for Respondents in both actions on their negligence claim. Upon granting Respondents a directed verdict on the negligence cause of action the trial judge stated:

It would not be proper to allow counsel to represent to the jury that the defendant is responsible and intends to engage in repairs on the one hand and on the other hand argue as a matter of law they are not responsible. More importantly than that, the witnesses all acknowledge defects in the construction and I grant the plaintiffs' motion for directed verdict on the issue of negligence. [*Emphasis added*]. (R. p. 1385, lines 17-24).

The jury returned a general verdict in the POA Action of \$4,250,000.00 actual damages and \$250,000.00 in punitive damages. (R. p. 52-53). The actual damages are well within the range between Petitioners' expert's estimate and the Respondents' expert's estimate. In the Pope Class Action, the jury returned a general verdict of \$250,000.00 in actual damages and \$750,000.00 in punitive damages. (R. p. 58-59). The actual damages

are well within the range between the Petitioners' expert's estimate of the loss of use damages and the Respondents' expert's estimate of the loss of use damages.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY UPHELD THE TRIAL COURT'S APPLICATION OF THE "AMALGAMATION OF CORPORATE INTERESTS AND IDENTITY" THEORY TO DETERMINE THAT HCI, HRI AND BUILDSTAR WERE ONE AND THE SAME FOR PURPOSES OF LIABILITY.

A. THE "AMALGAMATION OF CORPORATE INTERESTS AND IDENTITY" THEORY IS AN EQUITABLE THEORY TO PLACE LIABILITY WHERE IN EQUITY IT SHOULD BE PLACED.

This Court has placed South Carolina in the vanguard of protecting innocent new home buyers from contractors and developers who put defective housing in the stream of commerce. The Court has made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce. *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 334, 384 S.E.2d 730, 736 (1989). The Court has recognized in this new society, homes are sometimes produced in mass by the "super developer" and purchasers do not oversee the construction as was the case pre-World War II. In order to deal with the "super developers" and remote contractors with whom the homebuyer has no contact, the Court has discounted or done away with traditional legal doctrines that may prevent innocent homebuyers from satisfying their claims for defectively constructed homes. Such traditional doctrines as "merger by deed", *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970); necessity of "privity" between a builder and a remote home buyer, *Lane v. Trenholm Building Co.*, 267 S.C. 497,

229 S.E.2d 728 (1976); “economic loss rule” which prevented recovery when damages were only diminution in value to a home, *Kennedy, Supra.*, that stood in the way of protecting new home buyers were discounted or done away with. This Court has made it clear that new home buyers can proceed against all those who participated in placing the home in the stream of commerce whether it be contractor, developer, subcontractor, architect or engineer. *Kennedy, supra.* The Court has decreed that violations of building codes or industry standards would subject builders to not only actual damages, but also punitive damages. *Kennedy, supra.*

By these rulings, this Court has recognized the difference in bargaining power between the home purchaser and the developer/builder and the many obstacles facing the new homebuyer who is many times an unsophisticated buyer.

At the end of the testimony, Respondents moved the Court to rule that Heritage Communities, Inc., and its two subsidiaries, Heritage Riverwalk, Inc. and Buildstar be considered amalgamated as one and the same company. (R. p. 1368, lines 16-23). The Trial Judge granted the motion and found that:

“As to the plaintiffs’ motion for directed verdict on the issue of negligence, I grant the motion, find that the entities are amalgamated, that the legal distinction between the entities are blurred, that they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others as far as the three entities because they are in effect one and the same but for the, and that the case that was handed up to me notwithstanding outlines that stock ownership alone ordinarily doesn’t render a parent corporation liable for contracts of a subsidiary, that is something that is not applicable to this situation, would deal with the development and construction and marketing of this and sale of these properties, condominiums.” (R. p. 1384, line 24-p. 1385, line 13).

The Petitioners contend that this amalgamation ruling resulted in unfair prejudice to HCI, HRI and Buildstar for three reasons:

- a) Respondents were relieved of their burden of establishing the existence of all elements of the claims against each separate entity;
- b) The ruling suggests to the jury that each of these corporations had engaged in some form of misconduct and were deserving of being stripped of their corporate entity status; and
- c) It allowed a finding 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. (Petitioners' Brief pp. 13-14).

The underlying basis of Petitioners' objection to amalgamating the corporations is that amalgamation subjects all three corporations to the same liability including punitive damages. For example, Since HCI did not build the condominiums, they would not be liable for punitive damages. As discussed below, the equitable theory of amalgamation is to place liability where in equity it should lie.

The "amalgamation of corporate interests" or "blurred identity theory" was first applied by the Court of Appeals in the case of *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (S.C. App. 1986) ("Kincaid") (discussed *infra*). Whether the label is amalgamation, identity, alter-ego, instrumentality, agency or single business enterprise, all are equitable doctrines of procedural relief to prevent the corporate entity from being used in a manner that is unjust, wrong or violates public policy.¹ This Court too has recognized the equitable doctrine of amalgamation. In *Kennedy*, *supra*, this Court pointed

¹ Alter-ego and "piercing the corporate veil" are not one and the same. Alter-ego is a type of procedural relief and "piercing the corporate veil" is the relief itself. *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 100 n. 1. 668 S.E.2d 798, 800, 799 n.l. (2008)

out that a lender can incur liability if it is so “amalgamated” with the developer or builder so as to blur its legal distinction citing *Kincaid*. *Id.* pp. 341-42. Why? Because equity places the liability in its proper location. *Long v. Carolina Banking Co., Inc.*, 190 S.C. 367, 3 S.E.2d 46 (1939) (“The corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not hinder or defeat it.”) *Id.* p. 50.

In *Kincaid*, three corporate entities were formed to market, develop, sell and construct residential property. Landing Development Corporation (“LDC”); Resort Management Group (“RMG”); and Landing Construction Corporation (“LCC”). RMG was the “overall developer” that was the marketer; LDC was the seller of the homes and LCC was the general contractor. Kincaid purchased one of the homes and later discovered numerous deficiencies in the home’s construction. The witness for Respondents and Appellants testified to numerous construction defects.

The *Kincaid* Court granted a directed verdict of liability against all three corporations. Appellants contended that it was error not to grant a directed verdict of no liability in favor of RMG since it was merely the sales and marketing agent for the development. The Trial Court disagreed citing evidence that RMG, LDC and LCC, although separate corporations, represented an “amalgamation of corporate interests, entities, and activities as to blur the legal distinction between the corporations and their activities.” *Id.* p. 96. The Court of Appeals in upholding the Trial Court noted these five factors which justified a holding of amalgamation:

- 1.) Common shareholders and officers in each of the three corporations;
- 2.) All three corporations were located at the same place;

- 3.) RMG would respond to problems with construction;
- 4.) A letter notified the homeowners that RMG was the project developer and would handle construction problems;
- 5.) Another letter to the homeowners carried the letterhead “Resort Management Group”, with a notation, “A Development, Construction, Sales and Property Management Company”. *Id.* p. 96.

Although not stated directly, the implicit reasoning behind the Court’s ruling was that the corporate form could not be used to insulate RMG from liability when in justice and equity it shared equal responsibility.² Just as a lender should not escape liability because it is a separate legal entity when it becomes highly involved in the construction process and should in fairness and equity share liability. *Kennedy, supra.*

In fact, this theory of “amalgamation” was announced by this Court long before *Kennedy, supra*, and *Kincaid, supra*. In *State v. Broad River Power Company*, 157 S.C. 1, 153 S.E. 537 (1929) (“State”), this Court did not use the word “amalgamation” but clearly described it:

It is true that mere ownership of the capital stock of one corporation by another does not create an identity of corporate interest between the two companies, or render the holding company the owner of the property of the other, or create the relation of principal and agent, or representative, or alter ego between the two; but it is equally true that when the facts show not only stock ownership, common officers and the like, but that the subsidiary company was a mere agency or department of the holding company, or that it was an instrumentality to subserve some special purpose of the holding company, particularly where the public interests are involved, the Court will deal with the substance of the

² “A Court of equity seeking to do justice among all the parties looks at the spirit and not the form of the transaction... it regards corporate organization objectively and realistically, unencumbered by fictions of corporate identity, and thus, brushing aside form, deals with substance... Corporate identity offers no bar to equities pursuit of the ‘plumb line’ of right dealing and fair accounting.” *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 453, 454, 181 S.E.2d 799, 805 (1971)

transaction as if separate corporate entities did not exist. *Id.* p. 545
[Citations omitted] [Emphasis supplied]³

This case presents yet another factual scenario for the Court to protect innocent home buyers from legal frameworks that impede complete satisfaction for inferior and defective construction.

Amalgamation or blurred corporate identity theory of liability as well as alter ego, instrumentality, single enterprise, agency, etc., are all equitable doctrines to prevent the use of the corporate fiction to further an illegal purpose or to create wrong, unfairness or to avoid liability to third parties by one of the corporations. In proper cases, “the Courts will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.” *State, Id.* p. 553-54. Many theories and names have been applied that permit the equity side of the Court to disregard the corporate separateness. “Alter-ego”, instrumentality, agency and single enterprise have all been used to look behind the form so that equity can place liability where in fairness it should be. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (Although the tests employed to determine when circumstances justify imposing liability on the parent for the subsidiaries liability are variously referred to as alter-ego, instrumentality, or identity doctrines, the formations are generally similar and courts rarely distinguish between them.) “Amalgamation” is simply another description of a legal theory of procedural relief to determine if in substance several corporations are in reality one and the same, and if they are, the Court will consider them as such to prevent wrong or injustice

³ *Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013) (noting this Court has crafted public policy affording heightened protection to home purchasers)

such as allowing one corporate entity to unjustly escape liability. Generally “piercing the corporate veil” is the traditional description of equitable relief to pierce the veil of the corporate protection to find shareholders, officers or directors liable for the debts or other liabilities of the corporation. “Amalgamation”, “instrumentality”, “identity”, “alter-ego” or “single business enterprise” are theories of procedural relief which are also used to determine in equity and in fairness, that parent and subsidiary or adjunct corporations should be considered one and the same so as to place liability where in equity should lie.

The Petitioners provided to this Court as supplemental authority: *Phillips L. McWilliams, Magnolia North v. Heritage Communities: The South Carolina Court of Appeals End Run Around the Necessity of Equitable Jurisdiction When Disregarding the Corporate Form*, 64 S.C. L. Rev., 825-847 (2013). This article analyzes the Court of Appeal’s holding on amalgamation in *Magnolia North Property Owners’ Association v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (S.C. App. 2012) (“Magnolia North”), a case which will be argued with this case and which has basically the same facts and issues. The writer concludes that the Court of Appeals was wrong to determine the corporations amalgamated. The author points out that the Court of Appeals did not find that the Respondents demonstrated some “deliberate fraud, injustice or fundamental unfairness” and did not acknowledge that the theory should only be applied after “substantial reflection”. The writer concludes that amalgamation is in “direct contravention of South Carolina Public Policy”. This theory he contends will doom corporate businesses in South Carolina.

Respondents’ believe this article was written with a basic misunderstanding of amalgamation. “Amalgamation” is a theory that allows the Court to determine if it would

be inequitable, wrong or unjust to allow several corporations to keep their separateness. It does not depend totally upon, for example, inadequate capitalization, observance of corporate formalities, nonpayment of dividends, etc., as the Court of appeals enunciated for “piercing the corporate veil” in *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (S.C. App. 1984). Although the Court of Appeals did not say in *Kincaid*, “Magnolia North” or this case that amalgamation should not be applied without “substantial reflection”, it is hard to imagine that the trial judge or the Court of Appeals did not give the issue “substantial reflection”. The Trial Judge presided over this case for approximately ten (10) days and heard substantial testimony as discussed below.

B. THE “AMALGAMATION OF INTEREST AND IDENTITY THEORY” OR “BLURRED CORPORATE IDENTITY THEORY” WAS PROPERLY APPLIED BY THE TRIAL JUDGE AND PROPERLY UPHELD BY THE COURT OF APPEALS.

As noted above, there were three corporations: Heritage Communities, Inc. (“HCI”) was the overall developer;⁴ Heritage Riverwalk, Inc. (“HRI”) was the site specific developer; and Buildstar Corporation (“Buildstar”) was the general contractor. HCI was the parent corporation of both HRI and Buildstar. (R. p. 867, lines 7-16). Roger Van Wie, Dr. Jack Green and Roger Van Wie’s wife were the owners of all three corporations. (R. p. 704, lines 1-9). The Board of directors of all three consisted of Van Wie and Dr. Green (R. p. 704, lines 10-13). The officers of all three originally were Dr. Green and Van Wie. The corporate offices of the three were located in the same place. (R. p. 704, lines 23-25; p. 706, lines 17-19; p. 707, lines 7-14). HRI held title to the properties and conveyed the condominiums to the homeowners. (R. p. 868, lines 9-11). HRI had no employees but

⁴ Petitioners refer to HCI as the “overall developer”. One would have to infer HCI was over all phases of development including marketing, building by Buildstar and selling by HRI.

oversight and administration was done by the Chief Operating Officer (“COO”) of HCI who reported to Van Wie. (R. p. 708, line 22 – p. 709, line 8). HRI leased sales agents. (R. p. 868, lines 6-11). Van Wie controlled day to day activities of HCI (R. p. 704, lines 19-22) and was the boss of HCI’s COO. (R. p. 703, lines 20-25). Van Wie controlled the general contractor, Buildstar. (R. p. 706, lines 14-16). Van Wie controlled HRI. (R. p. 708, lines 9-12).⁵ The delineation between employees of HCI and Buildstar was vague, but they all reported to Roger Van Wie. (R. p. 709, lines 9-19). All three corporations had the same telephone number. (R. p. 876, lines 12-20). HCI’s Vice President of finances, Lynn Anderson, wrote checks for all of the companies. (R. p. 869, lines 2-8). She also was the president of Buildstar at one point and also held the general contractor’s license for Buildstar (R. p. 868, lines 12-20). Ms. Anderson was not only the comptroller for HCI, she was also supervised by Buildstar and was the qualifier for Buildstar to get a building permits. (R. p. 879, line 23 – p. 880, line 12). The accounting for the corporations was handled by HCI and the subcontractors were paid by HCI. (R. p. 869, lines 2-8).

Importantly, HCI gave each purchaser of a condominium a written warranty. (R. p. 187, line 7-p. 190, line 2; R. pp. 1807-1834). Although this manual is titled “Heritage Communities, Inc. Limited Warranty Manual” (R. p. 1808), it is clearly written to convey to prospective purchasers and the homeowners that HCI is not only the developer/seller, but is also the contractor. For example, on the cover of the warranty, it says it is based on “Residential Performance Guidelines” 1996 edition. (R. p. 1808). This guideline is an explanation of what performance homeowners can expect from the residential construction industry. The first page begins with “Our Building Philosophy”. (R. p. 1810). It says their

⁵ Petitioners admit that all three corporations were controlled by Van Wie. (Petitioners’ Brief, p. 3)

competitors can't match what you get from HCI. (R. p. 1810). It refers to "our attention to detail like ceramic tile, crown moldings, etc." (R. p. 1810). HCI states they monitor "our subcontractors" on a daily basis. (R. p. 1811). HCI warrants defects in material or workmanship. (R. p. 1815). They do not warrant loss or damage "which does not constitute a defect in the construction of the HCI villa by its employees, agents or subcontractors". Beginning on page 7 of the manual which is entitled "what you can expect from the developer", HCI states to the homeowner what the contractor will and will not do. (R. pp. 1816-1822). HCI and its subcontractors will fully warrant material and installation for a period of one year. (R. p. 1827). The reality that HCI is representing to the homeowners/purchasers that they are also the contractor is reaffirmed on page 15 of the warranty manual which provides that HCI will not only make sure that a quality home is produced, but will also inspect the project throughout the building process on a continual basis to make sure materials and workmanship are up to standards, the sole function of Buildstar. (R. p. 2114)*. The manual refers to Riverwalk as a "Heritage Communities, Inc. complex" and the "Heritage Communities, Inc. homes". (R. p. 1826). The warranty also describes "Our construction department" which can only be Buildstar. (R. p. 2114) *. Finally, the manual states that the City and County Building Departments will inspect "to insure we have adhered to all code requirements". (R. p. 2114) *.

With the knowledge of HCI, HRI and Buildstar, defective condominiums were built and sold to unsuspecting homeowners. (R. p. 715, lines 12-25). Gwyn Hardister, COO of HCI, acknowledged purchasers were not told of defects and should have been. (R. p. 715, line 23 – p. 716, line 2). He also acknowledged that the Heritage developers, who were

** References are to Second Supplemental Record on Appeal*

also the Board of the Homeowners Association, were representing to the homeowners the problems would be fixed, but they never were. (R. p. 717, lines 2-16).

Kincaid is directly on point both factually and legally with the case at bar. There were three corporations involved in Kincaid: The Landing Development Corporation (“LDC”), the developer; Resort Management Group, Inc. (“RMG”), the marketer; and Resort Construction Corporation (“RCC”), the contractor. In the case at bar, there were three corporations: Heritage Communities Inc. (“HCI”), the overall developer; Heritage Riverwalk Inc. (“HRI”), the site specific developer; and Buildstar, the general contractor. In both Kincaid and the case at bar these corporations developed, built and sold residential construction. The facts in Kincaid directly correlate to the facts in this case: There were common officers and directors; all three corporate offices were located in the same building; the developer represented to the homeowners that they would fix construction defects; and the warranty given to each of the Heritage unit purchasers clearly conveyed they were a single entity for marketing, building and selling.

The Kincaid Court amalgamated the three corporations because the evidence revealed “an amalgamation of corporate interests, entities, and activities so as to blur the distinction between the corporations and their activities.” Id. p. 874

The facts in the case at bar and Kincaid are almost identical:

<u>Kincaid</u>	<u>Riverwalk</u>
1) Officers and shareholders practically identical in all three;	1) Officers, directors and shareholders identical in all three;

2) Roger Van Wie was an officer in all three;	2) Roger Van Wie was an officer in all three and controlled all three;
3) When the homeowners homes were built, all three corporate officers were located in the same place;	3) When the condominiums were built all three corporations were located in the same place;
4) RMG handled all the construction questions;	4) HCI handled all the construction problems and promised to remedy the problems;
5) Letters represented to the homeowners that RMG was constructing and selling the homes;	5) HCI represented through its warranty manual given to its purchasers it was the developer/contractor/seller;
6)	6) HCI paid the sub-contractors and warranted their work;
7)	7) HRI had no employees but management was supplied by HCI;
8)	8) The corporations were incorporated by HCI as “cost Centers”; they were all controlled by a shareholder, director and officer of HCI;

9)	9) Buildstar was a management company that oversaw the subcontractors and Buildstar was managed and controlled by Van Wie, CEO of HCI and officer, shareholder and director of HRI; and Buildstar;
10)	10) There was centralized accounting;
11)	11) All three corporations had the same telephone number.

Other Courts have adopted the “amalgamation” theory without using that name. For example, the Indiana Court of Appeals has held that when a case does not have facts sufficient to “pierce the corporate veil” they will look at other factors to determine if equity requires the Court to determine the corporations are one and the same to protect the innocent Plaintiff. *Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188 (Ind. App. 2002). In *Smith v. McLeod Distributing, Inc.*, 744 N.E.2d 459 (Ind. App. 2000) (“Smith”), the Court found that the Plaintiff had failed to meet all the requirements to “pierce the corporate veil” but nevertheless, found the corporations were one and the same. The Court noted that Indiana Courts refuse to recognize corporations as separate entities where the facts establish several corporations are acting as the same entity. The Court stated “while no one talismanic fact will justify with impunity piercing the corporate veil, a careful review of the entire relationship between various corporate entities, their directors and officers may

reveal that such an equitable action is warranted.” *Id.* p. 462. The Court noted that the corporate fiction may be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation. *Id.* p. 462. Additionally, the Court noted that it will not refuse to pierce the corporate veil because factors for piercing the corporate veil are not present, especially when it is asked to decide whether two or more affiliated corporations should be treated as a single entity and not whether the corporate veil should be pierced to hold the individual officers and directors liable. The factors considered in *Smith* (and as noted below are present in this case) are:

1) Similarity between names of the corporations:

FACTS OF THIS CASE:

HCI and HRI of course had similar names. It should be noted that these entities along with Buildstar were all referred to as “Heritage” both in testimony and by Petitioners’ attorney (who represented all three corporations) in arguments to the jury.

2) The Corporations were engaged in the same line of business.

FACTS OF THIS CASE:

It is stipulated in the statement of facts that the parent corporation, HCI and the subsidiary corporation, HRI, were both “developers”. HCI was the “overall” developer which could only mean they controlled the sales of the units by HRI and the construction of the units by Buildstar, which in fact was the case.

The business of “Heritage” was to develop, market and sell condominiums. (R. p. 701, lines 13-16). Of course “Heritage” used their subsidiaries, HRI and Buildstar, Inc to accomplish their business. Each of these corporations were

controlled by Roger Van Wie (R. p. 729, lines 17-25) HRI and Buildstar were conduits, adjuncts, or departments of HCI.

3) There was commonality of the officers and directors of the corporations.

FACTS OF THIS CASE:

All three corporations, HCI, HRI and Buildstar had the same officers and directors who all shared the same office and the same telephone number. (R. p. 876, lines 12-20). Buildstar, HCI and HRI were controlled by Van Wie. (R. p. 729, lines 17-25). All three corporations had the same owners who were also on the board of all three. (R. p. 729, lines 22-25). HRI, seller of the condominiums had no employees but leased employees. These employees (sales agents) were overseen by Gwyn Hardister, COO of HCI. Hardister reported to Van Wie. (R. p. 703, lines 20-25; R. p. 709, lines 1-8). Buildstar was strictly management, they did no construction. (R. p. 872, lines 5-15).

4) The Corporations operated at the same address and used an identical telephone number.

FACTS OF THIS CASE:

All of the corporations, HCI, HRI and Buildstar operated in the same building. (R. p. 876, lines 12-20; R. p. 706, lines 17-20; R. p. 707, lines 4-14). The corporations could be reached at the same telephone number. (R. p. 1814; R. p. 1838).

5) Corporations intermingled their assets or that one corporation paid for the obligations of the other.

FACTS OF THIS CASE:

There was centralized accounting which was handled at the corporate office. (R. p. 869, lines 2-8). There is substantial evidence in the record that the subcontractors were actually hired by HCI. (R. p. 871, line 19-p. 872, line 9).

The warranty issued by HCI referred to “our subcontractors” (R. p. 1811) or “Heritage Communities, Inc.” and “its subcontractors”. (R. p. 1828). HCI also warranted the construction by Buildstar which was performed by subcontractors and overseen by Van Wie. HCI and its subcontractors fully warranted material and installation of said items for a period of one year. (R. p. 1827). This warranty applied to a new “Heritage Communities, Inc.” home. (R. p. 1827). Heritage warranted all of the home, including for example, the foundation. (R. p. 1830).

After considering these five factors, the Smith Court concluded that there was ample evidence indicating that, in dealing with the public, the corporations were adjunct corporations, mere alter-ego, or instrumentalities of each other that shared a common identity. In other words, as in amalgamation, the corporations were structured and operated in such a manner that their corporate identity and activities became blurred to such an extent equity required the corporate entities be considered one and the same for liability so as to protect the innocent Plaintiff. In this case HCI says it cannot be liable for punitive damages because it did not build the defective condominiums. Buildstar, a separate entity, built them. Yet HCI incorporated Buildstar, which was controlled by HCI, had the same shareholders, directors and officers and orchestrated the construction and sale of hundreds of defective condominiums. Amalgamation places the liability on HCI where it belongs.⁶ Petitioners made no effort at trial to distinguish to the Court or to the jury the differences in HCI, HRI and Buildstar. Had there truly been any difference in liability or the type of damages that could be assessed, surely each corporation would have had separate lawyers

⁶ Clarke Auto Co. v. Fyffe, 124 Ind. App. 222, 116 N.E.2d 532 (1954) (Businesses conducted in such a manner that they were in effect one will not allow one of the entities to escape liability by saying they didn't sell the car)

protecting the separate interests of the corporations. *Fort & Turner Enterprises, Inc. v. Scrocca*, 195 Ga. App. 554, 394 S.E.2d 364 (1990) (Even though the Plaintiff had dealt with only one of three corporations, all three were liable since they had the same majority shareholder, officers and general manager; entered into litigation jointly; and held themselves out as being the same entity. This was sufficient evidence to prevent one entity from receiving a directed verdict because they did not deal with appellee.).

The facts in the case at bar fall squarely in the facts enunciated in *Kincaid*. In fact, the facts in this case give even a stronger basis to find these corporations amalgamated. Whether using the reasoning for amalgamation set out in *Kincaid, supra* or the reasoning set out in *State v. Broad River Power Co., supra*, equity and fairness require these corporations be amalgamated to prevent any of the Heritage entities from escaping full liability. The Court of Appeals should be confirmed.

C. THE COURT OF APPEALS WAS CORRECT IN FINDING PETITIONERS FAILED TO PRESERVE THEIR “PIERCING THE CORPORATE VEIL” ARGUMENT WHICH WAS NEVER RULED ON BY THE TRIAL JUDGE.

The Respondents asked that the Trial Court declare that HCI, HRI and Buildstar be “amalgamated” for various reasons. (R. p. 1368, lines 16-23). The only reference to “piercing the corporate veil” in the record is on page 1372, wherein Respondents’ counsel in response to the motion to amalgamate stated that Plaintiffs were attempting to “pierce the corporate veil” to say it is all Van Wie. (R. p. 1372, lines 9-23).

Respondents would note that “piercing the corporate veil” to reach Van Wie was never raised by the Respondents at trial. Petitioners raised it only in the context of their contention that Respondents were trying to make a claim against Van Wie. Petitioners did not argue, as they do in their briefs, that the Court had to find the elements required to “pierce the

corporate veil” to determine that HCI, HRI and Buildstar were amalgamated. The Trial Judge never ruled on this issue. Neither did the Petitioners raise this issue on post-trial motion. (R. p. 1922). Issues on which the Trial Judge never ruled and which were not raised in post-trial motion are not preserved for review. *SSI Medicaid Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990) (issue on which the trial judge never ruled and which was not raised in post-trial motion is not properly before the Supreme Court).

D. PETITIONERS FAILED TO PRESERVE FOR APPEAL THEIR ISSUE OF A REQUIREMENT OF A FINDING OF WRONGDOING BEFORE AMALGAMATING THE CORPORATE ENTITIES.

As noted by the Court of Appeals, nowhere in the Record do the Petitioners argue there must be a finding of fraud, wrong or unfairness before applying amalgamation. The purpose of an appeal is to determine whether the Trial Judge erroneously acted or failed to act and when Petitioners’ contentions are not presented or passed on by the Trial Judge, such contentions will not be considered on appeal. *Roche v. South Carolina Alcoholic Beverage Control Commission*, 263 S.C. 451, 211 S.E.2d 243 (1975).

Nevertheless, substantial injustice will result in allowing HCI to use this type of corporate structure to avoid full liability. The precedent the Petitioners ask this Court to set would allow a developer to conduct business through subsidiary corporations which are in substance conduits, instrumentalities or adjunct corporations owned, financed and completely controlled by the developer and use this as a method to escape liability on itself. This would obstruct, not advance this Court’s judicially crafted public policy which affords heightened protection to home purchasers. *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882, 884 (2013).

The very reason equity applies amalgamation, alter-ego, instrumentalities, etc., is to prevent an entity from escaping liability when, although separate corporations, are in reality one and the same such as HCI, HRI and Buildstar. *Eden United, Inc. v. Short*, 573 N.E.2d 920, 933 (Ind. App. 1991) (The corporate fiction will be disregarded when corporations are not operated as separate entities but are manipulated or controlled as one enterprise through their interrelationship to cause illegality, fraud or injustice, or to permit one economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole.) As this Court pointed out in *Kennedy*, a lender cannot be allowed to escape liability when it is so amalgamated with the developer so as to blur its legal distinction. Why? Because equity places the liability where in fairness it belongs. That the lender and developer are separate corporations (legal entities) is of no consequence. To allow HCI or HRI to escape liability would be unjust and a wrong to these innocent home buyers.

E. THE COURT CAN SUSTAIN THE RULING OF AMALGAMATION ON SEVERAL THEORIES APPEARING IN THE RECORD. THE ELEMENT OF WRONGDOING, INJUSTICE OR INEQUITABLE CONDUCT IS PRESENT.

No principal in the disposition of appeals is more firmly established than that a right decision upon a wrong ground will be affirmed.” *Foster v. Taylor*, 210 S.C. 324, 329, 42 S.E.2d 531, 534 (1947); *Morehead v. First Piedmont Bank and Trust Co.*, 273 S.C. 356, 256 S.E.2d 414 (1979) (Irrespective of the ground stated, the Court may affirm upon any ground appearing in the record). Although Respondents believe amalgamation is the correct ruling, there are other grounds appearing in the record upon which this Court can affirm.

It is part of the business framework in this State and all other states to form a parent corporation and then separate different functions by forming subsidiary corporations. This is a legitimate use of the corporate form and should not be disturbed. However, this method of using the corporate form can be subject to abuse and the Courts have not hesitated to use their equitable powers to recognize this abuse and stop it. Long v. Carolina Banking Co., *supra*, holding that the corporate form is properly a part of business but the fiction cannot be used to hinder or defeat a just result. *Id.* p. 50. As the Court in State, *supra*, said, the Court will not be blinded by the form of the transaction but will look to the substance of the transaction. The formation of HCI, HRI and Buildstar was facially legal. HCI was formed to build, market and sell residential structures; a completely legitimate enterprise. They decided that instead of doing all aspects of development in their company name (HCI), they would fragment the business into the seller, HRI, and the builder, Buildstar. In doing so, HCI decided to use the same shareholders, directors and officers; provide centralized accounting; utilize the same office space and maintain complete control. They would hire no employees for HRI but they would lease a sales force to be overseen by HCI. Buildstar would not do any construction but would hire and pay through HCI subcontractors who would be overseen by the CEO of HCI. These corporations would simply be “cost centers” or departments and would all be controlled by Roger Van Wie, an officer, shareholder and director of each corporation. The Court must look at the substance of the corporations and their operation, control and activities and determine in fairness and equity whether these corporations should be treated as different and distinct, or amalgamated, adjuncts, or conduits for the purpose of liability.

HRI and Buildstar were incorporated by HCI; owned by HCI; completely dominated and controlled by HCI; and were conduits through which HCI did their sole business. Without the subsidiaries, HCI had no cash flow. All of the millions of dollars from the sale of the condominiums went to HCI; not HRI who sold the units and not Buildstar who constructed the units. And here is the wrong. Now that HCI has been sued, they are taking the position that HCI didn't sell the units, and so they cannot be liable for negligent building, including pervasive code violations, and in addition, certainly HCI and HRI should not be charged with punitive damages because they did not build the buildings. Additionally, even though Buildstar had the same officers, shareholders and directors and was controlled by Van Wie, president of HCI, they can't be charged with breach of fiduciary duty because they did not have anything to do with knowingly unloading the defective buildings on the homeowners. In other words, Petitioners ask for the Court's aid in allowing an unjust escape of liability. Smith v. McLeod Distributing, Inc., 744 N.E.2d 459 (Ind. App. 2000) is apposite.

...jurisdictions have disregarded the separateness of affiliated corporations when the corporations are not operated as separate entities but are manipulated or controlled as one enterprise through their interrelationships to cause illegality, fraud or injustice, or to permit one economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise) *Id.* at p. 463 [Emphasis supplied]

See also: Camelot Carpets, Ltd. v. Metro Distributing Company, 607 S.W.2d 746 (Mo. App. 1980) (separate entities operated and controlled as one economic entity cannot be used as a means to escape liability arising out of an operation conducted as a whole enterprise. [Emphasis supplied])

This Court can affirm the amalgamation ruling using the “single business enterprise” theory. Courts have been unwilling to allow affiliated corporations that are not directly involved to escape liability simply because of business fragmentation. Where a single corporation has been fragmented into branches that are separately incorporated and are managed by a parent or dominant entity, or have their interlocking directorates, the Courts have held the dominant or parent corporation liable for the obligations of its branches whenever justice requires protection of third parties. *Green v. Champion Ins. Co.*, 577 So.2d 249 (La. App. 1991) *Id.* p. 257-58. Some of the factors considered in *Green* are:

- 1) corporations with identity of ownership;
- 2) common directors and officers;
- 3) unified administrative control whose business functions are similar or supplementary;
- 4) directors or officers of one corporation act independently in the interest of that corporation;
- 5) corporation financing another corporation;
- 6) corporation causing the incorporation of another affiliated corporation;
- 7) corporation paying salaries and other expenses or losses of another corporation;
- 8) receiving no business other than that given to it by its affiliated corporation;
- 9) common employees;
- 10) services rendered by the employees of one corporation of behalf of another;
- 11) common offices;
- 12) centralized accounting.

These are only some of the factors to be considered. No one factor is dispositive. See also *Glenn v. Wagner*, 67 N.C. App. 563, 313 S.E.2d 832 (1984) reversed on other grounds, 313 N.C. 450, 329 S.E.2d 326 (1985). The facts in Riverwalk meet most, if not all of the factors set forth in *Green, supra*, HCI fragmented its business to keep up with costs, but in reality they all were a part of a single business enterprise to market, construct and sell condominiums. This is simply another theory to prevent the unjust escape of liability.

The Petitioners discuss this “business enterprise theory” of liability saying that whatever the procedural theory, there is a requirement of a finding of injustice or inequity, citing S.S.P. Partners v. Gladstrong Investments Corp., 275 S.W.3d 444 (Tex. 2008). (Petitioners’ Brief, pp. 9-10). Petitioners correctly point out that the Supreme Court of Texas in S.S.P. rejected the “single business enterprise theory” because the Texas Appeal’s Court did not include the requirement that the corporate form be used as an unfair device to achieve an inequitable result. Petitioners then quote from the holding in S.S.P. saying it is commonplace for affiliated corporations to limit liability while pursuing common goals. The S.S.P. Court pointed out that they had never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes and shared finances. Petitioners quote this from the opinion: “there must also be evidence of abuse... injustice or inequity.” The ellipsis in Petitioners’ brief left out an important statement by the Court. The Court said the abuse required was as described in “Castleberry”⁷. In Castleberry, one of the types of injustice or inequity that would warrant disregarding corporate separateness under the “single business enterprise theory” is “when a corporation is organized and operated as a mere tool or business conduit of another corporation;” Castleberry, Id. p. 272. The same injustice would result if the Heritage entities are not amalgamated and HCI and HRI are allowed to escape liability for punitive damages.

Another theory upon which the amalgamation ruling can be affirmed is the “alter ego” theory which provides that when equity requires the Court will not preserve the separateness of subservient corporations if the subsidiary manifests no separate interests of its own and functions solely to achieve the goals of the dominant entity. This theory will

⁷ Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986)

be applied when there is fraud or misuse of control that results in some injustice. Colleton County Taxpayers Association v. School District of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006) (“Colleton”). A perfect description of the facts in this case; the injustice being allowing the Heritage entities to escape full liability. HCI through Van Wie completely dominated and controlled HRI and Buildstar. HRI and Buildstar held no employees except those furnished by HCI. They exhibited no independent interests and were used solely as business conduits for HCI.

The Court in Colleton also discussed the “agency” theory of liability. This liability results when a person or corporation confers the management of some businesses to be transacted in the principals name, and who brings about or effects legal relationships between the principal and third parties. Like using HRI as its agent to sell and Buildstar as its agent to build. The agency relationship is determined by examining whether the party alleged to be the principal has the right to control the conduct of the alleged agent. Not only did HCI have the right of control, it also in fact controlled the corporations with complete domination.

The “instrumentality” theory is also a basis for this Court to confirm the amalgamation ruling. In Peoples Federal Savings & Loan Ass’n. v. Myrtle Beach Golf and Yacht Club, 310 S.C. 132, 425 S.E.2d 764 (S.C. App. 1992) the Court discussed the alter-ego and instrumentality theories as synonymous citing Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir 1973) (“Krivo”). Krivo pointed out that the parent corporation can be held liable for the liabilities of another corporation when it misuses it by treating it, and by using it, as a mere business conduit for the purposes of the dominant corporation. “Instrumentality” is sometimes used to describe this relationship.

Since the dominant corporation has used the subservient corporation for its own purposes, the obligations of the subservient corporation should be in fairness and equity imposed on the dominant corporation. In this event the Court will “look through” the forms to the substance of the relationship between the companies as if the corporate entity did not exist and deal with them as the justice of the case may require. *Id.* p. 1102-03. In such a situation, the subservient corporation is disregarded so as to fix liability where it justly belongs. The fact that the subservient company had a valid corporate existence is wholly immaterial. This is also known as the “identity” theory of liability. *Id.* p. 1103. A complete description of the amalgamation or blurred corporate identity theory.

In *Krivo*, the Court pointed out that many labels are placed upon this theory of liability. But it is not the label that is important. What is important is that the Court look through the legal forms and invoke its equity powers to prevent injustice and to protect third parties. Whether by applying amalgamation, identity, instrumentality, single business enterprise, agency, alter-ego, tool or adjunct, this Court should uphold the Court of Appeals and not allow any of these corporations to escape total liability.

II. THE COURT OF APPEALS WAS CORRECT IN UPHOLDING THE TRIAL COURTS GRANTING A DIRECTED VERDICT ON NEGLIGENCE LEAVING PROXIMATE CAUSE AND DAMAGES TO THE JURY.

The Trial Judge was correct in granting the Respondents a directed verdict on their negligence cause of action and leaving proximate cause and the amount of damages to the jury because: a.) Petitioners’ trial attorney conceded to the jury that Respondents were entitled to a verdict, the only question being the amount of damages; and b.) Petitioners’ expert witnesses agreed to each and every code violation and violation of industry standard alleged by the Respondents.

“In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt. *Strange v. S.C. Dep’t of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). When considering directed verdict motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Creech v. S.C. Wildlife and Marine Resources Dep’t*, 328 S.C. 24, 491 S.E.2d 571 (1997). The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981).” A verdict for the Petitioners is not reasonably possible in this case especially since Petitioners told the jury Respondents were entitled to a verdict.

A. PETITIONERS CONCEDED LIABILITY AND REPRESENTED TO THE JURY THAT THE ISSUE IN THE CASE WAS THE AMOUNT OF DAMAGES REQUIRED TO FIX THE DEFECTIVE CONSTRUCTION AND THAT RESPONDENTS WERE ENTITLED TO A VERDICT.

Petitioners’ strategy at Trial was to convey to the jury that Petitioners empathized with the Respondents’ plight and agreed the Respondents were entitled to receive a sufficient verdict to get their homes repaired, but the Respondents were being greedy.

Petitioners’ trial attorney began his opening statement with a clear representation to the jury that the “Heritage entities” acknowledged deficiencies in the building and the only dispute was how much the fix would cost:

In his opening statement, Petitioners’ trial counsel had this to say:

Ladies and gentleman of the jury, the real issue in this case is what is it going to cost to fix condominiums out at Riverwalk, and that is the central issue and what we deny, as Mr. Henry has raised in the pleadings, is that the costs out at Riverwalk are going to cost over 8.6 million dollars, because that is what they are going to come before you during the course of this trial and ask from you, multi, multi-millions of dollars to do repairs out at Riverwalk which are not in line with what the true issues are out there. We submit that the cost estimates that we will put before you are the real and true costs for fixing the issues out there at Riverwalk.

You will hear us say repeatedly during this case we're not running from these issues, we acknowledge there are issues out at Riverwalk. We acknowledge there are certain repairs that need to be made but they do not fall anywhere near the class of repairs that these Plaintiffs are going to ask for in this case ... (R. p. 211, line 17-p. 212, line 12).

Throughout the remainder of Petitioners' attorney's opening statement to the jury, he concentrated on the acknowledged defects and the scope of repair. (R. p. 211, line 17 – p. 215, line 10). He then concludes his opening statement with:

“... and we ask you to render a true verdict in this case, which would be the cost of repairs that we submit to you through our expert are the true issues in this case, the true cost of the repairs in this case, which will be around 2.3, 2.391 million dollars.” (R. p. 215, lines 5-10).

Respondents contended they should be awarded costs they had incurred to repair (pre-trial) some of the construction deficiencies. In his closing, Petitioners' attorney stated: “they [homeowners] should get the \$126,578.48, for the previous repairs.” (R. p. 1479, lines 9-18).

Then in Petitioners' trial counsel's closing statement he concluded with:

Ladies and Gentlemen, the real number in this case is the fix that you heard from Steve Watkins, \$2,391,619.00 is the Steve Watkins' fix, you will have it back there and when you add that to the repairs that the Noble Company made out there that are permanent, then the true verdict, the true verdict in this case would be the two added together, \$2,518,196.48. That is the true verdict. ... This is the true verdict and what we ask you to find. (R. p. 1480, line 14-p. 1481, line 5) [Emphasis supplied].

Petitioners' trial counsel told the Judge:

I certainly got up there in opening and being nothing but frank with the jury acknowledged there were issues ...at Riverwalk ...we laid out that that our defect's expert and our estimator have identified that there is \$2,391,619.00 in deficiencies out there... what it is really going to cost to fix it... (R. p. 1377, line 25-p. 1378, line 9)

When Petitioners' attorney began questioning Gwyn Hardister, COO of HCI, it went like this:

Q. When you say they [homeowners] are entitled to have their repairs made, we don't disagree. Have you seen the scope of repair?

A. No.
(R. p. 723, lines 21-24)

The Trial Judge in ruling on Respondents' directed verdict motion appropriately dealt with Petitioners' strategy of trying to ingratiate Petitioners with the jury and then taking an opposite tact with the Court. The Trial Judge stated:

It would not be proper to allow counsel to represent to the jury that the defendant is responsible and intends to engage in repairs on the one hand and on the other hand argue as a matter of law they are not responsible. More importantly than that, the witnesses all acknowledge defects in the construction and I grant the plaintiffs' motion for directed verdict on the issue of negligence. (R. p. 1385, lines 17-24).

No words could constitute a more unequivocal and direct concession of liability than Petitioners' statement to the jury: "the true verdict in this case would be the two added together, \$2,518,196.48. That is the true verdict and what we ask you to find". (R. p. 1480, line 14- p. 1481, line 5). The Court of Appeals was correct in holding that Petitioners' concessions to the jury were alone sufficient to grant a directed verdict of negligence, leaving proximate cause and damages to the jury. Collins v. Bisson Moving and Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (S.C. App. 1998) (issue conceded at trial cannot be

argued on appeal); *Raptis v. Alexander*, 104 Vt. 203, 158 A. 73 (1932) (Judicial admission found where Defendant's attorney expressly admitted Plaintiff was entitled to a judgment).

B. THE PETITIONERS' EXPERT WITNESSES ACKNOWLEDGED THE PERVASIVE CONSTRUCTION DEFECTS ALLEGED BY THE RESPONDENTS; THE ONLY ISSUE LEFT FOR THE JURY WAS PROXIMATE CAUSE AND THE EXTENT OF THE DAMAGES.

During the trial, Respondents' expert presented a "Matrix of Issues" which detailed each and every code violation and violation of industry standards found by him and a scope of repair of these deficiencies. (R. p. 417, lines 9-20). On cross examination of Alan Campbell, Petitioners' expert, he conceded that he had testified in a deposition that all of the deficiencies contained on Respondents' matrix existed at Riverwalk. (R. p. 1069, line 19- p. 1071, line 13). Speaking of Respondents' Matrix of issues, Mr. Campbell testified

"we can go through [the matrix] we can shorten the list or hit it item by item, but yes, I did agree with you, we did not elaborate on those conditions and you asked me about code violations and industry standards and we agreed that those conditions did exist on this building and that there were problems... these may be problems that exist in one location on this building and may exist on a hundred locations on this building, so we have to talk about how pervasive the problem is, how critical the problem is, what it represents and how it needs to be addressed." (R. p. 1071, lines 1-13).

Mr. Campbell is conceding that all of Respondents' alleged code violations and violations of industry standards are present to some extent but the contest is how pervasive they are and how they need to be addressed. The violation of a building code violates a legal duty for which a builder can be liable for proximately caused damages. *Kennedy, supra, Id.* p. 737.⁸ Mr. Campbell is conceding liability, but not the amount of damages. This is exactly what Petitioners' trial counsel represented to the jury in his opening

⁸ Where legal rights of the Plaintiff have been invaded, the law presumes that he suffered some actual damages and it is proper to direct a verdict for such form of damages leaving the amount to the jury. *Gordon v. Rothburg*, 213 S.C. 492, 50 S.E.2d 202 (1948)

statement: “the real issue in this case is what is it going to cost to fix condominiums out a Riverwalk and that is the central issue and what we deny...” (R. p. 211, line 17 – p. 212, line 5).

Petitioners contended that the Trial Judge should not have directed a verdict of negligence because this told the jury that Petitioners were responsible for each and every defective condition and removed from their hands numerous factual determinations that they should have been required to make before every defect was imposed on Petitioners. (Petitioners’ Brief, p. 17-18). What Petitioners miss is that the Judge directed a verdict on negligence, but left proximate cause and damages to the jury. CSX Transp., Inc. V. McBride, 131 S. Ct. 2630, 180 L. Ed. 637 (2011) (“The term “proximate cause” is shorthand for a concept: injuries have countless causes, and not all should give rise to legal liability”). Id. p. 2637. In order for negligence to be actionable it must proximately cause damage. McNight v. South Carolina Department of Corrections, 285 S.C. 380, 684 S.E.2d 566 (S.C. App. 2009) (Negligence is not actionable unless it is the proximate cause of the injuries) Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries. Id. p. 569. When the cause of the Plaintiff’s injury may be as reasonably attributed to an act for which the Defendant is not liable, the Plaintiff has failed to carry the burden of establishing the Defendant’s conduct proximately caused his injuries. Mellen v. Lane, 377 S.C. 261, 280, 659 S.E.2d 236, 246 (S.C. App. 2008). The Court gave a full explanation of proximate cause to the jury and instructed them they could only award Respondents damages that were proximately caused by the Petitioners’ negligent conduct or breach of fiduciary duty. (R. p. 1486, line 22 – p. 1490, line 19). The instruction was repeated time and again by the Trial Judge.

Petitioners point out several items that they contend create issues of fact for the jury that should have prevented a directed verdict. Ironically, the first issue is water infiltration damage on the decking. (Petitioners' Brief, p. 17). The property manager (Noble Company) had repairs made to the decks to make them safe for the homeowners at a cost of \$126,577.48. (R. p. 263, line 12 – p. 265, line 13). Petitioners' attorney told the jury this expenditure should be added to their verdict. (R. p. 1480, lines 14-21). Alan Campbell, Petitioners' expert, testified that the problem with the water infiltration on the decks was "the absence of proper waterproofing." (R. p. 1031, line 21- p. 1032, line 2). Numerous other deficiencies were found on the decks. Proximate cause does not mean the "sole cause". The Defendant's conduct can be a proximate cause if it is at least one of the direct, concurring causes of the injury. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (S.C. App. 2002). The other issues that Petitioners raise as to why the Judge should not have granted a directed verdict as to the "entirety" of the case are all dealing with the pervasiveness (amount of damages) of the deficiencies which were all left to the jury's discretion. (Petitioners' Brief p. 18).

As pointed out by the Court of Appeals, Petitioners' reliance on *Guffey v. Columbia/Colleton Regional Hospital, Inc.*, 364 S.C. 158, 612 S.E.2d 695 (2005) for the proposition the Trial Judge should have tailored its directed verdict as to each specification of negligence, is misplaced. *Guffey* stands for the proposition that a directed verdict is appropriate for the Defendant where Plaintiff fails to present evidence of one element of his cause of action, such as proximate cause. The Court is clearly not talking about specifications of negligence. Where the Plaintiff proves one specification of negligence,

the cause is properly submitted to the jury. Young v. Charleston & W.C. Ry Co., 229 S.C. 580, 93 S.E.2d 866 (1956).

The Kincaid case is apposite. In Kincaid, the respondents alleged negligent construction of a home. The trial court directed a verdict for the homeowners on the issue of liability. Upholding the Judge's directed verdict on appeal, the Court stated:

The Trial Judge directed a verdict for the homeowners on the issue of liability. On appeal from this order, we must review the evidence and all reasonable inferences in the light most favorable to the Appellate. Claytor v. General Motors Corp., 277 S.C. 259, 286 S.E.2d 129 (1982). Wayne Vereen, a witness for Appellants, testified on direct examination to construction defects in the house. Also, he gave an estimate as to the costs of repairs. John Simko, another witness for the Appellants, agreed with Vereen. Based on this testimony, the trial Court correctly directed a verdict for the homeowners. We note the record is replete with other evidence of negligence construction. (Id. at p. 5).

As noted above, Alan Campbell, testified that there were many construction defects in the buildings and he also provided a scope of repair. (R. p. 1069, line 19- p. 1078, line 9). The Petitioners also called Mr. Steve Watkins to provide an estimate based upon the Alan Campbell supplied scope of repair. (R. p. 1160, lines 8-11). Mr. Watkins testified it would cost \$2,391,619.00 to repair the construction defects. The Record is also replete with other evidence of defective construction which was unchallenged by the Petitioners. (R. p. 388, line 16 – p. 574, line 8). The only difference in Petitioners' and Respondents' position were the amount of damages (scope of work) necessary to fix the deficiencies.

Finally, Petitioners state that "there was no evidence that Buildstar breached its standard of care as the general contractor". (Petitioners' Brief, p. 18). After testifying to numerous code violations and violations of industry standards which were not disputed, Drew Brown, Respondents' expert, testified that Buildstar breached its standard of care. This was never challenged by the Petitioners. (R. p. 479, lines 2-9).

III. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS IN THE HOMEOWNERS' ACTION AND THE POPE CLASS ACTION ON THE ADDITIONAL SUSTAINING GROUND THAT PETITIONERS FAILED TO APPEAL ALL CAUSES OF ACTION WHICH WERE INCLUDED IN THE GENERAL VERDICT.

In the POA action, the Trial Judge directed a verdict on negligence but declined to direct a verdict on breach of fiduciary duty. (R. p. 1388, lines 16-24). Breach of Fiduciary Duty was submitted to the jury and the jury found a breach of fiduciary duty which was included in the general verdict. (R. p. 52). No appeal has been taken from the finding by the jury of a Breach of Fiduciary Duty. Breach of Fiduciary Duty does not require a finding of negligence. The developer has a duty to the POA to transfer the common areas to the POA in good repair or to provide the necessary funds to bring the common areas up to a reasonable standard. Failure to do this makes the developer liable for bringing the common areas up to a reasonable standard and any continuing damage. *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002). Petitioners have never denied their liability for breach of fiduciary duty. Petitioners only mention breach of fiduciary duty in the statement of the case and facts (Petitioners' Brief, p. 2) and in reference to the directed verdict. (Petitioners Brief p. 19). The Argument of breach of fiduciary duty being against Buildstar was never made to the Court of Appeals. Breach of fiduciary duty will support actual and punitive damages. *Mazloom v. Mazloom*, 382 S.C. 307, 675 S.E.2d 746 (S.C. App. 2009).

In the Pope Class Action, the Judge submitted for the jury's consideration whether the Petitioners breached their Warranty of Habitability. It was included in the general verdict. (R. p. 58). The Warranty of Habitability is not based on fault, but springs from the sale of a new house. *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006); *Lane v.*

Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728 (1976) (the warranty springs from the sale and is not determined by whether the seller also built the house, but is determined by placing a defective house in the stream of commerce). Rutledge v. Dodenhoff, 254 S.C. 407, 413-15, 175 S.E.2d 792, 795 (1970) (The “sellers liability is not founded upon fault, but because it has profited by reviewing a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects.”). Nowhere in their brief do Petitioners contest this warranty finding and do not argue how their arguments on amalgamation or negligence affect the jury’s finding on this issue.

The Court should apply the “two issue rule” and affirm the verdict in both the POA action and the Pope Class Action. Neither in Petitioners’ statement of issues on appeal in the Court of Appeals, nor in its brief to this Court do Petitioners attack the finding by the jury in its general verdict of the Breach of Fiduciary Duty in the POA Action or the Breach of Habitability in the Pope Class Action. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 287 S.C. 190, 193, 336 S.E.2d 472, 473-74 (1958) (when a jury’s general verdict is supportable by more than one cause of action submitted to it, the Appellate Court will affirm unless the Appellate appeals all causes of action); Smoak v. Liebherr-America, Inc., 281 S.C. 420, 315 S.E.2d 116 (1984) (where case was presented to the jury on negligence and breach of warranty causes of action, Appellate Court need not address breach of warranty exceptions if it finds the verdict was supported by the evidence under the theory of negligence).

The “two issue rule” bars Petitioners from arguing error in granting a directed verdict on negligence since negligence is not required for a finding either to sustain the jury’s verdict on breach of fiduciary duty or warranty of habitability. The Petitioners did

not mention breach of warranty of habitability or breach of fiduciary duty in their statement of issues on appeal or in their brief. *Horton v. City of Columbia*, 408 S.C. 27, 757 S.E.2d 537 (S.C. App. 2014) (failure to preserve an issue for appeal it becomes the law of the case under the two-issue rule).

CONCLUSION

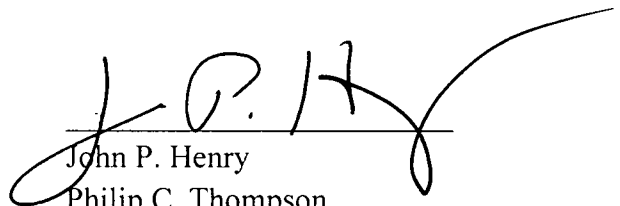
For the foregoing reasons, Respondents respectfully request this Court to affirm the Court of Appeals.

Respectfully submitted,

Conway, South Carolina

THOMPSON & HENRY, P.A.

October 14, 2014

A handwritten signature in black ink, appearing to read "J.P.H.", is written over a horizontal line. The signature is stylized and extends to the right with a long, sweeping flourish.

John P. Henry
Philip C. Thompson
Thompson & Henry, PA
1300 Second Avenue, Third Floor (29526)
P.O. Box 1740
Conway, SC 29528
(843) 248-5741 (Phone)
(843) 248-6396 (Fax)
ATTORNEYS FOR RESPONDENTS

**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-26-3289
Appellate Case No.: 2012-206066

Tony L. Pope and Lynn S. Pope, Individually and
Representing as a Class All Unit Owners for Riverwalk At
Arrowhead Country Club Horizontal Property Regime,Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.
and Buildstar Corporation,Petitioners.

Case # 2003-CP-26-7169

Riverwalk At Arrowhead Country Club Property Owners'
Association, Inc.,Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.,
and Buildstar Corporation,.....Petitioners.

PROOF OF SERVICE

I, Stephanie Hall, an employee for Thompson & Henry, P.A., attorneys for the Respondents, Tony L. Pope and Lynn S. Pope, Individually and Representing as a Class All Unit Owners for Riverwalk At Arrowhead Country Club Horizontal Property Regime, in the above-captioned appeal, certify that I have this 14th day of October, 2014 mailed a copy and/or copies of the following:

1. Respondents' Brief

to the undersigned at his/her/their address(es) of record, with sufficient postage attached thereto, as follows:

Counsel Served: C. Mitchell Brown
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

Stephen L. Brown, Esquire
Jeffery J. Wiseman, Esquire
Young Clement Rivers, LLP
Post Office Box 993
Charleston, SC 29402


Stephanie Hall

Conway, South Carolina