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
Appellant 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 RESPONDENT

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STATEMENT OF THE CASE

This appeal arises from a construction defects action which involves the construction of the Magnolia North condominiums ("Magnolia North") near Myrtle Beach, South Carolina. Heritage Communities, Inc. ("HCI") was the overall developer; Heritage Magnolia North ("HMN") was the site specific developer; and Buildstar Corporation ("Buildstar") was the general contractor for the Magnolia North condominium project (hereinafter "Petitioners"). HCI is the parent corporation of both HMN and Buildstar.

Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation, 397 S.C. 348, 725 S.E.2d 112 (S.C. App. 2012), C/A No. 03-CP-26-3202 was originally filed May 28, 2003, (Initial Complaint filed May 28, 2003; R. pp. 19-27) by the Magnolia North Property Owners Association ("POA") seeking to recover repair costs and punitive damages related to construction defects in the Magnolia North development. The operative Amended Complaint was filed on February 24, 2009, which asserted numerous claims including negligence, breach of warranty of workmanlike service and breach of fiduciary duty. (8th Amended Complaint, R. pp. 39-45). The Plaintiff also pled that the three corporations, HCI, HMN and Buildstar were "amalgamated" because their legal distinction was blurred.

The trial commenced on May 11, 2009 and concluded with a general jury verdict on May 20, 2009. (Verdict Form, May 20, 2009; R. pp. 16-18). 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 one of the Petitioners applied to the others. (R. p. 675, line 16-p. 676, line 7). At the close of all evidence, both Respondent and Petitioners moved for directed verdicts. (R. pp. 1014-1040). The trial court denied Petitioners' motions and denied

Respondent's motion as to Breach of Fiduciary Duty claims, but granted Respondent a directed verdict as to the claims for Negligence and Breach of Implied Warranty of Workmanlike Service. (R. p. 1040, lines 1-23). The trial court submitted proximate cause and damages and Respondent's claim for breach of fiduciary duty to the jury.

Following the directed verdict at the close of the testimony, the only issues remaining for jury determination were whether the Petitioners breached their fiduciary duty by turning over the POA to the unit owners with substandard common elements and determining proximate cause, actual and punitive damages. On May 20, 2009, the jury found for the Respondent on the Breach of Fiduciary Duty claim and awarded a general verdict on all claims of Six Million Five Hundred Thousand Dollars ($6,500,000) in actual damages. The jury also found that the Petitioners were willful, wanton, reckless and/or grossly negligent and awarded Two Million Dollars ($2,000,000) in punitive damages. (R. pp. 16-18).

On May 29, 2009, Petitioners filed post-trial motions seeking a new trial pursuant to the Thirteenth Juror Doctrine, Judgment Notwithstanding the Verdict, New Trial Absolute, New Trial *Nisi Remittitur*, review of the punitive damages and a set-off. (Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation, Inc.'s Post-Trial Motions; R. pp. 2084-2100). Subsequent to a hearing on the post-trial motions, the trial court issued an Order denying all of Petitioners' post-trial motions with the exception of the motion for set-off, which was granted in full. (R. pp. 6-15).

HCI, HMN and Buildstar timely appealed and the Court of Appeals affirmed the Trial Court in opinion 4943. HCI, HMN and Buildstar sought a rehearing and the Court of

Appeals denied it. This Court granted HCI's, HMN's and Buildstar's petition for a Writ of Certiorari on certain issues on June 26, 2014.

STATEMENT OF THE FACTS

At trial Respondent presented evidence claiming entitlement to cost of repair damages of approximately nine million dollars ($9,000,000) and the Petitioners contended the Respondent was only entitled to approximately Two Million, Five Hundred Thousand Dollars ($2,500,000). (R. pp. 991-992). The jury decided the Respondent was entitled to Six Million, Five Hundred Thousand Dollars ($6,500,000) actual damages and Two Million Dollars ($2,000,000) punitive damages.

The Magnolia North Horizontal Property Regime consists of twenty-five buildings, twenty-one of which were developed, constructed, marketed and sold by Petitioners.

Petitioners' trial attorney made it clear to the jury that HCI was one and the same as Buildstar, telling the jury problems at Magnolia North were caused by "a subcontractor that was hired by Heritage." (R. p. 949, line 19-p. 950, line 1). The three corporations were referred to throughout the trial as "Heritage". The trial judge determined that these three corporations were "amalgamated" because the legal distinction was blurred, and the actions of one were the actions of all. (R. p. 675, line 16-p. 676, line 7).

Prior to the developer's turnover of the association, the Noble Company (the property manager hired by HCI), procured two building assessment reports as required by the master deed (R. p. 1072), detailing construction deficiencies; one report dated December of 2000 (R. p. 1512) and the other dated May, 2002. (R. p. 1540). These reports were given to the developer. (R. p. 149, lines 1-3). Despite Petitioners' continuous representations to the homeowners that HCI would fix the construction problems at

Magnolia North, the May 3, 2002 report contained the same deficiencies that were in the December, 2000, report. (R. p. 148, lines 19-21).

The parties stipulated that the 1994 and 1997 building codes were applicable to the construction at Magnolia North. (R. p. 78, lines 13-19). Petitioners' expert witness, Mr. Dave Roady, admitted that he found practically the same violations of the building code and industry standards as Respondent's expert witness. (R. p. 917, line 15-p. 0924, line 6). Mr. Roady provided a scope to repair these deficiencies. (R. p. 1951). Petitioners' expert, Tom Carlson, gave an estimate to repair the deficiencies in the rounded off amount of Two Million Five Hundred Thousand Dollars ($2,500,000). (R. p. 992, lines 9-24). Respondent's expert Drew Brown developed a scope of repair. (R. p. 1781). Respondent's estimator, Chris Cooper, estimated repair costs of Nine Million Three Hundred Ten Thousand, Nine Hundred Two Dollars ($9,310,902). (R. p. 625, lines 1-8). Additionally, Respondent presented costs of repairs after turnover made by the POA which amounted to $525,150. (R. p. 159, line 12-p. 163, line 12). The jury returned a general verdict on all three causes of action in the amount of Six Million Five Hundred Thousand Dollars ($6,500,000), actual damages and Two Million Dollars ($2,000,000), in punitive damages. The actual damages are well within the range between Petitioners' expert's estimate and Respondent's expert's estimate. Respondent filed post-trial motions that were denied. (R. p. 6.). The Court also upheld the award of punitive damages after a gamble review. (R. p. 6).

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, HMN AND BUILDSTAR WERE ONE AND THE SAME.

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

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, 343, 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 that the homebuyer has no contact with, 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); and "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 in the residential homebuilding arena. This Court has made it clear that new home buyers may proceed against all those who participated in placing the home in the stream of commerce whether it be seller, 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. These words in *Lane, supra.*, still ring true today: "The law should not orphan the purchaser of a house, who has likely invested his life savings...." *Id.* p. 731. One of the Magnolia North homeowners who testified wrote a letter on behalf of the developer because he believed the developer would honor their representations to take care of the problems. His testimony falls squarely in the reasons for this Court's protectionary stance:

> A. I don't like the way things went down, the way people got taken advantage of on these condos and the problem we're having and this letter here I was proud to write that letter and I mean every word in this letter but it was prior the first two years prior to when all this happened cause I really thought they were, Dr. Green I never met him personally and them people I, I, I just felt, I just took for granted that they're going to take care of things. They took my life savings when I came down here and bought my place and I was proud and I liked it but I was very upset with the way things ended up. (R. p. 198, lines. 15-25). [Emphasis supplied]

HCI can only be described as a "super developer". They were the developer/builder and seller ("overall developer") of numerous condominium projects, all of which generated litigation because of virtually the same defects. (R. p. 2013, line 24-p. 2014, line 11) Heritage developed at least 1,500 condominiums generating Fifty-Five Million Dollars ($55,000,000.00) of cash flow. (R. p. 2015, lines 1-7) Heritage admits it put hundreds of defective condominiums in the stream of commerce. (R. p. 2068, lines 14-18).

Respondent moved the Court to rule that Heritage Communities, Inc., and its two subsidiaries, Heritage Magnolia North, Inc., and Buildstar be considered amalgamated as one and the same company. (R. p. 660, lines 13-24). The Trial Judge granted the motion and found that:

> "Well I find as a matter of law that the facts in this case are 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 Management v. Sherwood Development Corporation*, the piercing the corporate veil ruling in the amalgamation ruling in that case and the analysis applied in that case in 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. Hardister's testimony as well as the evidence in the case and that's the order of the Court." (R. p. 675, line 16–p. 676, line 7).

The Petitioners contend that this amalgamation ruling resulted in unfair prejudice to HCI, HMN 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. (Petitioner's Brief p. 15).

These corporations were a single business entity and each played their part in knowingly building and selling defective condominiums to these innocent homebuyers and unloading the defective common elements on them.

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"). Whether the label is amalgamation, 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 out that a lender may 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 contractor that constructed the homes. Kincaid purchased one of the homes and

[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.1. (2008)

later discovered numerous deficiencies in the home's construction. The witnesses for Respondents and Appellants both 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 in this way to insulate one corporation (RMG) from liability when RMG was organized, operated and represented to be a part of the same business enterprise which brought about the construction and sale of a defective home to

the Plaintiff. In such a situation equity will look at the substance of the transaction and place liability where it should be to prevent an injustice. [2]

Amalgamation or blurred corporate identity theories 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 unjustly avoid liability to third parties. 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*, *infra*, pp. 553-54. A person [or corporation] cannot use the corporate entity to avoid or hide from the normal consequences of carefree business by doing so through a corporate shell. *Dumas v. Infosafe Corp.*, 320 S.C. 188, 463 S.E.2d 641 (S.C. App. 1995). "Amalgamation" as with other forms of relief in this arena, is an equitable form of relief that looks beneath the rigid rules of the law to seek substantial justice by placing liability where in fairness and justice it should be. *Nettles v. Sottile*, 184 S.C. 1, 191 S.E. 796 (1937) (Where a corporation exists as a device to evade legal obligations, the Courts without regard to actual fraud, will disregard the entity theory.) [Citation omitted]

In fact, this theory of "amalgamation" (without using the name) was announced by this Court long before *Kincaid*, *supra* and *Kennedy*, *supra*. In *State v. Broad River Power*

[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 pursuant 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)

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

This holding in *State* is a clear description of both "amalgamation" and the "instrumentality" theory. As noted by this Court in *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 271 S.E.2d 596 (1980), the "instrumentality rule" is invoked when the retention of separate corporate personalities would promote fraud, wrong or injustice or contravene public policy. *Id.* p. 600. In this case, the Heritage entities, for the purposes of escaping liability, ask the Court to divide them so that HCI and HMN can escape liability for punitive damages, because they did not build the condominiums, or to allow Buildstar to escape liability for breach of fiduciary duty because it did not unload the defective condominiums on the homeowners. The Trial Court was correct to invoke its equity powers to prohibit the use of this type of corporate fragmentation to avoid liability when in substance all jointly participated in bringing about the harm to these innocent home purchasers.[3]

[3] *Gladden v. Boykin*, 402 S.C. 140, 739, S.E.2d 882 (2013) (This Court has judicially crafted public policy affording heightened protection to home purchasers.)

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

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

As noted in the Statement of the Case, there were three corporations: Heritage Communities, Inc. ("HCI") was the overall developer; Heritage Magnolia North, Inc., ("HMN") was the site specific developer; and Buildstar Corporation ("Buildstar") was the general contractor. HCI was the parent company of HMN and Buildstar. HCI had the same officers and directors as HMN and Buildstar. (R. p. 2024, lines 9-12). HCI hired the architect to design the project (R. p. 2024, lines 13-16) and the actual construction was overseen by HCI through its Chief Executive Officer ("CEO"), Roger Van Wie. (R. p. 2022, lines 12-14). The Chief Operating Officer (COO) of HCI would oversee the sales agents who were selling the units and the closing of the units through HMN. (R. p. 2017, line 24–p. 2018, line 16). HMN held title to the property and was the corporation that conveyed the units. They marketed (sold) the units through sales agents loaned from another company. As noted above, HCI oversaw these sales agents. (R. p. 2002, lines 1-14). The corporations (HMN and Buildstar) were set up as cost centers. (R. p. 2029, line 15-p. 2030, line 18). All of the officers and directors of HMN were the same as HCI and Buildstar. (R. p. 2024, lines 9-12). HMN was located in the same office with HCI and Buildstar. (R. p. 2029, lines 2-7). HMN had the same telephone number as HCI and Buildstar. (R. p. 2029, lines 2-13). Buildstar was a cost center of HCI to contain HCI's construction cost allocation. (R. p. 2030, lines 2-18). The employees of Buildstar would be

assumed to be also employees of HCI. (R. p. 2039, lines 9-13). Roger Van Wie, CEO of HCI, was in charge of overseeing Buildstar (R. p. 2022, lines 12-14) and was overseeing construction of Magnolia North. (R. p. 2022, line 24–p. 2023, line 1). Buildstar had the same officers and directors as HMN and HCI. (R. p. 2021, lines 10-15). Lynn Anderson, an HCI employee, was eventually made president of Buildstar (R. p. 2021, lines 16-18) and was also secretary of HMN (R. p. 1189) and on the Board at HCI. (R. p. 2020, lines 3-5).

James Miles Watson, an officer of HCI incorporated Magnolia North Property Owners Association, Inc. ("POA"). (R. p. 1103-1104). Lynn Anderson, Roger Van Wie and Gwyn Hardister, all officers or directors of HCI, made up the board of the POA. (R. p. 2034, line 1–p. 1035, line 10). HCI controlled the POA. (R. p. 2035, lines 11-18). HCI represented to the homeowners that they would remedy the construction deficiencies and should have but they did not. (R. p. 2059, lines 1-9).

HCI gave to each of the purchasers at closing a limited warranty manual. (Plt.'s Ex. 4, R. p. 1481; p. 2030, line 19-p. 2032, line 10). The warranty manual clearly identified HCI as both the developer, seller and contractor. For example, Page 1 of the warranty manual describes HCI's "building philosophy"; HCI discusses how the shortage of sheetrock slowed "us down"; in the last paragraph of page 2, HCI refers to "responses of 'our' subcontractors"; if building problems existed the homeowner was to call the homeowners assistance manager at the same telephone number as HCI; on page 6, HCI referred to the condominiums as a "Heritage Communities, Inc. unit"; beginning on page 7, HCI states what the homeowners can expect from them for various items in the building. The reality that HCI and Buildstar are one and the same is clearly reaffirmed on page 15

of the warranty manual which provides that HCI will not only do all it can to make sure that a quality home is produced, but will also inspect the project throughout the building process on a continual basis to ensure materials and workmanship are up to standards. This is the function of a general contractor. In fact this was the function of Buildstar.[4] Also on page 15, Heritage states that during construction "our construction department is responsible for the home during this phase." This was the function of Buildstar which HCI referred to as their "construction department." On page 19 of the warranty manual HCI provides a form to "authorize HCI to enter my condominium for the purpose of completing punch work and warranty repairs..." These are contractor functions. In the manual on page 21, HCI states that "Heritage Communities and its subcontractors will fully warrant material and installation of said items for a period of one year." The employees of Buildstar could be assumed to be employees of Heritage. (R. p. 2039, lines 9-11). Accompanying the warranty manual was a letter addressed to the homeowner from HCI. (R. p. 1957). It is clearly a representation that HCI, HMN and Buildstar are the same and that HCI is both builder and seller. Statements such as "we have been in the business of building homes for many years..."; and "...our responsibilities as the developer/ builder..." and "you have made a wise decision purchasing a home from Heritage Communities, Inc." are clear representations that HCI, HMN and Buildstar are one and the same.

With the knowledge of HCI, HMN and Buildstar, defective condominiums were built and sold to unsuspecting homeowners which were expressly being warranted by HCI. (R. p. 2048, lines 3-9). Gwyn Hardister, HCI, Chief Operating Officer, (COO),

[4] Gwyn Hardister, Senior Vice President and COO of HCI, testified that Buildstar was responsible to oversee the construction to make sure that the buildings complied with the code and the architect's specifications. (R. p. 2080, line 24-p. 2081, line 5).

acknowledged purchasers were not told of defects. (R. p. 2018, line 17–p. 2019, line 9). He also acknowledged that the Heritage developers were the Board of the Homeowners Association (R. p. 2054, lines 8-20) and they were representing to the homeowners the problems would be fixed, but they never were. (R. p. 2040, lines 9-22).

The facts for amalgamation in this case and in *Kincaid* are strikingly similar:

Kincaid	Magnolia North
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;
3) When the homeowners' homes were built, all three corporate offices were located in the same place;	3) When the condominiums were built all three corporate offices 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 builder and seller. Along with the warranty manual HCI gave to the purchaser a letter stating that HCI has been

	in "the business of building homes for many years" and described HCI as the developer/builder. (R. p. 1957);
6)	6) HCI paid the sub-contractors and warranted their work;
7)	7) HMN had no employees but management was supplied by HCI;
8)	8) HMN and Buildstar were "cost centers";
9)	9) Buildstar was a management company that oversaw the subcontractors and Buildstar was overseen by Van Wie, President, shareholder and director, who was also in direct control of HCI and HMN;
10)	10) All three corporations had the same telephone number.

These facts clearly require amalgamation.

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;

   HCI and HMN shared similar names. HCI, HMN and Buildstar were represented to the public and to the jury as being one and the same. They were called "Heritage".

There was no effort at Trial to distinguish the three corporations. The corporations were all represented by one attorney who made no distinction between the three.

2) The corporations were engaged in the same line of business;

It is not disputed that HCI held itself out to be the "developer" of the condominiums.[5] Along with the warranty manual, the homeowners got a letter from HCI stating they are the developer/builder of the home (R. p. 1957) and HCI has been "in the business of building homes for many years". (R. p. 1957). Without HMN and Buildstar, HCI had no reason for existence. HCI, HMN and Buildstar were engaged in the marketing, construction and sale of condominiums to the public. As noted above, the warranty manual and letter given to the purchasers clearly conveyed that HCI was the "developer/builder". (R. p. 1481).

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

All of the corporations had the same officers and directors. (R. p. 2024, lines 9-12). Roger Van Wie was a shareholder, director and officer and oversaw the construction of the condominiums. HMN and Buildstar were essentially cost centers operated by the same officers and directors. (R. p. 2030, lines 2-18). In other words, they were "departments" of HCI.

4) The corporations operated at the same address, and used an identical phone number;

HCI, HMN and Buildstar operated out of the same office and had the same telephone numbers (R. p. 2029, lines 2-14). All construction deficiencies were reported to the same telephone number at the same office as HCI, HMN and Buildstar. (R. p. 2029, lines 2-14).

[5] Petitioners refer to HCI as the "overall" developer. One would have to assume this means HCI is over all phases of development including marketing, building and selling. (Petitioner's Brief, p. 2)

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

Buildstar was run by HCI employees. (R. p. 2039, lines 2-11). HMN had no employees but had sales agents leased from another company who were supervised by the COO of HCI. (R. p. 2002, lines 1-14). Gwyn Hardister was hired by Heritage as Vice President of Sales and Marketing. (R. p. 2015, lines 10-12). He was in charge of the HMN "leased" sales agents, and closings and explaining the building process. (R. p. 2018, lines 3-16). Lynn Anderson, an HCI employee, was at some point on the HCI Board and was also at one point, President of Buildstar. Van Wie (shareholder, officer and director of all three corporations) would oversee Buildstar. (R. p. 2022, lines 12-14). He oversaw building of Magnolia North. (R. p. 2022, line 12-p. 2023, line 1). Mr. Van Wie would be the one that would know why they did not have architects inspect construction. (R. p. 2026, lines 10-20). HCI guaranteed the work of Buildstar. (R. p. 1481). All of the cash flow from the sales of the condominiums flowed to HCI. (R. p. 2014, line 12–p. 2015, line 7).

After considering these 5 factors, (and with much less evidence that is present in this case) 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 this case HCI says it cannot be liable for punitive damages because it didn't build the defective condominiums. Buildstar did and they are a separate corporation. Yet HCI incorporated Buildstar, oversaw work of Buildstar, guaranteed the work of Buildstar, 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.

Whether you use the reasoning for amalgamation set out in *Kincaid* or the reasoning set out in *State v. Broad River Power Co.*, *supra*, or in *Smith*, *supra*, equity and fairness require these corporations to be amalgamated so that liability is put in the proper place.

The Petitioners provided as supplemental authority to this Court: *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 this case. 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" as required when "piercing the corporate veil". 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.

This article was written with a basic misunderstanding of amalgamation. This is a different theory than the traditional relief of "piercing the corporate veil" (which the writer concentrated on) in an attempt to hold shareholders, officers or directors liable for the debts or liabilities of the corporation. "Amalgamation" is an equitable theory that allows the Court to determine if it would be inequitable or unjust to allow several corporations to keep their separateness. It does not depend 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). The inequity in this case is to use subsidiaries as conduits in order to unjustly manipulate and escape liability. Although the Court of Appeals did not say 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 over ten (10) days and clearly recognized these corporations were one and the same and in fairness and equity their liabilities should be the same.

C. 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). Respondents believe the "amalgamation" ruling by the Trial Judge and affirmed by the Court of Appeals is the correct ruling. However, if this Court finds this ruling flawed, there are other grounds upon which this case can be affirmed.

An examination of the Record in this case provides, in addition to amalgamation, several other grounds to uphold the Trial Judge's and the Court of Appeal's determination that the Petitioners were properly "amalgamated". 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 can be 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 its substance. The formation of HCI, HMN and Buildstar was facially legal. HCI was formed to develop, build and sell residential structures, a completely legitimate enterprise. HCI decided that instead of doing all aspects of development in their company name, they would fragment the business into the seller, HMN, and the builder, Buildstar. In doing so, HCI decided to make the two corporations "departments" or "cost centers" and so used the same officers, directors, shareholders and employees of HCI. They would hire no employees for HMN but they would lease a sales force to be overseen by HCI. Buildstar would not do any construction but HCI's CEO would oversee the subcontractors doing the work and warrant the work of its subcontractors. Because all three corporations had the same officers, shareholders and directors, the corporations were aware they were participating in an enterprise to build, market and sell condominiums that eventually turned into the building, marketing and knowingly selling defective condominiums. And now, Petitioners seek to use this scheme of corporate structure to evade liability. Petitioners say HCI and HMN cannot be liable for negligence and punitive damages because they did not build the condominiums; they just sold them and HCI received the proceeds. HCI could not be liable in implied warranty; the condominiums were sold by HMN. Buildstar could not be liable for selling or unloading

defective condominiums on the homeowners, they just built them. This is the wrong and injustice equity must not allow. *Smith*, *supra*, 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. [Emphasis supplied] Id. at p. 463.

Petitioners contend that the amalgamation theory was wrongly applied because unlike the *Kincaid* case, there was no showing that Respondent was misled or confused. Petitioners misread *Kincaid*. Nowhere in the *Kincaid* decision is there a mention of the homeowners being confused or mislead. Instead, the Court is refusing to let one of the corporations escape liability when in reality it was the overall developer that used the subsidiary corporations as conduits to transact its business. The Court should never sanction the use of the corporate form in this manner which allows one corporation to escape liability when in substance it is operated and controlled and represented as the same business enterprise.

"Amalgamation" is a different word to describe old concepts, like alter-ego, agency, instrumentality, single business enterprise, or identity doctrines which all provide procedural relief to prevent the inequitable use of the corporate form to avoid liability.

In the recent case of *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012), the Court discussed the "alter-ego" theory holding that:

> An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby. Control may be shown where the subservient entity manifests no separate interests of its own and functions solely to achieve the goals of the dominant entity. *Id.* (citation omitted) This theory does not apply however, in the

absence of fraud, injustice or contravention of public policy. *Id.* p. 465

Clearly the facts in this case contain the first element. The second element of inequitable consequences is the element Petitioners claim was necessary for the Court to apply the "amalgamation" theory. The second element of injustice is present applying either the amalgamation or alter-ego theories. In *Kincaid* RMG attempted to escape a directed verdict of liability for negligent construction and sale of a defective home even though they completely controlled the builder and seller and represented themselves as builder and seller. Even though RMG was legally a separate entity, RMG was organized, represented and operated in such a manner that for purposes of liability equity would treat it as one and the same. In Justice Hearn's dissent in *Oskin*, *supra*, she pointed out that using an orchestrated scheme (although facially legal) to prevent the collection of a valid judgment supplies the element of injustice for application of the alter-ego theory. *Id.* p. 409. Herritage's fragmentation of its business into corporations that were clearly their alter-egos, although facially legal, cannot be used to avoid legitimate claims by these homeowners. All of the requirements are present in this case to apply the alter-ego theory or amalgamation to affirm the Court of Appeals' and the Trial Court's ruling on amalgamation.

This Court could also affirm using the "single business enterprise" theory. This theory of corporate liability is applied when two or more affiliated corporations constitute a single business. 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 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). Some of the factors to be considered 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 on 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 this case meet most, if not all of the factors set forth in *Green*. This is another theory to prevent the unjust escape of liability.

In their brief (Petitioner's Brief, pp. 9-10), 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 correctly point out that the Supreme Court of Texas rejected the "single business enterprise theory" because the Texas Appeals 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 (as noted in Petitioners' Brief) that they had never held corporations liable for each other's obligations merely because of centralized control, mutual purposes and shared finances; "there must also be evidence of abuse... injustice or inequity." This ellipsis in Petitioner's Brief left out an important statement by the Court. The Court said the injustice and inequity required was as described in "*Castleberry*"[6]. In *Castleberry*, one of the types of injustice or inequity that would warrant disregarding corporate separateness is "when a corporation is organized and operated as a mere tool or business conduit of another corporation;" *Castleberry*, *Id.* p. 272. The identical situation presented in this case. HCI, HMN and Buildstar were operated as a single business enterprise and this Court can affirm the ruling of amalgamation on this basis.

This Court in *Colleton County Taxpayers Association v. School District of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006) ("Colleton") 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 principal's name, and who brings about or effects legal relationships between the principal and third parties. 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. Again, the perfect description of the relationship between HCI and its subsidiaries, HMN and Buildstar. HMN and Buildstar were agents, conduits or adjuncts of HCI. They were in substance one and the same.

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 of Appeals discussed the alter-ego and instrumentality theories as synonymous, citing *Krivo Indus. Supply Co. v. National*

[6] *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986).

Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir 1973) ("Krivo"). *Krivo* pointed out that the parent corporation can be held responsible 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. 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.

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 on the theory of amalgamation, identity, instrumentality, agency, single enterprise, tool or adjunct, this Court should uphold the Court of Appeals. There is no dispute that HMN and Buildstar were instrumentalities of HCI which completely controlled and dominated them.

II. THE COURT OF APPEALS DID NOT ERR IN UPHOLDING THE TRIAL JUDGE'S CHARGE TO THE JURY ON THEIR DUTY TO AWARD PUNITIVE DAMAGES IF THEY FOUND THE RESPONDENTS WERE ENTITLED TO PUNITIVE DAMAGES.

Petitioners complain of the following charge:

> 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. p. 971, line 24-p. 972, line 4). *(Emphasis supplied).*

The judge gave a charge on punitive damages that he described as the most extensive charge on punitive damages he had ever given. (R. p. 1049, lines 18-25). The Judge gave the jury the factors to consider as set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) ("Gamble"). (R. p. 970, lines 9-25).

The duty of the jury to award punitive damages when under proper allegations a plaintiff proves willful, wanton, reckless or a malicious violation of his rights has been the law of this state at least since 1904. In this State exemplary damages are awarded not only as punishment for wrong, but as vindication of a private right. It therefore logically follows that if a Plaintiff proves wanton, willfull, or malicious violation of his rights he is entitled to such damages. *Dagnall v. Southern Ry. Co.*, 69 S.C. 110, 48 S.E. 97 (1904). See also *Beaufort v. Southern Ry. Co.*, 69 S.C. 160, 48 S.E. 106 (1904); Wilcox v. Southern Ry. Co, 91 S.C. 71, 74 S.E. 122 (1912) and *Sample v. Gulf Refining Company*, 183 S.C. 399, 191 S.E. 209 (1937). The Court of Appeals recognized this as being the law in *Broom v. Southeastern Highway Contracting Company, Inc.*, 291 S.C. 93, 352 S.E.2d 302 (S.C. App. 1986). These holdings have never been overruled.

The Appellants objected to this charge at trial because:

> [I] have some concerns that may be that old South Carolina language that gets used so often doesn't comply with the more recent U.S. Supreme Court cases with due process and punitive damages. So I, I just want to preserve my right on that issue. (R. p. 1046, line 13-p.1047, line 12).

> [J]ust that all that... predates State Farm v. Campbell. As your Honor is well aware, the U.S. Supreme Court has gotten awfully concerned about due process rights... I believe any jury instruction... along those lines takes away my due process rights... (R. p. 1049, lines 5-17).

Petitioners contend that this charge violated their due process rights but did not state to the Trial Judge specifically how this charge violated Petitioner's due process rights. Petitioners argue: "... because a judicial evaluation of a jury's punitive damage award is constitutionally necessary, it logically follows that a punitive damage award is under no circumstances mandatory." (Appellants' Brief p. 25). This was never argued to the trial judge or ruled on and is not preserved for appeal.

Petitioners have yet to explain how this charge violated their procedural due process rights. Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the due process clause of the Fifth and Fourteenth Amendment of the United States Constitution. *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 656 S.E.2d 346 (2008). The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. *Kurschner*, *supra*, at 171. Petitioners were provided all three.

Petitioners begin their argument by a discussion of numerous cases that require trial courts to review punitive damages awards. In this case, the Trial Court charged the jury extensively including the *Gamble* factors on what they were required to consider before they determined Respondent was entitled to punitive damages. (R. p. 965, line 20-p. 972, line 4). Additionally, the Trial Judge conducted a post-trial hearing on the *Gamble* factors and found the award appropriate and proportionate to the severity of the offenses and would accomplish society's goals of punishment and deterrence. (R. pp. 9-14).

Petitioners discussion of *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625 (1983) misses the mark. Nowhere in this decision does it even hint that the requirement to award punitive damages would violate due process. The Court is simply describing the difference in actual

and punitive damages under federal law. If a State can determine that the award of actual damages is mandatory under a given set of circumstances, where would it run afoul of the due process clause if this State determines that under certain circumstances the award of punitive damages (but not the amount) is mandatory because it furthers the state's interest in deterrence?

The case of *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003) relied on by Petitioners is inapposite. *Campbell* holds that "the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* p. 416. The *Campbell* Court also pointed out that states possess discretion over the imposition of punitive damages. It is the amount of the award that may offend due process. *Id.* p. 416-17.

Petitioners do not attack the amount awarded or the sufficiency of the evidence for the award of punitive damages; they only attack the jury instruction which has been the law of this state since 1904. Federal courts have long recognized that states have a legitimate interest in allowing punitive damages in order to punish unlawful conduct and deter its repetition. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L.Ed. 2d 789 (1974); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 101 S. Ct. 2748, 2759- 2760 (1981); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22, 111 S. Ct. 1032, 1045-1046 (1991). (Alabama's imposition of vicarious liability on an insurance company for punitive damages for fraud resulting from activities of its agent gives the insurance company more incentive in overseeing its agents which furthers the State's interest.) Likewise, in this State it does not violate the 14th Amendment to hold the railroad liable for the willful and wanton acts of its servant. *Dagnall*, *supra*. The Judge's

elaborate instructions and verdict form made it clear to the jury that punitive damages could only be awarded if they determined that Petitioners' conduct was willful, wanton, reckless and/or grossly negligent. (R. p. 0965, line 20-p. 0974, line 10). Once the jury found the Petitioners were willful, wanton and reckless, the State had a legitimate interest to require some amount of punitive damages to deter the Petitioners and others from future conduct of such nature. The judge also instructed the jury on the *Gamble* factors with which to measure the amount of punitive damages. (R. 0970, lines 9-25). The jury was free to award nominal punitive damages. As stated in Gore, *infra*, "only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the due process clause of the Fourteenth Amendment." *Id.* p. 568. Thus, it is the excessiveness of the award and not the requirement of an award that violates due process. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), *State Farm Mut. Auto Ins. Co. v. Campbell*, *supra.*, and *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). The Petitioners have pointed to no authority that a mandatory award of some amount of punitive damages violates due process rights. The Court of Appeals and Trial Court should be upheld.

III. THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR A DIRECTED VERDICT AS TO THE NEGLIGENCE AND BREACH OF WARRANTY OF WORKMANLIKE SERVICE CLAIMS BECAUSE RESPONDENT'S AND PETITIONERS' WITNESSES AGREED THAT THE MAGNOLIA NORTH CONDOMINIUM BUILDINGS WERE CONSTRUCTED IN A NEGLIGENT MANNER AND THE PETITIONERS CONCEDED LIABILITY AND DAMAGES.

At the conclusion of Petitioners' evidence, the trial court granted Respondent a directed verdict as to its negligence and breach of warranty of workmanlike service claims.

When deciding the propriety of a motion for a directed verdict, appellate courts apply the same standard as the trial court, viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. A court should deny a motion for directed verdict when the evidence yields more than one inference. The court will reverse only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Richland County v. Carolina Chloride, Inc.*, 382 S.C. 634, 677 S.E.2d 892 (S.C. App. 2009). 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. *Estate of Haley ex rel. Haley v. Brown*, 370 S.C. 240, 634 S.E.2d 62 (S.C. App. 2006). In this case it is not possible under the facts and concessions by Petitioners for the Petitioners to have received a verdict. Petitioners told the jury that Respondent was entitled to a verdict.

A. THE TRIAL JUDGE WAS CORRECT IN GRANTING A DIRECTED VERDICT ON NEGLIGENCE AND BREACH OF WARRANTY OF WORKMANLIKE SERVICES AND LEAVING PROXIMATE CAUSE AND DAMAGES TO THE JURY.

Petitioners contend that the Trial Judge should not have directed a verdict of negligence and breach of warranty of workmanlike service because this told the jury that petitioners were responsible for each and every defective condition and removed from their hands numerous factual determinations that the jury should have been required to make before every defect was imposed on Petitioners. What Petitioners miss is that the Judge directed a verdict on negligence and breach of warranty of workmanlike service, not proximate cause and damages. *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 there must be damage proximately caused by the negligence. *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 Respondent damages that were proximately caused by the Petitioners' negligent conduct. (R. p. 957, line 14–p. 964, line 22). On five occasions the Trial Judge instructed the jury they could only award those damages which were the proximate result of the Petitioners' negligence or breach of warranty. (R. pp. 957-963).

The first item Petitioners contend is an example of why the Judge erred in directing a verdict is ABTCO trim because there was evidence that it was commonly used before anyone knew it was a defective product. (Petitioner's Brief p. 27). The ABTCO trim was a product used extensively throughout the Magnolia North buildings and caused pervasive water intrusion and rot.[7] Ironically, this is one of the several items that Petitioners' trial attorney asked the jury to give Respondent the money to fix. In his opening statement Petitioner's attorney stated the following speaking of the ABTCO trim:

> I'm not going to ask you to do anything other than to fix that trim product. I'm not Louisiana Pacific, I didn't make it but I will ask you to give them the money to fix it. (R. p. 83, lines 19-22).

[7] Petitioners' expert, Mr. David Roady, testified that the ABTCO trim had to be replaced because it was deteriorated and was not installed correctly. (R. p. 845, lines 19-25).

All of the items Petitioners' set forth in their brief are items that relate to the amount of damages (scope) and proximate cause, (Petitioner's Brief, p. 28) which were left to the jury.

The contractor's standard of care was violated by the pervasive code violations (R. p. 919, line 6-p. 924, line 6). At no point did Petitioners deny liability. Instead, Petitioners told the jury, "It's about the money". (R. p. 85, lines 2-17).

Drew Brown, Respondent's expert, testified to numerous and significant code violations and violations of industry standards (which he summarized in a matrix of issues) he found in his investigation at Magnolia North. (R. p. 1650-1651; R. p. 360, line 13-p. 364, line 14). Dave Roady, Petitioners' expert, testified that the homeowners were entitled to components in a building that met the minimum standards of the code. (R. p. 882, lines 3-5). *Stevens v. Draffin*, 327 S.C. 1, 488 S.E.2d 307 (1997) (Every violation of a legal right imports damage and authorizes the maintenance of an action and recovery of at least nominal damages, regardless of whether any actual damage has been sustained.). Mr. Roady conceded that many code violations and violations of industry standards existed at Magnolia North. (R. p. 919, line 6-p. 923, line 16). Mr. Roady gave a scope of repair for these deficiencies. (R. p. 1843, lines 10-12). Petitioners' expert Tom Carlson provided an estimate of the cost to repair the deficiencies. (R. pp. 1803-1950). The disagreement between the experts was not what needed to be fixed but the pervasiveness of the defects and as Petitioners' attorney told the jury, "it's about the money". This testimony, combined with the Petitioners' concession of liability and damages, left the court no choice but to grant Respondent a directed verdict on the issues of negligence and breach of warranty of workmanlike service.

In reference to the warranty of workmanlike service, this Court, beginning with *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970), and extending through the Court's jurisprudence as evidenced in *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976), and *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730 (1989), has decreed that a builder who constructs a home warrants that the home is fit for its intended use as a dwelling; that the home was constructed in a workmanlike manner; and that the home is free of latent defects. This warranty, unlike negligence, is not based on fault. *Rutledge*, *supra*. This warranty extends not only to the original purchasers of the home with whom the builder is in privity, but also to subsequent purchasers who may pursue a cause of action in contract or tort against a builder for a reasonable period after the home's construction. *Terlinde v. Neely*, 275 S.C. 395, 397, 271 S.E.2d 768, 769 (1980). Taking the evidence from Petitioners' expert Mr. Roady, of the extensive code and industry standards violations, along with the Petitioners' admissions, the court had no choice but to grant the Respondent's motion for a directed verdict on its claim of breach of implied warranty of workmanlike service. *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 504 S.E.2d 347 (S.C. App. 1998)(Appellant's attorney's admission of liability supports the granting of a directed verdict and may procedurally bar Appellant from raising this issue on appeal).

As pointed out in Section I, the Court of Appeals in *Kincaid*, *supra*, dealt with almost the identical facts and legal issues confronting the court in this case. The trial court directed a verdict for the homeowners on the issue of liability. Upholding the Trial Judge's directed verdict on appeal, the Court of Appeals 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 Appellant. *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 negligent construction. (*Id.* at p. 5).

These facts parallel this case. It is also notable that in this case, Drew Brown, Respondent's expert, testified that in his opinion, the contractor violated his standard of care. (R. p. 364, lines 1-14). This opinion was admitted without objection and was not challenged by Petitioners.

Because of the testimony and admissions by Petitioners, it would be unreasonable to believe that under any circumstances the jury could find a verdict for Petitioners. *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981) ("In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor.")

B. PETITIONERS TRIAL ATTORNEY MADE IT CLEAR THAT THE ONLY ISSUE THE JURY NEEDED TO DECIDE WAS THE AMOUNT OF DAMAGES.

From beginning to the end of trial it was Petitioners' strategy to ingratiate themselves with the jury by saying there are problems which Petitioners are willing to fix, but contending the Respondent was inflating damages. In his opening statement Petitioners' trial attorney told the jury:

> We were general contractors and as many people know general contractors these days mostly sub out their work and that's what we did. Doesn't mean we're in here trying to hide from any responsibility for anything... (R. p. 82, lines 5-8).

> ...you can have a problem and you can fix a problem or you can try to make it into a much bigger problem... we have some problems that are just being blown up for reasons I think you'll understand at the end of this case more than they should be. (R. p. 83, lines 4-11).

As noted above, one of the major problems that caused pervasive water intrusion and damage to the Magnolia North condominiums was a trim board, ABTCO, made by Louisiana Pacific. In his opening statement, Petitioners' attorney told the jury:

> I'm not going to ask you to do anything other than fix that trim product. I'm not Louisiana Pacific, I didn't make it but I will ask you to give them the money to fix it. (R. p. 83, lines 19-22). [8]

Another example of Petitioners' attorney conceding liability and telling the jury its just the amount of damages that are in dispute:

> ...what are the real problems, what needs to be done, and what really doesn't need to be done or what's a bit of overkill on the part of some people.
>
> We're going to show you that the problems up there can be fixed and <u>they can be fixed in the range of two and a half million dollars</u>. That's not a cheap number. That's especially not a cheap number these days but you're going to hear evidence from the other side that's going to consistently say whatever our scope has been over these many six years when we've been trying to get this thing going we need nine million dollars plus. So <u>we're going to have a disagreement on the money and you know I don't think we really disagree all that much about how to fix this per se or how you go about fixing something in this case, the evidence is going to show you that's really our problem, it's about the money</u>. (R. p. 85, lines 2-17). [Emphasis supplied]

[8] Petitioners' expert, Mr. Lewis, testified that the trim was a big problem because it was on all the buildings. (R. p. 804, lines 11-23).

Petitioners' attorney in unequivocal terms is telling the jury Respondent is entitled to a verdict, we just can't agree on the amount, "it's about the money".

In closing statement made by Petitioner's trial attorney, he again made clear to the jury that Petitioners were responsible for the construction defects at Magnolia North and Respondent was entitled to a verdict but Respondent was inflating damages:

> And I told you at the beginning of this case that my clients' problem with it was overkill because when someone comes and admits there's a problem, and I've admitted there's a problem, there are two paths you can take on that thing. (R. p. 939, lines 15-19).
>
> You can say, okay, the trim product that was made by Louisiana Pacific we now know isn't working right where it's exposed. We can fix that. That seems fair and reasonable to me or you can get people to say he's admitting they've got a problem what we can do to take advantage of this... We don't believe Heritage did any of this deliberately or with intent to hurt. (R. p. 939, line 20-p. 940, line 4).
>
> ... I thought to myself how in the world can they claim a seven-million-dollar fix plus a bunch of add on in a case where we've admitted certain problems, something is not right here. It just seems like too much to me, common sense. (R. p. 940, lines 16-21). [Emphasis added]
>
> The developer should have put on the last coat of asphalt... we should have done it, we went out of business... if its 80, between 89 and $90,000.00 like the two competitive bids, I don't think that is a problem that seems fair and reasonable to me... (R. p. 941, lines 10-18).
>
> ... and we've conceded there is a problem with it [decks]. I don't have any problem paying the 120 some thousand dollars they paid to fix those decks... (R. p. 947, lines 2-5).
>
> [I] want to fix it but what I don't want to do is give them million and millions and millions of dollars for a windfall because they might have some hidden unknown damage... (R. p. 948, lines 1-5).

> Its [Magnolia North] a community that's got problems with a trim product that was made by Louisiana Pacific and it's a community that's got some problems because a subcontractor that was hired by Heritage didn't do some proper flashing and didn't put some slopes and Row Locks and do I think two and a half million dollars will fix those problems, absolutely... do I think the Plaintiffs are entitled to somewhere between the $89,000.00 they got in competitive estimates for paving and the 170 they paid, I have no problem with that whatsoever, I think that is fair and reasonable. And I don't even have a problem with you making my client pay for the repairs on decks 1 through 5 that they claim... (R. p. 949, line 20–p. 950, line 7). [Emphasis added]

Although the Judge did not indicate he was basing his directed verdict motion of negligence and breach of warranty of workmanlike service on Petitioners' attorney's concession that Respondent was entitled to a verdict, he had every basis to do so. (R. p. 1040, lines 2-11) *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); *National Grange Mutual Ins. Co. v. Butler*, 253 S.C. 325, 170 S.E.2d 371 (1969) (Attorney's admission that his client did not own automobile caused client's case to fall by judicial admission); *United States v. Blood*, 806 F. 2d 1218, 1221 (C.A. 4 1986) (...a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party); *Major v. CSX Transp., Inc.*, 278 F. Supp. 2d 597 (D. Md. 2003) (Defendant's statement that failure to obey signal indications was a substantial legal cause of the collision amounts to an admission of causation excusing the need to produce evidence of causation.). The statement by Petitioners' attorney that the problems at Magnolia North resulted from a subcontractor hired by Heritage is a judicial admission and

alone supplies a sufficient basis to direct a verdict on negligence and breach of warranty of workmanlike service.

Petitioners conceded the problems with the decks which was a major part of the damages; conceded they are liable for the asphalt; conceded they are liable to fix the trim product which was the major cause of the water intrusion and rot; and were liable for the flashing, slopes and row locks which was the brick work and lintels; and the "problems" can be fixed for $2.5 million dollars are all judicial admissions. The admitted defects caused by Petitioners' subcontractors cover all of the essential defects for which Respondent sought damages. Petitioners should not be allowed to now appeal the directed verdict of negligence and breach of warranty of workmanlike service. *Southern Ry. Co. v. Routh*, 161 S.C. 328, 159 S.E. 640 (1929) (Concession made to the Court by attorney as to whether there were facts to be submitted to the jury is binding and cannot be raised on appeal.).

C. PETITIONERS FAIL TO POINT TO ANY ERROR IN THE TRIAL COURT GRANTING A DIRECTED VERDICT ON BREACH OF WARRANTY OF WORKMANLIKE SERVICE OR IN THE JURY'S FINDING OF BREACH OF FIDUCIARY DUTY.

In addition to granting Respondent a directed verdict on negligence, the Trial Judge granted Respondent a directed verdict on breach of implied warranty of workmanlike service ("IWWS"). A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner and the home will be free of latent defects which is the "IWWS". This warranty is not based on fault. *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970). Petitioners only mention "IWWS" *in re* the directed verdict motion. However, Petitioners' argument is only

directed toward negligence which has no bearing on the "IWWS"; no error is discussed *in re* the "IWWS". An issue not argued within the body of the brief but is only a short conclusory statement is deemed abandoned. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (S.C. App. 2004)

The Trial Judge refused to grant a directed verdict on breach of fiduciary duty and submitted this cause of action to the jury. The jury found that Petitioners violated their fiduciary duty to the Property Owners Association ("POA"). A developer has a fiduciary duty to the POA to transfer the common areas to the POA in good repair or to provide the necessary funds to the POA to bring the common areas up to a reasonable standard. *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 262 S.E.2d 633 (2002). Petitioners do not take issue with the jury's award on this cause of action and only mention it *in re* amalgamation. 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).

This Court should not find it necessary to address Petitioners' arguments *in re* the negligence cause of action since the verdict can be sustained under the Breach of Warranty of Workmanlike Service or Breach of Fiduciary Duty. *Anderson v. South Carolina Dept. of Hwys and Public Trans*. 322 S.C. 417, 472 S.E.2d 253 (1996) (under "two issue rule" the Appellate Court will find it unnecessary to address all grounds appealed where one requires affirmance); *Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 315 S.E.2d 116 (1984) (where case was presented to jury on negligence and breach of warranty causes of action, Appellate Court need not address breach of warranty exceptions if it finds that verdict was supported by the evidence under the theory of negligence).

CONCLUSION

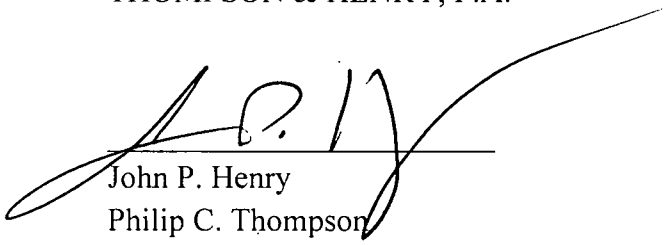
For the foregoing reasons, Respondent respectfully requests this Court to affirm the jury's verdict and the holdings of the lower court.

Respectfully submitted,

Conway, South Carolina

October 14, 2014

THOMPSON & HENRY, P.A.



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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
Appellant 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, Stephanie Hall, an employee for Thompson & Henry, P.A., attorneys for the Respondent, Magnolia North Property Owners Association, Inc., 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. **BRIEF OF RESPONDENT**

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