THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

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

v.

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

Reply Brief of Petitioners

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This appeal arises from a construction defect case involving a condominium complex near Myrtle Beach known as the Magnolia North Horizontal Property Regime ("Magnolia North"). In 2003, the Magnolia North Property Owners Association ("the POA" or "Respondent") sued the complex's overall developer (Heritage Communities, Inc. ("HCI")), the site specific developer (Heritage Magnolia North, Inc. ("HMN")), and the general contractor (Buildstar Corporation ("Buildstar")) (collectively, "Petitioners"). After trial, Petitioners appealed, seeking reversal of the trial court's errors and remand for a new trial. The Court of Appeals affirmed. *See Magnolia North Property Owners' Ass'n, Inc. v. Heritage Comm's, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). On June 26, 2014, this Court granted certiorari on certain issues. Petitioners submitted their primary brief on August 27, 2014, and the POA submitted its brief as Respondent on October 14, 2014. Petitioners now submit this reply brief rebutting the arguments raised by the POA.

Argument

As explained in Petitioners' primary brief, the lower courts erred by misapplying the "amalgamation of interests" theory in contravention of South Carolina law, by determining it was proper to instruct the jurors that an award of punitive damages was mandatory, and by granting and upholding a directed verdict despite the existence of conflicting evidence. These errors warrant reversal and remand for new trial.

I. The lower courts erred by applying the "amalgamation of interests" theory despite the absence of fraud, misrepresentation, confusion, or injustice.

As explained in Petitioners' primary brief, the evidence presented at trial established that HCI, HMN, and Buildstar were separate South Carolina corporations operating as separate entities with separate purposes. *See* Pet. Brief at 5. Accordingly, in

the absence of any evidence (and there was none) that the differing corporations confused the plaintiffs, misled the plaintiffs, or were used as an unfair device to engage in unjust or inequitable conduct, the trial court erred by ruling that HCI, NMN, and Buildstar were "amalgamated" and should be treated as one. *Id.* at 5-15. As explained below, the POA's arguments to the contrary are unavailing.

A. South Carolina's courts have not and should not disregard the corporate form absent evidence of confusion, misrepresentation, fraud, or inequitable conduct.

As explained in Petitioners' primary brief, in the few instances in which South Carolina's courts have mentioned or discussed the "amalgamation of interests" theory, they have applied it only when there was evidence that the plaintiffs were confused as to the different corporations by virtue of the defendants' conduct, where the distinction between the corporate entities was blurred by the defendants' affirmative misrepresentations, or where the differing corporations were intentionally used as a device to achieve an inequitable result. *See* Pet. Brief at 6-10. Here, in contrast, the lower courts' rulings would disregard the corporate form because the corporations shared office space, officers, and ownership, and also because of some indication of a shared goal or purpose.

In an attempt to defend the lower courts' erroneous rulings, the POA argues that this Court has, in the past, established precedent intended to protect homebuyers from negligent or unscrupulous conduct by builders. *See* Resp. Brief at 5-6. While this Court has indeed done so, the POA's reliance on that body of law is a red herring here. Contrary to the POA's argument, the Petitioners' argument for reversal—that a court may disregard the corporate form only when there has been abuse of the corporate form—is

not contrary to this Court's protection of homebuyers and does *not* erect any barrier to a homebuyer's ability to sue or recover from wrongdoers.

Rather, it is the *POA's* argument that goes beyond this Court's precedent. Under the argument urged by the POA and adopted by the lower courts, a plaintiff homebuyer is not required to prove his or her claims against the proper defendant, is not limited to recovering from the proper defendant, and is relieved of these requirements without satisfying the legal standard for disregarding corporate separateness.

This new rule the POA seeks to impose is significantly different from the precedent upon which it relies. In the past, the Court has removed legal impediments that prevented a homebuyer from bringing suit, but the Court has never relaxed the fundamental requirement that a plaintiff (including a homebuyer) must prove the elements of his claim against the proper defendant. For example, this Court has stated that the economic loss rule applies differently in the context of residential real estate than in other contexts. *See Sapp v. Ford Motor Co.,* 386 S.C. 143, 148-49, 687 S.E.2d 47, 49-50 (2009). This, however, is a "narrow exception," *id.*, which this Court has stated applies only to suits against the builder of a home, *Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013). In addition, this Court has never held that the relaxation of the economic loss rule relieves a homebuyer from the obligation to prove each element of his claims against the proper defendant. Similarly, the Court has allowed subsequent homebuyers to enforce the implied warranty of merchantability and fitness, *Terlinde v. Neely,* 275 S.C. 395, 271 S.E.2d 768 (1980), but has not relieved them from the requirement that they establish the elements of the claim against the proper defendant and

recover for that claim only from the proper defendant. *See Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008).[1]

Here, in contrast, the rule adopted by the lower courts and urged by the POA would do something entirely different than this Court's past protection of residential purchasers. It would eliminate the basic requirement that a plaintiff must prove its claim against the at-fault defendant and, if successful, may recover only from the at-fault defendant. Nothing in this Court's precedent indicates such a new rule is permissible, needed, or prudent.

B. The lower courts' amalgamation rulings would effectively nullify statutory law and would lead to absurd results.

As explained in Petitioners' primary brief, the amalgamation rulings by the lower courts are directly inconsistent with the provisions of the South Carolina Code that permit the formation of corporate entities like LLCs that are separate and distinct entities despite sharing an address, phone number, and purpose with their owner(s). *See* Pet. Brief at 12.

The rule urged by the POA and employed by the lower courts would permit a court, at will, to disregard the corporate form of any LLC and impose liability on the LLC's owner *solely* because the LLC and its owner, who by nature share a common goal or purpose, also share an address or phone number. Such a ruling would place every

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[1] In *Fields*, a subsequent homebuyer became aware of problems associated with the exterior synthetic stucco finish on the home and sued the builder, the subcontractor who installed the exterior stucco, and the manufacturer of the stucco. *Fields*, 376 S.C. at 552, 658 S.E.2d at 84. The subcontractor and manufacturer settled prior to trial. *Id.* The jury returned a verdict against the builder. On appeal, this Court reiterated the rule of *Terlinde* (which is what enabled the downstream purchaser to sue the builder), but made clear that a homebuyer plaintiff must still establish the elements of his claim against the proper defendant. *Id.* at 560-61, 658 S.E.2d at 88 (rejecting argument that "a general contractor is 'automatically responsible' for the negligence of a subcontractor"). Stated simply, this Court's solicitude for homebuyers does not go so far as to allow a plaintiff to lump all the defendants together and impose liability on one for the alleged wrongdoing of another.

owner of a single-member LLC in this state in personal jeopardy and would nullify the limitation of liability created by statute. There could never be a suit against a single-member LLC under such a rule; the corporate form would always be disregarded and the owner would always be amalgamated with the corporate entity. Such a ruling would imperil the majority of the 363,374 small businesses in this state and their owners,[2] many of whom would be exposed to personal liability. Ironically, and contrary to the intent of the legislature in enacting sections 33-44-101 *et seq.*, under the lower courts' rulings here, the only corporations who would be allowed the benefit of the corporate form and the concomitant limitation on liability would be large corporations who can afford to have separate offices, phone numbers, and employees for each enterprise.

Furthermore, as noted above, the rule adopted by the lower courts here is antithetical to the LLC Act and to the intent of the legislature in enacting that statute—an intent the legislature has made clear. *See* South Carolina House Bill 5150 (introduced in response to the Court's initial opinion in *16 Jade Street* and expressly stating that "the clear and unambiguous intent of the General Assembly of the State of South Carolina as expressed in the language of [the LLC Act] is that the limited liability act was intended by the General Assembly to shield a member of an LLC from personal liability for actions taken in the ordinary course of business of the LLC), available at

[2] *See* United States Small Business Administration 2013 South Carolina Small Business Profile (noting that in 2012, there were 295,574 non-employer small business in this state and an additional 67,800 small businesses with fewer than 19 employees), available at www.sba.gov/sites/default/files/sc12.pdf (last visited October 29, 2014); *see also* Rodney D. Chrisman, *LLCs are the New King of the Hill*, 15 Fordham J. Corp. & Fin. L. 459, 476 (2010) (noting that 84,698 new LLCs were formed in South Carolina between 2004 and 2007).

http://www.scstatehouse.gov/sess119_2011-2012/bills/5150.htm (last visited October 29, 2014).[3]

In sum, the amalgamation rulings by the lower courts are directly inconsistent with the language and intent of the South Carolina Code and, if not corrected by this Court, impose an ill-advised and untenable burden on the small businesses of this state.

C. Equitable theories that disregard the corporate form are inapplicable absent evidence of abuse of the corporate form.

The POA argues that this Court should deviate from precedent and detach the "amalgamation of interest" theory from any objective standard or evidence of abuse and instead should permit the lower courts to disregard the corporate form based on a subjective evaluation that corporations share similar purposes as well as office space, directors, or ownership. The POA argues that this sort of free-wheeling jurisprudence should be permitted because amalgamation is an equitable theory, *id.* at 5, 10-11, but fails to acknowledge that the other equitable theories permitting the disregard of the corporate form (*e.g.*, alter ego, etc.) are constrained by the rule that they apply only where the corporate formation was abused to defraud, mislead, confuse, or to violate public policy. *See, e.g., Oskin v. Johnson*, 400 S.C. 390, 397-400, 735 S.E.2d 459, 463-65 (2012) ("An action to pierce the corporate veil under an alter-ego theory also lies in equity. . . . This theory does not apply, however, in the absence of fraud, injustice, or contravention of public policy.") (citations omitted); *Drury Dev. Corp., v. Found. Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 800 (2008) ("In general, equitable principles govern the veil-

[3] Prior to passage of the Bill, this Court withdrew its initial opinion, which had imposed personal liability on members of defendant LLCs, and replaced it with another opinion which resolved the appeal without deciding this issue. *See 16 Jade Street, LLC v. R. Design Const. Co., LLC.*, 405 S.C. 384, 747 S.E.2d 770 (2013).

piercing remedy. . . . 'If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of a legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.'") (citation omitted). Likewise, amalgamation is and should be subject to the same threshold requirement as these other doctrines that permit a court to disregard the corporate form.

D. There is no evidence here of any confusion, affirmative misrepresentation, or abuse of the corporate form for fraudulent, unjust, or oppressive purposes.

As explained above and in the Petitioners' primary brief, controlling law and public policy mandate that the amalgamation of corporate interests theory applies only where there was abuse of the corporate form to confuse or mislead consumers or to engage in some fraudulent, unjust, or oppressive conduct. Here, there is no evidence that any homebuyer (or any other person) was confused as to HCI's, HMN's, and Buildstar's distinct existence and specific roles, much less that any confusion caused any prejudice to anyone. Similarly, there is no evidence that the Petitioners made any misrepresentations regarding the corporate separateness or that any person was misled by any such statements. Likewise, there is no evidence that the separate corporate status of HCI, HMN, and Buildstar was intended and used to perpetrate some unjust or fraudulent conduct.

The POA's only assertion on this issue falls flat. Specifically, the POA argues that a "limited warranty manual" was provided to each purchaser and that this manual allegedly "clearly identified HCI as both [sic] the developer, seller and contractor." *See* Resp. Brief at 13. The POA points to language in the manual describing HCI's "building

philosophy;" language stating that construction shortages slowed "us" down; a section directing homeowners with problems to call a manager who shared a phone number with HCI; language stating that HCI would ensure that materials and workmanship were appropriate; and the like. *See id.* at 13-14.[4] As explained below, the POA's arguments on this point are unavailing for several reasons.

First, it is not surprising, much less confusing or misleading, that a condominium complex's overall developer would have a philosophy regarding how the project was constructed or would coordinate maintenance and repairs for residents. Accordingly, the fact that HCI, as developer of the Magnolia North complex, expressed such sentiments hardly renders HCI synonymous or indistinguishable from the general contractor.

Second, even assuming *arguendo* that the manual blurred the distinction between HCI (the overall developer) and Buildstar (the general contractor), there is no evidence that any homeowner (or other person) was confused or misled by the manual or the statements therein, much less that any such confusion caused any harm or was detrimentally relied upon by any homeowner. Assuming *arguendo* that someone *could* conceivably be confused by the manual, such is no substitute for actual evidence that someone *was*, in fact, confused or misled by the manual. "[W]hatever doesn't make any

[4] The POA also points to alleged similarities between this suit and *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). *See* Resp. Brief at 15-16. To the extent the trial court and Court of Appeals applied amalgamation of interest in *Kincaid* on the same erroneous basis as it was applied here, Petitioners respectfully submit that *Kincaid* was wrongly decided on that point and should be overruled in part. In addition, Petitioners note that in *Kincaid*, the amalgamation issue concerned only one of the defendants—the sales and marketing agent—and the evidence showed that the plaintiffs had, in fact, relied on that sales and marketing agent to remedy building problems encountered in the plaintiff's home. Here, in contrast, there is no such evidence that any homeowner relied on or was confused by the statements in the manual and, in any event, it is not confusing that the developer of a condominium complex would coordinate and arrange for any repairs needed by residents of the complex.

difference, doesn't matter," *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987), and in the absence of evidence of any prejudice or harm actually caused by the supposed misrepresentation, the POA should not be relieved of its burden of proving its claims against each defendant.

Third, even if the manual did blur the distinction between HCI and Buildstar, and even if that confusion or misrepresentation prejudiced any person, the lower courts here nevertheless erred by amalgamating all *three* defendants together. There is no evidence in the record, and the POA points to none, indicating any blurring, confusion, or misrepresentation as to HMN (the site specific developer) with any other entity. The manual makes no mention of HMN, and none of the manual's supposed misleading statements supply any possible reason one might confuse HMN with the other entities. Accordingly, the amalgamation of HMN, HCI and Buildstar was error in any event.

Fourth, there is no evidence or argument that the separate corporate formation of HCI, HMN, and Buildstar was intended or used to defraud anyone or to achieve some unjust or inequitable result. The use of separate corporations did not mislead the POA into suing the wrong entity, did it prevent the POA from suing the right entity, and did not prevent the POA from recovering from the alleged wrongdoers. Instead, the POA sued each separate entity by asserting claims pertinent to such entity. This is what distinguishes this suit from the Indiana case upon which the POA relies: *Smith v. McLeod Distribs., Inc.*, 744 N.E.2d 459 (Ind. Ct. App. 2000). In *Smith*, Mr. Smith had personally guaranteed any debts owed by his company, Colonial Mat, to a supplier called McLeod Distributing. *Id.* at 461. Smith later notified McLeod that Colonial Mat would henceforth be doing business as Colonial Carpets. *Id.* Smith subsequently incorporated Colonial

Carpets, and McLeod updated the name in its billing system. *Id.* Notably, however, Smith never guaranteed the debts of Colonial Carpets. Accordingly, when Colonial Carpets failed to pay several invoices, McLeod sued *Colonial Mat* and Smith. When the suit eventually proceeded to a bench trial ten years later, Colonial Mat (which had been dissolved shortly after the suit was filed) argued it was not a proper defendant because the unpaid invoices had been addressed to Colonial Carpets. The trial court and the Indiana Court of Appeals disagreed, noting the "unfairness" that would result unless Colonial Mat (and thus Mr. Smith) were liable for the debts of Colonial Carpets.

In short, unless the *Smith* court disregarded the distinction between the two separate corporations, McLeod would find it difficult or impossible to recover from the proper defendant because (1) due to the passage of time it was too late to sue Colonial Carpets and (2) Mr. Smith had guaranteed only Colonial Mat's debts. Accordingly, the court concluded that Colonial Carpet was the "adjunct" or "alter ego" of Colonial Mat, and thus Smith was personally liable for the debt. Here, in contrast, there is no barrier or impediment to the POA suing the proper defendants and recovering for its damages. Rather, the POA simply relies on amalgamation to shirk its responsibility to prove the elements of its claims against each defendant, choosing instead to simply lump them all in together and assert that a particular wrong done by one should be answerable by all.

Even assuming Petitioners here were negligent, breached warranties, etc.—again, an assumption with which the Petitioners disagree—there is no indication or allegation that this wrongdoing was enabled or exacerbated by the use of distinct corporate forms, nor is there any indication or allegation that the Petitioners established or used the distinct corporate entities to commit fraud or to achieve some unjust or inequitable result.

In sum, there is no evidence that any homeowner was confused or misled as to the distinct corporations, there is no evidence that any homeowner might have been confused about HMN's distinct identity from the other defendants, and there is neither evidence nor allegation that the corporate form was abused for fraudulent or unjust purposes. The use of separate corporations did not mislead the POA into suing the wrong entity, did not prevent the POA from bringing suit, and would not prevent the POA from recovering against the defendants. Rather, the POA wishes to disregard the corporate form simply to avoid the long-standing and well-established requirement that it assert, prove, and recover for the wrongdoing done by each entity. This supposed inconvenience is no basis to disregard the corporate form, and the lower courts in this suit erred by doing so.[5]

II. The lower courts erred by giving and then upholding a jury charge requiring the jury to award punitive damages if they found the Plaintiff entitled to such damages.

As explained in Petitioners' primary brief, the trial court erred by instructing the jury that it had a "duty" to award punitive damages. *See* Pet. Brief at 16-25. Such a jury charge is contrary to the suggested jury instructions promulgated by South Carolina's and other courts. *See* South Carolina Suggested Jury Instructions—Civil at 243 ("If you award actual damages, you *may* also consider an award of punitive damages. . . . If you find that the defendant's conduct was willful, wanton, or reckless, you *may* award the

[5] The additional sustaining grounds raised by the POA, *e.g.*, alter ego or the "single business enterprise" theory, *see* Resp. Brief at 24-25, provide no basis for affirming the lower courts.. The alter ego theory does not apply "in the absence of fraud, injustice or contravention of public policy." *Oskin v. Johnson*, 400 S.C. 390, 397-400, 735 S.E.2d 459, 463-65 (2012). Similarly, South Carolina courts have never previously recognized the "single business enterprise" theory, and in the absence of any South Carolina precedent this theory provides no basis upon which to affirm an otherwise infirm ruling. No theory disregarding the corporate form has ever, nor should it be, recognized in South Carolina in the absence of fraud, injustice or contravention of public policy.

plaintiff punitive damages.") (emphasis added), available at www.judicial.state.sc.us/juryCharges/CivilChargesJune2013.pd (last visited October 29, 2014); Fifth Circuit 2014 Civil Jury Instructions § 15.7 (stating in part, "You are not required to award punitive damages."), available at http://www.lb5.uscourts.gov/juryinstructions/fifth/2014civil.pdf (last visited October 29, 2014); Ninth Circuit Manual of Model Civil Jury Instructions § 5.5 ("If you find for the plaintiff, you may, *but are not required to*, award punitive damages.") (emphasis added), available at http://www3.ce9.uscourts.gov/jury-instructions/node/111 (last visited October 29, 2014).

The POA's response to this is to argue that Petitioners fail to explain how the jury charge violated their due process rights. *See* Resp. Brief at 29. The POA's confusion appears to stem from its belief that due process requires only notice, an opportunity to be heard, and judicial review. *Id.* Due process, however, requires more. Specifically, it requires proper jury charges to avoid the risk that a jury may wrongly impose punitive damages. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 139-40 682 S.E.2d 877, 887 (Ct. App. 2009) (stating that where the evidence and argument create a risk that the jury could award punitive damages improperly, the Due Process Clause requires a jury charge correctly stating the law); *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (concluding an Alabama trial court's jury instruction on punitive damages comported with due process in part because it gave the jury discretion to award punitive damages and "explained that their imposition was not compulsory").

The POA takes issue with Petitioners' reliance on *Smith v. Wade*, 461 U.S. 30 (1983), arguing that *Smith* does not "even hint that the requirement to award punitive damages would violate due process." *See* Resp. Brief at 29. While *Smith* did not couch its

analysis in terms of due process, its issue and holding are clear and indubitably indicate that the trial court's jury charge here was erroneous. Specifically, the issue before the *Smith* Court was whether the trial court "applied the correct legal standard in instructing the jury that it might award punitive damages," *Smith*, 461 U.S. at 31, and the Court expressly stated that "a key feature of punitive damages [is] that *they are never awarded as of right, no matter how egregious the defendant's conduct*" and that "'the question whether to award punitive damages is left to the jury." *Id.* at 52 (citations omitted) (emphasis added).

Lastly, the POA asserts that Petitioners have identified no authority stating that a mandatory award of punitive damages violates due process. *See* Resp. Brief at 31. The following cases indicate that such a charge violates due process. *Haslip*, 499 U.S. at 19-20 (holding a state trial court's jury charge satisfied due process where it stated, among other things, that the imposition of such damages "was not compulsory"); *Spalding v. Coulson*, 1998 Ohio App. Lexis 4105, *61-64 (Ohio Ct. App. Sept. 3, 1998) ("It is contrary to Ohio law for any court to instruct that an award of punitive damages is mandatory under any circumstances. . . . Instructing the fact-finder that it must 'presume' malice . . . would invade its prerogative to determine the actor's animus and deny due process of law on the central issue of the case.").[6]

[6] The relative paucity of authority supporting this proposition is a result of the fact that very few trial courts have committed this error, likely because of the well-established and universally recognized rule that the question of whether to award punitive damages is one for the discretion of the jury and punitive damages are never mandatory. *See* Pet. Brief at 21-23 n.7 (compiling cases from numerous jurisdictions).

III. The lower courts erred by granting and then upholding a directed verdict in favor of two of the POA's claims in their entirety, when the evidence indicated the Petitioners were not at fault as to all the alleged wrongdoing.

As explained in Petitioners' primary brief, the trial court erred by granting a directed verdict in favor of the POA on the claims for negligence and breach of warranty despite evidence introduced at trial that Petitioners were not negligent as to at least some of the alleged defective conditions. *See* Pet. Brief at 26-32. The POA raises three arguments in response, each of which is addressed below.

The POA's first argument is that the grant of directed verdict was permissible because the court left the issues of proximate cause and damages to the jury. *See* Resp. Brief at 32-36. This misses the error of the trial court's rulings, which is that it ruled Petitioners were negligent in *each* of the numerous, different ways alleged by the POA, when in fact the evidence showed otherwise.[7] In light of this conflicting evidence, the jury might have found the Petitioners were not negligent in some or all of these particulars, and the trial court should not have taken that determination out of their hands. The fact that the jury was permitted to evaluate whether these actions proximately caused harm to the buildings and to place a monetary value on that damage does not minimize or rectify the error of the trial court's ruling.

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[7] For example, the Petitioners introduced testimony to refute the POA's allegations that Petitioners were negligent by failing to properly supervise and oversee the construction (*see* R. 220, 223-24, 545, 770), by failing to properly install various building components (*see* R. 773-74, 762, 923), by failing to construct the building using watertight means and materials (*see* R. 740, 751, 754, 803, 826), and by using ABTCO trim as it was commonly used at that time (*see* R. 305-06). Trial testimony about building code standards and building code defects present at Magnolia North, *see* Resp. Brief at 34, does not sweep away the fact that Petitioners presented evidence and argument at trial that they were not negligent as to certain allegations.

Second, the POA argues that Petitioners' trial counsel supposedly conceded negligence and breach of warranty at trial, and thus the trial court was justified in directing a verdict on those claims. *See* Resp. Brief at 36-40. This is incorrect. A judicial admission is an admission made in court by a person's attorney for the purpose of being used as a substitute for the regular legal evidence of the facts at trial. Black's Law Dictionary 48 (6th ed. 1990). The statements of Petitioners' trial counsel and the testimony of Petitioners' witnesses regarding defective conditions and the estimated costs to remedy those defects do not constitute admissions of liability.[8] They merely acknowledge that defective conditions exist at Magnolia North, and *not* that Petitioners were liable for those defective conditions.

Even if trial counsel did effectively concede *some* of the allegations of negligence, counsel did not concede *all* the alleged defects or *all* the alleged negligence.

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[8] As has been clearly stated by the South Carolina Supreme Court "[t]he contention that the statements of counsel are in effect testimony or evidence simply ignores reality and would substitute for it a figment of the imagination. Every trial judge knows as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual views." *Harper v. Bolton*, 239 S.C. 541, 561-62, 124 S.E.2d 54, 64 (1962); *see also Brown v. State*, 383 S.C. 506, 517-18, 680 S.E.2d 909, 915 (2009) (noting that statements of counsel are not to be considered as evidence); *State v. Bottoms*, 260 S.C. 187, 193, 195 S.E.2d 116, 117-18 (1973) (noting that the jury was properly charged that arguments of counsel are not to be considered as evidence).

Other states have held that statements, such as Petitioners' trial counsel's statements in this case, do not constitute judicial admissions of liability. *See, e.g., Hurt v. Chavis*, 739 A.2d 924, 929 (Md. Ct. Spec. App. 1999) (holding that no judicial admission occurred based on counsel's statements that the case was about damages where causation was clearly at issue looking at the trial in its entirety); *Baxter v. Gannaway*, 822 P.2d 1128 (N.M. Ct. App. 1991) (holding that defense counsel's statement to the jury as to what he thought the defendant owed was not a judicial admission); *Hayes v. Xerox Corp.*, 718 P.2d 929, 932-33 (Alaska 1986) (holding that defense counsel's statement that defendant owed plaintiff a lot of money, but the amount owed was for the jury to decide, was merely opinion, and not the clear, deliberate and unequivocal statements of fact necessary for a judicial admission).

For example, the POA fails to point to any "concession" of liability on the allegations of failing to properly supervise and oversee the construction, failing to properly install various building components, and failing to construct the building using watertight means and materials—because each of these were significant, disputed issues at trial. In addition, the POA points only to statements taken from trial counsel's opening and closing statements, and neglects to note the numerous and repeated instances throughout the trial in with Petitioners and their counsel contested allegations of negligence. In sum, trial counsel did not admit every alleged defect and all the alleged negligence. Accordingly, the trial court erred by granting a directed verdict, as that directed verdict encompassed all of the POA's specifications of negligence.

Finally, the POA incorrectly argues that the two issue rule provides a basis upon which to uphold the trial court's erroneous rulings. *See* Resp. Brief at 40-41. Specifically, the POA argues that the trial court's erroneous grant of directed verdict on the negligence claim can be sustained because the verdict is also supported by the breach of warranty[9] and breach of fiduciary duty claims, the latter of which was submitted to the jury. *Id.* The two issue rule, however, provides no basis here to sustain the erroneous grant of directed verdict. "'Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.'" *Atl. Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 289 (2012) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). The two issue rule applies both to general

[9] The "two issue rule" also has no application since Petitioners have expressly argued in this appeal that the trial court erred in directing a verdict on the breach of implied warranty of workmanlike service. *See* Pet. Brief at 28-29.

jury verdicts and to rulings by a trial court. *See Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996) ("[A]lthough cases generally have discussed the 'two issue' rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts.").

Here, the two issue rule cannot support the erroneous grant of directed verdict. While the claim for breach of fiduciary duty was not separately addressed in Petitioners' appeal to the Court of Appeals, it is necessarily included within the issue of the amalgamation ruling and other issues appealed to the Court of Appeals. Furthermore, even if some other claim could support the jury's verdict, there is no other claim or basis to support the trial court's erroneous *order* granting a directed verdict on the negligence claim, particularly where that error was compounded by the trial court's erroneous charge requiring the jury to award punitive damages on the negligence claim.

Because there was conflicting evidence as to whether Petitioners were negligent or breached the implied warranty of workmanlike service, the trial court erred by directing a verdict as to the entirety of those claims. Neither trial counsel's supposed "concessions" nor the two issue rule can remedy this error.

Conclusion

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

Signature Page Attached

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November 3, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

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

v.

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

PROOF OF SERVICE

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

Pleadings:

Reply Brief of Petitioners

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November 3, 2014

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation
Civil Action No. 2003-CP-26-3202
SC Court of Appeals Case Tracking No. 2009147806
SC Supreme Court Case No. 2012-212048
Our File No. 00470/01576

Dear Mr. Shearouse:

Enclosed please find the original and sixteen copies of the Reply Brief of Petitioners in regard to the above-referenced matter. We would ask that you file the original and return a clocked-on copy to us via our courier.

Very truly yours,

Brian P. Crotty

BPC:lpw
Enclosures
cc: John P. Henry, Esquire (w/enc.)
Stephen L. Brown, Esquire (w/enc.)