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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

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

v.

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

Case No. 2003-CP-26-7169

Riverwalk at Arrowhead Country Club Property Owners' Association, Inc., ... Respondent,

v.

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

Reply Brief of Petitioners

C. Mitchell Brown
William C. Wood, Jr.
Brian P. Crotty
NELSON MULLINS RILEY & SCARBOROUGH LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

William L. Howard
Stephen L. Brown
Russell G. Hines
YOUNG CLEMENT RIVERS, LLP
Post Office Box 993
Charleston, SC 29402
(843) 720-5492

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

This appeal arises from two construction defect cases involving a condominium complex near Myrtle Beach known as the Riverwalk at Arrowhead Country Club Horizontal Property Regime ("Riverwalk"). The same companies were named as defendants in both actions: Heritage Communities, Inc. ("HCI") was the overall developer, Heritage Riverwalk, Inc. ("HRI") was the site specific developer, and Buildstar Corporation ("Buildstar") was the general contractor for the project. (Collectively, "Petitioners"). HCI is the parent corporation of both HRI and Buildstar.

The Riverwalk Property Owners' Association ("the POA") filed suit to recover repair costs related to Riverwalk, and Tony and Lynn Pope (collectively, "Respondents") filed a putative class action on behalf of unit owners at Riverwalk seeking damages for their "lost use" regarding their property during any alleged repair period. The cases were consolidated for trial. After trial, Petitioners appealed, seeking reversal of the trial court's errors and remand for a new trial. The Court of Appeals affirmed. *See Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). 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 Respondents.

Argument

As explained in Petitioners' primary brief, the lower courts erred by misapplying the "amalgamation of interests" theory in contravention of South Carolina law 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, HRI, and Buildstar were separate South Carolina corporations operating as separate entities with separate purposes. *See* Pet. Brief at 4-5. 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, HRI, and Buildstar were "amalgamated" and should be treated as one. *Id.* at 4-12. As explained below, the POA's and Popes' 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 and the Popes argue that this Court has, in the past, established precedent intended to protect

homebuyers from negligent or unscrupulous conduct by builders. *See* Resp. Brief at 7-8. While this Court has indeed done so, the Respondents' reliance on that body of law is a red herring here. Contrary to the Respondents' 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 *Respondents'* argument that goes beyond this Court's precedent. Under the argument urged by the Respondents' 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 and Popes seek 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 Respondents 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 11-

[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.

12. The rule urged by the Respondents 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 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

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[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).

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 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 and Popes argue 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 Respondents argue that this sort of free-wheeling jurisprudence should be permitted because amalgamation is an equitable theory, Resp. Brief at 9, 11-12, 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

[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).

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-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, HRI, 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, HRI, and Buildstar was intended and used to perpetrate some unjust or fraudulent conduct.

The Respondents' assertion on this issue falls flat. Specifically, the Respondents argue that a "written warranty" was provided to each purchaser and this document

allegedly "is clearly written to convey to prospective purchasers and the homeowners that HCI is not only the developer/seller, but is also the contractor." *See* Resp. Brief at 15-16. The Respondents point to language in the manual describing HCI's "building philosophy;" language referring to "our attention to detail;" language referring to "our subcontractors;" and the like. *See id.* at 16.[4] As explained below, the Respondents' 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 pay attention to the details of the facility. Accordingly, the fact that HCI, as developer of the Riverwalk complex, expressed such sentiments hardly renders HCI synonymous with 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

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[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 17-19. 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.

someone *was*, in fact, confused or misled by the manual. "[W]hatever doesn't make any 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 Respondents should not be relieved of their burden of proving their 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 Respondents point to none, indicating any blurring, confusion, or misrepresentation as to HRI (the site specific developer) with any other entity. The written warranty makes no mention of HRI, and none of the supposedly misleading statements supply any possible reason one might confuse HRI with the other entities. Accordingly, the amalgamation of HMN, HRI and Buildstar was error.

Fourth, there is no evidence or argument that the separate corporate formation of HCI, HRI, 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 or the Popes into suing the wrong entity, did it prevent them from suing the right entity, and did not prevent them from recovering from the alleged wrongdoers. Instead, the POA and the Popes sued each separate entity by asserting claims pertinent to such entity. This is what distinguishes this suit from the Indiana case upon which the Respondents rely: *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 or the Popes into suing the wrong entity, did not prevent the POA or the Popes from bringing suit, and would not prevent the POA or the Popes from recovering against the defendants. Rather, the Respondents wish 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.

E. Petitioners preserved their argument that the corporate form may be disregarded only where there is evidence of confusion, misrepresentation, fraud, or inequitable conduct.

As explained in Petitioners' primary brief, they properly preserved the argument that a court may disregard the corporate form—whether using the theory of amalgamation, piercing the corporate veil, alter ego, etc.—only when there is evidence the corporate form was used for fraud, wrongdoing, or injustice. *See* Pet. Brief at 14-15. Respondents, however, now argue that Petitioners failed to preserve this argument because (1) the trial court never ruled on their "piercing the corporate veil" argument, and (2) the Petitioners never argued that amalgamation required a finding of fraud, wrong, or unfairness. *See* Resp. Brief at 23-24. This is incorrect. Petitioners' trial counsel expressly

argued to the trial court that it was inappropriate to disregard the Petitioners' corporate forms under either a theory of amalgamation or piercing the corporate veil. (*See* R. 1369-72.) Specifically, counsel argued the plaintiffs should not be permitted to "pierce the corporate vail [sic] without ever having any elements," (R. 1372), *i.e.*, without showing the requisite elements of fraud, injustice, or inequitable conduct. The trial court clearly ruled on these arguments by rejecting them and ruling the Petitioners' should be amalgamated and their corporate separateness ignored.

The POA and Popes also argue it would be unjust to allow "HCI to use this type of corporate structure to avoid full liability." Resp. Brief at 24. This argument misunderstands the effect of corporate distinction. Recognizing the Petitioners' separate corporate forms would not relieve any of them from any liability for wrongdoing. Rather, it would simply require the POA and the Popes (just as every plaintiff is required to do) to prove the wrongdoing, if any, committed by each corporation. Once they have done so, nothing prevents them from recovering and nothing protects HCI from "full liability" for its wrongdoing. Stated simply, Petitioners organization as distinct corporations does not insulate any Petitioner from liability for its wrongdoing, nor does it limit the Respondents' ability to recover.

F. No alternative theories or grounds can sustain the trial court's erroneous amalgamation ruling.

The POA and Popes argue that this Court can sustain the amalgamation ruling on several theories and that the elements of wrongdoing, injustice, or inequitable conduct are present here. *See* Resp. Brief at 25-31. The Respondents fail, however, to identify any legitimate basis upon which to disregard the corporate form here, nor do they point to any evidence that would justify such a result.

First, the POA and Popes argue that it is necessary to disregard the corporate form to avoid "an unjust escape of liability." *Id.* at 27. As explained above, this is a red herring. Recognizing the distinct corporations present in this suit does not permit any of them to escape liability for *their own* wrongdoing, if any. If HRI, which sold the units, had nothing to do with their construction, then HRI should not be liable for construction defects. Contrary to Respondents assertion, there is nothing nefarious or unjust about this result. Similarly, if Buildstar supervised the construction but not the sales, it should be liable (if at all) for construction related defects, but not for breach of fiduciary duty, since it did not own and then turn over the common areas allegedly in disrepair. Again, there is nothing unjust or inequitable about holding each defendant liable for its own wrongdoing, if any, and not for the wrongdoing of others.

Second, the POA and the Popes argue this court could affirm the amalgamation ruling by relying on the "single business enterprise" theory. *See* Resp. Brief at 28-29 (citing cases from Louisiana and North Carolina). This Court has never previously adopted 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. If the amalgamation ruling was incorrect (and as explained above, it was), then it is equally incorrect to reach that same erroneous result by simply referring to it by a different name.

Third, the POA and the Popes argue that this Court could sustain the amalgamation ruling by relying on the "alter ego" or "instrumentality" theories, which it states are synonymous. *See* Resp. Brief at 29-31. Yet again, these theories provide no

basis upon which to affirm the erroneous ruling. 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), and the Respondents have shown none.

II. The lower courts erred by granting and then upholding a directed verdict on the Respondents' negligence claims in its 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 and the Popes on the claim for negligence despite evidence introduced at trial that Petitioners were not negligent as to at least some of the alleged defective conditions. *See* Pet. Brief at 16-22. The Respondents raise two arguments in responds, both of which are addressed below.

First, the POA and the Popes argue that the Petitioners' trial counsel and expert witnesses conceded at trial that Respondents were entitled to a verdict. *See* Resp. Brief at 32-36. 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.[5]

[5] 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

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. For example, the Respondents point to a statement made in the opening statement of Petitioners' trial counsel that "there are *certain* repairs that need to be made but they do not fall anywhere near the class of repairs that these Plaintiffs are going to ask for." See Resp. Brief at 33 (quoting R. 211) (emphasis added). In addition, 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 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 plaintiffs' specifications of negligence.

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).

Second, the POA and the Popes argue 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 36-38. 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 Respondents, when in fact the evidence showed otherwise.[6] 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.

III. The two issue rule cannot save the lower courts' erroneous rulings.

Finally, the POA and the Popes argue that this Court can affirm the rulings of the lower courts based on the two issue rule. *See* Resp. Brief at. 39-41. They argue that the jury found a breach of fiduciary duty, which was included in the general verdict (in the POA suit) and found a breach of the warranty of habitability (in the Popes' suit), and they assert the Petitioners did not appeal these findings which support the verdicts. *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

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[6] For example, the Petitioners introduced testimony that some of the buildings did not suffer from defective decking causing water damage (*see* R. 987), that there was no damage to the decking's framing (*see* R. 993), that some buildings did not have framing problems (*see* R. 1009), that sheathing and framing were undamaged in many areas (*see* R. 110-11), and only some decks had slope issues (see R. 1030). Similarly, trial testimony about building code defects present at Riverwalk, *see* Resp. Brief at 35, does not sweep away the fact that Petitioners presented evidence and argument at trial that they were *not* negligent as to certain allegations.

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 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 claims for breach of fiduciary duty and breach of the warranty of habitability were not separately addressed in Petitioners' appeal to the Court of Appeals, they are 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 when the court then instructed the jury that it "*must* award" damages to the plaintiffs on that claim in the POA Action and "*must* determine the nature and extent of damages" to award on that claim in the Pope Class Action. (R. 1487) (emphasis added). Further, the trial court merged the concepts of simple negligence with reckless, willful and wanton in its jury charge. (R. 1486-87). This impermissible blending of legal principles coupled with the trial court's directed verdicts for negligence, required the jury to award punitive damages for negligence. Again, the decision was taken from the jury. Therefore, the damages awarded by the jury are forever tied to the negligence claims because the jury had to

award damages on these claims. The two issue rule is incapable of addressing such errors and has no applicability here.

Additionally, the two issue rule only applies if the evidence as to the remaining issue supports the damages. *Cole v. Raut*, 378 S.C. 398, 406-07, 663 S.E.2d 30, 34 (2008) (emphasis added) ("Under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed. "). Here, the breach of warranty claim cannot support the award of $750,000 in punitive damages to the Popes' suit because punitive damages were not available under South Carolina law. *See Rhodes v. McDonald*, 345 S.C. 500, 504, 548 S.E.2d 220, 222 (Ct. App. 2001) (holding punitive damages are not available in breach of warranty cases unless the breach is accompanied by a fraudulent act). Accordingly, the two issue rule is inapplicable to this case.

Conclusion

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

Signature Page Attached

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: _____

C. Mitchell Brown
William C. Wood, Jr.
Brian P. Crotty
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

YOUNG CLEMENT RIVERS, L.L.P.
William L. Howard
Stephen L. Brown
Russell G. Hines
Post Office Box 993
Charleston, SC 29402
(843) 720-5492

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

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-26-3289
Appellate Case No. 2012-206066

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

v.

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

Case No. 2003-CP-26-7169

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

v.

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

PROOF OF SERVICE

I, 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

Counsel Served:

John P. Henry, Esquire
Phillip C. Thompson, Esquire
Thompson & Henry, PA
P.O. Box 1740
Conway, SC 29528-1740

William L. Howard, Sr.
Stephen L. Brown
Russell G. Hines
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402-0993

Lisa P. Whitehurst
Administrative Assistant

November 3, 2014

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9040
www.nelsonmullins.com

Brian P. Crotty
(Admitted in [illegible] S.C.)
Tel: 803.255.9422
Fax: 803.255.9040
brian.crotty@nelsonmullins.com

November 3, 2014

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

RE: Riverwalk at Arrowhead Country Club Property Owners' Association, Inc. v. Heritage Communities, Inc., et al.
Civil Action No. 2003-CP-26-7169
SC Court of Appeals Tracking No. 2009126826
SC Supreme Court Tracking No. 2012-206066
Our File No. 00470/01577

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.)