FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-08-3916

THE OAKS AT RIVERS EDGE PROPERTY OWNERS ASSOCIATION, INC., et. al.

PLAINTIFF(S)

DANIEL ISLAND RIVERSIDE DEVELOPERS, LLC, and CARRIAGE HILL ASSOCIATES OF CHARLESTON, LLC

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : DUE TO THE NUMBER OF PLAINTIFFS, EXHIBIT A IS ATTACHED AND INCORPORATED HEREIN

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
SEE EXHIBIT A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date 10/23/13

SCRF Form 4C (10/2011)

10/25/13
email:
RAM, CCK
CSA, WHB
PTM, MJC
PGN, MGS
GWS, MSW
CDA, TSF,
TAC, OSC
RME, LEP, MDE
ERC, ACH, AKH
CCO, AWC, LCH, DDA
JPS, EMG, MBM, KBS

For Clerk of Court Office Use Only

This judgment was entered on the 25 day of Oct, 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of Oct, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Mary P. Brown DB
CLERK OF COURT

Court Reporter:

EXHIBIT A

INFORMATION FOR THE PUBLIC INDEX Complete this section below when the Judgment affects title to real property or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below		
Judgment in favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)
Oaks at Rivers Edge Property Owners Association, Inc.	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$9,389,134.47
John E. Atkinson and Joan D. Strandquist	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$416,625.00
Joseph E. Chiovarou, Jr.	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$422,721,80
Edward Wallace Barr, III and Thomas E. Keene	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$422,721.80
Peyton H. Cook and Brenda J Cook	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$388,250.00
John W. Edelen and Karen A. Nelson	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$446,625.00
Robert J. Graham and Maureen S. Graham	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$453,633.00
Carolyn M. Jennings	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$468,265.00
Nancy K. Johnson, as trustee for the Nancy K. Johnson Revocable Trust	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly And Severally	$395,750.00
William Jung	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$418,512.92
Charles Maraziti and Patricia Maraziti	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$422,721.80
Richard B. Pekruhn and Pauline Pekruhn	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$374,825.00
George S. Pollard and Eleanor J. Pollard	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$425,896.80
Robert Reece	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$451,625.00
Gerard M. Ruvo and Sue S. Ruvo, as trustees for the Ruvo 2006 Living Trust	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$422,742.00
Matthew J. Severance and Elizabeth Ashley Phillips Severance	Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Jointly and Severally	$423,704.20

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT
)

DANIEL ISLAND RIVERSIDE DEVELOPERS, LLC, and CARRIAGE HILL ASSOCIATES OF CHARLESTON, LLC,

Plaintiffs,

vs.

WEATHER SHIELD MANUFACTURING, INC., THE MUHLER CO., INC., and A.C. CONSTRUCTION, INC.,

Defendants.

C/A. No.: 2009-CP-08-1068

PLAINTIFFS THE OAKS AT RIVERS EDGE PROPERTY OWNERS ASSOCIATION, INC. ET.AL.'S PROPOSED ORDER

A.C. CONSTRUCTION, INC.,

Plaintiffs,

vs.

DANIEL ISLAND RIVERSIDE DEVELOPERS, LLC, and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendants.

C/A. No.: 2009-CP-08-1413

GEOFFREY C. CIPKALA and SAMUEL C. AGEE, as tenants in common of the common elements of the Oaks at River's Edge Horizontal Property Regime and on behalf of themselves and all other tenants in common,

Plaintiffs,

vs.

DANIEL ISLAND RIVERSIDE DEVELOPERS, LLC, CARRIAGE HILL ASSOCIATES OF CHARLESTON, LLC, CARRIAGE HILL ASSOCIATES, INC.,

Defendants.

C/A. No.: 2008-CP-08-2714

THE OAKS AT RIVERS EDGE PROPERTY OWNERS ASSOCIATION, INC., JOHN E. ATKINSON, JOAN D. STRANDQUIST, JOSEPH E. CHIOVAROU, JR., PEYTON H. COOK, JR., BRENDA COOK, JOHN W. EDELEN, KAREN A. NELSON, ROBERT J. GRAHAM, MAUREEN S. GRAHAM, KEVIN O. HUX, NANCY K. JOHNSON as trustee for the Nancy K. Johnson Revocable Trust, WILLIAM JUNG, CHARLES MARAZITI, PATRICIA MARAZITI, DONNA DEE MORAN, GEORGE S. POLLARD, ELEANOR J. POLLARD, ROBERT REECE, GERARD M. RUVO AND SUE S. RUVO as trustees for the Ruvo 2006 Living Trust, ROBERT FARINA, MARY ANN FARINA, CAROLYN M. JENNINGS, THOMAS EDWARD KEANE, EDWARD WALLACE BARR, III, RICHARD B. PEKRUHN, PAULINE PEKRUHN, GREGORY B. NATHAN, RICHARD JENNINGS, MATTHEW J. SEVERANCE, and ELIZABETH ASHLEY PHILLIPS SEVERANCE, Plaintiffs, vs. DANIEL ISLAND RIVERSIDE DEVELOPERS, LLC, CARRIAGE HILL ASSOCIATES OF CHARLESTON, LLC, CARRIAGE HILL ASSOCIATES, INC., WEATHER SHIELD MANUFACTURING, INC., THE MUHLER CO., INC., A.C. CONSTRUCTION, INC., COASTAL ROOFING, CO., INC., COASTAL CAULKING, INC., MIKE PHILLIPS d/b/a MIKE PHILLIPS MASONRY, GERALD RUMPLICK, EDWARD J. D'ORAZIO, and RICH BEHRINGER, Defendants.	)	**C/A. No.: 2009-CP-08-3916**

This matter came before the Court for a non-jury trial on April 8, 2013 through April 11, 2013. Appearing before the Honorable J.C. Nicholson, Jr. were W.H. Bundy, Jr., Esq. and M. Brent McDonald, Esq. for the Plaintiffs and Charles Altman, Esq. and Roy P. Maybank for the

Defendants. Based upon careful examination of the evidence and weighing the credibility and testimony of each of the witnesses, I find as follows:

Findings of Fact

(1) This is a case involving allegations of construction defects arising out of the development, design, construction, and sale of condominium units located on Daniel Island in South Carolina and known as the Oaks at Rivers Edge Horizontal Property Regime (the "Project"). The Project consists of six buildings with four floors in each building with the first floor constituting a garage for parking. Each building contains six (6) units. The Project was developed, designed and constructed from 2004 to 2006.

(2) Plaintiff The Oaks at Rivers Edge Homeowner's Association, Inc. ("HOA") is a non-profit corporation organized for the purposes of repairing and maintaining the common elements, among other responsibilities dictated in the Master Deed for the Oaks at Rivers Edge Horizontal Property Regime and the amendments thereto, the South Carolina Horizontal Property Regime Act, and the By-Laws of The Oaks at Rivers Edge Homeowner's Association, Inc. The HOA made a claim for damages as a result of the cost to repair the construction defects and the cost to relocate the occupants of individual units during the repairs.

(3) Plaintiffs John E. Atkinson, Joan D. Strandquist, Joseph E. Chiovarou, Jr., Peyton H. Cook, Jr., Brenda Cook, John W. Edelen, Karen A. Nelson, Robert J. Graham, Maureen S. Graham, Nancy K. Johnson as trustee for the Nancy K. Johnson Revocable Trust, William Jung, Charles Maraziti, Patricia Maraziti, George S. Pollard, Eleanor J. Pollard, Robert Reece, Gerard M. Ruvo and Sue S. Ruvo as trustees for the Ruvo 2006 Living Trust, Carolyn M. Jennings, Thomas Edward Keane, Edward Wallace Barr, III, Richard B. Pekruhn, Pauline Pekruhn, Matthew J. Severance, and Elizabeth Ashley Phillips Severance (sometimes collectively referred to herein as "Unit Owners") are or were at one time individual unit owners at the Project. The individuals made a claim for damages arising out of loss rent, damages arising out of the denial

of market access, damages arising from out of pocket costs, damages arising out of the inability to refinance, damages arising out of a deficiency judgment, and damages arising out of costs to repair and replace wood flooring for the unit owners on the second floor. The Unit Owners also claimed inconvenience and loss of enjoyment arising out to their ownership and use of the units.

(4) Plaintiffs John E. Atkinson, Joan D. Strandquist, Joseph E. Chiovarou, Jr., Peyton H. Cook, Jr., John W. Edelen, Karen A. Nelson, Charles Maraziti, Patricia Maraziti, George S. Pollard, Eleanor J. Pollard, Robert Reece, Richard B. Pekruhn, Pauline Pekruhn occupied, used and lived in their units from March 28, 2008 until December 31, 2011.

(5) Plaintiffs Robert J. Graham, Maureen S. Graham, William Jung, Gerard M. Ruvo and Sue S. Ruvo as trustees for the Ruvo 2006 Living Trust, Carolyn M. Jennings, Thomas Edward Keane, Edward Wallace Barr, III, and Matthew J. Severance, and Elizabeth Ashley Phillips Severance owned their units but did not occupy their units from March 28, 2008 until December 31, 2011.

(6) Plaintiff Nancy K. Johnson as trustee for the Nancy K. Johnson Revocable Trust did not occupy her unit from March 28, 2008 to July 22, 2010 when she sold the unit. Plaintiffs Peyton H. Cook, Jr., Brenda Cook did not occupy their unit from March 28, 2008 until April 8, 2011 when it was sold in a short sale.

(7) Plaintiffs John E. Atkinson, Joan D. Strandquist, Joseph E. Chiovarou, Jr., William Jung, Charles Maraziti, Patricia Maraziti, George S. Pollard, Eleanor J. Pollard, Gerard M. Ruvo and Sue S. Ruvo as trustees for the Ruvo 2006 Living Trust, Carolyn M. Jennings, Thomas Edward Keane, Edward Wallace Barr, III, Richard B. Pekruhn, Pauline Pekruhn, Matthew J. Severance, and Elizabeth Ashley Phillips Severance still own their unit at the time of trial.

(8) Plaintiffs Peyton H. Cook, Jr., Brenda Cook, John W. Edelen, Karen A. Nelson, Robert J. Graham, Maureen S. Graham, Nancy K. Johnson as trustee for the Nancy K. Johnson Revocable Trust, and Robert Reece no longer owned their units at the time of trial.

(9) Defendant Daniel Island Riverside Developers, LLC ("Developer") was the developer of the Project, as identified by the Master Deed, and originally placed into the stream of commerce each of the units at the Project as well as organized and created the HOA by drafting and recording the required documents. The Developer also appointed board members to the board of the HOA until control of the HOA was turned over to the unit owner controlled board on or after December 7, 2006.

(10) Defendant Carriage Hill Associates of Charleston, LLC ("Construction Manager") was the construction manager during the design, development, and construction of the Project. The Construction manager also pulled the permits for the construction of the Project for each of the six buildings pursuant to its general contracting license number G107574.

(11) The Project was marketed as "luxury condominiums." Beginning in 2004 Developer sold the units prior to the completion pursuant to marketing materials and representations made to the purchasers regarding the superior quality of the Project. In the marketing materials Developer represented, among other things, that there was sound proofing between units, that the second and third floor units had ten (10) foot high ceilings, that the expected association dues would be 470.47 per unit/per month, that there would be a brick and stucco façade, and hardwood flooring throughout the units.

(12) During and after the time Developer was entering into contracts of sale, Developer and Construction Manager used and employed an architect named Gerald R. Rumplick to perform design, development, and construction related services for the Project. Rumplick was not a licensed architect in South Carolina during the design, development and construction of the Project. Developer and Construction Manager were aware thereof and recklessly and consciously disregarded the fact that Rumplick was not licensed and allowed Rumplick, notwithstanding said knowledge, to perform a significant role in the design, development and construction of the Project for which a license to practice architecture in South Carolina was

required. Rumplick was affiliated with Developer and Construction Manager and performed services that should have been performed by a licensed South Carolina architect or engineer for this Project. The conscious decision of Developer and Construction Manager not to employ a licensed South Carolina architect or engineer proximately caused and contributed to the construction defects that must be repaired as discussed herein. Tom Scholtens, chief building official for the City of Charleston, testified that the City relies implicitly on licensed South Carolina architects and engineers to perform construction administration and supervision before and during construction. Plaintiffs presented credible and uncontested expert testimony that many of the defects, discussed below, would have been discovered by a qualified and licensed South Carolina architect or engineer during construction.

(13) On January 31, 2007, the Board of Architectural Examiners of South Carolina found that Rumplick practiced architecture without a license on this Project without a license and ordered him to cease and desist the practice of architecture in South Carolina until April 15, 2007 at which time he may be eligible for a license.

(14) All units were completed and sold by Developer in 2006. Unit owners either purchased directly from the Developer or within a short time from a intervening purchaser. Pursuant to the terms of the Master Deed, Developer was required to "turn over" control of the HOA to a unit owner controlled HOA Board of Directors.

(15) On December 6-7, 2007 at the time of the turnover meeting, Developer and the Construction Manager were made aware of significant sound transmission problems between the units. In response, Developer and Construction Manager represented to HOA and Unit Owners that the sound transmission problems would be addressed so that the quality of construction would be consistent with the selling price, industry standards, and as advertised—namely, luxury condominiums.

(16) At turnover, Developer failed to provide HOA any funds necessary for repairs to the common elements or necessary for capital reserves for the common elements. Developer never funded an amount of $19,440.00 that they represented was in the capital reserve account for the HOA at the time of turnover.

(17) In January and February of 2007, Developer and Construction Manager hired Noral Stewart, an acoustics expert, to evaluate the sound problems. Stewart, after testing, informed Developer and Construction Manager that the as-built construction failed to meet the applicable acoustical building code requirements.

(18) Stewart informed Developer and Construction Manager that this wood framed construction should have been constructed with a light weight concrete called gypcrete poured on the sub-floor along with an acoustical mat under the finished floor. Moreover, Stewart informed Developer and Construction Manager that the ceilings in the units had sheet rock connected directly to the wood floor trusses which should have been constructed as a suspending ceiling hung from resilient channels. Stewart informed Developer and Construction Manager that he would have expected the sound problems experienced by the Unit Owners due to the as-built construction.

(19) Stewart testified that repairs to the floors and the ceilings could have been made to achieve the correct sound attenuation and that he had explained to Developer and Construction Manager that a complete repair would require demolition due to the necessity to access the sub floor on the fourth and third floors and to remove the sheetrock ceilings on the second and third floors.

(20) Stewart testified that Developer and Construction Manager decided not to perform the work necessary to achieve the correct sound attenuation and that this decision was driven by the pecuniary interests of Developer and Construction Manager. Stewart testified that the sound repair implemented only improved bad situation rather than to achieve what should have done

originally. Specifically, the repair did not include gypcrete nor did it include the removal of all of the sheetrock on the ceiling as this work (while necessary) was determined to be too expensive to Developer and Construction Manager.

(21) Neither HOA nor Unit Owners were informed that the original sound transmission as constructed did not meet the applicable building code. Construction Manager and Developer did not disclose to HOA or Unit Owners that any repairs that they intended to make were not going to utilize construction methods that would achieve sound attenuation results that should have been accomplished during original construction.

(22) In March of 2007, Stewart reviewed the design of Developer, Construction Manager, and Rumplick for the proposed acoustical repairs. Stewart testified that Rumplick was involved in this design because Stewart was not a licensed South Carolina architect or engineer. Notwithstanding that Rumplick had been ordered to cease and desist the practice of architecture during this time, Developer and Construction Manager, both of whom were aware of the fact that Rumplick was not licensed and had been ordered to cease and desist practicing architecture in South Carolina, allowed and aided Rumplick in completing the proposed repairs that failed to meet industry standards and presale representations.

(23) The repairs that were proposed included dropping the ceilings of the second and third floor units to add materials that would reduce sound transmission, though not to a level that would have been attainable had the original design and construction been proper. Gypcrete was not installed and the sheetrock attached directly to the wood floor trusses was only partially removed.

(24) In the spring of 2007, Construction Manager and Developer represented to HOA and Unit Owners that it would be fixing all of the sound transmission problems and informed at least some of the Unit Owners that if they did not have their unit repaired, Construction Manager

and Developer would not perform the repairs for any putative purchasers as a further inducement to make owners accept their repair.

(25) Construction Manager and Developer did not disclose to HOA or Unit Owners that the repairs to be performed were not meant to achieve the sound attenuation results required by industry standards, but were meant to simply improve a bad situation. Developer and Construction Manager misled the HOA and the Unit Owners by representing to the HOA and Unit Owners that the remediation was in fact going to bring the Project to a level consistent with the sales price, industry standards, and marketing materials.

(26) From 2007 to 2008 the remediation was preformed by Construction Manager and Developer on the ceilings of the second and third floor units of all of the second and third floor units except three. Developer and Construction Manager refused to disclose the results of the testing performed by Stewart but continued to misrepresent to HOA and Unit Owners that the necessary repairs were being made to make the condominiums consistent with the purchase price, industry standards, and marketing materials.

(27) Subsequent to the remediation, the sound transmission problems continued to be experienced by Unit Owners and/or their tenants or occupants. All Unit Owners named as Plaintiffs in this action testified at trial and each of them testified regarding the significant noise transmission between the units both before and after the remediation. In fact, the parties stipulated that every owner was going to testify as to the egregiousness of the sound issues as they experienced them both before and after the remediation. Some of the Unit Owners testified that they could not sleep as a result of the sound. Some of the Unit Owners testified that they even tried to put down rugs over the hardwood floors and were asked by their adjacent neighbors to wear socks when at home to attempt to address the sound transfer. Unit Owners sustained significant discomfort and inconvenience as a result of the construction defects, including the

sound problems. Unit Owners had to endure almost constant disruption of their right o quiet enjoyment of the units.

(28) Theodore Padgett, a licensed professional engineer in South Carolina with over 30 years of experience in multifamily and condominium design and construction, was qualified without objection as an expert on industry standards for multifamily construction. He testified that the original design and construction relative to sound and the repairs that were made during the sound repairs did not meet industry standards because of the significant sound transfer between units, the absence of gypcrete, and the sheetrock attached directly to the wood floor trusses. Padgett testified that representatives of Developer and Construction Manager informed him after the construction of the Project that they simply did not know that gypcrete and suspended ceilings was the industry standard in construction of this type. The testimony Padgett was credible and based upon significant experience in the Charleston area as well as his experience with the Project. Padgett was the only witness to testify as to industry standards for condominium construction in South Carolina and the only witness to testify as to the requirements for gypcrete on wood framed multi-family construction. Stewart testified he was not qualified to give an opinion as to industry standards in construction of multi-family condominiums in South Carolina, though he did acknowledge that gypcrete was included in his recommendations to any client seeking to use wood floor joists in multi family construction.

(29) On the heels of the ongoing sound problems, moisture intrusion into the buildings began to be observed by HOA and Unit Owners. As a result of the moisture intrusion, Padgett inspected the property in May of 2008. The investigation discovered significant construction defects including building code violations and violation of industry standards relating to the brick facade, the stucco facade, as well as other problems. Padgett issued a report on May 14,

2008 regarding the defects. This report was provided to Developer and Construction Manager in 2008.[1]

(30) Padgett testified that the stucco construction and brick veneer construction violated the applicable building code and violated industry standards. He testified that the violations of the building code and industry standards has led to water infiltration damaging the structural components of the buildings, the sheathing of the buildings, the exterior trim of the buildings, the porches of the buildings, and other interior portions of the buildings. He testified that the brick failed to have the proper ties and lateral supports required by the building code and industry standards as this Project is in a seismic zone. Padgett testified that engineers licensed in South Carolina who regularly design buildings in Charleston, South Carolina are extremely familiar with the seismic code requirements as well as other code requirements and industry standards. He also testified the construction containing the defects was not done in a good and workmanlike manner and that the violations and shoddy construction should have been discovered during construction by proper supervision and coordination by Construction Manager of the individuals or entities performing the work. Padgett testified that the poor coordination and lack of proper supervision by Construction Manager of the trades caused the defects related to the required waterproofing of the buildings.

(31) In 2008, Construction Manager and Developer hired a licensed professional engineer in South Carolina, Michael Parker. Parker did not evaluate the stucco or brick veneer and offered no opinions thereon. Padgett's testimony is uncontradicted that the stucco and brick veneer at the project contains defects in violation of industry standards, the building code and is not good and workmanlike work. Padgett testified that it all must be removed and replaced as a result of the defects and to repair the damage caused by the defects.

[1] Some of the defects noted in the report were no longer an issue at the trial of this case due to settlement with other parties formerly in the case. The HOA made no claims for those defects and they are not included in the damage award hereinafter set forth.

(32) Parker did testify that he determined in 2008 that all of the windows and doors were defective, needed to be replaced, and that he so advised Developer and Construction Manager in 2008.

(33) Neither Developer and Construction Manager informed the HOA or Unit Owners of Parker's determination in 2008 that the windows and doors needed to be replaced.

(34) Padgett also discovered defects related to exterior waterproofing, exterior finishes and trim, wall insulation, brick entry stairs, garage slabs, parapet wall returns, shower waterproofing, wood floor buckling, flooding in the elevator pit in one of the buildings, interior sheetrock mold, HVAC for entry lobbies, carpet, and roof access ladders. Padgett testified that these defects were violations of applicable building codes and industry standards. Padgett testified that he determined that the defects caused consequential property damage to property other than the defective construction. He also testified that the violations and shoddy construction should have been discovered during construction by proper coordination and supervision by Construction Manager of the individuals or entities performing the work.

(35) Padgett described the necessary scope of repairs and testified that each of the repairs were necessary and caused by the shoddy construction that violated industry standards, the applicable building code, and was not good and workmanlike work. The scope of work to repair the defects in the buildings and the property damage caused by the defects was uncontradicted, necessary, and reasonable in light of all of the evidence.

(36) Plaintiffs offered the testimony of A. David Willis, Jr. of Southeastern Construction Company of Summerville, Inc. Southeastern is a licensed general contractor and construction manager in the state of South Carolina. Willis was offered without objection as an expert in general contracting and construction management. Willis was a knowledgeable and credible witness. Willis provided an estimate to repair the defects and the resulting property damage identified by Padgett. The cost of repair estimate relating to the common elements was in the

amount of seven million nine hundred and thirty four thousand seven hundred and four dollars and six cents. ($7,934,704.06). The repairs will take sixteen (16) months and construction must be performed sequentially on the buildings.

(37) Willis testified that he had inspected the Project and found that it was constructed using high-end finishes such as trim, countertops and appliances, but the structural components and exterior cladding was not consistent with luxury condominium construction. Willis testified that a construction manager is responsible to supervise and coordinate the construction of a project.

(38) Willis also provided an estimate for the cost to repair the wood floors on the second floor of each of the buildings based upon the testimony of Padgett that the floors were defectively installed. The estimate to repair an "A" unit was sixteen thousand ninety six dollars and eighty cents ($16,096.80). The estimate to repair the a "B" unit was fifteen thousand nine hundred and ninety four dollars and twenty cents ($15,994.20).

(39) Padgett testified that he reviewed the estimates and concluded that they conformed to his scope of work and the prices were reasonable and customary in the industry in Charleston, South Carolina. The cost to repair the buildings is reasonable in light of the evidence presented and was the only evidence introduced. Padgett also testified that he had accepted estimates to repair the elevator pit for fifteen thousand dollars ($15,000.00).

(40) Padgett testified that the hiring of an engineer to perform engineering services to complete the repairs was necessary, and that the cost of the engineer would be ten (10%) percent of the cost to repair.

(41) Padgett testified that the repairs would require the individual unit owners to move out for a period of at least 60 days per building and that all personal goods and furniture in each unit to be moved out and stored during the 60 day period and then be moved back into the unit. Joseph Chivarou, the president of the HOA, testified that the HOA would be responsible for the

replacement housing, storage, and move out/move in costs necessitated by the repairs pursuant to the terms of the Master Deed. Chivarou researched moving costs, storage costs, and alternate lodging costs on behalf of HOA and testified that HOA would more likely than not have to budget for and incur six hundred and forty one thousand five hundred and twenty ($641,520.00) dollars as a result of the relocation activities caused by the repairs necessary to address the construction defects. This included $250.00 dollars a day for replacement housing, $500.00 a month for storage, and $1,820.00 for moving costs, these amounts are reasonable and uncontraverted.

(42) Each of the Unit Owners also presented testimony at the hearing regarding damages they claimed as a result of construction defects. The parties stipulated that Unit Owners presented claimed damages as depicted on Exhibit A to this order. The claimed damages on Exhibit A are as follows: (1) loss of rent attributed by the Individual Unit Owner to the construction defects; (2) out of pocket expenses attributed by the Individual Unit Owner to the construction defects; (3) damages related to the defective wood floor on the second floor units; (4) expenses related to the inability to refinance a unit attributed by the Individual Unit Owner to the construction defects (*See* Plaintiffs John E. Atkinson and Joan D. Strandquist, only); (5) damages in the amount of a deficiency judgment and payments made on the deficiency judgment attributed by Unit Owner to the inability to sell the unit (*See* Plaintiffs Peyton H. Cook, Jr., Brenda Cook, only). Unit Owners also testified as to the significant inconvenience and loss of enjoyment they experienced having to live in and own defective condominiums.

(43) I find the damages presented by the Unit Owners are reasonable, foreseeable, and not speculative and were proximately caused by the defective construction. Unit Owners sustained significant inconvenience and loss of enjoyment as a result of the construction defects.

(44) Christopher Donato, MAI, a real estate appraiser qualified without objection as an expert. Defendants did not offer any testimony as to real estate values. Donato offered opinions

relating to two separate classes of Unit Owners. The first class contained Unit Owners who still owned their unit at the time of the trial (hereinafter sometimes "Class I Unit Owners"). These Unit Owners include John E. Atkinson, Joan D. Strandquist, Joseph E. Chiovarou, Jr., William Jung, Charles Maraziti, Patricia Maraziti, George S. Pollard, Eleanor J. Pollard, Gerard M. Ruvo and Sue S. Ruvo as trustees for the Ruvo 2006 Living Trust, Carolyn M. Jennings, Thomas Edward Keane, Edward Wallace Barr, III, Richard B. Pekruhn, Pauline Pekruhn, Matthew J. Severance, and Elizabeth Ashley Phillips Severance.

(45) Donato performed three separate appraisals for each of the units owned by these Unit Owners. A chart depicting the appraisal amounts and the claimed damages testified to by Donato is attached hereto Exhibit B.

(46) The first appraisal used the date of March 28, 2008 and assumed no defects. The second and third appraisals used the date of appraisal as December 31, 2011. The second appraisal assumed no defects, and the third appraisal appraised the units as constructed with defects.

(47) Donato then testified that Class I Unit Owners were denied access to the real estate market from 2008 until 2011 due to the construction defects and Class I Unit Owners were unable to sell their units at the market price. Donato testified to a reasonable degree of certainty that the inability to sell at a time when the market was going down prevented Class I Unit Owners from selling their units as prices continued to decline due to the real estate market. Donato testified that condominium ownership is different from single family residential ownership because the individual Unit Owner cannot repair the common elements. Donato concluded, therefore, that the Class I Unit Owners were damaged because they could not sell their unit as an owner of a non-defective condominium could have and did from 2008 to 2011.

(48) It is foreseeable that the inability to sell a defective condominium unit in a collapsing real estate market would proximately result in damage to the owner of a defective unit.

(49) Donato testified that if (when) the Project is completely repaired, the value of the unit will only return to the 2011 value without defects. The Class I Unit Owners, therefore, have sustained damages in that they have suffered the loss in value from the 2008 value without defects to the 2011 value without defects as a result of the lost opportunity to enter the market and sell the unit from 2008 to 2011. These individual damages have already been sustained by the Class I Unit Owners because of the denial of market access and could have been prevented by Developer and Construction Manager who were aware as early as 2006 and no later than 2008 that the buildings were defective and in need of repair. On March 28, 2008, Developer and Construction Manager sent a letter to all of the unit owners acknowledging problems. He testified this date then represented the date that the public became aware of the defects and the market reflected the defects. This date is also significant in that Parker testified that in 2008 he informed Developer and Construction Manager that all the windows were defective and needed to be replaced.

(50) Many Unit Owners testified that they lost potential sales as a result of the construction defects becoming public knowledge. Donato testified that the lost sale testimony was consistent with his opinion, experience and common sense that a purchaser will not pay market value for a condominium that is known to be defective.

(51) Class I Unit Owners Peckruhn testified he was unable to sell his Unit in 2008 as a result of the construction defects. Peckruhn testified that he believed the value of his unit in 2008 to be $800,000.00 without defects. This amount was based on his purchase price and other sales known to him to have occurred prior to 2008. Peckruhn then testified that he believed the value of his unit in 2011 without defects to be $600,000.00. His claimed damages were the

difference between the 2011 value without defects and the 2008 value without defects because even if the buildings are ultimately repaired he lost the opportunity to sell his unit in 2008 through 2011. Peckruhn had a reasonable basis for his claimed damages and that they were not speculative.

(52) The second class of individual Unit Owners according to Mr. Donato included owners who sold their Unit prior to the time of trial (hereinafter Class II Unit Owners). This class included John W. Edelen, Karen A. Nelson, Robert J. Graham, Maureen S. Graham, Nancy K. Johnson as trustee for the Nancy K. Johnson Revocable Trust and Robert Reece.

(53) Donato testified that Class II Unit Owners also sustained damages as a result of the denial of access to the market at fair market price. Donato testified that the Class II Unit Owners sustained damages equivalent to the difference between the December 31, 2011 appraisal with defects and the December 31, 2011 appraisal without defects. He opined to a reasonable degree of certainty that even if the buildings are ultimately fixed, these individuals would not receive the benefit of the repairs as they had to sell their unit a significantly below market value without defects. These damages are depicted on Exhibit B. The recovery by the HOA of damages herein and any subsequent repair of the Project will not compensate Class II Unit Owners for their loss.

(54) The damages testified to by Mr. Donato and depicted on Exhibit B for the current Unit Owners and for the former Unit Owners are not speculative and were proven to a reasonable degree of certainty. The Defendants did not present a real estate appraiser to dispute the testimony of Donato and did not put in any evidence otherwise to dispute the testimony of Donato.

CONCLUSIONS OF LAW

(55) The Plaintiff HOA brought claims against the Developer for Negligence, including gross negligence and recklessness, Negligent Misrepresentation, and Breach of Fiduciary Duty. The Plaintiff HOA also brought claims against the Construction Manager for

Negligence, including gross negligence and recklessness, Negligent Misrepresentation, and breach of implied warranty of workmanlike service.

(56) The Individual Unit Owner Plaintiffs brought claims against the Developer for Negligence, including gross negligence and recklessness, Negligent Misrepresentation, Breach of Implied Warranty of Habitability, and Breach of Contract. Finally, the Individual Unit Owners also brought claims against the Construction Manager for Negligence, including gross negligence and recklessness, Negligent Misrepresentation, and breach of implied warranty of workmanlike service.

I. Negligence as to Developer and Construction Manager by Unit Owners and HOA.

(57) In order to prove a negligence claim a party must prove (1) The defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Doe ex re. Doe v. Wal-Mart Stores, Inc., 711 S.E.2d 908 (S.C. 2011).

(58) Here, Developer and Construction Manager owed HOA and Unit Owners legal duties to develop, construct and sell a project consistent with industry standards and the applicable building code. *See* Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989)(establishing common law duties to purchasers of residences regardless of privity). Developer and Construction Manager also had the duty to exercise due care during the development and construction of the Project. *See* Fields v. J. Haynes Waters Builders, Inc. 376 S.C. 545, 560 658 S.E.2d 80, 88 (2008)(a builder owes a duty to exercise due care); Hart v. Doe, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973); ("[N]egligence is the failure to use due care," i.e., "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances."). Developer undertook to develop the Project. Developer put the residential Project and units in the stream of commerce. Developer also undertook to establish

the HOA, an entity which would be responsible for the future repair and maintenance of the common elements. Therefore, Developer undertook legal duties to the HOA and the Unit Owners.

(59) Developer owed further duties to the HOA to transfer the common areas of the Project in good repair or to supply the HOA with sufficient funds to bring the common elements into good repair. *See* Concerned Dunes West Residences, Inc. v. Georgia Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (2002). As will be explained below, this is a fiduciary duty, but a legal duty none the less.

(60) Construction Manager also owed common law duties due because as the construction manager it undertook to coordinate and supervise the construction. Fields, 658 S.E.2d 80, 88 (2008)("a builder who undertakes to supervise the construction is under a duty to exercise reasonable care and supervision to see that the work is done in conformity with the applicable building code.").

(61) Developer and Construction Manager breached the duties owned to the HOA and the Unit Owners by putting buildings in the stream of commerce which failed to comply with the applicable building code and failed to meet industry standards. Developer and Construction Manager also breached their duties as they failed to act reasonably under the circumstances. Developer breached his duty to HOA by failing to turn over the common elements in good repair and failing to supply the HOA with the funds necessary to put the common elements in good repair. The uncontradicted testimony is that there are construction defects in the common elements at the Project. The uncontradicted testimony is that Developer did not give the HOA any funds for capital repairs at the time of turnover.

(62) I further find that Construction Manager breached the duties it owed to the HOA and the Unit Owners due and owing to its failure to coordinate and supervise the construction in

a manner as to ensure that the work was done in conformity with the applicable building codes and industry standards.

(63) I also find that Developer and Construction Manager were grossly negligent in their breach of the duties owned to the Plaintiffs. Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). "Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances." Id. First, Developer and Construction Manager used the services throughout the development and construction of the Project of an unlicensed architect they new was unlicensed and consciously disregarded this fact during development, construction, and, as will be shown below, during the attempted sound remediation. I find that Developer and Construction Manager used the services of Rumplick to avoid hiring a licensed architect or engineer which was required on this Project. This was a conscious failure to do something as basic as hiring a licensed design professional for this Project which was required by the law. I further find that Developer's and Construction Manager's continued use of Rumplick after he was ordered to cease and desist from performing any architectural services for the design of a repair to a defect, the sound problem, of which they were aware was grossly negligent. Second, I find that the number of code violations identified by Padgett accompanied with his testimony regarding the totality of the defects at the project arises to a level of gross negligence on the part of Developer and Construction Manager.

(64) I find that the HOA claimed actual damages calculated by the cost of repair of the Project, including engineering fees. I find the cost of repair damages were not speculative, were reasonable, foreseeable, and proximately caused by the negligence and gross negligence of the Developer and Construction Manager and are appropriate under the law. *See* Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (1989)("cost of repair or

restoration is a valid measure of damages for injury to a building..."). The HOA also suffered actual damages for the amount Developer represented it was going to fund for the HOA at the time of turnover. I further find that the HOA claimed consequential damages for costs associated with the move out of the occupants of the buildings during the repairs. I find that these costs to be reasonable and not speculative and to be proximately caused by the breach of the duties owned by the Developer and the Construction Manager to the HOA.

(65) I find that the breaches of the Developer and the Construction Manager of duties owed to the Plaintiff HOA have combined to proximately cause damages to the HOA and that amount is in the conclusion section of this opinion. As such, I find the Developer and Construction Manager to be jointly and severally liable for the damages stated therein.

(66) I find that the individual Unit Owners presented damages as depicted on Exhibit A and Exhibit B to this Order. I find that the damages presented by the Individual Unit Owners were not speculative, were reasonable, foreseeable, and were proximately caused by the negligence of the Developer and the Construction Manager. I further find that the damages were based on the uncontradicted testimony of each of the Unit Owner and of Donato. With regard to the testimony of the Individual Unit Owner Plaintiffs, I find that their testimony as to their damages had a reasonable basis and that a property owner is capable of testifying as to his or her damages. Moreover, I find that the damages presented by the Unit Owners through Donato are separate and distinct from the damages claimed by the HOA as the repair of the common elements will not make the Individual Plaintiffs whole. As described by Donato, even if the buildings are repaired, the damages claimed by the Unit Owners will not be rectified as those damages regardless of whether the buildings are fully repaired have already been sustained. I do however find that any Unit Owner claiming lost rent must elect between the recovery of lost rent damages and the damages attributed to the lost opportunity to sell their unit from 2008 to 2011 as those damages are mutually exclusive.

(67) I find that the inconvenience and loss of enjoyment suffered by the Unit Owners to be proximately caused by the construction defects and the negligence of Developer and Construction Manager. The Plaintiffs presented evidence that a comparable replacement housing for the units would cost $250.00 a day. I find that the loss of enjoyment and in convenience for the Unit Owners to be half of that ($125.00 a day) from March 28, 2008 until December 31, 2011.[2]

(68) I find that the breaches of the Developer and the Construction Manager of duties owed to the Unit Owner Plaintiffs have combined to proximately cause damages to each of the Unit Owners in an amount outlined in the conclusion section of this opinion. As such, I find the Developer and Construction Manager to be jointly and severally liable for the damages stated therein.

II. Negligent Misrepresentation as to Developer and Construction Manager by Unit Owners and HOA.

(69) With regard to the negligent misrepresentation claim, to establish a negligent misrepresentation claim, the claimant must prove the following elements:

(1) the defendant made a false representation to the plaintiff;
(2) the defendant had a pecuniary interest in making the statement;
(3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff;
(4) the defendant breached that duty by failing to exercise due care;
(5) the plaintiff justifiably relied on the representation;
(6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (S.C.App. 1992).

(70) I find that Developer and Construction Manager made numerous false representations to HOA and Unit Owners. Developer and Construction Manager represented to HOA and Unit Owners that the Project would be and was constructed pursuant to luxury

[2] Since Plaintiff Nancy K. Johnson Revocable Trust sold her unit on July 22, 2010, any inconvenience and loss of enjoyment damages would stop as of that date. Plaintiffs Peyton H. Cook, Jr., Brenda Cook sold their unit as of April 8, 2011 and any inconvenience and loss of enjoyment damages would stop as of that date.

standards with high quality construction and materials. The only evidence in the record, from both Plaintiffs and Defendants, is that the construction, other than the countertops and the interior finishes, was not high quality and did not meet industry standards much less a luxury standard. Developer and the Construction Manager represented to HOA and Unit Owners that the sound remediation was being done to accomplish luxury standards. The testimony of Defendants' expert, Stewart, was that the goal of the remediation was simply to make the best of the defective situation rather than perform a remediation that would meet industry standards. The testimony of Plaintiffs' expert was that the remediation did not meet industry standards and that Developer and Construction Manager represented to him that they did not even know what the industry standards were for the Project. Moreover, by turning over the HOA to the unit owner controlled board, especially in light of the fact that it failed to turn over in funds for repairs or even the funds it represented it was going to turn over, Developer represented to HOA that the common elements were in good repair. The uncontradicted testimony is that the common elements are not in good repair.

(71) Developer and Construction Manager had a pecuniary interest making the false statements. The expert for Defendants, Stewart, testified that the sound remediation was performed specifically to save money by Developer and Construction Manager. Developer and Construction Manager did not want the extra costs of adding gypcrete to the floors or for tearing out the original sheetrock. Developer also had a pecuniary interest in the false statement regarding the high quality construction and materials. Willis testified that the most important part of a construction project is the structural components or the parts of construction that are covered up during construction, though the purchaser does not see that construction or those materials. Therefore, Developer saved money on cheap construction and materials on the "bones" of the Project.

(72) As discussed above, Developer and Construction Manager owned duties to the Plaintiffs, including the duty to convey truthful information. The Developers duty is further heightened to to its position as a fiduciary. Developer and Construction Manager undertook to convey information about the quality of construction, about the sufficiency of the sound remediation, and the condition of the common elements. Upon such undertaking, given the relationship of the parties (i.e. Developer to Purchaser/HOA and Construction Manager to Purchaser/HOA), Developer and Construction Manager undertook the duty to convey truthful and accurate information.

(73) Defendant and Construction Manager did not exercise due case in making the false statements to Plaintiffs. First, Developer and Construction Manager were in the best position to know the quality of the materials and construction. Developer paid for the construction and materials and knew or should have known the quality and type of construction and materials. Construction Manager was responsible for the supervision and coordination of the construction and, as such, had knew or should have known of the type of construction and materials. Therefore, either Developer and Construction Manager had no basis for the representations made as a result of their inability to determine high quality and low quality or they were aware of the quality and mistakenly believed for whatever reason that it was high quality construction. In either case, based upon the evidence presented, they failed to exercise appropriate care to make sure that they were conveying truthful information.

(74) Each of the Plaintiffs and the various board members and former board members for the HOA testified that they relied on the representations of Developer and Construction Manager. I find that given the relationship of the parties that this reliance was reasonable.

(75) HOA has suffered a pecuniary loss as a result of the negligent misrepresentations in that it is responsible for the repair and maintenance of the common elements. The only evidence

in this record is that the common elements are not high quality and do not meet industry standards and must be repaired.

(76) Unit Owners have suffered a pecuniary loss in that they purchased the units that have now proximately caused them monetary damages.

(77) I find that HOA claimed actual damages calculated by the cost of repair of the Project, including engineering fees. I find the cost of repair damages were not speculative, were reasonable, foreseeable, and proximately caused by the negligent misrepresentation of Developer Construction Manager and are appropriate under the law. *See* Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (1989)("cost of repair or restoration is a valid measure of damages for injury to a building..."). The HOA also suffered actual damages for the amount Developer represented it was going to fund for the HOA at the time of turnover. I further find that the HOA claimed consequential damages for costs associated with the move out of the occupants of the buildings during the repairs. I find that these costs to be reasonable and not speculative and to be proximately caused by the breach of the duties owned by the Developer and the Construction Manager to the HOA.

(78) I find that the negligent misrepresentation of the Developer and the Construction Manager of to the Plaintiff HOA have combined to proximately cause damages to the HOA and that amount is in the conclusion section of this opinion. As such, I find the Developer and Construction Manager to be jointly and severally liable for the damages stated therein.

(79) I find that the individual Unit Owners presented damages as depicted on Exhibit A and Exhibit B to this Order. I find that the damages presented by the Individual Unit Owners were not speculative, were reasonable, and were proximately caused by the negligent misrepresentations of the Developer and the Construction Manager. I further find that the damages were based on the uncontradicted testimony of each of the Individual Unit Owner Plaintiffs and of Mr. Donato. With regard to the testimony of the Individual Unit Owner

Plaintiffs, I find that their testimony as to their damages had a reasonable basis and that a property owner is capable of testifying as to his or her damages. Moreover, I find that the damages presented by the Individual Unit Owners through Mr. Donato are separate and distinct from the damages claimed by the HOA as the repair of the common elements will not make the Individual Plaintiffs whole. As described by Mr. Donato, even if the buildings are repaired, the damages claimed by the Individual Unit Owners will not be rectified as those damages regardless of whether the buildings are fully repaired have already been sustained. I do however find that any Individual Unit Owner claiming lost rent must elect between the recovery of lost rent damages and the damages attributed to the lost opportunity to sell their unit from 2008 to 2011 as those damages are mutually exclusive.

(80) I find that the inconvenience and loss of enjoyment suffered by the Unit Owners to be proximately caused by the construction defects and the negligent misrepresentations of the Developer and Construction Manager. The Plaintiffs presented evidence that a comparable replacement housing for the units would cost $250.00 a day. I find that the loss of enjoyment and in convenience for the Unit Owners to be half of that ($125.00 a day) from March 28, 2008 until December 31, 2011.[3]

(81) I find that the negligent misrepresentations of the Developer and the Construction Manager to the Unit Owner Plaintiffs have combined to proximately cause damages to each of the Unit Owners in an amount outlined in the conclusion section of this opinion. As such, I find the Developer and Construction Manager to be jointly and severally liable for the damages stated therein.

III. Breach of Fiduciary Duty as to Developer by HOA.

[3] Since Plaintiff Nancy K. Johnson Revocable Trust sold her unit on July 22, 2010, any inconvenience and loss of enjoyment damages would stop as of that date. Plaintiffs Peyton H. Cook, Jr., Brenda Cook sold their unit as of April 8, 2011 and any inconvenience and loss of enjoyment damages would stop as of that date.

(82) In South Carolina, a "developer has a fiduciary duty to the POA to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with funds necessary to bring the common areas up to a standard of reasonably good repair. The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas up to standard, is liable to the POA for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas." *See* Concerned Dunes West Residences, Inc., 562 S.E.2d 633, 638.

(83) In the present case, it is uncontradicted that Developer did not turn over the common elements in good repair. The only evidence in the record is the scope of repair offered by Padgett and the testimony of Stewart that the sound attenuation at the time of turnover failed to meet the building code. It is uncontradicted that Developer did not turn over any funds to HOA at the time of turnover. In Fact, the Developer did not even turn over the $19,440.00 it represented that it would turnover. The HOA has an uncontradicted estimate of repairs in the amount of $7,934,704.06 plus 10% engineering fees to put the common elements in good repair. Developer's failure to fund the HOA and turnover common elements in good repair is a breach of the fiduciary duty owed to the HOA.

(84) During the course of the sound remediation the Developer failed to disclose to the HOA that it would not be performing an actual remediation of the sound construction but would be completing a repair to make the best of the bad situation. Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. *See* Anthony v. Padmar, Inc., 320 S.C. 436, 465 S.E.2d 745 (Ct. App. 1995). The Developers failure to disclose this information to the HOA constituted an additional breach of its fiduciary duty to the HOA.

(85) I find that HOA claimed actual damages calculated by the cost of repair of the Project, including engineering fees. I find the cost of repair damages were not speculative and proximately caused by the breach of the fiduciary duty of Developer and are appropriate under the law. HOA also suffered actual damages for the amount Developer represented it was going to fund for HOA at the time of turnover. I further find that HOA claimed consequential damages for costs associated with the move out of the occupants of the buildings during the repairs. I find that these costs to be reasonable and not speculative and to be proximately caused by the breach of the duties owned by Developer to HOA.

(86) I find that the breach of the fiduciary duty of Developer to HOA has proximately caused damages to HOA and that amount is in the conclusion section of this opinion.

IV. Breach of Implied Warranty of Habitability as to Developer by Unit Owners.

(87) In South Carolina, an implied warranty of habitability springs from the sale of a new dwelling. Kirkman v. Parex, Inc., 632 S.E.2d 854, 856-57 (2006). The determining factor is not whether the defendant actually builds the defective house, but that he places it, by the initial sale, into the stream of commerce. Id. Judge Ralph King Anderson, Jr.'s S.C. Request to Charge explains the implied warranty of habitability as follows:

> The implied warranty of habitability for a condominium means that the condominium is reasonably fit for the ordinary and general purposes intended; i.e., as living quarters. A breach therefore would be that the condominium is not so fit for living quarters. The test of the breach of the implied warranty of habitability is an objective standard. The standard is whether the condominium meets ordinary, reasonable, and normal uses, reasonably to be expected **of living quarters of comparable kind and comparable quality**.

Andersons SC Requests to Charge §11-8 (emphasis supplied) *citing* Kirkman v. Parex, Inc., 632 S.E.2d 854 (S.C. 2006); Terlinde v. Neeley, 275 S.C. 395, 271 S.E.2d 768 (1980); Lane v. Trenholm Building Co., *infra*; Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S. C. 74, 374 S.E.2d 897 (Ct.

App. 1988), overruled on other grounds by Kennedy v. Columbia Lumber and Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989).

(88) The Lane v. Trenholm Building Co., 267 S.C. 497, 229 S.E.2d 728 (1976) case is instructive in this matter. The Lane Court held that an implied warranty of habitability extends from the sale of a residence because "a sound price warrants a sound commodity." 229 S.E.2d at 730. "Selling for a sound price raises an implied warranty that the thing sold is free from defects, known and unknown to the seller." Id. "The law should not orphan the purchaser of a house, who has likely invested his life savings..." 229 S.E.2d at 731.

(89) In the present case, each of Unit Owners purchased what was represented to be a "luxury" and high quality condominium. The purchase prices varied from $633,766.00 to $889,900.00. The record is clear that Unit Owners did not get a residence for which they paid a sound price. Indeed, Defendants stipulated that each of the Unit Owners testified or were going to testify that the sound problem was detrimental to their use of the condominium unit. Indeed, the Defendants' expert, Stewart, testified he would not live in the units knowing what he knows now. In addition to the sound problems are the other defects that are a daily inconvenience to the purchasers of the units at the Project. Even those unit owners who did not purchase directly from the Developer have a proper claim for breach of the implied warranty of habitability. In Terlinde v. Neeley, 275 S.C. 395, 271 S.E.2d 768 (1980), a subsequent purchaser brought an action for breach of implied warranty of habitability against the original seller of a residence. The trial court found that the implied warranty of habitability did not apply because the Terlindes were subsequent purchasers and the house was "about three years old." 271 S.E.2d at 769. The Supreme Court overruled the trial court and held as follows:

> "The length of time for latent defects to surface, so as to place subsequent purchasers on equal footing should be controlled by the standard of reasonableness and not an arbitrary time limit created by the Court. The aforementioned policy considerations aside, the literal holdings of our precedents require reversal of the trial judge on the question of privity. In Lane, supra, we held that when a "new building is sold, there

> is an implied warranty of fitness for its intended use which springs from the sale itself." Recently, we overruled a privity objection and allowed a suit by a subsequent purchaser of a warehouse against a manufacturer of materials used in its construction. *See* JKT Company, Inc. v. Hardwick et al., S.C., 265 S.E.2d 510, 1980. **In so ruling, we indicated the concept of privity is no longer viable in this jurisdiction. The only logical application of these principles requires a holding that an implied warranty for latent defects extends to subsequent home purchasers for a reasonable amount of time."**

271 S.E.2d at 769-70 (emphasis supplied).

(90) I find that Developer breached the implied warranty of habitability as to the Individual Unit Owners.

(91) I find that Unit Owners presented damages as depicted on Exhibit A and Exhibit B to this Order. I find that the damages presented by Unit Owners were not speculative, were reasonable, foreseeable and were proximately caused by the breach of the implied warranty of habitability of Developer. I further find that the damages were based on the uncontradicted testimony of each of the Unit Owners, Padgett, Stewart, and Donato. With regard to the testimony of Unit Owners, I find that their testimony as to their damages had a reasonable basis and that a property owner is capable of testifying as to his or her damages. Moreover, I find that the damages presented by Unit Owners through Donato are separate and distinct from the damages claimed by HOA as the repair of the common elements will not make the Unit Owners whole. As described by Donato, even if the buildings are repaired, the damages claimed by Unit Owners will not be rectified as those damages regardless of whether the buildings are fully repaired have already been sustained. I do however find that any Unit Owner claiming lost rent must elect between the recovery of lost rent damages and the damages attributed to the lost opportunity to sell their unit from 2008 to 2011 as those damages are mutually exclusive.

V. Breach of Implied Warranty of Workmanlike Service by Unit Owners and HOA as to Construction Manager.

(92) A Builder who undertakes to design or construct a dwelling impliedly warrants that work undertaken will be performed: (1) in careful, diligent, workmanlike manner; (2) creating

implied warranty of workmanlike service that is distinct from implied warranty of habitability. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 384 S.E.2d 730 (S.C.1989).

(93) In the present case, the only testimony in the record regarding the construction of the Project is that the defects complained of by the Plaintiffs arose out of work that failed to be good and workmanlike. Padgett testified that the defects outlined in his scope of repairs resulted from construction work that was unworkmanlike in addition to the fact that it violated applicable buildings codes and industry standards. The engineer for the Defendants, Parker, did not offer any testimony as to the defects identified by Padgett and sought to be repaired in the estimate of Willis.

(94) As such, I find that Construction Manager breached his implied warranty of workmanlike service.

(95) I find that HOA claimed actual damages calculated by the cost of repair of the Project, including engineering fees. I find the cost of repair damages were not speculative and proximately caused by the breach of the implied warranty of workmanlike service by the Construction Manager and are appropriate under the law. *See* Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (1989)("cost of repair or restoration is a valid measure of damages for injury to a building..."). I further find that the HOA claimed consequential damages for costs associated with the move out of the occupants of the buildings during the repairs. I find these costs to be reasonable and not speculative and to be proximately caused by the breach of Construction Manager's implied warranty of workmanlike service.

(96) I find that Unit Owners presented damages as depicted on Exhibit A and Exhibit B to this Order. I find that the damages presented by Unit Owners were not speculative, were reasonable, foreseeable and were proximately caused by the breach of the implied warranty of workmanlike service by Construction Manager. I further find that the damages were based on the uncontradicted testimony of each of the Unit Owners, Padgett, and Donato. With regard to

the testimony of Unit Owners, I find that their testimony as to their damages had a reasonable basis and that a property owner is capable of testifying as to his or her damages. Moreover, I find that the damages presented by Unit Owners through Donato are separate and distinct from the damages claimed by HOA as the repair of the common elements will not make the Unit Owners whole. As described by Donato, even if the buildings are repaired, the damages claimed by Unit Owners will not be rectified as those damages regardless of whether the buildings are fully repaired have already been sustained. I do however find that any Unit Owner claiming lost rent must elect between the recovery of lost rent damages and the damages attributed to the lost opportunity to sell their unit from 2008 to 2011 as those damages are mutually exclusive.

VI. Breach of Contract as to the Developer by the Unit Owners who purchased from the Developer.

(97) The Unit Owners also brought a claim for breach of contract against the Developer. I find that any contract entered into by the Unit Owners with the Developer was merged into the deed at the time of sale, and, as such the Unit Owners' claims are in the nature of breach of implied warranty of habitability and tort and no claim for breach of contract can stand.

Conclusion

Pursuant to the foregoing, I find Developer and Construction Manager jointly and severally liable to the Plaintiffs for negligence, gross negligence, and negligent misrepresentation. I find Developer liable to HOA for breach of fiduciary duty. I find the Developer liable to the Unit Owners for breach of implied warranty of habitability. I find the Construction Manager liable to the HOA and the Unit Owners for breach of the implied warranty of Workmanlike Service. I find that the HOA and Unit Owners have sustained damages proximately caused by the liability of Developer and Construction Manager as follows:

HOA: $7,934,704.06 (cost of repair)
$793,470.41 (engineering fees at 10% of cost to repair)
$641,520.00 (moving, storage, and replacement lodging)

I find that the Developer is also liable to the HOA for an additional $19,440.00 for the failure to fund the reserves actually promised.

Joseph E. Chiovarou, Jr.:	$235,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $16,096.80 (defective floors of 2nd floor).
William Jung:[4]	$245,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $17,800.00 (lost rent) $1,887.92 (out of pocket costs)
Charles Maraziti, Patricia Maraziti:	$235,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $16,096.80 (defective floors of 2nd floor).
George S. Pollard, Eleanor J. Pollard:	$235,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $16,096.80 (defective floors of 2nd floor) $3,175.00 (out of pocket costs)
Robert Reece:	$280,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125)
Nancy K. Johnson as trustee for the Nancy K. Johnson Revocable Trust:[5]	$290,000.00 (Loss of Market Access) $105,750.00 (Inconvenience (846 days x $125) $23,125.00 (lost rent)
Gerard M. Ruvo and Sue S. Ruvo as trustees for the Ruvo 2006 Living Trust:[6]	$240,000.00 (Loss of Market Access)

[4] Plaintiff Jung must make an election between damages for lost rent and damages for loss of market access.
[5] Plaintiff Johnson must make an election between damages for lost rent and damages for loss of market access.

[6] Plaintiff Ruvo must make an election between damages for lost rent and damages for loss of market access.

	$171,625.00 (Inconvenience (1373 days x $125) $15,000.00 (lost rent) $11,117.00 (out of pocket costs)
John E. Atkinson, Joan D. Strandquist:[7]	$245,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $100,000.00 (inability to refinance)
Carolyn M. Jennings:[8]	$290,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $26,400.00 (lost rent) $6,640.00 (out of pocket costs)
Peyton H. Cook, Jr., Brenda Cook:	$250,000.00 (Loss of Market Access and judgment) $138,250.00 (Inconvenience (1106 days x $125)
John W. Edelen, Karen A. Nelson:	$275,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125)
Robert J. Graham, Maureen S. Graham:[9]	$280,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $43,000.00 (lost rent) $2,008.00 (out of pocket costs)
Thomas Edward Keane, Edward Wallace Barr, III:	$235,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $16,096.80 (defective floors of 2nd floor)
Richard B. Pekruhn, Pauline Pekruhn:	$200,000.00 (Loss of Market Access) $171,625.00 (Inconvenience (1373 days x $125) $3,200.00 (out of pocket expenses)

[7] Plaintiff Atkinson/Strandquist must make an election between damages for inability to refinance and damages for loss of market access.

[8] Plaintiff Jennings must make an election between damages for lost rent and damages for loss of market access.

[9] Plaintiff Graham must make an election between damages for lost rent and damages for loss of market access.

Matthew J. Severance, and Elizabeth Ashley Phillips Severance:[10]

$235,000.00 (Loss of Market Access)
$171,625.00 (Inconvenience (1373 days x $125)
$23,400.00 (lost rent)
$15,994.20 (defective floors of 2nd floor)
$1,085.00 (out of pocket costs)

IT IS SO ORDERED!

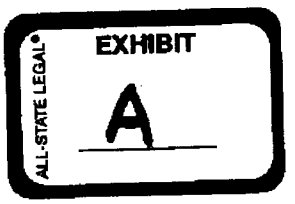
The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

10/11, 2013
Charleston, South Carolina

[10] Plaintiff Severence must make an election between damages for lost rent and damages for loss of market access.

Individual Damages Outside of Atlantic Appraisal Damages

Individual Plaintiff	Lost Rent	Out of Pocket
Maraziti	N/A	Floors $16,096.80
Barr/Keane	N/A	Floors $16,096.80
Cook	N/A	Note/Judgment $250,000
Nelson/Edelen	N/A	N/A
Pollard	N/A	Floors $16,096.80 and $$3,175.00
Graham	43,000.00	$2,008.00
Pekruhn	N/A	$3,200.00
Reece	N/A	N/A
Chivarou	N/A	Floors $16,096.80
Atkinson/Stranquist	N/A	Re-finance Inabililty $100,000.00
Ruvo	$15,000.00	$11,117.00
Johnson	$23,125.00	N/A
Severance	$23,400.00	Floors $15,994.20 and $1,085
Jung	$17,800.00	$1,887.92
C. Jennings	$26,400.00	$6,640.00



The Oaks at Rivers Edge
Fairbanks Oaks Allee
Summary of All Values

Address	Size(SF)	Owner	Purchase Price	2008 Value No Defects	2011 Value No Defects	2011 Value With Defects	Value Loss
Current Owners							
124 Fairbanks Oak Allee #2-A	2,644	Maraziti	$889,900	$840,000	$605,000	$330,000	$235,000
124 Fairbanks Oak Allee #2-B	2,644	Severance	$753,176	$840,000	$605,000	$330,000	$235,000
130 Fairbanks Oak Alle #2-A	2,644	Barr/Keane	$690,450	$800,000	$565,000	$300,000	$235,000
136 Fairbanks Oak Allee #2-A	2,644	Pollard	$870,000	$840,000	$605,000	$330,000	$235,000
140 Fairbanks Oak Allee #2-A	2,644	Chiovarou	$621,179	$800,000	$565,000	$285,000	$235,000
136 Fairbanks Oak Allee #3-A	2,888	Jung	$726,519	$865,000	$620,000	$350,000	$245,000
136 Fairbanks Oak Allee #3-B	2,888	Strandquist	$730,562	$865,000	$620,000	$350,000	$245,000
144 Fairbanks Oak Allee #3-A	2,888	Ruvo	$647,740	$790,000	$550,000	$270,000	$240,000
144 Fairbanks Oak Allee #4-A	2,888	Jennings	$670,208	$880,000	$590,000	$310,000	$290,000
136 Fairbanks Oak Allee #4-B*	2,888	Pekruhn	$746,300	N/A	$600,000	$385,000	N/A
Owners who Sold							
136 Fairbanks Oak Allee #2-B	2,644	Nelson	$686,863	$840,000	$605,000	$330,000	$275,000
144 Fairbanks Oak Allee #4-B	2,888	Graham	$667,750	$880,000	$590,000	$310,000	$280,000
140 Fairbanks Oak Allee #4-B	2,888	Reece	$716,850	$940,000	$650,000	$370,000	$280,000
140 Fairbanks Oak Allee #3-A	2,888	Johnson	$670,633	$865,000	$620,000	$330,000	$290,000

* Surles Appraisal Dated 3/8/2011