THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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SC Court of Appeals

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Case No. 2015-000392

Stoneledge at Lake Keowee Owners' Association, Inc.; C. Dan Carson; Jeffrey J. Dauler; Joan W. Davenport; Michael Furnari; Donna Furnair; Jessy B. Grasso; Nancy E. Grasso; Robert P. Hayes; Lucy H. Hayes; Ty Hix; Jennifer D. Hix; Paul W. Hund, III; Ruth E. Isaac; Michael D. Plourde; Mary Lou Plourde; Carol C. Pope; Steven B. Taylor; Bette J. Taylor; and Robert White, Individually and on Behalf of all other similarly situated, Respondents,

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating, A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.' Southern Basements; Carl Catoe Construction, Inc; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants

Of Defendants, Marick Home Builders, LLC and Rick Thoennes .....Appellants,

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INITIAL BRIEF OF APPELLANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES

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2. Did the lower court err by not charging the jury that the negligence and warranty of workmanlike service could only arise from the work performed by Marick?

3. Did the lower court err by charging the implied warranty of habitability?

4. Did the lower court err by upholding Plaintiffs' objection during closing?

5. Did the lower court err by failing to grant Marick's Motions for Directed Verdict with regard to Plaintiffs' causes of action for amalgamation of interest?

6. Did the lower court err in failing to grant Marick Home Builders, LLC's, and Rick Thoennes' (hereinafter collectively referred to as "Marick") Motions for Directed verdict on the issue of Marick Home Builders, LLC's and Rick Thoennes' liability in negligence, breach of implied warranty of workmanlike service and breach of fiduciary duty for lack of evidence of proximate cause with regard to Plaintiffs' damages?

7. Did the lower court err by neglecting to direct Plaintiffs' to elect its remedy to prevent Plaintiffs' double recovery and further by entering a judgment that was not supported by Jury's verdict?

8. Did the lower court err by entering judgment against Marick and did the lower court err in the application of the setoff?

9. Did the lower court err in failing to grant Marick's Motions for Summary Judgment and directed verdict based upon the failure of Plaintiffs' to submit evidence to establish the standard of care upon which a breach of fiduciary duty claim should be assessed and the business judgment rule? Further, did the lower court err by failing to charge the jury with the proper law for breach of fiduciary duty, by failing to charge the business judgment rule, and by effectively setting forth a strict liability standard upon the HOA board?

STATEMENT OF THE CASE

The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge (hereinafter "Stoneledge" or "Project"). Plaintiffs made claims against two general contractors affiliated with the Project, Marick, and its affiliated member Rick Thoennes, and Bostic Construction (hereinafter "Bostic"). Plaintiffs also sued Bostic as the developer of Phase I and IMK as the developer of Phase II. Plaintiffs alleged that the exterior roofing, stonework, cedar siding, decks, windows, doors, and foundations were defectively constructed or installed. Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Only Phase I of construction is at issue in this Appeal. Bostic constructed all of the exteriors of the Phase I units alleged to be defective.

In the fall of 2013 the case was tried to verdict. On November 7, 2013, the jury returned a verdict against Marick and Thoennes for negligence, breach of warranty of workmanlike service and breach of fiduciary duty. Only one set of damages, a repair scope and estimate, was submitted by Plaintiffs against all parties on all causes of action. The jury returned a verdict for the Plaintiffs for actual damages of $3,000,000 for negligence in construction, $1,000,000 for breach of implied warranty of workmanlike service, and $1,000,000 for breach of fiduciary duty. The jury apportioned the damages amongst the parties as following:

Negligence

IMK Development Co., LLC/Marick Home Builders, LLC	40%
Bostic Brothers Construction, Inc.	60%

Implied Warranty of Workmanlike Service

IMK Development Co., LLC/Marick Home Builders, LLC	70%

Bostic Brothers Construction, Inc.	30%
Breach of Fiduciary duty	**($1,000,000.00)**
IMK Development Co., LLC	
Integrys Keowee Development, LLC	
William C. Cox	
Larry D. Lollis	
Rick Thoennes	

Judge Macaulay initially issued a Form 4 order entering judgement against all Defendants in varying amounts dated November 8, 2013. Marick promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to The South Carolina Rules of Civil Procedure, Rule 59(e). On January 22, 2015, Judge MaCaulay issued an Order denying Marick's Post-Trial Motions. Judge Macaulay issued a Form 4 order dated January 30, 2015 entering a "cumulative" judgment against Marick and Thoennes for $2,144,088.44. Marick again promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to The South Carolina Rules of Civil Procedure, Rule 59(e), on the January 30, 2015 Order. Marick contemporaneously filed a Notice of Appeal on February 20, 2015.

STATEMENT OF THE FACTS

This case was originally filed May 29, 2009 by named Plaintiff Paul H. Hund, III, M.D. an owner in Phase II (hereinafter "Hund"). (See: pleadings of Marick and Plaintiffs and Plaintiffs' Complaint.) Hund's Complaint alleged, among other things, water intrusion to the exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the Project.

Upon information and belief, the Stoneledge Owners Association (hereinafter "SOA") took the position that Dr. Hund's Complaint was improper as the SOA was responsible for the exterior of the units. In November of 2009, the owners voted to retain an attorney to represent the SOA and amend the lawsuit to include the SOA and both Phase I and Phase II of the Project. Plaintiffs again alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, inadequate installation of building components, improper site work/grading, improper stone application and undisclosed latent defects.

Bostic was the general contractor for Phase I construction. Following completion of the exterior of all Phase I units and completion of a majority of the interiors of all Phase I units, Bostic terminated construction at Stoneledge. IMK purchased the development and Marick began work as general contractor in 2005 following Bostic at the Project. Evidence has been submitted that the exteriors of the Phase I buildings were already built upon Marick's arrival and Marick performed repair work at the request of unit owner's on the Phase I units. Marick also began construction of Phase II of the Project. Only one of Plaintiffs' witnesses purchased their home from IMK, the rest were purchased from Bostic or another party.

No evidence was submitted that Marick performed the construction of the exteriors Plaintiffs' sue upon. Conversely, all of the evidence at trial was that the exteriors were complete on all of the units in Phase I before Marick began work. Rick Thoenes testified:

> All of the roofs were on, and the stone was on. Siding was on. All the framing was done. Stone was on. Paving was in. Landscaping was in. Garages were in.
>
> (Trial Transcript P. 1147 Lns 11-18.)

Rick Thonennes testified that he relied upon Bostic and the Oconee County building inspector to have done their work correctly:

> I built a lot of multi-family units and had been aware of Bostic through that construction, knew that they were a large company that had a lot of integrity. So I

assumed that the project was built like it was supposed to be. And I had understood that this project was not the reason they had filed for bankruptcy. So I had no reason to believe that they would have shortcut anything.

(Trial Transcript P. 1149 Lns 13-20.)

Plaintiff's counsel showed a photo of water damage in unit 33 throughout the trial to prove that water damage existed, but Mr. Thoennes testified that Marick never worked on that unit:

Q: You've seen and heard testimony this week repeatedly about unit thirty-three. And you said that you didn't go into unit thirty-three until – or after 2005. Will you tell the jury why? Why didn't you go into unit thirty-three after 2005?
A: Why didn't I?
Q: Yes.
A: It was unsold. I think that was the units we sold to S.D.I.
Q: You never worked in that unit; is that right?
A: I don't believe so, other than to close the windows and make sure there was –that kind of thing.
Q: And that was the one ---
A: Now, Nathan could have. I don't know. But I didn't.
Q: And that is – the photograph that has been shown to this jury throughout this trial to infer that you knew all of these water leaks were happening; right?
A: That's what the inference is, yes.
Q: But you didn't work in that unit; right?
A: Right.
Q: And ultimately it was sold, and someone else got a permit and got a certificate of occupancy and sold it to one of these homeowners?
A: That's right.
Q: You don't know what they did with those leaks or any of that?
A: No.
Q: All right.
A: That was the case in several units. I mean, we sold several units in phase one to S.D.I.

(Trial transcript P. 1172 Lns 17-25-P. 1173 Lns 1-24.)

Plaintiff and board member Ms. Funari testified that Bostic built the exterior of her unit:

Q: Ms. Furnari—Do you understand that Marick Home Builders didn't build the exterior of your townhome?
A: I understand, yes.
Q: All right. And Marick Home Builders did not sell you your townhome?
A: That's correct.

(Trial Transcript P. 276 Lns 18-25.)

Steve Taylor, the "mayor" of Stoneledge testified that the units were complete on the exterior before Marick arrived:

Q: And after Bostic left – well, did you know anything about the quality of construction in the unfinished units or the level of construction in the unfinished units after Bostic left?

A: No, other than the fact that they were basically, basically finished, you know. There were situations where there was a window left out or doors would swing open because they didn't have locks on them. And garage doors were open and – in other words, it just was pretty much abandoned.

(Trial Transcript P. 298 Lns 5-14.)

Q: Why do they call you mayor of Stoneledge, Mr. Smith?

A: I was that guy that was around. You know, as I mentioned, there were only three of us. One is an elderly gentleman, and so on. And I just seemed to be the guy that people sounded off to or talked to.

Q: Yeah. You walk around the neighborhood and keep an eye on it?

A: Yeah. I'm there all the time.

Q: Pick up trash?

A: Absolutely.

Q: Let contractors in and out of buildings?

A: Yeah. That's what I do. I let you into more than one building; right?

Q: Yeah. The mayor of Stoneledge.

A: That's right.

Q: There's no question. Nobody's going to deny it, Mr. Taylor. So you're around. All right. So you're around. And when Bostic left – so, you're right. It's just your personality, isn't it? You're just kind of around. You move around a lot, don't you, Mr. Taylor?

A: Yeah, I move around.

Q: So when Bostic left, the exteriors were up, roofs were on? Stone? Right? Siding?

A: Yeah. Yeah.

(Trial Transcript P. 322 Lns 1-24.)

Nathan Hornaday, Marick's superintendent testified that the exteriors were complete when Marick arrived on the project:

Q: If you would, describe for me the condition of phase one at Stoneledge when you arrived as a superintendent in 2005.

A: Overall condition, mainly everything was finished except for, I think, two or three units. I'm not sure. And those units had all the exterior done.

They didn't have sheetrock inside of them, but I believe – I'm not sure, but I believe everything else was finished.

Q: And when you say finished, you mean roofs were on?

A: Roofs were on.

Q: Siding?

A: Siding. There were some doors and windows – excuse me—doors missing. There were some, one, two, maybe three at the most, exterior doors missing.

(Trial transcript P. 467 Lns 12-25)

Q: And the porches and decks, were they finished?

A: Yes.

Q: And the screens up on the screened porch?

A: Yes.

Q: And the grading had been completed by the time you got there?

A: Yes.

Q: And were the buildings painted?

A: They were painted.

Q: What kind of shape was that in?

A: They needed to be repainted.

Q: Did you know when those units had been constructed?

A: No.

Q: Did you know who had constructed those units?

A: Yes. Well, I heard that it was Bostic.

(Trial transcript P. 468 Lns. 1-15)

Although building permits submitted implied Marick built from the foundation up, Rick Thoeness and Nathan Hornaday denied that any homes in Phase I were constructed from the foundation up by Marick:

Q: This one says something different. This one says, "We're going to complete the townhome from the foundation stage up to complete." Right? You see that?

A: Yes.

Q: And as you would expect, the price is a little bigger. It's eighty-four thousand five hundred sixty-three dollars and forty cents. And your fee is bigger, the four hundred dollars; right?

A: Right.

Q: So on—just taking as an example, on lot thirty-one, you have a foundation. Marick has got a foundation on its hands that y'all need to build up through completion?

A: No.

Q: Okay?

A: There wasn't a home—there wasn't one like that.

(Trial Transcript P. 504 Lns. 1-16)

Q: Were all of the units built, all thirty-seven, all the way, roofs, shingles, stone?

A: Yes.

Q: When Marick arrived?

A: Yes.

(Trial Transcript P. 511 Lns. 1-5)

STANDARDS OF REVIEW

This appeal involves standards of review for summary judgment, directed verdict, Motion for New Trial, Motion for Remittur and Motion to Reconsider.

SUMMARY JUDGMENT

Summary Judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Strother v. Lexingon County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.197). However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials

contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP, SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1190); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608, (Ct.App. 1999).

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. See Baughman, 410 S.E.2d at 545-46 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of their case. See Carolina Alliance for Fair Employment v. South Carolina Dept. of Labor, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999) (citing Baughman, 410 S.E.2d 537 (1991)).

DIRECTED VERDICT

In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-477, 514 S.E.2d 126, 130 (1999). When only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). If the court finds that a verdict for the party opposing the motion is not reasonably possible under the facts, the court must direct a verdict in favor of the moving party. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). The "[c]ourt must resolve whether it would be

reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188-189, 617 S.E.2d 125,130 (S.C.App. 2005). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-477, 514 S.E.2d 126, 130 (1999). "This rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." Hanahan v. Simpson,326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997).

MOTION TO RECONSIDER

It is proper to view a Rule 59(e) motion not only as a vehicle to request that the Court "alter or mend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration" despite the absence of those words from the rule. "Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Elam v. SCDOT, 361 S.C. 9, 21-22, 602 S.E.2d 772, 779 (2004), citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) ("purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); see also Curcio v. Caterpillar, Inc., 355 S.C. 316, 318, 585 S.E.2d 272, 273 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"). "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a

previously raised argument. It is inherently unfair to disallow such an opportunity." Elam, 361 S.C. at 21-22, 602 S.E.2d at 779.

MOTION FOR NEW TRIAL ABSOLUTE/NEW TRIAL NISI REMITTUR

Where there has been a trial by jury, a motion for new trial must be made promptly after the jury is discharged or, in the discretion of the court, no later than ten days thereafter. Rule 59(b), SCRCP. A trial judge has authority to grant a new trial outright when, sitting as the thirteenth juror charged with the duty of seeing that justice is done, the judge is convinced the facts in the case necessitate a new trial. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). It should be noted, however, that where an order granting or denying a new trial is based solely on errors of law, it is reviewable on appeal. Southern Ry. Co. v. Coltex, Inc., 285 S.C. 213, 329 S.E.2d 736 (1985).

A trial court may grant a new trial absolute on the grounds that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute; the failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal the Supreme Court will grant a new trial absolute. Weir v. Citicorp Nat'l Servs., 312 S.C. 511, 435 S.E.2d 864 (1993).

A motion for a new trial or a new trial nisi is directed to the trial judge's discretion and will be upheld unless the verdict is wholly unsupported by the evidence or so excessive or inadequate as to be a result of caprice, passion, prejudice or sympathy or the result of an abuse of discretion amounting to an error of law. Jenkins v. Dixie Specialty Co., 284 S. C. 425, 326 S. E. 2d 658 (1985). Where a verdict is deemed excessive in the sense that it indicates merely undue

liberality on the part of the jury, the trial judge alone has the power of setting it aside absolutely or reducing it by granting a new trial nisi. Bell v. Harrington Mfg. Co., 265 S. C. 468, 219 S. E. 2d 906 (1975).

ARGUMENTS

I. Directed verdict should have been granted on the issue of Marick's liability for Breach of the Implied Warranty of Workmanlike Service.

Appellants could not be liable for the cause of action for breach of the warranty of workmanlike service as Marick did not build the components of the Phase I buildings which are at issue in this case. Smith v. Breedlove, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008)(A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner.); Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989) (An implied warranty of service attaches to a builder's construction of new residential housing. A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. This is an implied warranty of workmanlike service, and is distinct from the implied warranty of habitability.); § 11-9 BUILDER/SELLER LIABILITY - IMPLIED WARRANTY OF GOOD AND WORKMANLIKE SERVICE, Anderson, S.C. Requests to Charge - Civil, § 11-9 (2009)(When a builder contracts to construct a dwelling, he gives an implied warranty that the work undertaken will be performed in a careful, diligent, workmanlike manner. This means that the townhome is constructed in a reasonably workmanlike manner. The work must be done in an ordinarily skillful manner as a skilled workman would do the work. This warranty requires the builder to use the skill that is customarily used in the industry. The builder is required to complete the construction that is

reasonably expected of living quarters of comparable kind and comparable quality.) (emphasis added)

All of the testimony at trial was that the exteriors of the units were completed by Bostic, the original general contractor on Phase I of the Stoneledge Project. (See Trial Transcript p. 864:11-p.865:15; p. 1147:8-p.1147:18; p. 467:12-p. 468:15, p. 504:1-16, p. 511:1-5; p. 298:5-14)

The evidence is clear that Bostic completely built and finished the exteriors of the units for which Plaintiffs sue. To establish a claim for breach of an implied warranty of workmanlike service, a plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner. Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), reh'g denied (Apr. 20, 2012). There was no evidence presented that Marick constructed the defective exteriors of the units and thus no cause of action for breach of an implied warranty of workmanlike service could be found.

Derek Hodgin, Plaintiffs' forensic engineer, further testified that Marick was reasonable in relying upon the Oconee County building inspector to have performed his inspection prior to Marick's involvement. See Trial Transcript 870:5-873:16. Marick was also reasonable when it walked on the project in 2005 to believe that Bostic performed its work correctly. Hodgin further admitted that Marick was reasonable to rely on the subcontractors Bostic used to perform work such as the waterproofing, foundation, framing and fireproofing subcontractors. Id.

Hodgin testified that a general contractor coming onto a project following another general contractor did not need to deconstruct the building to look for issues, but only to make repairs to areas that were openly and obviously defective. Hodgin admitted that water intrusion could take years to become readily observable. See Trial Transcript p. 877:4-16. The only way for a general contractor to become aware of previous defective construction is if that construction is

readily observable. Id at p. 870:5-873:16. Hodgin found the defects at the project through destructive testing to observe latent defects that were otherwise hidden behind components of the units. See Trial Transcript p. 873:23-p.876:3. Hodgin did not provide evidence and, in fact, was unaware of the repairs performed by Marick on Phase I of the project. See Trial Transcript p. 890:20-p.893:27. Further, water staining in one unit was not observed by Marick.

In Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E. 2d 46 (1984), the South Carolina Supreme Court held that the defendant, which took over a project and undertook to repair existing defects, had a common law duty to use due care in making the repairs, but "may only be held liable for any damages proximately caused by the alleged negligent repair, but not for any original damages proximately caused by the negligence of the [original] Builder, Architect or Contractor." Because the trial court in Roundtree Villas failed to properly charge the jury as to the law governing the Defendant's liability for negligent repair, the Supreme Court reversed and ordered a new trial as to the alleged negligent repairs only. In the present case, the Court's failure to charge the jury as to the holding in Roundtree as requested by Defendants is prejudicial error to Defendants.

Based upon the clear evidence in the case, Marick could not be liable for breach of an implied warranty of workmanlike service for work done by Bostic which included all of the exterior work on the buildings. No evidence was submitted or argued regarding the scope or cost of improper repairs made by Marick. Therefore, the jury should not have been charged implied warranty of workmanlike service as to Marick and a directed verdict should have been granted for Marick on that cause of action for any work not performed by it.

II. It was error to fail to charge the jury that the claim for Negligence and Warranty of Workmanlike Service as to Marick could only arise from the work performed by Marick

The trial court failed to charge the jury on the proper elements of negligence for a subsequent owner for original construction defects or similar limitations for breach of the implied warranty of workmanlike service, as set forth above. South Carolina precedent makes clear that a subsequent purchaser of a project cannot be liable for the existing work of a predecessor builder. In Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E. 2d 46 (1984), the South Carolina Supreme Court held that the defendant, which took over a project and undertook to repair existing defects, had a common law duty to use due care in making the repairs, but "may only be held liable for any damages proximately caused by the alleged negligent repair, but not for any original damages proximately caused by the negligence of the [original] Builder, Architect or Contractor." Because the trial court in Roundtree Villas failed to properly charge the jury as to the law governing the Defendant's liability for negligent repair, the Supreme Court reversed and ordered a new trial as to the alleged negligent repairs only. In the present case, the Court's failure to charge the jury as to the holding in Roundtree as requested by Defendants is prejudicial error to Defendants.

III. It was error to charge the jury Warranty of Habitability

The jury should not have been charged implied warranty of habitability. The cause of action for breach of the implied warranty of habitability was dismissed prior to trial. (See Order filed October 29, 2013). During the charge for both liability and apportionment, Judge McCauley charged the jury the law on warranty of habitability twice and advised the jury that it arose from the "sale" of the units. (Trial Transcript pgs. 1730, 1752-1753.) Judge McCauley instructed the jury that the warranty is "presumed to be included in every sale". Thereafter, Bostic's counsel argued that Marick sold 70% of the units and therefore should be liable for 70% of the damages – which the jury in fact did:

> Now, as far as the allocation, the second allocation that y'all are going to have to have on the breach of warranties, the breach of warranty of workmanlike service, here's the way I think you need to look at it. All the testimony in the record says that Bostic sold/completed ten of these units. That makes them twenty-seven percent liable for that million dollar number. And I think that's fair, just and reasonable. You put us down for the ones that we sold. You put Marick down for the ones that they sold. And I think that is a fair, just and reasonable award.

Trial Transcript 1772.

Accordingly, the jury's apportionment of damages for these causes of action is clearly erroneous, and is likely based on juror confusion arising from the Court's erroneous charge of inapplicable law as well as the Court's refusal to charge the applicable law.

"Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." Vinson v. Hartley, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct.App. 1996). "[T]he trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." *Id.* at 403, 477 S.E.2d at 722. "The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion." *Id.* at 403-04, 477 S.E.2d at 722 (citations omitted). The discretion afforded the trial judge is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them..." *Id.* at 404, 477 S.E.2d at 723 (citation omitted). When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and

awards that are actuated by passion, caprice or prejudice. Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000). If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives, the trial judge is required to grant a new trial absolute. *Id.* Based upon the above, a new trial should have been granted.

IV. It was error to prevent counsel from impeaching Plaintiff's expert during closing arguments

The trial court erred by limiting the closing argument of defense counsel for failure to impeach an expert with his deposition, as there was no need to impeach that expert due to his admission in response to counsel's question. Judge McCauley upheld an objection to the closing argument regarding Plaintiff's expert's credibility due to a contrary argument made in another case despite that expert's admission during cross examination that his opinion was different in the other case:

> I took Mr. Hodgin's deposition in this case. And as you know, as you've heard, his repair scope is to tear it all down. Tear it all off. You heard Rick Moore say his scope takes all of this stone off, all of the cedar siding, all of the cedar roof, framing, everything, whether it's wet, ruined, perfect, pristine, take it all off. That was his testimony. I took his deposition in this case. He said tear it all down. He worked for plaintiffs eleven days later. Eleven. I was in a deposition. He was hired by a defendant ---
>
> Mr. Lyles: Your Honor, I would object to this argument. He's testifying about a deposition that he took with Derek Hodgin in another case.
>
> Mr. Imhoff: I asked him about this, Your Honor, on the stand. He admitted it. It's in the testimony.
>
> The Court: What's the relevance to this case?
>
> Mr. Imhoff: Credibility, Your Honor. Credibility.

The Court: Did you ask him – did you challenge him under Rule 613? Did you show him what he had said?

Mr. Imhoff: I asked ---

The Court: It was a deposition? It was written. The rules require that you do that in order to impeach your witness' credibility.

Mr. Imhoff: Your Honor, I have the deposition with me.

The Court: Well, you didn't use it at the time, so I'm going to tell the jury to disregard anything that has to do with a deposition because the rules provide that if you're going to challenge a person's answer to the question, did you make this statement, they have the right to explain their answer. And he's not here today to do it. That's beyond the scope of proper arguments. And I'm going to direct you to disregard anything about credibility of the witness based on a prior inconsistent – alleged inconsistency.

Trial Transcript P. 1667 Ln. 23 –P. 1669 Ln. 10.

That expert had previously admitted during cross-examination that he had testified differently in another case.

Q: You worked for the contractor and developer in a case called Ravines at Creekside; is that right, Mr. Hodgin?
A: Yes, sir.
Q: And that was similar construction, wasn't it? Asphalt shingle roof, lap siding, stone?
A: Yes.
Q: Right? And you testified in that case that not all of the roofs, not all of the siding and all of the stone had to come off; correct?
A: That's correct.
Q: And you were paid by the defendant in that case for that opinion; correct?
A: It's not for the opinion. It's for the time, yeah.
Q: And, Mr. Hodgin, were you deposed in that case?
A: Yes.
Q: And when you testified that the shingles, roof, siding, and stone did not all need to come off, that was eleven days after I took your deposition in this case, wasn't it?

A: I don't know. If you say that's what it was.

Trial Transcript P. 904 Ln. 9-P. 905 Ln. 4

The court further demanded that defense counsel "move on" while arguing credibility of Plaintiffs' expert for failure to identify that 7 units at the project did not have decks. For all of the forgoing, in addition to those made at or before trial, the Jury was clearly misled.

V. The trial court erroneously found that Defendants Marick, IMK, IKD, William Cox, Larry Lollis and Rick Thoennes were amalgamated with one another for the purposes of Plaintiffs' claims

The trial court's ruling amalgamating Marick, IMK, IKD, Williams Cox, Larry Lollis and Rick Thoennes for purposes of liability was erroneous, unsupported and created a multitude of problems involving the jury charges (or lack thereof), the verdict form and both judgments entered by the trial court. This confusion resulted in an ambiguous verdict unsupported by the evidence at trial.[1]

Under South Carolina law, amalgamated corporations share liability if the court finds an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities. Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 358, 725 S.E.2d 112, 118 (Ct. App. 2012), reh'g denied (Apr. 20, 2012). South Carolina courts have looked at the following aspects of corporate formalities to determine whether an amalgamation between corporations exists: offices, letterhead, owners, oversight, contact information and board members. Id.; See also: Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). In Pope v. Heritage Communities, 305 S.C. 404 (2011), the Court of Appeals found that three corporations were amalgamated due to shared

[1] To the extent the trial court relied upon the legal theories of piercing the corporate veil and/or alter-ego theory, Plaintiffs' counsel conceded at trial that piercing the corporate veil and/or alter-ego theory are not applicable in this case. See Trial Transcript p. 1332:15-1333:21.

location, telephone number, board members and vague delineation of employees. This case involved a suit by a property owners' association developer/seller HCI and the general contractor BuildStar. Id. at 410.

In this same vein, the trial court failed to charge the jury pursuant to S.C. Code Ann. §33-44-5303 which provides: "the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." A director, officer, or agent is not liable for the violations of duty of a corporation or of other officers or agents merely because of his office. He is liable only for such breaches of duty in which he has participated or which he authorized or directed. BPS, Inc. v. Worthy, 362, S.C. 319, 328, 608 S.E.2d 155, 160 (Ct. App. 2005).

South Carolina has no cases which amalgamated a corporation with an individual. The trial court improperly created new law in ruling that the individuals were amalgamated with the corporate entities.

The trial court further erred in failing to perform the proper analysis involved in the amalgamation of interest theory during Marick's Motion for Directed Verdict:

> "MR. IMHOFF: Your Honor, have you done the analysis between Marick and the individual owners of Marick that these individuals were so amalgamated with Marick that there was a blurring of the distinction between the individuals and the corporation? Because I think it needs to be done twice here.
> THE COURT: Well, I think I've done enough to -- what is it? -- see that there was a certain mixture of the two corporate groups by reason of their individual members."

See Trial Transcript p. 1338:16-25.

The trial court also found:

"I find that there is a little too much self-dealing, if you would, please, in this that needs to be sorted out. And I think the jury would be the better group to do that. So I'm going to deny your motion."

Id. at p. 1338:12-15.

No evidence was submitted on the elements of amalgamation of interests at the trial. No evidence was provided that IMK and Marick shared phone numbers, offices, letterhead, employees or board members so as to avoid corporate formalities. Marick's members were Rick Thoennes and his son, Rick Thoennes, III. See Trial Transcript p. 1140:17-23. Marick and Integrys Keowee operated within the IMK umbrella. Marick was to provide the construction at its cost and Integrys Keowee provided the investment with Marick and Integrys Keowee to split the profits. See Trial Transcript p. 1109:14-1110:1. Marick would submit bills to IMK for hard costs associated with the Stoneledge project and IMK would issue a check payable to Marick for those hard costs. See Trial Trans. p. 1143:23-p. 1145:17. Larry Lollis testified that he was not familiar with the day to day operation of IMK and was only a passive investor. See Trial Transcript p. 1090:21-p1091:9. Lollis was not affiliated corporately with Marick. See Trial Tr. 1092:20-23.

Robert White, a unit owner at Stoneledge, testified that he purchased the unit from IMK and was aware that IMK was the developer. See Trial Transcript p. 1045:5-14. Mr. White testified that Nathan Hornaday was employed by Marick and that Mr. Hornaday performs punch list work for Marick. See Trial Transcript p.1047:13-21.

The trial court failed to conduct any analysis involving the elements of amalgamation of interests under established South Carolina law. Additionally, the trial court ignored precedence by amalgamating individuals with corporations. Plaintiff's counsel stipulated that he did not

allege or prove piercing the corporate veil or alter ego leaving amalgamation of interests as Plaintiff's sole theory for blending Marick, IMK, IKD, Williams Cox, Larry Lollis and Rick Thoennes together for purposes of determining liability. The trial court's errors were prejudicial to Marick and caused mass confusion regarding the jury charges, verdict form, apportionment and subsequent orders.

VI. The lower court erred in denying Marick's Motion for Partial Directed Verdict regarding the lack of proximate cause of Plaintiffs' Damages

Marick could not be liable for construction defects emanating from work it did not perform. Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. McKnight v. S. Carolina Dept. of Corrections, 684 S.E.2d 566 (S.C. App. 2009). Proximate cause is an essential element common to alternative theories of negligence and breach of implied warranty. Small v. Pioneer Mach., Inc., 494 S.E.2d 835, 842 (S.C. App. 1997).

A subsequent builder/developer that takes over a project may only be held liable for any damages proximately caused by the alleged negligent repair, but not for any original damages proximately cause by the negligence of the initial builder, architect or contractor. Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984). One who undertakes to make repairs to defective components of a construction project is not liable for the negligent builder or contractor. Id. The liability of a subsequent builder/developer is expressly limited to the repairs the subsequent builder/lender actually performed. Regions Bank v. Coll. Ave. Dev.,LLC, CIVA8:091095-RBHBHH, 2010 WL 985298 (D.S.C. Jan. 22, 2010) report and recommendation adopted as modified sub nom. Regions Bank v. Coll. Ave. Dev, LLC, CIV .A809CV01095RBH, 2010 WL 973480 (D.S.C. Mar. 10, 2010).

There was limited evidence that any repairs made by Marick were defective and proximately caused damages. There was no evidence Marick constructed the original exteriors. Defendant Bostic was the original general contractor on Phase I of the Stoneledge Project who built and got permits for all units. See Trial Transcript p. 864:11-p.865:15. The exteriors of the buildings were constructed before Marick came on the Stoneledge Project. Id.; See also Trial Transcript p. 1147:8-p.1147:18. Derek Hodgin testified that a general contractor who undertakes to make a repair is responsible for an inadequate repair; however, Mr. Hodgin offered no testimony that a general contractor is responsible for defective construction work performed by a previous general contractor. See Trial Transcript p. 690:18-p.691:6. Hodgin did not provide evidence, and in fact was unaware, of the repairs performed by Marick on Phase I of the project. See Trial Transcript p. 890:20-p.893:27.

The testimony from Hodgin was that the repair scope from the time Marick came on the project in 2005 would be the same today except that there could potentially be differences in the allowances made for the damaged O.S.B. sheathing and framing. Id. at p.771:4-21. Hodgin testified to the following regarding the scope of repair being essentially the same:

> Certain things wouldn't change at all. The need for the fire-rated walls to be correct would not change. The need for every window to be removed and reset with proper flashing would not change. The waterproofing of the foundation walls would not change. The balcony reconstruction, I don't think would change. There may have been -- you may have had some framing to salvage in the balconies in 2004. I don't know. But other than that, it would essentially be the same fix.
>
> Trial Transcript p. 901:21-p.923:21.

John Folk prepared an estimate of repair based upon Hodgin's scope of repair and testified the damage to the O.S.B. sheathing and framing would cost two hundred and fifty thousand dollars ($250,000.00) to repair. See Trial Transcript p. 991:14-21.

Marick's partial Motion for Directed Verdict based upon lack of proximate cause should be granted based upon the testimony and evidence presented at trial. The standard established through Plaintiff's own expert is Marick is not responsible for the negligent construction performed by Bostic. The testimony is clear that the scope of repair to address Bostic's defective work would be the same today as it would have been in 2005 when Marick arrived at the Stoneledge project except for potential damage to O.S.B. sheathing and framing. Accordingly, the verdict against Marick for negligent construction should be limited to the repair estimate to repair the O.S.B. sheathing and framing.

VII. The trial court erred in failing to instruct the Plaintiffs to elect a remedy from the verdicts awarded under separate causes of action awarding damages for the same facts and circumstances, and further erred in entering a judgment which did not correlate with the jury's verdict.

The trial court erred by failing to require that Plaintiffs elect a remedy based upon the jury's findings and award. All of the damages awarded to the Plaintiffs by the jury arise from the same set of facts and are not distinct to different causes of action.

Within the verdict form submitted to the jury, included were questions to the jury seeking to determine if in fact the jury found that the Appellants were liable to the Respondents under the following causes of action: (1) Breach of Warranty; (2) Negligence; and (3) Breach of Fiduciary Duty. The jury ultimately found in favor of the Plaintiffs as to each cause of action. The jury then attributed an amount of damages awarded pursuant to each separate cause of action. In the verdict form, the apportionment form and otherwise, the trial court failed to provide appropriate direction to the jury or any safeguard to ensure that the damages awarded for negligence, breach of implied warranty of workmanlike service and breach of fiduciary duty did not result in a double/triple recovery of the same damages by Plaintiffs.

"Election of remedies involves a choice between two or more different and coexisting modes of procedure or forms of relief afforded by law for the same injury." Harper v. Ethridge, 290 S.C. 112, 120, 348 S.E.2d 374, 379 (Ct. App. 1986). "Stated another way, '[e]lection of remedies is the act of choosing between different remedies allowed by law *on the same state of facts.*'" Id.

"[T]he basic purpose of election of remedies is to prevent double recovery for a single wrong, application of the doctrine should normally be confined to cases where double compensation of the plaintiff is threatened." Harper v. Ethridge, 290 S.C. at 121.

> In many instances, this means the case can go to the jury on all causes of action supported by the evidence at trial, with election required after verdict but before judgment is entered. *See, e.g., Nichols v. State Farm Mutual Automobile Insurance Co.,* 279 S.C. 336, 306 S.E.2d 616 (1983) (circuit judge allowed case to go to jury on two causes of action but after verdict entered judgment on only one cause of action to prevent double recovery). When the facts entitle a party to alternative remedies, those remedies are not considered inconsistent, and he may plead and prove his entitlement to both. [Citation omitted] As we have previously observed, [t]his rule rests on the principle that the plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery.
>
> Id.

"When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both." Williams v. Riedman, 339 S.C. 251, 275 (Ct. App. 2000). In the case at bar, the verdict form and trial court's interpretation of the jury's finding leads to a double recovery. As such, the Plaintiffs must be required to select a single remedy.

It is clear from the jury's verdict that the actual damages that could be awarded against Marick by the jury and against Bostic by the jury, as a matter of law and upon all of the evidence, were the very same actual damages awarded against Marick and Bostic on the breach of implied warranty of workmanlike services cause of action. As a result, the case should be

remanded back to the trial court and the Plaintiffs should elect their remedy and the trial court should then enter a judgment on the elected cause of action only. Additionally, the actual damages awarded to Plaintiffs against Marick under the breach of fiduciary duty cause of action are the very same actual damages awarded under the negligence and implied warranty causes of action. Plaintiffs' counsel, in closing argument, admitted that all of the damages requested were exactly the same under each cause of action claimed. (Trial Transcript P. 1655 Lns. 8-10).

In determining that the Plaintiffs were entitled to a cumulative judgement as to the actual damages awarded under each of the three causes of action, the trial court and the Plaintiffs relied upon the case of Keeter v. Alpine Towers Inter, Inc., 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012). In Keeter, the plaintiff set forth three causes of action and each cause of action was submitted to the jury in the verdict form and included a blank for a damages amount to be written on each cause of action. Id. The jury awarded damages to the Plaintiff in Keeter under each cause of action pled. As a result, once the verdict was returned, the trial judge questioned the jury regarding the verdict and the jury indicated that the damages awarded were to be cumulative. No such discussion with the jury occurred in the case at bar.

The jury awarded damages in the following particulars: (1) negligent construction - $3,000,000.00; (2); breach of implied warranty of workmanlike service: $1,000,000.00; and (3) breach of fiduciary duty: $1,000,000.00. It is undisputed that all of the damages awarded are the same and arise from the same set of facts. When the jury awarded damages of $3,000,000.00 under the negligence cause of action, the jury further apportioned liability for each as follows: 60% - Bostic; and 40%-Marick. With regard to Plaintiffs' cause of action for breach of implied warranty, as a matter of law and evidence, the jury could not award actual damages that were different for the same construction defects and damages. The law behind breach of implied

warranty leads to damages that are the same or similar to that of damages awarded as a result of negligent construction: "A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 344 (1989). While the jury elected to award only a fraction ($1 Million) of the actual damages it awarded on the negligence cause of action, that does not change the fact that the actual damages awarded on the breach of warranty claim are indisputably duplicative of actual damages awarded on the negligence claim.

It further should be noted that the evidence is clear that Marick was only involved with performing minimal repairs to the properties, and that the repairs suggested by the Plaintiffs' experts were repairs that would have been required whether or not Marick came to the property or not due to Bostic's original construction work. The testimony from Derek Hodgin was that the repair scope from the time Marick came on the project in 2005 would be the same today except that there could potentially be differences in the allowances made for the damaged O.S.B. sheathing and framing. Id. at p.771:4-21. Hodgin testified to the following regarding the scope of repair being essentially the same:

> Certain things wouldn't change at all. The need for the fire-rated walls to be correct would not change. The need for every window to be removed and reset with proper flashing would not change. The waterproofing of the foundation walls would not change. The balcony reconstruction, I don't think would change. There may have been -- you may have had some framing to salvage in the balconies in 2004. I don't know. But other than that, it would essentially be the same fix.

See also Trial Transcript p. 901:21-p.923:21.

John Folk prepared an estimate of repair based upon Hodgin's scope of repair and testified the damage to the O.S.B. sheathing and framing would cost two hundred and fifty thousand dollars to repair. See Trial Trascript p. 991:14-21. That damage is the only damage which Hodgin attributed to repair work and not original construction.

Further, the jury's inexplicable apportionment of liability for damages on the implied warranty claim, among the same two builders and on the identical set of facts and evidence presented with regard to the negligence claim, can logically mean only one of two things: the jury entered its verdict in complete disregard of the applicable law and/or the evidence, or the jury did not understand the applicable law so as to enable it to enter a valid and legal verdict. Under the exact same evidence as to each claim (which builder constructed or repaired what work, resulting in which damages), and considering that each builder could only be legally responsible for damages its actions or omissions caused (whether under a theory of negligence or breach of warranty), it is not possible to find Bostic to be responsible for 60% of the damages under the negligence claim but only 30% of the same damages under the implied warranty claim (jury verdict apportionment under breach of warranty claim was 70% to Marick and 30% to Bostic). Nor is it possible to find Marick responsible for 40% of the damages under the negligence claim but 70% of the same damages under the implied warranty claim. Frankly, it would appear that the court has no option but to throw out the verdict on breach of implied warranty even if election remedies was not required in order to avoid double recovery of Plaintiffs' actual damages.

As it concerns the $1,000,000.00 in actual damages awarded by the jury on the breach of fiduciary duty claim, said damages are also undoubtedly the same actual damages awarded by the jury on the negligence cause of action. When addressing a developer's fiduciary duty owed to the homeowners and HOA in a development, courts have held that the developer's failure to turn over the common areas in good repair at the time they are conveyed to the HOA, or to ensure that the HOA had sufficient funds to maintain the common areas, subjected the developer to liability. See Goddard v. Fairways Dev. Gen. Partn., 310 S.C. 408, 414 (Ct. App. 1993).

However, as noted in the breach of fiduciary section of this Brief, "any liability imposed upon the developer is limited to the costs that would have been required [at the time the common areas were conveyed to the HOA] to bring the common areas up to standard." Id. at 415-416. Further, the standard for damages awarded under a breach of fiduciary duty claim is the "cost of repairs." Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp., 349 S.C. 251, 256, 562 S.E.2d 633, 636 (2002). Based upon the law applied by the trial court concerning the liability at issue in a breach of fiduciary duty context, it is perfectly clear that the actual damages flowing from the fiduciary responsibility are exactly the same as the actual damages associated with the negligence claim and breach of warranty claim; monies to repair the buildings. The damages awarded by the jury either do not follow the law and further are duplicative and lead to Plaintiffs receiving a double recovery.

VIII. The court erred in entering the judgment and applying setoff.

Over a year after the verdict/judgment was entered in this case, the Court granted a post-trial motion and amended the judgments entered against each party. On November 8, 2013, a judgment was entered by the trial court, which was based in whole or in part upon the verdict returned by the jury on the Verdict Form and the Apportionment Form. The November 8, 2013 Judgment entered by the trial court provided as follows: IMK - $1,150,000.00; Larry Lollis - $200,000.00; William Cox - $200,000.00; Rick Thoennes - $200,000.00; Integrys - $200,000.00; Marick - $950,000.00; and Bostic - $2,100,000.00.

After numerous post-trial motions and memoranda in support thereof were presented to the trial court over the course of more than one year, the trial court altered/amended the judgment entered against each party. On January 30, 2015, the trial court filed an amended order which provided as follows: (1) negligence: (a) Bostic - $2,144,088.23; (b) Marick & IMK:

$857,635.29; (2) Breach of Warranty: (a) Bostic: $643,226.47; Marick: $2,144,088.23; (3) Breach of Fiduciary Duty: (a) IMK: $2,144,088.23; (b) Integrys: $2,144,088.23; (c) Rick Thoennes: $2,144,088.23; William Cox: $2,144,088.23; and Larry Lollis: $2,144,088.23.

The damages awarded and apportionment provided do not correlate with the evidence presented as Plaintiffs own witnesses, including their retained expert, Mr. Hodgin, testified that the vast majority of the construction defects at issue, and the damages flowing from such defects, arose out of work performed by Bostic and its subcontractors, not from the work of Marick. As noted above, John Folk prepared an estimate of repair based upon Hodgin's scope of repair and testified the damage to the O.S.B. sheathing and framing would cost two hundred and fifty thousand dollars to repair. See Trial Transcript p. 991:14-21. That damage is the only damage which Hodgin attributed to repair work and not original construction. Thus, awarding the amount of damages awarded against Marick and IMK for the construction defects at the property does not correlate with the weight of the evidence presented.

First and foremost, the verdict rendered was in error because the verdict and apportionment forms submitted to the jury were deficient. The forms, which together instructed the jury to apportion liability for the actual damages resulting to the Plaintiffs as a result of negligence based on a percentage of negligence attributable to each defendant, were erroneous. The jury should have been instructed to determine the separate and distinct damages arising from negligent construction by Bostic and its subcontractors and the separate and distinct damages arising from negligent repairs of Marick, if any. The same can be said for the verdict and apportionment forms for the breach of warranty cause of action.

The apportionment errors in the jury's findings in the apportionment form, in the November 8, 2013 Judgment, and repeated in the January 30, 2015 Judgment must be corrected or the Defendants should be afforded a new trial.

Secondly, the trial court must set off in the amount of the settlements received by Plaintiffs from other culpable parties as against the judgment entered against each of the Defendants. Based upon information supplied to the Court by the Plaintiffs, Plaintiffs received $2,855,911.77 from settlements with other culpable parties. Defendants moved for the trial court to apply that set off to the original judgment (Trial Tran. Page 1525) entered against Marick and Thoennes. Defendants believe that consideration of the set off argument, in addition to the election of remedy argument, gave rise to the lower court's Order dated January 30, 2015 changing the judgment amounts. This has led to the erroneous cumulative verdict which was not the intent of the jury.

Lastly, and most importantly, the trial court's January 30, 2015 Order altering and amending the judgment entered in this case, was improper and is completely contrary to the evidence presented at trial, the applicable law, and the Verdict Form presented to the jury. Under section 3 of the Verdict Form, the Court submitted the question of liability for breach of fiduciary duty to the jury separately for IMK, IKD, Thoennes, Cox & Lollis. The jury verdict form indicates that the jury set the actual damages resulting to the Plaintiffs as a result of the breach of fiduciary duty cause of action at $1 Million. This represents the maximum sum that the jury allowed for recovery pursuant to the Plaintiffs' breach of fiduciary duty cause of action. No other claims against the individual Defendants including Thoennes were considered.

Once applied, the Defendants moved the trial court for application of set off in the amount of the settlements received by Plaintiffs from other parties ($2,855,911.77). Defendants requested set offs in the amount of $2,855,911.77 for Marick and Thoennes.

In response, Plaintiffs' counsel argued, by way of correspondence to the trial court dated November 25, 2013 that "in conformance with the Court of Appeals' decision in Keeter v. Alpine Towers, the full amount of the cumulative jury award, $5 Million, be assigned to each of the three causes of action (negligence, breach of warranty, and breach of fiduciary duty). After making said argument, the correspondence went on to provide that applying the apportionment act to the 'cumulative judgment" would result in the following judgments after set-off was applied (for breach of fiduciary duty as Thoennes): Thoennes: $2,144,088.23.[2]

No colloquy was made between the counsel and the trial court as to the cumulative nature of the verdict, nor was there inquiry made of the jury as to its intent. Defendants dispute that there was ever a discussion concerning the verdict being cumulative. Defendants do not believe this exchange occurred or that it occurred in such a way as to have properly given Defendant an opportunity to object or argue the matter after the verdict was rendered or the trial court made the alleged ruling. Even if the exchange had occurred, said ruling is for the jury, and not the court, and can only be cumulative when the claims at issue are against the same Defendants. Without commonality of claims and defendants, making the recovery cumulative calls for speculation as to the authority provided by the jury, which limited the Plaintiffs to certain awards under each cause of action pled.

In Keeter v. Alpine Towers Int'l, Inc., which was the sole authority relied on by Plaintiffs' counsel in support of the universal cumulative verdict with set-off, Plaintiff brought an

[2] The same amount of damages was attributed to each individual defendant and IMK and IK.

action against Alpine, for strict liability, negligent design, and negligent training after Plaintiff was injured and deemed a paraplegic as a result of a fall. The jury returned a verdict for the Plaintiff on each cause of action against Alpine. The jury awarded damages as follows: strict liability - $500.00; negligent design actual damages - $900,000.00; negligent design punitive damages - $160,000.00; negligent training actual damages - $2,500,000.00; and punitive damages for negligent training - $950,000.00. Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 184, 187 (Ct. App. 2012). Once the jury returned the verdicts, Plaintiff made a motion asking the court to inquire of the jury whether it meant for the damages awarded to be cumulative. While the jury was still in the courtroom, the judge asked the forelady and she responded that yes, it was to be cumulative. Id. at 200. The discussion between the judge and the forelady required a back and forth between the two to make a final determination of the jury's intent.

In the case at bar, there was no such colloquy. The trial court did not make such inquiry of the jury, and the jury did not decide such issue. As it stands, the trial court has invaded the province of the jury in two ways: (1) by ruling that the verdict is cumulative sua sponte without inquiring of the jury as to its intent; and (2) by re-writing the verdict and imposing a new and different damages amount over and above the amounts awarded for each individual cause of action. No evidence was ever presented in this case to persuade that the jury intended that the damages amounts written in the three blanks by the jury were to be added together for a total amount, unlike the jury intent as evidenced in Keeter. As noted further in Allegro, Inc. v. Scully, 409 S.C. 392, 405, 762 S.E.2d 54, 61 (Ct. App. 2014), reh'g denied (Aug. 26, 2014), cert. granted (Apr. 22, 2015), the court determined the intent of the jury's award by questioning the jury before and after the verdict was rendered. No interaction occurred between the court and the jury in the case at bar to determine the intent of the jury.

"It is not fair for the trial court to say what it thinks the verdict should be." Camden v. Hilton, 360 S.C. 164, 173 (Ct. App. 2004). A jury's verdict should be upheld when possible to do so and to carry into effect what was clearly the jury's intentions. Id. The trial court in this case decided to change the jury's award to what it thought the award should have been. It made this determination while using no guidance from that of the fact finder, the jury. This is a complete violation of the jury system that is so great in this country which affords ones peers to resolve disputes and not one appointed trier of fact. If this court upholds the trial court's willful violation of the jury's role, it will leave the court system in South Carolina with less credibility and honor to the citizens that rely upon it to resolve disputes.

This issue should be remanded to the lower court with one of the following to occur: (1) the court requires the Plaintiffs to elect its remedy and choose one of the awards rendered by the jury; or (2) require a new trial.

IX. The trial court erred by failing to properly charge the law associated with a breach of fiduciary duty action and the business judgment rule.

No evidence or expert witness testimony was presented to the jury to establish a standard of care upon which a breach of fiduciary duty could be asserted. Over the objections of Defendants, the Court charged the jury to the effect that a developer of a planned unit development owes a fiduciary duty to the property owners' association to turn over common areas that are in good repair or to provide the association with funds sufficient to effectuate any needed repairs without further explanation. The charge given by the Court is not an accurate statement of the law of South Carolina, and it incorrectly expresses and implies that such a duty by a developer is akin to strict liability for defects, whether latent or patent. This was a critical issue in the trial as there was no evidence that Thoennes or the other members of the HOA Board, had any knowledge of unrepaired defects at the Project at the time control of the HOA

Board was transferred to the homeowners in 2007. Rather, the evidence was that any defects then existing were latent, unknown and/or repaired when identified.

The jury should have been charged with the following accurate statement of the law, as requested by the Defendants: "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." Goddard v. Fairways Dev. Gen. Partn., 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." Baumann v. Long Cove Club Owners Ass'n, Inc., 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008).

It is true that certain South Carolina cases have recognized a fiduciary duty on the part of a developer of a planned unit development (PUD) "to insure that the common areas are in good repair at the time they are conveyed to the property owners association or to provide the association with funds sufficient to effectuate any needed repairs to those areas." Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp., 349 S.C. 251, 256-57, 562 S.E.2d 633, 636-37 (2002); see also Goddard, 310 S.C. at 414, 426 S.E.2d at 832; Magnolia North Prop. Owners' Ass'n, 397 S.C. at 374-75, 725 S.E.2d at 126-27. However, each of these opinions makes it clear that the quoted statement is not a complete and accurate statement of the law. There is no indication that these cases are intended to establish what amounts to a strict liability standard for defects, both known and unknown, at the time control of the HOA is transferred from the development to the homeowners. Importantly, each of these cases was decided in the context of patent defects only, of which the developer was aware but did not repair or provide

funds for repair. The quoted holding must be read in this context, and any charge to the jury should have made clear that the developer's duty did not include the repair of (or the provision of funds to repair) defects which were latent at the time control of the HOA was transferred to the homeowners.

In Goddard, the complaint was not construction defects but the developer's known failure to perform routine maintenance and repair of the common areas. The court recognized that the substandard nature of the common areas was known to the developer at the time it turned the common areas over to the HOA. "While the evidence shows the Developer provided some maintenance of the common areas at its own expense until it belatedly organized the Association, there is evidence that the common areas were substandard at the time the Developer turned them over to the Association. There is also some evidence the Developer seized the opportunity in 1987 to 'unload' the common areas on the Association without a plan to establish a reserve or a plan to fund the Association until such time as assessments were adequate to cover maintenance expenses. It seems unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." Goddard, 310 S.C. at 415, 426 S.E.2d at 832. The facts of this case do not correlate with the facts of Goddard, as is noted herein, when repairs were requested by the homeowners, those repairs were performed and further, when the HOA was transferred to the HOA, there was in excess of $70,000.00 in the account.

In Concerned Dunes West Residents, the court recognized that, before the developer executed a deed conveying the roads and other common areas within the development to the POA, the developer, "learned that significant additional road and drainage repairs were needed

within the development." Concerned Dunes West Residents, 349 S.C. at 255, 562 S.E.2d at 635. In citing and relying upon Goddard, the Supreme Court specifically cited the Goddard facts of patent defects quoted above.

In Magnolia North Prop. Owners' Ass'n, the court acknowledged that the subject defects were patent, not latent, at the time control was turned over to the POA. "Here, until the turnover, Appellants [developer] assured the unit owners the construction defects would be repaired, and, as a result, the owners were justified in relying on those assurances." Magnolia North Prop. Owners' Ass'n, 397 S.C. at 373, 725 S.E.2d at 126 (in context of affirming trial court's ruling that defendants were equitably estopped from asserting defense of statute of limitations). In this case, no evidence was ever presented that any repairs to patent defects were needed when the HOA was transferred to the homeowners.

The facts presented by HOA representative Steve Taylor, were that when Bostic left, Marick came in and saved this development. Trial Tr. Page 323-325. Further, Taylor testified that while Marick/Thoennes were onsite from 2005-2008, Taylor was not aware of any of the following: (1) defects to deck columns; (2) roofing defects; (3) that all foundations were leaking; (4) believed that the siding "wasn't right" but never made any complaint/comment to Marick, Thoennes or the HOA regarding his opinions of the siding; and (5) was not aware of problems with the stonework, or windows at the project. Trial Tr. Page 332-333.

The testimony from Steve Taylor further provides that during the time that Thoennes and others were in charge of the HOA, Marick was onsite and providing repairs as requested by the homeowners.

Q: Did Marick have someone that would respond to repair requests?
A: Yeah. There was a gentleman by the name of Nathan who was on site.
Q: And they also had an email address and phone numbers, didn't they?
A: Yeah.

Q: Okay. So if you're a homeowner between 2005 and 2008 at Stoneledge, you could call or you could email or you could grab Nathan, you could grab Rick?
A: Yeah.

(Trial Tr. Page 333 Ln. 15-25.)

Mr. Taylor went on to admit that he did not complain of the HOA or Marick from 2005-2008, as Marick had representatives available throughout to assist the homeowners with complaints. Trial Tr. Page 334 Ln. 17-25. Mr. Taylor testified that Marick and Thoennes helped make Stoneledge "an attractive community" and further, when turning the HOA over the homeowners, left the HOA with approximately $70,000.00 to $100,000.00. Trial Tr. Page 337 Ln. 22 – Page 339. Mr. Taylor ultimately admitted that Mr. Thoennes was honest and had done a good job handling the HOA. Trial Tr. Page 340 Ln 1-5. Mr. Taylor did not say that Thoennes and the other members of the HOA turned the HOA over to the homeowners while ongoing problems or defects existed. If that had occurred, certainly Mr. Taylor would have testified to the same and certainly the Plaintiffs would have presented documentation of the homeowners' objections. That is why this case differs from the cases cited above, as there was no evidence that the HOA members including Thoennes, when the HOA was transferred to the homeowners, were aware of patent defects that were left unrepaired (the business judgment rule applies). Further, even if there were patent defects, which there is no evidence of, Thoennes and the HOA left the homeowners between $70,000.00-$100,000.00 in the HOA's account.

Marick's representative Nathan Hornaday testified that if a repair was requested, he does not recall Mr. Thoennes ever refusing to make the repair. Trial Tr. Page 496 Ln. 10-12. Mr. Thoennes' testimony reveals the same:

Q: And when the homeowners, Mr. Taylor and everybody else, would come to you, did you repair their units or instead of making repair to their units, hire someone to repair their units?

A: Yes. I can only think of a rare instance where we didn't, and that would have been some kind of cosmetic thing inside the unit that we probably would not have tackled. But even inside, we did warranty work. We fixed doors and sump pumps and those kinds of things. It was more the cosmetic stuff that we didn't feel like we should fix.

Trial Tr. Page 1174 Ln. 3-13.

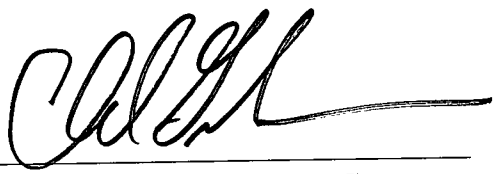
Further, individual Defendant William Cox testified that when repairs were identified they were performed and that he was unaware of any construction defects when property was sold. (Trial Transcript P. 1132-1133)

The testimony from the homeowners indicated that the homeowners believed the common areas were transferred from the developer to the HOA in good repair, and that Marick/Thoennes were responsive to the issues that were reported by the unit owners. It is clear that by failing to charge the proper standard for breach of fiduciary duty, and by failing to charge the business judgment rule, the Jury had no idea what this cause of action encompassed. No reasonable juror would have found, based upon the proper legal standard for breach of fiduciary duty, that the HOA members were in anyway liable for the latent defects identified at the property after the property was turned over to the homeowners.

CONCLUSION

The trial court committed a multitude of errors listed herein. For the reasons stated herein, the trial court's rulings on Marick's motions for summary judgment, motions for directed verdict and proposed jury charges regarding proximate cause, negligence, implied warranty of workmanlike service, implied warranty of habitability, amalgamation of interests and breach of fiduciary duty should be reversed to conform with the evidence. The trial court further committed error if failing to direct Plaintiff to elect its remedy and failed to apply the proper set off. The trial court's rulings regarding election of remedies and set off should be reversed.

Alternatively, Marick's motion for new trial absolute or motion for new trial nisi remittitur should be granted due to the trial court's errors listed herein.



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December 2, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Case No. 2015-000392

Stoneledge at Lake Keowee Owners' Association, Inc.; C. Dan Carson; Jeffrey J. Dauler; Joan W. Davenport; Michael Furnari; Donna Furnair; Jessy B. Grasso; Nancy E. Grasso; Robert P. Hayes; Lucy H. Hayes; Ty Hix; Jennifer D. Hix; Paul W. Hund, III; Ruth E. Isaac; Michael D. Plourde; Mary Lou Plourde; Carol C. Pope; Steven B. Taylor; Bette J. Taylor; and Robert White, Individually and on Behalf of all other similarly situated, Respondents,

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating, A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.' Southern Basements; Carl Catoe Construction, Inc; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants

Of Defendants, Marick Home Builders, LLC and Rick Thoennes .....Appellants,

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter by depositing a copy of it in the United States Mail, First Class postage prepaid, on December 2, 2015, addressed to Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, PO Box 773, Charleston, SC 29401 (attorney for Plaintiffs), Cynthia Buck Brown, Esquire and R. Patrick Smith, Esquire, Harper Lambert & Brown, PA, PO Box 908, Greenville, SC 29601 AND Wallace K. Lightsey, Esquire Wyche Burgess Freeman & Parham, PA, PO Box 728, Greenville, SC 29602 (attorney for IMK Development Co., LLC, Integrys Keowee Development, LLC, William C. Cox, and Larry Lollis), Alan Belcher, Esquire, Hall Booth Smith, PC, 40 Calhoun Street, Suite 550, Charleston, SC 29401 (Attorney for Bostic Brother Construction)

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December 2, 2015

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December 2, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11639
Columbia, SC 29211

Re: Stoneledge at Lake Keowee Owners' Association, Inc., et al. vs. IMK Development Co., LLC, et al. vs. Michael Franz, et al.
Appellate Case No: 2015-000392

Dear Ms. Kitchings,

Enclosed please find an original and two (2) copies of Marick Home Builders, LLC and Rick Thoennes' Designation of Matter and Initial Brief along with Proof of Service. Please return clocked copies in the enclosed, self-addressed, stamped envelope.

By a copy hereof, I am serving the same upon the Respondents' counsel.

Thank you for your assistance in this matter.

Sincerely,

The Ward Law Firm, PA

Chad M. Graham

CMG/ads
Enclosure
Cc: Robert T. Lyles, Jr., Esquire
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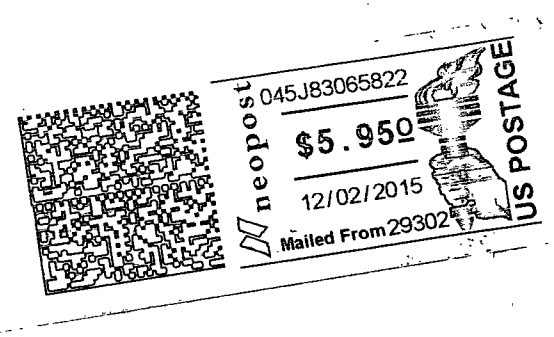

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