THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr.
Trial Court Case No.: 20089-CP-08-01068, 2009-CP-08-03916,
2009-CP-08-01413, 2008-CP-08-02714

Appellate Case No. 2014-002390

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, 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, Respondents,

v.

Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Appellants.

FINAL BRIEF OF RESPONDENTS

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(1) The Trial Judge was correct in denying the Appellants' S.C. Code Ann. Section 15-38-50 Motion to set off amounts received by the Respondents in prior settlements because the plain language of S.C. Code Ann. Section 15-38-50 does not allow for a set off and the Appellants had already received the benefit of the settlements prior to the trial of the action.

(2) The Trial Judge was correct in denying the Appellants' S.C. Code Ann. Section 15-38-15 Motion to allocate and apportion damages between settling defendants and the Appellants because no such allocation was required pursuant to the plain language of S.C. Code Ann. Section 15-38-15.

(3) The Trial Judge was correct in denying the Appellants' S.C. Code Ann. Section 15-38-15 Motion to require the Respondents to elect between remedies and damages awarded at trial because no election of remedies was required based upon the clear evidence presented and the plain language of S.C. Code Ann. Section 15-38-15.

(4) There is ample evidence in the record to support the Trial Judge's award of damages to the Oaks POA and Individual Unit Owners.

(5) The Court of Appeals should affirm the Orders and Judgment of the Trial Court based upon any evidence appearing in the record pursuant to Rule 220(c), SCACR.

COUNTER-STATEMENT OF THE CASE

The action which is the subject of this appeal was originally filed by the Respondents on December 3, 2009—2009-CP-08-3916 (hereinafter sometimes called "Oaks POA and Individual Unit Owners Action"). The complaint was amended four times and the operative pleading is the Fourth Amended Complaint filed June 6, 2012. *See* (R. pp. 277-326, Fourth Amended Summons and Complaint[1].) The Oaks POA and Individual Unit Owners Action alleged causes of action against the Appellants as well as other defendants involved in the construction of the condominiums known as the Oaks at

[1] The present action was consolidated for purposes of trial and discovery with other actions related to the construction and development of the Oaks at Rivers Edge Horizontal Property Regime by Order of April 12, 2010. However, this consolidation is irrelevant to the present appeal as the only action that was tried was the Oaks POA and Individual Unit Owners' Action against Appellants.

Rivers Edge Horizontal Property Regime. Some of the other defendants in the action, including Weather Shield, Muhler and AC Construction, asserted claims and cross claims against the Appellants in their respective Answers and pleadings.

Prior to trial, the Oaks POA and the Individual Unit Owners[2] reached two separate settlements described as follows:

(1) First, the Oaks POA and the Individual Unit Owners reached a settlement with Defendants Weather Shield, Muhler, AC Construction, and Coastal Caulking in the amount of $4,002,552.00 ("Window Defendant Settlement"). The Window Defendant Settlement amount related to damages caused by allegations as to the windows and doors at the project. The Appellants were parties to this settlement and received releases and dismissals of causes of action and claims from Defendants Weather Shield, Muhler, AC Construction and Coastal Caulking as a result of Window Defendant Settlement. Additionally, and most importantly as will be explained below, the Appellants also received the complete benefit of the settlement amount received by the Oaks POA and Individual Unit Owners because the damages alleged for the windows and doors **were removed** from the claim actually presented at trial to the Trial Judge.

(2) Second, the Oaks POA and the Individual Unit Owners reached a settlement with Defendants Carriage Hill New York, Rumplick, D'Orazio, Rich Behringer, Coastal Roofing **and Appellants** ("Remaining Defendant Partial Settlement") in the amount of $3,725,000.00. Each of these Defendants, including the Appellants, contributed to the Remaining Defendant Partial Settlement amount. Defendants Carriage Hill New York, Rumplick, D'Orazio, Rich Behringer, and Coastal Roofing received a full release from

[2] Individual Unit Owners Moran, Hux, Nathan and Jennings, originally parties to the Oaks POA and Individual Unit Owner Action, reached individual settlements with all of the named Defendants and are not parties to the present appeal. This settlement is, therefore, irrelevant to the present appeal.

the Oaks POA and Individual Unit Owners and the **Appellants**. The Appellants received a partial release from the Oaks POA and Individual Unit Owners, including a release and dismissal of causes of action for unfair trade practices, piercing the corporate veil, fraud, individual liability, amalgamation, aiding and abetting, aiding and abetting breach of fiduciary duty, and breach of contract accompanied by a fraudulent act. Additionally, as part of the Remaining Defendant Partial Settlement, the Appellants received a release and dismissal of any claims for punitive damages and attorneys' fees from the Oaks POA and Individual Unit Owners. The Oaks POA and the Individual Unit Owners also waived their right to a jury trial.

The Oaks POA and the Individual Unit Owners proceeded with their remaining claims against Appellants for negligence, negligent misrepresentation, breach of fiduciary duty, breach of express and implied warranties, and breach of contract. A non-jury trial before the Honorable J.C. Nicholson was held the week of April 8, 2013. At the conclusion of the trial, the Trial Court requested proposed orders from the parties. On May 17, 2013, the Respondents submitted a proposed order and the Appellants submitted a damages memorandum as well as each Appellant filed a directed verdict motion.

The Trial Court entered Judgment in favor of the Respondents on October 25, 2013. Notice of entry of the Judgment was sent by the clerk on October 25, 2013. On November 14, 2013, the Appellants filed four (4) post trial motions—a motion for order requiring election of remedies, motion for allocation of damages, motion for set-off of settlement amounts and a motion for JNOV, New Trial, Remittitur, to amend judgment and for other relief. The Respondents filed memoranda in opposition to the motions. A hearing was held on the post-trial motions on May 23, 2014, before the Honorable J.C.

Nicholson. On October 7, 2014, the Trial Court entered an Order denying the post-trial motions. The Appellants served their Notice of Appeal to this Court on October 31, 2014.

STATEMENT OF THE FACTS

This is a case involving 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 (sometimes referred to herein as the "Project"). The Project consists of six buildings with four floors in each building with the first floor constituting a garage for parking. *See* (R. pp. 2246-2346, Plaintiff's Exhibit 145). Each building contains six (6) units. Id. The Project was developed, designed and constructed from 2004 to 2006. Respondent The Oaks at Rivers Edge Homeowner's Association, Inc. ("Oaks POA") 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. *See* (R. pp. 2240-2363, Plaintiff's Exhibits 144-146).

Respondents 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 "Individual Unit Owners") are or were at one time individual unit owners at the Project. *See* (R. pp. 644-901; pp. 960-1157, Testimony of Individual Unit Owners, Trial Transcript). Appellant Daniel Island Riverside Developers, LLC ("DIRD") 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. *See* (R. pp. 2240-2363, Plaintiff's Exhibits 144-146). DIRD 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. *See* (R. pp. 681-685, Testimony of Joe Chivarou, Trial Transcript).

Carriage Hill Associates of Charleston, LLC ("CHAC") was the construction manager during the design, development, and construction of the Project. CHAC also pulled the permits for the construction of the Project for each of the six buildings pursuant to its general contracting license number G107574. *See* (R. p. 930, Testimony of Thomas Scholtens, Trial Transcript).

The Project was marketed as "luxury condominiums." *See* (R. pp. 2159-2164; Plaintiffs' Exhibit 123-B). *See also* (R. pp. 2165-2239, Plaintiffs' Exhibit 143). Beginning in 2004, DIRD sold the units prior to completion, pursuant to marketing materials and representations made to the purchasers regarding the superior quality of the Project. Id. In the marketing materials, DIRD 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. Id. During and after the time DIRD was entering into contracts of sale, DIRD and CHAC used and employed an architect named Gerald R. Rumplick to perform design, development, and construction related services for the Project. *See* (R. pp. 2524-2526, Defendants' Exhibit 256). *See also* (R. pp. 2494-2495, Defendants' Exhibit 218). Rumplick was not a licensed architect in South Carolina during the design, development and construction of the Project. Id. The Appellants were aware of this and disregarded the fact that Rumplick was not licensed and allowed Rumplick, notwithstanding this 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. Id. 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. *See* (R. pp. 942-946, Testimony of Thomas Scholtens, Trial Transcript).

On January 31, 2007, the Board of Architectural Examiners of South Carolina found that Rumplick practiced architecture without a license on this Project 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. *See* (R. pp. 2524-2526, Defendants' Exhibit 256). *See also* (R. pp. 2494-2495, Defendants' Exhibit 218).

At the time of turnover to the Oaks POA, DIRD failed to provide the Oaks POA any funds necessary for repairs to the common elements or necessary for capital reserves for the common elements. *See* (R. pp. 691-695, Testimony of Joe Chivarou, Trial Transcript). *See also* (R. pp. 2365-2370, Plaintiff's Exhibit 148). *See also* (R. pp. 2423-

2429, Plaintiff's Exhibit 171). Indeed, DIRD 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. Id.

In January and February of 2007, the Appellants hired Noral Stewart, an acoustics expert, to evaluate the sound and acoustical problems. *See* (R. pp. 1396-1467, Testimony of Noral Stewart, Transcript of Hearing). Stewart, after testing, informed the Appellants that the as-built construction failed to meet the applicable acoustical building code requirements. Id. At trial it was stipulated that all of the individual unit owners would testify that the sound problems at the project were significant. *See* (R. pp. 1072-1075, Transcript of Hearing). Stewart informed Appellants that the 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. *See* (R. pp. 1432-1457, Testimony of Noral Stewart, Transcript of Hearing). 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 Appellants 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. Id. Stewart testified that Appellants decided not to perform the work necessary to achieve the correct sound attenuation and that this decision was driven by the pecuniary interests of the Appellants. Id. Stewart testified that a sound repair was implemented but that it only improved a bad situation rather than to achieve what should have done originally. Id. 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 Appellant. Id.

Neither the Oaks POA nor the Individual Unit Owners were informed that the original sound transmission as constructed did not meet the applicable building code. *See* (R. p. 702, Testimony of Joe Chivarou, Trial Transcript). Appellants did not disclose to the Oaks POA or Individual 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.

Subsequent to the sound repair actually performed by the Appellants, the sound transmission problems continued to be experienced by Individual Unit Owners and/or their tenants or occupants. *See* (R. pp. 1072-1075, Transcript of Hearing). Individual Unit Owners and their tenants sustained significant discomfort and inconvenience as a result of the sound problems. Individual Unit Owners and their guests and tenants had to endure almost constant disruption of their right of quiet enjoyment of the units. *See* (R. pp. 644-901; pp. 960-1157; pp. 1072-1075, Testimony of Individual Unit Owners, Trial Transcript).

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. See (R. pp. 1312-1314; pp. 1354-1356, Testimony of Theodore Padgett, Trial Transcript). Padgett testified that representatives of Appellants informed him after the construction of the Project that they

simply did not know that gypcrete and suspended ceilings were the industry standard in construction of this type. Id. 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, the witness for the Appellants, 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. *See* (R. pp. 1398-1399; pp. 1425-1457, Testimony of Noral Stewart, Transcript of Hearing). He even testified that he would not live in them with the way they were "repaired" by Appellants. Id.

On the heels of the ongoing sound problems, moisture intrusion into the buildings and stucco problems began to be observed by Oaks POA and Individual Unit Owners. As a result of the problems, Padgett, who was originally hired by the Appellants to investigate the problems, inspected the property in May of 2008. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). 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. Id. Padgett issued a report on May 14, 2008 regarding the defects. *See* (R. pp. 1859-1876, Plaintiffs Exhibit 32).[3]

[3] 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 Oaks POA made no claims for those defects and they were not included in the damage estimate presented by the Oaks POA and claims at the trial. *See* (R. pp. 2432-2450, Plaintiffs' Exhibit 180).

Padgett testified that the stucco construction and brick veneer construction violated the applicable building code and violated industry standards. *See* (R. pp. 1289-1360, Testimony of Theodore Padgett, Trial Transcript). 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. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). 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. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). 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. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). 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 CHAC of the individuals or entities performing the work. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). Padgett testified that the poor coordination and lack of proper supervision by CHAC of the trades caused the defects related to the required waterproofing of the buildings. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript).

In 2008, the Appellants hired a licensed professional engineer in South Carolina, Michael Parker. Parker did not evaluate the stucco or brick veneer and offered no

opinions on them at trial. *See* (R. pp. 1579-1580, Testimony of Michael Parker, Trial Transcript). Mr. Parker also offered no opinions on the sound issue or repairs as it related to industry standards in the construction of multi-family condominiums. Mr. Parker offered no testimony on all the other defects unrelated to the windows and doors which were no longer at issue in the trial of the case. 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. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript).

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. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). Padgett testified that these defects were violations of applicable building codes and industry standards. Id. Padgett testified that he determined that the defects caused consequential property damage to property other than the defective construction. Id. He also testified that the violations and shoddy construction should have been discovered during construction by proper coordination and supervision by CHAC of the individuals or entities performing the work. Id. All of this testimony was uncontradicted. 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. Id; *See also* (R. pp. 2432-2450, Plaintiffs Exhibit 180). The scope of work to repair the defects in the buildings and the property damage caused by the defects was uncontradicted. Id.

The Oaks POA also offered the testimony of A. David Willis, Jr. of Southeastern Construction Company of Summerville, Inc. Willis provided an estimate to repair the defects and the resulting property damage identified by Padgett. *See* (R. pp. 2432-2450, Plaintiffs Exhibit 180). 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). 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. See (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). 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. Id. Padgett testified that the repairs would require the individual unit owners or their tenants to move out of the buildings and that all personal goods and furniture in each unit to be moved out and stored during this period and then be moved back into the unit. Id. 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. *See* (R. pp. 744-746, Testimony of Joe Chivarou, Trial Transcript). *See also* (R. p. 2430 Plaintiffs' Exhibit 178). 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. Id. This included $250.00 dollars a day for replacement housing, $500.00 a month for storage, and $1,820.00 for moving costs. Id.

Each of the Individual Unit Owners also presented testimony at the hearing regarding damages they claimed as a result of construction defects. The parties stipulated that the Individual Unit Owners presented claimed damages as depicted on Exhibit A to the Trial Court's Order. *See* (R. p. 36, Exhibit A to the Trial Court's Order filed October 25, 2013). 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 (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 (Plaintiffs Peyton H. Cook, Jr., Brenda Cook, only). *See* (R. p. 36, Exhibit A to the Trial Court's Order filed October 25, 2013). Individual Unit Owners also testified as to the significant inconvenience and loss of enjoyment they experienced having to live in and own defective condominiums. *See* (R. pp. 644-901; pp. 960-1157, Testimony of Individual Unit Owners, Trial Transcript).

Christopher Donato, MAI, a real estate appraiser was qualified without objection as an expert. *See* (R. pp. 1218-1222; pp. 1280-1284, Testimony of Christopher Donato, Trial Transcript). Appellants did not offer any testimony as to real estate values.

Donato's opinions on real estate appraisal were uncontradicted. 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"). Id. 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. 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 to the Trial Court's Order as Exhibit B. *See* (R. p. 37, Exhibit B to the Trial Court's Order filed October 25, 2013). *See also* (R. p. 2431, Plaintiffs' Exhibit 179). The first appraisal used the date of March 28, 2008 and assumed no defects. Id; *See* (R. pp. 1218-1231; pp. 1280-1284, Testimony of Christopher Donato, Trial Transcript). The second and third appraisals used the date of appraisal as December 31, 2011. Id. The second appraisal assumed no defects, and the third appraisal appraised the units as constructed with defects. Id. 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. Id. 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. Id. Donato testified that condominium ownership is different from single family residential ownership because the

individual Unit Owner cannot repair the common elements. Id. 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. Id.

Donato testified that if (when) the Project is completely repaired, the value of the unit will only return to the 2011 value without defects. Id. 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. Id. 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 Appellants who were aware no later than 2008 that the buildings were defective and in need of repair. In March 2008, Donato testified that the problems were public knowledge. *See* (R. p. 1219, Testimony of Christopher Donato, Trial Transcript). The recovery by the Oaks POA of damages herein and any subsequent repair of the Project did not compensate Class I Unit Owners for their loss. *See* (R. p. 1280, Testimony of Christopher Donato, Trial Transcript).

Class I Unit Owner Peckruhn testified he was unable to sell his Unit in 2008 as a result of the construction defects. *See* (R. pp. 1198-1206, Testimony of Richard Peckrun, Trial Transcript). Peckruhn testified that he believed the value of his unit in 2008 to be $800,000.00 without defects. Id. This amount was based on his purchase price and other sales known to him to have occurred prior to 2008. Id. Peckruhn then testified that he believed the value of his unit in 2011 without defects to be $600,000.00. Id. 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. Id.

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). *See* (R. pp. 1218-1231; pp. 1280-1284, Testimony of Christopher Donato, Trial Transcript). *See also* (R. p. 2431, Plaintiffs' Exhibit 179). 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. Id. 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. Id. 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. Id. 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 units at significantly below market value without defects. Id. The recovery by the Oaks POA of damages herein and any subsequent repair of the Project did not compensate Class II Unit Owners for their loss. *See* (R. p. 1280, Testimony of Christopher Donato, Trial Transcript).

The Appellants 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 or opinions of Donato.

STANDARD OF REVIEW

The matter before this Court arises from a defective construction lawsuit and is therefore an action at law. The case was tried before a judge without a jury, and this Court's scope of review is limited to correction of errors of law, and factual findings are reviewed for any evidence which supports the trial court's finding. *See* Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings."); Myers v. Nat'l Sales Ins. Co., 362 S.C. 41, 44, 606 S.E.2d 486, 488 (Ct. App. 2004); Osterneck v. Osterneck, 374 S.C. 573, 577, 649 S.E.2d 127, 129 (Ct. App. 2007) ("In a law case tried by the judge without a jury the standard of appellate review is limited to a correction of errors of law and a determination if there is any evidence to support the factual findings of the trial judge.").

LEGAL ARGUMENT

I. The Trial Judge was correct in denying the Appellants' S.C. Code Ann. Section 15-38-50 motion to set off amounts received by the Respondents in prior settlements because the plain language of S.C. Code Ann. Section 15-38-50 does not allow for a set off and the Appellants had already received the benefit of the settlements prior to the trial of the action.

There were two settlements prior to the trial of this action and prior to the judgment against the Appellants. The Appellants were parties to the settlements and have already received the benefits from both settlements, and, thus, are not entitled to a set-off.

First, the Oaks POA and the Individual Unit Owners settled and granted a release to various defendants (the "Window Defendant Settlement"). *See* Exhibits P-1 through P-

4 from the Post-Trial Motions Hearing[4].

Importantly, the Window Defendant Settlement resulted in the Oaks POA **removing from their claim**, ultimately claimed and presented as evidence at trial, the repair scope necessitated by the claims against the window defendants. The amount of damages removed from the claim was $4,260,498.00 (**Compare** Exhibit 180 [the repair estimate actually claimed at trial + 10% engineering cost = $8,728,174.00] **with** Exhibit 49 [the repair estimate not claimed at trial[5] including the window damages + 10% engineering fees = $12,988,672.40]). *See* (R. pp. 2432-2450, Plaintiffs' Exhibit 180). *See also* (R. pp. 1877-1897, Plaintiffs' Exhibit 49). Therefore, the amount of damages removed from the claim actually exceeded the amount of the settlement with the window defendants. *See* Exhibits P-1 through P-4 from the Post-Trial Motions Hearing. As the developer and the construction manager, the Appellants would have been legally liable for those damages had they been presented. Appellants are necessarily not entitled to a set-off in the amount paid by the window defendants because they have already received the benefit of the removal of those claims from the amount claimed at trial. Indeed, the removal of the items from the scope actually gave Appellants **more** value. Moreover, Appellants were parties to the Window Defendant Settlement and received full releases from the window defendants in the settlement. Therefore, Appellants also received the benefit of a release from cross-claims for indemnification and for claims for monetary damages from the window defendants. To set-off damages that were removed from the

[4] Appellants have moved to file these documents, included in the Respondent's Designation of Matter, under seal with this Court.

[5] It is worth noting that the Appellants do not even list Exhibit 180, the actual estimate claimed at trial by the Oaks POA, in their Designation of Matter to be Included in Record on Appeal. Instead, the Appellants only list Exhibit 49—the estimate that was not claimed as damages at trial.

claim of the Oaks POA at trial with the full knowledge of the Appellants and the Trial Court would have been error. Appellants are simply not entitled to a set-off of the Window Defendant Settlement as they have already received the "reduction" contemplated by Section 15-38-50. In fact, they have received even more of a benefit.

With regard to the second settlement, Appellants were also parties to that settlement. Only a non-settling party may be entitled to a set-off. *See* Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App. 2012)(a "nonsettling" defendant may be entitled to a setoff); *accord* Smalls v. South Carolina Dept. of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct.App. 2000)("nonsettling" tortfeasor may be entitled to setoff); Vaughn v. City of Anderson, 300 S.C. 55, 386 S.E.2d 297 (Ct.App. 1989); Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967); Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425-26 (Ct.App. 2000). Indeed, Section 15-38-50 of the South Carolina Code expressly states that a party claiming setoff must not be a party to the settlement and release as it states that a setoff is only applicable when a release is given "to one of two or more persons liable in tort for the same injury..." (Emphasis supplied). Moreover, and perhaps most importantly, Oaks POA and Individual Unit Owners released the Appellants in the second settlement for entire causes of action including fraud, unfair trade practices, punitive damages, breach of contract accompanied by a fraudulent act, aiding and abetting, amalgamation and any damages, attorneys' fees, and trebling that was associated with such causes of action, as well as waived their right to a jury trial. *See* Exhibits P-1 through P-4 from the Post-Trial Motions Hearing. The language of the second settlement release is clear that the Appellants received the benefit of the Oaks POA and Individual Unit Owners release of those certain causes of action against them.

See DAR Metal Works, Inc. v. SIR Machinery Repair, Inc., 288 S.C. 347, 342 S.E.2d 610 (Ct.App. 1986)(when the language of a settlement or release is clear the Court is without authority to alter its terms). As a result of the partial release of the Appellants, the Oaks POA and the Individual Unit Owners did not present those specific causes of action against the Appellants at the trial of this case. The Appellants paid money and received a release that was a great benefit to them. The Appellants assertion of a set-off for a release and payment from which they already received a benefit amounts to a double set-off that has no basis in law. The benefit of the second settlement is further highlighted by the Trial Court's statement at the post trial motion hearing that absent the release for the fraud type claims, the Court may have found the Appellants liable for fraudulent conduct. The Trial Court stated as follows:

The Court: Let me put this on the record. Okay? And I don't think this language is in the order, but I may modify the order. Let me state my assessment of the whole situation.

Mr. Maybank: Thank you, Your Honor.

The Court: We've got somebody that comes in, puts up this property, does a shoddy job, doesn't even comply with the building codes on building this building, period. Didn't even attach the brick to the—

Mr. Maybank: There's evidence—we put photographs in that show---

The Court: I understand. But don't comply, and then they come in and then glorify and glamorize it inside. So when you walk in and you look at your nice floors, you look at your granite countertops, so it looks like a fantastic place, but the bones of the construction were shoddy. That's what got my attention, to be perfectly honest with you. **And it was almost to the point of committing a fraud on the public coming in a marketing it that way.** In another words, you come in, you glamorize the internal part of the condo, and somebody walks in and says, man, this is really a nice place. But you can't see internally where all the—I don't want to say rot, but the inadequate construction was done. **It was almost, in the**

Court's opinion, fraudulent. I just want to put that on the record. That's not in my order. I may put it in there.

See (R. pp. 1818-1819, Transcript of Hearing on Post Trail Motions). (emphasis supplied). In response to the Court's statement on the record regarding the fraudulent conduct of the Appellants, Counsel for the Appellants affirmatively sought the protections of the second settlement and release and stated as follows:

Mr. Maybank: Your Honor, just so the record—I think the record is pretty complete on this. This is Plaintiff's Exhibit 3 [to the post-trial motions] that we have put into the record as being marked confidential. It is the memorandum of settlement. Contained within the memorandum of settlement on page 5, Your Honor—

The Court: Yes, sir.

Mr. Maybank: --the first paragraph says: As to the HOA's and the unit owners' claims against DIRD and CHAC, one of the HOA individual unit owners [sic] will dismiss with prejudice claims against DIRD and CHAC only for—and then we have—piercing, fraud, individual liability, amalgamation, aiding and abetting, aiding and abetting breach of fiduciary duty, and breach of contract accompanied by a fraudulent act. The HOA and the individual unit owners agree not to seek punitive damages or attorneys' fees arising out of any cause of action against DIRD and CHAC [****]
But we just wanted to make sure that we understood which causes of action that the plaintiffs were actually going under so that this Court doesn't put into any order or to any findings those which were not contemplated to be heard or dealt with at trial.

See (R. pp. 1833-1835, Transcript of Hearing on Post Trail Motions). The Trial Court's statement on the record and the response of Appellants completely defeat the current position of the Appellants regarding set-off. The Oaks POA and the Individual Unit Owners, in consideration for the second settlement amount, released a valid fraud/unfair trade practices act/attorneys' fees/punitive damages claim(s) and the Appellants received the benefit of such a release.

In sum, Appellants have already received the bargained benefit from the first and second settlements to which they were parties. The Respondents did not claim the damages sought in the Window Defendant Settlement in the trial of the case against the Appellants. The Respondents released Appellants for certain causes of action and damages that they did not present at trial as a result of the second settlement. The Appellants simply improperly seek a set-off for amounts they have already received the benefit of from the Respondents. They are not entitled to a set-off which would amount to a double benefit. As such, it is fundamental that the Trial Court did not award damages to the Respondents for the same injuries/damages that the Oaks POA and Individual Unit Owners received in settlement.

II. The Trial Judge was correct in denying the Appellants' S.C. Code Ann. Section 15-38-15 Motion to allocate and apportion damages between settling defendants and the Appellants because no such allocation was required pursuant to the plain language of S.C. Code Ann. Section 15-38-15.

The Appellants argue that they are "entitled to a special verdict allocating the damages suffered by the Plaintiffs" between other parties pursuant to S.C. Code Ann. Section 15-38-15. Appellants are not entitled to any allocation pursuant to the plain terms of Section 15-38-15. Subsection (F) of 15-38-15 clearly states as follows:

"This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional." (emphasis supplied). In this case, both of the Appellants were adjudged by the Court to have been grossly negligent. *See* (R. p. 20, Paragraph 63 of the Order filed October 25, 2014). This finding has not been appealed. For this reason alone, any potential allocation under Section 15-38-15 would simply not apply. Moreover, there is no evidence that Appellants (which can be

treated as one party pursuant to Section 15-38-15(C)(3)(a) were less than 50% at fault as they were the developer and construction manager for the entire project.[6] Therefore, no allocation is necessary under Section 15-38-15(A). Indeed, Appellants would have been responsible for putting in any evidence of degree or percentages of fault during the trial. *See* S.C. Code Ann. Section 15-38-15(C)(3)(B). No such evidence was submitted. Pursuant to the plain and express language of the statute under which Appellants contend they were entitled to allocation, it is clear that the Appellants are not entitled to any allocation.

III. The Trial Judge was correct in denying the Appellants' S.C. Code Ann. Section 15-38-15 Motion to require the Respondents to elect between remedies and damages awarded at trial because no election of remedies was required based upon the clear evidence presented and the plain language of S.C. Code Ann. Section 15-38-15.

With regard to election of remedies, the Appellants first argue that the doctrine of election of remedies required the Respondents to elect between certain causes of action prior to the entry of the judgment to avoid a "double recovery." However, in this case, while the Oaks POA and the Individual Unit Owners were awarded damages pursuant to

[6] DIRD and CHAC owed Oaks POA and the Individual 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). DIRD and CHAC 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."). DIRD undertook to develop the project. DIRD put the residential project and units in the stream of commerce. DIRD also undertook to establish the Oaks POA, an entity which would be responsible for the future repair and maintenance of the common elements. Therefore, there is substantial evidence that DIRD and CHAC undertook legal duties to the Oaks POA and the Individual Unit Owners and that all of the damages claimed by the Oaks POA and Individual Unit Owners and awarded by the Trial Court were proximately caused by the breach of the legal duties owed to the Respondents by the Appellants. Indeed, any discussion of set-off or allocation, notwithstanding that the Appellants are entitled to neither, necessarily begins with the admission by the party seeking allocation that it is liable along with others for the same injury. Otherwise, the argument would simply be that there is no evidence to support liability in the first instance. The latter position is not taken by the Appellants in this appeal.

different causes of action, there is simply no evidence that the Oaks POA and the Individual Unit Owners received "double damages" for the same injury. The Trial Court's order is clear that while the Oaks POA and Individual Unit Owners prevailed on different causes of action, only one amount of damages was awarded to each of the Plaintiffs. For example, there was simply no award of the same damages on the negligence cause of action and the award of the same damages on a breach of implied warranty causes of action. There was no double recovery that would give rise to an election of remedies.

The Appellants next argue, with regard to election of remedies, that the award of damages for the cost of repair to the Oaks POA and the award of damages to the Individual Unit Owners for loss of market access amounts to a double recovery. This is simply not the case. The premise upon which the Appellants base their argument as to double recovery is flawed. Appellants mistakenly assert that when the buildings are repaired, the full value of the units will return to the Individual Unit Owners as that value was established between 2008 and 2011. In a typical case, it may be true that a repaired condominium has its value restored. However, on the undisputed facts of this case, the theory of damages put forth in evidence was that the Individual Unit Owners were denied market access during a time in which the Appellants knew that the buildings needed to be repaired and refused to do so. Therefore, even if the buildings are fully repaired by the damages awarded to the Oaks POA, the Individual Unit Owners will not be made whole because of the unique factual situation present in this case. The Court found in its Order, in pertinent part, as follows:

(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.

See (R. p. 21, Paragraph 66 of the Order filed October 25, 2014).

This is necessarily not a double recovery which requires an election of remedies. There are distinct damages as found by the Trial Judge. The theory of damages for "loss of market access" was that because the Appellants knew of the defective condition of the buildings and refused to fix the buildings, the Individual Unit Owners could not sell their units during a time in which the market was rapidly declining. They were stuck so to speak. Therefore, even when the buildings are repaired, the Individual Unit Owners will not be returned to a position of market access (i.e. a chance to sell before or while the market rapidly declined) that they otherwise would have had but for the defective construction and the refusal to repair by the Appellants that denied them market access. This is the exact undisputed testimony of expert witness MIA appraiser Christopher Donato who testified as follows:

Q. Mr . Donato, will the opportunity that was lost by my clients in 2008 be returned to them when these units are fixed , if they ever are?

A. No, sir.

Q. So that opportunity, the ability to not lose 270,000, 330,000, whatever that number is, that train has pulled out of the station; correct?

A. Yes, sir. When you and I were feeling the effects of the current real estate recession, we had the opportunity to get out.

See (R. p. 1280, Testimony of Christopher Donato, Trial Transcript). The Individual Unit Owner damages for loss of market access is not a diminuition in value based upon defective construction. It is a different and distinct damage. This was clearly explained by Mr. Donato. Mr. Donato was qualified as an expert without objection (in fact Appellants stipulated he was an expert appraiser). *See* (R. p. 1218, Testimony of Christopher Donato, Trial Transcript). He performed three appraisals each with regard to two classes of owners—those that had sold their units and those that still owned their units. *See* (R. pp. 1218-1231, Testimony of Christopher Donato, Trial Transcript). The appraisals and the summary of appraisals were admitted into evidence without objection. *See* (R. pp. 1218-1221, Testimony of Christopher Donato, Trial Transcript). *See also* (R. pp. 1899-2145, Plaintiffs' Exhibits 90-101-A). *See also* (R. p. 2431, Plaintiffs' Exhibit 179). The Appellants argue that the testimony of Donato is speculative. However, the appraisals were based upon comparable sales and the appraisals and the opinions of Donato were uncontradicted. The evidence supports the Trial Court's finding that damages associated with the cost of repair as awarded to the Oaks POA are distinct from the damages awarded to the Individual Unit Owners for loss of market access.

The Appellants next argue, with regard to election of remedies, the Individual Unit Owners should have been required to elect between the "loss of market access" damages and the "loss of quiet enjoyment" damages. However, once again, these are two distinct damages. Loss of market access as a result of loss in value that can never be recovered because of the inability to sell is completely different damages associated with

loss of quiet enjoyment. As explained above, the Individual Unit Owners' inability to sell between 2008 and 2011 and the monetary loss caused thereby has nothing to do with the fact that the Trial Court found that during that time the units were uninhabitable[7] and during that time the Appellants made negligent misrepresentations to the Individual Unit Owners that they relied on to their detriment.[8] The Appellants rely heavily on the argument that because some Individual Unit Owners did not reside in their units then somehow they are not entitled to damages for loss of quiet enjoyment. The Appellants cite no case law for this argument. Indeed, there is no such case law. Whether a property owners rents, uses their property a little or a lot has no bearing on their right to quiet enjoyment of property they own. The relevant inquiry is whether or not there is evidence to support the Trial Court's finding that the Individual Unit Owners suffered a loss of quiet enjoyment and whether or not that loss is distinct from Donato's testimony on loss of market access. There is ample evidence in the record to support the Trial Court's findings. First, the parties stipulated that the Individual Unit Owners were going to testify that the sound issue was and continues to be horrible in these units. *See* (R. pp. 1072-1075, Transcript of Hearing). In fact, this is exactly what the Individual Unit Owners Testified to as well. *See* (R. pp. 644-901; pp. 960-1157, Testimony of Individual Unit Owners, Trial Transcript). Next, there is evidence in the record to serve as a basis for the loss of quiet enjoyment. *See* (R. p. 2430, Plaintiffs' Exhibit 178). Indeed, the Court used half of the per-day lodging amount of $250.00 included in Plaintiff's Exhibit 178. Finally, the damages testified to by Donato have nothing to do with the loss of quiet enjoyment. Donato's testimony relates to the inability to sell during a downturn in the

[7] This finding of breach of the implied warranty of habitabilty has not been appealed.
[8] The finding of negligent misrepresentations has not been appealed.

market—not the damages associated with the inability to actually enjoy the unit. By way of an example, there could have been defects that prevented market access to the Individual Unit Owners but did not impact quiet enjoyment like the horrible sound issues. Therefore, the Individual Unit Owners were not required to elect between loss of market access damages and inconvenience and loss of quiet enjoyment damages.

IV. There is ample evidence in the record to support the Trial Judge's award of damages to the Oaks POA and Individual Unit Owners.

The Respondents presented evidence of damages from three qualified experts, each of the Individual Unit Owners[9], and representatives from the Oaks POA. The experts quantified each element of damages to a reasonable degree of certainty. The Oaks POA damages were supported by the estimate of Southeastern Construction and David Willis, a licensed general contractor. *See* (R. pp. 2432-2450, Plaintiffs' Exhibit 180). The SECC estimate was based upon a scope of work created by Ted Padgett, a licensed professional engineer, who also testified to a reasonable degree of certainty that each of the repairs claimed and outlined in the SECC estimate were necessary and caused by the conduct of the Appellants. *See* (R. pp. 1285-1360, Testimony of Theodore Padgett, Trial Transcript). These damages are not speculative. Moreover, there is no question that the damages awarded by the Court were consistent with the actual, and in large part undisputed, evidence of damages presented at trial. As such, these damages were not speculative or grossly excessive.

The Respondents argue that the Trial Court erroneously held that the stucco and brick had to be removed because of code violations. This is, however, the exact

[9] Notwithstanding the statement by the Appellants that some of the Individual Unit Owners did not testify, at least one of the Individual Unit Owners or their representatives testified for each unit.

testimony given by Ted Padgett, P.E. *See* (R. pp. 1299-1301; pp. 1309-1310, Testimony of Theodore Padgett, Trial Transcript). The Respondents argue that Mike Parker did evaluate the brick and stucco. This is simply not the evidence at trial. Parker testified that he did not evaluate the brick and stucco for code or workmanship. *See* (R. pp. 1579-1580, Testimony of Michael Parker, Trial Transcript). Therefore, the testimony of Padgett that the brick and stucco had to be removed and replaced, regardless of the other issues, was not contradicted and the Trial Court did not err in so finding and in awarding the damages associated with the removal of the brick and stucco. Moreover, even if this was disputed, the Trial Court sitting as the finder of fact was free to find the facts as it saw fit.

Additionally, the award for sound remediation/acoustic repairs was fully in line with the evidence presented at trial. As stated above, the damage numbers were supported by the testimony and opinions of a licensed general contractor and a licensed professional engineer familiar with condominium construction in South Carolina. The Respondents argue that Ted Padgett was not qualified as an "expert in acoustical noise," and his testimony on the issue of sound remediation was improper. Mr. Padgett is a licensed professional engineer. His testimony with regard to sound remediation and acoustical repairs was given without objection. *See* (R. p. 1322, Testimony of Theodore Padgett, Trial Transcript). Mr. Padgett has been involved in the construction of condominiums in South Carolina, and Charleston specifically, for 30 years. He is more than qualified to give an opinion on industry standards with regard to the construction of sound proofing and the appropriate methods and industry standards for such construction in condominiums. The Respondents argue that the "sound proofing repairs" undertaken

in 2007 and 2008 brought the buildings "up to code," and, therefore, no damages could be awarded. This ignores the real issue. The issue was compliance with industry standards for this type of luxury condominium-not mere code compliance. It is axiomatic that the violation of an industry standard can give rise to a tort claim. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989). The Court found as follows:

(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.

See (R. p. 10, Paragraph 28 of the Order filed October 25, 2014).

Indeed, notwithstanding the statements of the Appellants in their brief, the expert for the Appellants unequivocally testified that the remediation was the best they could do with a bad situation and that it was not what you would expect in new construction nor was it a place he would live. *See* (R. pp. 1435-1438, Testimony of Noral Stewart, Trial Transcript). Based upon the evidence presented, the Trial Court ordered that the Project must be brought up to industry standards. This finding is not grossly excessive or speculative and it is based on the evidence presented.

The Appellants next argue that the Trial Court erred in awarding damages for hotel and storage costs during the repairs claimed by the Respondents at trial. Once again these damages were presented at trial and were undisputed. Padgett testified that the repairs to the common elements that were necessary would require the Individual Unit Owners to move out and store any furniture.[10] *See* (R. pp. 1351-1352, Testimony of Theodore Padgett, Trial Transcript). The representative of the Oaks POA, Joseph Chivarou, testified that it was the responsibility of the POA to address these costs because the repairs would be to the common elements, and there is ample evidence in the record of the damages associated with these move out/storage/lodging/move in costs. *See* (R. pp. 739-752, Testimony of Joe Chivarou, Trial Transcript). *See also* (R. p. 2430, Plaintiff's Exhibit 178). These damages amounts and the fact that the units could not be occupied during the repairs were uncontradicted. This finding is not grossly excessive or speculative and it is based on the evidence presented.

As discussed above, the damages amount awarded for loss of quiet enjoyment was also supported by evidence at the trial. *See* (R. p. 2430, Plaintiffs' Exhibit 178). The Court used half of the per-day lodging amount of $250.00 included in Plaintiffs' Exhibit 178. *See* (R. p. 2430, Plaintiff's Exhibit 178).

Finally, the Appellants argue in a footnote that there is no evidence to support the award of damages for repairs to defective garage slabs, parapet wall returns, brick entry steps, French drain system and lobby HVAC. Like all the other elements of liability and damages, there is ample evidence to support these specific items of damages. Padgett testified as to each of the foregoing and opined that each needed to be repaired as a result

[10] The Appellants argue that because some of the Individual Unit Owners did not live in their units, the cost for lodging and moving would be unnecessary. This, once again, ignores the facts that tenants must be moved and lodged.

of defective construction. *See* (R. pp. 1358-1359 [lobby HVAC]; p. 1317 [parapet wall returns]; pp. 1348-1350 [french drain system]; p 1347, p. 1318 [garage slab repairs]; pp. 1315-1316 [brick entry stairs], Testimony of Theodore Padgett, Trial Transcript). *See also* (R. pp. 2432-2450, Plaintiff's Exhibit 180).

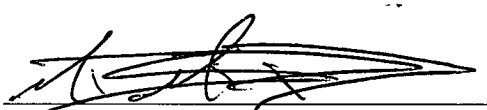
V. The Court of Appeals should affirm the Orders and Judgment of the Trial Court based upon any evidence appearing in the record pursuant to Rule 220(c), SCACR.

There is ample evidence in the record to support the Order, findings and Judgment of the Trial Court in this action. In fact, much of the evidence is uncontradicted and the Trial Court sat as the finder of fact. This Court should affirm the Trial Court based upon any evidence in the Record pursuant to Rule 220(c).

CONCLUSION

For the reasons stated herein, there is ample evidence in the record to support the findings of the Trial Court. The Appellants are not entitled to the relief they requested in their post-trial motions. The Order and the Judgment of the Trial Court should be affirmed.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



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Mt. Pleasant, South Carolina
May 7, 2015

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr.
Trial Court Case No.: 20089-CP-08-01068, 2009-CP-08-03916,
2009-CP-08-01413, 2008-CP-08-02714

Appellate Case No. 2014-002390

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, 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, Respondents

v.

Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Appellants.

CERTIFICATE OF COUNSEL

I certify that this final brief complies with Rule 211(b), SCACR.

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May 7, 2015

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on Appellants Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, via hand delivery, on May 7, 2015, addressed to their attorneys, Charles S. Altman, Esquire, Meredith L. Coker, Esquire and Melissa A. Fried, Esquire, of Altman & Coker, LLC, 575 King Street, Suite A, Charleston, SC 29402, and Roy P. Maybank, Esquire and Amanda Maybank, Esquire, of Maybank Law Firm, LLC, 531 Savannah Highway, P.O. Box 12579, Charleston, SC 29422.

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