

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Case No 2005-CP-26-3289

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

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JAN 11 2012

SC Supreme Court

Respondents,

v

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

Petitioners

Case No 2003-CP-26-7169

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

Respondents,

v

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

Petitioners

APPENDIX - VOLUME V

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005-CP-26-3289

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

Respondents,

v

Heritage Communities Inc Heritage Riverwalk Inc
and Buildstar Corporation,

Appellants

Case No 2003-CP-26-7169

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

Respondents,

v

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

Appellants

RECORD ON APPEAL - VOLUME V

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STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Tony L. Pope and Lynn S. Pope
individually and representing as a class all
unit owners of Riverwalk at Arrowhead
Country Club HPR,

Plaintiffs)

vs)

Hentage Communities Inc Hentage
Riverwalk Inc and BuildStar Corporation)

Defendants)

Riverwalk at Arrowhead Country Club
POA, Inc)

Plaintiff)

vs)

Hentage Communities Inc Hentage
Riverwalk, Inc and BuildStar Corporation)

Defendants)

22309
IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER 05-CP-26-3289

**MEMORANDUM IN SUPPORT OF
POST-TRIAL MOTIONS
BY DEFENDANTS**

CIVIL ACTION NUMBER 03-CP 26-7169

This Memorandum is filed in conjunction with and as additional support for the Heritage Defendants Post Trial Motions that were timely filed on January 26 2009 following the combined construction defect trial of the above-captioned actions before the Honorable Clifton Newman from January 5 through January 15, 2009. The combined cases are the Pope Class Action (Tony L. Pope et al v Hentage Communities, Inc., et al, Civil Action Number 2005 CP 26-3289) and the Riverwalk POA Action" (Riverwalk at Arrowhead Country Club POA, Inc v Hentage Communities, Inc et al Civil Action Number 2003 CP 26-7169).

The trial resulted in a general verdict in favor of the Plaintiffs against Heritage Communities Inc Hentage Riverwalk, Inc and Buildstar Corporation (hereinafter these

ROA_1933

APP_1944

separate and distinct corporations are collectively referenced as the Heritage Defendants")

Judge Newman granted ten (10) days for the parties to file their post trial motions

The Fourth Amended Complaint in the Riverwalk POA Action and the Third Amended Complaint in the Pope Class Action alleged the same causes of action against the Heritage Defendants but sought different relief. Plaintiffs also sought punitive damages. The following chart restates the claims asserted by the Plaintiffs in the Riverwalk POA Action and Pope Class Action complaints:

	Negligence	Express warranty	Implied warranty of habitability	Implied warranty of workmanlike service	Breach of fiduciary duty
Heritage Communities, Inc.	X	X			X
Heritage Riverwalk, Inc.	X		X		X
Buildstar Corporation	X			X	

Judge Newman directed a verdict in favor of the Plaintiffs, in both cases, on the negligence cause of action. He also found that the Heritage Defendants should be treated as a single amalgamated entity pursuant to Kincaid v. The Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). Judge Newman directed a verdict in favor of the Heritage Defendants on the claims for breach of express warranty and breach of implied warranty of workmanlike service. He also directed a verdict in favor of the Heritage Defendants on the claim for breach of fiduciary duty in the Pope Class Action only. Therefore, the verdict forms presented the following causes of action to the jury:

	Riverwalk POA Action	Pope Class Action
negligence ¹	X	X
warranty of habitability	X	X
fiduciary duty	X	
Actual damages	X	X
Punitive damages	X	X

In the Riverwalk POA Action the jury found for the Plaintiffs on the cause of action for breach of fiduciary duty and for the Heritage Defendants on the claim for breach of warranty of habitability. The jury then awarded the Riverwalk POA Action plaintiffs actual damages of \$4 250 000 and punitive damages of \$250 000.

The jury found for the Pope Class Action Plaintiffs on the cause of action for breach of warranty of habitability. For the negligence and breach of warranty of habitability claims asserted by the Pope Class Action plaintiffs the jury initially awarded actual damages of \$0 00 and punitive damages of \$1 000,000. Because of the inconsistent result Judge Newman provided a curative instruction that punitive damages can only be awarded if actual damages are first awarded. The jury was sent to the jury room for further deliberations. The jury then changed its Pope Class Action verdict to award actual damages of \$250 000 and punitive damages of \$750 000.

Following the publication of the jury verdicts at approximately 6 30 pm on Thursday January 15 2008 Judge Newman granted, with the consent of the parties ten (10) days to file their post trial motions. The Heritage Defendants respectfully submitted the following post trial motions:

- I New Trial – Thirteenth Juror Doctrine, or in the alternative
- II Judgment Notwithstanding the Verdict, or in the alternative
- III New Trial Absolute or in the alternative

¹ Since the trial judge granted the Plaintiffs' directed verdict motion on negligence in both the Riverwalk POA Action and the Pope Class Action, the question on the verdict form regarding whether the Heritage Defendants were negligent was already checked for the jury on the verdict form. However the trial judge charged the jury that the determination of the extent of damages was up to them.

- IV New Trial *Nisi Remittitur* or in the alternative and as a matter of right
- V Punitive Damages Review and as a further matter of right
- VI Setoff

I NEW TRIAL – THIRTEENTH JUROR DOCTRINE

The Trial Court may grant a new trial absolute when, sitting as the thirteenth juror it concludes the jury's verdict is not supported by the evidence Duncan v. Hampton County School Dist. No. 2 335 S.C. 535 517 S.E.2d 449 (Ct. App. 1999). In the instant case for the reasons recited during the directed verdict stage and as renewed by consent at the closing of the Heritage Defendants' case the jury's verdict was not supported by the credible evidence presented in this case.

A

The court failed to strike the punitive damages verdict in the loss of use Class Action matter when the jury did not return an actual damages verdict. An award of punitive damages without an award of actual damages is a verdict that is irreconcilable and inconsistent. See Gamble v. Stevenson, 305 S.C. 104 111 406 S.E.2d 350 354 (1991) (punitive damages may be awarded only upon a finding of actual damages). The trial court cannot enter a judgment where "the jury's answers are so ambiguous or conflicting that they cannot be reconciled fairly." Weprin v. Peterson, 736 F.Supp. 1131 1132 (N.D. Ga. 1988) (citing Burger King Corp. v. Mason 710 F.2d 1480 1489 (11th Cir. 1983)). The law is clear that the jury must first award actual damages before it can award punitive damages. See Gamble, supra, Weprin, supra (noting Georgia requires compensatory damages before punitive damages may be awarded). Therefore, it is not a question of resolving inconsistencies in the jury's logic but in reconciling the law with the verdict." Weprin, at 1132. In Weprin, the jury delivered a verdict awarding punitive damages but no actual damages. Since such a verdict was inconsistent and did not

follow the law the Court concluded [t]he *only* action the Court can take is to strike the award of punitive damages against [the defendants] Id. (emphasis added)

B

The Court improperly allowed testimony of Defendants' work and alleged defects at other sites not at all related to this case. The admission of such evidence was not consistent with Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286 (2005). The cumulative effect of these admissions over continued objections by the Heritage Defendants, of work and alleged deficiencies at other Heritage Communities projects unduly influenced the jury and unnecessarily and improperly inflated both the actual and punitive damage verdicts. The Court compounded the cumulative effect by denying the Heritage Defendants' pretrial motion to bifurcate the trial into actual and punitive damages phases.

In South Carolina, a court may admit evidence of similar happenings, lawsuits, or accidents only 'where there is some special relation between them tending to prove or disprove some fact in dispute.' Whaley at 483, 609 S.E.2d at 300. DANNY R. COLLINS, SOUTH CAROLINA EVIDENCE § 9.5 (S.C. Bar 2d ed. 2000). There is no specific formula for determining whether prior lawsuits are admissible; instead, '[i]t is simply a rule of relevance, logic, and common sense.' Reed v. Clark, 277 S.C. 310, 314-15, 286 S.E.2d 384, 387 (1982) (quoting with approval Brewer v. Morris, 269 S.C. 607, 239 S.E.2d 318 (1977)). Generally, courts consider whether 'the events are sufficiently similar in time, place, or circumstances' to determine the admissibility of prior incidents. Stutts v. Flour Daniel, Inc., 122 F.3d 1062, WL 583644 (4th Cir. 1997). Ultimately, the issue is left to the discretion of the trial court. However, the similarity of the injuries does not necessarily make the prior occurrence admissible. Because evidence of other accidents may be highly prejudicial, a plaintiff must present a factual foundation for the court to

determine that the other accidents were substantially similar to the accident at issue Whaley at 483 609 S E 2d at 300 (citation and internal quotation omitted)

In the underlying lawsuits the alleged common or similar activities between other projects and the Riverwalk condominiums fell into two categories (1) general references that the Heritage Defendants developed/constructed other projects in the Grand Strand that were also involved with litigation, and (2) testimony from James Graham the window manufacturer witness regarding windows at Magnolia Place and Riverwalk. The first category is improper and highly prejudicial since the only 'proof' of alleged liability is that the Heritage Entities were sued before. The argument is akin to a prosecutor arguing to the jury that they can find the accused guilty since he is wearing prison clothes and seated at the defense table. The second category was directly addressed in the Whaley case. Again plaintiffs were required to present a factual foundation that the other construction projects 'were substantially similar to' the alleged problems at the Riverwalk condominiums. See Whaley at 483 609 S E 2d at 300. In Whaley, the Court found that prior complaints of heat in locomotive engines was inadmissible and testimony that some cab roofs were painted white and had air conditioning or fans was not relevant to the plaintiff's claim arising from heat exhaustion in a separate cab. In the present actions Mr. Graham testified that although he recalls he observed the window installations at the Riverwalk condominiums he found no window leaks when he tested the Riverwalk condominium windows. Like the painted roofs in the Whaley locomotives the Riverwalk buildings are separate and distinct buildings from other projects. The only relevant information at trial was the condition and alleged damages at Riverwalk and only Riverwalk.

C

The Court improperly admitted evidence of alleged construction defects at other projects developed by Heritage Litchfield Inc Heritage Azalea Lakes Inc Gardens at Cypress Bay Inc Heritage Magnolia, Inc and Heritage Magnolia North, Inc which evidence unduly prejudiced the Heritage Defendants in this case The admission of such evidence was inconsistent with Rule 404, SCRE

All of these are separate and distinct construction condominium projects Plaintiffs implication that the Heritage Defendants should be found liable in the Riverwalk trials because they were also defendants in the other projects is improper and inadmissible Evidence of other crimes wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith Rule 404(b) SCRE

The cumulative effect of the admission of alleged defects at other projects further compounded the prejudice from the Court's denial of Defendants' motion to bifurcate the actual and punitive damages stages of the trial Defense counsel argued this point in limine and renewed it when Plaintiffs raised the other projects again and again as evidence at trial Plaintiffs were allowed to try and/or re try the various Heritage Communities Inc projects under the pretense that this was proper and limited solely to their claim for punitive damages However the testimony at trial did not establish that the alleged construction defects at the other projects were relevant to the Riverwalk project The Plaintiffs failed to present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue Whaley at 483 609 S E 2d at 300 The only testimony that suggested a similarity came from James Graham the Plaintiffs witness from the window manufacturer However Mr Graham unequivocally testified that he knew of no window leaks at Riverwalk

His testimony regarding issues at Magnolia Place did not set forth "substantially similar" issues at Riverwalk. The Court improperly admitted evidence of other lawsuits against the Heritage entities.

D

The Heritage Defendants were improperly deemed an amalgamated entity. The Heritage Defendants should not have been deemed amalgamated because Heritage Communities, Heritage Riverwalk, and Buildstar are separate and distinct entities. Each was separately and independently registered with the South Carolina Secretary of State. The credible testimony from Gwynn Hardister, former president of Heritage Communities, Inc., and Lynn Anderson, former president of Buildstar Corporation, was that the Heritage entities were separate corporations that shared office space. Simply sharing office space is not enough to give rise to an amalgamation claim. Mere stock ownership and the fact that a parent and subsidiary company share the same officers or directors does not impose liability on the parent company. Carroll v. Smith Henry, Inc., 281 S.C. 104, 106, 313 S.E.2d 649, 651 (Ct. App. 1984). The testimony at trial was that the Heritage Entities each fulfilled a distinct role in the construction of the Riverwalk condominiums. Heritage Communities was the developer. Heritage Riverwalk was the sales branch using borrowed employees from the Burroughs & Chapin Company, and Buildstar was the general contractor. The amalgamation ruling resulted in the finding of liability via guilt by association.

E

There was no testimony regarding the standard of care or developer's duty of care to the Riverwalk Property Owners' Association. There was no specific testimony of the construction industry standards in the 1997 through 1999 time period when the Riverwalk condominiums

were constructed. Plaintiffs allege a *res ipsa loquitur* standard of liability. Plaintiffs' arguments and testimony presented to the jury amounted to an impermissible conglomeration of the claims for negligence, breach of warranty of habitability, and breach of fiduciary duty, which the Courts expressly warns against. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 89 (2008) (noting the flaw in the Fields argument that impermissibly blends the law of negligence and warranty liability regarding the sales of homes).

F

The Court erred by finding the statute of limitations was equitably tolled during the period Hentage Riverwalk, Inc. was involved in and a member of the Riverwalk POA Board. During motions *in limine*, the parties argued the Hentage Defendants' motion for summary judgment and Plaintiffs' motion regarding tolling. A statute of limitations defense may be considered on a motion for summary judgment. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). When relevant facts are not in dispute, the question of limitations is a matter of law. Lawrence v. Sullivan, 666 S.E.2d 175, 182 (N.C. Ct. App. 2008). The burden is on the Plaintiffs to show that the claims were timely filed. See Id. Summary judgment is appropriate if there is no genuine issue of fact whether a party pursued his or her cause of action within the limitations period. Johnston v. Bowen, 313 S.C. 61, 64, 65, 437 S.E.2d 45, 47 (1993).

The applicable statute of limitations for all of the claims asserted by the Plaintiffs is three years. See South Carolina Code Ann. §15-3-530. Pursuant to the discovery rule, "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (citing Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)).

According to the discovery rule a cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that he might have a remedy for a harm Id (citing Dean v Ruscon Corp, 321 S C 360 468 S E 2d 645 (1996)) Therefore

an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed

Wiggins v Edwards, 314 S C 126 128 442 S E 2d 169 170 (1994)

[W]hether the plaintiff knew he had a claim is not the test Rumpf, 357 S C at 395 593 S E 2d at 187 (determining the discovery date is an objective rather than a subjective question) The courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist ' Id (emphasis added) It is settled law in South Carolina that when a person has notice of facts as are sufficient to put him on inquiry, and those facts if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts Multimedia Publ g of S C , Inc v Mullins, 314 S C 551 554 431 S E 2d 569 572 (1993)

It is a well established rule that the knowledge of the agent is imputed to the principal Wells v Inter Ocean Cas Co, 157 S C 123 __, 154 S E 98, 105 (1930) Continental Cas Co v Under Armour, Inc, 537 F Supp 2d 761 774 (D Md 2008) (citing Mut Life Ins Co of New York v Hilton-Green, 241 U S 613 622 (1916) ("The general rule which imputes an agent s knowledge to the principal is well established The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal s interest.) Furthermore a corporation like the Riverwalk at Arrowhead Country

Club Horizontal Property Regime in the present action must act through its agents Travelers Ins Co (NC) v Roof Doctor, Inc., 325 S C 614 615 481 S E 2d 451 452 (Ct App 1997) That is a corporation can only act through its agents Jost v Equitable Life Assurance Soc y of U.S., 271 S C 492 495 248 S E 2d 778 779 (1978)

In the present action there is a well-established principal/agent relationship between Plaintiffs and the Noble Company (Noble) Noble is the property management company hired by Plaintiffs Noble has consistently been the property managers for the POA since at least 1999 Pursuant to the Master Deed, the property is required to be inspected regularly to ensure that it is properly maintained In fact Noble obtained property inspection reports on behalf of the Property Owners Association in at least 1999 2001 and 2002 The Property Owners Association agent was clearly on notice of the possible construction issues at the Riverwalk condominiums None of these facts was disputed at trial

The first report issued by Kimley Horn dated October 26 1999 put Plaintiffs agent Noble on notice and thereby put Plaintiffs on notice of possible claims against the Heritage Defendants as well as the other contractors that constructed the Riverwalk condominiums See Barr v City of Rock Hill, 330 S C 640 645 500 S E 2d 157, 160 (Ct App 1998) (holding an inspection report is sufficient to put a party on notice of a cause of action) However the Riverwalk POA Action was not filed until December 8 2003 which is more than four years after the issuance of this report Additionally problems with units were discussed at the March 15 2000 Annual Homeowners Meeting which is more than three years before the Riverwalk POA Action was filed The Pope Class Action was filed June 23 2005 These facts indisputably show Plaintiffs were on notice of the alleged construction defects and failed to bring a cause of action within the three year statutes of limitations

G

Plaintiffs' evidentiary use of project plans and specifications as evidence of any breach prejudiced the defendants since the Plaintiffs neither relied on nor were entitled to rely on any conformance with such plans or specifications. As long as Heritage constructed the buildings pursuant to the building code, a certificate of occupancy was issued, and the buildings were inhabitable, then there is no evidence establishing a divergence of the project plans and no evidence of a breach that caused damages.

H

Plaintiffs' evidentiary use of efforts to remedy alleged window deficiencies at Riverwalk and other projects violates Rule 407, SCRE, and Webb v. CSX, 364 S.C. 639, 615 S.E.2d 440 (2005). Evidence of subsequent remedial measures is inadmissible in South Carolina. Id. Rule 407 permits admission of subsequent remedial measures only when necessary to demonstrate such things as ownership, control, impeachment, or feasibility of precautionary measures if contested. Id. at 653, 615 S.E.2d 448. None of the Rule 407 factors was at issue in this case.

The Plaintiffs called James Graham as a witness. Mr. Graham was the regional representative for a window manufacturer whose windows were incorporated into some Heritage projects. The Plaintiffs introduced the testimony of Mr. Graham (and the exhibits utilized during his testimony) in an effort to show Heritage experienced problems with windows at *other* projects. The documents demonstrate that Heritage sought certain remedial costs from the window manufacturer. But Mr. Graham testified there were *no leaks at Riverwalk*. The plaintiffs did not connect the exhibits entered (over objection) through Mr. Graham to actual leaks at Riverwalk. The request for remedial assistance was not connected to actual leaks at Riverwalk.

Former code inspector David Eiland testified to the impossibility of constructing a building perfectly. In fact, all of the experts corroborated the testimony that there is no perfect building. Likewise, Mr. Eiland testified that the Heritage projects were typical and similar to other construction projects in the Myrtle Beach area.

I

Plaintiffs failed to meet their burden of proof regarding alleged framing or sheathing damage since Plaintiffs failed to open areas of alleged damage and left the amount of actual damage to speculation. Actual damages are awarded to a litigant in compensation for his actual loss or injury. Mellen, 377 S.C. at 287, 659 S.E.2d at 250 (emphasis added) (citing Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). "Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained." Id. (citing Barnwell v. Barber-Colman Co., 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989)). It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's conduct. Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008) (citing Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001)).

Here, Plaintiffs merely allege they may have suffered damages and provided an estimate for possible damage but have proffered no evidence showing actual framing and/or sheathing damage. Instead, Plaintiffs' experts offered testimony that they *do not know* the extent of any damage, if any, because they did not investigate behind the cladding in the field or base of the walls. Plaintiffs failed to meet their burden of proof showing actual damages every time they acknowledged to the jury that they did not know the extent of the alleged damages. This failure of proof was demonstrated every time the Plaintiffs argued that they are not sure of the actual

damage and this was their only time to make a claim before the jury. The Plaintiffs sought damages based on fearful speculation rather than actual proof.

J

There is no support for the breach of fiduciary duty claim in the Riverwalk POA Action. Plaintiffs argued to the jury a standard that is not the law of South Carolina. The record is clear that when the property was transferred to the POA the reserve accounts were funded and the property manager in charge of maintaining the facilities affirmatively advised the POA was financially in good shape. A developer is held responsible for the condition of the common areas at the time these areas are deeded to the POA. Concerned Dunes West Residents, Inc. v. Georgia Pacific Corp., 349 S.C. 251, 259, 260, 562 S.E.2d 633, 638 (2002) (emphasis added). When the property was deeded to the POA the maintenance and financials were under the watchful eye of the Noble Company and there were no issues disclosed by Noble at that time.

K

The Court failed to decertify the Pope Class Action. The Pope Class Action is not proper under Rule 23 SCRPC and does not meet the requirements for class treatment under South Carolina law. Certification of a class in South Carolina requires a rigorous analysis by the Court to determine that the Plaintiffs have met their burden of demonstrating the presence of all essential elements mandated by Rule 23 SCRPC. See Waller v. Seabrook Island Property Owners Association, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990). "The fact that a proposed class representative is a property owner in a large or highly populated development does not in and of itself qualify him to bring a class action on behalf of the remaining property owners." Id. at 468, 388 S.E.2d at 801. Rather, the proposed class representatives must prove to the court the factors of Rule 23(a) SCRPC.

The preponderance of evidence standard should be applied when evaluating the propriety of class certification. In re Saftey Kleen Corp Bondholders Litig, No 3 00-1145-17 WL 3115870 (D S C Nov 1, 2004) (citing Ilhardt v A O Smith Corp, 168 F R D 613 617 (S D Ohio 1996) Shepherd v Babcock & Wilcox of Ohio, No C 3 98 391 2000 WL 987830 at *1 n 5 (S D Ohio March 3 2000) Gibb v Delta Drilling Co, 104 F R D 59 71 (N D Tex 1984)) Plaintiffs bear the burden of establishing that each of the elements of Rule 23(a) SCRPC can be met Waller, at 467 388 S E 2d at 801 (citing Wyndham v American Brands, Inc, 565 F 2d 59 (4th Cir 1977) cert den 435 U.S 968 (1978)) Plaintiffs failure to satisfy *any one* of the prerequisites is fatal to class certification Id (emphasis added) It is imperative the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied. Id (citing General Tel Co of Southwest v Falcon, 457 U S 147 (1982)) In undertaking this analysis the Court may not engage in speculation or conjecture nor may guess whether at some future date evidence may be forthcoming on any essential element Id

South Carolina looks to the federal courts for guidance when analyzing Civil Procedure Rule 23 See Gardner v Newson Buick, Co, 304 S C 328 404 S E.2d 200 (1991) (An absence of state law regarding civil rules courts should examine federal court construction) Therefore the class action review inquires into a requisite showing of numerosity commonality typicality and adequacy of representation Generally the court reviews whether the class action is superior to and more manageable than other procedural devices See Dickerson, Pope Class Actions The Law of 50 States § 606 (1998) Otherwise an action certified as a class is at risk of degenerating into an unmanageable quagmire of individual issues and affirmative defenses

In conducting its analysis the Court may look beyond the bald allegations in the Complaint but need not decide the merits of the underlying claim Falcon, 457 U S at 160 ([I]t

may be necessary for the court to probe behind the pleadings before coming to rest on the certification question), Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) ([G]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts and applicable substantive law in order to make a meaningful determination of certification issues). The Court conducts its analysis by "taking into account the substantive elements of Plaintiffs' claims and looks to the proof necessary to those elements so as to envision the form trial on those issues would take." Elliott v. ITT Corp., 150 F.R.D. 569, 572 (N.D. Ill. 1992) (citation omitted). Under the rigorous analysis required by Rule 23, SCRPC, Plaintiffs cannot meet that burden in this case. In fact, the testimony and other evidence at trial showed that the commonality and typicality prongs were not met.

**COMMONALITY
THERE ARE DISPARATE QUESTIONS OF LAW AND FACT
FOR THE INDIVIDUAL OWNERS TO RESOLVE.**

The second element of Rule 23(a), SCRPC, requires a showing of commonality. The Heritage Entities maintain that they are three distinct companies with distinct roles in the construction of the Riverwalk condominiums. Tony and Lynn Pope claim they represent the interests of all 228 unit homeowners. However, the mere fact that the Popes are property owners in the Riverwalk development does not, in and of itself, qualify [them] to bring a class on behalf of the remaining property owners. " Waller, 300 S.C. at 468, 388 S.E.2d at 801. Moreover, the Popes must demonstrate they have no interest antagonistic to or in conflict with the interests of the unnamed members of the class such that they are fairly and adequately able to protect the interests of the purported class." Id. (citation omitted).

The plaintiffs fail the commonality prong since there are at least three different types of unit owners at Riverwalk. A few unit owners are fulltime residents. Some unit owners use their units occasionally as a vacation home. Some unit owners are investors who rent their units either

to long term or short term renters. Since the Pope Class Action is for the prospective loss of use during the period of repair, each unit owner suffers a different loss since each has a different use.

Recently, the South Carolina Supreme Court reversed a trial court's class certification despite the similar issues of law and fact among the proposed class members. In Gardner v. South Carolina Dept. of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003), the Supreme Court reiterated that "[i]n practical terms, the party [requesting class certification] must articulate the existence of significant common, legal or factual issues which bind the proposed class together." Id. at 21, 577 S.E.2d at 200 (citation omitted). That is, commonality is only met where the class shares a determinative issue that overshadows all other issues. Id. at 21, 577 S.E.2d at 200-201. The Popes cannot meet this burden. A representative class cannot exist where the court must investigate each plaintiff's [individual] claim. Requiring such individualized examination negates the benefits of a class action suit. Id. at 22, 577 S.E.2d at 201 (citation omitted).

At trial, the Plaintiffs called only one homeowner in their case in chief, Mr. Pope. Mr. Pope gave no testimony that he was similarly situated with any other owner at Riverwalk. At most, Mr. Pope established that he owns a unit in building 13, which he uses very infrequently. By contrast, the Heritage Defendants called three unit owners, Constance Reddington, Sue Ann Hodges, and Mike Voyles, whose testimony established that there are no common uses, ownership, or damages that the homeowners might suffer. Half of the homeowners that testified only recently learned that they were involved in a lawsuit. The damages will be different since there are 19 different buildings. If repairs to one building take six weeks and repairs to another

take three weeks, the unit owners in those buildings have different periods of depreciation. Their damages are not actual but prospective. Regardless, they are not the same.

The Fourth Circuit Court of Appeals has cautioned that a class action is an *exception* to the general rule that litigation is conducted by and on behalf of individual named parties *only*. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 345 (1998). In Broussard, the Fourth Circuit held that it had been error for the District Court to certify a class of Meineke franchisees where members of the class had significantly disparate levels of damages. Id. at 344. The alleged damages for lost profits, the court stated, were "too dependent upon consideration of unique circumstances pertinent to each class member." Id. at 343 (quotation and citation omitted). Moreover, presenting an abstract analysis of averages for damages to the putative class members demonstrated the nonconforming nature of each purported class member's damages. That this shortcut was necessary in order for [the] suit to proceed as a class action should [be] a caution signal to the [court] that class-wide proof of damages [is] impermissible. Id. at 343. In the case at hand, Mr. Pope, the class representative, failed to demonstrate that his prospective damages for lost use are going to be the same as the unit owner that owns a unit in another building at Riverwalk or the unit owner that utilizes the property differently from Mr. Pope.

TYPICALITY

THE CLAIMS AND DAMAGES ARE NOT EQUIVALENT ACROSS THE PROPOSED CLASS

The third requirement of Rule 23(a), SCRPC, is that of typicality. Typicality is somewhat different than commonality in that it requires that the claims or defenses of the representative parties, the Papes, be similar to or be shared by most members of the putative class. See James Flanagan, South Carolina Civil Procedure 180 (2d ed. 1996). In other words, there must be a nexus between the individual class representatives' claims or defenses and the

common questions of law or fact that unit the class See Kornberg v. Carnival Cruise Lines, Inc.
741 F.2d 1332 (11th cir 1984) Pickett v. IBP, Inc., 182 F.R.D. 647, 647-49 (M.D. Ala. 1998)

The testimony at trial clearly established that the claims by the class members were not typical. Some owners had no damage. Some owners reported water intrusion. Some owners bought their units with knowledge of the Riverwalk litigation. Other owners had no such knowledge. Moreover, the individual owners use their units in different ways – from full time residential home to rental investment property. The claims are not 'typical'.

L

There is no support for the finding of a breach of warranty of habitability in the Pope Class Action. The evidence clearly established at trial is the units at Riverwalk have been fully utilized without interruption since purchased. The Court charged the jury that habitability is defined as the condition of a building in which inhabitants can live free from serious defects that might harm health and safety. See J. Newman's Jury Charge at p. 10, ¶2 (discussing implied warranty of habitability). There was no testimony at trial of any harm to any homeowner. It is clear from the jury's initial decision regarding damages in the Pope Class Action that they did not intend to award any actual damages to the individual homeowners.² The jury's revised finding on the breach of the warranty of habitability claim in the Pope Class Action is inconsistent with its decision on the same cause of action in favor of the Heritage Defendants in the Riverwalk POA Action. The testimony at trial established that the Riverwalk condominiums have been used for their intended purpose as temporary and permanent dwellings since their completion. Nonetheless, the jury was charged that a breach of this warranty [of habitability] would occur if the condominium cannot be lived in without serious defects that might harm

² The initial charge to the jury regarding punitive damages referenced twice that punitive damages were only recoverable in addition to actual damages. See J. Newman's Jury Charge at pp. 16, ¶1 & 19, ¶8 (discussing punitive damages).

health and safety See J Newman s Jury Charge at p 10 ¶3 Given the trial testimony and the jury charge the habitability claim can only arise from the alleged future repairs to the property The *only* repairs contemplated and presented at the trial were the repairs to the common elements which repairs are only claimed in the Riverwalk POA Action The Pope Class Action claims and damages were entirely derivative of the alleged repairs to the common elements Assuming *arguendo* that the Plaintiffs proved that the unit owners would not be able to access their units when the common elements are repaired the jury unequivocally determined in the Riverwalk POA Action that these repairs will not make the units uninhabitable The jury appears confused about the law and the proper award of damages by awarding inconsistent verdicts and imposing punitive damages and no actual damage in the Pope Class Action

M

The Court improperly admitted a purported cost estimate from Watkins Services which was not authenticated or accepted by the witness [R]elevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value Care and Treatment of Ettel v State, 377 S C 558 561 660 S E 2d 285 287 (Ct App 2008) see Rule 403 SCRE The subject applies to apples estimate was specifically rejected by Mr Watkins as anything he reviewed or adopted Plaintiffs use of the document purportedly to impeach Mr Watkins is highly prejudicial so as to mislead the jury Mr Watkins clearly testified that his pricing estimates were based on the scope of work from Applied Building Sciences Further the prejudice from the introduction of this other document was compounded by Plaintiffs improper use and presentation of prior deposition testimony by Mr Watkins Rather than attempting to impeach Mr Watkins with alleged prior inconsistent statements Plaintiffs counsel was allowed

to publish certain deposition testimony to the jury. The prejudice of admitting the document that Mr. Watkins himself did not authenticate clearly outweighed any probative value.

N

The Court denied Heritage the opportunity to cross-examine Plaintiff's window representative witness James Graham, regarding the window manufacturers' settlement. The Heritage Defendants acknowledge the general rule that courts favor compromise accordingly evidence relating to settlements is generally not admissible to prove liability. Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., 347 S.C. 545, 558 S.E.2d 718, 725 (Ct. App. 2001) (citations omitted). However, the prohibition contained in Rule 408 only extends to circumstances where such evidence is offered to prove liability for or the invalidity of the claim or its amount. The reason for impeaching Mr. Graham about the window settlements was not to discuss liability but to address credibility.

The window manufacturers were excused from trial because they pledged to pay Plaintiff's \$222,074.65. Plaintiff's, however, still claimed a \$2 Million window loss at trial. The fact that the window manufacturers settled out of the litigation in an amount $\frac{1}{10}^{\text{th}}$ of the total claimed window damages clearly shows the bias of the window manufacturer witness. In fact, Mr. Graham acknowledged that he volunteered his time to testify on behalf of the Plaintiff's at trial. He was not subject to subpoena since he lives in North Carolina. The Heritage Defendants should have been allowed to fully cross-examine Mr. Graham. The jury was entitled to know why the window manufacturers were absent from the trial in order to fully explore the biases of the witnesses called by Plaintiff's.

O

The Court improperly allowed Plaintiffs' expert Francis "Bud" DeSantis to testify as to economic loss. The actual role an expert witness plays at trial is limited. Under Rule 702 of the South Carolina Rules of Evidence, when admitting scientific evidence, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. State v. Council, 335 S.C. 120, 515 S.E.2d 508, 518 (1999). Expert testimony is allowed only if it 'will assist the trier of fact to understand the evidence or determine a fact in issue.' Rule 702, SCRE (emphasis added). Thus, 'To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.' Gooding v. St. Frances Xavier Hosp. 326 S.C. 248, 253, 47 S.E. 454, 54 S.E.2d 596, 598 (1997) (emphasis added and citation omitted).

The analysis is the same for entering the purported experts' evidence at trial. See State v. Council, 335 S.C. 120, 515 S.E.2d 508 (Ct. App. 1999). The factors for determining whether the evidence is admissible include: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Id. at 19, 515 S.E.2d at 518 (emphasis added) (citing State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)). The court must also determine if the probative value of the evidence is outweighed by its prejudicial effect. Council at 20, 515 S.E.2d at 518 (emphasis added). The court's review under Council is 'very similar' to the gatekeeper review of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). See In Re Robert R.

340 S C 242 278 531 S E 2d 301 303 (Ct App 2000) (citing G Ross Anderson, Jr *Evidence Eggshells-A New Walk for Experts*, The Bulletin Fall 1999 at 7 9)

Here DeSantis is being offered as an expert regarding Plaintiff's alleged lost use. The test for an expert witness qualifications is a relative one depending on the particular witness's reference to the subject. Botehlo v Bycura, 282 S C 578 586 320 S E 2d 59 64 (1984). DeSantis fails to satisfy the technical skills application of Rule 702. He is not trained or licensed in the specialty. He has not taught classes in the specialty. He does not rely on reliable information from someone trained or licensed in the specialty. His methods have not been subjected to peer review. His methodology has not been adopted in South Carolina. There are no quality control procedures to ensure reliability with DeSantis methodology. There is no consistency of his methods with recognized scientific laws and procedures. In fact, at trial DeSantis gave no basis for his testimony. He merely concluded that everyone should be treated exactly the same, despite his acknowledgment that homeowners use their units in different ways. DeSantis testimony improperly inflated Plaintiffs alleged damages. Mr DeSantis testified his calculations that support his view of loss of use were simple arithmetic. The Plaintiffs cloak a simple arithmetic calculation with the aura of an expert opinion in an effort to bolster the validity of their prospective loss of use claim.

P

The Court, though granting a jury view failed to allow jurors to walk around the buildings or walk on building walkways as requested by defendants. Thus jurors did not view the true condition of the buildings at issue. The purpose of a jury view is to enable the jury better to understand the evidence presented in the courtroom. City of Columbia v Jennings, 288 S C 79 80 339 S E 2d 534 535 (Ct App 1986). The Defendants respectfully suggested that

the jury should walk around Building 13 where the class representative, Tony Pope owned his unit as well as building 1512 in Phase II because it was easier to walk around It is entirely reasonable to allow the jury to view the home of the class representative in this type of litigation When the Court restricted the jury from even getting out of the vehicles it effectively denied the jury the opportunity to better observe and understand the evidence presented in the courtroom The jury should have been allowed to walk around the buildings and on the walkways especially in light of Plaintiffs counsel s arguments that the only way to see damage and the condition of the buildings is to look closely and walk around the entire building

Q

The Court allowed plaintiffs to make improper burden shifting arguments regarding proof of window defects or lack thereof It is well established that the plaintiff bears the burden of proving his case Cole v South Carolina Elec & Gas, Inc., 362 S C 445, 608 S E 2d 859 (2005) Beaufort County v Trask, 349 S C 522 563 S E 2d 660 (Ct App 2002) A plaintiff may not rest on the bald allegations of his complaint but has the burden of establishing facts to support his cause of action. Knight v Am Nat Fire Ins Co., 831 F Supp 1284 (D S C 1993) It is the plaintiff's burden to establish each elements of his complaint Yarborough v Montgomery, 554 F Supp 2d 611 (D S C 2008)

In this case Plaintiffs impermissibly shifted the burden on the Heritage Defendants to *disprove* allegations in Plaintiffs' complaint The Plaintiffs alleged that the windows were improper and allowed water to leak into the buildings It was incumbent on the Plaintiffs to actually *prove* these allegations Plaintiffs hired Drew Brown specifically to address alleged construction defect and product choice issues It was demonstrated during cross examination of Mr Brown and direct examination of Alan Campbell that Plaintiffs conclusions about the

windows could not be demonstrated by Mr. Brown's inadequate and incorrect testing procedures. However, Plaintiffs attempted to cure their own witness' inadequate testing protocols by suggesting that the Heritage Defendants should have tested the windows, dismantled the exterior cladding, or use devices to peer behind the brick cladding. That is, Plaintiffs improperly argued to the jury that it was the Heritage Defendants' responsibility to jointly conduct a proper investigation on behalf of the Plaintiffs. Plaintiffs are shifting the burden of proof. Defendants were not required to test the windows nor were they participating in Plaintiffs' testing procedures. Plaintiffs' own failures proving their case cannot be shifted to the defendants to disprove the bald allegations asserted by the Plaintiffs. See Baughman v. AT&T, 306 S.C. 101, 117 S.E.2d 537-546 (1991) (bald allegations are insufficient to create a genuine issue of fact.)

R

The Court erred by including the terms "willful," "wanton," and "reckless" when charging the jury on the negligence cause of action. Including these terms with the simple negligence charge equated the award of punitive damages with the preponderance standard rather than with the clear and convincing standard for punitive damages. An award of punitive damages must be proven by clear and convincing evidence. Longshore v. Saber Sec. Serv., Inc., 365 S.C. 554-564, 619 S.E.2d 511 (Ct. App. 2005). [A] punitive damage award is warranted only when the defendant's conduct is shown to be willful, wanton, or in reckless disregard of the rights of others. S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S.C. 149, 152 S.E.2d 57, 58 (1996) (citing Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993); Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 (1986); Gilbert v. Duke Power, 255 S.C. 495, 179 S.E.2d 720 (1971); Hinson v. AT&T Constr. Co., 236 S.C. 125, 113 S.E.2d 341 (1960)).

Rogers v Florence Printing Co., 233 S C 567 106 S E 2d 258 (1959) However as the court charged the jury the incorporation of the punitive damages language into the mere negligence charge suggested that all damages can be awarded under the lower preponderance standard The instruction was prejudicial and confusing Punitive damages should not have been awarded in this case

S.

The damages verdict is not consistent with the actual conditions at the Riverwalk condominium complex A jury verdict should be upheld when it is possible to do so and carry into effect the jury s clear intention. However when a verdict is so confused that the jury s intent is unclear the safest and best course is to order a new trial. Vinson v Jackson, 327 S C 290 293 491 S E 2d 249 250 (1997) Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge should not be required to guess as to what the jury sought to render Daves, 355 S C at 231 584 S E 2d at 430 (citing Prego v Hobart, 287 S C 116 118 336 S E 2d 725 726 (Ct. App 1985)(internal citation omitted)) When the jury assesses liability to a defendant but awards zero damages the verdict is facially inconsistent and contrary to South Carolina law Longshore v Saber Sec Serv, Inc., 365 S C 554 562-63, 619 S E 2d 5 10 (Ct App 2005) (internal citation and quotations omitted)

Here the jury clearly found the homeowners would suffer no damages for lost use The jury was charged initially that punitive damages could only be awarded in addition to actual damages " See J Newman s Jury Charge at pp 16 ¶1 and 19 ¶8 Nonetheless the jury returned its first verdict in the Pope Class Action with no actual damages and \$1 000 000 00 punitive damages Their determination that the Pope Class Action plaintiffs suffer no actual damages is

consistent with testimony at trial. The entire Pope Class Action damages award should be struck.

T

The verdicts in the Pope Class Action and Riverwalk POA Action cases are not consistent with South Carolina's economic loss rule. The economic loss rule "is limited to those cases where duties are created solely by contract." Beachwalk Villas Condominium Ass'n, Inc. v. Martin, 305 S.C. 144, 146 S.E.2d 372, 374 (1991). See Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989). The completed buildings are a product. There is no tort liability for a defective product if the damage suffered by the plaintiff is to the product itself. Kershaw Co. Bd. of Ed. v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990). Here, the homeowners are fully compensated by the cost of repairs damages. Tort liability and punitive damages should not be imposed when the only damage is to the "product," i.e., the building itself.

U

The jury's verdict was not supported by the credible evidence presented in this case. There is no support for the negligence cause of action in both the Riverwalk POA Action and the Pope Class Action. Plaintiffs failed to meet their burden of proof every time they acknowledged to the jury that they do not know the extent of the alleged damages. Moreover, Plaintiffs failed to prove that the damages were a result of a known building code violation at the time of construction.

The trial judge should use his discretion sitting as the 13th juror to grant a new trial on the grounds that the damages verdict is not consistent with the actual conditions at the Riverwalk condominium complex. The cumulative effect of the admission over objections of issues at

other Heritage Communities projects unduly influenced the jury and unnecessary inflated both the actual and punitive damage verdicts. Because of these errors set forth above the Heritage Defendants are entitled to a new trial. Accordingly, the jury's verdict should be overturned by this Court sitting as the thirteenth juror.

II JUDGMENT NOTWITHSTANDING THE VERDICT

A judgment notwithstanding the verdict is a renewal of a directed verdict motion. Roland v. Palmetto Hills, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992). In the instant case the Heritage Defendants moved for directed verdict at the close of Plaintiff's case in chief as well as at the close of their own case. The Heritage Defendants independently premised their motions upon the assertion that there was an insufficiency of evidence to support all material elements of Plaintiff's respective causes of action against the Heritage Defendants. For the reasons stated at the hearing on the Heritage Defendants' motions for directed verdict the Heritage Defendants now move this Court for judgment notwithstanding the verdict.

A

Over the Heritage Defendants' continued objections Plaintiffs were allowed to present testimony regarding other construction projects and other lawsuits. In essence as the Heritage Defendants argued at trial, Plaintiffs were allowed to try multiple construction projects against the defendants. This testimony was presented to implicate the Heritage Defendants' liability through improper character evidence.

B

The trial court should have directed a verdict in favor of the Heritage Defendants on punitive damages because Plaintiffs failed to prove or provide any testimony that the conduct during the construction of the Riverwalk condominiums arose to the level of clear and

convincing evidence of liability Longshore v. Sabre Sec. Serv., Inc., 365 S.C. 554, 564, 619 S.E.2d 511 (Ct. App. 2005).

C

The Plaintiffs failed to prove their case every time their experts and attorneys acknowledged that they cannot say how much damage is actually on the condominium buildings. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation. Baughman v. AT&T, 306 S.C. 101, 116, 410 S.E.2d 537, 146 (1991) (citing Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968)). Instead, actual damages are intended to compensate the Plaintiff for an actual loss. By admitting that they do not know the extent of the claimed damages, Plaintiffs concede that their damages are speculative.

D

The Heritage Defendants renew their objection to the Court's finding that these three entities were an amalgamation of corporate interests under the Court of Appeals case of Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) and, therefore, should be treated as the same entity. This finding caused the blurring of the distinct causes of action that were presented to the jury. The Court decided this point because the same owners were officers of Heritage Communities, Heritage Riverwalk, and Buildstar and that the three distinct corporations shared office space. The sharing of office space and employees is not determinative of the blending of corporate interests. See Carroll v. Smith Henry, Inc., 281 S.C. 104, 106, 313 S.E.2d 649, 651 (Ct. App. 1984). The Heritage Defendants renew their objection that the mere testimony that office space was shared is wholly inadequate for a finding that distinct corporate entities should be amalgamated. Instead, the testimony at trial was that the

three entities were created to perform different and distinct tasks. Heritage Communities was the parent corporation and developer. Heritage Riverwalk was the sales company using employees leased from Burroughs & Chapin Company, and Buildstar was the general contractor.

The amalgamation finding is a back-door attempt at piercing the corporate veil without requiring plaintiff to prove the necessary elements under the multi-prong test for piercing. See Mid South Mgt. Co., Inc. v. Shorwood Development Corp., 374 S.C. 588, 649 S.E.2d 135 (Cl. App. 2007) reh'g denied (Aug. 24, 2007). "The party seeking to have the corporate identity disregarded has the burden of proving that the doctrine should be applied." Sturkie v. Siffly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Cl. App. 1984). The Court's ruling regarding the alleged amalgamation then tainted the distinct causes of action alleged in the case.

At trial, the general contractor, Buildstar Corporation, was required to defend against the claims against the developer, Heritage Communities, Inc., for breach of habitability and breach of fiduciary duty. The warranty of habitability claim, which the jury found in favor of the Heritage Defendants in the Riverwalk POA Action, springs from the sale of a home. See Kennedy v. Columbia Lumber and Manufacturing Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989). The warranty of habitability thus springs from the activities of the developer, not the general contractor.

E

This Court must revisit its previous grant of directed verdict as to Plaintiff's negligence cause of action. When reviewing the denial of a motion for directed verdict, the Trial Court must consider the evidence in the light most favorable to the non-moving party. Brady Dev. Co. v. Town of Hilton Head Island, 312 S.C. 73, 439 S.E.2d 266 (1993). When deciding a motion for directed verdict, the evidence and all reasonable inferences that may be drawn from it must be

viewed in the light most favorable to the non moving party. If the evidence yields more than one inference, the motion for directed verdict should be denied. Substation II v. Oliver, 307 S.C. 166, 414 S.E.2d 141 (1992); Bonaparte v. Floyd, 291 S.C. 427, 354 S.E.2d 40 (Ct. App. 1987); see also Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993) (stating that a directed verdict should not be granted unless only one reasonable inference can be drawn from the evidence); Steinke v. S.C. Dept. of Labor, Licensing, and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999) (holding the trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt). When considering the motion, the Trial Court does not have the authority to decide credibility issues or to resolve conflicts in the testimony in evidence. Garrett v. Locke, 309 S.C. 94, 419 S.E.2d 842 (Ct. App. 1992).

In the instant case, the experts for Plaintiffs, Defendants, and even Dave Eiland, the building code witness, testified that it is impossible to build a structure free from all possible building code violations. Alleged violations of the building code are not sufficient, standing alone, to establish a directed verdict on the negligence claim. See Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989) (noting only that a violation of a building code violates a legal duty that can lead to liability in tort); New Amsterdam Casualty Co. v. Novick Transfer Co., Inc., 274 F.2d 916 (4th Cir. 1960) (noting violation of a building code is not evidence of negligence *per se*); Elliott v. City of New York, 747 N.E.2d 760, 762 (NY App. 2001) (violation of a municipal ordinance constitutes only evidence of negligence). Indeed, the jury was charged on this point:

A general contractor has a duty to supervise the construction of the underlying project. However, the general contractor is not automatically responsible for the negligence of the subcontractors that worked on the same project. The Plaintiff still must prove that the general contractor breached its duty to supervise the construction of the project and that this alleged breach was the proximate cause of Plaintiffs' damages.

See J Newman s charge to the jury charging Defendants Request to Charge No 5, which referenced Fields v J Haynes Waters Builders, Inc 376 S C 545 658 S E 2d 80 (2008)

Plaintiffs provided no evidence at trial that the homeowners and the POA were entitled to completed structures that exceeded the building code requirements and code inspection review At the very least regarding the negligence cause of action, the issue of what were the independent duties of the Heritage Defendants and whether these duties were in fact breached were question for the jury

F

The Heritage Defendants renew their position that construction is not completed in a vacuum That is other parties like the subcontractor and the designer also participate in the construction process Pegram, a named defendant who testified at but did not participate in the trial acknowledged his participation in the design and final sign-off of the project for the bank The Heritage Defendants filed their affirmative defenses that other parties either were principally liable or shared in the liability to the Plaintiffs for the alleged construction defects The jury was charged that while a general contractor has a duty to supervise construction, the general contractor is not automatically responsible for the negligence of the subcontractors that worked on the same project. The Plaintiff still must prove that the general contractor breached its duty to supervise the construction of the project and that this alleged breach was the proximate cause of Plaintiffs damages See Judge Newman s charge to the jury charging Defendants Request to Charge No 5 which referenced Fields v J Haynes Waters Builders, Inc 376 S C 545 658 S E 2d 80 (2008)

G

The Defendants were further prejudiced by the mandatory instruction to the jury that they must award damages following the grant of a directed verdict on negligence. In fact, the Court compounded the mandatory language by sheer repetition of the term and the concept in the charge to the jury.

H

The negligence finding further prejudiced the Heritage Defendants as a result of the Court providing instructions on punitive damages. Since the credible testimony from all qualified defect experts at trial agrees that it is an impossibility to construct a perfect building, providing the jury with instruction on punitive damages was unduly prejudicial when considering all the evidence as a whole. In both the Riverwalk POA Action and the Pope Class Action, the jury returned an award of punitive damages. However, the basis for the punitive damages award was clearly based on something other than the construction of the Riverwalk condominiums. Over the Heritage Defendants' continued objections, Plaintiffs were allowed to present testimony regarding other construction projects and other lawsuits. In essence, as the Heritage Defendants argued at trial, Plaintiffs were allowed to try multiple construction projects against the defendants. The testimony was allowed for the punitive damages portion of the case. However, incorporating unrelated projects into the Riverwalk litigation is expressly limited by the courts. See State Farm v. Campbell, 123 S.Ct. 1513, 1522 (U.S. 2003) ('A defendant's dissimilar acts independent from the acts upon which liability was premised may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.') In fact, it gives credence to defendants' motion to bifurcate damages because of the prejudicial effect of crossover evidence from other projects.

I

The Court erred by not decertifying the Pope Class Action as the testimony and evidence showed that the requirements of Rule 23 SCRCF for commonality and typicality were not fulfilled. This prejudice was further demonstrated by the disparate decisions by the jury in the Pope Class Action compared to the Riverwalk POA Action. The jury clearly found that the Pope Class Action Plaintiffs were *not* entitled to actual damages. The original jury verdict form vexed the Court and the matter was sent back to the jury for further deliberations. The final result is an apparent compromise to award the Pope Class Action Plaintiffs additional money simply because the Riverwalk POA Action Plaintiffs claimed repair costs were not proven. The jury did not award Plaintiffs' repair cost figure. Thus, the repetition of discussing punitive damages and further referencing the willful and wanton language required for a finding of punitive damages clearly prejudiced the Heritage Defendants. Not only did the discussion about punitive damages bolster and inflate the Plaintiffs' claims of actual damages, the Heritage Defendants were further prejudiced by the failure to grant a directed verdict as to punitive damages and, therefore, are entitled to judgment notwithstanding the verdict.

III NEW TRIAL ABSOLUTE

The trial judge must grant a new trial absolute if the amount of the verdict is grossly excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). 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 court will grant a new trial absolute. Id.

It is the duty of a trial judge to correct formal mistakes in a verdict, but this power to correct is limited to mere matters of form and does not include the right to change the substance of a jury's finding. Zedd v. Jenkins, 194 Va. 704, 707-74 S.E.2d 791-793 (Cl. App. 1953).

When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, the error in the charge is difficult, if not impossible, to correct without retrial in light of the jury's general verdict. Memphis Comty. Sch. Dist. v. Stachura, 477 U.S. 299-312 (1986) (internal quotation omitted, citing Newport v. Fact Concerts, Inc., 453 U.S. 247-256 n.12 (1981)); see Albright v. Longview Police Dep't, 884 F.2d 835-843 (5th Cir. 1989). Specifically, the trial court must set aside a verdict for punitive damages and

grant a new trial if it is of the opinion that the verdict (1) is against the clear weight of the evidence, (2) is based upon evidence that is false, or (3) will result in a miscarriage of justice even though there may be substantial evidence that would prevent the direction of a verdict.

GTR Rental, LLC v. Dalcanton, 547 F.Supp.2d 510-518 (D.S.C. 2008) (citing Atlas Food Sys. & Svcs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587-594 (4th Cir. 1996)).

Additionally, if the jury's answers are so ambiguous or conflicting that they cannot be reconciled fairly, the trial court may not enter judgment thereon. Weprin v. Peterson, 736 F.Supp. 1131, 1132 (N.D. Ga. 1988); see Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983). An award of punitive damages without an award of actual damages is a verdict that is irreconcilable and inconsistent. Weprin, 736 F.Supp. at 1132; Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350-354 (1991). "Therefore, it is not a question of resolving inconsistencies in the jury's logic but in reconciling the law with the verdict." Weprin at 1132. In Weprin, the jury delivered a verdict awarding punitive damages but no actual damages. In that case, the Court ruled there may be no punitive damage award without an actual damage

award and [t]he only action the Court can take is to strike the award of punitive damages
Id. (emphasis added)

A

The Heritage Defendants are entitled to a new trial absolute in both the Riverwalk POA Action and the Pope Class Action. The jury's verdict in the Riverwalk POA Action was \$4,250,000 actual damages and \$250,000 punitive damages. The jury's verdict in the Pope Class Action was \$0.00 actual damages and \$1,000,000 punitive damages. After re-instruction from the court that the jury had to award actual damages in order to award punitive damages, the jury *changed* its verdict in the Pope Class Action to \$250,000 actual damages and \$750,000 punitive damages. The Court should have merely struck the Pope Class Action damages. See Weprin, supra. In South Carolina, the trial judge has the discretion whether to grant a new trial. Daves v. Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2004). This decision will not be disturbed on appeal unless unsupported by evidence or is controlled by an error of law. Id. 'A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention. However, when a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial.' Vinson v. Jackson, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997). Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge should not be required to guess as to what the jury sought to render. Daves, 355 S.C. at 231, 584 S.E.2d at 430 (citing Prego v. Hobart, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985)). The Heritage Defendants respectfully submit that the jury's verdicts in both cases were the product of passion, caprice, prejudice, partiality, or some other improper motive.

B

The Heritage Defendants submit that they are entitled to a new trial as a result of the grant of a directed verdict in favor of the Plaintiffs on the amalgamation issue. The amalgamation ruling by the Court was prejudicial to the separate and distinct corporate defendants: Heritage Communities, the parent company developer; Heritage Riverwalk, the special purpose developer and sales entity that borrowed sales employees from Burroughs & Chapin; and Buildstar, the general contractor. Each of these Heritage Defendants is a separate corporate entity with separate responsibilities. The Court's ruling on amalgamation caused the jury to blend the different causes of action that the Plaintiffs asserted against the various Heritage Defendants' entities. Moreover, the ruling deprived the jury of its role to determine whether the Plaintiffs successfully proved their distinct causes of action against the Heritage Defendants.

C

The Heritage Defendants are entitled to a new trial based upon the Court's failure to fully charge the jury on negligence. Instead, the Court took the decision regarding alleged negligence away from the finders of fact. This is contrary to the law and the charge to the jury that:

A general contractor has a duty to supervise the construction of the underlying project. However, the general contractor is not automatically responsible for the negligence of the subcontractors that work on the same project. The Plaintiff still must prove that the general contractor breached its duty to supervise the construction of the project and that this alleged breach was the proximate cause of Plaintiffs' damages.

Judge Newman's charge to the jury (Defendant's Request to Charge No. 5) referencing Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008).

D

The damages awarded by the jury are so excessive that they shock the conscience. In the Riverwalk POA Action, the jury awarded a sum for actual damages for the construction between

the proposed figures by the Heritage Defendants and the Plaintiffs. However, there is no basis for this figure in the record. Clearly, the jury did not agree with Plaintiffs' position that the repair costs alone were in excess of \$8.5 Million. As such, the jury should have awarded the Heritage Defendants' figures. As discussed throughout this memorandum, the award of punitive damages has absolutely no basis at law and, therefore, is *per se* shocking, requiring a new trial.

Additional grounds for the grant of a new trial absolute are discussed in section V below regarding punitive damages.

IV NEW TRIAL NISI REMITTITUR

The trial court has the power to grant a new trial nisi Remittitur when the verdict indicates the jury was unduly liberal in determining damages. Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 637, 529 S.E.2d 758, 762 (Ct.App. 2000). The trial court must evaluate the adequacy of the verdict in light of the evidence presented. Id. In the underlying Riverwalk POA Action and Pope Class Action cases, the trial court should grant a nisi Remittitur to the amount of \$2,518,196.48³ for two reasons:

First, the Trial Judge has the power to grant a new trial nisi when it finds the amount of the verdict to be excessive. As asserted above, the \$5.5 Million dollar verdict awarded to Plaintiff was excessive. The Plaintiffs' figure is excessive as it is clear from the record that the jury did not accept Plaintiffs' repair estimate or scope. The verdict should be reduced to the sum of Two Million Five Hundred Eighteen Thousand One Hundred Ninety Six and 48/100 (\$2,518,196.48) Dollars, which represents the accurate past and future repairs rather than the excessive and speculative figure proposed by the Plaintiffs.

³ The sum of the Heritage Defendants' repair costs (\$2,391,619.00) plus the Noble Company repairs (\$126,577.48).

Second the Court should consider the lack of testimony regarding actual sheathing or framing damage. The Heritage Defendants estimate accounts for all arguable damages accurately and truly. The jury clearly did not accept Plaintiffs plea for damages. The number the jury determined has no basis in the record. Instead, the only credible number for the jury to award was Defendants number.

Additional grounds for the grant of a new trial *nisi remittitur* are discussed in section V below regarding punitive damages.

V PUNITIVE DAMAGES REVIEW

A

The Trial Court is required to review all awards of punitive damages and, to ensure that no award be grossly disproportionate to the severity of the offense the trial court shall set forth its findings on the record." Gamble v. Stevenson, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991). This review ensure[s] that the award does not exceed an amount that will accomplish society's goals of punishment and deterrence." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 121, 111 S.Ct. 1032, 1045 (1991) (citation and internal quotation omitted). If the trial judge finds the award of punitive damages shocking and the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives, then the Court should grant a new trial absolute. See Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). However, if the trial judge is convinced that the amount awarded is [merely] overliberal, he has the authority and corresponding *duty* to reduce the verdict by order *nisi*. Gamble at 111, 406 S.E.2d at 354 (emphasis in original, citation omitted).

In South Carolina, in order to award punitive damages there must be an award of actual damages. Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (citing

Carroway v. Johnson 245 S C 200 139 S E 2d 908 (1965)) see J Newman s charge to the jury p 16 ¶1 and p 19 ¶8 The trial judge charged the jury with this requirement before deliberations commenced ⁴ [A]n award of punitive damages must be proven under a significant burden of proof clear and convincing evidence Longshore v. Saber Security Services, Inc., 365 S C 554 564 619 S E 2d 5, 11 [A] punitive damage award is warranted only when the defendant s conduct is shown to be willful wanton, or in reckless disregard of the rights of others S C Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S C 149 152 478 S E 2d 57 58 (1996) (citations omitted) Punitive damages are not awarded for mere gross negligence Bell v. Atlantic Coast R. Co., 202 S C 160 __ 24 S E 2d 177, 182 (1943)

The South Carolina Supreme Court provides the trial court with the following guidelines for a post trial review of punitive damages

- (1) defendant s degree of culpability
- (2) duration of the conduct
- (3) defendant s awareness or concealment
- (4) the existence of similar past conduct
- (5) likelihood the award will deter the defendant or others from like conduct
- (6) whether the award is reasonably related to the harm likely to result from such conduct
- (7) defendant s ability to pay and finally
- (8) as noted in [Pacific Mut. Life Ins. Co. v. Haslip 499 U S 1 111 S Ct 1032 (1991)] other factors deemed appropriate [such as the impact on innocent third parties]

⁴ The charge to the jury began by stating that "in this case the Plaintiffs seek punitive damages in addition to actual damages (J Newman s charge p 16 ¶1) and reiterates near the conclusion. Accordingly if you should find that the plaintiffs are entitled to recover punitive damages in addition to actual damages it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances (J Newman charge p 19 ¶8)

Gamble 305 S C at 111 12 406 S E 2d at 354 The post-trial review of punitive damages does not stop with the Gamble factors The trial court must also act as the gatekeeper to ensure that the punitive damages award does not violate the constitution.

A trial court shall review the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts (1) the degree of reprehensibility of the defendant's misconduct (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases

James v. Horace Mann Ins. Co., 371 S C 187 195, 638 S E 2d 667, 671 (2006) (citing BMW of North America, Inc. v. Gore, 517 U S 559 116 S Ct 1589 (1996)) Although the trial judge must weigh many factors, the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct Frazier v. Badger, 361 S C 94 107 603 S E 2d 587 593 (2004) (citing State Farm Mut. Ins. Co. v. Campbell, 538 U S 408 419 (2003))

B

The punitive damages award violates the mandate of State Farm Mutual Automobile Insurance Company v. Campbell 538 U S 408, 123 S Ct 1513 155 L Ed 2d 585 (2003) The harm was economic not physical and the jury was allowed to hear evidence of other projects that bore no relation to these plaintiffs' actual damages

The Court improperly admitted evidence of alleged construction defects at other projects developed by Heritage Litchfield, Inc., Heritage Azalea Lakes Inc., Gardens at Cypress Bay Inc. Heritage Magnolia, Inc. and Heritage Magnolia North Inc. In South Carolina, a court may admit evidence of similar happenings, lawsuits or accidents only 'where there is some special relation between them which would tend to prove or disprove some fact in dispute' DANNY R. COLLINS SOUTH CAROLINA EVIDENCE § 9-5 (S C Bar 2d ed 2000) There is no specific formula

for determining whether prior lawsuits are admissible instead. It is simply a rule of relevance logic and common sense. " Reed v. Clark, 277 S.C. 310, 314-15, 286 S.E.2d 384, 387 (1982)(quoting with approval Brewer v. Morris, 269 S.C. 607, 239 S.E.2d 318 (1977)). Generally, courts consider whether the events are sufficiently similar in time, place, or circumstances" to determine the admissibility of prior incidents. Stutts v. Flour Daniel, Inc., 122 F.3d 1062, WL 583644 (4th Cir. 1997). Ultimately, the issue is left to the discretion of the trial court. Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). However, the similarity of the injuries does not necessarily make the prior occurrence admissible under Whaley because the Whaley Court determined prior complaints of the same types of conditions and injuries are inadmissible. See id. at 483, 609 S.E.2d at 300 (discussing how the prior statements admitted also complained of heat related injuries).

In seeking to admit this evidence, Plaintiff has the burden of establishing a factual foundation demonstrating that the events were substantially similar to the [event] at issue. See Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). This burden is substantial as the Whaley court emphasized, because of the highly prejudicial nature of prior events. Therefore, this Court must examine the similarity of the prior incidents with heightened suspicion in order to prevent misleading the jury.

Here, Plaintiff is unable to demonstrate the prior claims or suits are substantially similar to the facts of this case. The events of the other claims are not sufficiently similar in time, place, and circumstance in order to be admissible. Plaintiff must be barred from admitting into evidence any other claims or suits concerning Heritage Communities, Inc. because they are not substantially similar to the case at bar.

C

Additionally the other claims or suits still are not admissible even if the Court determines they satisfy the substantially similar test because the balancing of substantial prejudice and probative value under Rule 403 SCRE remains applicable to the admissibility of similar occurrences See Whaley, 362 S C 456 483 609 S E 2d 286 300 (2005) ("Because evidence of other accidents may be highly prejudicial [a] plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue")(internal citation omitted) For the reasons aforementioned admitting the other claims or lawsuits, has minimal probative value with regard to the disputed issues in this case and would unfairly prejudice the Defendants by allowing the jury to determine liability based on past events wholly unrelated to the events underlying the present case See State v. Alexander, 303 S C 377, 401 S.E 2d 146 (1991) Lai v. Sagle, 818 A 2d 237 245-46 (Md Ct. App 2003) Schwartz v. New Castle Corp., No 96-17178 1997 U S App LEXIS 33701 (9th Cir Nov 26 1997) (unpublished opinion)

D

Plaintiffs claim that a breach of a building code is tantamount to a statutory breach such that it is evidence of willful wanton or reckless conduct is not the law of the State of South Carolina The violation of a building code is merely evidence of negligence Huerta v. New York City Transit Authority, 290 A D 2d 33 735 N Y S 2d 5 (2001) Elliot v. City of New York, 94 N Y 2d 730 747 N E 2d 760 (Ct App 2001) Therefore evidence of a breach of a locally adopted building code does not rise to willful, wanton, or reckless conduct

E

Hentage was improperly and unfairly deemed culpable for defects which were the workmanship of other contractors. Therefore Hentage was unfairly deemed responsible and punished for work which was not its own. In order to recover in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff (2) a breach of that duty by a negligent act or omission and (3) damages proximately resulting for the breach Carson v. Adgar, 486 S.E.2d 3 (S.C. 1997).

'It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's [conduct] Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008) (citing Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001)).

Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the plaintiff's injury would not have occurred but for the defendant's action. Legal cause is proved by establishing foreseeability. Conduct is the proximate cause of an injury if that injury is within the scope of reasonably foreseeable risks of the conduct. Where the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, plaintiff has failed to carry the burden of establishing that his injuries were the proximate result of defendant's conduct.

Mellen, 377 S.C. at 278, 280, 659 S.E.2d at 245-46 (internal citations and quotations omitted).

Here, it is unforeseeable and unreasonable to assess liability on Hentage for the work of other contractors. The injury would not have occurred but for the actions of the other contractors, and not the actions of the Hentage Defendants. Plaintiffs have failed to carry the burden of proving proximate cause. Hentage must not be liable for the defective work of other contractors because such work was outside the scope of Hentage's responsibilities and no acts of Hentage proximately caused damage to Plaintiffs in this instance.

F

The punishment for alleged building deficiencies when the buildings were prima facie constructed in compliance with local codes, as evidenced by the Certificates of Occupancy constitutes punishment for lawful conduct in violation of the Constitutions of the United States of America and the State of South Carolina.

G

The only evidence in the record is that when Defendants became aware of potential issues relating to the construction of these units they affirmatively took steps to address those issues. This is addressed in the testimony by Lynn Anderson, Gwynn Hardister and in the meeting minutes entered at trial. The Heritage Defendants' efforts are even documented in the documents proffered during Mr. Graham's (the Plaintiff's window representative) testimony which documents the Heritage Defendants still challenge as admissible.

H

The Plaintiffs do not sufficiently meet any proof regarding existence of similar past conduct since the evidence upon which they exclusively rely appears to be that other alleged deficiencies of other Heritage entities. However, such conduct was not in the past but all projects were being concurrently developed and Plaintiffs fail to meet the past conduct prong of Gamble. At trial, Gwynn Hardister testified that problems with windows at Riverwalk happened simultaneously. Additionally, Lynn Andersen testified that she was not even aware of any problems with the windows at Riverwalk. Only Plaintiffs' counsel advocated a long passage of time between construction and knowledge of an alleged problem; however, Plaintiffs' counsel's statements are not evidence. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (1991).

I

There is no deterrent effect for punitive damages since the only evidence in the record is that the Heritage Defendants are not ongoing business entities. Lynn Andersen testified that the Heritage entities ceased all construction practices by August 2000. Punitive damages are inappropriate because they offer no disincentives to Heritage for conduct warranting such penalties.

J

There is no evidence of punitive damages being reasonably related to the harm caused by these alleged defects since the harm is fully compensated and covered by the actual damages verdict. Here, actual damages were awarded to compensate Plaintiffs. Punitive damages in this case are unwarranted because they are being used to compensate Plaintiffs, not punish, deter, or compensate for reckless or willful invasion of Plaintiff's private rights. The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others. Mellen v. Lane, 377 S.C. 261, 290 S.E.2d 236, 251 (Ct. App. 2008) (internal citation omitted).

K.

There is no evidence of the Heritage entities' ability to pay since the Heritage entities are not an ongoing business. [T]he wrongdoer's ability to pay is a relevant factor in assessing punitive damages. Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991). See Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958). Here, Plaintiffs argued in limine and presented to the jury that the Heritage entities are bankrupt. Additionally, Lynn Andersen testified to the jury that Heritage is out of business. Punitive damages are inappropriate in this case because of Heritage's inability to pay.

L

The jury was charged regarding the law of punitive damages prior to the first verdict in the Pope Class Action. The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). The trial judge is required to charge only the current and correct law of South Carolina. McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995) (citing State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991)); Keaton v. Greenville Hospital System, 334 S.C. 488, 496, 514 S.E.2d 570, 574 (1999) (A jury charge is correct if "[w]hen the charge is read as a whole it contains the correct definition and adequately covers the law.") State v. Rabon, 275 S.E.2d 459, 462, 272 S.E.2d 634, 636 (1980) (the trial judge declares the law "but no particular verbiage is necessary"). In South Carolina, in order to award punitive damages there must be an award of actual damages. Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (citing Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965)). The trial judge charged this basic law that punitive damages are to be awarded only in addition to actual damages to wit:

Accordingly "if you should find that the plaintiffs are entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances."

J. Newman's charge to the jury p. 19 ¶8. Thus, an award of punitive damages without an award of actual damages is an irreconcilable and inconsistent verdict. See Weppin, 736 F.Supp. at 1132. The jury, however, commenced to award zero actual damages and \$1 Million in punitive damages in the Pope Class Action. Such an award strongly suggests the jury disregarded the charge from the trial judge.

M

An award of punitive damages must be proven by clear and convincing evidence Longshore, 365 S C at 564 619 S E 2d at 11 [A] punitive damage award is warranted only when the defendant s conduct is shown to be willful wanton or in reckless disregard of the rights of others S C Farm Bureau Mut Ins. Co v Love Chevrolet, Inc., 324 S C 149 152 478 S E 2d 57 58 (1996) (citing Wise v Broadway 315 S C 273 433 S E 2d 857 (1993) Cartee v Lesley, 290 S C 333, 350 S E 2d 388 (1986) Gilbert v Duke Power, 255 S C 495 179 S E 2d 720 (1971) Hinson v AT Sistare Constr Co., 236 S C 125 113 S E 2d 341 (1960) Rogers v Florence Printing Co., 233 S C 567 106 S E 2d 258 (1959) Since the jury was properly charged the first time their award in the Pope Class Action was pure error

However The jury heard reference to willful wanton, and reckless conduct within the context of the explanation of negligence which was doubly confusing since the court had already directed a verdict as to negligence A jury charge is correct if the charge when read as a whole, adequately covers the current and correct law To warrant reversal on appeal, the trial court s instructions must be not only erroneous, but must also be prejudicial Fields v J Haynes Waters Builders, Inc., 376 S C 545 560 658 S E 2d 80, 88 (citing Keaton ex rel Foster v Greenville Hosp Sys., 334 S C 488 495 96 514 S E 2d 570 574 (1999)) Thus, the charge equated willful wanton and reckless conduct with the preponderance of evidence burden of proof rather than the much higher clear and convincing evidence burden of proof for punitives

The Court should have struck the punitive damages verdict on loss of use class action claim since the jury did not return an actual damages verdict In South Carolina in order to award punitive damages there must be an award of actual damages Gamble v Stevenson, 305 S C 104 111 406 S E 2d 350 354 (1991) (citing Carroway v Johnson 245 S C 200, 139

S E 2d 908 (1965)) It is the duty of a trial judge to correct formal mistakes in a verdict, but this power to correct is limited to mere matters of form and does not include the right to change the substance of a jury's finding. Zedd v. Jenkins, 194 Va. 704, 707, 74 S E 2d 791, 793 (Ct. App. 1953). The action of the trial court in changing the verdict is reversible error that entitles a litigant to a new trial. Id. When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, [the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict. Memphis Comty. Sch. Dist. v. Stachura, 477 U.S. 299, 312 (1986) (citing Newport v. Fact Concerts, Inc., 453 U.S. 247, 256 n. 12 (1981)). See Albright v. Longview Police Dep't, 884 F.2d 835, 843 (5th Cir. 1989). Specifically, the trial court must set aside a verdict for punitive damages and

grant a new trial if it is of the opinion that the verdict (1) is against the clear weight of the evidence, (2) is based upon evidence that is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence that would prevent the direction of a verdict.

GTR Rental, LLC v. Dalcanton, 547 F. Supp. 2d 510, 518 (D.S.C. 2008) (citing Atlas Food Sys. & Svcs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir. 1996)).

Additionally, if the jury's answers are so ambiguous or conflicting that they cannot be reconciled fairly, the trial court may not enter judgment thereon. Weprin v. Peterson, 736 F. Supp. 1131, 1132 (N.D. Ga. 1988). See Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983). An award of punitive damages without an award of actual damages is a verdict that is irreconcilable and inconsistent. Weprin, 736 F. Supp. at 1132. Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (citing Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965)). Longshore, 365 S.C. at 562, 63, 619 S.E.2d at 10. Stevens, 342 S.C. at 53, 536 S.E.2d at 665, 66. "Therefore, it is not a question of resolving inconsistencies in the jury's logic but in reconciling the law with the verdict." Id. In Weprin, the jury delivered a verdict

awarding punitive damages but no actual damages. In that case, the Court ruled there may be no punitive damages without first finding actual damages. [t]he only action the Court can take is to strike the award of punitive damages. Id. (emphasis added)

N

The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S.Ct. 1513 (2003). In determining the constitutionality of punitive damages, the South Carolina Supreme Court looks to the three guideposts set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589 (1996):

Concerning the three guideposts, the first and the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. State Farm, 538 U.S. at 419 (citing Gore, 517 U.S. at 575). See Atkinson, 361 S.Ct. 156, 604 S.E.2d 385; Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008). The reprehensibility of a defendant can be determined by considering the following:

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident.

Id. (citing Gore, 517 U.S. at 576-77); Atkinson, 361 S.Ct. at 167, 604 S.E.2d at 391. However, the mere existence of any one of these factors may not be sufficient to sustain a punitive damages award. Id. The absence of all of these factors renders any award suspect. Id. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. Id.

The Riverwalk POA Action and the Pope Class Action failed to show that by clear and convincing evidence the Heritage Defendants' conduct arose to the requisite level of reprehensibility. It is *presumed* that the Plaintiffs have been made whole for their injuries arising from alleged construction defects by the compensatory damages and therefore there is no need for punitive damages.

The third guidepost analyzes 'the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Atkinson, 361 S.C. at 166, 604 S.E.2d at 390. [A] reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue. Collins Entertainment Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 142, 584 S.E.2d 120, 129 (Ct. App. 2003) (citing Gore, 517 U.S. at 583) (emphasis added).

In Campbell, punitive damages were excessive compared to civil penalties where the Utah trial court levied a \$10,000 fine for fraud and \$145 million in punitive damages. The U.S. Supreme Court found that the punitive damages award was neither reasonable nor proportionate to the wrong committed and it was an irrational and arbitrary deprivation of the property of the defendant. Campbell, 538 U.S. at 429. The U.S. Supreme Court in Gore likewise found that an award of punitive damages above an award of \$4,000 in economic damages was improper. The "\$2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance." Gore, 517 U.S. at 584. The Supreme Court admonished that the conclusion of the Alabama Supreme Court did not demonstrate "that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty." Id. at 585.

In the case at bar the parties stipulated to comply with the 1994 and 1997 Standard Building Code with regard to the construction of the buildings involved in this suit. Section 110 of the Building Code titled 'Violations and Penalties' equates that one who violates a provision of the Building Code shall be guilty of a misdemeanor punished within the limits as provided by state laws. S.C. Code Section 16-1-100 lists matters classified as misdemeanors. In this list the contractor licensing statute regarding 'unlawful practice' and penalties relates the best to construction practices and building code issues. S.C. Code Section 40-11-200 is a class C misdemeanor with a fine not more than five thousand dollars. Nonetheless the jury awarded punitive damages to the Riverwalk POA Action and the Pope Class Action Plaintiffs in the amounts of \$250,000 and \$750,000 respectively. The punitive damages awarded by the jury are substantially greater than a related legislative penalty. The punitive damages awards are fifty (50) and one hundred fifty (150) times the comparative penalty of S.C. Code §40-11-200(A). The award is tantamount to a severe criminal penalty. Gore supra

VI SETOFF

Independent from but in addition to the discussions and arguments above, the Heritage Defendants are entitled to a total set-off of Plaintiffs' actual damages in the amount of One Million Twenty Eight Thousand Eight Hundred Twenty One and 69/100s (\$1,028,821.69) Dollars. A non-settling defendant is entitled to credit for the amount paid by another defendant who settles. Welch v. Epstein, 342 S.C. 279, 312 S.E.2d 408, 425 (Ct. App. 2000) (citing Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967); Hawkins v. Athology Associates of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395 ____ (Ct. App. 1998)). The Court verifies a set off as a matter of law without determining the equities involved. Vortex Sports & Ent., Inc. v. Ware, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (reh'g den. June 26, 2008).

Instead the set-off must be applied once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors Id (citing S C Code § 15 38 50) "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him Welch at 312 536 S E 2d at 425, (Truesdale v S C Hwy Dep t, 264 S C 221 213 S E 2d 740 (1975)) Atlas Food Systems and Services, Inc v Crane Nat l Vendors, Inc, 99 F 3d 587 596 (4th Cir 1996) (South Carolina s setoff rule rests on the almost universally held principle that there can be only one satisfaction for an injury or wrong. (citing Truesdale, internal quotations omitted)) See also Collins v Bisson Moving and Storage, Inc, 332 S C 290 504 S E 2d 347 (Ct App 1998) (Case distinguishing between a setoff and payments from a collateral source) In other words, there can be only one satisfaction for an injury or wrong Welch, at 312 536 S E 2d at 425

A set-off must be granted when the claims arise out of the same factual scenario Vortex, 378 S C at 209-210, 662 S E 2d at 451 (quoting and citing with approval Ellis v Oliver, 335 S C 106 515 S E 2d 268 (Ct App 1999)) The specific causes of action pled are not the determinative factor for applying a set off in a case See Vortex, supra (acknowledging it was proper to set-off a prior settlement with a jury verdict where the causes of action against the defendant at trial included aiding and abetting a breach of fiduciary duty and tortious interference with a contract) The claims by the Riverwalk POA Action and Pope Class Action Plaintiffs all arise from the original construction of the Riverwalk condominiums The common claims the Plaintiffs asserted against all parties including developers general contractors subcontractors and product manufacturers, was for negligence The claims and the eventual settlements all arose out of the original construction of the Riverwalk condominiums These

settlement funds must now reduced the final verdict awarding actual damages as a set-off See Centex Rooney Construction Co., Inc v Martin County, 706 So 2d 20, (1997)

In Centrex Rooney, a local government sued the original construction entities alleging water intrusion behind synthetic stucco (EIFS) caused damage to the structure and made the building unsafe to work in. The appellate court upheld the reduction of the trial verdict against Centex Rooney the construction manager with the pre trial settlements paid by the architect and the masonry subcontractor. The underlying complaint against all of the parties made claims for breach of contract and negligence however, the claim against Centex Rooney was only for breach of contract. In support of the set-off the appellate court concluded that [w]e find that the County s claimed damages were not separate and distinct from the damages compensated by its settlements, thereby requiring the court s set-off of the settlement amounts to prevent double recovery. Centex Rooney at 29

The amount of the setoff is a determination for the Court and not the jury (See Welch at 313 536 S E 2d at 425-426 (a setoff is equitable in nature) Hawkins at 113 498 S E 2d at 406 ('the jurisdiction of the court to setoff one judgment against another is equitable in its nature and should be exercised so as to do justice between the parties ') Again the total amount of the known settlements paid to the Riverwalk POA Action and Pope Class Action Plaintiffs is \$1 028 821 69. The non settling Heritage defendants are entitled to a dollar for dollar setoff of these monies paid by the settling defendants to the plaintiffs. Tubbs v Bowie, 308 S C 155 417 S E 2d 550 (1992) (since one tortfeasor is entitled to credit for the amount paid by another tortfeasor the amount of setoff is the amount actually paid rather than the lifetime value of a structured settlement ') Lloyd s, Inc v Good, 306 S C 450 412 S E 2d 441 (Ct.App 1991) (the amount of the damages recoverable against the non settling tortfeasor is reduced by the total`

amount of consideration paid for a release of a joint tortfeasor) Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 596 (4th Cir. 1996) ("Under South Carolina law, a non-settling defendant is entitled to a *pro tanto* reduction of a judgment in a same cause of action" (citing Powers and Ward)).

The Riverwalk POA Action and Pope Class Action Plaintiffs have already guaranteed that approximately seventy-eight percent (78%) of the total settlements paid by subcontractors, sub-subcontractors, and product manufacturers will be set off dollar for dollar. This guaranty is specifically noted in the settlement releases with the following:

a. The Settlement Agreement and Release with Louisiana Pacific Corporation, the manufacturer of the composite trim that was installed at Riverwalk, was approved in October 2008.⁵ This agreement reads in part that the non-settling parties to the Litigation are entitled to a set-off in the amount of Two Hundred Eighty Two Thousand Five Hundred Eighty and 38/100 (\$282,580.38) Dollars from a verdict, if any, obtained in favor of the Plaintiffs in the Litigation. (See Exhibit 1 at page 3 ¶ 3).

b. The Settlement Agreement and Release with the framing subcontractor and sub-subcontractors was entered into on September 15, 2008. This agreement reads in part that the Plaintiffs agree that by virtue of the funds paid hereby, a verdict obtained in favor of the Plaintiffs against non-settling parties to the Litigation (including but not limited to the Heritage Entities) shall be set-off in the amount of THREE HUNDRED SEVENTY FIVE THOUSAND (\$375,000.00) DOLLARS. (See Exhibit 2 at page 3 ¶ 3).

c. The Release of Liability and Settlement Agreement with the brick masons for buildings 12 through 15 was entered into on December 17, 2008. This agreement reads in part that the Non-Settling Defendants are collectively entitled to receive a dollar-for-dollar set-off equal to the amount paid by B.R. Brick and Boss Management in consideration for their agreement to dismiss all cross-claims, third-party claims, or claims of any kind against B.R. Brick and Boss Management in the above-captioned litigation. (See Exhibit 3 at page 4, last ¶ on page).

⁵ The attached Exhibit 1 is a copy of the unexecuted Settlement Agreement and Release with L.P. as well as a copy of a cover letter dated October 20, 2008, from counsel for the Heritage Defendants to counsel for L.P. L.P. required a signature on behalf of the Heritage Defendants on this agreement. The Heritage Defendants supplied this signature in consideration of the guaranteed set-off language referenced above.

The Plaintiffs also entered into settlements with a project architect, the grading subcontractor and the window manufacturers

d Tom Pegram of named defendant Pegram Associates Inc the architect of record for the first seventeen (17) buildings at Riverwalk, testified during Plaintiffs case in chief that he settled with the Riverwalk POA Action and Pope Class Action Plaintiffs at some point prior to the trial The Plaintiffs have neither produced the terms of this settlement nor any documentation of it Nonetheless to the extent that Pegram has tendered any settlement funds to the Plaintiffs, the Heritage Defendants are entitled to set-off

e Weaver Co the grading subcontractor entered into a Settlement and Release Agreement with Plaintiffs that was filed under the Riverwalk POA Action on February 15 2007 The total amount of this settlement was \$7 500 00 (See Exhibit 4)

f The window manufacturers MI Caradon, Novar and Honeywell have not entered into a formal settlement agreement However the Plaintiffs and the window manufacturers exchanged letters dated November 26 2008 that set forth the general terms of the settlement These letters reference that \$222,074 65 out of a total combined settlement paid to resolve the Riverwalk litigation as well as the pending Magnolia North POA, Inc v Heritage Communities, Inc, et al, C/A No 03-CP 26-3203 case in the amount of \$425 000 00 (See Exhibit 5)

All of the settlements discussed above arise from the same construction defect litigation. There is no justifiable reason to treat the settlements with the guaranteed set-offs with the other settlements For example it would be inequitable for the Plaintiffs to agree to a set-off with the trim product manufacturer but object to a set-off with the window manufacturers See Hawkins at 113 498 S E 2d at 406 (noting that set-off should be exercised so as to do justice between the parties) Plaintiffs alleged in their underlying complaints that the composite trim and the windows were both defective products and that they were installed incorrectly Under the settlements with the respective product manufacturers the Plaintiffs specifically reserved their right to present evidence at trial that the trim product and the windows would need to be replaced In fact the Plaintiffs elicited such testimony The claims regarding the trim products and the windows all arose from the original construction of the Riverwalk condominiums

As noted above the Heritage Defendants are entitled to the dollar for dollar set off of all prior settlements paid as a matter of right to wit.

Louisiana Pacific Corporation – composite trim manufacturer	\$ 282 580 38
Right Way Construction Inc	\$ 217 701 00
Profiro Borjas d/b/a Siding By Profino	\$ 87 500 00
AK Construction, Inc	\$ 50 000 00
Ronialdo Vilanno d/b/a RAV Carpentry	\$ 11 299 00
Robert Shaw	\$ 8 500 00
Total for framing sub and sub-subcontractors	\$ 375 000 00
BR Brick & Masonry L.P and Boss Management Services Inc	\$ 141 666 66
Pegram Associates Inc	<i>undisclosed amount of settlement</i>
Weaver Co – grading and paving	\$ 7 500 00
MI Home Products Inc Novar, Inc Caradon, Inc and Honeywell International Inc – window manufacturers	<u>\$ 222,074.65</u>
Total set-off is at least	\$ 1 028 821 69

CONCLUSION

For the foregoing reasons the Heritage Defendants respectfully submit that this Court should order a new trial under the thirteenth juror doctrine. Alternatively this Court should order judgment notwithstanding the verdict. In the next alternative this Court should order a new trial absolute. In the further alternative Defendants request a remittitur of the verdict amount to equal no more than the total of the Heritage Defendants' repair cost plus the interim repair costs from 2003 through 2008.

In addition as a substantial right regardless of the decisions on the post-trial motions noted in the previous paragraph, the trial court must review the award of punitive damages and make specific findings regarding the same on the record. The Heritage Defendants respectfully

submit that punitive damages should not have been awarded in this case as the evidence at trial did not arise to the requisite level of clear and convincing evidence to award punitive damages

Finally independent from the decisions on the matters referenced in the two paragraphs above the trial court must grant a total set-off in the amount of \$1 028 821 69 and reduce the final verdict amount after remittitur if applicable accordingly

Respectfully submitted,
COLLINS & LACY P C

By


✓ ERIC G FOSMIRE
ANDREW N COLE
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
(803) 771 4484 (f)

Columbia, South Carolina
February 23 2009



Andrew N Cole | Direct Dial 803 255 0433 | E Mail acole@collinsandlacy.com

October 20 2008

James E. Weatherholtz, Esquire
Bust Moore Smyth & McGee PA
Post Office Box 999
Charleston, SC 29402

Re: Riverwalk at Arrowhead Country Club Property Owners' Association, Inc. v. Heritage Communities, Inc. Heritage Riverwalk, Inc., BuildStar Corporation, Right Way Construction, Inc., Pegram Associates, Inc., Tuscan Architectural Group, Inc. Louisiana Pacific Corporation Enterprises, and MI Home Products, Inc.
Case No.. 03-CP 26-7169

RE: Tony L. Pope and Lynn S. Pope, individually, and representing as a class all unit owners of Riverwalk at Arrowhead Country Club Horizontal Property Regime v. Heritage Communities, Inc., Heritage Riverwalk, Inc., BuildStar Corporation, et al.
Case No.. 2005-CP 26-3289
Claim No.. HO-494770
C&L File No.. 390-167

Dear James:

Enclosed is my signature on the Release of Louisiana-Pacific in the above-referenced matters. Please provide me with a fully executed copy of the Release once you have it. If you need anything further please feel free to call.

With warmest regards, I remain

Very truly yours,

Andrew N Cole

ANC:jr
Enclosure

cc: Mr Brian Torney
Ms Anna M. Torres
Philip C Thompson, Esquire

Collins & Lacy, PC | 1330 Lady Street, Sixth Floor (29201) P.O. Box 12437 | Columbia, SC 29211
ph 803.255.2660 f 803.771.4484 www.collinsandlacy.com

ROA_1991

APP_2002

STATE OF SOUTH CAROLINA)
) SETTLEMENT AGREEMENT AND RELEASE
COUNTY OF HORRY)

This Settlement Agreement and Release (the "Agreement") is entered by and among the undersigned on the dates set forth next to their signatures below

WITNESSETH

WHEREAS the Riverwalk At Arrowhead Country Club Property Owners' Association, Inc. has filed that certain lawsuit in the Horry County Court of Common Pleas bearing case number 2003-CP 26-7169 and entitled Riverwalk At Arrowhead Country Club Property Owners Association, Inc. v. Heritage Communities, Inc., et al. and the owners of units at the Riverwalk at Arrowhead Country Club condominium project (the "Project") have filed that certain lawsuit in the Horry County Court of Common Pleas bearing case number 05-CP-26-3289 and entitled Tony L. Pope, et al. v. Heritage Communities, Inc., et al. (these lawsuits are collectively referred to herein as the "Litigation") and

WHEREAS the Litigation included allegations that there were defects, deficiencies, and property damage related to and resulting from the manufacture, sale, use and installation of the exterior trim on the buildings at the Project, among other things, and

WHEREAS the Litigation included claims against Defendants Heritage Communities Inc. Magnolia North, Inc., and Buildstar Corporation (collectively the "Heritage Entities") by virtue of their role as the developer and/or general contractor for the Project, and

WHEREAS the Litigation included claims against Defendant Louisiana Pacific Corporation ("LP") that ABTco TrimBoard, the hardboard trim used in certain locations on the Project, was inherently defective and not fit for its intended purpose; and

WHEREAS the above-named Defendants disputed the Plaintiffs' claims in the Litigation with respect to the scope and extent of the alleged defects in the installation of the siding and trim at the Project; and

WHEREAS LP disputed the Plaintiffs' claims in the Litigation that the ABTco TrimBoard product was defective or otherwise deficient in its design or manufacture, or that it had caused damage to itself or other building components at the Project; and

WHEREAS some of the above-named Defendants asserted Cross-Claims against one another in connection with the alleged defects in and the alleged damages resulting from the sale and installation of the exterior trim at the Project; and

WHEREAS the Plaintiffs, the Heritage Entities and LP have agreed to resolve these matters as set forth below

NOW, THEREFORE, know all men by these presents that.

FOR AND IN CONSIDERATION of the mutual promises set forth herein, the duly authorized representatives of the undersigned do hereby agree as follows.

1 Upon the execution of this Agreement, LP shall remit payment to the Plaintiffs in the total amount of Two Hundred Eighty Two Thousand Five Hundred Eighty and 38/100 (\$282,580.38) Dollars

2 The Plaintiffs and their officers, directors, agents, members, insurers, heirs, successors, and assigns shall and do hereby forever dismiss, discharge, release, and acquit LP and its respective consultants, agents, employees, officers, directors, owners, attorneys, insurers, sureties, successors, and assigns (collectively referred to hereinafter as the "Released Party") of and from any and all liability for claims, demands, suits, and causes of action of every nature and

kind, whether at law or in equity whether known or unknown, and whether foreseen or unforeseen arising out of or in any manner whatsoever related to the Project.

3 The Plaintiffs and their officers, directors, agents members, insurers heirs, successors and assigns DO NOT dismiss discharge, release, or acquit the Heritage Entities in any manner whatsoever and specifically reserve all claims and causes of action against the Heritage Entities However the Plaintiffs agree that by virtue of the funds paid to the Plaintiffs by LP as set forth above, ~~the non-settling parties to the Litigation are entitled to a set-off in the amount of Two Hundred Eighty-Two Thousand Five Hundred Eighty and 38/100 (\$282,580.38) Dollars from a verdict, if any, obtained in favor of the Plaintiffs in the Litigation.~~

4 The Heritage Entities and LP and their officers, directors, agents members insurers, heirs successors, and assigns, shall and do hereby forever mutually dismiss, discharge, release, and acquit one another of and from any and all claims demands, suits, and causes of action of every nature and kind, whether at law or in equity, whether known or unknown, and whether foreseen or unforeseen arising out of or in any manner whatsoever related to the Project

5 The undersigned understand and agree that this Agreement is intended to and does hereby forever and fully extinguish the common liability of the Released Party to the Plaintiffs

6 The undersigned understand and agree that this Agreement shall not reduce eliminate, or in any manner whatsoever affect the Plaintiffs' rights, claims demands suits, and causes of action against any other person or entity including but not limited to the other parties to the Litigation, and the Plaintiffs hereby specifically reserve said rights, claims, demands, suits, and causes of action.

7 The undersigned understand and agree that this Agreement affects their legal rights and they have executed the same on the advice of counsel, that they understand and

Page 3 of 6

ROA_1994

APP_2005

appreciate the consequences attendant to the execution of this Agreement, that they have full and complete authority to execute this Agreement on behalf of the entity or entities they purport to represent; that this Agreement is a compromise of hotly disputed claims, that this Agreement is contractual in nature and not a mere recital, that this Agreement is an accord and satisfaction as among the Plaintiffs and the Released Parties that this Agreement shall be construed under and subject to the laws of the State of South Carolina, and, that this Agreement was drafted with input from counsel for all the undersigned and shall not be construed against or in favor of any party

8 The undersigned understand and agree that the Plaintiffs will allocate some portion of the funds paid hereby to each of the above-referenced cases and that those funds which the Plaintiffs allocate to case number 05-CP 26-3289 shall be held in trust by counsel for the Plaintiffs until such time as that case is resolved pursuant to the requisite proceedings

9 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal with prejudice of the Plaintiffs' claims against the Released Party, and the Heritage Entries and LP's claims against one another

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

By _____
(Sign Name)

Date _____

Name _____
(Print Name)

Page 4 of 6

ROA_1995

APP_2006

Its _____
(Print Title)

Page 5 of 6

ROA_1996

APP_2007

**Tony L. Pope, Individually and as a
Representative of all Unit Owners**

By _____
(Sign Name)

Date _____

Name _____
(Print Name)

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

By _____
(Sign Name)

Date _____

Name _____
(Print Name)

Its _____
(Print Title)

Louisiana-Pacific Corporation

By _____
(Sign Name)

Date _____

Name _____
(Print Name)

Its _____
(Print Title)

STATE OF SOUTH CAROLINA)
) Settlement Agreement and Release
COUNTY OF HORRY)

THIS Settlement Agreement and Release (the "Agreement") is entered by and among the undersigned this 15th day of September 2008.

WITNESSETH

WHEREAS the Riverwalk At Arrowhead Country Club Property Owners Association, Inc. has filed that certain lawsuit in the Horry County Court of Common Pleas bearing case number 2003-CP-26-7169 and entitled Riverwalk At Arrowhead Country Club Property Owners Association, Inc. v Heritage Communities, Inc., et al., and the owners of units at the Riverwalk at Arrowhead Country Club condominium project (the "Project") have filed that certain class action lawsuit in the Horry County Court of Common Pleas bearing case number 05-CP 26-3289 and entitled Tony L. Pope, et al. v Heritage Communities, Inc., et al. (these lawsuits are collectively referred to herein as the "Litigation"); and

WHEREAS the Litigation included, among other allegations, that there were defects, deficiencies, and property damage related to and resulting from the negligent construction and/or installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, flashing, siding, and trim at the Project; and

WHEREAS the Litigation included claims against Defendants Heritage Communities Inc., Heritage Riverwalk, Inc., and Buildstar Corporation (collectively the "Heritage Entities") by virtue of their role as the developer and/or general contractor for the Project; and

WHEREAS the Litigation included claims against Defendants Right Way Construction, Inc ("Right Way"), Ronaldo Vilarino d/b/a RAV Carpentry ("RAV"), AK Construction, Inc. ("AK"), Robert Shaw ("Shaw") and Profirio Borjas d/b/a Siding by Profirio ("Profirio") by virtue of their

Ex 2

involvement in the construction and installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, siding, and/or trim at the Project; and

WHEREAS the above-identified Defendants disputed the Plaintiffs' claims in the Litigation with respect to, among other things, the scope and extent of the alleged defects in and the alleged damages resulting from the construction and installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, flashing, siding, and/or trim at the Project; and

WHEREAS some of the above-identified Defendants asserted Cross-Claims against one another in connection with the alleged defects in and the alleged damages resulting from the construction and installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, flashing, siding, and/or trim at the Project; and

WHEREAS the Plaintiffs, the Heritage Entities, Right Way RAV AK, Shaw and Profirio have agreed to resolve these matters as set forth below, now, therefore, know all men by these presents that

FOR AND IN CONSIDERATION for the mutual promises set forth herein, the undersigned duly authorized representatives of the undersigned do hereby agree as follows:

1. Upon the execution of this Agreement, Right Way and the Subcontractors shall remit payment to the Plaintiffs in the total amount of THREE HUNDRED SEVENTY FIVE THOUSAND (\$375,000.00) DOLLARS as follows:

On behalf of Right Way	\$217,701.00
On behalf of Profirio	\$ 87,500.00
On behalf of AK	\$ 50,000.00
On behalf of RAV	\$ 11,299.00
On behalf of Shaw	<u>\$ 8,500.00</u>
	\$375,000.00

2. The Plaintiffs and their officers, directors, agents, members, owners, insurers, heirs, successors, and assigns shall and do hereby forever dismiss, discharge, release, and acquit Right Way RAV AK, Shaw and Profirio and their respective consultants, agents, employees, officers, directors, owners, insurers (but only in their capacity as the insurers of Right Way RAV AK, Shaw, and Profirio in connection with the Litigation), sureties, successors, and assigns (all these entities are collectively referred to hereinafter as the "Released Parties") of and from any and all liability for claims, demands, suits, and causes of action of every nature and kind, whether at law or in equity.

whether known or unknown, and whether foreseen or unforeseen arising out of or in any manner whatsoever related to the Project.

3 The Plaintiffs and their officers, directors, agents, members, insurers, heirs, successors, and assigns DO NOT dismiss, discharge, release, or acquit the Heritage Entities in any manner whatsoever and specifically reserve all claims and causes of action against the Heritage Entities. However, the Plaintiffs agree that by virtue of the funds paid hereby a verdict obtained in favor of the Plaintiffs against non-settling parties to the Litigation (including but not limited to the Heritage Entities) shall be set-off in the amount of THREE HUNDRED SEVENTY FIVE THOUSAND (\$375 000 00) DOLLARS.

4 The Released Parties and the Heritage Entities and their respective officers, directors, agents, members, insurers, heirs, successors, and assigns shall and do hereby forever dismiss, discharge, release, and acquit one another of and from any and all liability for claims, demands, suits, and causes of action of every nature and kind, whether at law or in equity, whether known or unknown, and whether foreseen or unforeseen arising out of or in any manner whatsoever related to the Litigation.

5 The undersigned understand and agree that this Agreement is intended to and does hereby forever and fully extinguish the common liability of the Released Parties to the Plaintiffs.

6 The undersigned understand and agree that except for the set-off granted by Paragraph 3 above, this Agreement shall not reduce, eliminate, or in any manner whatsoever affect the Plaintiffs' rights, claims, demands, suits, and causes of action against any person or entity except the Released Parties, and the Plaintiffs hereby specifically reserve said rights, claims, demands, suits, and causes of action.

7 The undersigned understand and agree that this Agreement affects their legal rights and they have executed the same on the advice of counsel; that they understand and appreciate the consequences attendant to the execution of this Agreement; that they have full and complete authority to execute this Agreement on behalf of the entity or entities they purport to represent; that this Agreement is a compromise of hotly disputed claims; that this Agreement is contractual in nature and not a mere recital, that this Agreement is an accord and satisfaction as among the Plaintiffs and the Released Parties; that this Agreement shall be construed under and subject to the laws of the State of South Carolina, and, that this Agreement was drafted with input from counsel for all the undersigned and shall not be construed against or in favor of any party.

8 The undersigned understand and agree that the Plaintiffs will allocate some portion of the funds paid hereby to each of the above-referenced cases and that those funds which the Plaintiffs allocate to case number 05-CP 26-3289 shall be held in trust by counsel for the Plaintiffs until such time as that case is resolved pursuant to the requisite proceedings.

9 The undersigned understand and agree that the negotiations which resulting in this Agreement are confidential and cannot be used in any other proceeding or trial, and this Agreement relates only to claims arising out of and connected with the Project.

10 The undersigned understand and agree that the Heritage Entities have specifically reserved their right, if any, to pursue such claims as they deem appropriate in the event the Plaintiffs fail or refuse to comply with their agreement to provide a set-off as granted in Paragraph 3 hereof.

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCP

By *[Signature]*
(Sign and Print Name)

By _____
(Sign Name)

Its President
(Print Title)

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

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Rondalio Villarino d/b/a RAV Carpentry

Profile Borjas d/b/a Siding by Profile

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRPC

By _____
(Sign and Print Name)

By Tony L. Pope
(Sign Name)

Its _____
(Print Title)

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Bulldozer Corporation

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Ronaldito Villarino d/b/a RAV Carpentry

Profrido Borjas d/b/a Siding by Profrido

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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

Right Way Construction, Inc.

By Andrew A. Cole
(Sign and Print Name) Andrew A Cole

By _____
(Sign and Print Name)

Its Attorney
(Print Title)

Its _____
(Print Title)

Ronald Vilario d/b/a RAV Carpentry

Profrido Borjas d/b/a Siding by Profrido

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Slaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

Riverwalk At Arrowhead Country Club
Property Owners Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners Subject
To Court Approval per Rule 23, SCRPC

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Renaldo Vilario d/b/a RAY Carpentry

Profrino Borjas d/b/a Siding by Profrino

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRPC

By _____
(Sign and Print Name)
Its _____
(Print Title)

By _____
(Sign Name)

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Builders Corporation

Right Way Construction, Inc.

By _____
(Sign and Print Name)
Its _____
(Print Title)

By _____
(Sign and Print Name)
Its _____
(Print Title)

Ronald Villaseca d/b/a RAV Carpentry

Profruto Berjns d/b/a Siding by Profruto

By _____
(Sign and Print Name)
Its _____
(Print Title)

By _____
(Sign and Print Name)
Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)
Its _____
(Print Title)

By _____
(Sign Name)

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCP

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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

Right Way Construction, Inc

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Ronielde Vitarino d/b/a RAV Carpentry

Profrío Borjas d/b/a Siding by Profrío

By _____
(Sign and Print Name)

By DAVID J. LARSON
(Sign and Print Name)

Its _____
(Print Title)

Its ATTORNEY
(Print Title)

AKC Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Petition with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Bulldozer Corporation

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Renzalde Villarino d/b/a RAV Carpentry

Proflrio Borjas d/b/a Sidlag by Proflrio

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Sumy

By John Tully
(Sign and Print Name)

By _____
(Sign Name)

Its Attorney
(Print Title)

Page 4 of 4

ROA_2007

APP_2018

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

**Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.**

**Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF**

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its: _____
(Print Title)

**Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Bulldozer Corporation**

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its: _____
(Print Title)

Its: _____
(Print Title)

Ronalds Villarino d/b/s RAY Carpentry

Profirmo Borjas d/b/s Siding by Profirmo

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

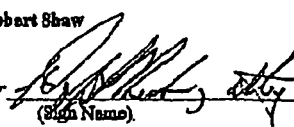
Its: _____
(Print Title)

Its: _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By 
(Sign Name)

Its: _____
(Print Title)

STATE OF SOUTH CAROLINA)
) Settlement Agreement and Release
COUNTY OF HORRY)

THIS Settlement Agreement and Release (the "Agreement") is entered by and among the undersigned this 15th day of September, 2008

WITNESSETH

WHEREAS the Riverwalk At Arrowhead Country Club Property Owners' Association, Inc. has filed that certain lawsuit in the Horry County Court of Common Pleas bearing case number 2003-CP 26-7169 and entitled Riverwalk At Arrowhead Country Club Property Owners' Association, Inc. v. Heritage Communities, Inc., et al. and the owners of units at the Riverwalk at Arrowhead Country Club condominium project (the "Project") have filed that certain class action lawsuit in the Horry County Court of Common Pleas bearing case number 05-CP 26-3289 and entitled Tony L. Pope, et al. v. Heritage Communities, Inc., et al. (these lawsuits are collectively referred to herein as the "Litigation"), and

WHEREAS the Litigation included, among other allegations, that there were defects, deficiencies, and property damage related to and resulting from the negligent construction and/or installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, flashing, siding, and trim at the Project; and

WHEREAS the Litigation included claims against Defendants Heritage Communities, Inc., Heritage Riverwalk, Inc., and Buildstar Corporation (collectively the "Heritage Entities") by virtue of their role as the developer and/or general contractor for the Project; and

WHEREAS the Litigation included claims against Defendants Right Way Construction, Inc. ("Right Way"), Romaldo Vilarimo d/b/a RAV Carpentry ("RAV") AK Construction, Inc. ("AK"), Robert Shaw ("Shaw") and Profino Borjas d/b/a Siding by Profino ("Profino") by virtue of their

involvement in the construction and installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, siding, and/or trim at the Project, and

WHEREAS the above-identified Defendants disputed the Plaintiffs' claims in the Litigation with respect to, among other things, the scope and extent of the alleged defects in and the alleged damages resulting from the construction and installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, flashing, siding, and/or trim at the Project; and

WHEREAS some of the above-identified Defendants asserted Cross-Claims against one another in connection with the alleged defects in and the alleged damages resulting from the construction and installation of the balconies, walkways, hand rails, windows, entry doors, sliding glass doors, Tyvek, flashing, siding, and/or trim at the Project; and

WHEREAS the Plaintiffs, the Heritage Entities, Right Way RAV AK, Shaw and Profirio have agreed to resolve these matters as set forth below now therefore, know all men by these presents that

FOR AND IN CONSIDERATION for the mutual promises set forth herein, the undersigned duly authorized representatives of the undersigned do hereby agree as follows.

1 Upon the execution of this Agreement, Right Way and the Subcontractors shall remit payment to the Plaintiffs in the total amount of THREE HUNDRED SEVENTY FIVE THOUSAND (\$375,000 00) DOLLARS as follows:

On behalf of Right Way	\$217 701 00
On behalf of Profirio:	\$ 87,500 00
On behalf of AK.	\$ 50 000.00
On behalf of RAV	\$ 11,299 00
On behalf of Shaw	<u>\$ 8,500.00</u>
	\$375,000.00

2 The Plaintiffs and their officers, directors, agents, members, owners, insurers, heirs, successors, and assigns shall and do hereby forever dismiss, discharge, release, and acquit Right Way RAV AK, Shaw and Profirio and their respective consultants, agents, employees, officers, directors, owners, insurers (but only in their capacity as the insurers of Right Way RAV AK, Shaw and Profirio in connection with the Litigation) sureties, successors, and assigns (all these entities are collectively referred to hereinafter as the "Released Parties") of and from any and all liability for claims, demands, suits, and causes of action of every nature and kind, whether at law or in equity,

whether known or unknown, and whether foreseen or unforeseen arising out of or in any manner whatsoever related to the Project.

3 The Plaintiffs and their officers, directors, agents, members, insurers, heirs, successors, and assigns DO NOT dismiss, discharge, release, or acquit the Heritage Entities in any manner whatsoever and specifically reserve all claims and causes of action against the Heritage Entities. However the Plaintiffs agree that by virtue of the funds paid hereby a verdict obtained in favor of the Plaintiffs against non-settling parties to the Litigation (including but not limited to the Heritage Entities) shall be set-off in the amount of THREE HUNDRED SEVENTY FIVE THOUSAND (\$375 000.00) DOLLARS.

4 The Released Parties and the Heritage Entities and their respective officers, directors, agents, members, insurers, heirs, successors, and assigns shall and do hereby forever dismiss, discharge, release, and acquit one another of and from any and all liability for claims, demands, suits, and causes of action of every nature and kind, whether at law or in equity, whether known or unknown, and whether foreseen or unforeseen arising out of or in any manner whatsoever related to the Litigation.

5 The undersigned understand and agree that this Agreement is intended to and does hereby forever and fully extinguish the common liability of the Released Parties to the Plaintiffs.

6 The undersigned understand and agree that except for the set-off granted by Paragraph 3 above, this Agreement shall not reduce, eliminate, or in any manner whatsoever affect the Plaintiffs' rights, claims, demands, suits, and causes of action against any person or entity except the Released Parties, and the Plaintiffs hereby specifically reserve said rights, claims, demands, suits, and causes of action.

7 The undersigned understand and agree that this Agreement affects their legal rights and they have executed the same on the advice of counsel, that they understand and appreciate the consequences attendant to the execution of this Agreement, that they have full and complete authority to execute this Agreement on behalf of the entity or entities they purport to represent; that this Agreement is a compromise of hotly disputed claims; that this Agreement is contractual in nature and not a mere recital, that this Agreement is an accord and satisfaction as among the Plaintiffs and the Released Parties; that this Agreement shall be construed under and subject to the laws of the State of South Carolina; and, that this Agreement was drafted with input from counsel for all the undersigned and shall not be construed against or in favor of any party.

8 The undersigned understand and agree that the Plaintiffs will allocate some portion of the funds paid hereby to each of the above-referenced cases and that those funds which the Plaintiffs allocate to case number 05-CP 26-3289 shall be held in trust by counsel for the Plaintiffs until such time as that case is resolved pursuant to the requisite proceedings.

9 The undersigned understand and agree that the negotiations which resulting in this Agreement are confidential and cannot be used in any other proceeding or trial, and this Agreement relates only to claims arising out of and connected with the Project.

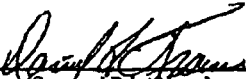
10 The undersigned understand and agree that the Heritage Entities have specifically reserved their right, if any, to pursue such claims as they deem appropriate in the event the Plaintiffs fail or refuse to comply with their agreement to provide a set-off as granted in Paragraph 3 hereof.

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By 
(Sign and Print Name)

By _____
(Sign Name)

Its PRESIDENT
(Print Title)

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

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Ronielde Vilarino d/b/a RAV Carpentry

Profrío Berjas d/b/a Siding by Profrío

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By _____
(Sign and Print Name)

By Tony L. Pope
(Sign Name)

Its _____
(Print Title)

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

Right Way Construction Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Ronielde Villarino d/b/a RAV Carpentry

Proflrio Borjas d/b/a Siding by Proflrio

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Builders Corporation

Right Way Construction, Inc.

By Andrew N. Cole
(Sign and Print Name) Andrew N. Cole

By _____
(Sign and Print Name)

Its Attorney
(Print Title)

Its _____
(Print Title)

Ronaldito Villarino d/b/a RAV Carpentry

Profrido Borjas d/b/a Siding by Profrido

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

Riverwalk At Arrowhead Country Club
Property Owners Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By _____
(Sign and Print Name)

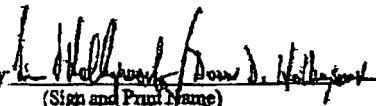
By _____
(Sign Name)

Its: _____
(Print Title)

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

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By  _____
(Sign and Print Name)

Its: _____
(Print Title)

Its:  _____
(Print Title)

Ronaldo Villarino d/b/a RAY Carpentry

Profrío Borjas d/b/a Siding by Profrío

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its: _____
(Print Title)

Its: _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its: _____
(Print Title)

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IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By: _____
(Sign and Print Name)

By: _____
(Sign Name)

Its: _____
(Print Title)

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Bulldozer Corporation

Right Way Construction, Inc.

By: _____
(Sign and Print Name)

By: _____
(Sign and Print Name)

Its: _____
(Print Title)

Its: _____
(Print Title)

Ronaldito Villanueva d/b/a RAV Carpentry

Profundo Borjas d/b/a Shiling by Profundo

By: _____
(Sign and Print Name)

By: _____
(Sign and Print Name)

Its: _____
(Print Title)

Its: _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By: _____
(Sign and Print Name)

By: _____
(Sign Name)

Its: _____
(Print Title)

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IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its: _____
(Print Title)

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

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its: _____
(Print Title)

Its: _____
(Print Title)

Ronaldo Vilarino d/b/a RAY Carpentry

Profrino Borjas d/b/a Siding by Profrino

By _____
(Sign and Print Name)

By DAVID J. HARMON
(Sign and Print Name)

Its: _____
(Print Title)

Its: ATTORNEY
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its: _____
(Print Title)

11 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.

Tony L. Pops, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Bulldozer Corporation

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Ronalds Villarino d/b/a RAY Carpentry

Profrino Berjas d/b/a Sliding-by Profrino

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By John T. Kelly
(Sign and Print Name)

By _____
(Sign Name)

Its Attorney
(Print Title)

17 The undersigned understand and agree that their respective counsel are hereby authorized and directed to execute and file such documents as are necessary to secure the dismissal of the Release Parties with prejudice.

IN WITNESS WHEREOF the undersigned have set their hand and seal hereto on the date(s) set forth below:

**Riverwalk At Arrowhead Country Club
Property Owners' Association, Inc.**

**Tony L. Pope, Individually and as a
Representative of all Unit Owners -Subject
To Court Approval per Rule 23, SCRCF**

By _____
(Sign and Print Name)

By _____
(Sign Name)

Its _____
(Print Title)

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

Right Way Construction, Inc.

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

Its _____
(Print Title)

Its _____
(Print Title)

Ronaldo Villarino d/b/a RAV Carpentry

Profrío Borjas d/b/a Siding by Profrío

By _____
(Sign and Print Name)

By _____
(Sign and Print Name)

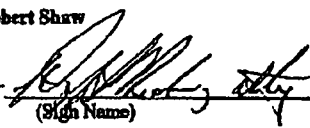
Its _____
(Print Title)

Its _____
(Print Title)

AK Construction, Inc.

Robert Shaw

By _____
(Sign and Print Name)

By 
(Sign Name)

Its _____
(Print Title)

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE 15TH JUDICIAL CIRCUIT
) CASE NO. 2005-CP 26-3289

TONY L POPE and LYNN S POPE
Individually and representing as a class all
unit owners of Riverwalk At Arrowhead
Country Club Horizontal Property Regime

Plaintiffs

v

HERITAGE COMMUNITIES, INC.,
HERITAGE RIVERWALK, INC.,
BUILDSTAR CORPORATION RIGHT
WAY CONSTRUCTION, INC. PEGRAM
ASSOCIATES, INC. TUSCAN
ARCHITECTURAL GROUP INC.,
LOUISIANA PACIFIC CORPORATION
MI HOME PRODUCTS INC. BILL
EVANS d/b/a TOP NOTCH PAINTERS
BR BRICK & MASONRY LP and
WEAVER CO INC RONIALDO
VILARINO d/b/a RAV CARPENTRY,
AK CONSTRUCTION INC. PROFIRO
BORJAS d/b/a SIDING BY PROFIRO and
ROBERT SHAW,

Defendants

RELEASE OF LIABILITY AND
SETTLEMENT AGREEMENT

BR BRICK & MASONRY, LP

Third-Party Plaintiff

v

BOSS MANAGEMENT SERVICES INC

Third-Party Defendant

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE 15TH JUDICIAL CIRCUIT
) CASE NO. 2003-CP-26-7169r

1 Ex 3

ROA_2020

APP_2031

RIVERWALK AT ARROWHEAD
COUNTRY CLUB PROPERTY
OWNERS' ASSOCIATION INC ,

Plaintiff

v

HERITAGE COMMUNITIES INC
HERITAGE RIVERWALK, INC
BUILDSTAR CORPORATION, RIGHT
WAY CONSTRUCTION, INC PEGRAM
ASSOCIATES INC TUSCAN
ARCHITECTURAL GROUP, INC
LOUISIANA-PACIFIC CORPORATION MI
HOME PRODUCTS INC BILL EVANS
d/b/a TOP NOTCH PAINTERS BR BRICK
& MASONRY L.P. WEAVER CO INC
RONIALDO VILARINO d/b/a SIDING BY
PROFIRO, and ROBERT SHAW

Defendants.

BR BRICK & MASONRY L P ,

Third-Party Plaintiff

v

BOSS MANAGEMENT SERVICES INC

Third-Party Defendant.

WHEREAS Tony L. Pope and Lynn S. Pope individually and representing as a class all unit owners of Riverwalk At Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners' Association, Inc ("Plaintiffs") commenced this litigation against Heritage Communities Inc Heritage Riverwalk, Inc Buildstar Corporation ("Heritage Defendants") MI Home Products Inc. MI Windows and Doors Inc (MI Windows*) and others and

WHEREAS B R. Brick And Masonry Inc ("B R. Brick") as sub-contractor and

Boss Management Services Inc (Boss Management") as sub-sub-contractor provided labor for the installation for the brick masonry on the project;

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that for and in consideration of the sum of One Hundred Forty One Thousand Six Hundred Sixty Six and 66/100 Dollars (\$141 666 66) the receipt of which is hereby acknowledged, and for no other consideration or inducement whatsoever the Plaintiffs do for themselves and their predecessors, successors and assigns hereby release and forever discharge only B R. Brck and Boss Management and their insurers sureties officers directors stockholders, pnncipals, attorneys agents servants, representatives present and former employees, supervisors administrators fiduciaries subsidiaries affiliates partners, sub-contractors joint venturers predecessors and successors in interest, heirs and assigns from all liability for claims demands causes of action damages, suits debts or otherwise which Plaintiffs had, now have or may hereafter have from the beginning of time whether based on federal or state statute common law rule or regulation whether in law or equity, contract or tort, whether liquidated or unliquidated whether known or unknown arising from or concerning the construction installation and/or repair of brick veneer on buildings 12 13 14 & 15 at Riverwalk at Arrowhead Country Club in Horry County South Carolina and including, but not limited to liability for such claims injuries and damages which were or could have been asserted by Plaintiffs against B R. Brck and Boss Management in the above entitled actions currently pending in the Court of Common Pleas in Horry County, South Carolina and agree that none of such claims injuries, and damages may hereafter be the subject of any claim or lawsuit by Plaintiffs against B R. Brick and Boss Management.

Without in any way limiting the broad scope of this release granted to B R. Brick and Boss Management, this release extends only to B R. Brck and Boss Management and

not to any other parties to this lawsuit, and not to any other parties' insurers sureties officers directors stockholders principals attorneys agents servants representatives present and former employees supervisors administrators fiduciaries subsidiaries affiliates partners sub-contractors joint venturers, predecessors, and successors in interest, heirs and assigns

IT IS FURTHER EXPRESSLY STIPULATED UNDERSTOOD AND AGREED that the consideration paid therefore is not to be considered or construed as a full satisfaction of all claims and damages suffered by Plaintiffs and that all claims and causes of action contained in the above captioned lawsuit against other parties are specifically and fully reserved and the dismissal with prejudice from this action of B R. Brick and Boss Management is not to be construed as a release of other joint tortfeasors or a bar to the prosecution or continued prosecution of this action against the remaining defendants for any and all liability for claims demands causes of action damages surts debts, accounts which Plaintiffs had now have or may hereafter have from the beginning of time whether based on federal or state statute common law rule or regulation whether in law or in equity contract or tort whether liquidated or unliquidated whether known or unknown

IT IS FURTHER EXPRESSLY STIPULATED UNDERSTOOD AND AGREED that the payment and receipt of the consideration herein may not be construed in any manner as an admission of liability or fault on the part of B R. Brick and Boss Management and the foregoing payment is made and accepted for the sole purpose for enabling B R. Brick and Boss Management to purchase their peace and freedom from claims demands and litigation including but not limited to those asserted in the above captioned action

IT IS FURTHER EXPRESSLY STIPULATED UNDERSTOOD AND AGREED that the Non Settling Defendants are collectively entitled to receive a dollar for dollar set-off equal to the amount paid by B R. Brick and Boss Management in consideration for their

agreement to dismiss all cross-claims third party claims or claims of any kind against B R Brick and Boss Management in the above captioned litigation

IT IS FURTHER EXPRESSLY STIPULATED, UNDERSTOOD AND AGREED that for and in consideration of their respective contributions towards the payment of the consideration recited above B R. Brick and Boss Management do each for themselves and their predecessors successors and assigns hereby release and forever discharge the other and their insurers sureties officers directors stockholders principals attorneys agents servants representatives, present and former employees supervisors administrators fiduciaries subsidiaries affiliates partners sub-contractors jointventurers, predecessors and successors in interest, heirs and assigns from all liability for claims demands causes of action, damages, suits debts accounts which they had now have or may hereafter have from the beginning of time whether based on federal or state statute common law rule or regulation whether in law or in equity contract or tort, whether liquidated or unliquidated, whether known or unknown, arising from or concerning the construction installation and/or repair of brick veneer on buildings 12 13 14, & 15 at Riverwalk at Arrowhead Country Club Horizontal Property Regime including but not limited to, liability for such claims injuries and damages which were or could have been asserted by either of them against the other in the above entitled action currently pending in the Court of Common Pleas for Horry County South Carolina and agree that none of such claims injuries and damages may hereafter be the subject of any claim or lawsuit by either of them against the other This release between B R. Brick and Boss Management extends only to the claims and liability arising from or concerning the Riverwalk at Arrowhead Country Club project and that project only

IN WITNESS WHEREOF the Parties hereunto set their hands and seals this
17th day of December, 2008

WITNESSES

Danny C. Thompson
Kristina Gutierrez

TONY L POPE individually and representing
as a class all unit owners of RIVERWALK AT
ARROWHEAD COUNTY CLUB
HORIZONTAL PROPERTY REGIME

Tony Pope

WITNESSES

Danny C. Thompson
Kristina Gutierrez

LYNN S POPE individually and representing
as a class all unit owners of RIVERWALK AT
ARROWHEAD COUNTY CLUB
HORIZONTAL PROPERTY REGIME

Lynn S Pope

WITNESSES

RIVERWALK AT ARROWHEAD COUNTY
CLUB PROPERTY OWNERS'
ASSOCIATION INC

By _____
_____ Its _____

ATTORNEY CERTIFICATION

I the undersigned attorney for the Plaintiffs certify that the contents, meanings
and effect of this Release have been fully explained to them by me and I have
recommended that they execute this Release for the consideration expressed above

PHILIP C. THOMPSON
PHILIP C. THOMPSON

WITNESSES

TONY L. POPE individually and representing
as a class all unit owners of RIVERWALK AT
ARROWHEAD COUNTY CLUB
HORIZONTAL PROPERTY REGIME

WITNESSES

LYNN S. POPE individually and representing
as a class all unit owners of RIVERWALK AT
ARROWHEAD COUNTY CLUB
HORIZONTAL PROPERTY REGIME

WITNESSES

[Signature]
[Signature]

RIVERWALK AT ARROWHEAD COUNTY
CLUB PROPERTY OWNERS'
ASSOCIATION INC

By [Signature]
DAVID L. REAVES its PRES

ATTORNEY CERTIFICATION

I the undersigned attorney for the Plaintiffs certify that the contents meanings
and effect of this Release have been fully explained to them by me and I have
recommended that they execute this Release for the consideration expressed above

[Signature]
PHILIP C. THOMPSON

RELEASE OF LIABILITY AND SETTLEMENT AGREEMENT

WITNESSES

[Signature]
[Signature]

WITNESSES

B R. BRICK AND MASONRY INC

By *Dana J. Coleman*
Dana Coleman its attorney

BOSS MANAGEMENT SERVICES, INC

By _____ its _____

RELEASE OF LIABILITY AND SETTLEMENT AGREEMENT

WITNESSES

HERITAGE COMMUNITIES INC
HERITAGE RIVERWALK, INC
BUILDSTAR CORPORATION

By _____
_____ its _____

RELEASE OF LIABILITY AND SETTLEMENT AGREEMENT

WITNESSES

MI WINDOWS AND DOORS INC
Formerly MI HOME PRODUCTS INC

By _____ Its _____

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 05-CP 26-3289

Riverwalk At Arrowhead Country)
Club Property Owners Association,)
Inc.,)

Plaintiff,

vs

Heritage Communities, Inc.,)
Heritage Riverwalk, Inc. BuildStar)
Corporation, Right Way)
Construction, Inc., Pegram)
Associates, Inc., Tuscan)
Architectural Group Inc., and)
Louisiana Pacific Corporation, MI)
Home Products Bill Evans d/b/a)
Top Notch Painter, BR Brick &)
Masonry L.P., Weaver Co., Inc.,)
Romaldo Vilarno d/b/a RAV)
Carpentry AK Construction, Inc.,)
Proffiro Borges d/b/a Siding By)
Proffiro and Robert Shaw)
Defendants,)

HORRY COUNTY
07 FEB 15 AM 10:07
MR. L. A. HUGGINS
CLERK OF COURT

SETTLEMENT AND RELEASE
AGREEMENT

This Settlement, and Release Agreement ("Agreement") is made as of the _____
day of January 2007 by and between Riverwalk At Arrowhead Country Club Property
Owners Association, Inc., ("Plaintiffs") (hereinafter referred to as "Releasors") and
Weaver Co., Inc. as the sole Releasee (hereinafter referred to as "Releasee")

WHEREAS, Plaintiff is an eleemosynary corporation organized and existing
under the laws of the state of South Carolina and is responsible for the maintenance and
upkeep of the common elements in the Riverwalk at Arrowhead Country Club Horizontal
Property Regime (the "Property") and

Et 9

ROA_2030

APP_2041

WHEREAS Weaver Co., Inc. performed the grading and paving work at the Property, the subject of this action, and

WHEREAS Releaseors have alleged that there are numerous problems and defects related to the grading and paving and that said problems and defects are a result of the work by Weaver Co., Inc, and

WHEREAS the Releasee denies the extent of such defects, if such defects exist, and denies that it is liable at all to Releaseors and

WHEREAS Releaseors have asserted claims against Releasee for damages allegedly incurred as a result of the grading and paving at the property by Releasee and

WHEREAS Releaseors have instituted a civil action in the Circuit Court for Horry County, South Carolina, styled Riverwalk At Arrowhead Country Club Property Owners Association, Inc. vs. Heritage Communities, Inc., Heritage Riverwalk, Inc., BuildStar Corporation, Right Way Construction, Inc., Pogram Associates, Inc., Tuscan Architectural Group, Inc., and Louisiana Pacific Corporation, MI Home Products, Bill Evans d/b/a Top Notch Painters, BR Brick & Masonry, L.P., Weaver Co., Inc., Ronaldo Villego d/b/a RAVCarpentry, AK Construction, Inc, Profiro Bonas d/b/a Siding By Profiro, and Robert Shaw, Civil Action Number 05-CP-26-3289 (the "Lawsuit") and

WHEREAS, Releasee denies the claims and allegations asserted against it in the Lawsuit and has filed various Answers and other pleadings disputing said claims and allegations and asserting affirmative defenses, and

WHEREAS Releaseors and Releasees desire to avoid the expense, uncertainties, and risks of other litigation between themselves and to fully finally, and forever compromise and settle all past, present, and future claims between them involving, in any

way the grading and paving work performed at the Property the subject of this action, including but not limited to all claims which were raised or could have been raised in the Lawsuit related to the grading and paving defects and of its components, whether known or unknown or hereinafter discovered.

NOW THEREFORE, know all by these present that:

1 Releasee, for and in consideration of the payment to them of the total sum of Seven Thousand Five Hundred Dollars (\$7,500.00), to be paid by or on behalf of Releasee, the receipt and sufficiency of which is hereby acknowledged, do for themselves, their successors, heirs, purchasers and assigns, hereby remise, release, acquit, and forever discharge Releasee and its parent and subsidiary corporations, dealers and distributors, and their heirs, successors, assigns, partners, agents, representatives, insurers, sureties, subcontractors, shareholders, officers, directors, servants, and employees (hereinafter referred to collectively as "Releasees") of and from any and all past, present, and future claims, demands, debts, rights, actions, damages (including direct, indirect, incidental, special, consequential, statutory, and exemplary damages), costs, causes of action, suits at law or in equity expenses and fees of attorneys expenses and fees of consultants and/or experts, and all claims of any major or kind whatsoever now existing or which may hereafter accrue relating to the grading and paving by Weaver Co., Inc. of the grading and paving at the Property, the subject of this action, whether known or unknown, discovered or undiscovered, and any losses or damages resulting from, or which may in any way be alleged to have resulted from, any and all matters or things done, admitted or suffered or to be done by Releasees in connection with the grading and paving performed on the Property, the subject of this action, by Weaver Co.,

Inc and its components, including, but without limiting the above in any way, of and from.

- (a) All claims which were raised, or which could have been raised if known by or discoverable to Releasors in the Lawsuit and
- (b) All claims relating in any way to alleged construction problems and defects in the grading and paving at the Property the subject of this action, which were known to or knowable by Releasors, whether such problems and defects actually are now known or hereafter discovered.

It is the expressed intent of the Releasors to fully, completely, and forever release Releasees from any and all claims now existing, having anything to do, in any way with the allegations in the Lawsuit related to grading and paving by Releasee.

The releases contained in this paragraph are specific to the Releasees identified above, and in no way limit the rights of Releasors with respect to claims against any other parties and do not release any party except as specifically set forth herein.

2. Each Releasee's share of the settlement amount shall be paid by check(s) made payable to the order of Thompson & Henry, P.A. and shall be delivered to Philip C. Thompson, Esquire as Attorney for the Plaintiffs.

3. For the consideration set forth in Paragraph 1 above, the Releasors and Releasees also agree to execute, or cause their counsel to execute, a stipulation, order or other documents required to dismiss, with prejudice, all claims and causes of action asserted by Releasors against Releasees in the Lawsuit, and asserted by Releasees against each other, provided, however, that such dismissal shall not adversely effect the rights of

Releasess to prosecute in the Lawsuit or in a separate action or actions their claims for indemnity and any other claims or causes of action it may have against any other person, entity or party not herein released.

4. Notwithstanding any other provision, Releasors and Releasees agree and acknowledge that this settlement is a compromise of disputed claims and neither the existence of the agreement, nor any recitals, terms, conditions, or other statements contained in it, nor the payment of the settlement amount shall be construed as an admission of liability by or on the part of any Releasees for any allegation or claim. Releasees do not admit, but expressly deny all liability for the claims asserted against them and enter into this settlement solely to avoid the expense, uncertainties, and risks of further litigation. Consequently this Agreement shall not be admissible in this Lawsuit or in any other action, suit, or legal proceeding as evidence of any liability culpability or fault of or on the part of any Releasees.

5. The undersigned parties declare and represent that they have read this Agreement and acknowledge that they have had the advice of counsel and that no promise, inducement, or agreement not herein expressed has been made to them and that the instrument contains the entire agreement between the parties hereto and that the terms of this incident are contractual and not a mere recital, and further that if any paragraph or part of this Agreement is found void or unenforceable the remainder of this Agreement shall not be affected.

6. This Settlement and Release Agreement shall cover and shall include, and does cover and does include, any and all damages and/or damages not now knowable or discoverable by the Releasors presently, but which may later develop or be discovered,

including the effects and consequences thereof, and including all causes of action
therefore resulting directly or indirectly from the construction, design, or application of
the materials and labor used during the grading and paving work done by the Weaver
Co., Inc. at the Property the subject of this action.

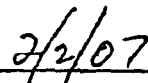
7 This instrument shall be binding on all the parties successors and
interests, heirs, purchasers, and assignees.

8 This Agreement shall be construed in accordance with the laws of the
State of South Carolina.

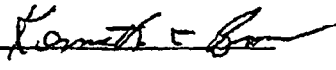
9 Releasees represent and agree that their attorneys may sign this Agreement
for and on their behalf.

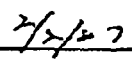
IN WITNESS WHEREOF the undersigned have executed this document on the
respective dates noted.


Philip C. Thompson, Esquire,
Attorney for the Plaintiffs


Date 2/2/07

Riverwalk At Arrowhead Country Club
Property Owners Association, Inc.

By 


Date 2/2/07

Its 

Settlement and Release Agreement
as to Weaver Co. Inc. Only
C/A NO 05-CP 26-3289



Charles G. Blackburn, Esquire, Attorney for
Weaver Co., Inc.

2/13/07

Date



Mark V. Genda, Esquire
Co-counsel for Weaver Co. Inc.

1/19/07

Date

THOMPSON & HENRY, P.A.

ATTORNEYS AT LAW

1300 SECOND AVENUE, THIRD FLOOR

PO BOX 1740

CONWAY, SOUTH CAROLINA 29528

JOHN P. HENRY
LINDA WOODS GANGE
J. JACKSON THOMAS
EMMA RUTH BENTLEY*
CLAY D. BENTON, II
C. MICHAEL SMITH
PHILIP C. THOMPSON
CATHERINE H. DRESE
MATTHEW R. HANSEN
CHARLES D. JORDAN
E. S. DAVIS BRADLEY, JR.**

TELEPHONE
(843) 248-5741

TELECOPIER
(843) 248-5112
(843) 248-8206

MYRTLE BEACH OFFICE
1314 PROFESSIONAL DRIVE
POST OFFICE BOX 1290
MYRTLE BEACH, S.C. 29578
TELEPHONE
(843) 682-2628
TELECOPIER
(843) 682-0919
(843) 682-0928

November 26 2008

RETIRED
JOHN C. THOMPSON

*CERTIFIED EMPLOYMENT &
LABOR LAW SPECIALIST
**ALSO ADMITTED IN N.C.

Finley B. Clark, Esq.
Clarke Johnson Peterson & McLean P.A.
P.O. Box 1869
Florence, SC 29503

Re: *Riverview of Arroyohead Condominium (The Property Owners Association, Inc. vs. Heritage Communities, Inc., et al - Case No. 2003-CP-26-7109)*
Finley B. Pope, et al vs. Heritage Communities, Inc., et al - Case No. 03-CP-26-2389

Magnolia North Property Owners Association, Inc. vs. Heritage Communities, Inc. et al - Case No. 03-CP-26-2203
James G. McLintney et al v. Heritage Communities, Inc. et al
Case No. 2003-CP-26-0044

Dear Finley:

In connection with the above-captioned cases, please find enclosed herewith my signed consent to your letter dated November 26 2008 accepting the terms of the settlement with the "window defendants". Of the \$425,000.00, the *Riverview/Pope* cases will receive \$222,074.63. The *Magnolia North/McLintney* cases will receive \$202,925.35. Please make these checks payable to Thompson & Henry, P.A. Trust Account. Our Fax ID No. 57-0685011.

I am pleased that we resolved these cases and wish you a happy holiday season. I remain

Very truly yours

JOHN P. HENRY

JPH/kwg

cc: Counsel for Window Defendants

E-5

ROA_2037

APP_2048

7
FINLEY B. CLARKE
BROWN W. JOHNSON
JAMES W. PETERSON, JR.
JOSEPH P. McLEAN

LAW OFFICES
CLARKE JOHNSON PETERSON & McLEAN, P.A.
620 WESTEVANS STREET
POST OFFICE BOX 1865
FLORENCE, SOUTH CAROLINA 29503

TELEPHONE (843) 669-2401
FAX (843) 662-1779
E-MAIL clj@cljpm.com

November 26, 2008

phenry@thompsonlaw.com

John P. Henry Esquire
Thompson & Henry P.A.
Post Office Box 1740
Conway, South Carolina 29528

RE: Magnolia North/McCartney and Riverwalk/Pope
Our File 05-145

Dear Pat:

I am enclosing a revised settlement agreement based upon our additional conversations this morning. We have agreed to a settlement of the construction defects suits and class actions relating to both of these projects for the sum of \$425,000 and the following terms and conditions. Of that amount, \$400,000 is being paid by Liberty Mutual and \$25,000 is being paid by Caradon, Novar and Honeywell. Additional terms are:

- (1) Release of all window defendants, including MI, Caradon, Novar, Honeywell, their present and former agents and employees, predecessors, successors, any parent companies, subsidiaries, affiliates, other related companies, distributors and assigns from all past, present and future claims and damages relating to the windows, including release of all past, present and future warranty claims.

ROA_2038

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John P. Henry Esquire
Page Two
November 26, 2008

- (2) Plaintiffs shall cause to be stricken from their Complaints in all cases and shall not assert at trial any claims or damages based upon any alleged defect or defects in the design, manufacture, instructions, selection by window defendants' specifications, or performance of the MI/Caradon/Novar/Honeywell window products, including BetterBilt windows and Capitol windows, and shall remove from the cases all claims and evidence that existing windows need to be replaced with new windows because of any alleged wrongful conduct on the part of the window defendants.

Plaintiffs reserve, however, the right to assert claims for window replacement and damages against the Heritage entities arising from their alleged improper selection and/or installation of windows and damage to windows by other trades who were under their supervision.

- (3) Plaintiffs will join with the window defendants in moving to sever the cross-claims of the Heritage entities against the window defendants. Plaintiffs' participation will be limited to attending a hearing on the motion to sever and verbally concurring with the motion.
- (4) Consent orders of dismissal with prejudice with respect to the window defendants will be entered in all four cases, subject to court approval of the class action settlements.
- (5) The agreement shall be confidential to the extent permitted by law. The parties are entitled, however, to confirm that the matter has been resolved. The parties may reveal the details of the settlement in connection with court approval. The window defendants may reveal the settlement in connection with any motions which they file in connection with the cross-claims of the Heritage entities or other parties.

ROA_2039

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John P Henry Esquire
Page Three
November 26, 2008

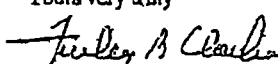
- (6) The class actions shall be subject to court approval.
- (7) The scheduled depositions of Drew Brown, MI and Will Smith will be cancelled. Any scheduled discovery which is canceled pending court approval may be exercised before trial if the court should refuse to approve the settlement.
- (8) The settlement proceeds will be paid within 45 days from today. Settlement proceeds will be held in client trust account pending court approval. Should the court refuse to approve the settlements, the total settlement proceeds will be returned to payors.
- (9) The settlement is contingent on the payment of the full \$425,000 and court approval of class action settlements.
- (10) This release applies only to the window defendants named above, and plaintiffs do not release but reserve their rights against all other parties including the Hentage entities.

Please confirm the terms of our settlement by signing at the bottom of this letter and returning same to me.

Also, please let me know how the settlement proceeds are to be allocated between the two projects.

Wishing you a happy holiday season I remain

Yours very truly


FINLEY B. CLARKE

FBC-vjc
Enclosure

ROA_2040

APP_2051

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

FIFTEENTH JUDICIAL CIRCUIT

Tony L. Pope and Lynn S. Pope,
individually and representing as a class all
unit owners of Riverwalk at Arrowhead
Country Club HPR,

Plaintiffs,

CIVIL ACTION NUMBER 05-CP 26 3289

vs

POST-TRIAL MOTIONS
BY DEFENDANTS

Heritage Communities, Inc., Heritage
Riverwalk, Inc and BuildStar Corporation

Defendants,

(Oral Argument Requested)

Riverwalk at Arrowhead Country Club
POA, Inc.

Plaintiff,

CIVIL ACTION NUMBER 03-CP 26 3289

vs

Heritage Communities, Inc., Heritage
Riverwalk, Inc and BuildStar Corporation

Defendants.

HORRY COUNTY
CLERK OF COURT
09 JAN 26 PM 01
MELANIE HIGGINS

The combined construction defect lawsuits brought by Riverwalk at Arrowhead Country Club POA, Inc ("Riverwalk POA") to recover repair costs and a class of homeowners (the "Pope Class Action") to recover the loss of use value during the repair period were tried before the Honorable Clifton Newman from January 5 through January 15, 2009. Heritage Communities, Inc., Heritage Riverwalk, Inc and Buildstar Corporation ("the Heritage Defendants") herein submit their post-trial motions.

A. The court determined the defendants were an amalgamated entity and directed a verdict for the Plaintiffs on the negligence cause of action. The jury found for the POA Action Plaintiffs on the breach of fiduciary duty claim and for the Class Action Plaintiffs on the breach of warranty of habitability claim. The jury then awarded the POA Action Plaintiffs actual

Post-Trial Motions by Defendants

Ex 1

ROA_2041

APP_2052

damages of \$4,250,000 and punitive damages of \$250,000 on the negligence and breach of fiduciary duty claims. For the negligence and breach of warranty of habitability claims asserted by the Pope Class Action Plaintiffs, the jury initially awarded actual damages of \$0.00 and \$1,000,000 punitive damages. However, the Court instructed the jury to deliberate further and the jury changed its verdict in favor of the Pope Class Action Plaintiffs to award actual damages of \$250,000 and punitive damages of \$750,000. Following the publication of the jury verdicts at approximately 6:30 pm on Thursday, January 15, 2008, Judge Newman granted, with the consent of the parties, ten (10) days to file their post-trial motions.

B The Heritage Defendants respectfully submit the following post-trial motions and contend that they are entitled to a new trial, alternatively a reduction in damages, and as a matter of right a review of the punitive damages, and further as a matter of right, a set-off of the final verdict with the settlement monies the Riverwalk POA and Pope Class Action Plaintiffs have received and/or been promised arising from the same underlying construction defect lawsuits. The Heritage Defendants' requested relief is based on the following legal authority:

- I New Trial - Thirteenth Juror Doctrine; or in the alternative,
- II Judgment Notwithstanding the Verdict; or in the alternative,
- III New Trial Absolute; or in the alternative,
- IV New Trial *Nisi Remittitur*; or in the alternative and as a matter of right,
- V Punitive Damages Review and as a further matter of right,
- VI Setoff.

I NEW TRIAL - THIRTEENTH JUROR DOCTRINE

The Trial Court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence. Duncan v. Hampton County School Dist. No. 2, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). The trial judge should use his discretion sitting as the thirteenth juror to grant a new trial on any one of the following grounds:

- o The court failed to strike the punitive damages verdict on the loss of use class action when the jury did not return an actual damages verdict.
- o The Court improperly allowed testimony of Defendants' work and alleged defects at other sites not at all related to this case. The cumulative effect of the admission, over objections, of work and alleged deficiencies at other Heritage Communities projects unduly influenced the jury and unnecessarily and improperly inflated both the actual and punitive damage verdicts.
- o The Court improperly admitted evidence of alleged construction defects at other projects developed by Heritage Litchfield, Inc., Heritage Azalea Lakes, Inc., Gardens at Cypress Bay, Inc., Heritage Magnolia, Inc., and Heritage Magnolia North, Inc. which evidence unduly prejudiced the Heritage Defendants in this case.
- o The Court's admission of other alleged deficiencies at other projects violated Rule 404 SCRE and Whaley v. CSX, 362 S.C. 456, 609 S.E.2d 286 (2005).
- o The Court improperly admitted evidence of other lawsuits against the Heritage entities.
- o The cumulative effect of the admission of alleged defects at other projects further compounded the prejudice from the Court's denial of Defendants' motion to bifurcate the actual and punitive damages stages of the trial.
- o The Heritage defendants were improperly deemed an amalgamated entity.
- o There was no testimony regarding the standard of care or developer's duty of care to the Property Owners' Association.
- o There was no specific testimony of the construction industry standards in the 1997 through 1999 time period when the Riverwalk condominiums were constructed. Instead, Plaintiffs allege a *res ipsa loquitur* standard of liability. Plaintiffs' arguments and testimony presented to the jury amounted to an impermissible conglomeration of the claims for negligence, breach of warranty of habitability, and breach of fiduciary duty which the Courts expressly warns against. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80, 89 (2008) (noting the "flaw" in the Fields' argument that impermissibly blends the law of negligence and warranty liability regarding the sales of homes.)
- o The Court erred by finding the statute of limitations was equitably tolled during the period Heritage Riverwalk, Inc. was involved in and a member of the Riverwalk POA Board.
- o Plaintiffs' evidentiary use of project plans or specifications as evidence of any breach prejudiced the defendants since Plaintiffs neither relied on nor were entitled to rely on any conformance with such plans or specifications.

- o Plaintiffs' evidentiary use of efforts to remedy alleged window deficiencies at Riverwalk and other projects violates Rule 407 SCRE and Webb v. CSX, 364 S.C. 639 615 S.E.2d 440 (2005)
- o Plaintiffs failed to meet their burden of proof regarding alleged framing or sheathing damage since Plaintiffs failed to open areas of alleged damage and left the amount of actual damage to speculation. This failure of proof was further compounded by Plaintiffs' argument that they "are not sure of the actual damage" and thus "was their only time" to make a claim before the jury. The Plaintiffs sought damages based on fearful speculation rather than actual proof.
- o Plaintiffs failed to meet their burden of proof every time they acknowledged to the jury that they did not know the extent of the alleged damages. Moreover Plaintiffs failed to prove that the damages were a result of a known building code violation at the time of construction.
- o There is no support for the breach of fiduciary duty claim in the Riverwalk POA Action. Plaintiffs argued to the jury a standard that is not the law of South Carolina. The record is clear that when the property was transferred to the Riverwalk POA the reserve accounts were funded and the property manager in charge of maintaining the facilities affirmatively advised the Riverwalk POA was financially in good shape.
- o The Court failed to decertify the Pope Class Action. The Pope Class Action is not proper under Rule 23 SCRCF, and does not meet the requirements for class treatment under South Carolina law.
- o There is no support for the finding of a breach of warranty of habitability in the Pope Class Action. The evidence is that the units at Riverwalk have been fully utilized without interruption since purchased. It is clear from the jury's initial decision regarding damages in the Pope Class Action that they did not intend to award any actual damages to the homeowners.¹ The finding of a breach of the warranty of habitability in the Pope Class Action is inconsistent with the decision on the same cause of action in the Riverwalk POA Action in favor of the Heritage Defendants. The jury was charged that habitability is "defined as a condition of a building in which inhabitants can live free of serious defects that might harm health and safety." The habitability claim can only arise from the alleged repairs to the property. The only repairs contemplated and presented at the trial were the repairs to the common elements. The Pope Class Action claims and damages were entirely derivative of the alleged repairs to the common elements. Assuming arguendo that the Plaintiffs' repair scope is correct and the unit owners will not be able to access their units when the common elements are repaired, the jury unequivocally determined that these repairs will not make the units uninhabitable. The jury was confused about the law and the proper award of damages by awarding inconsistent verdicts and imposing punitive damages and no actual damage in the Pope Class Action.

¹ The initial charge to the jury regarding punitive damages referenced that punitive damages were only recoverable "in addition to actual damages."

- o The Court improperly admitted a purported cost estimate from Watkins Services, which was not authenticated by Steve Watkins. The document was specifically rejected by Mr. Watkins as an estimate as utilized by Plaintiffs.
- o The Court denied Heritage the opportunity to cross-examine window representative James Graham regarding the window manufacturer's settlement.
- o The Court improperly allowed Plaintiffs' expert Francis "Bud" DeSantis to testify as to economic loss. Neither was Mr. DeSantis qualified nor was his methodology accepted and verified within the field of economics or economic loss.
- o The Court, though granting a jury view, failed to allow jurors to walk around the buildings or walk on building walkways as requested by defendants. Thus, jurors did not "view" the true condition of the buildings at issue.
- o The Court allowed plaintiffs to make improper burden shifting arguments regarding proof of window defects or lack thereof.
- o The Court erred by including the terms willful, wanton, and reckless when speaking of negligence within the jury charge. Doing so equated punitive damages with the lower preponderance standard rather than the clear and convincing standard of proof for punitive damages.
- o The damages verdict is not consistent with the actual conditions at the Riverwalk condominium complex.
- o The verdicts in the Pope Class Action and Riverwalk POA cases are not consistent with South Carolina's economic loss rule.
- o The jury's verdict was not supported by the credible evidence presented in this case.

Because of these errors, the Heritage Defendants are entitled to a new trial. Accordingly, the jury's verdict should be overturned by this Court sitting as the thirteenth juror.

II JUDGMENT NOTWITHSTANDING THE VERDICT

A judgment notwithstanding the verdict is a renewal of a directed verdict motion. Roland v. Palmetto Hills, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992). The Heritage Defendants renew their motions that certain additional portions of the POA Action and Class Action Plaintiffs' claims and damages should have been dismissed outright. The Heritage Defendants renew the following points:

- o Over the Heritage Defendants' continued objections, Plaintiffs were allowed to present testimony regarding other construction projects and other lawsuits. In essence, as the Heritage Defendants argued at trial, Plaintiffs were allowed to try multiple construction projects against the defendants. This testimony was presented to implicate the Heritage Defendants' liability through improper character evidence.
- o The trial court should have directed a verdict in favor of the Heritage Defendants on punitive damages because Plaintiffs failed to prove or provide any testimony that the conduct during the construction of the Riverwalk condominiums arose to the level of clear and convincing evidence of liability.
- o The Plaintiffs failed to prove their case every time their experts and attorneys acknowledged that they cannot say how much damage is actually on the condominium buildings.
- o The trial court erred in finding that Heritage Communities, Heritage Riverwalk, and Buildstar were an "amalgamation of corporate interests" under the Court of Appeals case of Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) and, therefore, should be treated as the same entity. This finding blurred the distinct causes of action that the Plaintiffs actually asserted against the separate entities in the underlying pleadings.
- o The trial court improperly granted Plaintiffs' motion for a directed verdict on the negligence cause of action in contravention of the clear testimony in the record by the experts for Plaintiffs, Defendants, and even the building code witness, that it is impossible to build a structure free from all possible building code violations. Alleged violations of the building code are not sufficient, standing alone, to establish a directed verdict on the negligence claim. At the very least, the issue of what were the independent duties of the Heritage Defendants and whether these duties were in fact breached were questions for the jury.
- o The negligence finding further prejudiced the Heritage Defendants as a result of the Court providing instructions on punitive damages. Since it is an impossibility to construct a "perfect building" providing the jury with repetitive instructions discussing "willful and wanton behavior for punitive damages was unduly prejudicial when considering all the evidence as a whole.
- o The Court should have directed a verdict in favor of Defendants on the habitability claim in the Pope Class Action.
- o The conduct complained of, even if true, does not rise to willful, wanton or reckless conduct and, therefore, Plaintiffs' prayer for punitive damages should have been struck.
- o The Court erred by not decertifying the Pope Class Action as the testimony and evidence showed that the requirements of Rule 23 SCRCP for commonality and proper class representation were not fulfilled.

- o The Heritage Defendants incorporate all arguments made at the close of Plaintiffs case and renewed at the close of all evidence.

III NEW TRIAL ABSOLUTE

The Defendants move for a new trial based on errors of law at trial. In addition, Defendants move for a new trial due to the excessive verdict. The trial judge must grant a new trial absolute if the amount of the verdict is grossly excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and, on appeal, this court will grant a new trial absolute. Id. The Heritage Defendants respectfully submit that any of the following reasons entitle them to a new trial absolute:

- o The Heritage Defendants are entitled to a new trial absolute in both the POA Action and the Class Action. The jury's verdict in the POA Action was \$4,250,000 actual damages and \$250,000 punitive damages. The jury's verdict in the Class Action was initially \$0.00 actual damages and \$1,000,000 punitive damages. The final verdict in the Class Action was \$250,000 actual damages and \$750,000 punitive damages. The Heritage Defendants respectfully submit that the jury's verdicts in both cases were the product of passion, caprice, prejudice, partiality or some other improper motive.
- o The Heritage Defendants reassert all grounds itemized in Section I. under the Thirteenth Juror Doctrine.

IV NEW TRIAL NISI REMITTITUR

The trial court has the power to grant a new trial nisi Remittitur when "the verdict indicates the jury was unduly liberal in determining damages." Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 637, 529 S.E.2d 758, 762 (Ct.App. 2000). The trial court must "evaluate the adequacy of the verdict in light of the evidence presented." Id. In the underlying POA Action

and Class Action cases, the trial court should grant a nisi Remittitur to the amount of \$2,518 196 48² based on at least the following points

- o The Trial Judge has the power to grant a new trial nisi when it finds the amount of the verdict to be excessive. As asserted above, the \$3.5 Million verdict awarded to Plaintiff was excessive. The verdict should be reduced to the sum of Two Million Three Hundred Ninety One Thousand Six Hundred Nineteen and No/100 (\$2,319 619 00) Dollars for the the accurate repair figure prepared on behalf of the Defendants rather than the excessive figure proposed by the Plaintiffs, plus One Hundred Twenty-Six Thousand, Five Hundred Seventy Seven and ⁴⁸/100 (\$126,577 48) Dollars for the repairs already made.
- o The Court should consider the testimony regarding lack of proven sheathing or framing damage and should find the Heritage Defendants estimate was accurate and true and remit the verdict consisted therewith.

Additional grounds for the grant of a new trial nisi remittitur are discussed in section V below regarding punitive damages.

V PUNITIVE DAMAGES REVIEW

The Trial Court is required to review all awards of punitive damages and, to ensure that "no award be grossly disproportionate to the severity of the offense, the trial court shall set forth its findings on the record. Gamble v. Stevenson, 305 S.C. 104 111 112, 406 S.E.2d 350, 354 (1991). An award of punitive damages must be proven by clear and convincing evidence Longshore, 365 S.C. at 564 619 S.E.2d at 11

The factors the trial court is advised to rule on include "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment, (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant's ability to pay and finally, (8) as noted in (Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 111 S.Ct. 1032 (1991)) "other factors" deemed appropriate ["such as the

² The sum of the Heritage Defendants' repair costs (\$2,391 619 00) plus the Noble Company repairs (\$126,577 48).

impact on innocent third parties"]" Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354. Thus, review ensure[s] that the award does not exceed an amount that will accomplish society's goals of punishment and deterrence." Pacific Mut. Life Ins. Co. v Haslip, 499 U.S. 1, 21, 111 S.Ct. 1032, 1045 (1991) (citation and internal quotation omitted).

The Heritage Defendants submit that punitive damages were not warranted in the present Riverwalk lawsuits based on the following factors:

- o The punitive damages award violates the mandate of State Farm Mutual Automobile Insurance Company v Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). The harm was economic, not physical, and the jury was allowed to hear evidence of other projects which bore no relation to these plaintiffs' actual damages.
- o The Court improperly admitted evidence of alleged construction defects at other projects developed by Heritage Litchfield, Inc., Heritage Azalea Lakes, Inc., Gardens at Cypress Bay, Inc., Heritage Magnolia, Inc., and Heritage Magnolia North, Inc.
- o Plaintiffs claim that a breach of a building code is tantamount to a statutory breach such that it is evidence of willful, wanton, or reckless conduct. It is not the law of the State of South Carolina. Evidence of a breach of a locally adopted building code does not rise to willful, wanton, or reckless conduct.
- o Heritage was improperly and unfairly deemed culpable for defects, which were the workmanship of other contractors. Therefore, Heritage was unfairly deemed responsible and punished for work which was not its own.
- o The punishment for alleged building deficiencies when the buildings were prima facie constructed in compliance with local codes as evidenced by the Certificates of Occupancy constitutes punishment for lawful conduct in violation of the Constitutions of the United States of America and the State of South Carolina.
- o The only evidence in the record is that when Defendants became aware of potential issues relating to the construction of these units, they affirmatively took steps to address those issues.
- o The Plaintiffs do not sufficiently meet any proof regarding "existence of similar past conduct" since the evidence upon which they exclusively rely appears to be that other alleged deficiencies of other Heritage entities. However, such "conduct" was not in the "past," but all projects were being concurrently developed and Plaintiffs fail to meet the "past conduct" prong of Gamble.

- o There is no deterrent effect for punitive damages since the only evidence in the record is that the Heritage entities are not an ongoing business entity and effectively ceased construction activities by August 2000
- o There is no evidence of punitives being reasonably related to the harm caused by these alleged defects since the "harm" is fully compensated and covered by the actual damages verdict.
- o There is no evidence of the Heritage entities' ability to pay since the Heritage entities are not an ongoing business
- o The jury was not properly charged relating to punitive damages
- o The jury heard reference to willful, wanton, and reckless conduct within the context of the explanation of negligence, which was doubly confusing since the court had already directed a verdict as to negligence. Thus, the charge equated willful, wanton, and reckless conduct with the preponderance of evidence burden of proof rather than the much higher clear and convincing evidence burden of proof for punitives.
- o The Court should have struck the punitive damages verdict on loss of use class action claim since the jury did not return an actual damages verdict. In South Carolina, in order to award punitive damages there must be an award of actual damages. Gamble v. Stevenson, 305 S.C. 104 111 406 S.E.2d 350 354 (1991) (citing Carroway v. Johnson, 245 S.C. 200 139 S.E.2d 908 (1965))
- o The punitive damages are impermissibly high in comparison to actual damages and exceeds that which is acceptable for economic loss under Constitutional due process.

VL SETOFF

The Heritage Defendants move for setoff. A set-off is a matter of right when the claims from which the prior settlements and the current trial arise "out of the same factual scenario" Vortex, 378 S.C. at 209-210, 662 S.E.2d at 451 (quoting and citing with approval, Ellis v. Oliver, 335 S.C. 106 515 S.E.2d 268 (Ct.App. 1999)). The reduction in a jury verdict through a set-off from a prior settlement between the Plaintiff and another party in the same litigation prevents double recovery for the Plaintiff arising from the same alleged damage. See Weich v. Epstein, 342 S.C. 279 312, 536 S.E.2d 408 425 (Ct.App. 2000) ("In other words, there can be only one satisfaction for an injury or wrong.")

In the present litigation, the Heritage Defendants are entitled a total set-off in the amount of \$1,028,821.69 based on the settlement of claims against co-defendants noted in the following table

Louisiana-Pacific Corporation – composite trim manufacturer	\$ 282,580.38
Right Way Construction, Inc.	\$ 217,701.00
Profiro Borges d/b/a Siding By Profiro.....	\$ 87,500.00
AK Construction, Inc.	\$ 50,000.00
Ronaldo Villarino d/b/a RAV Carpentry.....	\$ 11,299.00
Robert Shaw	\$ 8,500.00
Total for framing sub and sub-subcontractors	\$ 375,000.00
BR Brick & Masonry L.P. and Boss Management Services, Inc.	\$ 141,666.66
Pegram & Associates, Inc.	unknown at this time.
Weaver Co – grading and paving	\$ 7,500.00
MI Home Products, Inc. Novar, Inc., Caradon, Inc. and Honeywell International, Inc – window manufacturers	\$ 222,074.65
Total set-off	\$1,028,821.69

All settlements paid in settlement to the common litigation are subject to a set-off. See Vortex, supra, Ellis, supra, Centex Rooney Construction Co., Inc. v. Martin County, 706 So 2d 20 (1997). Therefore, the Heritage Defendants are entitled to a total set-off against the final verdict—after any grant of a new trial and/or nisi remittitur if applicable—in the amount of \$1,028,821.69

CONCLUSION

For the foregoing reasons, the Heritage Defendants respectfully submit that this Court should order a new trial under the thirteenth juror doctrine. Alternatively, this Court should order judgment notwithstanding the verdict. In the next alternative, this Court should order a new trial absolute. In the further alternative, Defendants request a remittitur of the verdict amount to equal no more than the total of the Heritage Defendants' repair cost plus the interim repair costs from 2003 through 2008.

In addition, as a substantial right regardless of the decisions on the post trial motions noted in the previous paragraph, the trial court must review the award of punitive damages and

make specific findings regarding the same on the record. The Heritage Defendants respectfully submit that punitive damages should not have been awarded in this case, as the evidence at trial did not arise to the requisite level of clear and convincing evidence to award punitive damages.

Finally, independent from the decisions on the matters referenced in the two paragraphs above, the trial court must grant a total set-off in the amount of \$1 028 821 69 and reduce the final verdict amount, after remittitur if applicable, accordingly

In support of this motion, the Defendants will rely upon the law of this state, the pleadings the record at trial, any memoranda offered in support thereof and oral arguments as may be heard.

To RelayFax via port COM3
JAN-26-2009 MON 05 17 PM

From N/A

1/26/2009 5 18:10 PM (Page 20 of 20)
FAX NO P 20

Respectfully submitted,
COLLINS & LACY P C

By



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ANDREW N COLE
1330 Lady Street, Sixth Floor (29201)
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Columbia, South Carolina
January 26th, 2009

Post Trial Motions by Defendants

ROA_2053

APP_2064

To RelayFax via port COM3

From N/A

1/26/2009 5 16 10 PM (Page 7 of 20)

JAN-28-2009 MON 05 11 PM

FAX NO.

P 07

STATE OF SOUTH CAROLINA)

IN THE COMMON PLEAS

COUNTY OF HORRY)

TONY POPE, ET AL)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff(s))

C/A No 05-CP 26-3289

vs.)

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and BuildStar Corp.

Defendant(s))

Plaintiff's Attorney John P. Henry PO Box 1740 Conway SC 29528 Tele: 843 248 5741		Defendant's Attorney: Eric G. Fosmure PO Box 12487 Columbia, SC 29211 Tele: 803 256-2660 email: efosmure@collinsandae.com	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I. Hearing Information			
Nature of Motion: Post Trial Motion Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II. Motion/Order Type			
☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant		Date submitted: 1/26/09	
SECTION III. Motion Fee			
☒ PAID - AMOUNT ☐ EXEMPT (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69 SCRPC) ☐ Proposed order submitted at request of the court; or reduced to writing from motion made in open court per judge's instructions Name of Court Reporter ☐ Other			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order ☐ Other		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED ☐ CONTESTED - AMOUNT DUE _____			

HORRY COUNTY
09 JAN 26 PM 4:01
M. LAKE HUGGINS
CLERK OF COURT

ROA_2054

APP_2065

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Tony L. Pope and Lynn S. Pope, individually and representing as a class all unit owners of Riverwalk at Arrowhead Country Club HPR,	)	CIVIL ACTION NUMBER 05-CP 26-3289
	)	
Plaintiffs,	)	
vs.	)	DEFENDANTS' MOTION FOR SETOFF
	)	(Oral Argument Requested)
	)	
Hentage Communities, Inc., Hentage Riverwalk, Inc. and BuildStar Corporation	)	
	)	
Defendants.	)	
	)	
Riverwalk at Arrowhead Country Club POA, Inc.	)	CIVIL ACTION NUMBER 03-CP 26-3289
	)	
Plaintiff,	)	
vs.	)	
	)	
Hentage Communities, Inc. Hentage Riverwalk, Inc. and BuildStar Corporation	)	
	)	
Defendants.	)	

HORRY COUNTY
09 JAN 26 PM 4:07
JAIL ANIE HUGGINS
CLERK OF COURT

The combined construction defect lawsuits brought by Riverwalk at Arrowhead Country Club POA, Inc. ("Riverwalk POA") to recover repair costs, and a class of homeowners (the "Pope Class Action") to recover the loss of use value during the repair period were tried before the Honorable Clifton Newman from January 5 through January 15 2009. Hentage Communities, Inc., Hentage Riverwalk, Inc., and Buildstar Corporation ("the Hentage Defendants") herein submit their post-trial motions.

The jury awarded the POA Action Plaintiffs actual damages of \$4,250,000 and punitive damages of \$250,000 on the negligence and breach of fiduciary duty claims. For the negligence and breach of warranty of habitability claims asserted by the Pope Class Action Plaintiffs the jury initially awarded actual damages of \$0.00 and \$1,000,000 punitive damages. However, the

ROA_2055

APP_2066

Court instructed the jury to deliberate further and the jury changed its verdict in favor of the Pope Class Action Plaintiffs to award actual damages of \$250,000 and punitive damages of \$750,000. Following the publication of the jury verdicts at approximately 6:30 pm on Thursday, January 15, 2008, Judge Newman granted, with the consent of the parties, ten (10) days to file their post trial motions.

The Heritage Defendants hereby move for setoff because all damages arise from the same factual scenario. A set-off is a matter of right when the claims from which the prior settlements and the current trial arise "out of the same factual scenario." Vortex Sports & Ent., Inc. v. Ware, 378 S.C. 197, 209-210, 662 S.E.2d 444, 451 (Ct.App., 2008) (reh'g den. June 26, 2008) (quoting and citing with approval, Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct.App. 1999)). The reduction in a jury verdict through a set-off from a prior settlement between the Plaintiff and another party in the same litigation prevents double recovery for the Plaintiff arising from the same alleged damage. See Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct.App. 2000) ("In other words, there can be only one satisfaction for an injury or wrong.")

In the present litigation, the Heritage Defendants are entitled a total set-off in the amount of \$1,028,821.69 based on the settlement of claims against co-defendants noted in the following table:

Louisiana-Pacific Corporation — composite trim manufacturer	\$ 282,580.38
Right Way Construction, Inc.	\$ 217,701.00
Profluro Borges d/b/a Siding By Profluro	\$ 87,500.00
AK Construction, Inc.	\$ 50,000.00
Ronaldito Villarino d/b/a RAV Carpentry	\$ 11,299.00
Robert Shaw	\$ 8,500.00
Total for framing sub and sub-subcontractors	\$ 375,000.00
BR Brick & Masonry L.P., and Boss Management Services, Inc.	\$ 141,666.66
Pegram & Associates, Inc.	unknown at this time.
Weaver Co. — grading and paving	\$ 7,500.00
MI Home Products, Inc., Novar Inc., Caradon, Inc., and Honeywell International, Inc. — window manufacturers	\$ 222,074.65
Total set-off	\$1,028,821.69

ROA_2056

APP_2067

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JAN-28-2009 MON 05 10 PM

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P 05

All settlements paid in settlement to the common litigation are subject to a set-off. See Vortex, supra, Elia, supra, Centex Rooney Construction Co., Inc. v Martin County, 706 So.2d 20 (1997). Therefore, the Heritage Defendants are entitled to a *total* set-off against the final verdict—after any grant of a new trial and/or new remittitur if applicable—in the amount of \$1,028,821.69.

[Signature Page to Follow]

ROA_2057

APP_2068

To RelayFax via port COM3
JAN-26-2009 MON 05 10 PM

From N/A

FAX NO

1/26/2009 5 16 10 PM (Page 6 of 20)
P 06

Respectfully submitted,
COLLINS & LACY P.C.

By


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(803) 256-2660
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Columbia, South Carolina
January 26th, 2009

Motion For Set-Off
Memorandum in Support of Post-Trial Motions by Defendants

ROA_2058

APP_2069

To RelayFax via port COM3

JAN-28-2008 MON 05 08 PM

From N/A

FAX NO

1/28/2009 5 16 10 PM (Page 2 of 20)

P 02

STATE OF SOUTH CAROLINA
COUNTY OF Horry

Pope et al and
Riverwalk POA

☐ Plaintiff,

vs.

Heritage Communities et al.

☒ Defendant.

check box above indicating submitting party

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NUMBER:

2005-CF-26-3289
2005-CF-26-7169

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Name, S.C. Bar No. and address of plaintiff's attorney:

Phillip C. Thompson, Esquire
John P. Henry, Esquire
Thompson & Henry
PO Box 1740
Cunaway, SC 29528-1740
telephone: fax:
e-mail: other:

Name, S.C. Bar No. and address of defendant's attorney:

Eric G. Fournier, Esquire
Andrew N. Cole, Esquire
Collias & Lacy PC
PO Box 12487
Columbia, SC 29211
telephone: fax:
e-mail: other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Defendant's Motion for Spill

Rehearsal Time Needed: 15 Minutes

Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion -

I hereby move for relief or action by the court as set forth in the attached proposed motion.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date Submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT
(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ Sexually Violent Predator Act

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Proposed order submitted in request of the court, or,
referred to writing from motion made in open court per judge's instructions

Name of Court Reporter

☐ Other

☐ State Agency v. Indigent Party

☐ Post-Conviction Relief

☐ Motion for Remission (Rule 69, SCRPC)

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by _____
(print name)

☐ MOTION FEE COLLECTED - \$

☐ CONTESTED - AMOUNT DUE: \$

SCCA/233 (11-03)

ROA_2059

APP_2070

To RelayFax via port COM3

JAN-26-2008 MON 05 08 PM

From N/A

FAX NO

2009 5 16 10 PM (Page 1 of 20)

P 01



Attorneys at Law

Reply To
ROBERT C. CALAMARI
Direct Dial: (843) 449-0831
bob.calamari@mgclaw.com
MYRTLE BEACH

FAX COVER SHEET

DATE. January 26, 2009

TO: Eric Fomire & Jennifer Rath FAX: 803-771-4484
FROM: Robert C. Calamari
PHONE NO (843) 449-0831

RE Harleysville Insurance Group, Inc. v Riverwalk at Arrowhead Country Club Property Owners' Association, Inc., Heritage Communities, Inc., Heritage Riverwalk, Inc., BuildStar Corporation, National Surety Corporation, and Tony L. Pope and Lynn S. Pope, Individually, and representing as a class all unit owners of Riverwalk at Arrowhead Country Club HPR
MGC File No. 20721 09003
Carrier Claim No. H0494770

NUMBER OF PAGES - INCLUDING THIS COVER SHEET
COMMENTS

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ROA_2060

APP_2071

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Riverwalk at Arrowhead Country)
Club Property Owners' Association, Inc.)
AND)
Tony L. Pope and Lynn S. Pope,)
individually and representing as a class all)
unit owners of Riverwalk at Arrowhead)
Country Club Horizontal Property Regime,)
Plaintiffs,)
vs)
Heritage Riverwalk, Inc.,)
Heritage Communities Inc.)
Bulldstar Corporation,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO 03-CP 26-7169

CIVIL ACTION NO 05-CP 26 3289

JURY CHARGE

MADAM FOREPERSON AND MEMBERS OF THE JURY YOU HAVE HEARD THE
TESTIMONY AND EVIDENCE AND ARGUMENTS OF THE PLAINTIFFS AND THE
DEFENDANTS I WILL NOW EXPLAIN TO YOU THE LAW THAT APPLIES TO THIS
CASE

UNDER THE CONSTITUTION AND LAWS OF SOUTH CAROLINA, YOU ARE
THE FINDERS OF THE FACTS IN THIS CASE I DO NOT HAVE THE RIGHT TO PASS
UPON THE FACTS OR EVEN TO EXPRESS ANY OPINION THAT I MIGHT HAVE AS TO
THEM.

ROA_2061

APP_2072

PREPONDERANCE OF THE EVIDENCE

THE PLAINTIFFS HAVE THE BURDEN OF PROVING THE CLAIMS ALLEGED IN THIS CASE. PLAINTIFFS MUST MEET THIS BURDEN AS TO ACTUAL DAMAGES BY PROVING THE CLAIMS BY THE PREPONDERANCE OF THE EVIDENCE. A PREPONDERANCE OF THE EVIDENCE SIMPLY MEANS THE GREATER WEIGHT OF THE EVIDENCE. IT IS EVIDENCE WHICH, AS A WHOLE, SHOWS THAT THE FACT SOUGHT TO BE PROVED IS MORE LIKELY TRUE THAN NOT TRUE.

THIS CAN BE BEST ILLUSTRATED BY IMAGINING A SET OF SCALES. WHEN THE CASE BEGINS, THE SCALES ARE EVEN. AFTER ALL THE EVIDENCE HAS BEEN PRESENTED, IF THE SCALES SHOULD REMAIN EVEN OR IF THEY TIP EVEN SLIGHTLY IN FAVOR OF THE DEFENDANTS, THEN THE PLAINTIFFS HAVE FAILED TO MEET THIS BURDEN OF PROOF AND WOULD NOT BE ENTITLED TO RECOVER THE DAMAGES SOUGHT.

IF, ON THE OTHER HAND, THE SCALES TIP EVEN SLIGHTLY IN FAVOR OF THE PLAINTIFFS, THE PLAINTIFFS WILL HAVE MET THE BURDEN OF PROOF AND WOULD BE ENTITLED TO RECOVER THE DAMAGES SOUGHT.

THE PREPONDERANCE OF THE EVIDENCE IS NOT DETERMINED BY THE NUMBER OF WITNESSES. INSTEAD, IT MUST BE DETERMINED BY THE GREATER WEIGHT OF ALL OF THE EVIDENCE.

ROA_2062

APP_2073

STIPULATIONS

THERE HAVE BEEN SOME STIPULATIONS ENTERED INTO IN THIS CASE. A STIPULATION IS AN AGREEMENT AS TO A FACT ONCE A FACT IS STIPULATED TO THAT FACT BECOMES ESTABLISHED FOR PURPOSES OF THE CASE AND CANNOT BE QUESTIONED OR CONTRADICTED

IN THIS CASE, THE PARTIES HAVE STIPULATED THAT THE 1994 AND 1997 STANDARD BUILDING CODES WERE THE CODES THAT GOVERNED THE CONSTRUCTION OF THE RIVERWALK CONDOMINIUM BUILDINGS

ROA_2063

APP_2074

AS WAS EXPLAINED AT THE BEGINNING OF THE TRIAL, THERE ARE TWO LAWSUITS THAT ARE COMBINED FOR THIS TRIAL. THE FIRST IS THE ACTION BROUGHT BY RIVERWALK AT ARROWHEAD COUNTRY CLUB PROPERTY OWNERS ASSOCIATION INC. (POA) THIS LAWSUIT WAS BROUGHT BY THE BOARD OF DIRECTORS OF THE PROPERTY OWNERS ASSOCIATION THE POA LAWSUIT SEEKS DAMAGES FOR REPAIRS PAST AND FUTURE, INCLUDING ANY OTHER RELATED COSTS INCIDENTAL THERETO

THE SECOND LAWSUIT WAS BROUGHT BY TONY L POPE AND LYNN S POPE, INDIVIDUALLY AND REPRESENTING AS A CLASS ALL UNIT OWNERS OF RIVERWALK AT ARROWHEAD COUNTRY CLUB HORIZONTAL PROPERTY REGIME (CLASS ACTION) THESE PLAINTIFFS SEEK DAMAGES FOR LOSS OF USE OF THE CONDOMINIUM UNITS DURING THE REPAIRS TO BE MADE

PLAINTIFFS HAVE ASSERTED SEVERAL CLAIMS AGAINST THE DEFENDANTS THE PLAINTIFFS IN THE PROERTY OWNERS ASSOCIATION HAVE ASSERTED CLAIMS AGAINST THE DEFENDANTS FOR NEGLIGENCE, BREACH OF FIDUCIARY DUTY AND FOR BREACH OF THE WARRANTY OF HABITABILITY PLAINTIFFS IN THE CLASS ACTION HAVE ASSERTED CLAIMS AGAINST THE DEFENDANTS FOR NEGLIGENCE AND BREACH OF THE WARRANTY OF HABITABILITY

BUILDSTAR WAS THE GENERAL CONTRACTOR FOR THE CONSTRUCTION OF THE RIVERWALK CONDOMINIUMS HERITAGE RIVERWALK WAS THE ENTITY CREATED TO DEVELOP AND SELL THE RIVERWALK CONDOMINIUMS HERITAGE COMMUNITIES IS THE PARENT COMPANY TO HERITAGE RIVERWALK AND BUILDSTAR.

ALL THREE DEFENDANTS SHALL BE TREATED AS ONE FOR DETERMINING ANY LIABILITY

ROA_2064

APP_2075

I CHARGE YOU THAT AS A MATTER OF LAW I HAVE DETERMINED THAT THE DEFENDANTS WERE NEGLIGENT IN THE CONSTRUCTION OF THESE CONDOMINIUMS, AS A RESULT YOU MUST AWARD THE PLAINTIFFS PROPERTY OWNERS ASSOCIATION DAMAGES FOR THE COST OF REPAIRS AND ANY OTHER COSTS RELATED INCIDENTAL THERETO TO THE EXTENT PROVEN BY A PREPONDERANCE OF THE EVIDENCE. AS TO THE CLASS ACTION LAWSUIT BROUGHT BY TONY AND LYNN POPE, YOU MUST DETERMINE THE NATURE AND EXTENT OF ANY DAMAGES SUFFERED BY THE UNIT OWNERS FOR THE LOSS OF USE OF THE CONDOMINIUMS DURING REPAIRS

ROA_2065

APP_2076

BREACH OF FIDUCIARY DUTY

THE PLAINTIFFS PROPERTY OWNERS' ASSOCIATION CLAIM THAT THE DEFENDANT DEVELOPERS ARE IN BREACH OF A FIDUCIARY DUTY OWED TO THEM. A FIDUCIARY RELATIONSHIP IS FOUNDED ON THE TRUST AND CONFIDENCE OF ONE ENTITY IN THE INTEGRITY AND FIDELITY OF ANOTHER. A FIDUCIARY RELATIONSHIP EXISTS WHEN ONE IMPOSES A SPECIAL CONFIDENCE IN ANOTHER SO THAT THE LATTER, IN EQUITY AND GOOD CONSCIENCE, IS BOUND TO ACT IN GOOD FAITH AND WITH DUE REGARD TO THE INTEREST OF THE ONE IMPOSING THE CONFIDENCE.

THE LAW REQUIRES THAT PARTIES IN A FIDUCIARY RELATIONSHIP MUST FULLY DISCLOSE TO EACH OTHER ALL KNOWN INFORMATION THAT IS SIGNIFICANT AND MATERIAL. ONE STANDING IN A FIDUCIARY RELATIONSHIP WITH ANOTHER IS SUBJECT TO LIABILITY TO THE OTHER FOR HARM RESULTING FROM A BREACH OF DUTY IMPOSED BY THE RELATIONSHIP

IF YOU FIND THAT THE DEVELOPERS BREACHED THIS DUTY, YOU MUST FIND THE DEFENDANTS LIABLE FOR ANY DAMAGES PROXIMATELY RESULTING FROM THE BREACH.

ROA_2066

APP_2077

PROVEN TO YOU BY THE PREPONDERANCE OF THE EVIDENCE THAT IS TO SAY
SUCH DAMAGES AS SUCH NATURALLY AND PROXIMATELY RESULTED FROM
THE NEGLIGENCE AND /OR BREACH OF A WARRANTY OF HABITABILITY OR
BREACH OF FIDUCIARY DUTY BY THE DEFENDANTS

ROA_2067

APP_2078

MITIGATION OF DAMAGES

A PARTY SUFFERING DAMAGES HAS A DUTY TO EXERCISE REASONABLE CARE AND DILIGENCE TO MINIMIZE ITS DAMAGES NO RECOVERY MAY BE HAD FOR LOSSES WHICH THE DAMAGED PARTY MIGHT HAVE PREVENTED BY REASONABLE EFFORTS AND EXPENDITURES THE DAMAGED PARTY IS REQUIRED TO DO ONLY THAT WHICH WOULD BE REASONABLE IN OTHER WORDS, A DAMAGED PARTY IS REQUIRED TO DO THAT WHICH AN ORDINARY PRUDENT PERSON OR PARTY WOULD DO UNDER SIMILAR CIRCUMSTANCES TO MITIGATE ITS DAMAGES HOWEVER, THE DAMAGED PARTY IS NOT REQUIRED TO UNREASONABLY EXERT ITSELF TO INCUR SUBSTANTIAL EXPENSE IN AN EFFORT TO MITIGATE DAMAGES

WHERE NO EVIDENCE IS GIVEN THAT DAMAGES COULD REASONABLY HAVE BEEN REDUCED, THE DAMAGED PARTY IS NOT REQUIRED TO HAVE DONE MORE. YET A PARTY WILL NOT BE ALLOWED TO SIT BACK AND WAIT AND THEN SEEK TO RECOVER DAMAGES WHEN REASONABLE ATTEMPTS WOULD HAVE MITIGATED DAMAGES THERE IS NO OBLIGATION TO MINIMIZE AVOIDABLE DAMAGES WHERE A PARTY HAS A VESTED RIGHT TO RECOVER THE FULL AMOUNT SOUGHT

ROA_2068

APP_2079

PLAINTIFFS RIGHTS OR WHERE DEFENDANTS ACTIONS WERE SO GROSSLY NEGLIGENT AS TO IMPLY A WILLFULNESS OR WANTONNESS A CONSCIOUS FAILURE TO EXERCISE DUE CARE CONSTITUTES WILLFULNESS IT IS THE PRESENT CONSCIOUSNESS OF WRONGDOING THAT JUSTIFIES THE ASSESSMENT OF PUNITIVE DAMAGES AGAINST THE WRONGDOER. PUNITIVE DAMAGES WILL BE ALLOWED EVEN WHEN A DEFENDANT DOES NOT REALIZE IT IS INVADING THE PLAINTIFFS RIGHTS SO LONG AS THE ACT IS COMMITTED IN SUCH A MANNER THAT A PERSON OF ORDINARY PRUDENCE WOULD CONCLUDE IT WAS DONE IN RECKLESS DISREGARD OF THE RIGHTS OF ANOTHER.

THE PLAINTIFFS CANNOT RECOVER PUNITIVE DAMAGES BASED ON NEGLIGENT CONDUCT NEGLIGENCE IS THE DOING OF SOME ACT WHICH A PERSON OF ORDINARY PRUDENCE WOULD NOT HAVE DONE UNDER SIMILAR CIRCUMSTANCES OR FAILURE TO DO WHAT A PERSON OF ORDINARY PRUDENCE WOULD HAVE DONE UNDER SIMILAR CIRCUMSTANCES MERE NEGLIGENCE WILL NOT SUPPORT A PUNITIVE DAMAGES AWARD

TO RECOVER PUNITIVE DAMAGES, THE PLAINTIFFS MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANTS ACTIONS WERE WILLFUL, WANTON OR RECKLESS OR SO GROSSLY NEGLIGENT AS TO IMPLY A WILLFULNESS OR WANTONNESS THE WORDS RECKLESSNESS WILLFULNESS AND WANTONNESS ARE SYNONYMOUS THE TERMS ARE USED TO DESCRIBE A CONSCIOUS FAILURE TO EXERCISE AND OBSERVE REASONABLE OR DUE CARE.

RECKLESSNESS IS DISTINGUISHED FROM NEGLIGENCE. NEGLIGENCE IS THE FAILURE TO USE DUE CARE. NEGLIGENCE IS CARELESSNESS NEGLIGENCE IS FAILURE BY OMISSION OR COMMISSION TO EXERCISE DUE CARE AS A PERSON OF ORDINARY REASON AND PRUDENCE WOULD EXERCISE IN THE SAME CIRCUMSTANCES

RECKLESSNESS IS A HIGHER DEGREE OF CULPABILITY AND RESPONSIBILITY RECKLESSNESS SIGNIFIES A CONSCIOUS FAILURE TO EXERCISE DUE CARE RECKLESSNESS IS A CONSCIOUS INDIFFERENCE TO THE

ROA_2069

- 6) DEFENDANTS' AWARENESS OR CONCEALMENT
- 7) THE EXISTENCE OF SIMILAR PAST CONDUCT
- 8) LIKELIHOOD THE AWARD WILL DETER THE DEFENDANTS AND OTHERS FROM LIKE CONDUCT,
- 9) WHETHER THE AWARD IS REASONABLY RELATED TO THE HARM LIKELY TO RESULT FROM SUCH CONDUCT, AND
- 10) DEFENDANTS WEALTH OR ABILITY TO PAY

THE FINANCIAL CONDITION OF THE DEFENDANTS IS A FACTOR YOU SHOULD CONSIDER IN AWARDING PUNITIVE DAMAGES HOWEVER, THERE IS NO REQUIREMENT THAT THE DEFENDANTS BE A PERSON OR ENTITY OF MEANS BEFORE YOU ARE JUSTIFIED IN AWARDING PUNITIVE DAMAGES WHILE THE WEALTH OF A DEFENDANT IS A RELEVANT FACTOR IN ASSESSING PUNITIVE DAMAGES, IT IS NOT NECESSARILY CONTROLLING IN OTHER WORDS THE FINANCIAL WORTH OF A DEFENDANT IS A FACT PROPERLY TO BE CONSIDERED BY YOU IN DETERMINING THE AMOUNT TO BE AWARDED AS PUNITIVE DAMAGES, BUT EVIDENCE OF NET WORTH IS NOT A PREREQUISITE TO A PUNITIVE DAMAGE AWARD

WHEN UNDER PROPER ALLEGATIONS A PLAINTIFF PROVES, BY CLEAR AND CONVINCING EVIDENCE A WILLFULL, WANTON RECKLESS OR MALICIOUS VIOLATION OF HIS RIGHTS, IT IS NOT ONLY THE RIGHT BUT THE DUTY OF THE JURY TO AWARD PUNITIVE DAMAGES

ACCORDINGLY, IF YOU SHOULD FIND THAT THE PLAINTIFFS ARE ENTITLED TO RECOVER PUNITIVE DAMAGES IN ADDITION TO ACTUAL DAMAGES IT WOULD BE YOUR DUTY TO INCLUDE SUCH DAMAGES IN YOUR VERDICT AND AWARD SUCH AN AMOUNT AS YOU MAY DEEM REASONABLE AND PROPER IN LIGHT OF THE FACTS AND CIRCUMSTANCES

A PLAINTIFF CANNOT RECOVER CONJECTURAL OR SPECULATIVE DAMAGES NEITHER THE EXISTENCE CAUSATION NOR AMOUNT OF DAMAGES CAN BE LEFT TO CONJECTURE, GUESS OR SPECULATION HOWEVER, IF YOU FIND THAT THE PLAINTIFFS ARE ENTITLED TO A VERDICT FOR ACTUAL DAMAGES YOUR VERDICT SHOULD INCLUDE AN AMOUNT TO COVER ANY DAMAGES THAT THE EVIDENCE SHOWS WILL BE REASONABLY CERTAIN TO OCCUR IN THE FUTURE. FUTURE DAMAGES NEED NOT BE PROVED TO A MATHEMATICAL CERTAINTY AND OFTEN MUST BE APPROXIMATED THESE FUTURE DAMAGES MUST BE THE RESULT OF THE DEFENDANTS NEGLIGENCE ANY FUTURE DAMAGES THAT YOU AWARD MUST BE REDUCED TO THEIR PRESENT-DAY VALUE

ROA_2071

APP_2082

DOOR, ADVISE THE BALIFF AND WE WILL BRING YOU OUT TO RECEIVE YOUR
VERDICT

ROA_2072

APP_2083

H Court of Appeals of South Carolina
 Kimberly Johnson WELCH, as Personal
 Representative of the Estate of Marshall O
 Welch, Jr. Respondent/Appellant,

v
 Franklin M. EPSTEIN M.D. Martin Greenberg,
 M.D., and Southern Neurologic
 Institute P.C. Defendants,
 of whom Franklin M. Epstein, M.D. and Southern
 Neurologic Institute, P.C. are
 Appellants/Respondents.
 No. 3235.

Heard June 5 2000
 Decided July 31 2000
 Rehearing Denied Nov 4 2000

Personal representative of deceased patient brought wrongful death and survival action against neurosurgeon, alleging medical malpractice during post-operative care. After plaintiff settled with co-defendant for \$450,000 the Circuit Court, Aiken County William P. Keesley, J. entered judgment on jury verdict awarding plaintiff \$28,535.88 in survival suit, \$3 million in wrongful death action, and \$3.9 million in punitive damages, and entered partial set off against verdicts based upon settlement with co-defendant. Neurosurgeon and plaintiff appealed. The Court of Appeals, Anderson, J. held that: (1) whether neurosurgeon deviated from generally accepted standard of care during post-operative care of patient was jury question, (2) evidence supported jury's finding that neurosurgeon acted recklessly during post-operative care of patient so as to justify award of punitive damages, (3) damages awarded on survival and wrongful death claims were not grossly excessive, (4) punitive damages award was not grossly excessive; and (5) neurosurgeon was entitled to set off \$421,464.12 of co-defendant's settlement against wrongful death verdict.

Affirmed.

West Headnotes

[1] Appeal and Error ⇨ 1079
 30k1079 Most Cited Cases

Issue not specifically argued in the body of appellate brief is deemed abandoned.

[2] Appeal and Error ⇨ 863
 30k863 Most Cited Cases

[2] Appeal and Error ⇨ 866(3)
 30k866(3) Most Cited Cases

[2] Appeal and Error ⇨ 927(7)
 30k927(7) Most Cited Cases

[2] Appeal and Error ⇨ 934(1)
 30k934(1) Most Cited Cases

When reviewing the denial of a motion for directed verdict or for judgment notwithstanding the verdict (JNOV), appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party and will reverse the trial court only when there is no evidence to support the ruling below.

[3] Judgment ⇨ 199(3.6)
 228k199(3.6) Most Cited Cases

[3] Trial ⇨ 142
 388k142 Most Cited Cases

The trial court must deny the motions for directed verdict or for judgment notwithstanding the verdict (JNOV) when the evidence yields more than one inference or its inference is in doubt.

[4] Appeal and Error ⇨ 863
 30k863 Most Cited Cases

[4] Appeal and Error ⇨ 866(3)
 30k866(3) Most Cited Cases

[4] Judgment ⇨ 199(3.3)
 228k199(3.3) Most Cited Cases

[4] Trial ⇨ 139 1(3)
 388k139,1(3) Most Cited Cases

[4] Trial ⇨ 140(1)

388k140(1) Most Cited Cases

When considering motions for directed verdict and for judgment notwithstanding the verdict (JNOV), neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.

[5] Judgment ⇨ 199(3.5)

228k199(3.5) Most Cited Cases

A motion for judgment notwithstanding the verdict (JNOV) may be granted only if no reasonable jury could have reached the challenged verdict.

[6] Appeal and Error ⇨ 1001(1)

30k1001(1) Most Cited Cases

(Formerly 30k999(1))

The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision.

[7] Health ⇨ 825

128k825 Most Cited Cases

(Formerly 299k18.90 Physicians and Surgeons)

Whether neurosurgeon deviated from generally accepted standard of care during post-operative care of patient was jury question in wrongful death and survival action brought by patient's personal representative.

[8] Damages ⇨ 915(1)

115k915(1) Most Cited Cases

(Formerly 115k91(1))

A conscious failure to exercise due care constitutes "willfulness," for purposes of awarding punitive damages. Code 1976, § 15-33-135.

[9] Damages ⇨ 208(8)

115k208(8) Most Cited Cases

The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. Code 1976, § 15-33-135.

[10] Death ⇨ 93

117k93 Most Cited Cases

(Formerly 299k18-110 Physicians and Surgeons)

Evidence supported jury's finding that neurosurgeon acted recklessly during post-operative care of patient so as to justify award of punitive damages in medical

malpractice action brought by deceased patient's personal representative, where neurosurgeon used narcotic analgesic transdermal patch in a post operative setting despite manufacturer's warning not to use drug in that setting and there was evidence that no other doctor used the transdermal patch in that manner. Code 1976, § 15-33-135.

[11] New Trial ⇨ 77(2)

275k77(2) Most Cited Cases

[11] New Trial ⇨ 77(4)

275k77(4) Most Cited Cases

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.

[12] New Trial ⇨ 77(2)

275k77(2) Most Cited Cases

Excessiveness of verdict warrants new trial absolute only when verdict is shockingly disproportionate to the injuries suffered and so grossly excessive as to indicate that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.

[13] Appeal and Error ⇨ 979(5)

30k979(5) Most Cited Cases

[13] New Trial ⇨ 76(1)

275k76(1) Most Cited Cases

The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal.

[14] Appeal and Error ⇨ 946

30k946 Most Cited Cases

An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law.

[15] Appeal and Error ⇨ 933(1)

30k933(1) Most Cited Cases

In deciding whether to assess error when a new trial motion is denied, appellate court must consider the

testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party

[16] New Trial **162(1)**
275k162(1) Most Cited Cases

The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive.

[17] New Trial **162(1)**
275k162(1) Most Cited Cases

When the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by the granting of a new trial nisi remittitur.

[18] New Trial **162(1)**
275k162(1) Most Cited Cases

A motion for new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.

[19] New Trial **162(3)**
275k162(3) Most Cited Cases

If the amount of the verdict is grossly 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, not a new trial nisi remittitur.

[20] New Trial **74**
275k74 Most Cited Cases

The jury's determination of damages is entitled to substantial deference for purposes of new trial motion.

[21] Appeal and Error **979(5)**
30k979(5) Most Cited Cases

Denial of motion for new trial nisi additur will not be disturbed on appeal unless it clearly appears the judge's exercise of discretion was controlled by a manifest error of law.

[22] New Trial **75(1)**
275k75(1) Most Cited Cases

In considering a motion for new trial nisi, the trial court must evaluate the adequacy of the verdict in light of the evidence presented.

[23] Death **10**

117k10 Most Cited Cases

Actual damages in a survival action are awarded for the benefit of the decedent's estate.

[24] Death **81**

117k81 Most Cited Cases

Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering and mental distress of the deceased.

[25] Death **99(1)**

117k99(1) Most Cited Cases

Damages award of \$28,535.88 was not grossly excessive in survival action brought by personal representative of patient who suffered cardiac arrest, lapsed into coma, and never recovered, award equalled amount of medical expenses incurred from point of arrest to death.

[26] Death **85**

117k85 Most Cited Cases

In a wrongful death case the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death.

[27] Death **81**

117k81 Most Cited Cases

Damages recoverable in a wrongful death action include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society including the loss of his or her experience, knowledge, and judgment in managing the affairs of himself or herself and of his or her beneficiaries.

[28] Death **99(4)**

117k99(4) Most Cited Cases

Damages award of \$3 million was not grossly excessive in wrongful death action to recover for death of 37-year-old patient who died during post-operative care, where expert testified that pecuniary loss resulting from the patient's death was \$630,690; patient was survived by 28-year-old wife and two young children, and patient was active, loving husband and father.

[29] New Trial 74

275k74Most Cited Cases

The amount of damages, actual or punitive remains largely within the discretion of the finder of fact, as reviewed by the trial judge on motion for new trial.

[38] Appeal and Error 1004(11)

30k1004(11)Most Cited Cases

[30] Damages 94 7

115k94.7Most Cited Cases

(Formerly 115k94)

The trial judge is vested with considerable discretion over the amount of a punitive damages award, and appellate courts review is limited to correction of errors of law.

[31] Constitutional Law 4426

92k4426Most Cited Cases

(Formerly 92k303)

Due process prohibits states from imposing grossly excessive punishments on tortfeasors. U.S.C.A. Const. Amend. 14.

[32] Constitutional Law 4427

92k4427Most Cited Cases

(Formerly 92k303)

[32] Damages 94 1

115k94.1Most Cited Cases

(Formerly 115k94)

In determining if a punitive damages award comports with due process, trial court must consider: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. U.S.C.A. Const. Amend. 14.

[33] Damages 222

115k222Most Cited Cases

The trial court is not required to make findings of fact for each Gamble factor to uphold a punitive damage award.

[34] Constitutional Law 4427

92k4427Most Cited Cases

(Formerly 92k303)

[34] Death 99(1)

117k99(1)Most Cited Cases

(Formerly 299k18 110 Physicians and Surgeons)

Punitive damages award of \$3.9 million against neurosurgeon was not grossly excessive or unreasonable so as to violate due process in medical malpractice action based on neurosurgeon's negligence in post-operative care that resulted in patient's death, challenged treatment took place over several days, neurosurgeon ignored a specific manufacturer's warning concerning the post-operative use of narcotic analgesic, expert testimony established neurosurgeon violated the standard of care in the treatment of anemia and blood volume loss and the ratio of actual damages to punitive damages was clearly not excessive. U.S.C.A. Const. Amend. 14, Code 1976, § 15-33 135

[35] Damages 94.1

115k94.1Most Cited Cases

(Formerly 115k94)

Reasonableness of punitive damages award depend on (1) the degree of reprehensibility (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and (3) the comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.

[36] Damages 189.5

115k189.5Most Cited Cases

(Formerly 115k184)

While the wealth of a defendant is a relevant factor in assessing punitive damages it is not necessarily controlling; evidence of defendant's net worth is not a prerequisite to a punitive damage award.

[37] Damages 87(1)

115k87(1)Most Cited Cases

Although "economic bankruptcy" of defendant may be factor to consider in awarding punitive damages, the "economic bankruptcy" factor is not an absolute bar to the imposition of punitive damages.

[38] Trial 202

388k202Most Cited Cases

A trial court must charge the current and correct law

[39] Trial $\hookrightarrow$ 295(1)

388k295(1) Most Cited Cases

When reviewing a jury charge for alleged error an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial.

[40] Trial $\hookrightarrow$ 295(1)

388k295(1) Most Cited Cases

If the jury charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error.

[41] Appeal and Error $\hookrightarrow$ 1033(5)

30k1033(5) Most Cited Cases

Erroneous jury instruction that imposition of punitive damages may not effect economic bankruptcy was not reversible error in medical malpractice in which jury imposed \$3.9 million punitive damages award against neurosurgeon, notwithstanding neurosurgeon's net worth of approximately \$2.8 million, erroneous instruction was more favorable to neurosurgeon than he was entitled to.

[42] Damages $\hookrightarrow$ 63

115k63 Most Cited Cases

A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles, reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him or her.

[43] Damages $\hookrightarrow$ 63

115k63 Most Cited Cases

Although nonsettling defendant is entitled to credit for amount paid by another defendant who settles, reduction in judgment must be from settlement for same cause of action.

[44] Judgment $\hookrightarrow$ 883(1)

228k883(1) Most Cited Cases

The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties.

[45] Damages $\hookrightarrow$ 63

115k63 Most Cited Cases

Nonsettling defendant's motion to set off damages

award by amount of codefendant's settlement with plaintiff is addressed to discretion of court.

[46] Damages $\hookrightarrow$ 63

115k63 Most Cited Cases

In allocating set off of co-defendant's pretrial settlement of \$450,000 against judgment entered against neurosurgeon, the trial court did not abuse its discretion in granting neurosurgeon set off of \$28,535.88 against survival action and \$421,464.12 against wrongful death action, even though settling parties had allocated \$5,000 to the wrongful death claim and \$445,000 to the survival claim. Code 1976, § 15-38-50

**412*287 Stephen P. Groves, Sr., John Hamilton Smith and Stephen L. Brown, all of Young, Clement, Rivers & Tisdale, of Charleston, and David A. Brown, of Aiken, for Appellants/Respondents.

Dorset A. Early, III, Richard B. Ness and Norma A. I. Lett, all of Early & Ness, of Bamberg, for Respondent/Appellant.

Amicus Curiae, O. Fayrell Furr, Jr., of Furr & Henshaw and Glenn V. Ohanesian, of Ohanesian & Ohanesian, both of Myrtle Beach, on behalf of the South Carolina Trial Lawyers Association.

ANDERSON, Judge:

[1] This is a medical malpractice case arising out of the death of Marshall O. Welch, Jr. The jury awarded actual damages of \$28,535.88 in the survival suit, \$3,000,000 in the wrongful death claim, and punitive damages of \$3,900,000. After the verdict, the judge issued an order entering a partial set-off against the verdicts based upon a settlement with a prior defendant. Cross appeals have been filed. Dr. Franklin Epstein and Southern Neurologic Institute (hereafter collectively referred to as Dr. Epstein) raise issues concerning (1) the denial of their motions for directed verdict and judgment notwithstanding the verdict (JNOV); (2) the denial of their new trial motion based upon the excessiveness of the actual and punitive damages verdicts; and (3) the jury charge on *288 punitive damages. [FN1] The personal representative, Kimberly Johnson Welch, challenges the set-off order. We affirm.

[FN1] The Statement of the Issues on Appeal by Dr. Epstein includes an issue

concerning the format of the special interrogatories submitted to the jury but the issue is not specifically argued in the body of the brief. Thus, the issue is deemed abandoned. Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998) (issue which is raised but not argued in brief is deemed abandoned and will not be considered on appeal).

FACTS/PROCEDURAL BACKGROUND

Marshall O. Welch, Jr. (Welch) was a thirty-seven year old registered nurse employed by Southern Neurologic Institute. He worked for Dr. Franklin Epstein, a board certified neurosurgeon, who practiced at Southern Neurologic Institute along with Dr. Martin Greenberg. Welch assisted Dr. Epstein for almost three years in the care of surgical patients.

Welch suffered from severe back pain, which began between 1990 and 1992. Dr. Epstein characterized it as an "unrelenting backache." According to Dr. Epstein, Welch initially went to Dr. Greenberg about the problem because "being a stoic, [he] didn't want to let on to me directly that he was needing something."

In June or July of 1995 Welch was taking a significant amount of prescribed pain medication, including Tylox and Vicodin. Welch might also have been using sample pain medication from the drug cabinet at Southern Neurologic Institute. Even with this medication, the pain was very severe. Dr. Greenberg stated he did not know how Welch continued to work. During the latter part of 1995 Welch's pain worsened. Dr. Greenberg recommended surgery. Welch consulted Dr. Melvyn Haas, a neurologist, for a second opinion in February of 1996. Dr. Haas agreed surgery was indicated.

**413 The surgery involved a neurological and an orthopedic component. The orthopedic procedure would result in blood loss. Dr. Epstein declared Welch was adamant he did not want a transfusion unless there was no alternative. As a result, a cell saver was used during the surgery to "save [Welch] from getting donor blood by using [his] own blood." A cell saver is a machine which processes blood lost from a patient during surgery. The plasma and platelets are washed out and the packed red cells are returned for use in the patient.

On the morning of Thursday February 22, 1996 Welch was admitted to the Aiken Regional Medical Center. At admission, his blood pressure was 126 over 72, temperature was 97.4, pulse was 71 and respiration was 18. His pre-operative hemoglobin was 14.4 and hematocrit was 42. Hemoglobin is a pigment within a red blood cell that carries the oxygen molecule. Hematocrit refers to the percentage of total blood volume that consists of red blood cells. Welch's estimated blood volume was 5,852 cc's.

Dr. Epstein was the attending neurosurgeon assisted by Dr. Greenberg. There is no issue concerning Dr. Epstein's performance of the neurosurgery. Henry Holsenback, a registered nurse anesthetist, administered the anesthesia to Welch and monitored his vital signs. Welch received approximately 2,500 cc's of fluid and 625 cc's of blood cells from the cell saver. Holsenback estimated that during the surgery Welch had a blood loss of 2,000 cc's, which is normal for this type of fusion back surgery. Mary Ann Camp, the operator of the cell saver, noted a net blood loss of 2,000 cc's during surgery and another 100 cc's of blood lost from the time Welch left the operating room until Camp hooked up the hemovac in the recovery room. A hemovac is a machine which pumps blood and other liquids from a wound or surgical site.

During the surgery Holsenback applied a 50 micrograms per hour Fentanyl transdermal patch to Welch as ordered by Dr. Epstein for post-op pain control. Fentanyl, a narcotic analgesic, is a very strong pain reliever. It is fifty to one hundred times as potent as morphine. A transdermal patch is designed to mimic an infusion or to drip medication into the patient's body so as to deliver the medication over a long period of time. Although not charted, Holsenback asserted the patch came off and was missing when the sterile drapes were removed from Welch.

Laurel Phillips, a recovery room nurse, charted a total red drainage into the hemovac of 300 cc's. Welch's heart rate elevated from 80 to 115 beats per minute. Phillips contacted the anesthesiologist, who ordered a complete blood count*190 (CBC) and 500 cc's of Heparin, a volume expander. The lab report indicated a hemoglobin of 12 and a hematocrit of

33 2. Welch complained of pain and received 2.5 milligrams of Dilaudid, 25 milligrams of Phenergan, and 1 milligram of Valium. Dilaudid is a narcotic analgesic. Phenergan prevents nausea and is a mild anti-anxiety agent. Valium is an anti-anxiety agent. Another 50 microgram Fentanyl patch was applied pursuant to Dr. Epstein's orders to replace the patch which had fallen off. Welch was discharged to the floor. At that time his pulse rate was 120 and respirations were 16.

The following day Friday February 23 drainage from the hemovac was measured at 385 cc's. Welch's hemoglobin level on Friday morning was 8.6. His hematocrit was 24.6. When Dr. Epstein saw Welch on Friday Welch was puffy and pasty looking, which is not unusual for someone who has just had major surgery. He was aware of the hemoglobin level, but expected the drop due to dilution from fluids received during surgery and in the recovery room. Dr. Epstein claimed Welch was fluid overloaded, not fluid depleted. Dr. Epstein knew Welch was receiving a lot of pain medication. During that day Welch received six injections of Dilaudid, four injections of Phenergan, and a dosage of Valium by mouth. Further he was receiving 50 micrograms of Fentanyl hourly from the patch. Dr. Epstein computed the combined pain medication on Friday equaled ten milligrams of morphine per hour. Yet, Dr. Epstein did not feel Welch was seriously volume depleted or over medicated. In addition, he did not believe the hemoglobin decrease was causing a problem as Welch was **414 not short of breath, had no chest pain, good mental status, and good urine output.

On Saturday February 24 Darlene Colvin was the charge nurse on Welch's floor during the 7:00 a.m. to 7:00 p.m. shift. Approximately 100 cc's of drainage was charted before the hemovac was removed at 7:44 a.m. Colvin noted a morning hemoglobin level of 6.9 which was rechecked and reported as 6.6. Dr. Epstein called in that morning and Colvin advised him of the hemoglobin level. According to Dr. Epstein, the hemoglobin level was getting close to the 6.0 trigger point for transfusion, but he was aware of Welch's desire not to have transfusions. Since Welch had a normal blood pressure, was **291 alert, and urinating, Dr. Epstein decided to wait and recheck the hemoglobin later.

Dr. Melvyn Haas was taking calls for Dr. Epstein on Saturday. Dr. Haas found Welch alert and oriented, but with a temperature. Dr. Haas noted the hemoglobin level was strikingly low in comparison to the pre-op level. He talked to Welch about the possible need for a transfusion. Welch indicated he did not want one because of the risks. Based upon the presence of a fever and his conversation with Welch, Dr. Haas ordered a CBC and an "H and H," a hemoglobin and hematocrit check. Dr. Haas felt he had an agreement from Welch that if the hemoglobin level went any lower Welch would receive a couple of units of packed red blood cells.

In the afternoon, Dr. Greenberg saw Welch while he was on the floor checking another patient. Dr. Greenberg ordered Valium for Welch's back spasms. Around 4:20 p.m., Dr. Haas called to check on Welch's lab results. The hemoglobin level was 6.5 and Welch still had a fever. Dr. Haas ordered two blood cultures and a transfusion of two units of packed blood cells. In her nurse's progress notes, Colvin wrote that Dr. Greenberg called the hospital at approximately 4:45 p.m. in response to Welch "beep[ing]" him. Dr. Greenberg was notified of Welch's increasing temperature, his hemoglobin level of 6.5 and Dr. Haas' transfusion order. According to Colvin's notes, Dr. Greenberg agreed Welch needed a transfusion. Dr. Greenberg denied making that statement.

At 5:30 p.m. Darlene Colvin called Dr. Epstein at home because Welch had asked her to contact him regarding Dr. Haas' transfusion order. Colvin's progress note reads:

Dr. Epstein not on call this weekend, but I attempted to reach him. I phone [d] his home and notified Dr. Epstein of [Welch's] condition. Notified that Dr. Haas had given orders to transfuse [two] units of packed cells for [hemoglobin] of 6.5. Also notified that [Welch] had develop[ed] puffiness to the [left] side of incision that was soft. Informed of [Welch's] increasing temperature with [no] response to Tylenol. Notified Dr. Epstein that [Welch] was very rigid and [complaining of] discomfort to the groin area. Dr. Epstein gave order to not transfuse [Welch] and to stop drawing labs.

*292 The physician's order form indicates a phone order at 5:30 p.m. from Dr. Epstein per Darlene Colvin as follows:

(1) Cancel transfusion, (2) Cancel all labs; (3) Increase Fentanyl patch to 100 micrograms; (4) Valium, 5 milligrams, PO every eight hours, (5) Compazine, 10 milligrams, PO every six to eight hours as needed; (6) Colace, 100 milligrams, PO BID

Dr Epstein recalled the telephone conversation with Darlene Colvin. He believed the slight drop in the hemoglobin level was within an accepted error margin. Dr Epstein decided to "hold off on the transfusion because Welch was thinking clearly, urinating, and had a stable blood pressure. He instructed Colvin to increase the dosage of the Fentanyl by adding a second patch because of the regularity with which Welch was asking for additional pain medication. Dr Epstein did not do a blood culture for the fever because he was unconcerned with the presence of a fever a few days after surgery. The additional Fentanyl patch was not immediately applied by the nursing staff because Welch received injections of Dilaudid and Phenergan at 5:40 p.m. and was resting comfortably. As charge nurse, Darlene Colvin agreed with this nursing decision by Welch's primary care nurse.

About 6:25 p.m., Dr Haas called to check on the transfusion and lab results. Darlene **415 Colvin advised him that Dr Epstein had canceled the orders. Dr Haas then ordered a hemoglobin check and CBC to be performed at 8:00 p.m. He asked to be notified if the hemoglobin level decreased below 6.5

During her Saturday shift, Colvin did not observe any indication of hyperventilation in Welch, but he was tachycardic. Hyperventilation refers to depressed respiration, a slower than normal breathing rate. Tachycardia, an abnormally rapid heartbeat, is a sign of blood loss. Between 2:20 a.m. and 8:30 p.m. on Saturday Welch received five injections of Dilaudid, three injections of Phenergan, and two doses of Valium by mouth. This was in addition to the Fentanyl patch of 100 micrograms, which was given at 10:15 p.m.

Sherryll Brooks Scott was the charge nurse for Welch's floor on the 7:00 p.m. to 7:00 a.m. shift on Saturday night. Scott was working with Deborah Cole, a senior L.P.N. and the primary care nurse for Welch. Around 8:30 p.m. Welch was *293 given additional Dilaudid and Phenergan and was resting comfortably. Because of this, during the early

evening hours, Scott and Cole made a nursing decision not to apply the Fentanyl patch which Dr Epstein had ordered at 5:30 p.m.

About 8:00 p.m. blood was drawn for the lab work ordered by Dr Haas. A report of a hemoglobin level of 6.0 was received around 10:00 p.m. About that time, Dr Haas called to check on the lab results as he had not yet been notified. Upon being advised of the result, Dr Haas told the nurse to call Dr Epstein and see what he wanted to do. Dr Haas felt a transfusion was required.

Scott "beeped" Dr Epstein. When Dr Epstein called in, he spoke with Scott and Cole. Scott's progress note provides:

Dr Epstein answered his page and was informed of [patient's hemoglobin] being 6.0 and was informed that Fentanyl patch was held at this time due to [patient] being comfortable and sleeping but easily aroused. Dr Epstein ordered for 3 units of PRBC's [packed red blood cells] to be given and to put Fentanyl patch on now and to do a finger stick H and H after transfusion.

In her conversation with Dr Epstein, Cole informed him that she had not applied the Fentanyl patch because Welch had been given Dilaudid and Phenergan at 8:30. Her nursing judgment was to hold off on applying the patch. Dr Epstein was very critical of her decision. He ordered her to apply the patch immediately. Cole removed the Fentanyl patch that was on Welch and applied two 50 microgram patches. In his recollection of the conversation, Dr Epstein testified he told the nurse to do what he said and put the patch on. He made the decision to transfuse due to the lower hemoglobin level, the continued tachycardia, and reduced fever.

Scott was unsuccessful in getting the needle into Welch's vein for the transfusion so she requested assistance from an ICU nurse. The ICU nurse, Martha Ulmer had a difficult time finding a vein in Welch's hands. When the needle was inserted in his right hand, she did not "get much of a blood return." The transfusion needle was removed from the right hand and inserted in the left hand. According to Ulmer when there is not much of a blood return after an IV has been *294 inserted, that may indicate the patient has a low volume of blood, like there [isn't] much circulating.

The nurse started the transfusion in the early morning hours of Sunday February 25th. When the nurse checked on Welch at 2:00 a.m. she found the transfusion in progress with Welch sleeping but easily aroused, alert, and oriented. At 4:00 a.m. a second unit of red blood cells was started. At that time Welch was alert, oriented and easily aroused from sleep.

At 5:30 a.m., Cole checked on Welch and found him alert. He spoke to her and held the thermometer while she took his temperature. However at 6:00 a.m. Cole could not rouse Welch so she called Scott to the room. Scott tried to rouse Welch but was unable to do so. She called for an ICU nurse to come to the room. The ICU nurse described Welch's skin as very very white with his mouth and tongue a light white color. That indicated Welch had a blood circulatory and blood volume problem.

Approximately 6:10 a.m. while the nurses were in the room with him, Welch's pulse and **416 respirations ceased. The ICU nurse stated she lost his pulse and then she "looked down and he was not breathing. Cardiopulmonary resuscitation was immediately initiated and a code was called. Narcan was administered to counter the effect of the narcotics. Resuscitation efforts continued and Welch was transferred to ICU. On Sunday morning, Dr. Epstein entered a note stating Welch had suffered a respiratory arrest secondary to narcotics. Dr. Epstein declared that at the time this note was made he was not aware that Welch's pulse had ceased prior to the time his respirations stopped.

While in the ICU Welch received six units of blood and other fluids. He was maintained on life support for several days. However because he had failed to regain consciousness and exhibited no brain activity he was removed from life support on February 29, 1996. Dr. Epstein's discharge summary noted a final diagnosis of respiratory arrest. At the time of trial, Dr. Epstein testified his opinion was Welch did not receive an overdose of narcotics. Based upon further review of the record, he was of the opinion Welch died from a massive pulmonary embolism.

***295 Expert Witnesses Presented by the Personal Representative**

The personal representative presented three expert witnesses: (1) a clinical pharmacologist; (2) a

hematologist; and (3) a neurosurgeon.

A. Clinical Pharmacologist—Dr. Pamela J. Summs
Dr. Pamela Summs testified as an expert witness in the field of clinical pharmacology. Dr. Summs reviewed the product information for the Fentanyl transdermal patch prescribed by Dr. Epstein. A warning label on the package stated "NOT FOR ACUTE OR POSTOPERATIVE USE. The product insert sheet for the Fentanyl patch contained the following contraindication:

BECAUSE SERIOUS OR LIFE THREATENING
HYPOVENTILATION COULD OCCUR,
DURAGESIC (FENTANYL TRANSDERMAL SYSTEM) IS CONTRAINDICATED.

In the management of acute or post-operative pain, including use in out patient surgeries. Additionally the insert sheet included a warning about the concomitant use of other drugs with the Fentanyl.

THE CONCOMITANT USE OF OTHER
CENTRAL NERVOUS SYSTEM
DEPRESSANTS INCLUDING OTHER
OPIOIDS, SEDATIVES OR HYPNOTICS,
GENERAL ANESTHETICS,
PHENOTHAZINES, TRANQUILIZERS,
SKELETAL MUSCLE RELAXANTS,
SEDATING ANTIHISTAMINES AND
ALCOHOLIC BEVERAGES MAY PRODUCE
ADDITIVE DEPRESSANT EFFECTS
HYPOVENTILATION, HYPOTENSION AND
PROFOUND SEDATION OR COMA MAY
OCCUR WHEN SUCH COMBINED
THERAPY IS CONTEMPLATED. THE DOSE
OF ONE OR BOTH AGENTS SHOULD BE
REDUCED BY AT LEAST 50%.

Further the sheet provided a warning regarding the use of the drug in patients with a low blood volume.

Dr. Summs stated the product information contraindicated (1) using the patch in an acute care setting; (2) using starting dosages higher than 25 micrograms per hour and (3) using *296 the patch in the management of pain that could be treated with a non-opiate drug. In her opinion, the use of the transdermal patch was not an approved use in Welch's case because it was used for post-operative pain and it was started at the highest, rather than the lowest, dosage. Dr. Summs testified the hospital record indicated Welch received moderate to aggressive dosages of Dilaudid, Phenergan, and

Valmm. She declared:

[A]ll of these medications affect the central nervous system; that system we were talking about that helps us stay alert, and that controls our breathing and our heart and things like that. And all of these medications tends to depress it, or cause it to be less able to function. So it causes a person to be more sedate, for them to breathe less efficiently for their heart to beat less efficiently. And all of these do that together. And one of the rules that **417 people use when they use medications like this that add together the same [e]ffect is each time you add another medication that has the same affect, you should decrease the dose of one or both.

Given that the other medications were used in conjunction with the Fentanyl patch, Dr. Summs opined the dosages should have been reduced. According to Dr. Summs, care should have been exercised in the use of the Fentanyl patch and the other drugs if there was a low hemoglobin because the drugs would add to any underlying condition of drowsiness or improper breathing. Moreover an inadequate hemoglobin slows down the body's ability to rid itself of the drugs.

B. Hematologist—Dr. Samuel K. Morgan

Dr. Samuel K. Morgan testified as an expert in the field of hematology. In his opinion, Welch suffered a substantial blood loss and Dr. Epstein deviated from the standard of care by (1) not determining the cause of the bleeding; (2) not defining the extent of the bleeding; and (3) not timely treating the situation. It was more likely than not that these deviations were a cause of Welch's death.

The drop in the hemoglobin levels indicated Welch was anemic and the anemia was due to blood loss. Anemia is a condition which involves a low red blood cell count and hemoglobin. The extent of the anemia was not recognized. Based upon a comparison of the starting hemoglobin and hematocrit **297 levels versus the last recorded levels before his arrest, Welch suffered a blood loss equaling 58% of his total blood volume. Dr. Morgan stated a loss of this percentage of blood volume is not compatible with life. He further testified.

I think that from the time that we began the surgery and when we had the numbers that he came into the hospital with for hemoglobin and hematocrit, namely 416 hematocrit and 14.4 hemoglobin, until

the time we achieved this last level in the chart, we have a time in which the hemoglobin gradually fell in general figures from the pre-op 14 to recovery room 12 to a value the next morning after surgery at 5.45—that would have been on the 23rd, of 8.6, so we see a gradual fall in the hemoglobin. And then no evaluation of his blood counts until 27 hours later at approximately 8:40 on the following morning.... That would have been the 24th, from 5:45 am on the 23rd until 8:40 on the 24th, 27 hours. At which time, on the 24th, his hemoglobin was 6.5. I think that this was a critical period of time where no attention was paid to his blood counts, and I said this was critical because if we show that he has lost more than 50 percent of his blood at the time the last blood count was done during this period of time that he must have passed through the time period where he lost at least 30 to 40 percent of his blood. And when we pass through that point, unless further hemorrhage or unless further blood loss is prevented and appropriate treatment undertaken, then significant organ damage occurs and death ensues. Death occurs. That doesn't say when death occurs but it says predictably that death will occur.

C. Neurosurgeon—Dr. Victoria Samuels

Dr. Victoria Samuels, a board certified neurosurgeon, testified as an expert in the field of neurosurgery. Based upon a review of the medical records and deposition testimony of various witnesses, Dr. Samuels declared Dr. Epstein deviated from the generally accepted standard of care for neurosurgeons in (1) the management of the anemia, (2) the management of the volume depletion; and (3) the use of medications.

In her opinion, given the drop between the pre-operative and post-operative hemoglobin and hematocrit levels, a check of those levels should have been performed on Thursday **298 evening after the surgery. Moreover according to Dr. Samuels, once the levels were checked on Friday morning and a hemoglobin level of 8.6 was noted, a transfusion should have been considered. Welch was anemic at that time and had experienced a significant blood loss. It was a deviation from the standard of care to wait until Saturday morning to obtain the next hemoglobin level. Dr. Samuels stated Welch lost 3,243 cc's or 55% of his total blood volume. He **418 was volume depleted. IV fluids should have

been started in the recovery room and continued. Canceling the transfusion and lab orders on Saturday afternoon was a deviation from the standard of care. Starting the transfusion after midnight on February 25th was a day late and a dollar short.

The use of the Fentanyl patch was a deviation from the standard of care due to the contraindications in the product literature and Welch's low blood volume. The use of the other pain medications at the levels prescribed in conjunction with the Fentanyl patch was a deviation from the standard of care.

In Dr. Samuels' opinion, the cumulative effect of the drop in hemoglobin level, volume depletion, and use of the Fentanyl patch in conjunction with the other drugs caused Welch's death. When asked the cause of Welch's coma, Dr. Samuels replied, "The cause of the coma was anoxic brain injury which they were able to see on a CT scan, and it is my belief that the anoxic brain injury itself was through a combination of three factors; one being hypo-low volume; the second being anemia and the third being the medication causing the hyperventilation. The following colloquy occurred on redirect examination.

Q: Now Doctor let's sort of wrap it up. We've got the situation with the volume depletion, we've got the situation with the hemoglobin which went to 6 and we've got the Fentanyl patch and the concomitant use of the Dilaudid, Phenergan, Vahum and Compazine. What cumulative effect did all three of those things [the medicines, the low volume and the low blood] have on [Welch]?

A: Okay I believe what it did was cause his demise. The combination of the low blood volume, the low volume with the anemia is what they call a lethal combination in general *299 surgery. And the body's attempt to take care of that is with hyperventilation or breathing fast, upping your blood pressure and your heart rate, okay? And unfortunately the three things the body--the only three things the body has to do to compensate to help tackle the low volume and the low blood is those three things, and those three things were markedly depressed because of the massive amount of medicine he was given and the types of medicine he was given.

ISSUES

I. Did the trial court err in failing to grant Dr

Epstein's motion for JNOV as to negligence?

II. Did the trial judge err in denying Dr. Epstein's motions for directed verdict and JNOV as to punitive damages?

III. Did the trial court err in refusing to grant Dr. Epstein's motion for new trial as to actual damages?

IV. Did the trial judge erroneously deny Dr. Epstein's motion for new trial as to punitive damages?

V. Was the jury instruction as to punitive damages incorrect?

VI. Did the trial court err in granting Dr. Epstein's motion for set-off against the wrongful death verdict in an amount greater than \$5,000?

LAW/ANALYSIS

I. APPEAL OF DR. EPSTEIN AND SOUTHERN NEUROLOGIC INSTITUTE

A. DIRECTED VERDICT/JUDGMENT
NOTWITHSTANDING THE VERDICT (JNOV). [2][3][4] When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. See, e.g., Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); *300 Garnett v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. Steinke, supra.

This Court will reverse the trial court only when there is no evidence to support the ruling below. Id., **419 Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Creech, supra; Reiland v. Southland Equip. Serv. Inc., 330 S.C. 617, 500 S.E.2d 145 (Cl.App.1998).

[5][6] A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crosier v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Small v. South Carolina Dep't of Educ.

339 S.C. 208, 528 S.E.2d 682 (Cl.App.2000), *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Cl.App.1999).

I. Motion for JNOV as to Negligence

[7] Dr Epstein argues the trial court erred in failing to grant his motion for JNOV as to negligence. We disagree.

This is a complex medical negligence case. The personal representative presented three expert witnesses who gave their opinions concerning the applicable standard of care and deviations by Dr Epstein from that standard of care. Dr Epstein testified in his own defense. In addition, he presented an expert witness, Dr Joseph Marzouff, a board certified neurosurgeon, who testified there was no deviation from the applicable standard of care.

Clearly conflicting evidence exists in this case. It is not the function of this Court to weigh the evidence and resolve those conflicts. In a negligence case on appeal from a jury verdict, the jurisdiction of an appellate court extends merely to the correction of errors of law and factual findings of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the findings.

*301 Here more than one reasonable inference could be drawn from the evidence. The evidence supports the factual findings implicit in the jury's verdict. Viewing the evidence in the light most favorable to the personal representative, we find the trial court properly denied Dr Epstein's motion for JNOV as to negligence.

2. Motions for Directed Verdict and JNOV as to Punitive Damages

Dr Epstein claims the trial court erred in denying his motions for directed verdict and JNOV as to punitive damages because the personal representative failed to present clear and convincing evidence showing she was entitled to punitive damages." We disagree.

[8][9] In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C.Code Ann. § 15-33-135 (Supp.1999), *Taylor v. Medenica*, 324

S.C. 200, 479 S.E.2d 35 (1996). A conscious failure to exercise due care constitutes willfulness. *McCurt v. and through McCurt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995), *Hawkins v. Pathology Assoc. of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Cl.App.1998). The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984); *Hawkins supra*.

[10] There is clear and convincing evidence of Dr Epstein's reckless culpability justifying an award of punitive damages. Dr Epstein was aware of the manufacturer's warning concerning the use of the Fentanyl transdermal patch in a post-operative setting. However he chose to use the patch despite that warning. Dr Epstein testified on cross examination that he knew more about the drug than people down here. Dr Epstein opined his practice was more advanced than others in the area. He stated "[t]his has been a recurrent theme to try to undercut me when I came here because the Augusta physicians and Columbia physicians were practicing like Eisenhower was still in office." There was evidence *302 no other doctor used the Fentanyl transdermal patch in this manner. While Dr Epstein's expert witness, **420 Dr Marzouff, did not use Fentanyl in a post-operative setting, he declared it would be acceptable to use the Fentanyl patch in a hospital on a patient under close observation with frequent vital sign checks, especially if the patient "had been on a lot of narcotics before."

This was sufficient evidence to create a jury issue as to recklessness. See *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 468 S.E.2d 633 (1996) (package inserts for catheters introduced to support a punitive damages award by showing doctor's awareness of the conditions which may be caused by improper placement of catheter). Therefore, the trial court did not err in denying Dr Epstein's motions for directed verdict and JNOV as to punitive damages.

B NEW TRIAL

[11][12] 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. Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Cl.App.1996). In other words, to warrant a new trial absolute, the verdict reached must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993).

[13][14][15] The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal. Krepps v. Auser, 324 S.C. 597, 479 S.E.2d 290 (Cl.App.1996). An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Id. In deciding whether to assess error when a new trial motion is *303 denied, this Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party. Vinson, supra.

[16][17][18][19][20][21][22] The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive. Rush, supra. Indeed, when the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by the granting of a new trial *nisi remittitur*. Allstate, supra.

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive although not motivated by considerations such as passion, caprice or prejudice. O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993). If the amount of the verdict is grossly 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, not a new trial *nisi remittitur*. Id. However the jury's determination of damages is entitled to substantial deference. Rush, supra. The judge's decision will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law. Id. In considering a motion for new trial *nisi*, the trial court

must evaluate the adequacy of the verdict in light of the evidence presented. Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Cl.App.2000).

1 Motion for New Trial as to Actual Damages

Dr. Epstein challenges the denial of his motion for new trial or in the alternative, new trial *nisi remittitur* arguing the size of the actual damages award indicates it resulted from passion, caprice prejudice, or other considerations on the part of the jury. We find no error.

[23][24][25] Actual damages in a survival action are awarded for the benefit of the decedent's estate. Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Cl.App.2000). Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious **421 pain, suffering, and mental distress of the deceased. Id. Based upon the evidence that Welch lapsed into a coma from which he never recovered, the trial judge charged the jury it could only award damages in the *304 survival claim for the amount of the medical bills incurred from the point of the arrest to his death. The jury awarded actual damages of \$28,535.88 the amount of these medical bills.

[26][27] In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death. Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969); Self v. Goodrich, 300 S.C. 349, 387 S.E.2d 713 (Cl.App.1989). Damages recoverable in a wrongful death action include (1) pecuniary loss, (2) mental shock and suffering; (3) wounded feelings (4) grief and sorrow (5) loss of companionship and (6) deprivation of the use and comfort of the testator's society including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972). Scott, supra.

[28] Dr. Oliver Wood, a recognized expert in the field of economics and economic forecasts testified the pecuniary loss resulting from the death of Marshall Welch was \$630,690. At the time of his death, Welch was thirty seven years old and his widow Kim, was twenty-eight years old. Their two children were eight and six. Welch was an active,

loving husband and father. Despite his physical pain, he was a hard worker. According to Dr. Epstein, if you cut his legs off he would have tried to keep going. In addition to his nursing career he helped his father on the family farm. He assisted his wife with work around the house including yard work, maintenance and cleaning. Welch helped with the care of the children. He was involved in their school and sports activities. The family bicycled together. He took his son hunting and fishing. Every Saturday morning, Welch would take the children out to breakfast and spend the morning with them.

The jury awarded actual damages of \$3,000,000 in the wrongful death claim. Given the evidence of the pecuniary and non-pecuniary losses, we conclude the trial judge did not abuse his discretion in refusing to grant the new trial motion based upon the size of the actual damages award. Cf. Knoke v. South Carolina Dep't of Parks, Recreation and Tourism, 324 S.C. 136, 478 S.E.2d 256 (1996) (wrongful death verdict of \$305,000,000 for death of twelve year old was not an excessive verdict); Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct.App.2000) (wrongful death verdict of \$1,500,000 for death of nineteen month old child was not excessive).

We affirm the trial judge's denial of Dr. Epstein's motions for new trial absolute or in the alternative, new trial *nisi* remittitur as to the actual damage verdicts in the survival and wrongful death actions.

2. Motion for New Trial as to Punitive Damages a. Gamble [FN2] Analysis

[FN2] Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991).

Dr. Epstein maintains the trial judge erred in denying his motion for new trial or in the alternative, new trial *nisi* remittitur asserting the excessive size of the punitive damages award indicates it resulted from passion, caprice, prejudice, or other consideration on the part of the jury. He further complains the trial judge failed to properly apply the Gamble factors. We disagree.

The jury awarded punitive damages of \$3,900,000. The evidence at trial established that as of August of 1996 Dr. Epstein had a net worth of \$2,811,788. His monthly salary was \$60,000 with an estimated

yearly bonus of \$534,000.

[29][30] The amount of damages actual or punitive, remains largely within the discretion of the finder of fact, as reviewed by the trial judge. Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). The trial judge is vested with considerable discretion over the amount of a punitive damages award, and this Court's review is limited to correction of errors of law. **422 South Carolina Farm Bureau Mut. Ins. Co. v. Low Chevrolet, Inc., 324 S.C. 149, 478 S.E.2d 57 (1996); Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E.2d 449 (Ct.App.1997).

[31] The Due Process Clause of the Fourteenth Amendment prohibits states from imposing grossly excessive punishments on tortfeasors. BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). In *306 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Supreme Court determined whether the Due Process Clause rendered a punitive damages award unconstitutional. The Court noted unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Id. at 18, 111 S.Ct. at 1043, 113 L.Ed.2d at 20. In Haslip, the Court upheld the punitive damages award, finding Alabama's post-trial procedures for scrutinizing such awards and its appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. Id. at 21, 111 S.Ct. at 1045, 113 L.Ed.2d at 22.

[32][33] In response to Haslip, the South Carolina Supreme Court, in Gamble supra, developed an eight factor post-verdict review which trial courts are required to conduct to determine if a punitive damages award comports with due process. The Gamble factors are:

(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally (8) as noted in Haslip, other factors deemed appropriate.

Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354. Under Gamble, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award. McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996).

[34] The trial judge correctly submitted to the jury the issue regarding Dr. Epstein's recklessness. The trial judge conducted an appropriate post-verdict Gamble review arriving at well-reasoned conclusions amply supported by the record. The court set forth its findings as to each of the relevant factors articulated in Gamble. The judge found the challenged treatment by Dr. Epstein took place over several days. Dr. Epstein ignored a specific manufacturer's warning concerning the use of the Femuryl patch. He canceled the orders of Dr. Haas for the transfusion on Saturday afternoon. "307 Expert testimony established Dr. Epstein violated the standard of care in the treatment of anemia and blood volume loss. The judge concluded the award was reasonably related to the foreseeable harm, i.e. the death of the patient, and the award was within Dr. Epstein's ability to pay "without effecting economic bankruptcy. Further the ratio of actual damages to punitive damages is clearly not excessive. We agree with the trial court's determination the punitive damages award was proper.

[35] Although we find the damages award proper under Gamble, we must analyze the award in light of the United States Supreme Court's decision in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The Court provided the following guideposts for determining the reasonableness of punitive damages awards: (1) the degree of reprehensibility; (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff; and (3) the comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. Id.

Under the South Carolina Supreme Court's Gamble test and the United States Supreme Court's BMW guideposts, we hold the punitive damage award of \$3,900,000 was not unreasonable. We find the punitive damage award is neither grossly excessive so as to justify a new trial absolute nor merely excessive so as to justify a new trial *nisi remittitur*. Thus, the trial court did not err in denying Dr.

Epstein's motions for new **423 trial absolute or in the alternative, new trial *nisi remittitur* as to the punitive damage verdict.

b "Economic Bankruptcy"

Dr. Epstein contends the trial judge erred in denying his motion for new trial or in the alternative, new trial *nisi remittitur* asserting the excessive size of the punitive damages award clearly violates the law by rendering [him] economically bankrupt." We disagree.

[36] While the wealth of a defendant is a relevant factor in assessing punitive damages, it is not necessarily controlling. Hicks v. Herring, 246 S.C. 429, 144 S.E.2d 151 (1965). The financial worth of a defendant is a fact properly to be considered "308 by the jury in determining the amount to be awarded as punitive damages, but evidence of net worth is not a prerequisite to a punitive damage award. Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958). The defendant's financial ability to pay is always a factor to be considered by the jury in awarding punitive damages. Charles v. Toms Co., 199 S.C. 156, 18 S.E.2d 719 (1942). Yet, evidence of ability to pay is not a *sine qua non* of a punitive damage award. Id. There is no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages. Norton v. Ewbank, 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963). See also Clamp v. Clamp, 293 S.C. 142, 359 S.E.2d 86 (Ct.App.1987) (financial condition of defendant is factor to be considered by jury in awarding punitive damages but there is no requirement the defendant be a man of means before the jury is justified in awarding punitive damages).

Dr. Epstein cites Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir.1991), in support of his "economic bankruptcy" argument. In Mattison, the United States Court of Appeals for the Fourth Circuit reviewed South Carolina's post-Gamble punitive damages system. The Court articulated:

If the plaintiff demonstrates an entitlement to punitive damages, we direct that the district court's instructions on the amount of punitive damages that may be awarded include instruction on four aspects, which are derived from Gamble and Haslip.

(1) *Relationship to harm caused.* Any penalty imposed should take into account the

reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury.

(2) *Other penalties for the conduct*: Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.

*309 (3) *Improper profits and plaintiff's costs*: The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct and on awarding the costs to the plaintiff of prosecuting the claim.

(4) *Limitation based on ability to pay*: Any penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.

Mattison, 947 F.2d at 109-10 (emphasis added). In Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co., 809 F.Supp. 400, 402 (D.S.C.1992), the District Court judge discussed Mattison. "The Mattison decision significantly altered the law of punitive damages in South Carolina.

Initially we note that Mattison and Defender Industries are not controlling precedent on this Court. Dr. Epstein's reliance upon Mattison and Defender Industries is misplaced. Neither Mattison nor Defender Industries holds that economic bankruptcy is an absolute bar to an award of punitive damages. Rather Mattison and Defender Industries involve jury instructions that are inclusive of "economic bankruptcy" considerations as one factor in a punitive damage award. If Mattison and Defender Industries**424 can be construed to erect economic bankruptcy as a complete defense to punitive damages in South Carolina, we reject this holding.

[37] We hold the "economic bankruptcy" factor is not an absolute bar to the imposition of punitive damages in South Carolina under Gamble-Hicks-Rogers-Charles and Norton. In a proper case, the jury may be instructed to consider

economic bankruptcy as one factor in awarding punitive damages.

The broad brush attack launched by Dr. Epstein in reference to the punitive damage award can be crystallized to a financial impact analysis on Dr. Epstein as juxtaposed to his actual economic position. The quintessence of the legal argument presented by Dr. Epstein is a contention that a punitive damage award can not thrust a party into economic bankruptcy. The gist and gravamen of Dr. Epstein's assertion is that the law on punitive damages has evolved to the point of erecting an irrevocable financial barrier to the imposition of *310 punitive damages if harsh financial realities emanate from the award. We reject this position. It is untenable and unsupportable under South Carolina precedent and decisions of the United States Supreme Court.

C. JURY INSTRUCTION ON PUNITIVE DAMAGES

Dr. Epstein asserts the trial judge's instruction to the jury as to punitive damages was incorrect because the charge implied the jury could award punitive damages in an amount exceeding Dr. Epstein's net worth.

The trial was bifurcated. In the first phase, the jury determined liability and actual damages. Special interrogatories were submitted to the jury. The jury affirmatively answered the question (d) do you find that the plaintiff has proven by clear and convincing evidence that Dr. Epstein acted recklessly wilfully wantonly or in conscious disregard for the rights of his patient, Marshall O. Welch, Jr. in proximately causing injury to and the death of Mr. Welch?

Evidence was received from Dr. Oliver Wood concerning Dr. Epstein's financial statements. As of August of 1996 Dr. Epstein had a net worth of \$2,811,788. His monthly salary was \$60,000 with an estimated yearly bonus of \$534,000.

The attorneys presented closing arguments. The trial judge gave a charge on punitive damages. The judge instructed as part:

If you decide that punitive damages should be awarded, you must then determine the amount of the punitive damage award to be assessed against this defendant. In doing so ladies and gentlemen,

the law requires that you must consider several factors. First, the amount of the damages or punishment imposed by punitive damages should bare [sic] a reasonable relationship to the nature and the extent of the wrongful conduct and the harm caused. In other words, you should take into account the degree of wrongfulness of the defendant's conduct and the extent of actual damages that resulted from the conduct, and there should be a reasonable relationship between the actual damages and the punishment imposed. Secondly you must consider any other penalties that may be imposed against the defendant for the conduct involved. Third, you must consider whether *311 or not the defendant's wrongful conduct conferred any profit on him. You may also consider awarding the plaintiff the cost of prosecuting her claim against the defendant. And fourth, you must also consider the defendant's ability to pay the amount of the punitive damages awarded. In making this determination, the defendant's wealth, or lack of it, is a relevant factor and you would therefore award such amount of punitive damages as would punish the defendant but not effect economic bankruptcy (Emphasis added)

Our state supreme court has indicated that the following factors are relevant to an evaluation of an award of punitive damages. First, the defendant's degree of culpability the degree of his wrongdoing and his responsibility for it. Second, the duration of the wrongful conduct, how long it lasted. Third, the defendant's awareness of wrongdoing or concealment of wrongdoing. Fourth, whether the defendant had engaged in similar wrongdoing in the past. *425 Fifth, the likelihood that the award will deter the defendant, or others, from like conduct. Sixth, whether the harm that actually resulted was reasonably related to the harm that was likely to result from the wrongdoing. In other words, was the harm foreseeable? And seventh, the defendant's ability to pay

[38][39][40] A trial court must charge the current and correct law McCourt by and through McCourt v. Abernathy 318 S.C. 301, 457 S.E.2d 603 (1995) See also Brown v. Smalls 325 S.C. 547, 481 S.E.2d 444 (Ct.App.1997)(trial judge is required to charge current and correct law applicable to issues presented) When reviewing a jury charge for alleged error an appellate court must consider the

charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys. 334 S.C. 488, 514 S.E.2d 570 (1999) If the charge is reasonably free from error isolated portions which might be misleading do not constitute reversible error Id.

[41] Included in the jury charge is the statement "but not effect economic bankruptcy" The jury charge on punitive damages improperly stated the law of South Carolina. Economic bankruptcy" is not a categorical prohibition to an award *312 of punitive damages. Rather financial net worth and ability to pay are factors for the jury to consider in awarding punitive damages. It is reversible error to charge a jury that an award of punitive damages may not exceed the net worth of a defendant nor effect economic bankruptcy" The trial judge's instruction to the jury was more favorable to Dr. Epstein than he was entitled to. Thus, we find no reversible error

II. APPEAL OF THE PERSONAL REPRESENTATIVE

Three days prior to trial, the personal representative settled wrongful death and survival claims against a co-defendant (hereafter referred to as Doe [FN3]) The settlement totaled \$450,000 of which the parties allocated \$5,000 to the wrongful death claim and \$445,000 to the survival claim. Dr. Epstein objected to the proposed allocation between the two claims. He filed a post-trial motion seeking a set-off based upon a reallocation of the settlement proceeds. The judge ordered a reallocation of the settlement: (1) survival action--\$28,535.88 and (2) wrongful death action--\$421,464.12

[FN3] This designation is used by the Court to protect the anonymity of the settling co-defendant pursuant to a confidentiality agreement.

The personal representative does not challenge the offset and satisfaction of the survival verdict. However, she argues only \$5,000 should be offset against the wrongful death verdict. She avers the trial judge erred because the parties' allocation between the two claims was not fraudulent and was a valid and reasonable apportionment based upon evidence of conscious pain and suffering which could have been presented against Doe.

[42][43] A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles. Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967). The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him. Truesdale v. South Carolina Hwy. Dep't, 264 S.C. 221, 213 S.E.2d 740 (1975). In other words, there can be only one satisfaction for an injury or wrong. Id., Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998). *313 However, the reduction in the judgment must be from a settlement for the same cause of action. Hawkins, supra.

[44][45] The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. Smalls v. South Carolina Dep't of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct.App.2000). Hawkins, supra. A set-off is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court. Reckard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 71 S.E. 982 (1911). Therefore such **426 motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised.

[46] Dr. Epstein was not a party to the settlement between the personal representative and Doe and is not bound by its terms. Welch fell into a coma at the time of his arrest and did not recover from that condition. While the personal representative claims Welch was in considerable pain prior to the arrest, that pain was directly related to the back surgery. Further the trial judge charged the jury only medical bills could be recovered in the survival action and the personal representative did not appeal that ruling.

In our view a set-off is warranted in this case *sub judice*. Considering the facts and equities of this case, we agree with the trial judge the allocation between the survival and wrongful death claims must yield to fairness and justice.

The personal representative relies on Ward v. Epping, 290 S.C. 547, 351 S.E.2d 867 (Ct.App.1986). Ward is distinguishable. In Ward, prior to her arrest, there

was some evidence, Mrs. Ward was responding to directions while in the recovery room. Thus, a factual issue was presented as to conscious pain and suffering. The trial judge in Ward rejected the argument the pain and suffering cause of action was a sham.

Additionally the personal representative maintains the trial judge's order contravenes S.C.Code Ann. § 15-38-50 (Supp.1999). This statute is part of the Uniform Contribution Among Tortfeasors Act. Section 15-38-50 provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more *314 persons liable in tort for the same injury or the same wrongful death.

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

The trial judge's order complies with § 15-38-50 because there is one complete satisfaction for the injury suffered by Welch. See Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999) (trial court correctly reduced jury verdict for wrongful death and survival claims against doctor by \$140,000 amount of settlement with hospital, even though settlement constituted the only amount of medical bills and no evidence regarding these hospital bills was introduced in trial against doctor). The trial court properly allocated the settlement proceeds.

CONCLUSION

We affirm the trial court's denial of Dr. Epstein's motions for directed verdict and JNOV as to actual and punitive damages. Further we find the trial court did not abuse its discretion in denying the new trial motion based upon the size of the actual damages award. In addition, the judge did not err in denying Dr. Epstein's motion for new trial based upon the excessiveness of the punitive damages verdict. The trial judge conducted an appropriate post verdict Gamble review. We agree the punitive damage award is proper under Gamble and AMT. We conclude the jury instruction by the trial court on

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punitive damages was not in compliance with South Carolina law. In a proper case the trial court may instruct the jury to consider *economic bankruptcy* as one factor in awarding punitive damages. Moreover we hold the *economic bankruptcy* factor is *not* an absolute bar to the imposition of punitive damages. We rule Dr. Epstein is entitled to a set-off of \$315 in the sum of \$421,464.12 as to the wrongful death verdict. Accordingly the judgment of the Circuit Court is

AFFIRMED

HEARN, C.J. and HUFF, J. concur

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APP_2103

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Court of Common Pleas

The Honorable Clifton Newman

Case Nos 05 CP 26 3289 and
03-CP-26-7169 (combined for trial)

Tony L. Pope and Lynn S. Pope individually and
representing as a class all unit owners of Riverwalk
at Arrowhead Country Club Horizontal Property Regime

Respondents

v

Hentage Communities Inc, Hentage Riverwalk Inc
and Buildstar Corporation

Appellants

AND

Riverwalk at Arrowhead Country Club Property Owners
Association Inc

Respondents

v

Hentage Communities Inc, Hentage Riverwalk Inc
and Buildstar Corporation

Appellants

NOTICE OF APPEAL

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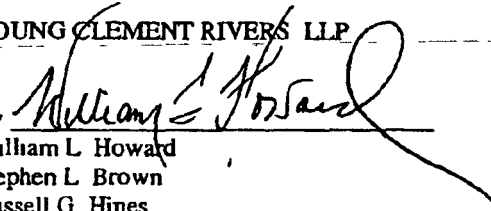
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Hentage Communities Inc Hentage Riverwalk, Inc and Buildstar Corporation
appeal the jury verdicts rendered January 15 2009 and judgments entered thereon on
January 22 2009 in the above-captioned cases as well as the Order Denying
Defendants Post Trial Motions dated April 10 2009 In so appealing, Appellants
expressly note their appeal from the Honorable Clifton Newman's oral ruling(s)
regarding equitable tolling/estoppel during the trial of the above-captioned cases which
took place from January 5 15 2009 Attached to this Notice of Appeal are copies of the
judgments entered and the Order Denying Defendants Post Trial Motions

Appellants received notice of the execution of the Order Denying Defendants'
Post Trial Motions via e-mail dated April 10 2009 The Order was filed with the Clerk
of Court on April 14 2009

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005 CP-26-3289

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

Respondents,

v

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

Appellants

Case No 2003-CP-26-7169

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

Respondents,

v

Heritage Communities Inc Heritage Riverwalk Inc
and Buildstar Corporation,

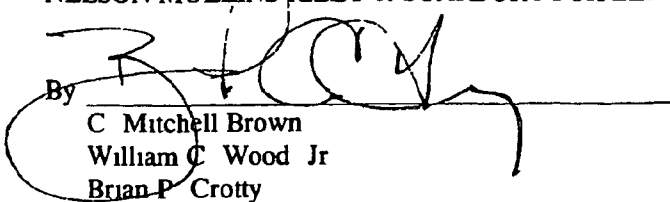
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material

Signature Page Attached

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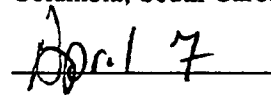
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

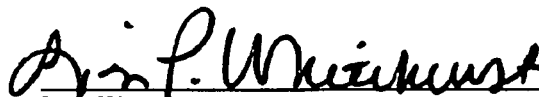
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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Statement of Issues

- 1 Did the Trial Court err in its instructions to the jury (a) by including the standard of willful wanton and reckless conduct in the definition of simple negligence and (b) by instructing the jury that damages as to the negligence claims were mandatory?
- 2 Did the Trial Court err by ruling that Appellants were “amalgamated” and disregarding their separate corporate forms?
- 3 Did the Trial Court err by allowing evidence and testimony as to alleged construction defects and related litigation at other Heritage developments?
- 4 Did the Trial Court err by failing to decertify the Pope Class Action because the class failed to meet the prerequisites of commonality and typicality?
- 5 Did the Trial Court err by certifying Francis DeSantis as an expert in the area of lost use and allowing him to testify?
- 6 Did the Trial Court err by allowing the admission of evidence of subsequent remedial measures relating to windows?
- 7 Did the trial Court err by granting Respondents motions for directed verdict as to the negligence claims?
- 8 Did the Trial Court err by failing to grant Appellants motions for directed verdict and judgment notwithstanding the verdict?
- 9 Did the Trial Court err by permitting the awards of punitive damages?

Statement of the Case

This appeal involves two construction defect actions which arise from the construction of the Riverwalk at Arrowhead Country Club Horizontal Property Regime (“Riverwalk”) in Myrtle Beach, South Carolina. Heritage Communities, Inc. (“HCI”) was the overall developer. Heritage Riverwalk, Inc. (“HRI”) was the site specific developer and Buildstar Corporation (“Buildstar”) was the general contractor for the Riverwalk project. HCI is the parent corporation of both HRI and Buildstar.

Riverwalk at Arrowhead County Club Property Owners Association v. Heritage Communities, Inc. et al. C/A No. 2003-CP-26-7169 (the “POA Action”) was filed on December 5, 2003, by the Riverwalk Property Owners’ Association (“POA”) seeking to recover repair costs related to the Riverwalk development (R. 60-71). In addition to the POA Action, a putative class action, *Pope, et al. v. Heritage Communities, Inc. et al.* C/A No. 2005-CP-26-3289 (the “Pope Class Action”) was filed on June 23, 2005, by unit owners Tony and Lynn Pope on behalf of the owners at Riverwalk seeking to recover damages for the “lost use” of the property during the alleged repair period (R. 72-89). The operative complaint in the POA action is the Fourth Amended Complaint filed on August 3, 2006, (R. 90-103) and the operative complaint in the Pope Class Action is the Third Amended Complaint filed on July 22, 2008 (R. 104-23). These operative complaints each asserted the following claims: (1) negligence against HCI, HRI and Buildstar, (2) breach of express warranty against HCI, (3) breach of the warranty of habitability against HRI, (4) Breach of the warranty of workmanlike service against Buildstar, and (5) breach of fiduciary duty against HCI and HRI. On September 3, 2008, the Trial Court certified a class consisting of all owners of the

condominium units of Riverwalk in the Pope Class Action (R 20-32) Subsequent motions to decertify the class were denied (R 125-38 162-75 209 842 1384)

The POA Action and the Pope Class Action were consolidated for trial and a jury trial commenced on January 5 2009 At the close of Respondents case Appellants moved for directed verdict as to all of the claims (R 822-63) The Trial Court directed verdict in favor of the HCI on the express warranty claim and in favor of Buildstar on the warranty of workmanlike service claims, and denied directed verdict as to the remaining claims (R 862-64) At the close of all evidence, both Appellants and Respondents moved for directed verdict (R 1351-93) The Trial Court denied all of Appellants' motions but granted Respondents motion for directed verdict on the negligence claims (R 1384-93) Additionally the Trial Court ruled that Appellants were "amalgamated" such that they were to be treated as one and the same and the actions of any one of the Appellants applied to the others (R 1384-85)

Following the directed verdict motions at the close of trial the only issues remaining for jury determination in the POA Action were the claims for breach of the warranty of habitability and breach of fiduciary duty, and the damages under the negligence claim In the Pope Class Action, the remaining jury issues were the claim for breach of the warranty of habitability and the damages under the negligence claim On January 15 2009 the jury returned its verdicts in these actions As to the POA Action, the jury found for Appellants on the breach of the warranty of habitability claim and found for Respondents on the breach of fiduciary duty claim and awarded \$4 250 000 in actual damages and \$250 000 in punitive damages on the negligence and breach of fiduciary duty claims (R 52, 1509) As to the Pope Class Action, the jury

found for Respondents on the breach of the warranty of habitability claims and initially awarded zero actual damages and \$1 000 000 punitive damages for the negligence and warranty of habitability claims (R 58) After reinstruction by the Trial Court, the jury changed its verdict in the Pope Class Action to an award of \$250 000 in actual damages and \$750,000 in punitive damages (R 58 1506-09) The total of the verdicts in both actions was \$5 500 000

On January 26 2009 Appellants filed their post-trial motions seeking judgment notwithstanding the verdict new trial pursuant to the thirteenth juror doctrine, new trial absolute new trial *nisi remittitur* review of the punitive damages, and a setoff based upon a settlement involving the other defendants in the underlying actions (R 1920-32 1933-90) A hearing as to the post-trial motions was held on February 24 2009 and on April 14 2009 the Trial Court issued an Order denying Appellants motions for new trial and judgment notwithstanding the verdict upholding the punitive damages award and granting a setoff of \$1,028 821 69 against the combined judgment amounts making the total combined judgment amount \$4 471 178 31 (R 42-47) Appellants timely served and filed a Notice of Appeal on May 8 2009

Statement of the Facts

The Riverwalk condominium complex consists of nineteen buildings containing 228 units (R 176) Phase I consisted of seventeen buildings of similar shape and design with brick veneer on three sides and composite siding on the front (R 1909) Phase II consisted of two buildings which were similar to those in Phase One, except for some differences in the windows used and the brick veneer was limited to the first floors with the remainder of the building covered with composite siding (Id)

Construction began on June 30 1997 and was complete by the end of 1999 (R 177-80)

Respondents alleged defects in the design and construction of Riverwalk primarily asserting that due to these defects water was permitted to intrude into the buildings causing rot deterioration and other damage (R 271-352 388-584 620-643) Respondents estimated that repairs in excess of \$8 000 000 were needed and that the unit owners would suffer "lost use" damages in excess of \$1,000 000 (R 644-99, 731-822) Respondents' estimates of the alleged damage and the cost to repair admittedly included "extrapolations " "assumptions" as to "hidden damage " and other unknowns" resulting from their limited inspection of only certain areas (R 484 490, 520, 534-39, 543-44 653-55, 658, 559-70, 745, 769) Respondents sole evidence on the issue of lost use was the testimony of Francis DeSantis, who was permitted to testify as an expert over Appellants' objection (R 788-90)

Both liability and damages were disputed The evidence at trial established that Appellant Buildstar was the general contractor at Riverwalk and that all actual construction was performed by subcontractors (R 872) Appellants' witnesses offered testimony refuting the contention that Appellants caused the defective conditions as well as the extent of the alleged defects (R 973-1306) Additionally, Appellants offered testimony from actual homeowners and experts refuting Respondents claims of "lost use" damages (R 219 764, 896, 902-04, 905-1347 1137 1202 1228 1348-49) The testimony of the witnesses established that the Pope Class consists of several subcategories of owners segregated by their differing uses of their units (R 223-25 888, 901-02 1318-19 1348) Prior to and during trial, Appellants moved to decertify

the class based upon the individualized nature of the alleged lost use damages and the corresponding lack of commonality and typicality, but these motions were denied (R 125-38 162-75, 209, 842, 1348)

In seeking to establish the existence and cause of defects surrounding windows Respondents admitted a document and sought testimony regarding Buildstar's demand in September 1998 that the window manufacturer replace 192 defective windows (R 1835, 636, 882 1097 1105, 1292, 1476) Appellants objected to this evidence because it related to subsequent remedial measures taken by Buildstar but the Trial Court overruled the objection (R 634-35 727)

In addition to Riverwalk Appellants HCI and Buildstar were involved in other condominium developments in the Myrtle Beach area, including Avian Forest, Magnolia North, Magnolia Place the Gardens at Cypress Bay Azalea Lake and Sea Dunes Despite these other projects being separate and distinct undertakings Respondents repeatedly referred to alleged defective conditions and litigation involving these other projects (R 238-51, 282, 290, 304-404, 436-39 478-79, 586 622-41 708 711-12 878 884 1068-69, 1078-79 1106 1109, 1121, 1248 1254, 1304, 1305 1334) These repeated references culminated in Respondents' counsel's argument at closing that Appellants should be "severely punished" by the "people of Horry County" for all of these condominiums (R 1477-78)

The evidence at trial with regard to the relationship among Appellants HCI HRI and Buildstar established that each was properly formed as a separate South Carolina corporation and that they operated as separate entities with distinct purposes (R 725) Buildstar was the general contractor HRI was the site specific developer for Riverwalk

holding and transferring the title to the units, and HCI was the overall developer and parent corporation for HRI and Buildstar (R 704-11 724-25 866-70) While there was evidence that the three entities shared officers directors and office space and were ultimately controlled by the same person there was no evidence offered of any confusion fraud or other inequitable conduct with regard to the operation of these distinct entities (R 176 704-05 729)

Following the close of all evidence the Trial Court held that Appellants HCI, HRI and Buildstar were “amalgamated” and would be treated as “one and the same ” (R 1384-85) After disregarding the separate corporate form of each Appellant making each liable for the actions of the others the Trial Court granted Respondents Motion for directed verdict as to the negligence claims (R 1385) This ruling by the Trial Court that “the condominiums were negligently constructed” did not address each of the specific defective conditions alleged but rather operated as a blanket verdict determining the issue of negligence as to all of them

During jury instructions, while defining simple negligence to the jury, the Trial Court twice equated “negligent or careless” conduct with “reckless, willful and wanton” conduct (R 1486-87) The Trial Court then informed the jury that “as a matter of law I have determined the defendants were negligent in the construction of these condominiums ” (R 1487) Appellants took exception to this error but the Trial Court did not reinstruct or otherwise clarify this point (R 1504-05) Instead after having defined simple negligence to include willful wanton and reckless conduct, and after having told the jury that as a matter of law Appellants had been determined to be negligent, the Trial Court then instructed the jury that punitive damages could be

awarded only where there was clear and convincing evidence that Appellants' conduct had been willful wanton or reckless (R 1493) Additionally despite the issue of proximate cause remaining before the jury on the negligence claim the Trial Court instructed the jury that it "must award" damages in the POA Action, and "must determine the nature and extent of damages" in the Pope Class Action (R 1487)

Argument

I A New Trial Should be Granted Because the Trial Court Erred in Its Instructions to the Jury

The Trial Court committed two key errors while instructing the jury in this matter which require a new trial of both the POA Action and the Pope Class Action First in instructing the jury as to the definition of simple negligence the Trial Court erroneously and repeatedly included the terms "reckless willful and wanton" in that definition (R 1486-87) Second, the jury was incorrectly instructed that it was required to award Respondents damages because directed verdict had been granted to Respondents as to negligence (R 1487)

An erroneous jury instruction should result in a reversal where the trial court abused its discretion Clark v Cantrell 339 S C 369, 389, 529 S E 2d 528, 539 (2000) An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence Id Cole v Raut 378 S C 398 404 663 S E 2d 30, 33 (2008) South Carolina takes a holistic approach in reviewing jury charges, and an error in the jury instructions may be excusable where the charges as a whole are otherwise reasonably free from error Ardis v Sessions 383 S C 528 532 682 S E 2d 249 250 (2009) However "[a] trial court must charge the current and

correct law ” Wells v Halyard 341 S C 234 237 533 S E 2d 341 343 (Ct App 2000) An erroneous jury charge is grounds for reversal where the appellant can demonstrate error and prejudice Cole 378 S C at 405 663 S E 2d at 33 Here, the Trial Court’s instructions constituted errors of law which resulted in clear prejudice to Appellants and therefore warrant the grant of new trials

A The Trial Court’s inclusion of the terms “reckless, willful and wanton” in the definition of simple negligence warrants a new trial

Both the POA Action and the Pope Class Action involved identical claims of negligence for which Respondents sought both actual and punitive damages The Trial Court granted Respondents’ motions for directed verdict as to liability on the negligence claims (R 1384-85) The elements of simple negligence are “(1) a duty of care owed by the defendant, (2) a breach of that duty by negligent act or omission and (3) damage proximately caused by the breach ” Kleckley v Northwestern Nat l Cas Co , 338 S C 131 138 526 S E 2d 218 221 (2000) Beyond these basic elements “a punitive damages award is warranted only when the defendant’s conduct is shown to be willful wanton or in reckless disregard of the rights of others S C Farm Bureau Mut Ins Co v Love Chevrolet, Inc 324 S C 149, 152, 478 S E 2d 57, 58 (1996) Additionally this higher standard for punitive damages must be proven by clear and convincing evidence Longshore v Saber Sec Servs Inc 365 S C 554 564 619 S E 2d 5, 11 (Ct App 2005)

While instructing the jury on the definition of simple negligence, the Trial Court gave the following instruction

Now the plaintiffs allege that the defendants negligently constructed the Riverwalk Condominiums Negligence is the failure to

exercise the degree of care which a person or entity of ordinary reason and prudence would exercise under the same or similar circumstances as exists in this case. Carelessness and negligence means the same thing.

To establish negligent construction the plaintiff must prove four essential elements. One, that there was an undertaking to construct a building by the defendants that the defendants were negligent or careless or reckless, willful and wanton in the performance of that construction work or stated another way that they did not perform the work in a good workman like manner.

Three that the negligence or carelessness or recklessness, willfulness and wantonness of the defendants in performing that construction work was a proximate cause of any damages sustained by the plaintiffs.

And four the resulting damages must be shown.

(R 1486-87) (emphasis added). Significantly, only moments later the Trial Court instructed the jury regarding the grant of Respondents' directed verdict motions on the negligence claims stating "I charge you that as a matter of law I have determined the defendants were negligent in the construction of these condominiums." (R 1487)

In this charge, the Trial Court twice equated simple negligence to the higher standard of willful, wanton or reckless conduct. No distinction was drawn between conduct that was negligent or careless and conduct that arose to the higher level of willful, wanton or reckless. Rather, the jury was instructed that it was all one and the same. This had the prejudicial effect of blurring the standard of preponderance of the evidence for negligent or careless conduct for actual damages under simple negligence with the stricter requirement of clear and convincing evidence for willful, wanton, or reckless conduct needed to support an award of punitive damages. Furthermore, the prejudicial effect of this erroneous instruction was increased exponentially due to the Trial Court's simultaneous charge to the jury that it was already determined by the

Court that Appellants were negligent. After first instructing the jury that simple negligence equated to willful, wanton or reckless conduct, the Trial Court then instructed the jury that the Court had determined that Appellants were negligent. The only logical conclusion the jury could have drawn from these instructions was that it was already determined that Appellants' conduct was not only negligent but was also willful, wanton or reckless.

On the subject of punitive damages, the jury was later instructed as follows:

Punitive damages can only be awarded where the plaintiffs prove by clear and convincing evidence that Defendants' actions were willful, wanton, malicious and in reckless disregard of the plaintiff's rights or where Defendant's actions were so grossly negligent as to imply a willfulness or wantonness.

(R 1493) While this was a correct statement of the law, the Trial Court's prior definition of simple negligence equating willful, wanton and recklessness with negligence and carelessness, coupled with the instruction regarding the grant of directed verdict, effectively required the jury to find that the higher standard for punitive damages had been met. Following the close of instructions, counsel for Appellants took exception to the Trial Court's use of the terms willful, wanton and reckless in describing the elements of negligence, but the Trial Court made no attempt to cure the error. (R 1504-05)

While South Carolina's Appellate Courts have not previously addressed this specific error, courts in other jurisdictions have held that such an error warrants a new trial. In Takes v. Metropolitan Edison Co., the Pennsylvania Superior Court ordered a new trial where the jury charge and verdict interrogatories erroneously included "grossly negligent conduct" along with willful, wanton or reckless conduct, as

conduct that would support punitive damages 655 A 2d 138 147-48 (Pa Super Ct 1995) rev d on other grounds Takes v Metro Edison Co 695 A 2d 397 401 (Pa 1997) (reversing on issue preservation) The Takes Court specifically reasoned that [i]f the jury imported this concept of ordinary negligence into its punitive damage considerations, as the court's instruction invited it to do then we must acknowledge the possibility that Metropolitan Edison could have been improperly penalized Such error would mandate a new trial " Takes 655 A 2d at 149 (internal citation omitted)

Similarly, in Crow v Ballard 139 S E 2d 624 626-27 (N C 1965) the North Carolina Supreme Court ordered a new trial where the trial court's jury instruction increased the plaintiff's burden to proving both gross negligence and willful and wanton behavior, and blurred the distinction between such conduct by calling the terms "synonymous " In Crow, the court held, an erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated " Id at 627

Hence, this was an error of law that prejudiced Appellants by effectively requiring the jury to find that the standard for punitive damages had been met by virtue of the directed verdict on the negligence claims Therefore this Court should grant Appellants a new trial in both actions

B The Trial Court's instruction to the jury that they must award damages as to the negligence claims constituted reversible error

After informing the jury that Respondents had been granted a directed verdict as to liability on the negligence causes of action the Trial Court erroneously instructed the

jury that it must award Respondents actual damages on these claims Specifically, the Trial Court stated

I charge you that as a matter of law I have determined that the defendants were negligent in the construction of these condominiums **As a result you must award the plaintiff property owners association damages for the cost of repairs and other costs, and any other costs related incidental thereto** to the extent these damages have been proven by a preponderance of evidence

As to the class action lawsuit brought by Tony and Lynn Pope **you must determine the nature and extent of any damages suffered by the unit owners for the loss of use of the condominiums during any repairs**

(R 1487) (emphasis added) This instruction that damages were mandatory constitutes reversible error and warrants a new trial as to both actions

The Trial Court's granting of Respondents' directed verdict motion as to the negligence claims amounted to a determination that Appellants had breached the applicable standard of care However it is well settled in South Carolina jurisprudence that while a defendant may breach a standard of care such a breach might not result in any damages to the plaintiff Stevens v Allen, 342 S C 47, 52-53, 536 S E 2d 663, 665-66 (2000) (holding that in a negligence claim the jury must find that the plaintiff's damages were proximately caused by the defendant) There are three essential elements to a negligence claim "(1) a duty of care owed by the defendant (2) a breach of that duty by negligent act or omission, and (3) damage proximately caused by the breach Stevens, 342 S C at 51, 536 S E 2d at 665 The third element's requirement of proximate cause prevents a trial court from instructing a jury it must award damages

The case of Hinds v Elms 358 S C 581, 595 S E 2d 855 (Ct App 2004), directly addresses and illustrates this issue The plaintiff in Hinds was involved in three

separate car accidents within a short time period Id. at 583 595 S E 2d at 856 The Hinds case focused on the second accident and the plaintiff was granted a directed verdict on the issue of negligence Id. at 584 595 S E 2d at 857 However that grant of directed verdict did not resolve the issue of proximate cause because the plaintiff did not visit a doctor to evaluate his injuries from the second accident until after the third accident had occurred Id. at 583-84, 595 S E 2d at 856-57 Following the grant of directed verdict on negligence “[t]he trial court properly charged the jury on the applicable law including the Hinds burden as plaintiffs to establish that the claimed damages were proximately caused by the admitted negligence ” Id. at 584, 595 S E 2d at 857 The trial resulted in a defense verdict and the plaintiff appealed asserting that, because of the grant of directed verdict he “was entitled to an award of damages ” Id. at 584-85, 595 S E 2d at 857 The Court of Appeals rejected Plaintiff’s argument and held that

A determination of negligence, standing alone, is a far cry from a determination of liability Liability encompasses all elements of a negligence claim including damages proximately caused by the alleged negligence

Id. at 585 595 S E 2d at 857

As is illustrated by the holding in Hinds, the grant of directed verdict as to negligence does not result in a requirement that the jury award damages Rather the plaintiff must still prove and the jury must find that that plaintiff’s actual damages were proximately caused by the defendant Therefore the Trial Court’s instruction to the jury in this case that it must award the POA damages and that it must determine the damages of the Pope Class constituted an error of law The prejudice resulting from

the mandatory damages instruction is clear. Proximate cause was a major component of Appellants' defense as to the negligence claim in both actions, with Appellants asserting that any defective conditions were proximately caused by other actors such as subcontractors. Significantly, in the Pope Class Action, the jury initially found that the Plaintiffs had suffered no actual damages whatsoever, and only found actual damages after reinstruction by the Court that "in order to find punitive damages you must find some actual damages." (R. 1506-08). The Trial Court's instruction to the jury that it was required to award damages on the negligence claims was an error of law which prejudiced Appellants and warrants the grant of a new trial in both actions.

II A New Trial Should be Granted Because the Trial Court Improperly Ruled That Appellants Were "Amalgamated"

After the close of evidence in this matter, the Trial Court ruled that HCI, HRI, and Buildstar were "amalgamated." (R. 1384-85). The basis for this ruling, as explained by the Trial Court, was

[T]he legal distinction between the entities are blurred that they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others as far as the three entities because they are in effect one and the same but for the, and that the case that was handed up to me notwithstanding outlines that stock ownership alone ordinarily doesn't render a parent corporation liable for contracts of a subsidiary, that is something that is not applicable to this situation. [W]e would deal with the development and construction and marketing of this and sale of these properties, condominiums.

(Id.) This ruling constituted a clear error by the Trial Court that not only improperly stripped HCI, HRI, and Buildstar of their separate corporate forms, but also freed Respondents from the requirement that each claim be proved as to each Appellant, and

further prejudiced Appellants by making it appear to the jury that Appellants conduct justified stripping them of their corporate forms

The evidence supporting this ruling was that HCI was the parent corporation of both HRI and Buildstar the three entities shared officers directors and the same office space and the three entities were ultimately controlled by the same person (R 704-05, 729 876) In contrast, the record is clear that each entity was properly formed as a separate corporation under South Carolina law and that they operated as separate entities with separate Boards (R 725) Specifically HCI was the overall developer of Riverwalk, while Buildstar was the general contractor and HRI held title to the Riverwalk properties and served as the seller of the units to homeowners (R 704-05 724-25 866-70) While there was cross-over among the people involved each was operated as a separate entity with separate responsibilities (R 725) Significantly there was no evidence of any confusion inequitable conduct, or fraud in the operation of these three distinct entities, and there was no indication that Trial Court s ruling was based on such a finding The Trial Court’s “amalgamation” ruling misconstrued South Carolina s well established law on corporate forms and the limited circumstances under which the corporate form may be disregarded

A The requirements for “piercing the corporate veil” must be met in order for a Court to disregard the corporate form

It is a well settled principle of South Carolina law that “a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears ” Drury Dev Corp v Foundation Ins Co 380 S C 97 101 668 S E 2d 798, 800 (2008) Where the corporate entity is used to “protect fraud justify wrong or defeat public

policy” it will be disregarded Sturkie v. Sifly 280 S C 453, 457 313 S E 2d 316 318 (Ct App 1984) The disregarding of the corporate form by the courts is referred to as “piercing the corporate veil Id This equitable doctrine is not applied by the courts “without substantial reflection” and it is the party seeking to pierce the corporate veil that has the burden of proving the doctrine should apply Id

The phrase “piercing the corporate veil” refers to the relief itself – that is, disregarding the corporate form Drury at 101 n 1 668 S E 2d at 800 n 1 There are several theories which can serve as the basis for obtaining this relief See id (explaining that the “alter ego” doctrine is merely a theory or means of obtaining the procedural relief of piercing the corporate veil), Wilson v. Friedberg 323 S C 248, 257, 473 S E 2d 854 859 (Ct App 1996) (discussing the “instrumentality rule” within the concept of piercing the corporate veil) However whatever the theory the limitations on piecing the corporate veil still apply

Typically, in South Carolina a piercing the corporate veil analysis consists of the two prong test Drury, at 102, 668 S E 2d at 800 The first part of the test is an eight factor analysis which looks to the observance of corporate formalities Sturkie at 457 313 S E 2d at 318 The eight factors to be considered are (1) the capitalization of the corporation, (2) the observation of corporate formalities, (3) the payment of dividends, (4) the solvency of the corporation (5) whether corporate funds were siphoned by a dominant shareholder (6) whether other officers or directors are functioning (7) the maintenance of corporate records, and (8) whether the corporation is a facade for the operations of a dominant shareholder Wilson at 252 473 S E 2d at 856 “The conclusion to disregard the corporate entity must involve a number of the

eight factors but need not involve them all ” Dumas v InfoSafe Corp , 320 S C 188 192 463 S E 2d 641 644 (Ct App 1995) The second prong of the test requires that there be an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the individual Id The Trial Court failed to apply these prongs and thus erred in its ruling

B The “amalgamation of interests” theory does not apply

The Trial Court s ruling was based upon what is referred to in South Carolina as the “amalgamation of interests ’ theory or the “blurred identity ’ theory See Mid-South Mgmt Co Inc v Sherwood Dev Corp , 374 S C 588, 604-05, 649 S E 2d 135 144 (Ct App 2007) ¹ In other jurisdictions particularly those within the Fifth Circuit a similar theory has been referred to as the “single business enterprise” theory See SSP Partners v Gladstrong Invs Corp , 275 S W 3d 444 (Tex 2008)

The first case in South Carolina addressing the “amalgamation of interests” theory was Kincaid v Landing Development Corp 289 S C 89 344 S E 2d 869 (Ct App 1986) Kincaid is similar to the case at bar in that it involved an action for construction defects brought against three related corporate entities which had served as the developer (“LDC”) builder (“RCC”), and sales/marketing agent for the property (“RMG”) Id at 91 344 S E 2d at 871 At trial, the court ruled that the evidence revealed “an amalgamation of corporate interests, entities and activities so as to blur the legal distinction between the corporations and their activities ” Id at 96, 344 S E 2d at 874 RMG appealed, asserting that it should have been granted directed verdict because it was “merely the sales and marketing agent for the development ” Id

¹ Appellants have found no cases in any other jurisdictions that have discussed a theory by these names in the context of disregarding corporate form

The Court of Appeals affirmed the trial court's ruling noting that the three corporations shared the same officers, directors, and corporate offices Id. In addition the Court noted that the plaintiff testified that when she contacted RMG about problems with the house someone would then respond to correct the problem Id. Furthermore the evidence in the record included two letters from RMG identifying themselves as the "project developer" and "[a] Development, Construction, Sales, and Property Management Company" whose vice president would handle construction issues Id.

Thus, the Kincaid Court's affirmance of the amalgamation ruling was based not only on the sharing of corporate officers, directors and offices, but also on the existence of evidence that RMG held itself out to the plaintiffs as the "project developer" and would respond to construction complaints and concerns Id. Subsequently in Mid-South the Court of Appeals again addressed the "amalgamation of interests theory" and reiterated the significance of the additional evidence in Kincaid establishing from the plaintiff's perspective, that RMG was the equivalent of the developer and the general contractor Mid-South 374 S.C. at 605 649 S.E.2d at 145 (refusing to apply the "amalgamation of interests" theory in part because there was no evidence that the parties were confused as to the separate nature of the corporate entities).

As was illustrated by the South Carolina Supreme Court in Drury, theories of procedural relief such as the "alter ego" or the "amalgamation of interests" theories are merely means by which "piercing the corporate veil" may be accomplished. Despite the use of different theories of relief there always remains the limitation that the equitable doctrine of piercing the veil is limited to situations where there is some fraud

wrong, or fundamental unfairness Drury, 380 S C at 101-02, 668 S E 2d at 800 see also Jones v Enter Leasing Co -Se 383 S C 259 267-68 678 S E 2d 819 824 (Ct App 2009) (holding that under the “alter ego” theory of piercing the corporate veil one must show that the retention of separate corporate personalities would promote fraud, wrong or injustice in addition to control or dominance by a parent over a subsidiary), Wilson, 323 S C at 257 473 S E 2d at 859 (noting that the “instrumentality rule” should be used to pierce the corporate veil only where “retention of separate corporate personalities would promote fraud wrong, or injustice or contravene public policy”)

The recent Texas Supreme Court case of SSP Partners v Gladstrong Investments Corp 275 S W 3d 444 (Tex 2008) illustrates how whatever the procedural theory used a finding of “injustice or “inequity is a prerequisite to a court disregarding the corporate form The SSP Court addressed a theory developing in Texas jurisprudence called the “single business enterprise” theory which provided that when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose each corporation may be held liable for debts incurred in pursuit of that business purpose Id at 450 In determining whether this theory applied, the courts considered factors such as common employees common offices centralized accounting payment of wages by one entity to the other s employees, and services rendered by one entity s employees on behalf of the other entity Id at 450-51 The SSP Court noted that, unlike theories such as “piercing the corporate veil” and “alter ego ” the “single business enterprise theory did not include the requirement that the corporate form be used as an unfair device to achieve an

inequitable result Id. at 451-52. For this reason, the court expressly rejected the single business enterprise theory as a basis for imposing liability despite the corporate structure. Id. at 455. Specifically, the court held

Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each others obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, injustice and inequity. By “injustice” and “inequity” we do not mean a subjective perception of unfairness by an individual judge or juror, rather these words are references for the kinds of abuse specifically identified that the corporate structure should not shield – fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. Such abuse is necessary before disregarding the existence of a corporation as a separate entity. Any other rule would seriously compromise what we have called a “bedrock principle of corporate law” – that a legitimate purpose for forming a corporation is to limit individual liability for the corporation’s liabilities.

Id. (emphasis added)

As was the case in SSP, South Carolina’s jurisprudence also illustrates that regardless of the theory used, the corporate form may be disregarded only where retention of separate corporate personalities would promote fraud, wrong, or injustice or contravene public policy. Drury, 380 S.C. at 101-02, 668 S.E.2d at 800; see also Jones, 383 S.C. at 267-68, 678 S.E.2d at 824; Wilson, 323 S.C. at 257, 473 S.E.2d at 859. As the Trial Court made no such finding, its “amalgamation” ruling was incorrect.

C. Respondents failed to meet the proper standard for “piercing the corporate veil” under the “amalgamation of interests” or any other theory.

Respondents failed to meet the traditional test outlined in Sturkie for piercing the corporate veil. There was no evidence supporting a finding as to any one of the eight

factors of the first prong. Additionally, there was no evidence offered as to, nor any finding by the Trial Court of, any injustice or unfairness if the corporate form were not disregarded. Respondents also failed to establish that piercing the corporate veil was appropriate under the “amalgamation of interest” theory. Unlike the facts in Kincaid there is no evidence of any confusion by any homeowner as to the distinct functions of the three Appellants. The record is clear that HCI was the overall developer and parent corporation. Buildstar was the general contractor, and HRI held title to the properties and acted as the seller. There is nothing in the record establishing any fraud, wrong or injustice resulting from each of these entities retaining their distinct corporate forms.

The amalgamation ruling resulted in significant prejudice to Appellants. Respondents were relieved of their burden of establishing the existence of all elements of the claims for each separate Appellant. Additionally, the ruling suggested to the jury that Appellants had engaged in some form misconduct and were deserving of being stripped of their corporate entity status. Most significantly, the amalgamation ruling opened the door for the application of punitive damages against all three Appellants without the requirement that Respondents prove by clear and convincing evidence that each Appellant deserved such punishment. Appellants should be granted a new trial in both the POA Action and the Pope Class Action due to this error.

III A New Trial Should be Granted Because the Trial Court Improperly Allowed Respondents to Repeatedly Present Evidence of Other Heritage Condominium Projects

In addition to the Riverwalk condominium project, Appellant HCI was the developer of and Appellant Buildstar was the General Contractor for several other

condominium projects in Myrtle Beach and the surrounding area² Specifically, the other projects included Avian Forest Magnolia North Magnolia Place the Gardens at Cypress Bay Azalea Lake Sea Dunes and Heatherstone Each of these projects was a separate and distinct undertaking Throughout the course of the trial Respondents repeatedly elicited testimony and introduced evidence of alleged construction defects at these other projects as part of an overall strategy to support their claims of defective construction at Riverwalk The admission of this evidence violated Rule 404 of the South Carolina Rules of Evidence as well as the Supreme Court's mandate in Whaley v CSX Transportation, Inc , 362 S C 456 609 S E 2d 286 (2005), limiting the admissibility of "similar events' evidence The admission of this "other events' evidence to attempt to prove the character of Appellants and to show conformity therewith constitutes a clear error by the Trial Court entitling Appellants to a new trial in both actions

Continuously throughout the trial over Appellants objections Respondents referenced construction defects and problems alleged to exist at the other projects as a means of inundating the jury with evidence of the "bad character" of Appellants³ The

² HRI was involved in only the Riverwalk project

³ During the testimony of Jennifer Harmon objection was made to testimony and exhibits referencing alleged defects and litigation relating to the other projects (R 238 51) During the testimony of Thomas Pegram objection was made to the reference of the similarity of the plans used in the construction of Riverwalk to those used in the other projects (R 282 290) During the testimony of Drew Brown objections were made to testimony of his investigation of other Heritage projects and the deficiencies he found at those projects (R 304-404 436 39 478 79 586) During the testimony of Jim Graham objection was made as to his testimony regarding window defects at other projects (R 586 622-41) During the testimony of Quinn Hardester objection was made to the reference to the other corporate entities used for other projects litigation relating to the other projects and window leaks at other projects (R 708 711 12) During the testimony of Lynn Anderson objections were made to reference to litigation involving the other projects and the Heritage entities profits resulting from all of the different projects (R 878 84) During the testimony of Alan Campbell reference was made to his status as an expert in litigation relating to the other projects construction defect issues that allegedly existed at the other projects the total number of

purpose behind these repeated references was clear. Respondents improperly sought to establish to the jury that construction defects existed at Appellants' other projects so that the jury would conclude that such defective conditions must therefore exist at Riverwalk. The references to other projects and the myriad of different defective conditions alleged to exist at those other projects were so numerous that any distinction between the facts relating to Riverwalk and the facts relating to the other projects was lost. The resulting confusion played into Respondents' clear theme that the jury should punish Appellants not only for alleged defects at Riverwalk, but for every project in which Appellants had ever been involved because Heritage was a bad developer. In his closing argument, Respondents' counsel made this point clear by imploring the jury with the following message:

These people unquestionably knew if they knew anything about construction at all that they were building defective condominiums and they were putting them in the stream of commerce, they were selling to innocent people these condominiums and they did it over a long period of time and you can consider that

And ladies and gentlemen we need in this county and it's like I say it is up to you but we need in this county somebody to tell these developers and contractors that do this the jurors the people of Horry County are not going to allow this to happen. If you do it you're going to be severely punished by this and I ask you to award substantial punitive damages and send the message especially across that waterway to tell people over there that are developing and selling condominiums get it right get it right

(R 1477-78) Respondents' strategy of repeatedly referencing the defects of other projects to establish that such defects exist at Riverwalk and the corresponding theme

allegedly defective condominiums the Heritage entities had put in the stream of commerce and specific issues that existed at other projects (R 1068 69 1079 80 1106 1109 1121). Additionally, during the testimony of Steve Watkins and Jess Teel, reference was made to other Heritage cases in which they were involved (R 1248 1254 1304 05 1334).

that Appellants should be punished for all of their projects was in clear violation of the South Carolina Rules of Evidence and South Carolina's jurisprudence on the limitations of such "prior event evidence

A Respondents failed to establish the necessary factual foundation that the conditions present at the other projects were "substantially similar" to those at Riverwalk and, thus, they failed to establish the "special relationship" required for the admission of similar accidents, transactions or happenings

Rule 404(b), SCRE provides that "[e]vidence of other crimes wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The evidence of alleged defects at other projects and the existence of other litigation as to the other projects is precisely the type of "other acts" evidence that is prohibited by Rule 404(b)

In addition to the prohibition set forth in Rule 404(b) the South Carolina Supreme Court has established the rule that evidence of similar events is not admissible unless "there is some special relation between them tending to prove or disprove some fact in dispute." Whaley v. CSX Transp., Inc. 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). "Because evidence of other [events] may be highly prejudicial '[a] plaintiff must present a factual foundation for the court to determine that the other [events] were substantially similar to the [event] at issue.'" Id. (quoting Buckman v. Bombardier Corp., 893 F.Supp. 547, 552 (E.D.N.C. 1995)).

The restrictive evidentiary rule outlined in Whaley is well recognized by other jurisdictions. See Mills v. Beech Aircraft Corp. 886 F.2d 758, 762 (5th Cir. 1989) (holding that proponent of evidence concerning a prior related accident must show that the accident occurred under circumstances "substantially similar" to the case at bar).

McKinnon v. Skil Corp. 638 F.2d 270, 277 (1st Cir. 1981) (holding that evidence of other accidents is admissible only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar) Renfro Hosiery Mills Co. v. National Cash Register Co., 552 F.2d 1061, 1068-69 (4th Cir. 1977) (holding that "other occurrences" evidence is admissible only if the "high standard" of similarity between the two occurrences has been demonstrated)

Thus, under the restrictive standard set forth by the Supreme Court in Whaley in order for the evidence relating to other Heritage projects to be admissible Respondents were required to show the existence of a "special relation" between Riverwalk and the other projects and that the alleged defects at the other projects stemmed not only from similar circumstances, but from "substantially similar circumstances" as the alleged defects at Riverwalk. Respondents failed to meet this strict standard.

Despite Respondents' repeated reference to alleged defects and litigation surrounding the other Heritage projects, the only "special relation" or similarities Respondents could establish were: (1) the projects shared the same overall developer (HCI) and the same general contractor (Buildstar); (2) the projects used the same plans and general layout; (3) similar materials such as similar trim and windows were used at the various projects; (4) the framing subcontractor used at Riverwalk was also the framer for several of the other projects; and (5) general deficiencies found at some of

the other projects were similar to deficiencies alleged to exist at Riverwalk.⁴ This does not meet the high standard established by the Court in Whaley.

Respondents did not show that the common design of the projects in any way related to the alleged defective conditions. Additionally, Respondents did not show that all of the contractors used at Riverwalk were also used at each of the other projects referenced. The evidence of defective conditions alleged to exist at Riverwalk and the other projects was also insufficient to establish the required substantial similarity. Evidence of isolated incidents of water intrusion around exterior trim and windows and similar construction issues is common to nearly all construction. As numerous witnesses testified, there is no such thing as a perfect building. (R. 336, 398, 502, 1039, 1071). The conditions complained of are not unique to Heritage buildings, but

⁴ Thomas Pegram, the architect who designed the buildings at Riverwalk, testified that the plans used for Riverwalk were the same as those used for several of the other Heritage projects. (R. 282, 290). Drew Brown, Respondents' expert regarding the scope of needed repairs, testified that he had inspected Riverwalk, as well as other Heritage projects, that the projects have the same basic layout. (R. 404). ABTCO trim was used at Riverwalk as well as at Magnolia North and Avian Forest and that he found similar installation problems at the other projects. (R. 436, 37). That at Riverwalk and the other projects when destructive cuts were performed, in some areas they found decay, and on others there was water penetration and sheathing damage. (R. 439). And that, without testifying as to any specifics, he had found deficiencies at the other Heritage projects he had inspected that were similar to those found at Riverwalk. (R. 478, 79). Jim Graham, a former employee of the company that provided Heritage with windows used at Riverwalk and other projects, testified that identical windows were sold to all of the Heritage projects. (R. 624). He performed a water test on a window at Magnolia and determined the window was not leaking but that water was intruding around the window. (R. 632, 33). He witnessed a window being improperly installed at Riverwalk. (R. 854, 55). And he tested a window at Riverwalk and the window didn't leak. (R. 638). Quinn Hardester, the former president of HCI, testified that there were problems associated with water intrusion with windows and decks at Magnolia Place and that he recalled some minimal issues with decks at Riverwalk but that he did not recall any of those issues with Magnolia North. (R. 711). And that Magnolia Place had problems with leaks at or near windows and used the same configuration of windows as Riverwalk. (R. 712). Lynn Anderson, the former president of Buildstar, testified that Right Way Construction were the framers for the Magnolia Place, the Gardens at Cypress Bay, and Avian Forest, as well as at Riverwalk. (R. 871, 72, 878). Alan Campbell, Appellant's expert as to the scope of repairs, testified that in addition to Riverwalk, he had inspected Avian Forest, the Gardens at Cypress Bay, Magnolia North, Magnolia Place, and Azalea Lakes. (R. 1068, 69). Issues similar to those identified at Riverwalk may have existed at the other projects but he was not certain. (R. 1078). Some of the other projects, such as Avian Forest and the Gardens at Cypress Bay, had the same MDF trim as Riverwalk and that he saw damage under the trim at the Gardens in one location. (R. 1120-21). And he was aware of claims of window leaks at other Heritage projects. (R. 1127).

rather are common to all construction. Thus Respondents cannot point to a handful of similar defective conditions among hundreds of condominium units and assert such similarities meet the 'substantially similar' threshold set forth in Whaley. Rather to meet that threshold at a minimum Respondents would have to establish a clear factual foundation not only of the existence of substantially similar defects, but that they were caused by precisely the same conduct and by the same actors. See JKT Co. Inc. v. Hardwick, 274 S.C. 413, 416, 265 S.E.2d 510, 511-12 (1980) (noting that evidence of a similar defective product was admissible where there was testimony that the manufacturing process used in the other shipments was "identical" to the process used to produce the materials at issue). Thus, just as in Whaley Respondents' repeated reference to alleged defects and litigation involving the other Heritage projects was improperly admitted in this action and Appellants should be granted a new trial.

B The evidence of conditions and litigation related to other Heritage projects was not admissible under South Carolina Rule of Evidence 406

In addition to incorrectly asserting that the "other projects" evidence was admissible under Whaley Respondents also asserted that this evidence was admissible pursuant to Rule 406, SCRE (R. 145). Rule 406 provides that "[e]vidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Rule 406, SCRE. Specifically, Respondents contended that it was Appellants' "routine practice" to construct condominiums in a defective manner. (R. 154-55)

As previously discussed Rule 404(b) prohibits the admission of other acts evidence to prove the character of a person or to show action in conformity therewith. The prohibition in Rule 404 is somewhat in tension with Rule 406 permitting evidence of habit or routine practice. The distinction between Rules 404 and 406 was discussed in State v. Brown, 344 S. Ct. 70, 74, 543 S. E. 2d 552, 554 (2001). Brown states

Federal courts have recognized the tension between Rule 406 (habit) and Rule 404 (character) and noted the difficulty in distinguishing between admissible evidence of habit and inadmissible character evidence. As indicated in the advisory committee's note to Federal Rule of Evidence 406, which is identical to our Rule 406, the distinguishing feature of habit is its degree of specificity. Habit has been described as conduct that is "situation-specific" or "specific, particularized conduct capable of almost identical repetition." This Court has defined the term "character," on the other hand, as "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness."

Id. at 74, 543 S. E. 2d at 554 (internal citations omitted). Thus, for habit evidence to be admitted, it must include specificity in order to remove the evidence from the realm of general character traits. In addition to specificity, the evidence must also be reliable, with reliability being established by the regularity with which the habit is observed.

"It has been repeatedly stated that habit or pattern of conduct is never to be lightly established, and evidence of examples, for purpose of establishing such habit, is to be carefully scrutinized before admission." Wilson v. Volkswagen of Am., 561 F. 2d 494, 511 (4th Cir. 1977). A habit must be a response to a specific situation with regularity and uniformity. Id. at 512. Brown, 344 S. Ct. at 74, 543 S. E. 2d at 554. In short, habit evidence must be a specific reaction to an environment, and this response must regularly and uniformly occur when the party is confronted with that specific environment or stimuli.

Here Respondents failed to establish the specificity or reliability required to admit evidence of defective conditions at other Heritage projects as “habit” evidence Under Rule 406 general similarities or traits go to character not habit Thus the “other projects” evidence was evidence of character and not habit, and should have been excluded under Rule 404(b) The erroneous admission of this highly prejudicial evidence warrants a new trial in both actions

IV The Pope Class Should Have Been Decertified Due to the Lack of Commonality and Typicality

The Trial Court erred in certifying the class in the Pope Class Action because it failed to meet the certification requirements of commonality and typicality set forth in Rule 23 of the South Carolina Rules of Civil Procedure On September 3, 2008, the Trial Court issued an Order certifying the class in the Pope Class Action (R 20-32) Prior to and during the trial Appellants moved to decertify the class but their motions were denied (R 125-38, 162-75, 209, 842, 1384)

Rule 23(a) allows class actions where the following prerequisites are met (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class (4) the representative parties will fairly and adequately protect the interests of the class, and (5) the amount in controversy exceeds one hundred dollars for each class member or the relief sought is primarily injunctive or declaratory Rule 23(a) SCRCF Proponents of the class certification shoulder the burden of proving the existence of each of the Rule 23(a) prerequisites, and the court must apply a rigorous analysis to assure the

prerequisites are satisfied as the failure to meet any one of the prerequisites is fatal to class certification. Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 467-68, 388 S.E.2d 799, 801 (1990). "A court may not look to the merits when determining whether to certify a class." Tilley v. Pacesetter Corp., 333 S.C. 33, 43, 508 S.E.2d 16, 21 (1998). Whether the trial court properly certified a class is within a trial court's discretion absent an error of law. Gardner v. South Carolina Dep't of Revenue, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003).

It was error for the Trial Court to certify the Pope Class because an accurate determination of the alleged "loss of use" damages of the class requires an individualized examination of the actual and legal distinctions among the putative class members. Such an examination reveals that the essential elements of commonality and typicality are not met under these circumstances. In order to avoid Rule 23(a)'s stringent requirements, Respondents encouraged the Trial Court to engage in speculation and conjecture to surmise that all of the putative class members would suffer exactly the same damages. Thus, the Trial Court made an error of law by certifying this class when there are substantial issues of material fact.

A. The Pope Class should have been decertified because the class lacked the requirement of commonality.

"To establish commonality, a party must show that 'there are question of law or fact common to the class.' Rule 23, SCRPC. In practical terms this means the party must articulate the existence of 'significant common legal or factual issues' which bind the proposed class together." Gardner, 353 S.C. at 21, 577 S.E.2d at 200 (quoting Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 64 (S.D. Ohio 1991)). Therefore

“[c]ommonality is met only where the class shares a determinative issue Gardner 353 S C at 21 577 S E 2d at 200-01 (emphasis added) The named plaintiffs in the Pope Class Action sought to represent a class of 228 Riverwalk unit owners Their mere status as property owners at Riverwalk “does not, in and of itself, qualify [them] to bring a class on behalf of the remaining property owners ” Waller 300 S C at 468 388 S E 2d at 801

As to the requirement of commonality, the Order granting certification states only that “[t]he Plaintiffs allege they will suffer loss of use during the remediation that will be necessary as a result of construction deficiencies ” (R 23) This allegation of “loss of use” is the sole basis for the Trial Court's determination that “the same questions of fact and law will be common to each member of the class (Id) Thus the only damages sought in the Pope Class Action were for the “lost use” the property owners would allegedly suffer in the future while repairs to Riverwalk’s common areas are made However the prospective “lost use” of the class is not a proper shared determinative issue Rather, each class member would potentially suffer a different level of lost use, and quite possibly no loss use whatsoever

The Pope Class consists of at least five possible types of property owners (1) full-time residents (2) part-time residents who use the property as a vacation home (3) part-time residents who use the property as a vacation home and sometimes rent it to third parties, (4) investment owners who rent the property to third parties, and (5) investment owners who do not rent use or rent the property The differing uses that owners have for their Riverwalk properties was acknowledged by Mr Pope as well as by Respondents’ purported expert Mr DeSantis (R 223-25 1318-19) The

testimony of various owners illustrated the different uses to which class members put their Riverwalk properties. Mr. Pope testified that he uses his unit as an occasional vacation home. (R. 223) Constance Reddington testified that she was a full time resident at Riverwalk. (R. 888) Sue Ann Hodges testified that she lived in her unit at Riverwalk for a few months after purchasing it in 1999 and subsequently uses the Riverwalk unit only to house family members when they visit her in Myrtle Beach. (R. 901-02) Mike Voyles testified he uses his unit as a vacation home four or five times a year and has never rented it. (R. 1348)

Even assuming that the units would be required to be vacated for an extended time during repairs,⁵ each class member's prospective "lost use" requires several individualized determinations including (1) their actual use of the unit, (2) whether they will suffer any actual loss of that use during repairs, (3) the extent of each owner's "lost use" and (4) the value to be attributed to each individual's lost use. Respondents sought to avoid these individual determinations by treating every property owner as if they were a full time resident and calculating their "lost use" damages as the rental value of an equivalent condominium for the full anticipated repair time regardless of whether this "replacement" home would be desired or used by the class member. This strategy served not only to avoid the requirement that commonality be established, but also to inflate the alleged actual damages to the maximum possible amount.

The class members' different uses for their respective units establishes a clear lack of commonality among the class. In Gardner, the Supreme Court reversed a trial

⁵ Respondents presented evidence estimating that every unit would be required to be vacated for a period of four months. (R. 218, 674, 75) However, there was also testimony that similar repair work at other projects in the area had not required residents to vacate the property or that the units would be inaccessible for considerably less time than Respondents claimed. (R. 764, 1137, 1202, 1228)

court's certification of a class where individual issues defeated the prerequisite of commonality 351 S.C. at 22, 577 S.E.2d at 201. The class in Gardner consisted of taxpayers who had their refund checks seized to pay delinquent debts to certain state agencies. Id. at 8, 577 S.E.2d 194. In order to prevail in the action, the plaintiffs would have to establish that notices to the class members were deficient and that the class members had been prejudiced by the deficiency. Id. at 22, 577 S.E.2d at 201. In reversing the certification of the Gardner class, the Supreme Court held that this was not a typical class action where minor factual differences exist among the individualized class members. Id. Rather, the factual differences (whether the class members had been prejudiced) were "the crux" of a predominant issue, and "a representative class cannot exist where the court must investigate each plaintiff's claim" because "such individualized examination negates the benefits of a class action suit." Id.

In the case at bar, the "crux" of the Pope Class Action is the "lost use" of each class member. Properly determining those damages requires an individualized examination of each class member's actual use, actual loss of use, and actual damages suffered as a result. Just as in Gardner, commonality is lacking in the present action because individualized determinations for each class member on this key issue are necessary. Therefore, because the commonality prerequisite of Rule 23(a) is lacking, the class should not have been certified and the certification Order of the Trial Court should be reversed.

B The Pope Class should have been decertified because the claims of the class representatives are not typical of those of the class

Rule 23(a)(3) requires that the claims and defenses of the representative parties be “typical of the claims or defenses of the class ” Rule 23(a)(3), SCRPC This requirement of “typicality” limit[s] the class claims to those fairly encompassed by the named plaintiffs’ claims ” Gen Tel Co of Nw Inc v EEOC 446 U S 318 330 (1980) ⁶ The typicality requirement is based on the premise, “as goes the claim of the named plaintiff, so go the claims of the class ” Broussard v Meineke Disc Muffler Shops, Inc , 155 F 3d 331 340 (4th Cir 1998) In short, the named plaintiff provides the court the necessary focal point when determining the sufficiency of the case and if warranted the appropriate level of damages See McElhaney v Eli Lilly & Co 93 F R D 875 878 (D S D 1982) (internal quotation omitted) (“[I]n the course of proving her own claim, plaintiff must also prove the claims of the other members of the class The claims and defenses of the class representative would not be typical if [they] would require substantially more or less proof than required for the other members of the class ”)

If this focal point does not accurately portray the class members causes of action, positions, damages, or defenses, then the typicality requirement as well as the representation of the class is compromised See McClain v S C Nat l Bank 105 F 3d 898 903 (4th Cir 1997) (citations omitted) (“Since [plaintiff] did not suffer a cognizable injury similar to the injuries suffered by the other class members, her claims

⁶ South Carolina s courts will look to federal law for guidance when analyzing Rule 23 See Gardner v Newson Buick, Inc 304 S C 328 330 404 S E 2d 200 201 (1991) (holding that [s]ince [South Carolina s] Rules of Procedure are based on the Federal Rules where there is no South Carolina law we look to the construction placed on the Federal Rules of Civil Procedure)

[were] atypical from the claims of the rest of the class ”), J H Cohn & Co v Am Appraisal Assocs Inc 628 F 2d 994, 999 (7th Cir 1980) (“[T]he presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff[s] representation ”) 7A Charles A Wright, et al , Federal Practice and Procedure § 1764 (3d ed 2005) (Rule 23(a)(3) may [be] used to screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present ”)

Here the named plaintiffs, Tony and Lynn Pope, own a unit at Riverwalk which they use as a vacation home (R 223) During trial Mr Pope admitted that unit owners use their units in different ways with some living there full-time others using them occasionally as vacation homes and others renting them (R 223-24) The “crux” of the Class’ claims is the lost use they allegedly will suffer during repairs The Popes would suffer lost use only to the extent they would have used the vacation home during any time it is inaccessible due to repairs Thus the Popes “lost use” damages would be markedly different than the damages of a full-time residents or owners who rent their units full-time Additionally, the Popes’ “lost use” damages also differ from the damages of others who use their units as vacation homes depending on the extent of each specific owner s use of their respective units Were damages properly calculated based on the class representative s actual lost use the class would be limited to the lost use damages of an owner who used his home only occasionally Therefore because the class members differing uses of the properties and the corresponding differing levels of

“lost use” damages defeat Rule 23(a)(3) s requirement of typicality the class should not have been certified and the certification Order of the Trial Court should be reversed

V A New Trial Should be Granted Because the Trial Court Erred By Allowing the Expert Testimony on Lost Use and By Allowing Evidence of Remedial Measures

Appellants should also be granted a new trial in both actions because the Trial Court erred in admitting the expert testimony of Francis “Bud” DeSantis and in admitting evidence of remedial measures taken by Appellants regarding windows at Riverwalk

A The Trial Court abused its discretion in allowing expert testimony regarding the alleged “lost use” damages of the Pope Class

Mr DeSantis was Respondents’ sole expert on the Pope Class’ “lost use” damages (R 788) Over Appellants’ objection he was designated an expert in that area and permitted to testify despite his lack of qualifications and the unreliability of his methodology (R 788-90) Rule 702, SCRE, governs the admission of expert testimony The rule provides

If scientific technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue a witness qualified as an expert by knowledge, skill, experience training or education may testify thereto in the form of an opinion or otherwise

Rule 702 SCRE South Carolina s Courts have noted a distinction between two types of expert testimony scientific evidence versus experience-based knowledge State v White, 382 S C 265, 269-70, 676 S E 2d 684, 686 (2009) While this distinction has been acknowledged ‘[a]ll expert testimony must satisfy the Rule 702 criteria and that includes the trial court s gatekeeping function in ensuring the proposed expert testimony

meets a reliability threshold for the jury's ultimate consideration Id. at 270 676 S E 2d at 686

As the gatekeeper of expert testimony the trial court must conduct threshold determinations of whether the potential expert witness offering either scientific or nonscientific evidence, is qualified and whether the subject matter is reliable Jamison v Morris, Op No 26720 (S C Sup Ct filed Sept 21, 2009) ("All expert testimony must meet a reliability threshold under Rule 702 SCRE, which imposes an affirmative and meaningful gatekeeper function on the trial judge) White 382 S C at 273 676 S E 2d at 688 (overruling State v Morgan, 326 S C 503, 513, 485 S E 2d 112, 118 (Ct App 1997) to the extent Morgan suggested only scientific expert testimony necessitated a threshold reliability determination and holding that Rule 702 also requires a determination of nonscientific expert qualifications and reliability)

With respect to scientific expert testimony the Supreme Court has outlined a three-step inquiry "the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified and the underlying science is reliable " State v Council, 335 S C 1, 20, 515 S E 2d 508 518 (1999) In determining the reliability of the science – the third step in the inquiry - the Court employs the standards first set forth in State v Jones, 273 S C 723, 259 S E 2d 120 (1979) and restated in State v Ford, 301 S C 485, 392 S E 2d 781 (1990) The overarching concern in the reliability inquiry is "the degree to which the trier of fact must accept, on faith scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom " Council, 335 S C at 19 515 S E 2d at 517 (quoting Jones, 273 S C at 731 259 S E 2d at 124) A trial court must consider several factors to determine the

reliability of the science underlying expert testimony, including (1) the publication and peer review of the technique (2) prior application of the method to the type of evidence involved in the case (3) the quality control procedures used to ensure reliability, and (4) the consistency of the method with recognized scientific laws and procedures Council 335 S C at 19, 515 S E 2d at 517 (citing Ford, 301 S C at 487-90 392 S E 2d at 782-84) With respect to non-scientific expert testimony the Supreme Court in White made it clear that such testimony “must satisfy Rule 702 both in terms of expert qualifications and reliability of the subject matter ’ 382 S C at 273 676 S E 2d at 688

Mr DeSantis was offered and accepted as an expert in the economic damages resulting from “loss of use ” (R 788-90) His education was limited to an undergraduate degree in mechanical engineering with graduate work in engineering and business (R 783) For the past fifteen years he operated a real estate rental business where he is the broker-in-charge (R 786) He is neither an economist nor an accountant (R 788-89) He has never published the methodology he used to calculate the lost use in this case in any trade publications (R 789) He is also unaware of his methodology being taught anywhere and is unaware of any other person having applied his methodology to the alleged loss of use of a condominium project (R 789-90) While Mr DeSantis testified he had been previously qualified by a South Carolina court as an expert of loss of use he offered no explanation of the specific circumstances surrounding that qualification (R 788)

Whether applying the standards set forth in Council or in White, Mr DeSantis failed to meet the Rule 702 threshold for expert testimony There was no basis for a

finding that he was an "expert" in loss of use nor was there any basis for a determination that his methodology and findings were in any way reliable To the contrary without any formal education in economics or accounting Mr DeSantis has developed his own methodology for determining loss of use in varying circumstances This methodology has never been published taught or even used by anyone else

Mr DeSantis concluded that the "lost use" damages of the Pope Class were the equivalent of the rental value of a comparable condominium in the area for the entire four months it was estimated the Riverwalk units would be unavailable due to repairs (R 793) Using his knowledge of rental values in the Myrtle Beach area Mr DeSantis calculated that monthly value, multiplied it by four months, and then multiplied it by the number of class members (R 793-804) In his own words "its arithmetic " (R 801) Mr DeSantis acknowledged that the class members use their homes in different manners even segregating the homeowners into four groups (permanent residents second home rental and vacation rental) (R 799) However despite these different actual uses of the units under his methodology, all of the homeowners were deemed to have suffered the same "lost use" damages (Id)

During the pretrial motions on the admissibility of Mr DeSantis testimony the Trial Court noted that maybe this isn t an area that you need an expert witness" because the plaintiff could establish the time period the units would be closed and the owners could establish the value of their loss (R 140-41) The Trial Court then concluded that Appellants attack on him is pretty much an attack as it relates to believability of his testimony or the weight to be given to his testimony but not necessarily the admissibility of his testimony " (R 141) This was a clear error by the

Trial Court It remained incumbent upon the Trial Court to perform its gatekeeping function by evaluating not only Mr DeSantis' qualifications, but also the reliability of his methodology As the Supreme Court stated in White

The familiar tenet of evidence law that a continuing challenge to evidence goes to weight not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony including the threshold determination of reliability

White 382 S C at 273 676 S E 2d at 688 The Trial Court s error resulted in severe prejudice to Appellants By cloaking Mr DeSantis with the authority of an "expert" in the loss of use, the key issue of the class members actual damages was immeasurably clouded This error necessitates a new trial of the Pope Class Action

B The Trial Court erred in admitting evidence of remedial measures attempted by Appellants in violation of South Carolina Rule of Evidence 407

During the trial of this matter, Respondents were permitted to enter evidence regarding steps taken by Appellant Buildstar in 1998 to address window issues at Riverwalk Specifically, on September 3 1999 Appellant Buildstar requested in writing that Better Bilt, the manufacturer of windows used in the Riverwalk replace 192 windows that Buildstar deemed to be defective (R 1835) This document was admitted into evidence over Appellants' objection and testimony was repeatedly elicited on this subject by Respondents (R 634-35 727)

This evidence relating to Buildstar s efforts to remedy alleged window defects should have been excluded pursuant to Rule 407 SCRE, which provides

When after an event measures are taken which if taken previously would have made the event less likely to occur evidence of the subsequent measures is not admissible to prove negligence or culpable

conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose such as proving ownership, control, or feasibility of precautionary measures if controverted or impeachment.

In Webb v. CSX Transportation, Inc., 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005) the Supreme Court of South Carolina explained that "Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose." As is illustrated by the Rule, the allowable uses of remedial measures evidence are limited to proving ownership, control, or the feasibility of precautionary measures.

Buildstar's attempts in 1998 to remedy window problems became a focal point of the trial. (R. 363, 880, 1097, 1105, 1292, 1476). Buildstar's remedial measures were used by Respondents to support their claim that the windows were installed in a defective manner and that all of the windows needed to be replaced. (R. 1105, 1292). Additionally, Respondents used this evidence to paint an ill motive upon Appellants by asserting in closing argument "they built these condominiums, they knew they were defective, they knew in 1998 the windows had significant problems. They were asking for 192 windows to be replaced." (R. 1476).

Buildstar's communication with Better Bilt regarding the window issues constituted a subsequent remedial measure. At that time, seven buildings at Riverwalk incorporating the windows in question had been completed. (R. 614). The communication between Buildstar and Better Bilt centered on Buildstar's assertion that it was the windows that were defective, not their installation. Respondents' use of this subsequent remedial measure to support their theory of defective installation does not

fall within the exceptions to Rule 407's prohibition. Additionally, the misuse of this evidence to paint Buildstar as a bad actor resulted in severe prejudice to Appellants requiring a new trial as to both actions.

VI The Trial Court Improperly Granted Respondents' Motion for Directed Verdict as to the Negligence Claims in Both Actions

The Trial Court erroneously granted Respondents' motion for a directed verdict as to the negligence claims in both actions. Specifically, the Trial Court held that the "condominiums were negligently constructed" (R. 1385). The stated basis for this ruling was the fact that the witnesses all acknowledged the existence of construction defects and the "representation of counsel" that defendant is responsible and intends to engage in repairs. (*Id.*) This ruling failed to take into consideration the high standard for directed verdict and also misconstrued an acknowledgement that some defects exist as an admission that Appellants were negligent as to all of the alleged defects. The issue of whether Appellants were negligent should have been presented to the jury.

"In ruling on motions for a directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. S.C. Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "[I]f there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for consideration." Wright v. Gilbert, 227 S.C. 334, 337, 88 S.E.2d 72, 74 (1955).

By granting Respondents' motion for directed verdict as to the negligence claims the Trial Court effectively ruled that Appellants were negligent as to all of the defective conditions that were alleged. This case, however, was not about one isolated defect. Rather, there were allegations of numerous distinct defective conditions (*i.e.*, improper trim installation, improper masonry work, improper sheathing, improper installation of decks, and improper installation of windows). As to several, if not all of these, Appellants presented evidence that, when viewed in a light most favorable to Appellants, warranted denial of directed verdict. These issues should have been presented to the jury for determination.

For example, one of the clearly disputed issues related to water infiltration damage on the decking. Respondents' contention was that this was caused because the decks were constructed with an improper slope, while Appellants' expert testified that the damage was caused because, during the POA's maintenance, a carpet installer cut through the protective weatherproofing. (R. 970, 1002, 1097). An issue relating to the replacement or reuse of windows also illustrates a factual issue as to negligence that should have been left to the jury. Respondents' scope of repairs called for virtually all of the windows to be replaced despite the windows themselves not being defective. (R. 758-60). In contrast, Appellants presented testimony that, if repairs relating to the windows were necessary, the vast majority of the windows could be removed and reinstalled. (R. 1001, 1023, 1049). Replacement of the windows constituted \$2,000,000.00 of Respondent's scope of repairs. (R. 759-60). Other examples of factual issues relating to the alleged construction defects include testimony in the record as to the following:

- water damage issues with the decking was not a universal problem at Riverwalk (R 987),
- water damage in the sheathing was confined to areas under and outward from the windows (R 989),
- there was no damage as to the decking s framing (R 993)
- issues as to framing damage were not a universal problem at Riverwalk (R 1009),
- sheathing damage would not extend to the framing except at certain areas around windows and a bore scope inspection showed the sheathing and framing were undamaged in many areas (R 1010-11) and
- slope issues with decks was not a universal issue at Riverwalk and where there was a negative slope, there was no evidence it was damaging the building (R 1030)

The Trial Court s ruling that Appellants “negligently constructed the condominiums ” left the jury to conclude that Respondents claims had been completely established and that each one of these issues had already been decided in Respondents’ favor The Trial Court s erroneous instruction to the jury that they must award damages in the POA case (see Section I) compounded this error These factual issues as to whether the defective conditions existed and the extent of such defects, should have been left for the jury to decide

The directed verdict on the negligence claims was also improper because there was evidence that would support the jury finding that Buildstar did not breach its standard of care as the general contractor The evidence in the record clearly established that Buildstar did not engage in actual construction rather all construction was performed by subcontractors (R 872) A general contractor is not “automatically” liable for the negligent work of subcontractors Fields v J Haynes

Waters Builders Inc 376 S C 545 560-61 658 S E 2d 80, 88 (2008) Rather, a general contractor must only exercise the degree of care reasonably expected in the industry in constructing and supervising the construction of the home Id Respondents failed to establish that Buildstar failed to properly supervise the subcontractors under this standard

The fact that subcontractors performed all of the construction also illustrates how a directed verdict on negligence was improper Viewing the evidence in a light most favorable to Appellants the Trial Court should have denied the directed verdict motion because there was a reasonable inference that it was the negligence of various subcontractors that was the proximate cause of any damages suffered by Respondents

Significantly the Trial Court's grant of directed verdict was coupled with its "amalgamation ruling" (discussed in Section II) Thus, the Trial Court made no independent determination as to whether a directed verdict on the issue of negligence was appropriate as to *each* individual Appellant This reason alone warrants a new trial as to both actions

VII The Trial Court Should Have Granted Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict

A Respondents failed to establish their damages as to any of the causes of action

Respondents were entitled to directed verdict and JNOV as to all of Respondents' claims because Respondents failed to meet their burden of proof as to damages In order for damages to be recoverable the evidence should be such as to enable the jury to determine the amount thereof with reasonable certainty or accuracy Whisenant v James Island Corp 277 S C 10 13 281 S E 2d 794 796 (1981)

While proof to a mathematical certainty is not required the amount of damages can not be left to conjecture, guess or speculation Id As was illustrated in the testimony of their experts Drew Brown and Albert Best, Respondents damages were impermissibly speculative Mr Brown who prepared Respondents scope of repairs admitted that there were numerous “unknowns” in his estimated repairs and that he did not know the actual extent of the alleged damage because they did not expose the various areas or inspect them using a bore scope (R 484, 490, 520, 534-39, 543-44) Similarly, Mr Best who prepared Respondents’ estimate of repair costs admitted that his estimate was based on “extrapolations” and “assumptions” as to “hidden damage” that had not been confirmed (R 653, 655, 658 669-70, 745 769)

Additionally as to the Pope Class Action, Respondents failed to offer any proper evidence of their damages for loss of use Respondents relied entirely upon the testimony of Francis DeSantis to establish the existence and amount of lost use damages for the class As is discussed in Section V A Mr DeSantis testimony should have been excluded, leaving Respondents with no evidence as to the lost use damages

B Respondents failed to establish that each Appellant violated its respective standard of care and failed to establish punitive damages by clear and convincing evidence

Appellants motion for directed verdict and JNOV as to the negligence claims should have been granted because Respondents failed to establish a breach by each Appellant of the applicable standard of care Additionally Respondents failed to establish by clear and convincing evidence their entitlement to an award of punitive damages against each Appellant

In the context of construction litigation the South Carolina Supreme Court has mandated that each defendant's individualized standard of care must be addressed Fields v J Haynes Waters Builders, Inc 376 S C 545, 560-61, 658 S E 2d 80 88 (2008) (holding that a general contractor is not automatically liable where a subcontractor performs negligent work but rather the general contractor's individualized standard of care must be addressed) No individualized determinations were ever made in this case as to the standards of care applicable respectively to HCI HRI and Buildstar Rather the Trial Court ruled that they were 'amalgamated' and were to be treated as one entity (R 1384-85) Because of this ruling Respondents were relieved of establishing the negligence, using the appropriate standards of care for each defendant Instead the negligence verdict was applicable to all Appellants without the necessary finding that each had breached the appropriate standard of care

Correspondingly the jury's award of punitive damages against all three Appellants was also not based on individualized determinations that clear and convincing evidence existed to support such damages In any civil action where punitive damages are claimed the plaintiff has the burden of proving such damages by clear and convincing evidence " S C Code Ann § 15-33-135 (2005) "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established " Peeler v Spartan Radiocasting, Inc 324 S C 261 265 n 4 478 S E 282, 284 n 4 (1996)

In the POA Action the claims for negligence and breach of fiduciary duty that went to the jury could have supported punitive damages In the Pope Class Action only the claim for negligence could have supported an award of punitive damages In order

for the jury to determine that clear and convincing evidence existed as to these claims it was necessary for them to be instructed as to the standard of care that was applicable to each defendant. Since this was not done, the Trial Court erred in failing to grant new trials.

VIII The Punitive Damages Awards in Both Actions Were Improper

A The jury was improperly permitted to render punitive damages for harm to non-parties to the litigation

As illustrated in Section III, the Trial Court improperly admitted evidence of alleged defects and related litigation at other Heritage developments. The admission of this evidence violated Appellants' due process rights because it resulted in the jury imposing punitive damages upon Appellants based upon alleged harm to non-parties to the litigation. The South Carolina Supreme Court has held that "[p]unitive damages

serve to vindicate a private right of the injured party." Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). "Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004).

"[T]he Constitution's Due Process clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are essentially strangers to the litigation." Phillip Morris USA v. Williams, 549 U.S. 346, 353 (2007). First, in this situation, the defendant is denied "an opportunity to

present every available defense ” Id Second permitting ‘punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation Id at 354 As stated by the Supreme Court in such situations “[t]he jury would be left to speculate” as to the number of victims as well as the extent of and circumstances surrounding their injuries magnifying the risks of arbitrariness uncertainty and lack of notice with which fundamental due process is concerned Id

The admission of evidence relating to other Heritage condominium developments violated Rule 404(b), SCRE, and the requirement set forth in Whaley v CSX Transportation, Inc 362 S C 456 483 609 S E 2d 286 300 (2005) that a “special relation” be shown to exist and a factual foundation establishing substantial similarity in order for “other occurrences evidence to be admissible In addition the admission of this evidence and Respondents reliance on it in arguing to the jury that it should “send the message” to ‘these developers and contractors” by awarding – “substantial punitive damages ” (R 1477-78) violated Appellants’ Due Process rights The allegations of defective conditions at other projects and the references to the litigation surrounding those other developments were used to inflame the jury and portray Appellants as “serial” bad developers The sheer volume of references to the other projects illustrates that the jury s award of punitive damages in this action was punishment not only for Appellants actions with regard to Riverwalk but for every project in which Appellants were ever involved This error warrants reversal of the punitive damages awards or failing that a new trial in both actions

B The punitive damages awards were inconsistent with the guidelines established in Gamble v Stevenson

In Gamble v Stevenson 305 S C 104 111 406 S E 2d 350 354 (1991) the South Carolina Supreme Court set forth guidelines “to ensure that a punitive damages award is proper ” Specifically, the Court mandated that the trial court shall conduct a post-trial review and may consider the following

(1) defendant’s degree of culpability (2) duration of the conduct, (3) defendant’s awareness or concealment, (4) the existence of similar past conduct, (5) likelihood the award will deter the defendant or others from like conduct (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant s ability to pay, and finally (8) “other factors” deemed appropriate

Id at 111-12, 406 S E 2d at 354

Several of these enumerated factors weigh in favor of reversal of the punitive damages award First the award of punitive damages has no deterrent effect in this case because Appellants all went out of business prior to the commencement of this litigation (R 718 874-75, 887) Additionally, since Appellants became insolvent there was no ability for them to pay any award of punitive damages (R 144 154) Finally the Trial Court's approach to allowing Respondents to try the case by injecting large amounts of evidence as to other developments renders a fair analysis of many of the remaining factors impossible Taking these Gamble factors into consideration, the punitive damages awards in both actions should be reversed, or failing that, a new trial should be ordered in both actions

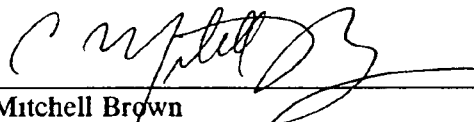
CONCLUSION

For the foregoing reasons, the Court should reverse the judgments entered below and enter judgments in favor of Appellants as requested herein Failing that this

Court should grant judgment to Appellants on punitive damages and order new trials as to liability and compensatory damages Failing that this Court should grant Appellants new trials absolute

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2009

THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

Clifton Newman, Circuit Court Judge

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Regime

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v

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and Buildstar Corporation,

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Riverwalk at Arrowhead Country Club Property
Owners' Association Inc

Respondent

v

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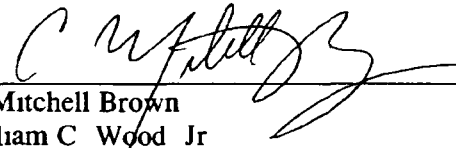
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR

SIGNATURE PAGE ATTACHED

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for Appellants do hereby certify that I
have served all counsel in this action with a copy of the pleading(s) hereinbelow
specified by mailing a copy of the same by United States Mail, postage prepaid, to the
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April 14, 2010

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STATEMENT OF ISSUES ON APPEAL

- I VIEWING THE TRIAL COURT S INSTRUCTIONS AS A WHOLE, DID THE TRIAL COURT ERR IN ITS USE OF THE TERMS WILLFUL, WANTON AND RECKLESS AND IN CHARGING THE JURY THAT IT MUST FIND DAMAGES FOR THE PLAINTIFF IN THE POA ACTION WHEN THESE INSTRUCTIONS WERE NOT OBJECTED TO OR WERE OBJECTED TO WITHOUT STATING SPECIFIC GROUNDS?
- II DID THE TRIAL COURT ABUSE ITS DISCRETION BY RULING THAT THE APPELLANTS WERE AMALGAMATED BECAUSE OF THEIR CONDUCT AND REPRESENTATIONS IN REGARD TO THE CONSTRUCTION OF THE RIVERWALK CONDOMINIUM BUILDINGS?
- III DID THE TRIAL COURT ERR IN ALLOWING THE RESPONDENTS TO INTRODUCE TESTIMONY OF SIMILAR CONSTRUCTION DEFECTS AND RELATED LITIGATION AT OTHER HERITAGE PROJECTS TO SUPPORT RESPONDENTS' CLAIMS FOR PUNITIVE DAMAGES?
- IV DID THE TRIAL COURT ABUSE ITS DISCRETION IN DECLINING TO DECERTIFY THE CLASS WHICH HAD PREVIOUSLY BEEN CERTIFIED BY ANOTHER TRIAL JUDGE?
- V (a) DID THE TRIAL COURT ABUSE ITS DISCRETION IN ALLOWING RESPONDENTS TO INTRODUCE EXPERT TESTIMONY REGARDING THE LOSS OF USE DAMAGES?
- V (b) DID THE TRIAL COURT S ADMISSION OF EVIDENCE ESTABLISHING THAT APPELLANTS HAD NOTICE OF INCORRECT WINDOW INSTALLATION DURING CONSTRUCTION VIOLATE RULE 407, SCRE RELATING TO POST REMEDIAL MEASURES AND DID APPELLANTS FAIL TO PROPERLY PRESERVE THE ISSUE FOR REVIEW?
- VI DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING RESPONDENTS A DIRECTED VERDICT AS TO THE NEGLIGENCE CLAIMS IN BOTH ACTIONS IN LIGHT OF THE FACT THAT APPELLANTS COUNSEL ADVISED THE JURY THAT THE TRUE VERDICT TO BE AWARDED TO THE RESPONDENTS WAS \$2 518,196 48?

- VII (a) DID THE RESPONDENTS SUBMIT SUFFICIENT EVIDENCE FOR THE JURY'S CONSIDERATION TO ALLOW THE JURY TO ASSESS THE ACTUAL DAMAGES WITH REASONABLE CERTAINTY?
- VII (b) DID THE RESPONDENTS SUBMIT CLEAR AND CONVINCING EVIDENCE AS TO THE STANDARD OF CARE OF EACH OF THE APPELLANTS TO AN EXTENT SUFFICIENT FOR THE JURY TO DETERMINE AN AWARD OF PUNITIVE DAMAGES?
- VIII (a) DID THE COURT ABUSE ITS DISCRETION IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY AND UPHOLDING THE PUNITIVE DAMAGES AWARD UNDER THE GUIDELINES OF GAMBLE V. STEVENSON?
- VIII (b) DID THE COURT ABUSE ITS DISCRETION IN UPHOLDING THE PUNITIVE DAMAGE AWARD AFTER A REVIEW OF THE GAMBLE FACTORS?
- IX ARE THE RESPONDENTS ENTITLED TO AN AFFIRMANCE OF THE AWARD IN THE POA ACTION AND THE CLASS ACTION BECAUSE THE APPELLANTS FAILED TO APPEAL ALL CAUSES OF ACTION WHICH WERE INCLUDED IN THE GENERAL VERDICT?

STATEMENT OF THE CASE

This appeal involves two construction defects actions which arise from the construction of the buildings comprising Riverwalk at Arrowhead Country Club Horizontal Property Regime (Riverwalk') near Myrtle Beach South Carolina. Heritage Communities Inc (HCI) was the overall developer Heritage Riverwalk, Inc ("HRI") was the site specific developer and Buildstar Corporation (Buildstar") was the general contractor for the Riverwalk project HCI is the parent corporation of both HRI and Buildstar Prior to trial Respondents settled with all Defendants excepting HCI HRI and Buildstar

Riverwalk at Arrowhead Country Club Property Owners Association v Heritage Communities, Inc et al , C/A No 2003-CP-26-7169 (the POA Action") was filed on December 5, 2003 by the Riverwalk Property Owners Association ("POA) seeking to recover repair costs related to construction defects in the Riverwalk development (R pp 0060-0071) In addition to the POA action, a putative class action, Pope et al v Heritage Communities, Inc et al , C/A No 2005-CP-26 3289 (the 'Pope Class Action") was filed June 23, 2005, by unit owners Tony and Lynn Pope on behalf of the owners at Riverwalk seeking to recover damages for the "lost use of the property during the time the units will be closed for repairs (R pp 0072 0089) The operative complaint in the POA Action is the Fourth Amended Complaint filed on August 3 2006 (R pp 0090-0103) The operative complaint in the Pope Class action is the Third Amended Complaint filed on July 22 2008 (R pp 0104-0123) These actions were consolidated for trial These operative complaints each asserted the following claims (1) negligence against HCI, HRI and Buildstar (2) breach of express warranty against HCI (3) breach

of the warranty of habitability against HRI (4) breach of the warranty of workmanlike service against Buildstar, and (5) breach of fiduciary duty against HCI and HRI. On September 3, 2008, the Honorable Benjamin H. Culbertson certified a class consisting of all owners of the condominium units in Riverwalk in the Pope Class Action (R pp 0020-0025). A motion to decertify the class action was filed by Appellants on December 19, 2008, which was heard by the trial judge, the Honorable Clifton Newman, and was denied (R pp 1914-1915).

The POA Action and the Pope Class Action were consolidated for trial and a jury trial commenced on January 5, 2009, and concluded on January 15, 2009. Prior to trial, the Appellants and Respondents stipulated that the 1994 and 1997 Standard Building Codes were applicable to the construction of the Riverwalk condominium buildings. At the close of Respondents' case, Appellants moved for directed verdict as to all of the claims (R p 0823, line 23-p 0864, line 1). The trial court directed a verdict for HCI on the express warranty claim and for Buildstar on the warranty of workmanlike service claim, and declined to direct a verdict as to the remaining claims (R p 0862, line 22-p 0863, line 7). At the close of all evidence, both Appellants and Respondents moved for a directed verdict (R p 1352, line 12 p 1393, line 20). The trial court denied all of Appellants' motions, but granted Respondents' motion for directed verdict on the negligence claims (R p 1384, line 20-p 1393, line 20). Additionally, the trial court ruled that the Appellants were 'amalgamated' such that they were to be treated as one and the same and the actions of any one of the Appellants applied to the others (R p 1384, line 20 p 1385, line 13).

Following the directed verdict motions at the close of trial the only issues remaining for jury determination in the POA Action were the claims for breach of warranty of habitability and breach of fiduciary duty and the damages under the negligence claim. In the Pope Class Action, the remaining issues were the claim for breach of warranty of habitability and the damages under the negligence claim. On January 15, 2009, the jury returned general verdicts for the Respondents in both actions. As to the POA Action, the jury found for Appellants on the breach of the warranty of habitability claim but returned a general verdict on negligence and breach of fiduciary duty in the amount of \$4,250,000.00 and punitive damages in the amount of \$250,000.00 (R. pp. 0052-0053). As to the Pope Class Action, the jury returned a general verdict on breach of warranty of habitability and negligence in the amount of \$250,000.00 actual damages and \$750,000.00 punitive damages (R. pp. 0058-0059). The total verdict of both actions was \$5,000,000.00.

On January 26, 2009, Appellants filed their post-trial motions seeking judgment notwithstanding the verdict, new trial pursuant to the thirteenth juror doctrine, new trial absolute, new trial *nisi remittitur* review of the punitive damages, and a setoff based upon a settlement involving the other defendants in the underlying actions (R. pp. 1920-1932). A hearing on post-trial motions and review of the Gamble factors as to punitive damages was held on February 24, 2009, and on April 14, 2009, the trial court issued an Order denying Appellants' post-trial motions, setting forth findings after review of the Gamble factors, upholding the punitive damages award and granting a setoff of \$1,028,821.69 against the combined judgment amount, making the total combined

judgment amount \$4 471,178 31 (R pp 0042 0047) Appellants timely served and filed a Notice of Appeal on May 8, 2009

STATEMENT OF THE FACTS

The Riverwalk condominium project consists of nineteen (19) buildings and 228 condominium units which are located near Myrtle Beach South Carolina Construction, promotion and sale were handled through three corporations, namely Heritage Communities, Inc ("HCI") which was the parent corporation Heritage Riverwalk, Inc, (HRI) which was the site specific developer and actually conveyed the condominiums, and Buildstar Inc which was the general contractor These three corporations were all controlled by one Roger Van Wie (R p 0703 line 1-p 0705, line 21) Heritage Communities Inc was responsible for overseeing the sale, construction and manufacturing of the condominiums (R p 0701, lines 8-16) These three corporations will sometimes be referred to as the Heritage Entities' The Heritage Entities were all located in the same office and shared the same officers and directors (R p 0706, line 14 p 0707 line 14-p 0876, lines 12 20)

Construction began on the Riverwalk project on June 30, 1997, and was complete by the end of 1999 Prior to or simultaneously with the development of the Riverwalk project, Heritage had already developed, or was in the process of developing other condominium projects being Magnolia Place, Magnolia North Avian Forest Azalea Lakes The Gardens at Cypress Bay and Heatherstone (R p 0707 line 22-p 0708, line 8) All but Heatherstone were located in or around the Myrtle Beach area All of the projects suffered from the same or similar construction deficiencies (R pp 0251-0254 0434-0437 0477 0478, 0635-0637 0711-0712)

The POA and Pope Class asserted numerous construction deficiencies which were violations of the standard building code, good construction practices and industry standards (R pp 0090-0103 R pp 0104-0123) These deficiencies resulted in water intrusion causing rot, deterioration and other damages (R p 0410, line 6 p 0464 line 5) The POA also asserted a cause of action for breach of fiduciary duty alleging that the Heritage Entities willfully, wantonly and recklessly breached their fiduciary duty by turning over the common elements to the homeowners in a defective and deteriorated condition (R pp 0090-0103) The Pope class asserted that the condominiums would be required to be closed for repairs and that the class was entitled to compensation for their loss of use of their condominiums for the time during which repairs were being made Prior to the trial, the Pope class petitioned the Court to certify the action as a class action The Honorable Benjamin H Culbertson conducted a hearing on July 14 2008 to determine if the class could properly be maintained as a class action under the requirements of Rule 23 *SCRCP* As a result of that hearing Judge Culbertson found that the class action met all the requirements of Rule 23 *SCRCP* and could be properly maintained as a class action (R pp 0020-0030) The order provided that at any time during the pendency of the action any party could petition the Court to alter amend or modify the order and/or seek supplemental orders relative to the action being maintained as a class action Appellants filed a motion shortly before trial to decertify the class (R pp 1914-1915) Appellants contended that the class could not be properly maintained as a class action because it failed to meet the commonality and typicality requirements Appellants neither submitted proof nor argued that any circumstances had changed

subsequent to Judge Culbertson's order that would warrant decertifying the class Judge Newman declined to decertify the class (R p 0275 lines 6-7)

At the commencement of the Jury trial Appellants' counsel made it clear to the jury in his opening statement that the case was one not of liability but of the extent of Respondents' alleged damages. He stated to the jury that

the real issue in this case is what is it going to cost to fix condominiums out at Riverwalk and that is the central issue and what we deny as Mr Henry has raised in the pleadings, is that the costs out at Riverwalk are going to cost over 86 million dollars. We submit that the cost estimates that we will put before you are the real and true costs for fixing the issues out there at Riverwalk.

(R p 0211 line 17-p 0212, line 5)

Respondents' expert, Drew Brown, testified to many construction deficiencies amounting to code violations, violations of industry standards and violations of good construction practices (R p 0413, line 14-p 0477 line 8). Appellants' expert, Mr Alan Campbell, agreed with the Respondents' expert that there were many deficiencies in the construction of the Riverwalk buildings including numerous building code violations, violations of industry standards and good construction practices (R p 1069 line 19-p 1078, line 9). On behalf of the Appellants, Mr Campbell provided a scope to repair the deficiencies. Based on this scope, Mr Steve Watkins, Appellants' repair expert, estimated that the cost to repair was \$2,391,619.00 (R p 1164, line 13-p 1165 line 6). In addition, an expert report prepared by Mr Watkins' office estimated the scope to repair the deficiencies provided by Respondents' expert would amount to \$6,325,000.00. Mr Watkins claimed that the estimate got out of his office by mistake (R p 1269 line 9-p 1273 line 24). Respondents' expert, Mr Drew Brown, developed a scope of repair

(R p 0479, line 14-p 0495 line 7) Based on that scope Respondents estimator, Mr Albert Best, estimated that it would cost \$8,114,250.00 to repair all of the deficiencies at Riverwalk (R p 0736-p 0737, line 9) In addition, Respondents presented costs of repairs previously made by the POA to correct some of the deficiencies in the amount of \$126,577.48 (R p 0262 line 8-p 0264 line 1)

In reference to the Pope Class Action, Respondents called as its loss of use expert, Mr Francis DeSantis (R p 0782) He testified that the loss of use of the condominiums for a period of four months created a financial loss to the homeowners of \$928,215.00 (R p 0804, lines 13-19) Appellants' expert on loss of use, Mr Jesse Teel estimated loss of use damages of \$227,041.00 (R p 1321, lines 2-17)

At the end of all the evidence the trial Judge directed a verdict for Respondents in both actions on their negligence claim Upon granting Respondents a directed verdict on the negligence cause of action the trial judge stated

It would not be proper to allow counsel to represent to the Jury that the Defendant is responsible and intends to engage in repairs on the one hand and on the other hand argue as a matter of law they are not responsible More importantly than that, the witnesses all acknowledge defects in the construction and I grant the plaintiffs' motion for directed verdict on the issue of negligence

(emphasis added) (R p 1385 lines 17-24)

The jury returned a general verdict in the POA Action of \$4,250,000.00 actual damages and \$250,000.00 in punitive damages The actual damages are well within the range between Appellants' expert's estimate and the Respondents' expert's estimate In the Pope Class Action the jury returned a general verdict of \$250,000.00 in actual damages and \$750,000.00 in punitive damages The actual damages are well within the

range between the Appellants' expert's estimate of the loss of use damages and the Respondents' expert's estimate of the loss of use damages

ARGUMENTS

Standard of Review

In an action at law on appeal of a case tried by a jury, the jurisdiction of the Appellate court extends merely to correct errors of law. The factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)

When reviewing the trial court's ruling on a motion for a directed verdict, Appellate courts must employ the same standard as the trial court, that is, Appellate courts must consider the evidence in the light most favorable to the non-moving party. In this regard, 'the Court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor.' Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc., 379 S.C. 31, 664 S.E.2d 83 (Ct. App. 2008)

I The Trial Judge's Instructions to the Jury Do Not Warrant a New Trial Because Appellants Failed to Properly Object or Did Not Object to the Instructions to Which They Assign Error and Even if There Were an Objection or Proper Objection the Charges Are Correct

A The Appellants assign error to the following jury charge

Now, the plaintiffs allege that the defendants negligently constructed the Riverwalk Condominiums. Negligence is the failure to exercise the degree of care which a person or entity of ordinary reason and prudence would exercise under the same or similar circumstances as exists in this case. Carelessness and negligence means the same thing.

To establish negligent construction the plaintiff must prove four essential elements. One that there was an undertaking to construct a building by the defendants that the defendants were negligent or careless or reckless willful and wanton in the performance of that construction work, or stated another way, that they did not perform the work in a good workman like manner.

Three, that the negligence or carelessness or recklessness, willfulness and wantonness of the defendants in performing that construction work was a proximate cause of any damages sustained by plaintiffs.

(Emphasis added to note what Appellants deem objectionable) (R. p. 1486 line 14-p 1487, line 1) (Appellants' Brief P. 10)

The record of the charge conference with the trial judge reflects no objection to this charge. At the conclusion of the charges, the judge excused the jury and gave the lawyers the opportunity to object to any charges. (R. p. 1504, lines 7-8). The following colloquy occurred between Appellants' counsel and the court:

Mr. Fosmire: "Your honor, one exception to note. Right after you had spoken of the amalgamation of the entities you then went into negligence elements and we, and you were talking about straight negligence. You used the word willful wanton recklessness in charging negligence early on and we'll except to that that verbiage."

The Court: "Alright. All exceptions are noted for the record. If you all will collaborate on the exhibits."

(R. p. 1504 line 20-p 1505 line 14). Appellants' counsel gave no ground for his exception to the charge. Rule 51, *SCRCP*, provides that "no party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds for his objection." (*Emphasis Added*). In the absence of distinctly-stated grounds for an objection, Appellate review is not available. Bellamy v. E. Payne, DPM 304 S.C. 179.

403 S E 2d 326 (1991) There is clearly nothing in the record to suggest that the trial court deprived Appellants' counsel of an opportunity to state distinctly the grounds for the objection pursuant to Rule 51 *SCRCP* Bellamy, supra Again trial counsel excepted to the language but gave no grounds therefore and is precluded from raising grounds for the first time on appeal

Even if there had been a proper objection the judge's instruction quoted above is without error The Appellants' apparent objection to the instruction is that this instruction, combined with the court's advising the jury that the court had found as a matter of law that the Appellants were negligent in the construction of the condominiums suggested to the jury that it was already determined by the court that the Appellants conduct was not only negligent, but was also willful wanton and reckless (Appellants' Brief pp 10 11) When reviewing a jury charge for alleged error, the Appellate court must consider the trial judge's charge as a whole in light of the evidence and issues presented at trial Welch v Epstein 342 S C 279 536 S E 2d 408 (Ct App 2000) As a whole if the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error Keaton ex rel Foster v Greenville Hosp Sys 334 S C 488, 514 S E 2d 570 (1999) State v Sims 304 S C 409, 405 S E 2d 377 (1991), State v Adkins, 353 S C 312, 577 S E 2d 460 (Ct App 2003), Ardis v Sessions, 383 S C 528 682 S E 2d 249 (2009) The judge's charges on negligence as a whole combined with his explanation of the forms of the verdict remove any possibility of the jury being misled by the above quoted charge For example the judge took great pain to explain to the jury what was meant by willful wanton and reckless conduct (R p 1493 line 6-p 1495) In addition, the judge also instructed the jury on the difference

between mere negligence and willful, wanton and reckless conduct (R p 1494 line 15 p 1495, line 19) In explaining the forms of the verdict the judge instructed the jury that

Then another question posed to you does the Jury find by clear and convincing evidence that the Defendants actions were willful wanton reckless and are grossly negligent? And I have informed you as to the legal standard to apply to punitive damages in that regard and you answer yes or no If the answer is no you proceed no further If the answer is yes then you go to the next paragraph which says we the Jury award punitive damages in the amount of, blank

(R p 1500, line 23-p 1501, line 7)

Viewing the charge complained of in light of the other jury instructions, no confusion could have occurred

B The Appellants next assign error to the trial court in instructing the Jury as follows

I charge you that as a matter of law I have determined that the defendants were negligent in the construction of these condominiums **As a result you must award the plaintiff property owners association damages for the cost of repairs and other costs, and any other costs related incidental thereto** to the extent these damages have been proven by a preponderance of the evidence

As to the class action lawsuit brought by Tony and Lynn Pope you must determine the nature and extent of any damages suffered by the unit owners for the loss of use of the condominiums during any repairs

(R p 1487 lines 14-25)(*emphasis added*) (Appellants Brief p 13)

Appellants brief contains no record cite to any objection to this charge nor can they because no objection to this charge was made As noted above trial counsel only voiced one exception to the judge s charges and that was to the first above complained of charge (R p 1504 line 20-p 1505, line 2) The Appellants cannot

now argue error in giving a jury charge to which Appellants failed to object Appellants failed to preserve the issue for review on appeal State v. Tucker, 319 S C 425, 462 S E 2d 263 (1995)

Moreover even if the Appellants had properly objected to this instruction Appellants' argument is without merit As noted above, the dispute in this case was not liability but the extent and amount of the damages Respondents and Appellants' counsel both presented testimony as to the amount and extent of the damages to which Respondents were entitled When liability is admitted or a directed verdict is given as to liability a plaintiff is entitled to an award unless proof completely fails Page v Crisp, 303 S C 117 399 S E 2d 161 (Ct App 1990)(Holding that "When liability is admitted as in this case a plaintiff is entitled to an award unless the proof completely fails It is appropriate for the judge in his charge to tell the jury that a plaintiff is entitled to an award as a matter of law -- leaving to the jury whether actual damages alone or actual and punitive damages should be awarded) Accordingly, the judge committed no error in giving the challenged charge

II The Trial Court was Correct and Committed No Error in Determining that the Appellants Were "Amalgamated", Piercing the Corporate Veil was not Asserted by the Respondents or Raised by the Appellants at Trial

At the close of the testimony the trial judge held that the three corporations, HCI HRI and Buildstar were amalgamated" (R p 1384 line 2 p 1385, line 13) The court found that the representations by these corporations and their operations blurred their legal distinction to the extent that they would be considered one entity The actions of one would be considered the actions of all This holding is correct under well established South Carolina case law Beginning with Lane v Trenholm Bldg Co 267 S C 497 229

S E 2d 728 (1976) our court has placed South Carolina in the vanguard of protecting innocent homebuyers against developers or builders who place defective condominiums in the stream of commerce. Our courts have taken judicial cognizance of the fact that a modern homebuyer of new residential housing is normally in an unequal bargaining position as against the seller. Kennedy v Columbia Lumber and Mfg Co Inc, 299 S C 335, 384 S E 2d 730 (1989). In Kennedy, the Court said that "The practical difficulties facing today's new home buyer mandate that we allow a buyer to ordinarily proceed against both the builder and seller or either of them." Id. at 344. In Kennedy, the Court held that liability may attach to a lender who becomes highly involved with construction in a manner that is not normal commercial practice of a lender. The Court held that in such a situation a lender may be held to be a joint venturer if it is so amalgamated with the developer or builder so as to blur its legal distinction. Id. at 340-341, citing Kincaid v Landing Development Corp, 289 S C 89, 344 S E 2d 869 (Ct App 1986).

The Kincaid case is directly on point both factually and legally with the case at bar. There were three corporations involved in Kincaid: The Landing Development Corporation ("LDC") the developer, Resort Management Group, Inc ("RMG"), the marketer, and Resort Construction Corporation ("RCC") the contractor. In the case at bar, there were three corporations: Heritage Communities Inc ("HCI") the overall developer, Heritage Riverwalk Inc ("HRI") the site specific developer, and Buildstar, the general contractor. In both Kincaid and the case at bar these corporations developed, built, owned and sold homes or condominiums. In Kincaid the homeowner filed suit alleging that the home was defectively constructed. At trial the trial Court directed a verdict of liability and held that the three corporations were "amalgamated" because the

legal distinction between the corporations was blurred. Ironically, the Kincaid Court noted that one Roger Van Wie was an officer in each of the corporations. In the case at bar one Roger Van Wie was not only an officer and director in each of the three corporations but also controlled each of the corporations even when there was a President and COO (R p 0703 line 20 p 0704 line 22). In Kincaid, the Court pointed out that when the homeowners' house was built all three corporate offices were located at the same place. In the case at bar, all of the corporate offices were located at the same place (R p 0876 line 12-23). As in Kincaid, the three corporate entities in this case shared the same officers and directors (R p 0876, lines 16-20). The Kincaid Court pointed out that a letter was introduced into evidence notifying the homeowners that RMG was the project developer and RMG's Vice President would handle all construction questions. Id. at 96. Similarly, in the case at bar, Heritage represented to the homeowners that they would fix construction problems (R p 0716 line 3-p 0717, line 16) and Heritage gave to each of the purchasers a warranty manual which clearly implies that Heritage Communities, Inc. is both the developer and contractor (R p 0187, line 7 p 0189, R pp 1807-1833). Nowhere in the manual are Buildstar or HRI mentioned. For example, Page 1 (R p 1810) of the warranty manual describes HCI's 'building philosophy', HCI discusses how the shortage of sheetrock slowed us down', in the last paragraph of page 2 (R p 1811) HCI refers to 'responses of our subcontractors' if building problems existed the homeowner was to call the homeowners assistance manager at the same telephone number as HCI (R p 1814)) on page 6 (R p 1815) HCI referred to the condominiums as a "Heritage Communities Inc unit" beginning on page 7, (R p 1816) HCI states what the homeowners can expect from them for various items in the building

The reality that Heritage Communities Inc and Buildstar are one and the same is clearly reaffirmed on page 15 of the warranty manual which provides that Heritage Communities Inc will not only do all it can to make sure that a quality home is produced, but will also inspect the project throughout the building process on a continual basis to make sure materials and workmanship are up to standards. Heritage states that the building department makes sure that 'we have adhered to all code requirements' (R p 2114). The warranty manual also describes the 'construction department' of Heritage Communities Inc as being responsible for the homes during construction. The closing phase of the process is the responsibility of Heritage Communities, Inc's 'home buying assistance department' (R p 2114). The testimony of Lynn Anderson who was the Vice President for finance for HCI (R p 0876 lines 12-23) and later became the President of Buildstar is also significant in this regard (R p 0868, lines 12-14). She testified that Buildstar subbed out all work. "We [Buildstar] were strictly management" (R p 0872 lines 8-9).

Gwyn Hardister, the President and COO of Heritage Communities Inc, testified that Heritage was in the business to develop, market and sell condominiums (R p 0701, lines 13-16). As Mr. Hardister testified, the delineation between Heritage and Buildstar employees was vague, but they all reported to Roger Van Wie (R p 0709, lines 9-19). The record testimony clearly establishes that HCI, HRI and Buildstar were viewed by their owners, officers and directors and by the homeowners as one and the same.

Appellants' discussion of piercing the corporate veil has no application to this case. Respondents did not present any evidence seeking to pierce the corporate veil nor was it argued by Appellants before the trial judge. Mid South Mgt. Co. Inc. v. Sherwood

Development Corp , 374 S C 588, 649 S E 2d 135 (Ct App 2007), clearly distinguishes between the theory of piercing the corporate veil and “amalgamation of corporate interests” or “blurred corporate identity” theory. The ‘amalgamation of corporate interests’ or “blurred corporate identity” theory was presented in the case at bar and the Court correctly held that these entities were amalgamated. As set forth above, the record is replete with evidence supporting the trial court’s amalgamating the Appellants.

III The Trial Court Ruled Properly in Allowing Respondents to Introduce Evidence of Similar Conduct by Heritage in Other Projects Constructed by the Same Heritage Entities Because the Testimony was Relevant to Prove the “Gamble Factors” and was also Properly Admitted Under Rule 406, *SCRE*, to Prove the Routine Practice of the Heritage Entities

Appellants contend that the trial court erred in allowing testimony of construction deficiencies in other projects citing Whaley v CSX Transp, Inc., 362 S C 456, 609 S E 2d 286 (2005). Whaley discussed the rule in South Carolina that evidence of similar accidents, transactions or happenings is admissible where there is some special relation between them tending to prove or disprove some fact in dispute. Appellants misperceive the reason for the introduction of evidence of other similar conduct of the Appellants. Respondents did not introduce this evidence to show bad character or to establish that construction defects existed in Appellants’ other projects and therefore existed at Riverwalk. If Respondents had introduced this evidence for that purpose, it would have been superfluous since the Appellants admitted at trial that these defects existed at Riverwalk. (Appellants’ Brief p. 23)(R. p. 1069, line 19-p. 1080, line 9). In allowing evidence of similar transactions or happenings, the trial judge recognized that in order to meet their burden to establish an entitlement to punitive damages under Gamble, *infra*, the Respondents were required to present evidence of Appellants’ awareness or

concealment of their conduct existence of similar past conduct and the duration of their conduct (R p 0248, line 7-p 0249, line 8) As enunciated by the Supreme Court, although the jury may not punish a defendant for wrongs visited on other people directly conduct of a similar nature may be shown to demonstrate the reprehensibility of the defendant's conduct Phillip Morris USA v Williams, 549 U S 346, 127 S Ct 1057 (U S Or 2007) See also, Atkinson v Orkin Exterminating Co , Inc , 361 S C 156, 604 S E 2d 385 (2004)

Our Supreme Court in Gamble v Stevenson, 305 S C 104, 406 S E 2d 350 (1991) held that trial courts are required to conduct a post-trial review of punitive damage awards and consider the following factors

- (1) Defendant's degree of culpability,
- (2) Duration of the conduct
- (3) Defendant's awareness or concealment,
- (4) The existence of similar past conduct
- (5) Likelihood the award will deter the Defendant or others from like conduct,
- (6) Whether the award is reasonably related to the harm likely to result from such conduct,
- (7) Defendant's ability to pay,
- (8) Other factors deemed appropriate

This Court has consistently held that evidence of similar past conduct is relevant to assist jurors in assessing punitive damages Judy v Judy, 384 S C 634 682 S E 2d 836 (Ct App 2009), Burbach v Investors Mgmt Corp Int'l, 326 S C 492, 484 S E 2d 119 (Ct App 1997)

The conduct, in order to comport with due process must be similar to be admissible. There is substantial testimony of the similarity of the deficiencies in Riverwalk to the deficiencies in the other Heritage projects.¹ (See Appellants' Brief p. 23, footnote 3)

Significantly, Gwyn Hardister, COO and President of Heritage Communities, Inc. testified without objection to similar deficiencies in other Heritage projects found at Riverwalk (R. p. 0711, line 7-p. 0712, line 14). Mr. Hardister further testified that despite the fact that Heritage was aware of deficiencies in the condominiums, they continued to sell the units without informing the purchasers who he agreed should have been told of these deficiencies (R. p. 0715, line 12 p. 0716, line 2).

As an additional sustaining ground for the trial court's admission of similar conduct, Rule 406, *SCRE*, allows introduction of the routine practice of an organization to prove that the conduct of an organization on a particular occasion is in conformity with their routine practice. Clearly, the testimony as enunciated above is sufficient to show that the routine practice of the Appellants was to construct condominiums containing significant and pervasive construction deficiencies and to sell them to innocent

¹¹ Jennifer Harmon testified that her company, the Noble Company, managed other Heritage projects including Riverwalk, Magnolia North, Avian Forest, and The Gardens, that all of these projects had similar deficiencies, and that Heritage was aware of the construction deficiencies in each of the projects (R. p. 0250, line 16 p. 0251, line 19). She further testified that Heritage turned the associations over to homeowners with knowledge of the construction deficiencies (R. p. 0252, line 10 p. 16). Respondent's expert Drew Brown testified that in addition to Riverwalk, he had investigated construction deficiencies at Avian Forest, Magnolia North, and Azalea Lakes and consistently found the same problems in the other projects that he found at Riverwalk (R. p. 0439-0440, line 1 p. 0478, line 18 p. 0479, line 1). Mr. Jim Graham was the Betterbilt window representative for the area encompassing the five Heritage projects in Horry County. He testified that the same windows were sold to all the Heritage projects and that he investigated problems that they were having at the Heritage projects with the windows. Mr. Graham met with Roger Van Wie in 1998 at which time Mr. Van Wie was asking for many of the windows to be replaced in all of the projects including 192 windows at Riverwalk. Mr. Graham informed Mr. Van Wie that Betterbilt would not replace the windows because Heritage was installing them incorrectly (R. p. 0636, line 12 p. 0637, line 12).

homeowners without informing them of the deficiencies. This routine practice of the Appellants is confirmed by the Appellants own expert, Alan Campbell, who testified that he investigated a number of other Heritage projects which had construction deficiencies and required a scope of repair as with Riverwalk (R. p. 1068, line 5-p. 1069, line 18). The testimony of litigation at other Heritage projects was admitted without objection (R. p. 1068, line 5-p. 1069 line 18).

Similarly, for the reasons set forth above, the Appellants discussion of habit and character under Rules 406 and 404, *SCRE*, have no relevance to the issues at hand.

Because the lower court correctly admitted evidence of similar conduct at other projects under established South Carolina case law and Rule 406, *SCRE*, the jury verdict should be affirmed.

IV The Court Properly Denied Appellants' Motion to Decertify the Class Because the Class was Properly Certified and Appellants Presented No Evidence of Changed Circumstances Warranting Decertification

Because of the potential of loss of use to the individual condominium unit owners, a putative class action was brought on behalf of the 228 unit owners by Tony L. Pope and Lynn S. Pope, individually and representing as a class all unit owners of Riverwalk at Arrowhead Country Club Horizontal Property Regime ("Pope Class Action"). The Pope Class Action was originally filed on June 23, 2005, and was certified as a class action by order of the Honorable Benjamin H. Culbertson on August 28, 2008 (R. p. 0020-0025). The Pope Class Action and the POA Action were consolidated for trial.

Subsequent to trial, Appellants filed a motion to decertify the class (R. pp. 1914-1915). No changed circumstances were set forth in the motion to decertify. The motion to decertify was denied by Judge Newman (R. p. 0209 lines 6-7).

A trial court has discretion as to whether or not a class should be certified King v American General Finance Inc, 2009 WL 4893651(S C) In South Carolina a trial Court's ruling on whether an action is properly maintainable as a class action is within the Court's discretion Tilley v Pacesetter Corp 333 S C 33, 508 S E 2d 16 (1998) Therefore, a Court's decision on whether or not to certify a class is reviewed under an abuse of discretion standard Id Neither the trial court nor the reviewing court may look to the merits when determining whether to certify a class Id Although the decision to certify a class is not immutable, most Courts that have considered the issue have held that in order for the court to decertify there must be a showing of some changed circumstances warranting the decertification Rosolowski v Clark Refining and Marketing, 383 Ill App 3d 420 890 N E 2d 1011 (Ill App 1 Dist 2008)(decertification not warranted where no showing of changed circumstances justifying decertification), Wernikoff v Health Care Service Corp 376 Ill App 3d 228 877 N E 2d 11 (Ill App 1 Dist 2007)(decertification of class after class certification requires clearly changed circumstances rather than mere feeling of error regarding the original certification order) Green v Obledo 29 Cal 3d 126 172 Cal Rptr 206 (1981)(class should be decertified only where changed circumstances exist making continued class action treatment improper) Rivera v Veterans Memorial Medical Center, 262 Conn 730, 818 A 2d 731 (2003)(class should be decertified only where it is clear there exists changed circumstances), Doerr v Mobil Oil Corp 935 So 2d 231 (La App 4th Cir 2006)(In the absence of materially changed or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, courts should not condone a series of rearguments on the class issues by either the proponent or the

opponent of class [certification], in the guise of motions to reconsider the class ruling”) (*citation omitted*) The Appellants presented no evidence of changed circumstances warranting decertification In effect, Appellants simply argued that Judge Culbertson erroneously certified the class

Appellants argued the class should be decertified because of the lack of commonality in that each class member would potentially suffer a different level of loss or no loss at all The possibility that individualized inquiry into plaintiffs’ damage claims will be required does not defeat class certification if common issues nevertheless predominate that is liability issues far exceed in complexity the more mundane individual damage issues In re Honda Motor Co., Inc. 979 F Supp 365 (D Md 1997) Gunnells v Healthplan Services Inc. 348 F 3d 417 (4th Cir 2003) As interpreted by the federal courts the federal rule counterpart Rule 23 (a)(2) *FRCP* neither requires that all, or even most issues be common nor that common issues predominate, but only that common issues exist Central Wesleyan College v W R. Grace & Co 143 F R D 628 (D S C 1992) Because the commonality requirement may be satisfied if the putative class shares only a single common question of law or fact “it is easily met” Olvera Morales v Intern Labor Mgt Corp 246 F R D 250 (M D N C 2007) In the case at bar, the liability issues among the class members are the same, *i e* negligent construction and resulting damages There are not complex issues that require individual inquiries into damages that each homeowner would suffer that predominate over the common issues Windham v American Brands Inc 565 F 2d 59 (4th Cir 1977) See also Brown v Nucor Corp, 576 F 3d 149 (4th Cir 2009) The Appellants own witness Dr Teel was able to provide a damage estimate for loss of use using his determination of

the different uses made by the homeowners of their units (R p 1318 line 2 p 1567, line 3)

Appellants also assert that the typicality requirement of Rule 23(a)(3) *SCRCP* was not met since the Respondents Tony & Lynn Pope used their unit in a different manner than some of the other owners. Appellants misperceive the requirement of typicality. Rule 23(a)(3), *SCRCP* requires that the claims of the representative party be typical of the claims of the class. While the commonality requirement focuses on the claims of the class as a whole, the typicality requirement focuses on the named plaintiff's claim. Broussard v Meineke Discount Muffler Shops Inc., 155 F.3d 331 (4th Cir. 1998).

The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so goes the claim of the class. " *Id.* quoting Sprague v General Motors Corp. 133 F.3d 388 (6th Cir. 1998). [T]o establish typicality, the class

representatives must show (1) that their interests are squarely aligned with the interests of the class members, and (2) that their claims arise from the same events or course of conduct and are premised on the same legal theories as the claims of the class members.

Fisher v. Virginia Elec. & Power Co., 217 F.R.D. 201 (E.D. Va. 2003). *see also* In re Am.

Med. Sys. Inc. 75 F.3d 1069 (6th Cir. 1996) ("[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.") Here, the

Pope class representatives are Riverwalk unit owners whose claims are not only similar but identical to the claims of the other class members, i.e., negligent construction and loss of use damages. The fact that the Papes used their unit in a different manner than some

of the other owners does not destroy typicality. The claims are based on the same event or course of conduct. As goes the claims of the Popes, so goes the claims of the class.

Based on the well established case law, the court committed no error in refusing to decertify the class.

V The Court Properly Allowed Respondents' Expert to Testify Regarding the Loss of Use Damages. No Evidence of Post Remedial Measures Was Introduced Because No Remediation Was Performed by Appellants and No Objection Was Made by Appellants at Trial on the Grounds of Post Remedial Measures, the Trial Court Properly Allowed Evidence Establishing that Appellants Had Notice of Improper Window Installation During Construction.

A The trial court did not err in allowing Respondents' loss of use expert to testify.

The testimony of Mr. DeSantis was properly admitted because he was well qualified as an expert in the field of loss of use damages. The trial court's decision to admit or exclude testimony is subject to a clear abuse of discretion standard on appeal. Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002). All expert testimony, whether scientific, technical or specialized, must meet the reliability requirements of Rule 702. SCRE State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

At trial, Respondents called Mr. Albert Best, an experienced contractor, to testify as to the repairs needed at Riverwalk. (R. p. 0644). Mr. Best testified that the buildings at Riverwalk would need to be unoccupied during repairs for a period of four months. (R. p. 0674, lines 19-25). Respondents then called Mr. Francis DeSantis to testify as to the financial value of the loss of use for the period of four months. (R. p. 0782). Mr. DeSantis holds a degree in Mechanical Engineering from Villanova and has completed graduate work in engineering and in business. He worked at Exxon and Citibank in various capacities and then purchased a rental and real estate business in Myrtle Beach.

At the time of trial he had been operating that business for fifteen years. His business was 98% condominium rental and he rented approximately 150 condominium units of different sizes and at different locations. His responsibilities included determining rental rates, rental prices and market trends for these condominiums. He had been setting rental rates in the Myrtle Beach market for a period of fifteen years. As part of his responsibilities he also made comparisons of condominium rental rates and occupancy rates in the Myrtle Beach area. Mr. DeSantis also held a real estate broker's license for a period of fourteen years. In the past several years he has provided calculations of loss of use. He has done numbers of studies and analysis to put a financial value on rental rates needed to replace a condominium for a period of time. In 2006 he was tendered and qualified in the Courts as an expert in loss of use (R. p. 0782, line 18; p. 0788, line 18). Appellants' attack upon Mr. DeSantis' education and experience go to the weight, not the admissibility of his testimony. Peterson v. National R.R. Passenger Corp., 365 S.C. 391, 618 S.E.2d 903 (2005). Mr. DeSantis was properly qualified as an expert to testify as to the loss of use damages that would be sustained by homeowners during the four months which Mr. Best testified the condominiums would be closed.

B. The Trial Court did not commit error by admitting evidence that Appellants had notice of incorrect window installation during construction which is not evidence of post remedial measures and even if it were, no objection was made on the basis of Rule 407. *SCRE*

Respondents again note that Appellant is limited to the grounds for an objection which are raised at trial and the objection must be on a specific ground. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) (Appellant is limited to the grounds raised at trial); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008); State v. Luckabaugh, 327 S.C. 495, 489 S.E.2d 657 (Ct. App. 1997) (Issue not preserved when

defendant failed to object to testimony of less than clear and convincing), see also State v. Nichols 325 S C 111 481 S E 2d 118 (1997)(An objection must be on a specific ground) Our courts have held that in order for an appellant to preserve an issue for appeal it must be (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control 380 S C 349, 669 S E 2d 899 (Ct App 2008), see also S.C. Dep't of Transp v. First Carolina Corp. of S.C. 372 S C 295 641 S E 2d 903 (2007)

Appellants object to the admission of Respondents Exhibit 45 on the grounds that Exhibit 45 and testimony of James Graham violated Rule 407 SCRE involving post remedial measures. When Exhibit 45 was presented to Mr. Graham for introduction into evidence, Appellants' counsel objected stating "subject to the prior objection, Judge" (R p 0635, line 17-p 0636, line 6). Prior to the presentation of Mr. Graham a long colloquy was held between trial counsel and the court. At no time during this colloquy, however, did Appellants' counsel object either to Mr. Graham's testimony or to Exhibit 45 based upon Rule 407, SCRE (R p 0584, line 22 p 0636, line 10). Appellants' counsel argued that the Respondents were attempting to introduce evidence in violation of the evidentiary rules. When the court asked which evidentiary rule, Appellants' counsel responded it is 408 (compromise and offers to compromise) (R p 0591 lines 4-5). Further Appellants' counsel in arguing their objection, stated "It does not go to bias, it is not a violation of the rulebook it goes to the other aspects of settlement which could be introduced in this trial which goes to the bias of the witness (R p 0600, lines 19-22)

Even if a proper objection were made on Rule 407 *SCRE* grounds neither the testimony of Mr. Graham, nor the admission of Exhibit 45 violate Rule 407, *SCRE* which deals with post remedial measures. When Mr. Graham, a Betterbilt Window employee, investigated the reported problems with the windows at Riverwalk, Riverwalk was in the early stages of construction with only the first seven or eight buildings being completed at that time (R. p. 0631, lines 14-24). When Mr. Graham visited the Riverwalk site he observed that the windows were being installed incorrectly and he advised the construction superintendent of this fact (R. p. 0632 line 14-p. 0634 line 1). Despite being placed on notice of improper window installation, Heritage continued to construct the Riverwalk buildings and to install the windows in a defective manner. This is the condition found by Respondents' expert, Drew Brown, when he investigated the Riverwalk project (R. p. 0413 line 20-p. 0414, line 21, R. p. 0049, line 6-p. 0452, line 18) -- Respondents' counsel correctly noted to the court that the purpose of the introduction of Exhibit 45 was to show that Heritage had notice that they were installing the windows incorrectly and despite this fact they failed to correct these deficiencies and continued selling the units (R. p. 0616 line 7 p. 0617, line 16). The testimony by Mr. Graham and Respondents' Exhibit 45 could not be evidence of post trial remedial measures in violation of Rule 407, *SCRE* because the window problems were never remedied. Appellants' expert Alan Campbell testified that the windows he proposed to be fixed were the same windows Heritage was trying to get Betterbilt to replace in 1998 (R. p. 1097 line 20-p. 1098, line 1). Accordingly, Appellants' argument that the challenged testimony and Exhibit 45 violate Rule 407, *SCRE*, is clearly without merit because the substance of the testimony and Exhibit 45 do not address remedial measures.

VI The Trial Court Correctly Granted Respondents' Motion for Directed Verdict as to the Negligence Claims in Both Actions Especially in Light of the Fact that Appellants' Counsel Conceded to the Jury that the Issue Before Them was the Amount of Damages to be Awarded Respondents

When ruling on a motion for directed verdict, appellate courts apply the same standard as the trial court, viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. A court should deny a motion for directed verdict when the evidence yields more than one inference or its inference is in doubt. The court will reverse only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Richland County v. Carolina Chloride Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct. App. 2009).

In his opening statement, Appellants' trial counsel had this to say:

Ladies and gentleman of the jury, the real issue in this case is what is it going to cost to fix condominiums out at Riverwalk, and that is the central issue and what we deny, as Mr. Henry has raised in the pleadings, is that the costs out at Riverwalk are going to cost over 8.6 million dollars because that is what they are going to come before you during the course of this trial and ask from you, multi, multi-millions of dollars to do repairs out at Riverwalk which are not in line with what the true issues are out there. We submit that the cost estimates that we will put before you are the real and true costs for fixing the issues out there at Riverwalk.

You will hear us say repeatedly during this case we're not running from these issues. We acknowledge there are issues out at Riverwalk. We acknowledge there are certain repairs that need to be made but they do not fall anywhere near the class of repairs that these Plaintiffs are going to ask for in this case.

(R. p. 0211, line 17-p. 0212, line 12)

Similarly, in his closing statement Appellants' counsel stated to the jury:

Ladies and Gentlemen, the real number in this case is the fix that you heard from Steve Watkins, \$2,391,619.00 is the Steve

Watkins fix, you will have it back there and when you add that to the repairs that the Noble Company made out there that are permanent, then the true verdict, the true verdict in this case would be the two added together \$2 518 196 48 That is the true verdict

(R p 1480, lines 14 21) This admission by Appellants counsel supports the granting of the directed verdict and bars the Appellants from raising this issue on appeal Collins v Bisson Moving & Storage, Inc 332 S C 290, 504 S E 2d 347 (Ct App 1998) see also Southern Ry Co v Routh, 161 S C 328, 159 S E 640 (1930)(Holding directed verdict properly granted where counsel conceded there was no question to be submitted to the jury, issue conceded at trial may not be argued on appeal)

Even if Appellants' counsel had not conceded liability a directed verdict would have been appropriate Kincaid v Landing Development Corporation, 289 S C 89 344 S E 2d 869 (Ct App 1986), is apposite In Kincaid, the respondents alleged negligent construction of a home The trial court directed a verdict for the homeowners on the issue of liability Upholding the judge's directed verdict on appeal the Court stated

The trial Judge directed a verdict for the homeowners on the issue of liability On appeal from this order, we must review the evidence and all reasonable inferences in the light most favorable to the Appellant Claytor v General Motors Corp 277 S C 259, 286 S E 2d 129 (1982) Wayne Vereen, a witness for Appellants testified on direct examination to construction defects in the house Also he gave an estimate as to the costs of repairs John Simko another witness for the Appellants, agreed with Vereen Based on this testimony the trial Court correctly directed a verdict for the homeowners We note the record is replete with other evidence of negligence construction

(Id at p 5)

In this case Appellants expert witness Alan Campbell testified that there were many construction defects in the buildings and he also provided a scope of repair for the

defects he determined needed to be corrected (R p 1069 line 19-p 1078 line 9) The Appellants also called Mr Steve Watkins to provide an estimate based upon the Alan Campbell supplied scope of repair (R p 1160, lines 8-11)) Mr Watkins testified it would cost \$2,391,619 00 to repair the construction defects On cross examination Mr Campbell with very little exception agreed to all the defects, code violations and violations of industry standards testified to by Mr Drew Brown, Respondents' expert (R p 1069 line 19-p 1078, line 9) The record is also replete with other evidence of defective construction which was largely unchallenged by the Appellants (R p 0388, line 16 p 0574, line 8)

Appellants argue the court erroneously granted a directed verdict as to negligence generally and not negligence as to specific defects Appellants argued at trial that because all of the work was done by sub-contractors they were not automatically liable for the acts of their sub-contractors, relying on Fields v J Havnes Waters Builders Inc., 376 S C 545, 658 S E 2d 80 (2008) In Fields, the homeowners brought suit against the builder for damages arising from installation of defective stucco siding that allowed moisture intrusion asserting claims *inter alia* for negligence and breach of warranty The Fields homeowners alleged that in South Carolina the general contractor is "automatically responsible" for the negligence of a sub-contractor The court rejected this argument pointing out that the court had instructed the jury that

[a] builder who undertakes construction of a building impliedly represents that he possess and will exercise a reasonable degree of skill usually possessed by a member of the building occupation and that [a] builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code and in a good and workmanlike manner "

(Id at p 561)

In this case, the judge at the insistence of Appellants charged the jury as follows

Ladies and gentleman, a general contractor has a duty to supervise the construction of the underlying project. However the general contractor is not automatically responsible for the negligence of the sub-contractors that work on the same project. The Plaintiff must still prove that the general contractor breached his duty to supervise the construction of the project and that this alleged breach was the proximate cause of the Plaintiffs' damages. You cannot award punitive damages where it is standard industry practice for a general contractor or developer to rely upon his sub-contractors and they do so. It is presumptively reasonable for a general contractor to rely on his sub-contractors when it is standard industry practice.

(R p 1498 lines 5-19)

Mr Drew Brown Respondent's expert testified without objection as follows

Question	Have you formed an opinion to a reasonable degree of certainty based on your experience as a contractor and forensic expert, as to whether or not the contractor and the developer in this case breached their standard of care?
Answer	Yes
Question	And what is your opinion?
Answer	That the standard of care was breached

(R p 0479 lines 2-9)

Appellants offered no challenge to this opinion. Their challenge was solely to the scope of the repair and not to liability. As the judge ruled in directing a verdict in Respondents' favor on the issue of negligence

It would not be proper to allow counsel to represent to the Jury that the Defendant is responsible and intends to engage in repairs on the one hand and on the other hand argue as a matter of law they are not responsible. More importantly than that, the witnesses all acknowledge defects in the construction and I grant

the Plaintiffs' motion for directed verdict on the issue of negligence

(R p 1385, lines 17-24)

The Court was correct by directing a verdict for Respondents on the issue of negligence. Appellants conceded liability in its arguments before the jury and cannot now raise the issue on appeal.

VII The Trial Court Properly Denied Appellants' Motion for a Directed Verdict or JNOV as to Respondents' Damage Claims Because the Respondents Proof Allowed the Jury to Assess the Damages With Reasonable Certainty and Clearly Created a Sufficient Basis for the Jury to Award Punitive Damages

A The damages were not speculative because the proof was sufficient to allow the Jury to determine the amount of damages with reasonable certainty.

Appellants contend that the Respondents' proof of damages was "impermissibly speculative" because there were numerous unknowns in the Respondents' expert's estimate of the cost of repairs. They argue that because some of the damage from water intrusion was hidden, the exact quantity of damage could only be estimated. First, Appellants' failed to object to the testimony of hidden damage and the estimation of the hidden damage (R p 0653 line 10-p 0654, line 14 R p 0069, line 24-p 0670, line 11.) Appellants' failure to timely object when this testimony was initially offered waives their right to argue error on appeal. Campbell v. Jordan, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009) see also City of Greenville v. Bryant, 257 S.C. 448, 186 S.E.2d 236 (1972) (failure to timely object to introduction of evidence constitutes waiver of argument on appeal).

Even if the Appellants had preserved this issue for review, an estimate of hidden damage was proper. In Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968), the court, addressing the issue of speculative damages, observed that while it is true that the existence or amount of damages cannot be left to conjecture, guess or speculation, proof to a mathematical certainty is not required. Proof must only be sufficient to allow a reasonable basis of computation.

Respondents' expert, Mr. Al Best, who was employed to give an estimate of the costs of repair, addressed the issue of hidden damages. (R. p. 0653, line 10-p. 0654, line 14). He testified that the restoration projects his company has undertaken involving water intrusion always have a fair amount of hidden damage. (R. p. 0653, line 10-p. 0654, line 14). This testimony was admitted without objection. He testified as to his method of determining the amount of hidden damage by comparing it to other buildings which his company had repaired which were of similar construction. He testified that they had done at least 200 to 300 buildings using this method of calculation. He further testified that his estimate at Riverwalk contained an allowance for hidden damage which constituted approximately 10% of the contract and in his experience in estimating repair costs in condominium projects in the Little River area hidden damage allowances run between 10% and 30% of the contract price. (R. p. 0669, line 24-p. 0670, line 11). This is a sufficient and reasonable basis for computation of hidden damages. In fact, Mr. Steve Watkins, Appellants' expert, in arriving at his estimate of damages included numerous allowances and contingencies for hidden damage. As Mr. Watkins testified, we don't have x-ray vision to see through

h these brick (R p 1188)² see May v Hopkinson, 289 S C 549, 347 S E 2d 508 (S C App 1986)(Court upheld contractor s repair estimate which projected the cost of repair at \$25 430 00' even though exact repairs to be completed could not be determined because removal of some defective wood was expected to reveal additional problems) Id p 8 Accordingly a reasonable basis of computation is set forth in the record and the issue of damages was properly submitted to the jury

Appellants argument regarding Mr DeSantis being unqualified as an expert to testify as to the loss of use is addressed in Argument V and Respondents rest on that argument

B Respondents established that each Appellant violated its respective standard of care and established its entitlement to punitive damages by clear and convincing evidence

The trial court properly ruled that the Hentage entties were so inter-related that their legal distinction was blurred and therefore the action of one was the action of all Even if the court erred in amalgamating the Appellants, such error was harmless since each of the Appellants' standard of care was clearly established Essentially, there were two parties i e , a developer (HCI and HRI) and a contractor, Buildstar No expert testimony was necessary to prove negligence or causation by these parties because from the testimony presented, a lay person would possess the knowledge and skill to determine

² Mr Watkins included an allowance of 15% of the repair areas for sheathing behind the bricks (R p 1191 lines 7 19) He testified 15% was appropriate and adequate for an allowance for hidden damage (R p 1191 lines 9 17) Mr Watkins testified that 10% allowance for the replacement of the windows was appropriate (R p 1192 lines 18 24) He gave an estimate of 10% for fixing band boards (R p 1196 lines 15 17) He gave an estimate of an amount needed to draft stop the attics although there were unknowns (R p 1204 line 15 p 1205 line 1) Mr Watkins included a 10% contingency to cover hidden issues or undiscovered issues that relate to the building (R p 1205 lines 2 7) He estimated \$2500 for landscaping that may be damaged during repairs (R p 1211 lines 5 11) He estimated 10% replacement of carpet with new carpet (R p 1223 lines 2 6)

the standard of care O'Leary-Payne v R R Hilton Head II Inc 371 S C 340, 638 S E 2d 96 (Ct App 2006)

Mr Gwyn Hardister Chief Operating Officer and President of Heritage Communities, Inc , which was the parent corporation of Heritage Riverwalk Inc and Buildstar, Inc testified that Heritage was in the business to develop market and sell condominiums (R p 0701, lines 13-16) The standard of care of the developer was clearly set forth by Mr Hardister (R p 0719) Sims v Hall 357 S C 288, 592 S E 2d 315 (Ct App 2003)(Expert testimony not needed to show standard of care where Defendants admit standard of care), Stallings v Ratliff, 292 S C 349 356 S E 2d 414 (Ct App 1987) (Defendant and his expert established the applicable standard of care) Mr Hardister testified that Heritage as the developer of residential condominiums had a duty to provide a condominium free from defects free from water intrusion, free from rot and compliant with the building codes (R p 0719 line 5-15) Mr Hardister further testified that notwithstanding Heritage's knowledge of construction deficiencies, it continued to sell condominiums without informing the purchasers of the construction deficiencies (R p 0715, lines 5-25) Mr Hardister candidly admitted that Heritage should have informed the purchasers of the deficiencies (R p 0715 line 23-p 0716, line 2) He also candidly admitted that Heritage placed defective condominiums into the stream of commerce (R p 0718 line 17-p 0719, line 4) There was also evidence that the developer received at least two maintenance survey reports detailing significant construction deficiencies throughout the Riverwalk buildings (R p 1694-1709 R pp 1711-1774)) The first report, prepared in October of 1999 by Kimley Horne (R p 0230, lines 1-14) was given to the board of directors of the Riverwalk Homeowners Association

which at that time was the developer (R p 0233, lines 12-16) In March of 2000 Mr Hardister appeared before the homeowners association and advised the homeowners that Heritage Communities had found the problem with the leaking decks and that Heritage Communities would repair them at its own expense (R p 0234 line 12-p 0326 line 19) In addition, Heritage informed the homeowners that it would fix all of the problems (R p 0237, lines 7-13) In 2002 another annual maintenance survey was conducted which identified the same problems that were identified in the 1999 report (R p 1775-1806) This report was also given to the developer (R p 0254 line 5-p 0255 line 17) As soon as the developer received the 2002 report (R p 1775-1806) its response was to dump the defective common elements on the homeowners, thereby placing the burden on the homeowners to correct the deficiencies (R p 0722, line 10-p 0723, line 2) Mr Hardister candidly told the jury that the homeowners were entitled to have those repairs made (R p 0723 lines 9-15) A lay person would not need expert testimony to determine the developer s standard of care and a breach thereof

The contractor's standard of care was likewise fully covered by the Respondents expert Mr Drew Brown and the Appellants expert Mr Alan Campbell A lay person would know that a contractor who admittedly built condominiums with code violations violations of industry standards and good construction practices would be guilty of negligence Madison ex rel Brvant v Babcock Center 371 S C 123 638 S E 2d 650 (2006) (Standard of care may be established by *inter alia* administrative regulations, common law and industry standards) Mr Brown testified without objection to a breach of HCI and Buildstar's standard of care (R p 0479, lines 2-9) As this Court said in Kincaid supra where there is considerable testimony in the record concerning building

deficiencies whether or not these deficiencies resulted in reckless wanton or willful conduct thus justifying punitive damages, was properly left to the jury by the trial judge. Id. The same holding is applicable in the case at bar. Accordingly, the jury's verdict should be affirmed.

VIII The Court Properly Submitted the Issue of Punitive Damages to the Jury and Properly Upheld the Punitive Damages Award Under the Guidelines of Gamble v. Stevenson

A The Appellants failed to raise a due process objection to similar past conduct by Heritage.

Appellants contend that the trial court erred in allowing testimony of defects and related litigation in other Heritage projects because the admission of such evidence violated their due process rights citing Phillip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057 (U.S. Or. 2007) and Atkinson v. Orkin Exterminating Company, 361 S.C. 156, 604 S.E.2d 385 (2004) in support. Appellants failed to raise the due process objection at trial. The due process objection discussed in Phillip Morris USA, *supra*, forbids a state from using a punitive damages award to punish a defendant for injury that it inflicts upon non-parties, i.e. injury that it inflicts upon those who are strangers to the litigation. Appellants' objection at trial was founded upon Whaley v. CSX Transp. Inc., 362 S.C. 456, 609 S.E.2d 286 (2005) which was cited to the trial judge (R. p. 0149 line 19-p. 0150 line 9). Whaley instructs that evidence of other conduct, happenings or transactions must be similar if introduced for the purpose of proving or disproving some fact in dispute. Since the Appellants did not raise the due process argument at trial, it is not preserved for appeal. (R. p. 0143 line 13-p. 0158 line 3) South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008).

Even if the issue were preserved for Appellate review the court was correct in admitting the evidence. Although the Supreme Court held in Phillip Morris USA, supra that a defendant may not be punished with punitive damages for the direct harm it inflicted upon non-parties to the litigation, the Court agreed with the plaintiff and Phillip Morris did not disagree that the plaintiff was entitled to show similar harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. As the trial court said in the case at bar such similar conduct is necessary in order for the Plaintiff to meet its burden under the requirements of the Gamble factors. (R. p. 0248, lines 7-25) See Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009) (Evidence of similar past conduct is admissible to support the Plaintiff's claim for punitive damages even though other tenants were not parties to the case because such evidence is relevant to the first five Gamble factors). Similarities of the deficiencies in other Heritage projects to which Appellants object are clearly established in the record and fully discussed under Argument III above.

B. The Court was correct in upholding the punitive damage award after a review of the Gamble factors.

In Gamble v. Stevenson, 305 S.C. 104, 111 S.E.2d 406, 350, 354 (1991), the South Carolina Supreme Court mandated that the trial courts conduct a post-trial review of any punitive damage award to determine if such award comports with requirements of due process. Those factors are:

- (1) Defendant's degree of culpability
- (2) duration of the conduct,
- (3) defendant's awareness or concealment
- (4) the existence of similar past conduct
- (5) likelihood the award will deter the defendant or others from like conduct
- (6) whether the award is reasonably related to the harm likely to

result from such conduct, (7) defendant's ability to pay and finally (8) other factors" deemed appropriate

Pursuant to this mandate, the trial court conducted a post-trial Gamble review and upheld the award of punitive damages (R. p 0042-0047). Appellants do not contend that the amount of the punitive damage award violates constitutional guidelines. Appellants contend that some of the Gamble factors weigh in favor of a reversal of the punitive damages award. The judge's findings will not be reversed unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd v City of Greenville, 266 S C 81, 221 S E 2d 773 (1976)

Appellants contend that since they were out of business prior to the commencement of the litigation there will be no deterrent effect in a punitive damages award. Additionally, Appellants contend that because the Appellants are insolvent there is no ability for them to pay any award of punitive damages. In Miller v City of West Columbia 322 S C 224 471 S E 2d 683 (1996), appellant claimed error by the trial court in failing to strike punitive damages pursuant to the Gamble review because the record did not establish that Broom acted in a similar manner in the past and that he had an ability to pay. In upholding the punitive damages award the Court said that although the Gamble factors are relevant in assessing an award of punitive damages specific factual findings concerning each factor are not required. Despite the fact that the Appellants are out of business and a punitive damages award may have no deterrent effect on Appellants an award of punitive damages is allowed as a deterrent to others. Mitchell, Jr v Fortis Ins Co 686 S E 2d 176 2009 WL 2948558 (S C)

The trial court's findings comport with the Gamble holding and therefore must be affirmed

IX This Court Should Affirm the Jury Awards in the POA Action and Class Action on the Additional Sustaining Ground that Appellants Failed to Appeal All Causes of Action Which Were Included in the General Verdict.

The Court should sustain the verdicts in both cases under the "two issue rule" since the Appellants failed to appeal the Breach of Fiduciary Duty cause of action in the POA Action and failed to appeal the Breach of Warranty of Habitability cause of action in the Pope Class Action. In the POA Action, three causes of action were submitted for the jury's consideration: Negligence, Breach of Fiduciary Duty, and Breach of the Warranty of Habitability. (R pp 0052-0053) The jury found for Appellants on the Breach of Warranty of Habitability claim. However, the judge determined negligence by directed verdict and the jury found a breach of fiduciary duty and rendered a general verdict in the amount of \$4,250,000.00 actual damages and \$250,000.00 punitive damages.

In the Pope Class Action, two causes of action were submitted for the jury's consideration: negligence and breach of the warranty of habitability. (R pp 0058-0059) The judge determined negligence by directed verdict and the jury found Appellants breached the warranty of habitability and rendered a general verdict in the amount of \$250,000.00 in actual damages and \$750,000.00 in punitive damages.

In the POA Action, the Appellants have failed to raise or appeal the cause of action of breach of fiduciary duty. In the Pope Class Action, the Appellants have failed to raise or appeal the cause of action of breach of warranty of habitability. Where a jury's general verdict is supported by more than one cause of action submitted to it, the

Appellate Court will affirm unless the Appellant appeals all causes of action Anderson v South Carolina Dep t of Highways and Pub Transp 322 S C 417, 472 S E 2d 253 (1996)(Trial Court s decision affirmed where the jury returned a general verdict, and appellant only raised abuse of process issue but failed to raise defamation issue) Accordingly, the court should sustain the verdicts rendered by the jury in this case under the "two issue rule

CONCLUSION

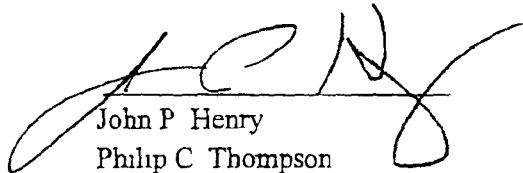
For the foregoing reasons respondents respectfully request the court to affirm the jury s verdict

Respectfully submitted

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April 23, 2010



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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005 CP-26 3289

Tony L Pope and Lynn S Pope, Individually and
Representing as a Class All Unit Owners for Riverwalk At
Arrowhead Country Club Horizontal Property Regime,

Respondents

v

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

Appellants

Case # 2003-CP-26 7169

Riverwalk At Arrowhead Country Club Property Owners'
Association, Inc ,

Respondents

v

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

Appellants

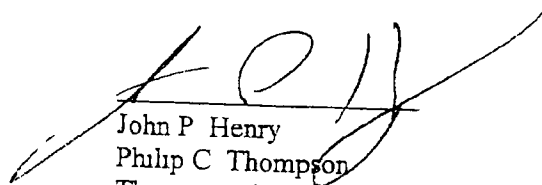
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR

SIGNATURE PAGE ATTACHED

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April 23, 2010 2010

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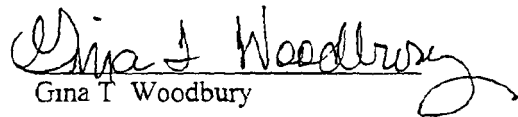
PROOF OF SERVICE

I certify that I have served the Final Brief of the Respondents and the Certificate of Counsel on the Appellants Heritage Communities Inc , Heritage Riverwalk, Inc , and Buildstar Corporation by depositing a copy of it in the United States Mail, postage prepaid on April 23, 2010, addressed to their attorneys of record as follows

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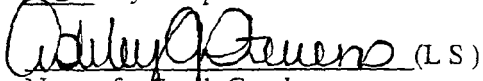
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23 day of April 2010

 (L S)

Notary for South Carolina

My Commission Expires 7/25/2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005-CP-26-3289

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Regime,

Respondents,

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Appellants

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Owners' Association, Inc

Respondent,

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and Buildstar Corporation,

Appellants

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1

ARGUMENT

I Appellants did not concede liability as to the negligence claims and the directed verdict as to these claims was improper

Throughout their Initial Brief Respondents repeatedly and incorrectly contend that the Appellants admitted or conceded liability as to the negligence claims (Respondents Initial Brief, pp 6-7, 12 26-32) Respondents essentially contend that by offering alternative damages evidence and making statements acknowledging the existence of defective conditions at Riverwalk Appellants' counsel made a judicial admission that Appellants were liable for the defective conditions This error was adopted by the Trial Court and it served as the primary basis for the Trial Court's erroneous grant of directed verdict as to the negligence claims (R 1385)

A judicial admission is an admission made in court by a person's attorney for the purpose of being used as a substitute for the regular legal evidence of the facts at trial Blacks Law Dictionary 48 (6th ed 1990) The statements of Appellants' counsel cited by Respondents and the testimony of Appellants' witnesses regarding defective conditions and the estimated costs to remedy those defects do not constitute admissions of liability They merely acknowledge that defective conditions exist at Riverwalk and not that Appellants are liable for those defective conditions Appellants offered evidence at trial on the issue of causation which would have allowed the jury to conclude that the defective conditions were the result of the negligence of subcontractors or Respondents' own negligent upkeep See Section VI, Appellants Initial Brief It was entirely permissible for Appellants to defend this action by challenging causation while simultaneously challenging and offering alternative

computations of Respondents damages MacFarlane v Manly, 274 S C 392 395, 264 S E 2d 838 840 (1980) (stating that defendants have the right to plead alternative or inconsistent defenses) This was noted by Appellants counsel during the Trial Court s consideration of the directed verdict motion

As to the negligence issue, Your Honor, I certainly got up there in opening and being nothing but frank with the jury acknowledged there were issues out there at Riverwalk and laying out the damages in an opening statement how the case will progress, we layed out that our defect experts and our estimator have identified there is \$2 391 619 in deficiencies out there and that I said to the jury was what are the real issues and what is it going to really cost to fix it and I gave them a number

Now to say that means you automatically have bought into that, I don t believe it is fair under the pleadings but under the pleadings we re allowed we pled both affirmatively that there are third parties' responsibility [sic] there are other third parties You can plead that in the alternative and plead inconsistent theories in the pleading process and at least offer alternative theories during the presentation of your case

(R 1377-78)

South Carolina s courts have acknowledged the common view that judicial admissions must be clear deliberate unequivocal statements of fact and not conclusions of law or expressions of opinion Lytle v Reagan, 256 S C 269, 274, 182 S E 2d 302 305 (1971) (agreeing with the majority view of other jurisdictions that where a party s testimony is adverse to himself and consists mainly of estimates opinions and conclusions, it is not the equivalent of a judicial admission and is not conclusive) Other states have held that statements, such as Appellants' counsel's statements in this case do not constitute judicial admissions of liability Hurt v Chavis 739 A 2d 924 929 (Md App 1999) (noting that liability requires more than a finding or admission of negligence and holding that no judicial admission occurred based on counsel's statements that the case was about damages where causation was clearly at

issue looking at the trial in its entirety), Haydel v Hercules Transport, Inc 654 So 2d 418, 427 (La App 1995) (holding that statement by defense counsel, while conceding negligence did not concede liability) Baxter v Gannaway 822 P 2d 1128 (N M App 1991) (holding that defense counsel s statement to the jury as to what he thought the defendant owed was not a judicial admission) Zitzmann v Miller, 551 N E 2d 707, 709-10 (Ill App 1990) (holding that defense counsel's statement of the value of plaintiff's damages was not a judicial admission when considering the circumstances of the case and the context of the comment) Hayes v Xerox Corp 718 P 2d 929 932-33 (Alaska 1986) (holding that defense counsel s statement that defendant owed plaintiff a lot of money, but the amount owed was for the jury to decide, was merely opinion, and not the clear deliberate and unequivocal statements of fact necessary for a judicial admission) Haynes v Hunt 208 Cal App 2d 331 335 (1962) (holding that "[s]tatements of counsel in argument (or otherwise) and not evidence and unless in the form of a stipulation or admission, are not binding on the client")

Respondents' contention that Appellants conceded liability on the negligence claims is unfounded Furthermore the Trial Court s mistaken adoption of this view served as the primary basis for its grant of directed verdict as to the negligence claims As illustrated in Appellants Initial Brief, evidence was offered at trial which created factual issues as whether Appellants' actions were the proximate cause of the defective conditions Specifically the evidence at trial established that all of the construction at Riverwalk was performed by subcontractors (R 872) Thus, even if there was no issue as to the existence of defective condition an issue remained as to whether Appellant Buildstar as the general contractor sufficiently supervised the work of the

subcontractors, of whether the cause of the defects laid only with the subcontractors. Significantly in laying out the basis for its grant of directed verdict as to the negligence claims the Trial Court made no mention of and no finding as to the supervision issue (R 1385). At the directed verdict stage this issue should have been viewed in a light most favorable to Appellants, which should have resulted in it being left to the jury for determination.

II Appellants preserved their objections to the erroneous jury instructions and the error was compounded when the instructions are reviewed as a whole

At the close of the Trial Court's instructions to the jury, the Judge asked counsel if there were any "additions or exceptions to the charge." Counsel for Appellants replied:

Your Honor, one exception to note. Right after you had spoken of amalgamation of the entities you then went into negligence elements and we and you were talking about straight negligence. You used the word willful, wanton, recklessness in charging negligence early on and we'll except to that. That verbiage.

(R 1504-05) Respondents claim that this exception is insufficient to preserve the issue of the erroneous negligence charge because Appellants' counsel did not distinctly state the grounds for the objection. However, the basis for the objection was clear from its context.

Appellants took exception to the fact that while instructing the jury as to the definition of simple negligence the Court mistakenly included the terms "willful," "wanton" and "reckless" in that definition. Appellants objected to the inclusion of that incorrect "verbiage." The basis for the objection is obvious from its context. Simple negligence involves merely careless conduct, or stated differently, the failure to use the

amount of care one ordinarily would use under the circumstances. However, in order to recover punitive damages the conduct must rise to the level of willful, wanton or reckless. The Trial Court improperly merged these two distinct standards into one definition. Then, immediately after charging the jury as to (its version of) "negligence" and proximate cause, the Judge informed the jury that "as a matter of law I have determined the defendants were negligent in the construction of these condominiums" (R. 1487). Given this context, the exception taken to the mistaken definition of simple negligence is clear. Appellants took exception to a negligence definition which resulted in the jury being instructed that it was already concluded that Appellants' conduct rose to the level of recklessness, willfulness and wantonness. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (holding that a general objection was sufficiently specific to preserve issue for appellate review where considering the objection in the context of the case, the judge could understand and rule upon the alleged error), State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 96-97 (Ct. App. 1999) (holding that issue was preserved for appellate review even if not expressly argued where the issue is clear from essence of counsel's argument).

Respondents further contend that, even if this issue was properly preserved when the charges are viewed in their entirety, they are reasonably free from error. To the contrary, the error in the instruction as to the definition of simple negligence was only exacerbated when viewed within the context of the entire charge. The jury was first erroneously instructed that simple negligence consisted not only of careless conduct but also of reckless, willful and wanton conduct (R. 1486-87). This was followed by an instruction that the Court had determined as a matter of law that

Appellants were negligent, which equated to an instruction that as a matter of law, it had already been determined that Appellants' conduct was reckless willful and wanton (R 1487) Then the jury was instructed that in order to award punitive damages Appellants conduct must be willful wanton or reckless (R 1493) The fact that the instruction as to the standard for punitive damages was a correct statement of law did nothing to remedy the fact that the jury had been erroneously instructed that it had already been determined by the Trial Court that Appellants' conduct was reckless willful and wanton Thus the charges as a whole led the jury to only one logical conclusion that the standard for punitive damages had already been established as a matter of law This error requires the granting of a new trial as to both actions Crow v Ballard 139 S E 2d 624 626-27 (N C 1965) (ordering a new trial based on erroneous negligence instruction and holding that "an erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated")

Respondents also assert that Appellants did not preserve the issue of the Trial Court's erroneous instruction that the jury "must award" damages and "must determine damages as to the negligence claims This issue is part and parcel of Appellants position on proximate cause and the Trial Court's erroneous directed verdicts rulings During the parties' conference with the Trial Court regarding jury instructions counsel for Appellants raised the issue in the context of the Trial Court s proposed instruction that the jury "must award" damages as to the negligence claims (R 1398-1400) The Trial Court ruled it would provide the instructions as they were ultimately given Appellants then raised and preserved the issue of whether proximate

cause remained to be determined by the jury (R 1400-01) The Trial Court incorrectly ruled that its directed verdict ruling included proximate cause resulting in the improper instruction that the jury must award damages (R 1401) A subsequent objection following the reading of the charge to the jury was not required to preserve the issue Keaton ex rel Foster v Greenville Hosp System, 334 S C 488, 494 514 S E 2d 570 573 (1999) (holding that where an objection to a charge is raised and ruled upon the issue is preserved despite no objection being made after the charge is read to the jury)

III The Trial Court misapplied the “amalgamation of interests” theory and ignored the requirement that there be a finding of fraud or fundamental unfairness in order to disregard Appellants’ corporate forms

Respondents incorrectly contend that Appellants did not raise the issue of the impropriety of using the amalgamation of interest theory as a means to “pierce the corporate veil” of the individual Appellant corporate entities During argument at trial on the issue of amalgamation counsel for Appellants specifically raised issues related to piercing the corporate veil (R 1369-72) Authority was cited for the basic rule that majority ownership of one corporation by another does not result in shared liability (R 1370) Additionally counsel asserted that under the basic law of corporations each corporation is a separate entity and shared officers shared directors and shared office space is not sufficient to justify disregarding the corporate form (R 1371-72)

“Piercing the corporate veil” is the common phrase used to describe the procedural relief where a court determines grounds exist to disregard the corporate form of a party Drury Dev Corp v Foundation Ins Co 380 S C 97 101 n 1 668 S E 2d 798, 800 n 1 (2008) While the remedy of disregarding the corporate form may

result from several different theories such as the alter ego theory the instrumentality rule, and the amalgamation of interests theory, certain limitations always apply. Specifically, the disregarding of the corporate form has always been limited to situations where there is some fraud, wrong or fundamental unfairness that justifies this drastic remedy. Drury, 380 S.C. at 101-02, 668 S.E.2d at 800; Jones v. Enter Leasing Co., 383 S.C. 259, 267-68, 678 S.E.2d 819, 824 (Ct. App. 2009) (requiring a showing that retention of corporate form would promote fraud, wrong or injustice before applying alter ego theory); Wilson v. Friedberg, 323 S.C. 248, 257, 473 S.E.2d 854, 859 (Ct. App. 1996) (noting that the instrumentality rule does not apply unless the retention of separate corporate personalities would promote fraud, wrong or injustice).

This limitation has also been applied in the two cases addressing the amalgamation of interests theory. In Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986), disregarding the corporate form of the defendant by "amalgamating" it with the other entities was justified because, in addition to shared officers, directors and office space, the evidence showed that the plaintiffs had been misled as to the roles of the different corporate entities. Similarly, in Mid South Management Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 605-06, 649 S.E.2d 135, 145 (Ct. App. 2007), the court refused to apply the amalgamation of interests theory because there was no evidence of confusion on the part of the plaintiffs as to the differing corporations and therefore no fundamental unfairness justifying disregarding the corporate forms. While Respondents cite to evidence in the record that the Appellants shared office space, officers and directors, there was no evidence of any

fraud wrong injustice or unfairness resulting from the continued recognition of the separate corporate forms of the Appellants

The amalgamation of interests theory is unique to South Carolina with no other jurisdictions adopting a theory by that name As recognized by the Court in Mid-South Management even under this new theory, the corporate form will not be disregarded absent some finding of fundamental unfairness in relation to the separate corporate forms Id at 605 649 S E 2d at 145 The possibility of mere confusion amongst those dealing with the various corporations is not sufficient to justify disregarding their separate corporate forms Recently, when confronted with a similar theory referred to as the “single business enterprise theory,” the Texas Supreme Court expressly rejected the notion of disregarding the separate corporate forms of defendants where those entities integrate their resources to achieve a common business purpose SSP Partners v Gladstrong Investments Corp - 275 S W-3d-444 (Tex 2008) The SSP court noted that “we have never held corporations liable for each other obligations merely because of centralized control, mutual purposes and shared finances ” Rather the SSP Court stated that there must be some evidence of abuse which created “an injustice and inequity” justifying disregarding the corporate form Id at 455 Additionally, more than merely a subjective perception of unfairness” is needed Id Rather, “injustice and inequity” refers to the kind of abuse that the corporate form should not shield specifically “fraud evasion of existing obligations circumvention of statutes monopolization, criminal conduct and the like Id Absent such level of abuse, the courts should not disregard the existence of a corporation as a separate entity Id Absent the essential showing of injustice and inequity it was error for the Trial Court

to disregard Appellants' separate corporate forms. This error severely prejudices Appellants in that it improperly relieved Respondents of their burden of establishing the elements of each cause of action and the standard for punitive damages as to each individual Appellant and it allowed the jury to impute the actions of each Appellant to the others.

IV The evidence related to other Heritage properties was improperly admitted because it failed to meet the standard under either the Whaley case or Rule 406

Respondents *now* contend that the reason for the repeated reference at trial to other Heritage projects was solely to meet their burden under Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991)¹, and that Rule 406 provides an additional sustaining ground because the "other projects" evidence was evidence of the routine practice of the organization. Prior to trial, argument was held on a motion in limine to exclude the other projects evidence. (R. 143-57) *At that time*, Respondents contended the primary basis for offering evidence related to other Heritage projects and the other litigation surrounding those projects was to show Appellants' habit or routine practice of constructing defective condominiums and their knowledge of the alleged deficiencies. (R. 145-46) However, neither Respondents' "Gamble factors" theory nor their "habit evidence" theory permits the admission of the unduly prejudicial evidence of alleged defects and litigation relating to entirely different and separate Heritage projects. In other words, regardless of Respondents' actual purpose in repeatedly infusing alleged

¹ Subsequent to the trial of this matter, the South Carolina Supreme Court decided the case of Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009). In Mitchell, the Court held that Gamble remains relevant in a post-judgment due process analysis only insofar as it adds substance to the standard outlined in BMW of North America v. Gore, 517 U.S. 559 (1996). Mitchell, at 587, 686 S.E.2d at 185. The Court further held that the reprehensibility factor in the Gore analysis adequately encompasses and obviates the need for the first four factors of the Gamble review. Id., at 587 n.7, 686 S.E.2d at 185 n.7.

defects at other Heritage projects in the present litigation, the admission of this evidence violated Rules 404 and 406 of the South Carolina Rules of Evidence and was contrary to the rule set forth in Whaley v CSX Transportation Inc 362 S C 456 609 S E 2d 286 (2005) placing strict limitations on the admissibility of “similar events” evidence

Respondents cannot establish the reprehensibility prong of a Gore/Gamble punitive damages analysis through evidence which is otherwise inadmissible Rule 404(b) provides that “[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith ” Thus, the “other projects” evidence cannot be used to portray Appellants as generally “bad developers ’ The Gore/Gamble consideration of whether construction deficiencies at Riverwalk were isolated incidents or part of repeated actions does not relieve Respondents of meeting the threshold for admissibility of highly prejudicial “similar events” evidence Evidence of “similar events” is not admissible unless “there is some special relation between them tending to prove or disprove some fact in dispute ” Whaley 362 S C at 483 609 S E 2d at 300 The potential relevance of other projects evidence as to the propriety of punitive damages does not overcome the initial requirement that Respondents establish the existence of a “special relation” between the separate Heritage projects and “substantially similar circumstances” surrounding the alleged defects at the different projects Id see also Duncan v Ford Motor Co , 385 S C 119, 682 S E 2d 877 (Ct App 2009) (holding first that evidence relating to a 1999 recall met the strict Whaley “substantial similarity” standard before later considering the recall evidence in the context of a Gore/Gamble review of the

punitive damages award) As is illustrated in Section III of Appellants Initial Brief the Whaley standard has not been met The defective conditions alleged to exist at Riverwalk are not unique to Heritage projects Rather they are common problems that exist in any construction As was repeatedly stated by the witnesses at trial there is no such thing as a perfect building (R 336, 398, 502, 1039, 1071, 1097) Thus, the existence of problems common in the industry as a whole at different Heritage projects does not meet the “substantially similar” threshold set forth in Whaley In order to admit the other projects evidence Respondents needed to show more than the mere existence of similar defects among the different projects It was necessary to show that specific defects were caused by the same conduct and actors This standard was not met

Additionally Rule 406 does not provide an additional sustaining ground for the “other projects” evidence under Respondents theory that it was evidence of Appellants “routine practice” of constructing defective condominiums As described in State v Brown, 344 S C 70 74 543 S E 2d 552 554 (2001) evidence of “habit” under Rule 406 must involve “specific, particularized conduct capable of almost identical repetition ” In contrast, evidence of “character” (governed by Rule 404) involves “a generalized description of a person’s disposition or a general trait ” Id at 74 543 S E 2d at 445 Respondents’ theory that Appellants routinely constructed defective condominiums falls within character evidence rather than habit evidence and should have been excluded pursuant to Rule 404(b)

V The evidence at trial established that the Pope Class lacked the requirements of commonality and typicality and certification should be reversed

Respondents assert that there must be a showing of changed circumstances in order to support decertification of the Pope Class. However, Respondents fail to cite any South Carolina authority for this proposition. Where the class was improperly certified, it is entirely within the power of an Appellate Court to reverse certification. Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 20-23, 577 S.E.2d 190, 200-01 (2003) (following trial court's certification of bilateral class action and grant of summary judgment for the plaintiffs, the Supreme Court reversed the certification of the classes because plaintiffs failed to meet their burden of establishing the existence of commonality).

Additionally, where the evidence at trial shows that the requirements of Rule 23(a), SCRCP, have not been met, it is incumbent upon the Court to decertify the class. This is illustrated by the requirement in Rule 23(d)(3) which provides

Whenever the representation appears to the court inadequate fairly to protect the interest of absent persons who may be bound by the judgment, the court may at any time impose additional conditions on the representative party, or order an amendment of the pleadings *eliminating therefrom all reference to the representation of the absent persons* and in that event the court shall order entry of the judgment in such form as to affect only the parties to the action and those adequately represented.

SCRCP 23(d)(3) (emphasis added). As is illustrated in Section IV of Appellants' Initial Brief, the requirements of both commonality and typicality have not been met. In the Order certifying the class, the sole basis for the determination that commonality and typicality had been established was that the class members would suffer "lost use"

of their respective units as a result of remediation of the construction deficiencies (R 23) However, the evidence at trial established that the class members used their respective units in different manners resulting in different sub-groups potentially suffering different levels of “lost use ” or no lost use whatsoever (R 223-25 1318-19) The individualized determinations that would be necessary to determine if any specific class member suffered lost use and the extent of such lost use defeats the requirement of commonality Gardner 353 S C at 22 577 S E 2d at 201 (holding that a representative class cannot exist where the court must investigate each plaintiff’s claim because such individualized examination negates the benefits of a class action suit) Additionally, due to their limited use of their unit as a vacation home the class representatives’ claim is not typical of the claims of the other class members The Popes’ “lost use” damages would be different from those potentially suffered by a full time resident of a unit Thus, if damages had been properly calculated based on the Popes’ limited use, the class as a whole would be limited to the lost use of a unit owner who used their unit only occasionally without regard to each class member’s actual use of their unit This lack of both commonality and typicality became evident at the trial Therefore this Court should reverse the Trial Court’s erroneous certification

VI Mr DeSantis was not qualified to testify as an expert on lost use and his methodology was unreliable

Respondents contend that the failure of their “expert” on the issue of the Class’ lost use damages Mr DeSantis to establish his qualifications as an expert in lost use and the reliability of his methodology in calculating lost use, was merely an issue as to the weight and not the admissibility of his testimony This view ignores the clear

mandate outlined in State v White, 382 S C 265, 676 S E 2d 684 (2009), that courts must exercise their gatekeeping role in assessing the qualification and reliability of expert testimony

Mr DeSantis was offered as an expert in economic damages resulting from “loss of use” and not merely as an expert on condominium rental values in the Myrtle Beach area (R 788-90) He is neither an economist nor an accountant, and his education was in the areas of mechanical engineering and business (R 783, 788-89) His methodology was simple “arithmetic, in that, without regard to a class member’s actual use, he unilaterally determined that each class member would suffer four months of “lost use” and multiplied this by his estimated rental value of similar units (R 793-804) This methodology has never been published and Mr DeSantis acknowledged that he is unaware of this methodology being taught anywhere or used by others (R 789-90)

The Trial Court failed to exercise its role as the gatekeeper of expert testimony In carrying out this role the Court needed to assess both the qualifications of the expert as well as the reliability of his methodology White, 382 S C at 273, 676 S E 2d at 688 Mr DeSantis failed in both areas There was no basis for determining he was qualified as an expert in the area of lost use and no basis for determining that his methodology was in any way reliable Because Mr DeSantis testimony was the only evidence of “lost use” damages offered by Respondents, the error in allowing him to testify and cloaking him with the status of “expert” in lost use damages resulted in severe prejudice to Appellants and warrants a new trial of the Pope Class Action

VII It was Respondents' burden to establish their damages with reasonable certainty or accuracy and the Appellants preserved the issue of Respondents' speculative damages evidence

Respondents contend that Appellants' failure to object to testimony establishing the speculative nature of Respondents' damages results in a waiver of this issue. Specifically, Respondents assert that contemporaneous objections were required each time a witness testified as to their estimation of hidden or unknown damage. This contention is incorrect and ignores the fact that it was Respondents' burden to adequately establish non-speculative damages. Howard v. Holiday Inns, Inc., 271 S.C. 238, 240, 246 S.E.2d 880, 881 (1978) (holding that the plaintiff must prove by competent evidence the amount of his damages). It is not that the testimony was objectionable or inadmissible. Rather, the issue is that the evidence was insufficient to establish the damages with reasonable certainty or accuracy. Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) (holding that in order for damages to be recoverable, the evidence should be such as to enable the jury to determine the amount thereof with reasonable certainty or accuracy). This issue was adequately preserved when it was raised by Appellants in both of their directed verdict motions. (R. 827, 1356)

VIII The two issue rule is not applicable

The Respondents are mistaken in their contention that, even if verdicts as to the negligence claims are reversed, the two issue rule allows for affirmance of the verdicts based on the additional sustaining grounds of the breach of fiduciary duty claim in the POA Action and the breach of the warranty of habitability claim in the Pope Class Action. While the claims for breach of fiduciary duty and breach of the warranty of

habitability are not separately addressed in Appellants' appeal, they are necessarily included within the issues of the amalgamation ruling, the improper admission of evidence related to other Heritage projects, the improper denial of Appellants' JNOV motion, and as to the Pope Class Action specifically, the improper certification of the class and the improper admission of the testimony of Mr. DeSantis.

The two issue rule is also limited to situations where the jury finds two or more claims exist and issues a general verdict for those claims. Dropkin v. Beachwalk Villas Condominium Ass'n, Inc., 373 S.C. 360, 365, 644 S.E.2d 808, 810 (Ct. App. 2007) ("Under the two issue rule, when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal.") That is not the case here. Here, the trial court erroneously directed verdicts on the negligence claims in both actions. (R. 1384-87). The trial court then instructed the jury that the jury "must award" damages to the plaintiffs in the POA Action and "must determine the nature and extent of damages" in the Pope Class Action. (R. 1487) (emphasis added). The trial court took the decision to award damages out of the jury's hands and *required* the jury to award damages. Further, the trial court merged the concepts of simple negligence with reckless, willful, and wanton in its jury charge. (R. 1486-87). This impermissible blending of legal principles coupled with the trial court's directed verdicts for negligence *required* the jury to award punitive damages for negligence. Again, the decision was taken from the jury. Therefore, the damages awarded by the jury are forever tied to the negligence claims because the jury had to award damages on these claims. The two issue rule is incapable of addressing such errors and has no applicability here.

Additionally, the two issue rule only applies if the evidence as to the remaining issue supports the damages Cole v Raut, 378 S C 398, 406-07, 663 S E 2d 30, 34 (2008) (emphasis added) (‘Under the two-issue rule when a jury returns a general verdict in a case involving two or more issues or defenses and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed ”) In the POA Action the jury found Appellants breached their fiduciary duty (R 52) This fiduciary duty claim was based on an allegation that Appellants breached a duty owed with regard to the condition of the common areas at the time they were turned over to the Association The evidence at trial in no way supports an award of \$4 250 000 in actual damages and \$250 000 in punitive damage based solely on this breach of fiduciary duty claim No evidence distinguished the extent of the alleged defects at the time the common areas were turned over from the extent of the alleged defects existing years later

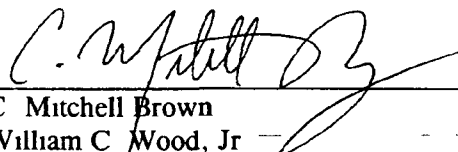
In the Pope Class Action, the jury found Appellants breached their warranty of habitability due to the class members’ alleged loss of use Again the evidence does not support an award of \$250 000 in actual damages as to this claim No evidence other than the improper testimony of Mr DeSantis was offered as to the alleged “lost use” damages The individual property owners who testified all stated that they had not been denied use of their homes (R 222-23 896 904 1348-51) Further the breach of warranty claim cannot support the award of \$750 000 in punitive damages to the Pope Class under South Carolina law Rhodes v McDonald, 345 S C 500 504 548 S E 2d 220, 222 (Ct App 2001) (holding punitive damages are not available in breach of

warranty cases unless the breach is accompanied by a fraudulent act) Accordingly the two issue rule is inapplicable to this case

CONCLUSION

For the foregoing reasons this Court should reverse the judgments entered below and enter judgment in favor of Appellants Failing that this Court should reverse certification of the Pope Class and grant judgment to Appellants on punitive damages and order new trials as to liability and compensatory damages Failing that this Court should reverse certification of the Pope Class and grant Appellants new trials absolute

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
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Clifton Newman Circuit Court Judge

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Regime

Respondents,

v

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and Buildstar Corporation,

Appellants

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Riverwalk at Arrowhead Country Club Property
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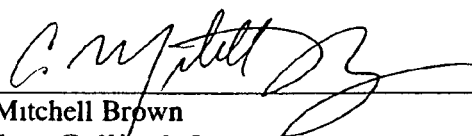
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),
SCACR

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PROOF OF SERVICE

I the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP attorneys for Appellants do hereby certify that I
have served all counsel in this action with a copy of the pleading(s) hereinbelow
specified by mailing a copy of the same by United States Mail, postage prepaid, to the
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April 14 2010

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Heritage Communities, Inc ,
Heritage Riverwalk, Inc , and
Buildstar Corporation, Appellants

Appeal From Horry County
Clifton Newman, Circuit Court Judge

Opinion No 4888
Heard June 15, 2011 – Filed September 14, 2011

AFFIRMED

C Mitchell Brown, William C Wood, Jr, A Mattison Bogan, and Michael J Anzelmo, all of Columbia, and William L Howard, Stephen L Brown, and Russell G Hines, all of Charleston, for Appellants

John P Henry and Philip C Thompson, both of Conway, for Respondents

SHORT, J Heritage Communities, Inc (HCI), Heritage Riverwalk, Inc (HRI), and BuildStar Corporation (collectively, Appellants) appeal the jury's verdicts in these consolidated construction defect actions We affirm

FACTS

Construction on Riverwalk Development (Riverwalk), a condominium complex in Horry County, began in June 1997 and was completed in December 1999 Riverwalk included 228 units in 19 buildings HCI was the parent corporation of both HRI (the developer and seller), and BuildStar (the general contractor supervising all construction) Prior to and simultaneously with the construction, Appellants developed numerous other properties in Horry County, South Carolina¹ HCI turned management of Riverwalk over to the Riverwalk at Arrowhead Country Club Property Owners' Association, Inc (the POA) in September 2002

The POA filed an action against Appellants alleging defects in the construction of Riverwalk Condominium owners Tony and Lynn Pope (the Popes) also filed an action against Appellants, on their own behalf and on behalf of the owners of Riverwalk, seeking to recover damages for the loss of use of their property during the estimated repair period By order filed September 3, 2008, the Honorable Benjamin Culbertson certified the Popes and all other unit owners as a class (the Class) The Class and POA actions were consolidated for trial

¹ Appellants also developed a property in Charlotte, North Carolina

The POA and the Class (collectively, Respondents) alleged numerous causes of action including (1) negligence against HCI, HRI, and BuildStar, (2) breach of express warranty against HCI, (3) breach of the warranty of habitability against HRI, (4) breach of the warranty of workmanlike service against BuildStar, and (5) breach of fiduciary duty against HCI and HRI

The case went to trial on January 5, 2009, before the Honorable Clifton Newman. After the close of Respondents' evidence, the trial court directed a verdict for HCI on the express warranty cause of action and for BuildStar on the warranty of workmanlike service cause of action. At the close of all evidence, the trial court granted Respondents' motions for directed verdicts on the negligence claims. The jury returned a verdict in favor of the POA for \$4.25 million in actual damages and \$250,000 in punitive damages. The jury awarded the Class \$250,000 in actual damages and \$750,000 in punitive damages. This appeal followed.

ISSUES ON APPEAL

- I Did the trial court err in its instructions to the jury?
- II Did the trial court err by ruling Appellants were amalgamated in interests?
- III Did the trial court err by failing to decertify the Class?
- IV Did the trial court err by admitting expert testimony as to loss of use damages?
- V Did the trial court err by admitting evidence of subsequent remedial measures?
- VI Did the trial court err by admitting evidence of construction defects at other HCI developments?
- VII Did the trial court err by granting Respondents' motions for directed verdict on the negligence claims?
- VIII Did the trial court err by denying Appellants' motions for directed verdict and judgment notwithstanding the verdict (JNOV)?
- IX Did the trial court err by permitting the punitive damages awards?

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." Felder v K-Mart Corp., 297 S C 446, 448, 377 S E 2d 332, 333 (1989)

LAW/ANALYSIS

I Jury Instructions

Appellants argue the trial court erred in its instructions to the jury. We find no reversible error.

a Willfulness, Wantonness, and Recklessness in Defining Negligence

Appellants maintain the trial court erred in charging the jury by including the standard of willful, wanton, and reckless conduct in the definition of simple negligence, which effectively required the jury to find the recklessness necessary to award punitive damages.

In instructing the jury, the court charged

Now, [Respondents] allege that [Appellants] negligently constructed the Riverwalk Condominiums. Negligence is the failure to exercise the degree of care which a person or entity of ordinary reason and prudence would exercise under the same or similar circumstances as exist[] in this case. Carelessness and negligence mean[] the same thing.

To establish negligent construction[,] [Respondents] must prove four essential elements. One, that there was an undertaking to construct a

building by [Appellants, two] that [Appellants] **were negligent or careless or reckless, willful and wanton** in the performance of that construction work, or stated another way, that they did not perform the work in a good and workman[-]like manner

Three, **that the negligence or carelessness or recklessness, willfulness and wantonness** of [Appellants] in performing that construction work was a proximate cause of any damages sustained by [Respondents]

And four, the resulting damages must be shown

Negligence is not actionable unless it proximately causes [Respondents'] damages

(emphasis added)

Later in the charge, the court addressed punitive damages

Punitive damages can only be awarded where [Respondents] prove by clear and convincing evidence that [Appellants'] actions were willful, wanton, malicious and in reckless disregard of [Respondents'] rights or where [Appellants'] actions were so grossly negligent as to imply a willfulness or wantonness. A conscious failure to exercise due care constitutes willfulness.

[Respondents] cannot recover punitive damages based on negligent conduct. Negligence is the doing of some act which a person of ordinary prudence would not have done under similar

circumstances Mere negligence will not support a punitive damages award To recover punitive damages [Respondents] must prove by clear and convincing evidence that [Appellants'] actions were willful, wanton or reckless or so grossly negligent as to imply a willfulness or wantonness

The word[s] recklessness, willfulness[,] and wantonness are synonymous The terms are used to describe a conscious failure to exercise and observe reasonable or due care Recklessness is distinguished from negligence Negligence is the failure to use due care Negligence is carelessness, as mentioned earlier Negligence is a failure by omission or commission to exercise due care as a person of ordinary reason and prudence would exercise in the same circumstances **Recklessness is a higher degree of culpability and responsibility Recklessness signifies a conscious failure to exercise due care Recklessness is a conscious indifference to the rights of [Respondents] or a reckless disregard of the rights of [Respondents] Recklessness is an awareness of wrongful conduct and continuation to act regardless of consequences**

Gross negligence is the intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do Negligence is the failure to exercise due care, while gross negligence is the failure to exercise even the slightest care

(emphasis added)

Appellants argue the instruction, combined with the grant of directed verdicts to Respondents on negligence, suggested to the jury the court had

already determined that Appellants were willful, wanton, and reckless. We find no reversible error.

In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the trial court's decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). Furthermore, an appellate court will review the charge as a whole. See Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (finding a jury charge should be reviewed as a whole, and if the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error). Here, although the trial court's initial language in instructing the jury on negligence may have been a misstatement of law, the court then extensively defined willful, wanton, and reckless conduct and instructed the jury on the difference between mere negligence and willful, wanton, and reckless conduct. In reading the charge in its entirety, we find no prejudice to Appellants. See Priest v. Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976) (finding an alleged error in a jury charge must be prejudicial to warrant a new trial).

b. Mandatory Award of Damages

Appellants also argue the trial court's jury charge was erroneous because it required the jury to award actual damages on the negligence claims. Appellants argue the charge inappropriately conveyed to the jury that the directed verdicts on negligence extended to proximate cause and should only have conveyed the court's determination of duty and breach.² We find no reversible error.

² "To establish a negligence cause of action under South Carolina law, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff, (2) breach of that duty by a negligent act or omission, and (3) damage proximately resulting from the breach of duty." J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369-70, 635 S.E.2d 97, 101 (2006).

During opening arguments, Appellants conceded that construction defects existed at Riverwalk, and repairs needed to be made. Appellants' counsel stated "[W]e ask you [the jury] to render a true verdict in this case, which would be the cost of repairs that we submit to you through our expert the true cost of the repairs in this case, which will be around 23, 2391 million dollars."

At the close of evidence, the court directed verdicts on the negligence claim. As to the POA's claim, the trial court instructed the jury

I charge you that as a matter of law I have determined that [Appellants] were negligent in the construction of these condominiums. As a result **you must award** [the POA] damages for the cost of repairs and other costs **to the extent these damages have been proven** by a preponderance of the evidence.

(emphasis added)

The trial court is required to charge only the current and correct law of South Carolina. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton, 334 S.C. at 497-98, 514 S.E.2d at 575. A jury charge that is substantially correct and covers the law does not require reversal. Id. at 496, 514 S.E.2d at 574.

In reading the charge in its entirety, we find no error based on the evidence at trial and the court's directed verdict on the POA's negligence claim. Ordinarily, proximate cause is a question for the jury, and the trial court's jury charge in a negligence action should include instruction on this element of negligence. See McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) (stating proximate cause is ordinarily a question for the jury), see also Clark, 339 S.C. at 390, 529 S.E.2d

at 539 (finding a trial court must charge the current and correct law) However, when the evidence is susceptible to only one inference, proximate cause is a matter of law for the court McKnight, 385 S C at 387, 684 S E 2d at 569

In this case, the trial court granted a directed verdict in the POA action on duty, breach, and proximate cause The dispute at trial was the amount of the damages Therefore, the court correctly charged the jury it must award damages to the extent they were proven See Hinds v Elms, 358 S C 581, 584-86, 595 S E 2d 855, 857-58 (Ct App 2004) (suggesting when liability is established in a negligence action, including proximate cause, the plaintiff is entitled to an award of damages unless proof completely fails), Baker v Weaver, 279 S C 479, 482, 309 S C 770, 771 (Ct App 1983) (stating instructions to the jury should be confined to the issues at trial) We find no reversible error in these jury instructions

Finally, as to Appellants' argument that the trial court erred in instructing the jury as to damages on the Class's negligence claim, we find no error During the jury charge conference, Appellants argued the directed verdict on the proximate cause element of negligence applied only to the POA's construction defect claim, and it did not apply to the Class's loss of use claim Agreeing with Appellants, the trial court stated "I'm clearly not going to tell them they must award damages on the loss of use They may find there were no damages, no loss of use " The court charged "As to the class action lawsuit you must determine the nature and extent of any damages suffered by the unit owners for the loss of use of the condominiums during any repairs " We find these instructions do not require the jury to award damages, as Appellants argued See Stewart v Richland Mem'l Hosp, 350 S C 589, 595, 567 S E 2d 510, 513 (Ct App 2002) (stating a jury charge that is substantially correct does not require reversal)

II Amalgamation of Interests

Appellants argue the trial court erred in finding the separate corporate entities, HCI, HRI, and BuildStar, were amalgamated We disagree

Gwyn Hardister,³ the chief operating officer and president of HCI, testified about the management of and interplay between the corporate entities. Hardister testified HCI was the parent corporation of HRI and BuildStar. HRI provided off-site management of Riverwalk, sold the condominium units, and owned title to the property. BuildStar was the general contractor acting as an oversight management group, and it supervised the construction of Riverwalk. Hardister testified Roger Van Wie was his boss, a corporate officer, and a board member. Although HCI, HRI, and BuildStar were separate corporations, they had the same board members, and all were managed and controlled by Van Wie. According to Hardister, Riverwalk did not have any employees, all employees of HCI, HRI, and BuildStar reported to Van Wie, the delineation of employees between the separate corporations was vague, and the three companies shared offices. Hardister acknowledged construction problems to the homeowners and represented that HCI would repair the problems. Furthermore, the warranty manual distributed to the homeowners upon purchase was entitled "Heritage Communities, Inc. Limited Warranty Manual" and identified HCI as the corporation extending the warranty.

Lynn Anderson, an HCI employee, testified she was the vice president of finance and accounting for HCI and eventually became the president of BuildStar. Anderson paid the bills for all three corporations. She testified the three corporations shared the same officers, directors, office, and telephone number.

The trial court found the corporate entities were amalgamated, stating "[T]he legal distinction[s] between the entities are blurred, they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others because they are in effect one and the same."

³ Mr. Hardister is identified in the record as Quinn Hardester, but identified by Respondents as Gwyn Hardister.

Appellants first argue the trial court erred by not employing a "piercing the corporate veil" analysis ⁴ We find this issue is not preserved for appellate review

At trial, Appellants' argument regarding piercing the corporate veil was as to Van Wie, not as to the separate corporations Counsel for Appellants stated "I raised earlier on this afternoon [Respondents] want to basically try Roger Van Wie and when they do that, what they are essentially asking the Court to do is to pierce a corporate veil [sic] without ever having any elements and without ever actually bringing any testimony to try to say it is all Roger Van Wie "

We find the issue raised on appeal, that the trial court erred in neglecting to find the elements necessary to pierce the corporate veil, is not preserved See Jean Hoefer Toal, Shahin Vafai & Robert A Muckenfuss, Appellate Practice in South Carolina 65 (2nd ed 2002) ("The objection must be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge ") In this case, the earlier discussion referred to by Appellants' counsel related to objections to testimony that impugned Van Wie's character In our view, the objection was not sufficiently specific to inform the trial court that Appellants wanted it to consider the theory of piercing the corporate veil, rather than the amalgamation of interests theory, as between the three corporate entities

Appellants also argue application of the amalgamation of interests theory, like piercing the corporate veil, requires a finding of fraud, wrong, or fundamental unfairness At trial, Appellants argued the three corporations were separate entities and sharing office space was not sufficient for the court to find an amalgamation of interests Appellants did not argue the trial court needed to find fraud, wrong, or fundamental unfairness Thus, this issue is

⁴ South Carolina employs a "two prong test for piercing the corporate veil The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors The second prong requires the plaintiff to demonstrate that 'fundamental unfairness' would result from recognition of the corporate entity " Drury Dev Corp v Found Ins Co., 380 S C 97, 102, 668 S E 2d 798, 800 (2008)

not preserved See Wilder Corp v Wilke, 330 S C 71, 76, 497 S E 2d 731, 733 (1998) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review)

Appellants finally argue the trial court erred in finding these corporations were amalgamated in interests We disagree

In Kincaid v Landing Development Corp, 289 S C 89, 91, 344 S E 2d 869, 871 (Ct App 1986), three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty The management corporation argued the court should have directed a verdict in its favor because it was merely the marketing and sales company Id at 96, 344 S E 2d at 874 In addition to sharing owners, the three companies shared a location Id Furthermore, the management company was the corporation called to remedy problems Id Finally, the company's letterhead identified the management company as "A Development, Construction, Sales, and Property Management Company " Id This court affirmed the trial court's finding that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities " Id (quoting the trial court), see Mid-South Mgmt Co v Sherwood Dev Corp, 374 S C 588, 597-605, 649 S E 2d 135, 140-44 (Ct App 2007) (discussing Kincaid as one of three theories raised for holding a parent corporation liable in place of a subsidiary (1) piercing the corporate veil, (2) alter-ego or instrumentality theory, and (3) the amalgamation of interests or blurred identity theory)

In this case, we find similar indicia of an amalgamation of interests between HCI, HRI, and BuildStar The corporations shared a location, telephone number, and board members Also, the record contains evidence the delineation of employees between them was vague In addition, HCI held itself out to the homeowners as the corporation responsible for construction defects in its warranty and through Hardister's representations to the homeowners In our view, evidence supports the trial court's finding of an amalgamation of interests between HCI, HRI, and BuildStar

III Decertification of the Class

Appellants argue the trial court erred in denying their motion to decertify the Class because it failed to meet the requirements of commonality and typicality. We disagree.

Prior to the consolidation of these two actions, the Class was certified by order of Judge Culbertson. The Class sought damages for the loss of use of their condominiums for the period of time Respondents' expert testified all units would have to be vacated. Citing the five prerequisites of class certification found in Rule 23(a) of the South Carolina Rules of Civil Procedure, Judge Culbertson made these findings: (1) the Class consisted of 228 condominium owners and was so numerous that joinder of all members was impracticable, (2) there were questions of law or fact common to the Class because they all alleged they would suffer loss of use during the remediation period necessary to repair the construction defects, (3) the claims of the representative parties were identical to the claims of the other members of the Class, (4) the representative parties would fairly and adequately protect the interests of the Class, and (5) the amount in controversy exceeded \$100 per member of the Class.

At trial, Appellants moved to decertify the Class. Appellants argued the class representatives, the Popes, were absentee homeowners who rarely utilized their unit, therefore, they did not represent the Class. Appellants also argued the Class was not common because members sustained differing amounts of damage to their units, and members utilized their units in different manners, including permanent residency, full or part-time rentals, and vacation homes. The trial court denied the motion, finding Appellants' primary argument, that the Class lacked the commonality required by Rule 23(a)(2) because the use of the units differed, was not an issue of commonality as much as an issue to be addressed by the parties' respective experts as to the amount of loss of use damages.

Tony Pope, a class representative, testified he owned a unit at Riverwalk and was the treasurer of the POA. Pope used his unit as a second home, did not rent it, and believed he was entitled to compensation for the period of time the unit would be unavailable to him while Riverwalk was

being restored. Albert Best, qualified as an expert in the field of estimating reconstruction and rehabilitation projects, testified he is a general contractor and owner of a construction company that specializes in restoration of houses in South Carolina with water intrusion damage. Best testified the reconstruction of Riverwalk would require the homeowners to move out of the development for four months.

Francis DeSantis,⁵ qualified as an expert in loss of use damages, testified he estimated the damages for loss of use by the number of units, the size and number of bedrooms per unit, and comparable rental rates in the area. DeSantis testified all owners, regardless of how each utilized his or her unit, were uniformly affected. DeSantis explained he considered loss of use based on habitability, not on occupancy. Thus, according to DeSantis, an owner who was a permanent resident and had to move out suffered the same loss of use damages as an owner who used the unit as a second home and could not use it.

It is within a trial court's discretion whether a class should be certified. Tilley v Pacesetter Corp., 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). The party seeking certification is required to prove the following five elements:

- 1) the class must be "so numerous that joinder of all members is impracticable,"
- 2) there must be "questions of law or fact common to the class,"
- 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class,"
- 4) "the representative parties [must] fairly and adequately protect the interests of the class," and
- 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class."

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003) (alterations by court) (quoting Rule 23(a), SCRPC). The failure to satisfy any one of the prerequisites is fatal to class certification. Id. at 21,

⁵ Mr. DeSantis is identified in the record as Francis DeSentes, but identified by Respondents as Francis DeSantis.

577 S E 2d at 200 "The first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation " Id

To establish commonality, a party must show "questions of law or fact common to the class " Rule 23(a)(2), SCRCP Commonality does not require every issue in the case to be common to all class members Gardner, 353 S C at 21, 577 S E 2d at 200-01 Rather, commonality is met when the class shares a determinative issue Id We find the Class shares the determinative issue of loss of use We also find the fact that the Class members utilized their units in different manners does not defeat the commonality prerequisite See McGann v Mungo, 287 S C 561, 568, 340 S E 2d 154, 157-58 (Ct App 1986) (discussing the commonality requirement of Rule 23 and stating it is not necessary that all questions of law and fact be common, only that common issues exist among the class)

To establish the typicality requirement, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class " Rule 23(a)(3) In King v American General Finance, Inc., 386 S C 82, 91, 687 S E 2d 321, 325 (2009), our supreme court reversed the trial court's order decertifying the class The trial court decertified the class, finding no typicality in a class action against a lender for failing to timely provide statutorily-mandated attorney preference disclosure forms Id at 87, 687 S E 2d at 323 The trial court based its decision on the differing times of when the class members' loans attached to property Id The supreme court reversed, finding the common feature satisfying typicality was the lender's failure to timely provide the form Id at 91, 687 S E 2d at 325 In this case, the representatives claimed damages arising from construction defects and loss of use The record contains evidence that all unit owners, regardless of the manner of their use, would be excluded from the property for four months We find the representatives' claims were typical of the claims of the other class members

IV Expert Evidence of Loss of Use Damages

Appellants argue the trial court erred in denying their motion to exclude the testimony of Respondents' expert on loss of use damages because the unit

owners were in different positions vis-a-vis the use of their units. Appellants argued the expert's theory, that a non-permanent resident was entitled to the same loss of use damages as a permanent resident, was flawed. Appellants also objected to qualifying the witness as an expert. We find no reversible error.

Francis DeSantis testified he has an undergraduate degree in mechanical engineering and did graduate work in engineering and business. For the last fifteen years, he has owned a real estate and rental broker's company in Horry County. DeSantis has been a licensed real estate broker in South Carolina for fourteen years. He testified that approximately ninety-eight percent of his company's revenue derives from the rental business.

Beginning in 2002, DeSantis began making loss of use and loss of profit calculations, performing studies to place a financial value on rental rates needed to replace a condominium for a period of time. DeSantis performs competitive analyses of rental rates, market trends, demand levels, occupancy rates, and rental prices in the area. His company focuses primarily on single-family homes and condominiums. DeSantis testified he has acted as a consultant for numerous clients, including a bank and many homeowners' associations. DeSantis was formerly qualified as an expert in loss of use damages in South Carolina in 2006. DeSantis admitted he had not published any studies and was not an economist or accountant. The trial court qualified DeSantis as an expert in loss of use damages.

The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice. Manning v. City of Columbia, 297 S.C. 451, 453-54, 377 S.E.2d 335, 337 (1989), McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 490, 626 S.E.2d 52, 55 (Ct. App. 2006).

Expert testimony is subject to the reliability requirements of Rule 702, SCRE. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise " Rule 702, SCRE Rule 702 applies to both scientific and nonscientific evidence State v White, 382 S C 265, 274, 676 S E 2d 684, 689 (2009) In White, the supreme court reiterated that whether an expert's testimony is scientific or nonscientific, the trial court has a gatekeeping role with respect to all evidence sought to be admitted under Rule 702 Id As a gatekeeper, "[t]he trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge " Watson, 389 S C at 449, 699 S E 2d at 177

Regarding Appellants' contention that the trial court abused its discretion in qualifying DeSantis as an expert, we find no error DeSantis has significant background knowledge of the condominium rental market in the area, and he has performed other studies of loss of use based on rental and occupancy rates Furthermore, he has been performing loss of use analyses for more than five years, including testifying as an expert in loss of use We find no error by the trial court in qualifying DeSantis as an expert in loss of use damages

Appellants also argue the trial court erred in admitting the expert testimony because the methodology was flawed by concluding homeowners that were not permanent residents suffered loss of use damages DeSantis testified he estimated the damages for loss of use by the number of units, the size and number of bedrooms per unit, and comparable rental rates in the area DeSantis included loss of use for all owners, regardless of how each owner utilized his or her unit, opining the owners were uniformly affected regardless of their use Thus, according to DeSantis, an owner who was a permanent resident and had to move out suffered the same loss of use damages as an owner that used the unit as a second home and could not use it DeSantis explained he applied the lowest monthly rate, rather than the seasonal weekly rate, to determine the total loss of use damages DeSantis testified the total loss of damages suffered was \$928,215 ⁶

⁶ Appellants' expert on loss of use damages, Jesse Teel, Jr , testified loss of use damages varied among condominium owners depending on use Teel calculated total loss of use damages at \$227,041

We find no abuse of discretion by the trial court in admitting this testimony. In considering the evidence, the court recognized Appellants' argument to exclude the testimony was based on a belief that the damages suffered by each type of owner were different. The trial court found the basis of Appellants' attack on DeSantis was the believability, rather the admissibility, of his testimony. The court noted the different methodologies used by the parties' experts. Appellants' expert analyzed loss of use by separating the owners into certain categories of homeowners. DeSantis analyzed loss of use as common among the different types of homeowners. The trial court found both methodologies to be appropriate measures of loss of use.

In sum, the trial court examined the matter pretrial, listened to extensive voir dire on DeSantis' qualifications and experience in calculating loss of use damages, and admitted the testimony. Based on our review of the record, we find the trial court adequately performed the gatekeeper function. See Watson, 389 S C at 449, 699 S E 2d at 177 (stating the trial court, as the gatekeeper, must examine the substance of the testimony to determine if it is reliable).⁷

V Evidence of Subsequent Remedial Measures

Appellants argue the trial court erred in admitting a letter from BuildStar to the manufacturer of the windows used in constructing Riverwalk, that asked the manufacturer to replace 192 defective windows. Appellants maintain the admission violated Rule 407, SCRE, regarding evidence of subsequent measures.⁸ We find this issue is not preserved for appellate review.

⁷ To the extent Appellants argue the trial court failed to specifically state it found the evidence reliable, we find the issue is not preserved because it was not raised to or ruled upon by the trial court. See Staubes v City of Folly Beach, 339 S C 406, 412, 529 S E 2d 543, 546 (2000) (noting that issues not raised to or ruled upon by the trial court are not preserved for appellate review).

⁸ Rule 407 governs the admissibility of subsequent remedial measures and provides "When, after an event, measures are taken which, if taken

Jim Graham testified he worked for a window manufacturer at the time Riverwalk was constructed. Graham was called in 1997 or 1998 by one of his company's distributors regarding water intrusion problems with the windows at HCI developments. During his testimony, Appellants objected to references regarding other HCI developments, Graham's ability to testify as to the cause of the water intrusion without qualifying as an expert, Graham's inability to authenticate the letter, Graham's bias due to settlement offers, and hearsay. Respondents introduced the letter from BuildStar during Graham's testimony. Appellants' counsel objected, "[s]ubject to the prior objection."

" Appellants never raised the issue of the inadmissibility of the exhibit based on a violation of the rule governing subsequent remedial measures. Because this issue was neither raised to nor ruled upon by the trial court, it is not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (noting that issues not raised to or ruled upon by the trial court are not preserved for appellate review), Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (noting the grounds for an objection must be specifically stated to preserve an issue for appellate review).

VI Evidence of Defects at Other Developments

Appellants argue the trial court erred in admitting evidence of defects at other HCI developments. We disagree.

Numerous times throughout the trial, Appellants objected to or moved to exclude evidence of construction defects at other HCI developments. The trial court admitted the evidence.

Rule 404(b) of the South Carolina Rules of Evidence governs this issue. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. In Whaley v. CSX Transportation, Inc., 362 S.C. 456,

previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence. " Rule 407, SCRE.

483, 609 S E 2d 286, 300 (2005), our supreme court recognized that similar acts are admissible if they tend to prove or disprove some fact in dispute See Branham v Ford Motor Co., 390 S C 203, 230, 701 S E 2d 5, 19 (2010) (discussing Whaley) Evidence of similar acts has the potential to be exceedingly prejudicial Branham, 390 S C at 230, 701 S E 2d at 19 Accordingly, a plaintiff must present facts showing the other acts were substantially similar to the event at issue Whaley, 362 S C at 483, 609 S E 2d at 300 Other acts may be admissible for purposes of establishing the facts necessary to prove entitlement to punitive damages Judy v Judy, 384 S C 634, 642-43, 682 S E 2d 836, 840-41 (Ct App 2009), aff'd on other grounds, 393 S C 160, 712 S E 2d 408 (2011) (affirming when the trial court admitted evidence of a similar prior lawsuit) The admission of evidence is within the trial court's discretion, and the trial court's decision will not be reversed on appeal absent an abuse of discretion Whaley, 362 S C at 483, 609 S E 2d at 300 (applying the abuse of discretion standard of review to the admissibility of evidence of similar accidents)

Jennifer Harmon, an employee of Noble Company, testified at trial Noble Company specialized in property management of homeowners' associations and was hired in 1999 to manage the POA At the time, Roger Van Wie, Gwyn Hardister, and Lynn Anderson were on the Board of Directors Harmon testified the Board requested a building condition assessment report, which was prepared in October 1999 The report noted numerous construction defects at Riverwalk, including moisture intrusion around the windows, doors, and breezeway ceilings, gaps in the brick facade, and water damage on porches

Harmon testified Noble Company managed four other HCI developments, and they had experienced similar construction defect problems Harmon admitted HCI had been given copies of building assessment reports on the other developments, similar to the one prepared for Riverwalk, indicating comparable problems

Thomas Pegram, an architect, was hired to develop plans for Riverwalk Pegram testified he used the same basic plans at Riverwalk that were used at the other HCI developments Graham, the window manufacturer, testified he was investigating problems with windows at

several HCI developments. Hardister, HCI's president, testified other HCI developments had problems with leaks at or near the windows, and were also involved in construction litigation. Anderson, HCI's vice president of finance and accounting and president of BuildStar, testified to involvement in litigation involving three of the other HCI developments. Franklin Drew Brown, qualified as Respondents' expert in contracting and building forensics, testified to numerous defects at Riverwalk. Brown testified he had been hired to investigate three other HCI developments and found similar deficiencies. Steve Watkins, qualified as Appellants' unlimited general contractor expert, testified he had been involved in "four or five" HCI development cases. Jesse Teel, Appellants' loss of use expert, testified he had performed a loss of use analysis on another HCI development. Alan Campbell, Appellants' engineering and construction defect expert, testified to the scope of work necessary to repair Riverwalk. Campbell testified he had prepared reports on the scope of work at other HCI developments.

After a review of the record, we find the construction defects at the other HCI developments were substantially similar to those experienced by Riverwalk. Many of the experts were involved in all of the HCI developments that were experiencing the same water intrusion problems and subsequent litigation. The HCI employees were likewise involved in the litigation of several of the developments. Brown testified the deficiencies at the various developments were the same, including the use of identical inappropriate trim. Graham testified he became involved when the issue with the windows was first reported in 1997 or 1998, prior to the completion of Riverwalk, and the same windows and installation occurred at Riverwalk. We find significant similarities between the construction defects alleged in this case and the defects testified about at the other developments.

We also find the evidence was admissible to prove several of the elements required for a punitive damages award, as argued by Respondents at trial. See Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) (listing the factors to consider in conducting a review of punitive damages as (1) defendant's degree of culpability, (2) duration of the conduct, (3) defendant's awareness or concealment, (4) existence of similar past conduct, (5) likelihood of deterring the defendant or others from similar conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant's ability to pay, and (8) other factors).

deemed appropriate) The evidence was relevant to the elements of the duration of the conduct, Appellants' awareness, and similar past conduct For instance, Graham's testimony of the discovery regarding moisture intrusion around the windows indicated knowledge as early as 1997 or 1998, and also indicated the duration of the conduct Harmon testified HCI had received building assessment reports on other developments, indicating the duration of the conduct and similar past conduct Viewing the testimony as a whole, we find no error by the trial court in admitting evidence of defects at the other developments

VII Directed Verdict on Respondents' Negligence Claims

Appellants argue the trial court erred in granting Respondents' motions for directed verdicts as to the negligence claims We disagree

During opening arguments, counsel for Appellants stated

Ladies and gentlemen of the jury, the real issue in this case is what is it going to cost to fix condominiums out at Riverwalk, and that is the central issue and what we deny is that the costs out at Riverwalk are going to cost over 8.6 million dollars We submit that the cost estimates that we will put before you are the real and true costs for fixing the issues out there at Riverwalk

You will hear us say repeatedly during this case we're not running from these issues, we acknowledge there are issues out there at Riverwalk We acknowledge there are certain repairs that need to be made but they do not fall anywhere near the class of repairs that these plaintiffs are going to ask for in this case

[W]e ask you to render a true verdict in this case, which would be the cost of repairs that we submit to you through our expert the true cost of the repairs in this case, which will be around 2 3, 2 391 million dollars

The trial court granted Appellants' motions for directed verdicts on the negligence claims, finding

[I]t [is] clear that [the] condominiums were negligently constructed, and that is based on the testimony as well as the representation of counsel. It would not be proper to allow counsel to represent to the jury that [Appellants are] responsible and intend[] to engage in repairs on the one hand and on the other hand argue as a matter of law they are not responsible. More importantly than that, the witnesses all acknowledge defects in the construction.

Appellants argue they did not concede liability on the negligence claim, but merely acknowledged the existence of the defects. In response to Respondents' motion for directed verdicts on negligence, counsel for Appellants argued

As to the negligence issue, Your Honor, I certainly got up there in opening and being nothing but frank with the jury acknowledged there were issues out there at Riverwalk and laying out the damages in an opening statement how the case will progress. [O]ur defect experts and our estimator have identified that there [are] \$2,391,619 in deficiencies out there and that what I said to the jury was what are the real issues and what is it going to really cost to fix it, and I gave them that number.

Now, to say that means you automatically have bought into that, I don't believe it is fair under the pleadings [W]e pled both affirmatively that there are third parties responsibl[e]

We find no error by the trial court in granting a directed verdict on negligence based on Appellants' concession at trial. We find the concession of counsel in this case similar to that in Collins v. Bisson Moving & Storage, Inc., 332 S C 290, 504 S E 2d 347 (Ct App 1998). In Collins, the plaintiff was injured in a car accident, and while being transported to the hospital in an ambulance, was further injured when a truck collided with the ambulance. Id. at 292, 504 S E 2d at 348. This court found the defendant's concessions during opening statements were concessions of liability and proximate cause. Id. at 303, 504 S E 2d at 354-55 (concluding defendant's statements that the plaintiff's injuries were primarily caused by the first accident and the plaintiff would fail to prove the damages were primarily caused in the second accident, was a concession supporting a directed verdict of liability and proximate cause), see Hall v. Benefit Ass'n of Ry Emps., 164 S C 80, 83, 161 S E 867, 868 (1932) ("The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial.")

Based on the evidence, we also affirm the trial court's grant of directed verdicts on the negligence claims. Appellants argue the case was about numerous distinctive defects, and even if Appellants' witnesses acknowledged the existence of defects, they did not acknowledge all defects alleged by Respondents. Viewing the trial in its entirety, the issue in this case was the extent of damages. The primary witnesses testified to conflicting estimates of the extent of the damages. The experts of both Appellants and Respondents testified to detailed defects in the construction of Riverwalk. The reports differed primarily in the scope of work necessary to repair the defects and the cost of the repairs.

Franklin Brown, Respondents' expert, testified to the construction defects at Riverwalk. Brown found numerous defects: (1) inadequate site drainage, (2) nonexistent or improperly installed sealant, (3) gaps in the cladding system, siding, and trim, (4) inadequate brick lintel support at the

windows, (5) improperly installed brick veneer, (6) missing flashing above windows, (7) deck membrane improperly terminated or compromised by the use of posts or screws on the balconies and decks, (8) no control joints installed in balcony ceilings, (9) inadequate attic access to one unit, (10) water damage to exterior trim, (11) water damage to interiors, and (12) water damage to wall sheathings. Brown testified that in his expert opinion, the industry standard of care in constructing Riverwalk was breached. Brown provided a report indicating the scope of work necessary to repair Riverwalk. Respondents' expert, Albert Best, estimated it would cost \$8,662,147 to make the repairs described in Brown's scope of work report. He estimated the job would take three years to complete.

Alan Campbell, Appellants' expert, acknowledged many construction defects, code violations, and violations of industry standards. He provided his own scope of work report for the defects he determined needed to be corrected. Appellants' expert, Steve Watkins, testified it would cost \$2,391,619 to repair the construction defects in Campbell's report.

Harmon, an employee of Riverwalk's property manager, also testified to the defects. Harmon testified about the building condition assessment report and Appellants' knowledge of the defects. Harmon also admitted HCI knowingly turned the homeowners' associations over to the homeowners with knowledge of the construction deficiencies and without the funds to make the necessary repairs. Harmon testified Hardister addressed the homeowners at a March 15, 2000 association meeting, admitted HCI was aware of construction problems, and assured the homeowners HCI intended to correct the problems.

Hardister also acknowledged the construction problems. He admitted he was aware of the construction deficiencies, HCI was still selling the condominiums with this knowledge, and the problems were not corrected at the time of the insolvency and closing of the corporations. Hardister admitted the POA was entitled to have repairs made.

In ruling on motions for directed verdict, the trial court must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motions and deny the motions if the

evidence yields more than one inference or its inference is in doubt Law v S C Dep't of Corr, 368 S C 424, 434, 629 S E 2d 642, 648 (2006) The trial court should deny the motions when either the evidence yields more than one inference or its inference is in doubt McMillan v Oconee Mem'l Hosp , Inc., 367 S C 559, 564, 626 S E 2d 884, 886 (2006) "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury " Proctor v Dep't of Health & Env'tl Control, 368 S C 279, 292-93, 628 S E 2d 496, 503 (Ct App 2006)

As this court did in Collins, we find the trial court's grant of a directed verdict affirmable based either on the concessions made at trial or based on the evidence 332 S C at 303, 504 S E 2d at 354 As the trial court in this case determined, we find the issue for the jury regarding the extent of the defects was a question of damages rather than liability or proximate cause

Appellants also argue the trial court erred in granting a directed verdict on the negligence claims because BuildStar, as the general contractor, was not responsible for the work performed by the subcontractors Although a general contractor is not automatically responsible for the negligence of a subcontractor, a builder who undertakes to supervise the construction of a building is under the duty to exercise reasonable care See Fields v J Haynes Waters Builders, Inc., 376 S C 545, 561, 658 S E 2d 80, 88-89 (2008) (rejecting the argument that a general contractor is automatically responsible for the negligence of a subcontractor, but approving jury instructions that included the law imposing a duty to use due care on a general contractor who supervises a subcontractor) Here, Pegram testified that a part of an architect's job is construction administration After plans are completed, an architect performing construction administration reviews the shop drawings of the contractors and subcontractors, checks the material to be used, and visits the job site on a daily or weekly basis to insure the construction follows the plans Pegram testified Van Wie would not permit his firm to conduct the contract administration at Riverwalk Pegram was not prohibited from contract administration on any previous or subsequent jobs Pegram warned Van Wie of the serious nature of the lack of contract administration and insisted on including a notice on the plans that Pegram's company was not permitted to inspect construction, and therefore, it was to be held harmless for construction defects Finally, Lynn Anderson testified

BuildStar was supervising the subcontractors at Riverwalk. We find no error in the trial court's grant of a directed verdict on Respondents' negligence claims.

VIII Denial of Directed Verdict and JNOV

Appellants argue the trial court erred in denying their motions for directed verdict and JNOV. Appellants maintain damages were speculative. Appellants also argue they were entitled to directed verdicts because no individualized determinations were made as to the standards of care applicable respectively to HCI, HRI, and BuildStar, and clear and convincing proof of entitlement to punitive damages from each Appellant was not established. We affirm the trial court's denial of Appellants' motions for directed verdict and JNOV.

Respondents' expert, Albert Best, acknowledged there were hidden damages in water intrusion construction defect projects. Best testified he determined the amount of hidden damage by comparing it to other buildings his company had repaired with similar construction. He testified that hidden damage in condominium projects ranged from ten to thirty percent of the contract, and he included ten percent in his estimate to repair Riverwalk. Appellants' expert, Steve Watkins, also acknowledged his estimate of damages included numerous allowances and contingencies for hidden damage.

When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). An appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy Whisenant v. James Island Corp., 277 S C 10, 13, 281 S E 2d 794, 796 (1981). The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation. Id. However, proof with mathematical certainty of the amount of loss or damage is not required. Id. The determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is afforded, permitting a reasonably close estimate of the loss. Piggy Park Enters., Inc. v. Schofield, 251 S C 385, 391-92, 162 S E 2d 705, 708 (1968).

We find a sufficiently reasonable basis of computation of damages in the record to support the trial court's submission of the issue of damages to the jury. See May v. Hopkinson, 289 S C 549, 559, 347 S E 2d 508, 514 (Ct App 1986) (affirming the award of damages based on the contractor's repair estimate even though the exact repairs needed could not be determined because the removal of defective wood was expected to reveal additional problems).

Appellants also argue Respondents failed to establish that each Appellant violated its respective standard of care, and that the jury's award of punitive damages was not based on individualized determinations that clear and convincing evidence supported such damages against each Appellant. Because we found the trial court did not err in finding Appellants amalgamated in interests, we decline to address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S C 598, 613, 518 S E 2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

IX Punitive Damages

Appellants finally argue the punitive damages awards in both actions were improper because (1) the jury was permitted to award punitive damages to non-parties (other HCI developments) and (2) the punitive damages awards were inconsistent with the guidelines established in Gamble v. Stevenson, 305 S C 104, 406 S E 2d 350 (1991). We find no error.

a Non-parties

Appellants argue the trial court's erroneous admission of evidence of defects at other Heritage developments resulted in the jury's imposition of punitive damages to non-parties. Because we found the trial court did not err in admitting evidence of defects at other HCI developments, we need not address this issue. See Futch v McAllister Towing of Georgetown, Inc., 335 S C 598, 613, 518 S E 2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive)

b Gamble v Stevenson

Appellants argue that several of the factors used to review a punitive damages award weigh in their favor. In particular, Appellants argue the award of punitive damages has no deterrent effect because Appellants went out of business prior to the commencement of this litigation, and Appellants have no ability to pay punitive damages.

In Gamble v Stevenson, 305 S C 104, 111-12, 406 S E 2d 350, 354 (1991), the supreme court listed the factors the trial court should consider in reviewing a punitive damages award: (1) the defendant's degree of culpability, (2) the duration of the conduct, (3) the defendant's awareness or concealment, (4) the existence of similar past conduct, (5) the likelihood that the award will deter the defendant or others from like conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) the defendant's ability to pay, and (8) other factors deemed appropriate. Specific factual findings as to each factor are not required. McGee v Bruce Hosp Sys., 321 S C 340, 346, 468 S E 2d 633, 637 (1996) (finding although evidence of ability to pay is a factor in reviewing a punitive damages award, it is not a prerequisite)⁹

⁹ Appellants do not argue the amount of the punitive damages award violates constitutional guidelines. See Mitchell, Jr v Fortis Ins Co., 385 S C 570, 582-83, 686 S E 2d 176, 182 (2009) (changing the standard of review of the constitutionality of a punitive damages award to de novo and mandating a review of the constitutionality of a punitive damages award)

The trial court conducted a post-trial review of the punitive damages award using the factors outlined in Gamble and properly set forth its findings on the record. As to Appellants' degree of culpability, the trial court found relevant Appellants' experts' admission of code and industry standard violations. The trial court also noted the relevancy of Appellants' admissions of selling defective condominiums. As to the factors of the duration of the conduct and Appellants' awareness, the trial court noted the sales of defective condominiums continued for several years, and Appellants admitted they were aware of the construction deficiencies. The trial court noted the admission of similar conduct in other developments in reviewing the factor of similar past conduct. The court also found the award reasonably related to the costs and losses the POA and the Class will incur as a result of the defective condominiums. Finally, the court noted that although Appellants were no longer in business, the award would deter others from similar conduct, and the Appellants' inability to pay was not a requirement before the jury was justified in awarding punitive damages. We find no error by the trial court in the findings made under Gamble.

CONCLUSION

Based on the foregoing, the jury's verdicts are

AFFIRMED

KONDUROS and GEATHERS, JJ , concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005-CP-26-3289

RECEIVED
OCT 14 2011
SC Court of Appeals

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

Respondents,

v

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

Appellants

Case No 2003-CP-26-7169

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

Respondent,

v

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

Appellants

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules,
Appellants Heritage Communities, Inc ("HCI"), Heritage Riverwalk, Inc ("HRC"), and
Buildstar Corporation ("Buildstar") hereby petition for rehearing and make their
suggestion for rehearing *en banc*

INTRODUCTION

In Opinion No 4888, filed September 14, 2011, a Panel of this Court affirmed the Trial Court's directed verdict entered against Appellants on the negligence claims asserted in these cases, affirmed the breach of fiduciary duty verdict entered by the jury against HCI and HRI in Case No 2003-CP-26-7169, and affirmed the breach of warranty of habitability verdict entered by the jury against HRI in Case No 2005-CP-26-3289. Appellants respectfully submit that rehearing or issuance of a new opinion reversing the Trial Court's decision is warranted because the Panel's Opinion overlooked or misapprehended critical matters of fact and law and represents a significant departure from the South Carolina Supreme Court's established jurisprudence.

By affirming the directed verdict against the three corporate Appellants on the negligence claims in these cases, the Panel ignored evidence in the record that the actions of Appellants were not the proximate cause of (at minimum some of) the construction deficiencies alleged. Additionally, the Panel misapprehended the synergistic effect of the Trial Court's erroneous jury instructions. Specifically, the erroneous instructions that negligence was the equivalent of recklessness and that the jury "must award" damages for negligence, and the instruction that punitive damages were appropriately awarded for recklessness combined to lead to the improper entry of a verdict for punitive damages against all Appellants. The Panel failed to correct the compounding of this error by the Trial Court when it ruled the jury could ignore the corporate separateness of each Respondent by application of the "amalgamation of interests" theory, without making any of the required showings for such. The Panel also erred when it affirmed the Trial Court's refusal to decertify the plaintiff class because the requisite commonality and

typicality were missing. The Panel committed error when it affirmed the Trial Court's admission of evidence of defects at developments other than Riverwalk without any showing of a special relationship, substantial similarity, or habit or routine as Rules 404 and 406 of the South Carolina Rules of Evidence require. This error essentially awarded Respondents punitive damages on behalf of homeowners at developments other than Riverwalk for deficiencies at those sites. Finally, the Panel erred in failing to find that the Trial Court did not properly act as a gatekeeper when it admitted Respondents' expert witness testimony.

Because the Panel overlooked or misapprehended these critical matters of law and fact in rendering its opinion, and correction of these errors is of exceptional importance, this case is deserving of rehearing and *en banc* review.

STATEMENT OF THE CASE

This appeal involves two construction defect actions which involve the Riverwalk at Arrowhead Country Club Horizontal Property Regime ("Riverwalk") in Myrtle Beach. Heritage Communities, Inc. ("HCI") was the overall developer, Heritage Riverwalk, Inc. ("HRI") was the site specific developer, and Buildstar Corporation ("Buildstar") was the general contractor for the Riverwalk project. HCI is the parent corporation of both HRI and Buildstar.

Riverwalk at Arrowhead County Club Property Owners Association v Heritage Communities Inc et al, C/A No. 2003-CP-26-7169 (the "POA Action"), was filed on December 5, 2003, by the Riverwalk Property Owners' Association ("POA"), seeking to recover repair costs related to the Riverwalk development (R. 60-71). In addition to the POA Action, a putative class action, *Pope et al v Heritage Communities Inc et al*,

C/A No 2005-CP-26-3289 (the "Pope Class Action") was filed on June 23, 2005, by unit owners Tony and Lynn Pope on behalf of the owners at Riverwalk seeking to recover damages for the "lost use" of the property during the alleged repair period. (R 72-89) The operative complaints each asserted the following claims (1) negligence against HCI, HRI and Buildstar, (2) breach of express warranty against HCI, (3) breach of the warranty of habitability against HRI, (4) Breach of the warranty of workmanlike service against Buildstar, and (5) breach of fiduciary duty against HCI and HRI On September 3, 2008, the Trial Court certified a class consisting of all owners of the condominium units of Riverwalk in the Pope Class Action (R 20-32) Subsequent motions to decertify the class were denied (R 125-38, 162-75, 209, 842, 1384)

The POA Action and the Pope Class Action were consolidated for trial At the close of Respondents' case the Trial Court directed verdict in favor of the HCI on the express warranty claim and in favor of Buildstar on the warranty of workmanlike service claims, and denied directed verdict as to the remaining claims (R 862-64) At the close of all evidence, the Trial Court granted Respondents' motion for directed verdict on the negligence claims (R 1384-93) Additionally, the Trial Court ruled that Appellants were "amalgamated" such that they were to be treated as one and the same (R 1384-85)

The only issues remaining for jury determination in the POA Action were the claims for breach of the warranty of habitability and breach of fiduciary duty, and the damages under the negligence claim In the Pope Class Action, the remaining jury issues were the claim for breach of the warranty of habitability and the damages under the negligence claim Verdicts were awarded by the jury against the Appellants In the POA Action, the jury found for Respondents on the breach of the warranty of habitability

claim and found for Respondents on the breach of fiduciary duty claim, and awarded \$4,250,000 in actual damages and \$250,000 in punitive damages on the negligence and breach of fiduciary duty claims. In the Pope Class Action, the jury found for Respondents in the amount of \$250,000 in actual damages and \$750,000 in punitive damages (R. 58, 1506-09). The total of the verdicts in both actions was \$5,500,000. After granting a set off but denying other post-trial motions, the total combined judgment amount was \$4,471,178.31 (R. 42-47). Appellants timely served and filed a Notice of Appeal.

STATEMENT OF THE FACTS

The Riverwalk condominium complex consists of nineteen buildings containing a total of 228 units (R. 176). Phase I consisted of seventeen buildings of similar shape and design with brick veneer on three sides and composite siding on the front (R. 1909). Phase II consisted of two buildings constructed with differences in the windows used, with the brick veneer limited to the first floors with the remainder of the building covered with composite siding (Id.)

Respondents alleged defects in the design and construction of Riverwalk primarily asserting that, due to these defects, water was permitted to intrude into the buildings causing rot, deterioration and other damage (R. 271-352, 388-584, 620-643). Respondents estimated that repairs in excess of \$8,000,000 were needed and that the unit owners would suffer "lost use" damages in excess of \$1,000,000 (R. 644-99, 731-822). Respondents' estimates of the alleged damage and the cost to repair admittedly included "extrapolations," "assumptions" as to "hidden damage," and other "unknowns" resulting from their limited inspection of only certain areas (R. 484, 490, 520, 534-39, 543-44,

653-55, 658, 559-70, 745, 769) Respondents' sole evidence on the issue of lost use was the testimony of Francis DeSantis, who was permitted to testify as an expert over Appellants' objection (R. 788-90)

Both liability and damages were disputed. The evidence at trial established that Appellant Buildstar was the general contractor at Riverwalk and that all actual construction was performed by subcontractors (R. 872). Appellants' witnesses offered testimony refuting the contention that Appellants caused the defective conditions as well as the extent of the alleged defects (R. 973-1306). Additionally, Appellants offered testimony from actual homeowners and experts refuting Respondents' claims of "lost use" damages (R. 219, 764, 896, 902-04, 905-1347, 1137, 1202, 1228, 1348-49). The testimony of the witnesses, established that the Pope Class consists of several subcategories of owners segregated by their differing uses of their units (R. 223-25, 888, 901-02, 1318-19, 1348).

In addition to Riverwalk, Appellants HCI and Buildstar were involved in other condominium developments in the Myrtle Beach area, including Avian Forest, Magnolia North, Magnolia Place, the Gardens at Cypress Bay, Azalea Lake, and Sea Dunes. Despite these other projects being separate and distinct undertakings, Respondents repeatedly referred to alleged defective conditions and litigation involving these other projects (R. 238-51, 282, 290, 304-404, 436-39, 478-79, 586, 622-41, 708, 711-12, 878, 884, 1068-69, 1078-79, 1106, 1109, 1121, 1248, 1254, 1304, 1305, 1334). These repeated references culminated in Respondents' counsel's argument at closing that Appellants should be "severely punished" by the "people of Horry County" for all of these condominiums (R. 1477-78).

The evidence at trial of the relationship among Appellants HCI, HRI and Buildstar established that each was properly formed as a separate South Carolina corporation and each operated as a separate entity with distinct purposes (R. 725) Buildstar was the general contractor, HRI was the site specific developer for Riverwalk that held and transferred title to the units, and HCI was the overall developer and parent corporation for HRI and Buildstar (R. 704-11, 724-25, 866-70) While there was evidence that the three entities shared officers, directors and office space, and were ultimately controlled by the same person, there was no evidence offered of any confusion, fraud, or other inequitable conduct with regard to the operation of these distinct entities (R. 176, 704-05, 729)

Following the close of all evidence, the Trial Court held that Appellants HCI, HRI and Buildstar were “amalgamated” and would be treated as “one and the same” (R. 1384-85) After disregarding the separate corporate form of each Appellant, making each liable for the actions of the others, the Trial Court granted Respondents’ Motion for directed verdict as to the negligence claims in both cases (R. 1385) This ruling by the Trial Court that “the condominiums were negligently constructed” did not address each of the specific defective conditions alleged, but rather operated as a blanket verdict determining the issue of negligence as to all of them

During jury instructions, while defining simple negligence to the jury, the Trial Court twice equated “negligent or careless” conduct with “reckless, willful and wanton” conduct (R. 1486-87) The Trial Court then informed the jury that “as a matter of law I have determined the defendants were negligent in the construction of these condominiums” (R. 1487) After having defined simple negligence to include willful,

wanton and reckless conduct, and after having told the jury that, as a matter of law, Appellants had been determined to be "negligent," the Trial Court then instructed the jury that punitive damages could be awarded where there was clear and convincing evidence that Appellants' conduct had been willful, wanton or reckless (R 1493) Additionally, despite the issue of proximate cause remaining before the jury on the negligence claim, the Trial Court instructed the jury that it "must award" damages in the POA Action, and "must determine the nature and extent of damages" in the Pope Class Action (R 1487)

ARGUMENT

I The trial court improperly directed a verdict in Respondent's favor on the negligence claims

Because evidence was admitted at trial that the three Appellants did not proximately cause all the deficiencies at Riverwalk, the Panel erred in affirming the Trial Court's directing a verdict against Appellants on the negligence claims The Panel's decision misconstrued counsel's acknowledgement that some defects existed at Riverwalk as an admission that Appellants were negligent and had caused all of the alleged defects, thereby permitting a finding of actual and punitive damages against all three Appellants¹ Moreover, the Panel erred in not finding the Trial Court's ruling was error because it failed to take into consideration the high standard for directed verdict

A There was evidence at trial that Appellants were not negligent and did not cause the problems at Riverwalk.

Given the evidence to the contrary, the Panel should not have affirmed the Trial Court's finding that, as a matter of law, the "condominiums were negligently constructed," and should not have upheld a directed verdict against all Appellants on the

¹ Assuming arguendo that this was an admission of liability the Trial Court and Panel failed to consider that it could just as easily been deemed an admission that a warranty had been breached a cause of action which would not have allowed for an award of punitive damages

negligence claims (R. 1385). The Trial Court's stated basis for this ruling, that the witnesses all acknowledged the existence of construction defects and the "representation of counsel" had been that defendants were responsible and intended to engage in repairs, did not support the blanket directed verdict ruling on negligence for Plaintiffs. (*Id.*) "In ruling on motions for a directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. S.C. Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "[I]f there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for consideration." Wright v. Gilbert, 227 S.C. 334, 337, 88 S.E.2d 72, 74 (1955).

The suits alleged *numerous, and different, defective conditions* at Riverwalk, *i.e.*, improper trim installation, improper masonry work, improper sheathing, improper installation of decks, and improper installation of windows, all of which were disputed by Appellants through the presentation of evidence that warranted submission of the particular defects and whether Appellants proximately caused those defects to the jury.

For example, one of the disputed issues related to water infiltration damage on the decking. Respondents' contention was that this was caused because the decks were constructed with an improper slope. In contrast, Appellants' expert testified that the damage was caused when, during the POA's maintenance, a carpet installer cut through the protective weatherproofing. (R. 970, 1002, 1097). The Panel erred when it found that this was not sufficient evidence to submit to the jury. This is obviously "some

evidence" that Appellants were not responsible for this alleged defect and its corresponding damage

There was ample testimony regarding other disputed factual issues relating to alleged construction defects, including the following

- water damage issues with the decking was not a universal problem at Riverwalk, there was a evidence that at some buildings there was no design flaw (R. 987),
- there was no damage as to the decking's framing (R. 993),
- issues as to framing damage were not a universal problem at Riverwalk, there was evidence at that some buildings there were no framing problems (R. 1009),
- sheathing damage would not extend to the framing except at certain areas around windows and a bore scope inspection showed the sheathing and framing were undamaged in many areas (R. 1010-11), and
- slope issues with decks was not a universal issue at Riverwalk and, where there was a negative slope, there was no evidence it was damaging the building (R. 1030)

The Trial Court's ruling, as a matter of law, that Appellants had "negligently constructed the condominiums," erroneously established and that each one of the above specific defect disputes had already been decided in Respondents' favor. The Panel was wrong to affirm this.

Further, there was no evidence that Appellant Buildstar breached its standard of care as the general contractor. The evidence in the record clearly established that Buildstar did not engage in actual construction, instead, all construction was performed by subcontractors. (R. 872). A general contractor is not "automatically" liable for the negligent work of subcontractors. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 560-61, 658 S.E.2d 80, 88 (2008). Rather, a general contractor must only exercise the degree of care reasonably expected in the industry in constructing and supervising the construction of the home. Id. Respondents failed to establish that Buildstar failed to

properly supervise the subcontractors under this standard. Viewing the evidence in a light most favorable to Appellants, the Panel should have overturned the directed verdict ruling because there was a reasonable inference that it was actually the negligence of various subcontractors, not Buildstar, that proximately caused the damages suffered by Respondents.

The Panel also misapprehended that the Trial Court's grant of directed verdict, coupled with its "amalgamation ruling" (discussed in Section II) that lumped the three corporate Appellants together, exacerbated the error because the jury was not permitted to make any independent determination on the issue of negligence as to *each* Appellant. The Panel erred in not finding that this reason alone warranted a new trial in both actions.

B Neither Appellants nor their counsel conceded liability as to the negligence claims and his statements did not constitute judicial admissions

The Panel also erred in affirming the Trial Court's finding that counsel for Appellant's admitted in his opening statement that they were liable for negligence, when he said

Ladies and Gentlemen of the jury, the real issue in this case is what is it going to cost to fix condominiums out at Riverwalk, and that is the central issue and what we deny is that the costs out at Riverwalk are going to cost over 8 6 million dollars, because that is what they are going to come before you during the course of this trial and ask from you, multi, multi-millions of dollars to do repairs out at Riverwalk which are not in line with what the true issue are out there. We submit that the cost estimates that we will put before you are the real and true costs of fixing the issues out there at Riverwalk.

You will hear us say repeatedly during this case we're not running from these issues, we acknowledge there are issues out at Riverwalk. We acknowledge there are certain repairs that need to be made but they do not fall anywhere near the class of repairs that these Plaintiffs are going to ask for in this case.

[W]e ask you to render a true verdict in this case, which would be the cost of repairs that we submit to you through our expert the true

cost of the repairs in this case, which will be around 23,239,100 million dollars

(Op No 4888 at 22-23)

The Panel erred when it held that the above constituted an admission sufficient to merit a directed verdict on negligence. On the contrary, counsel merely acknowledged that *some defective* conditions existed at Riverwalk, and the cost of repairing them was in dispute, he did not admit Appellants were *negligent* in causing *all* the defective conditions. There were *warranty* claims asserted in addition to negligence, and, as set forth above, there was clearly disputed evidence respecting, at minimum, as to the cause of least some of the defects. There was also a dispute as to certain alleged defects being defects at all, and disputed evidence as admitted as to that as well. The statements of Appellants' counsel and the testimony of Appellants' witnesses regarding defective conditions and the estimated costs to remedy those defects, as cited by the Panel, are a far cry from an admission of liability.

The Panel's opinion erroneously cites Collins v. Bisson Moving, 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998) for the conclusion that Appellants' counsel in this case had admitted or conceded liability for negligence just as counsel for the defendant had done in Collins. (Opinion at 24). The facts in Collins were quite different, however. That case arose from a second collision that occurred when the plaintiff was being transported in an ambulance after an earlier accident. Before the trial, the defendant in Collins agreed to concede it had been negligent in return for the Court's removing a claim for punitive damages from the case. In the defendant's opening statement, counsel stated it was the first accident that "*primarily caused*" the plaintiff's injuries. The trial court held that the defendant had "conceded the [second] accident *caused some* injury." Id. at 301,

504 S E 2d at 353 (emphasis added) As the Collins court properly noted, "this [admission of causation] went far beyond [the defendant's] earlier admission of negligence " Id at 404, 504 S E 2d at 354 ² In contrast to the facts of Collins, Appellants here asserted that third parties were responsible for various deficiencies at Riverwalk Appellant's counsel here did not, as counsel had in Collins, concede that his clients had "caused" the deficiencies complained of, rather, he conceded only that that there were "issues" at Riverwalk and that there was a dispute about how much it was going to cost to fix them

Even if the opening statement here could be deemed a concession that Appellants were liable (which Appellants deny), it does not follow that it constitutes an admission that Appellants *caused* the deficiencies in question, or that the Appellant's liability is grounded in negligence Collins makes this distinction clear As the Collins Court noted a finding of *causation* as a matter of law goes "far beyond" an admission that a party has been negligent The Panel erred in applying the holding of Collins to facts that are quite different from the facts there

During the Trial Court's consideration of the directed verdict motion, Appellants' counsel explained that he had not conceded causation in his opening statement

As to the negligence issue, Your Honor, I certainly got up there in opening and being nothing but frank with the jury acknowledged there were issues out there at Riverwalk and laying out the damages in an opening statement how the case will progress, we layed [*sic*] out that our defect experts and our estimator have identified there is \$2,391,619 in deficiencies out there and that I said to the jury was what are the real

² [W]e submit to you that the facts will show that Miss Collins's injuries were *primarily caused by this first accident and that they will fail in their burden of proof of showing that her damages were primarily caused in the second accident.*' This went far beyond Bisson's earlier admission of negligence " Collins v. Bisson Moving & Storage, Inc. 332 S C 290 303 504 S E 2d 347 354 (S C App 1998)(emphasis in original)

issues and what is it going to really cost to fix it, and I gave them a number

Now, to say that means you automatically have bought into that, I don't believe it is fair under the pleadings, but under the pleadings we're allowed, we pled both affirmatively that there are third parties' responsibility [*sic*], there are other third parties. You can plead that in the alternative and plead inconsistent theories in the pleading process and at least offer alternative theories during the presentation of your case

(R 1377-78)

The Panel erred in finding these statements constituted judicial admissions. South Carolina's courts have acknowledged the common view that judicial admissions must be clear, deliberate, unequivocal statements of fact, and not conclusions of law or expressions of opinion. Lytle v. Reagan, 256 S.C. 269, 274, 182 S.E.2d 302, 305 (1971) (agreeing with the majority view of other jurisdictions that where a party's testimony is adverse to himself and consists mainly of estimates, opinions and conclusions, it is not the equivalent of a judicial admission and is not conclusive).³ Rehearing should be granted and the Trial Court should be reversed.

³ Other states have held that statements such as Appellants' counsel's statements in this case do not constitute judicial admissions of liability. Hurt v. Chavis, 739 A.2d 924, 929 (Md. App. 1999) (noting that liability requires more than a finding or admission of negligence and holding that no judicial admission occurred based on counsel's statements that the case was about damages where causation was clearly at issue looking at the trial in its entirety); Haydel v. Hercules Transport, Inc., 654 So.2d 418, 427 (La. App. 1995) (holding that statement by defense counsel while conceding negligence, did not concede liability); Baxter v. Gannaway, 822 P.2d 1128 (N.M. App. 1991) (holding that defense counsel's statement to the jury as to what he thought the defendant owed was not a judicial admission); Zitzmann v. Miller, 551 N.E.2d 707, 709-10 (Ill. App. 1990) (holding that defense counsel's statement of the value of plaintiff's damages was not a judicial admission when considering the circumstances of the case and the context of the comment); Hayes v. Xerox Corp., 718 P.2d 929, 932-33 (Alaska 1986) (holding that defense counsel's statement that defendant owed plaintiff a lot of money, but the amount owed was for the jury to decide, was merely opinion and not the clear, deliberate and unequivocal statements of fact necessary for a judicial admission); Haynes v. Hunt, 208 Cal. App.2d 331, 335 (1962) (holding that [s]tatements of counsel in argument (or otherwise) and not evidence and, unless in the form of a stipulation or admission, are not binding on the client').

II. A new trial should be granted because the trial court improperly ruled that Appellants were “amalgamated ”

After the close of evidence, the Trial Court ruled that HCI, HRI, and Buildstar were “amalgamated ” (R. 1384-85) The express basis for this ruling was

[T]he legal distinction between the entities are blurred, that they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others as far as the three entities because they are in effect one and the same but for the, and that the case that was handed up to me notwithstanding outlines that stock ownership alone ordinarily doesn't render a parent corporation liable for contracts of a subsidiary, that is something that is not applicable to this situation, would deal with the development and construction and marketing of this and sale of these properties, condominiums (Id)

This clear error by the Trial Court, as affirmed by the Panel, not only improperly stripped HCI, HRI and Buildstar of their separate corporate forms, but also freed Respondents from the requirement that each claim be proved as to each Appellant. If allowed to stand, the Panel's opinion will create a drastic new form of corporate veil piercing that will allow courts to disregard critical aspects of a corporation's identity without any showing of misrepresentation or confusion, elements that courts in this state and elsewhere have almost always required before the corporate form may be disregarded. See "Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil," 45 WAKE FOREST L. REV. 931, 962 (Fall 2010) ("Our data revealed that a lack of misrepresentation resulted in refusal to pierce [the corporate veil] in 100% of the cases.")

The slender reed upon which the amalgamation of interests was based was that HCI was the parent corporation of both HRI and Buildstar, that the three entities shared officers, directors, office space, and a phone number, and that the three were ultimately controlled by the same person. (R. 704-05, 729, 876) The record is clear that each entity

was properly formed as a separate corporation under South Carolina law, and that they operated as separate entities with separate boards (R. 725) Specifically, HCI was the overall developer of Riverwalk, Buildstar was the general contractor, HRI held title to the Riverwalk properties and sold the units to purchasers (R. 704-05, 724-25, 866-70) While there was cross-over among the people involved, each of these corporations operated as a separate entity with separate responsibilities (R. 725) Significantly, there was **no evidence** of any confusion, inequitable conduct, or fraud in the operation of these three distinct entities, and there was no indication that the Trial Court's ruling was based on such a finding The Trial Court's "amalgamation" ruling, and the Panel's affirmance of it, misconstrued South Carolina's well established law on corporate forms that in only very limited circumstances permit the corporate form be disregarded

A The Panel Opinion misapplied the amalgamation of interests or "blurred identity" theory in this case because the requisite consumer confusion the theory requires was missing in this case

The Panel erred when it affirmed the Trial Court's ruling, that the act of one corporate Appellant was the act of all based upon South Carolina's unique "amalgamation of interests" or "blurred identity" theory See Mid-South Mgmt Co Inc v Sherwood Dev Corp., 374 S C 588, 604-05, 649 S E 2d 135, 144 (Ct. App 2007)⁴ This is an equitable theory, thus the appellate court's scope of review of this issue is supposed to be broad Id

Prior to the Panel's Opinion, South Carolina courts had referenced this theory only four times⁵ The name appears to be unique to South Carolina.

⁴ Appellants have found no cases in any other jurisdictions that have discussed a theory by these names in the context of disregarding corporate form

⁵ One such reference is in Schenk v National Healthcare, Inc 322 S C 316 319 471 S E 2d 736 737 (1996) in a footnote The South Carolina Supreme Court in Kennedy v. Columbia Lumber and

The first mention of this theory occurred in Kincaid v. Landing Development Corp., 289 S C 89, 344 S E 2d 869 (Ct App 1986). That case involved three sister corporations, all owned by the same individual shareholders. Id. The three corporations were involved in developing, building and marketing the plaintiff's subdivision. Id. When one corporation tried to deny liability for faulty construction by its sister corporation because it was only the marketer, this Court found that the marketing company had blurred the legal distinction between it and its sister corporations, and thus it, too, was liable. Kincaid, 289 S C at 96, 344 S E 2d at 874.

The Panel misapplied Kincaid, because it failed to recognize that the amalgamated interests theory was applied only after the plaintiffs testified they had been confused by the representations made by the defendants, one of which identified the marketing company as the "project developer" and the other of which was written on the marketing company's letterhead which identified it as "A Development, Construction, Sales, and Property Management Company." Id. From this evidence the appellate court held the trial court properly denied the marketing company's motion for directed verdict. Id. The Panel failed to recognize that the Court's adoption of the amalgamation theory in Kincaid was based not only on the sharing of corporate officers, directors, and offices, but also on evidence that the marketing company defendant had held itself out to the plaintiffs as the "project developer" that would respond to construction complaints and concerns. Id.

The requirement that the claimants be confused by misrepresentations of a defendant who is trying to avoid liability by hiding behind a sister corporation was

Manufacturing Company, Inc., 299 S C 335, 384 S E 2d 730 (1989) also alluded to the "blurring of legal distinction" theory in a lender liability situation.

confirmed in Mid-South, 374 S C at 605, 649 S E 2d 145. It was the absence of any misrepresentation or confusion among the related corporations that led the Court to reject the application of the amalgamation of interests theory in Mid-South. The Panel here mentioned Mid-South, but overlooked its importance. The Court of Appeals specifically addressed the “amalgamation of interests” theory and pointed out the significance of evidence in Kincaid that established, from the plaintiff’s perspective, confusion as a result of the marketing company’s misrepresentation that it was the equivalent of the developer and the general contractor. Id. (refusing to apply the “amalgamation of interests” theory, in part, because there was no evidence that the parties were confused as to the separate nature of the corporate entities.)

Absent some showing of confusion, fraud or the like, it was error for the Panel to hold that Appellants’ separate corporate forms were properly disregarded. This error severely prejudiced Appellants because, inter alia, it improperly relieved Respondents of their burden of establishing both the elements of each cause of action and the standard for punitive damages as to each individual Appellant. South Carolina’s jurisprudence illustrates that, regardless of the theory used, the corporate form may be disregarded only where retention of separate corporate personalities would promote misrepresentation, confusion, fraud, or injustice or would otherwise contravene public policy. Drury, 380 S C at 101-02, 668 S E 2d at 800, see also Jones, 383 S C at 267-68, 678 S E 2d at 824, Wilson, 323 S C at 257, 473 S E 2d at 859. As the Panel did not require or mention any such requirement, its “amalgamation” ruling was incorrect.

B The requirements for “piercing the corporate veil” must be met in order for a Court to disregard the corporate form

It is a well settled principle of South Carolina law that ‘a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears’ Drury Dev Corp v Foundation Ins Co, 380 S C 97, 101, 668 S E 2d 798, 800 (2008) Where the corporate entity is used to “protect fraud, justify wrong, or defeat public policy” it will be disregarded Sturkie v Sifly, 280 S C 453, 457, 313 S E 2d 316, 318 (Ct App 1984) The disregarding of the corporate form by the courts is referred to as “piercing the corporate veil” Id This equitable doctrine is not applied by the courts “without substantial reflection” and it is the party seeking to pierce the corporate veil that has the burden of proving the doctrine should apply Id Because it is an equitable remedy, the scope of appellate review on this issue is broad See Columbia Wholesale Co v Scudder May N V, 312 S C 259, 262, 440- S E 2 129, 131 (1994)(In an action seeking recovery under the equitable doctrine of quantum meruit, a broad of review applies) The Panel erred in declining to discuss this issue on the ground that the issue of piercing the corporate veil had not been raised below (See section II-D below)

The phrase “piercing the corporate veil” refers to the *relief itself* – that is, the remedy of a court disregarding the corporate form Drury, at 101 n 1, 668 S E 2d at 800 n.1 There are several theories or rationales which may serve as the basis for a party obtaining this equitable relief See id (explaining that the “alter ego” doctrine is merely a theory or means of obtaining the procedural relief of piercing the corporate veil), Wilson v Friedberg, 323 S C 248, 257, 473 S E 2d 854, 859 (Ct App 1996) (discussing the “instrumentality rule” within the concept of piercing the corporate veil) Whatever the

theory, including the "amalgamation" theory used here, the limitations on piecing the corporate veil still apply, however

In South Carolina, the analysis of whether a corporate veil should be pierced consists of a two-prong test. Drury, at 102, 668 S E 2d at 800. The first prong is an eight factor analysis that examines to the observance of corporate formalities Sturkie, at 457, 313 S E 2d at 318. The eight factors considered are (1) the capitalization of the corporation, (2) the observation of corporate formalities, (3) the payment of dividends, (4) the solvency of the corporation, (5) whether corporate funds were siphoned by a dominant shareholder, (6) whether other officers or directors are functioning, (7) the maintenance of corporate records, and (8) whether the corporation is a facade for the operations of a dominant shareholder Wilson, at 252, 473 S E 2d at 856. "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." Dumas v InfoSafe Corp., 320 S C 188, 192, 463 S E 2d 641, 644 (Ct App 1995). The second prong of the analysis requires that there be an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the individual Id. The Panel failed to apply this analysis and thus erred.

C Respondents failed to meet the proper standard for "piercing the corporate veil" under the "amalgamation of interests" or any other theory

Respondents failed to meet the traditional test outlined in Sturkie. The Panel erred in failing to recognize this prevented the court from disregarding the corporate separateness of each Appellant. There was no evidence to support a finding as to the eight factors of the first prong. Additionally, there was no evidence offered, nor any

finding by the Trial Court, of any injustice or unfairness if the corporate form were not disregarded. As set forth above, the amalgamation ruling resulted in significant prejudice to Appellants. Additionally, the ruling suggested to the jury that Appellants had engaged in some form misconduct and were deserving of being stripped of their corporate entity status. Most significantly, the amalgamation ruling opened the door for the application of punitive damages against all three Appellants without the requirement that Respondents prove by clear and convincing evidence that each Appellant deserved such punishment. The Panel erred in not granting Appellants a new trial in both the POA Action and the Pope Class Action due to this error.

D Contrary to the Panel's Opinion, Appellants raised both the issue of piercing the corporate veil as well as the amalgamation issue "

The Panel's opinion incorrectly concludes that Appellants failed to preserve its "piercing the corporate veil" argument. Op No 4888 at 11. This finding overlooks that Appellants' counsel expressly and specifically raised this point during his argument on the issue of amalgamation of interests (Tr pp 1622 – 1625). The Panel misapprehended this argument when it found that Appellants' argument related only to the "impugn[ing] [of Van Wie's] character ". On the contrary, Appellants' argument was focused on Respondents' claim that the separate character of Van Wie *and his three corporations* should be disregarded. During argument counsel for Appellants specifically raised issues related to piercing the corporate veil (R. 1369-72). Authority was cited for the basic rule that majority ownership of one corporation by another does not result in shared liability (R. 1370). Additionally, counsel asserted that, under the basic law of corporations, each corporation is a separate entity and shared officers, shared directors

and shared office space is not sufficient to justify disregarding the corporate form. (R 1371-72)

In three successive sentences, Appellant's counsel mentioned both the impropriety of piercing the corporate veil and the inapplicability of the amalgamated interests theory as a method of doing so. In the first sentence, he argued that Plaintiffs were tying all wrongdoing to Van Wie, the top man in all three corporations, he said he thought they were doing this so they could argue in closing that the jury should ignore any distinction between Van Wie and these three separate corporate defendants because they all were essentially the same. (R 1372) Counsel ended this first sentence with a statement that Plaintiffs were essentially asking the Court to "pierce a corporate veil [*sic*] *without ever having any elements*" (emphasis added) (*Id*). His second sentence anticipated that Plaintiffs' closing would assert "it is all Roger Van Wie[s] fault," and "you need to punish him" by entering a verdict against the three corporate defendants that he controlled. (*Id*) In the third sentence, counsel explained why this was not permitted under South Carolina corporate law. "That (lumping them together) is improper, Your Honor, it doesn't follow that you jump to say they are all amalgomated [*sic*] together" (*Id*). It is clear from these three sentences and the passages that precede and follow them that Appellants' objections were sufficient to preserve the arguments made in briefing.

III The Panel Should Have Granted Appellants A New Trial Because the Trial Court Committed Reversible Error in Its Instructions to the Jury

A. The Panel erred when it did not order a new trial based on the Trial Court's inclusion of the terms "reckless, willful and wanton" in the definition of simple negligence

The elements of simple negligence are "(1) a duty of care owed by the defendant, (2) a breach of that duty by negligent act or omission, and (3) damage proximately

caused by the breach.” Kleckley v Northwestern Nat’l Cas Co., 338 S C 131, 138, 526 S E 2d 218, 221 (2000) However, “a punitive damages award is warranted only when the defendant s conduct is shown to be willful, wanton, or in reckless disregard of the rights of others ” S C Farm Bureau Mut Ins Co v Love Chevrolet, Inc., 324 S C 149, 152, 478 S E 2d 57, 58 (1996)

While instructing the jury on the definition of simple negligence, the Trial Court gave the following instruction

Now, the plaintiffs allege that the defendants negligently constructed the Riverwalk Condominiums Negligence is the failure to exercise the degree of care which a person or entity of ordinary reason and prudence would exercise under the same or similar circumstances as exists in this case Carelessness and negligence means the same thing

To establish negligent construction the plaintiff must prove four essential elements One, that there was an undertaking to construct a building by the defendants, that the defendants were negligent or careless or reckless, willful and wanton in the performance of that construction work, or stated another way, that they did not perform the work in a good workman like manner

Three, that the negligence or carelessness or recklessness, willfulness and wantonness of the defendants in performing that construction work was a proximate cause of any damages sustained by the plaintiffs

And four, the resulting damages must be shown

(R 1486-87) (emphasis added) Significantly, only moments later, the Trial Court instructed the jury regarding the grant of Respondents’ directed verdict motions on the negligence claims, stating “I charge you that as a matter of law I have determined the defendants were negligent in the construction of these condominiums ” (R. 1487)

In its charge, the Trial Court twice equated simple negligence to the higher standard of willful, wanton or reckless conduct (Tr pp 1814-15) After first instructing the jury that simple negligence equated to willful, wanton or reckless conduct, the Trial

Court then instructed the jury that the Court had determined that Appellants were negligent. The only logical conclusion the jury could have drawn from these instructions was that it was already determined that Appellants' conduct was not only negligent, but was also willful, wanton or reckless.

On the subject of punitive damages, the jury was later instructed as follows:

Punitive damages can only be awarded where the plaintiffs prove by clear and convincing evidence that Defendants' actions were willful, wanton, malicious and in reckless disregard of the plaintiff's rights, or where Defendant's actions were so grossly negligent as to imply a willfulness or wantonness.

(Tr. p. 1821) While this was a correct statement of the law, the Trial Court's prior definition of simple negligence equating willful, wanton, and recklessness with negligence and carelessness, coupled with the instruction regarding the grant of directed verdict, effectively required the jury to find that the standard for punitive damages had been met.

The Panel Opinion misapprehended the law when it found that the Trial Court's charge, which the Panel acknowledged misstated the law, did not constitute an abuse of discretion because the charge as a whole was correct. (Opinion No. 4888 at 7) The law is well settled that when the trial court's ruling is based on an error of law, this constitutes an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000), Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). While an error in jury instructions may be excusable where the charges as a whole are otherwise reasonably free from error, this is only when the charge results in no prejudice to the appellant in light of the evidence and issues presented at trial. Ardis v. Sessions, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009) (where erroneous charge involved issue that was tangential to issues, erroneous charge was not prejudicial). An erroneous jury charge is grounds for

reversal when, as here, the appellant can demonstrate error and prejudice Cole, 378 S C at 405, 663 S E 2d at 33

In acknowledging the Trial Court's instructions on negligence "may have been a misstatement of law," (Opinion No 4888 at 7), the Panel then erred when it held that repeated misstatements of the law equating negligence and recklessness did not prejudice Appellant. The issues of negligence and punitive damages for reckless behavior were at the heart of the case. That the remainder of the charge may have been relatively free of error, that cannot correct an outright misstatement of the law in instructing the jury

The Panel erred in citing Keaton ex rel Foster v Greenville Hosp System, 334 S C 488, 514 S E 2d 570 (1999) as support for its view that the charge here, even if a portion of it was "misleading," was acceptable because it was "reasonably free from error." The facts of Keaton do not support the propriety of the charge given here. In Keaton, a medical malpractice case, the plaintiff objected to a "hindsight" charge because it was "confusing." The Supreme Court found that even if the particular jury instruction had been confusing, it did not misstate the law when placed in context. The Court declined to reverse, stating

Even though the jury charge in the present case was not a word for word quotation of previous case law, we believe that the charge adequately covered the law of South Carolina medical malpractice. "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v Smith*, 315 S C 547, 554, 446 S E 2d 411, 415 (1994)

Keaton ex rel Foster v Greenville Hosp System 334 S C at 496-497, 514 S E 2d at 574 (emphasis added)

Because the Court in Keaton found the jury charge "adequately covered the law of South Carolina," and merely "elucidated the meanings" of words --- and did not, as in this

case, misstate the law --- it found the charge was "reasonably free from error" and declined to reverse. Here the charge flatly misstated the law of South Carolina, and thus could not be said to have been "reasonably free from error."

Similarly, another case cited, Priest v. Scott, 266 S.C. 321, 223 S.E.2d 36 (1976), does not support the Panel's Opinion. In that case the Court declined to reverse the jury verdict because "we do not think the above-quoted portion of the charge was erroneous, and in any event, [it] was not prejudicial to [the appellant]." Priest v. Scott, 266 S.C. at 324, 223 S.E.2d at 38 (1976). It is not enough that other portions of the charge may have been free of error. "The fact that under the evidence the verdict of the jury may have been soundly based does not cure the error in declaring the law, because of which plaintiff is entitled to a new trial." Cummings v. Dorchester Coca-Cola Bottling Co. 260 S.C. 51, 54, 194 S.E.2d 185, 186 (1973).

The Panel also erred when it took no apparent note of cases Appellant cited from other jurisdictions holding an error of this magnitude warrants a new trial. See, e.g., Takes v. Metropolitan Edison Co., 655 A.2d 138, 147-48 (Pa. Super. Ct. 1995) rev'd on other grounds, Takes v. Metro Edison Co., 695 A.2d 397, 401 (Pa. 1997) (new trial ordered when the jury charge and verdict interrogatories erroneously included "grossly negligent conduct" and "willful, wanton or reckless conduct" as conduct that would support punitive damages, reasoning that "[i]f the jury imported this concept of ordinary negligence into its punitive damage considerations, as the court's instruction invited it to do, then we must acknowledge the possibility that Metropolitan Edison could have been improperly penalized. Such error would mandate a new trial." Id., 655 A.2d at 149 (internal citation omitted)), Crow v. Ballard, 139 S.E.2d 624, 626-27 (N.C. 1965) (new

trial ordered when jury instruction increased plaintiff's burden to proving both gross negligence and willful and wanton behavior, and blurred the distinction between such conduct by calling the terms "synonymous," court held, "an erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated." Id. at 627) Rehearing should thus be granted and the Trial Court reversed

B The Trial Court's instruction to the jury that they must award damages as to the negligence claims constitutes reversible error

After informing the jury that Respondents had been granted a directed verdict as to liability on the negligence causes of action, the Trial Court erroneously instructed the jury that it must award Respondents actual damages on these claims (R. 1487) This instruction that damages were mandatory constitutes reversible error and warrants a new trial as to both actions, and the Panel erred in not ordering that relief

The Trial Court's granting of Respondents' directed verdict motion as to the negligence claims, and the Panel's affirmance of that ruling, amounted to a determination that Appellants had breached the applicable standard of care It is well settled in South Carolina jurisprudence, however, that while a defendant may breach a standard of care, such a breach might not result in any damages to the plaintiff Stevens v. Allen, 342 S C 47, 52-53, 536 S E 2d 663, 665-66 (2000) (holding that in a negligence claim the jury must find that the plaintiff's damages were proximately caused by the defendant) There are three essential elements to a negligence claim "(1) a duty of care owed by the defendant, (2) a breach of that duty by negligent act or omission, and (3) damage proximately caused by the breach" Stevens, 342 S C at 51, 536 S E 2d at 665 The third element's requirement of proximate cause prevents a trial court from instructing a

jury it must award damages As stated in Hinds v Elms, 358 S C 581, 595 S E 2d 855 (Ct. App 2004)

A determination of negligence, standing alone, is a far cry from a determination of liability Liability encompasses all elements of a negligence claim, including damages proximately caused by the alleged negligence

Id at 585, 595 S E 2d at 857

Hence, the grant of directed verdict as to negligence does not result in a requirement that the jury award damages Rather, the plaintiff must still prove, and the jury must find, that that plaintiff's actual damages were proximately caused by the defendant Therefore, the Trial Court's instruction to the jury, and the Panel's affirmance of that instruction, that the jury must award the POA damages and that it must determine the damages of the Pope Class, constituted an error of law The prejudice resulting from the mandatory damages instruction is clear Proximate cause was a major component of Appellants' defense as to the negligence claim in both actions, with Appellants asserting that any defective conditions were proximately cause by other actors such as subcontractors

The Panel improperly validated the Trial Court's instructions which, reduced to their essence, amounted to this *If Appellants were negligent you must award damages regardless of causation The Court finds the Appellants were Negligent as a matter of law Negligence is the equivalent of recklessness Punitive damages are properly awarded for recklessness Therefore you must award punitive damages* The Panel Opinion misapprehended the synergistic effect of these multiple errors in the Trial Court's charge The Panel erred in failing to reverse

C Appellants preserved their objections to the erroneous jury instructions and the error was compounded when the instructions are reviewed as a whole.

At the close of the Trial Court's instructions to the jury, the Judge asked counsel if there were any 'additions or exceptions to the charge " Counsel for Appellants replied

Your Honor, one exception to note Right after you had spoken of amalgamation of the entities you then went into negligence elements and we, and you were talking about straight negligence You used the word willful, wanton, recklessness in charging negligence early on, and we'll except to that, that verbiage

(R. 1504-05) Respondents claim that this exception is insufficient to preserve the issue of the erroneous negligence charge because Appellants' counsel did not distinctly state the grounds for the objection. However, the basis for the objection was clear from its context

Appellants took exception to the fact that, while instructing the jury as to the definition of simple negligence, the Court mistakenly included the terms "willful," "wanton" and "reckless" in that definition Appellants objected to the inclusion of that incorrect "verbiage " The basis for the objection is obvious from its context. Simple negligence involves merely careless conduct The Trial Court improperly merged two distinct standards into one definition. Then, immediately after charging the jury as to (its version of) "negligence" and proximate cause, the Judge informed the jury that "as a matter of law I have determined the defendants were negligent in the construction of these condominiums " (R. 1487) Given this context, the exception taken to the mistaken definition of simple negligence is clear Appellants took exception to a negligence definition which resulted in the jury being instructed that it was already concluded that Appellants' conduct rose to the level of recklessness, willfulness and wantonness Wilder

Corp v Wilke, 330 S C 71, 76, 497 S E 2d 731, 734 (1998) (holding that a general objection was sufficiently specific to preserve issue for appellate review where, considering the objection in the context of the case, the judge could understand and rule upon the alleged error) State v Hamilton, 333 S C 642, 648, 511 S E 2d 94, 96-97 (Ct App 1999) (holding that issue was preserved for appellate review even if not expressly argued where the issue is clear from essence of counsel's argument)

The Panel misapprehended the law when it held that this is not error because, when viewed in their entirety, the charges are reasonably free from error That the instruction of the standard for punitive damages was a correct statement of law did nothing to remedy the fact that the jury had been erroneously instructed as set forth above This error requires the granting of a new trial as to both actions Crow v Ballard, 139 S E 2d 624, 626-27 (N C 1965) (ordering a new trial based on erroneous negligence instruction and holding that "an erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated") Rehearing should be granted and the Trial Court reversed

IV A New Trial Should be Granted Because the Trial Court Erred By Allowing the Expert Testimony on Lost Use

Appellants should also be granted a new trial in both actions because the Trial Court erred in admitting the expert testimony of Francis "Bud" DeSantis and in admitting evidence of remedial measures taken by Appellants regarding windows at Riverwalk Mr DeSantis was Respondents' sole expert on the Pope Class' "lost use" damages (R 788) Over Appellants' objection, he was designated an expert in that area and permitted to testify despite his lack of qualifications and the unreliability of his methodology (R

788-90) Rule 702, SCRE, governs the admission of expert testimony. The rule provides

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

Rule 702, SCRE. South Carolina's Courts have noted a distinction between two types of expert testimony, scientific evidence versus experience-based knowledge. State v. White, 382 S.C. 265, 269-70, 676 S.E.2d 684, 686 (2009). While this distinction has been acknowledged, "[a]ll expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." Id. at 270, 676 S.E.2d at 686.

As the gatekeeper of expert testimony, the trial court must conduct threshold determinations of whether the potential expert witness offering either scientific or nonscientific evidence is qualified and whether the subject matter is reliable. Jamison v. Morris, 385 S.C. 215, 684 S.E.2d 168 (2009) ("All expert testimony must meet a reliability threshold under Rule 702, SCRE, which imposes an affirmative and meaningful gatekeeper function on the trial judge"), White, 382 S.C. at 273, 676 S.E.2d at 688 (overruling State v. Morgan, 326 S.C. 503, 513, 485 S.E.2d 112, 118 (Ct. App. 1997) to the extent Morgan suggested only scientific expert testimony necessitated a threshold reliability determination and holding that Rule 702 also requires a determination of nonscientific expert qualifications and reliability). The Panel erred in ruling the Trial Court properly performed his required "gatekeeper" function.

With respect to scientific expert testimony, the Supreme Court has outlined a three-step inquiry “the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable” State v Council, 335 S C 1, 20, 515 S E 2d 508, 518 (1999) In determining the reliability of the science – the third step in the inquiry - the Court employs the standards first set forth in State v Jones, 273 S C 723, 259 S E 2d 120 (1979) and restated in State v Ford, 301 S C 485, 392 S E 2d 781 (1990) The overarching concern in the reliability inquiry is “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom” Council, 335 S C at 19, 515 S E 2d at 517 (quoting Jones, 273 S C at 731, 259 S E 2d at 124) A trial court must consider several factors to determine the reliability of the science underlying expert testimony, including (1) the publication and peer review of the technique, (2) prior application of the method to the type of evidence involved in the case, (3) the quality control procedures used to ensure reliability, and (4) the consistency of the method with recognized scientific laws and procedures Council, 335 S C at 19, 515 S E 2d at 517 (citing Ford, 301 S C at 487-90, 392 S E.2d at 782-84)

Mr DeSantis was offered as an expert in economic damages resulting from “loss of use” and not merely as an expert on condominium rental values in the Myrtle Beach area. (R. 788-90) (R 788-90) His education was limited to an undergraduate degree in mechanical engineering with graduate work in engineering and business (R 783) For the past fifteen years he operated a real estate rental business where he is the broker-in-charge (R 786) He is neither an economist nor an accountant (R. 788-89) He has never published the methodology he used to calculate the lost use in this case in any trade

publications (R. 789) He is also unaware of his methodology being taught anywhere and is unaware of any other person having applied his methodology to the alleged loss of use of a condominium project (R. 789-90) While Mr DeSantis testified he had been previously qualified by a South Carolina court as an expert of loss of use, the specific circumstances surrounding that qualification are unknown (R. 788) Nothing in the record shows whether his prior qualification was challenged

Mr DeSantis failed to meet the Rule 702 threshold for expert testimony There was no basis for a finding that he was an “expert” in loss of use, nor was there any basis for a determination that his methodology and findings were in any way reliable To the contrary, without any formal education in economics or accounting, Mr DeSantis has developed his own methodology for determining loss of use in varying circumstances This methodology has never been published, taught, or even used by anyone else

Mr DeSantis concluded that the ‘lost use’ damages of the Pope Class were the equivalent of the rental value of a comparable condominium in the area for the entire four months it was estimated the Riverwalk units would be unavailable due to repairs (R. 793) Using his knowledge of rental values in the Myrtle Beach area, Mr DeSantis calculated that monthly value, multiplied it by four months, and then multiplied it by the number of class members (R. 793-804) In his own words, “it’s arithmetic” (R. 801) Mr DeSantis acknowledged that the class members use their homes in different manners, even segregating the homeowners into four groups (permanent residents, second home, rental, and vacation rental) (R. 799) However, despite these different actual uses of the units, under his methodology, all of the homeowners were deemed to have suffered the same “lost use” damages (Id.)

During the pretrial motions on the admissibility of Mr DeSantis' testimony, the Trial Court concluded that Appellants' "attack on him is pretty much an attack as it relates to believability of his testimony or the weight to be given to his testimony, but not necessarily the admissibility of his testimony " (R 141) This was a clear error by the Trial Court, which the Panel failed to appreciate It remained incumbent upon the Trial Court to perform its gatekeeping function by evaluating not only Mr DeSantis' qualifications, but *also the reliability of his methodology* As the Supreme Court stated in White

The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability

White, 382 S C at 273, 676 S E 2d at 688 The Trial Court simply did not undertake to perform this aspect of his "gatekeeper" duties, and the Panel erred in ruling that he did This error resulted in severe prejudice to Appellants, and necessitates a new trial of the Pope Class Action

V A New Trial Should be Granted Because the Trial Court Improperly Allowed Respondents to Repeatedly Present Evidence of Other Heritage Condominium Projects

In addition to the Riverwalk condominium project, Appellant HCI was the developer of, and Appellant Buildstar was the General Contractor for, several other condominium projects in Myrtle Beach and the surrounding area.⁶ Throughout the course of the trial, Respondents repeatedly elicited testimony and introduced evidence of alleged construction defects at these *other* projects, as part of an overall strategy to

⁶ HRI was involved in only the Riverwalk project The other projects included Avian Forest Magnolia North Magnolia Place the Gardens at Cypress Bay Azalea Lake Sea Dunes and Heatherstone Each of these projects was a separate and distinct undertaking

support their claims of defective construction at Riverwalk. The admission of this evidence violated Rule 404 of the South Carolina Rules of Evidence, as well as the Supreme Court's mandate in Whaley v. CSX Transportation, Inc., 362 S.C. 456, 609 S.E.2d 286 (2005), limiting the admissibility of "similar events" evidence. The Panel's failure to find that the admission of this "other events" evidence in an effort to prove to prove the character of Appellants, and to show conformity therewith, constitutes clear error entitling Appellants to a new trial in both actions.

Throughout the trial, over Appellants' objections, Respondents continuously referenced construction defects and problems alleged to exist at the other projects as a means of inundating the jury with evidence of the "bad character" of Appellants.⁷ In doing so, Respondents improperly sought to establish that construction defects existed at Appellants' other projects so the jury would conclude that such defective conditions must therefore exist at Riverwalk. The references to other projects and the myriad of different defective conditions alleged to exist at those other projects were so numerous that any distinction between the facts relating to Riverwalk and the facts relating to the other

⁷ During the testimony of Jennifer Harmon objection was made to testimony and exhibits referencing alleged defects and litigation relating to the other projects (R. 238-51). During the testimony of Thomas Pegram objection was made to the reference of the similarity of the plans used in the construction of Riverwalk to those used in the other projects (R. 282, 290). During the testimony of Drew Brown objections were made to testimony of his investigation of other Heritage projects and the deficiencies he found at those projects (R. 304-404, 436-39, 478-79, 586). During the testimony of Jim Graham objection was made as to his testimony regarding window defects at other projects (R. 586, 622-41). During the testimony of Quinn Hardester objection was made to the reference to the other corporate entities used for other projects, litigation relating to the other projects, and window leaks at other projects (R. 708, 711-12). During the testimony of Lynn Anderson objections were made to reference to litigation involving the other projects and the Heritage entities, profits resulting from all of the different projects (R. 878-84). During the testimony of Alan Campbell reference was made to his status as an expert in litigation relating to the other projects, construction defect issues that allegedly existed at the other projects, the total number of allegedly defective condominiums the Heritage entities had put in the stream of commerce, and specific issues that existed at other projects (R. 1068-69, 1079, 80, 1106, 1109, 1121). Additionally during the testimony of Steve Watkins and Jesse Teel reference was made to other Heritage cases in which they were involved. (R. 1248, 1254, 1304-05, 1334).

projects was lost. The resulting confusion played into Respondents' clear theme that the jury should punish Appellants not only for alleged defects at Riverwalk, but also for those at every other project in which Appellants were involved because Heritage was a bad developer. In his closing argument, Respondents' counsel made this point clear by imploring the jury with the following message:

These people unquestionably knew, if they knew anything about construction at all, that they were building defective condominiums and they were putting them in the stream of commerce, they were selling to innocent people these condominiums and they did it over a long period of time and you can consider that

And, ladies and gentlemen, we need in this county, and it's like I say, it is up to you, but we need in this county somebody to tell these developers and contractors that do this the jurors, the people of Horry County are not going to allow this to happen. If you do it you're going to be severely punished by this and I ask you to award substantial punitive damages and send the message especially across that waterway to tell people over there that are developing and selling condominiums get it right, get it right.

(R. 1477-78) Respondents' strategy of repeatedly referencing defects in other projects to establish that such defects also existed at Riverwalk, and the corresponding theme that Appellants should be punished for all of their projects, was in clear violation of the South Carolina Rules of Evidence and South Carolina's jurisprudence on the limitations of such "prior event" evidence, and the Panel erred in not so holding.

A. Respondents failed to establish the necessary factual foundation that the conditions present at the other projects were "substantially similar" to those at Riverwalk and, thus, they failed to establish the "special relationship" required for the admission of similar accidents, transactions or happenings.

Rule 404(b), SCRE, provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The evidence of alleged defects at other projects and the existence of other

litigation as to the other projects is precisely the type of “other acts” evidence that is prohibited by Rule 404(b)

In addition to the prohibition set forth in Rule 404(b), the South Carolina Supreme Court has established the rule that evidence of similar events is not admissible unless “there is some special relation between them tending to prove or disprove some fact in dispute” Whaley v CSX Transp., Inc., 362 S C 456, 483, 609 S E 2d 286, 300 (2005) “Because evidence of other [events] may be highly prejudicial, ‘[a] plaintiff must present a factual foundation for the court to determine that the other [events] were substantially similar to the [event] at issue’” Id. (quoting Buckman v Bombardier Corp., 893 F Supp 547, 552 (E D N C 1995))

Despite Respondents’ repeated reference to alleged defects and litigation surrounding the other Heritage projects, the only “special relation’ or similarities Respondents could establish were (1) the projects shared the same overall developer (HCI) and the same general contractor (Buildstar), (2) the projects used the same plans and general layout, (3) similar materials such as similar trim and windows were used at the various projects, (4) the framing subcontractor used at Riverwalk was also the framer for several of the other projects, and (5) general deficiencies found at some of the other projects were similar to deficiencies alleged to exist at Riverwalk. This does not meet the high standard established by the Court in Whaley

Respondents did not show that the common design of the projects in any way related to the alleged defective conditions. Additionally, Respondents did not show that all of the contractors used at Riverwalk were also used at each of the other projects referenced. The evidence of defective conditions alleged to exist at Riverwalk and the

other projects was also insufficient to establish the required substantial similarity. Evidence of isolated incidents of water intrusion around exterior trim and windows and similar construction issues, is common to nearly all construction. As numerous witnesses testified, there is no such thing as a perfect building. (R. 336, 398, 502, 1039, 1071)

To meet the Whaley test, at a minimum, Respondents would have to establish a clear factual foundation not only of the existence of substantially similar defects, but that they were caused by precisely the same conduct and by the same actors. See JKT Co., Inc. v. Hardwick, 274 S.C. 413, 416, 265 S.E.2d 510, 511-12 (1980) (noting that evidence of a similar defective product was admissible where there was testimony that the manufacturing process used in the other shipments was "identical" to the process used to produce the materials at issue). Thus, just as in Whaley, Respondents' repeated reference to alleged defects and litigation involving the other Heritage projects was improperly admitted in this action, and the Panel erred in not holding that Appellants should be granted a new trial.

B The evidence of conditions and litigation related to other Heritage projects was not admissible under South Carolina Rule of Evidence 406

In addition to incorrectly asserting that the "other projects" evidence was admissible under Whaley, Respondents also asserted that this evidence was admissible pursuant to Rule 406, SCRE. (R. 145) Rule 406 provides that "[e]vidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Rule 406, SCRE. Specifically, Respondents contended that it

was Appellants' "routine practice" to construct condominiums in a defective manner (R 154-55)

As previously discussed, Rule 404(b) prohibits the admission of other acts evidence to prove the character of a person or to show action in conformity therewith. The prohibition in Rule 404 is somewhat in tension with Rule 406 permitting evidence of habit or routine practice. The distinction between Rules 404 and 406 was discussed in State v. Brown, 344 S. C. 70, 74, 543 S. E. 2d 552, 554 (2001). Brown states

Federal courts have recognized the tension between Rule 406 (habit) and Rule 404 (character) and noted the difficulty in distinguishing between admissible evidence of habit and inadmissible character evidence. As indicated in the advisory committee's note to Federal Rule of Evidence 406, which is identical to our Rule 406, the distinguishing feature of habit is its degree of specificity. Habit has been described as conduct that is "situation-specific" or "specific, particularized conduct capable of almost identical repetition." This Court has defined the term "character," on the other hand, as "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness."

Id. at 74, 543 S. E. 2d at 554 (internal citations omitted). Thus, for habit evidence to be admitted, it must include specificity in order to remove the evidence from the realm of general character traits. In addition to specificity, the evidence must also be reliable, with reliability being established by the regularity with which the habit is observed.

"It has been repeatedly stated that habit or pattern of conduct is never to be lightly established, and evidence of examples, for purpose of establishing such habit, is to be carefully scrutinized before admission." Wilson v. Volkswagen of Am., 561 F. 2d 494, 511 (4th Cir. 1977). A habit must be a response to a specific situation, with regularity, and uniformity. Id. at 512, Brown, 344 S. C. at 74, 543 S. E. 2d at 554. In short, habit evidence must be a specific reaction to an environment, and this response must regularly

and uniformly occur when the party is confronted with that specific environment or stimuli

Here, Respondents failed to establish the specificity or reliability required to admit evidence of defective conditions at other Heritage projects as “habit” evidence. Under Rule 406, general similarities or traits go to character, not habit. Thus, the “other projects” evidence was evidence of character and not habit, and should have been excluded under Rule 404(b). The Panel should have ordered a new trial in both actions.

C The evidence related to other Heritage properties was improperly admitted because it failed to meet the standard under either the Whaley case or Rule 406

The Panel erred in finding that the repeated reference at trial to other Heritage projects was proper in order for Respondents to meet their burden as it concerns punitive damages under Gamble v. Stevenson, 305 S. C. 104, 406 S. E. 2d 350 (1991).⁸ Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Thus, the Panel erred in finding that “other projects” evidence could be used to portray Appellants as generally “bad developers.”

The Gamble consideration of whether construction deficiencies at Riverwalk were isolated incidents or part of repeated actions does not relieve Respondents of meeting the threshold for admissibility of highly prejudicial “similar events” evidence. Evidence of “similar events” is *not admissible* unless “there is some special relation between them

⁸ After the trial of this matter, the South Carolina Supreme Court decided the case of Mitchell v. Fortis Ins. Co., 385 S. C. 570, 686 S. E. 2d 176 (2009). In Mitchell, the Court held that Gamble remains relevant in a post-judgment due process analysis only insofar as it adds substance to the standard outlined in BMW of North America v. Gore, 517 U. S. 559 (1996). Mitchell, at 587, 686 S. E. 2d at 185. The Court further held that the reprehensibility factor in the Gore analysis adequately encompasses and obviates the need for the first four factors of the Gamble review. Id., at 587 n. 7, 686 S. E. 2d at 185 n. 7.

tending to prove or disprove some fact in dispute ” Whaley, 362 S C at 483, 609 S E 2d at 300 The potential relevance of other projects evidence as to the propriety of punitive damages does not overcome the initial requirement that Respondents establish the existence of a “special relation” between the separate Heritage projects and “substantially similar circumstances” surrounding the alleged defects at the different projects Id., see also Duncan v Ford Motor Co., 385 S C 119, 682 S E 2d 877 (Ct App 2009) (holding first that evidence relating to a 1999 recall met the strict Whaley “substantial similarity” standard before later considering the recall evidence in the context of a Gore/Gamble review of the punitive damages award) Hence, Rehearing should be granted and the Trial Court should be reversed

VI. The Pope Class Should Have Been Decertified Due to the Lack of Commonality and Typicality

The Panel misapprehended the law in finding the class certified in the Pope Class Action met the certification requirements of commonality and typicality set forth in Rule 23 of the South Carolina Rules of Civil Procedure Rule 23(a) allows class actions where the following prerequisites are met (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) the amount in controversy exceeds one hundred dollars for each class member or the relief sought is primarily injunctive or declaratory Rule 23(a), SCRCF Proponents of the class certification shoulder the burden of proving the existence of each of the Rule 23(a) prerequisites, and the court must apply a rigorous analysis to assure the prerequisites are satisfied, as the failure to meet any one of the prerequisites is fatal to

class certification Waller v Seabrook Island Prop Owners Ass'n, 300 S C 465, 467-68, 388 S E 2d 799, 801 (1990) “A court may not look to the merits when determining whether to certify a class ” Tilley v Pacesetter Corp., 333 S C 33, 43, 508 S E 2d 16, 21 (1998)

It was error for the Panel to find the Trial Court properly certified the Pope Class because an accurate determination of the alleged “loss of use” damages of the class requires an individualized examination of the actual and legal distinctions among the putative class members. Such an examination reveals that the essential elements of commonality and typicality are not met under these circumstances. In order to avoid Rule 23(a)’s stringent requirements, Respondents encouraged the Trial Court to engage in speculation and conjecture to surmise that all of the putative class members would suffer exactly the same damages. Thus, the Panel committed an error of law by upholding certification of this class.

A The Pope Class should have been decertified because the class lacked the requirement of commonality

To establish commonality, a party must show that ‘there are question of law or fact common to the class ’ Rule 23, SCRCP. This means the party must articulate the existence of ‘significant common, legal, or factual issues’ which bind the proposed class together.” Gardner, 353 S C at 21, 577 S E 2d at 200 (quoting Boggs v Divested Atomic Corp., 141 F.R.D. 58, 64 (S.D. Ohio 1991)). Therefore, “[c]ommonality is met only where the class shares a determinative issue.” Gardner, 353 S C at 21, 577 S E 2d at 200-01 (emphasis added). The named plaintiffs in the Pope Class Action sought to represent a class of 228 Riverwalk unit owners. Their mere status as property owners at Riverwalk

“does not, in and of itself, qualify [them] to bring a class on behalf of the remaining property owners ” Waller, 300 S C at 468, 388 S E 2d at 801

As to the requirement of commonality, the Order granting certification states only that “[t]he Plaintiffs allege they will suffer loss of use during the remediation that will be necessary as a result of construction deficiencies ” (R 23) This allegation of “loss of use” is the sole basis for the Trial Court's determination that “the same questions of fact and law will be common to each member of the class ” (Id) However, the prospective “lost use” of the class is not a proper shared determinative issue Rather, each class member would potentially suffer a different level of lost use, and, quite possibly, no loss use whatsoever

The Pope Class consists of at least five possible types of property owners (1) full-time residents, (2) part-time residents who use the property as a vacation home, (3) part-time residents who use the property as a vacation home and sometimes rent it to third parties, (4) investment owners who rent the property to third parties, and (5) investment owners who do not rent use or rent the property The differing uses that owners have for their Riverwalk properties was acknowledged by Mr Pope as well as by Respondents purported expert, Mr DeSantis (R. 223-25, 1318-19) The testimony of various owners illustrated the different uses to which class members put their Riverwalk properties Mr Pope testified that he uses his unit as an occasional vacation home (R. 223) Constance Reddington testified that she was a full time resident at Riverwalk (R 888) Sue Ann Hodges testified that she lived in her unit at Riverwalk for a few months after purchasing it in 1999, and subsequently uses the Riverwalk unit only to house family members when

they visit her in Myrtle Beach (R. 901-02) Mike Voyles testified he uses his unit as a vacation home four or five times a year and has never rented it (R. 1348)

Even assuming that the units would be required to be vacated for an extended time during repairs,⁹ each class member's prospective "lost use" requires several individualized determinations, including (1) their actual use of the unit, (2) whether they will suffer any actual loss of that use during repairs, (3) the extent of each owner's "lost use," and (4) the value to be attributed to each individual's lost use. Respondents sought to avoid these individual determinations by treating every property owner as if they were a full-time resident and calculating their "lost use" damages as the rental value of an equivalent condominium for the full anticipated repair time, regardless of whether this "replacement" home would be desired or used by the class member. This strategy served not only to avoid the requirement that commonality be established, but also to inflate the alleged actual damages to the maximum possible amount.

The class members' different uses for their respective units establish a clear lack of commonality among the class. In Gardner, the Supreme Court reversed a trial court's certification of a class where individual issues defeated the prerequisite of commonality. 351 S.C. at 22, 577 S.E.2d at 201. The class in Gardner consisted of taxpayers who had their refund checks seized to pay delinquent debts to certain state agencies. Id. at 8, 577 S.E.2d 194. In order to prevail in the action, the plaintiffs would have to establish that notices to the class members were deficient and that the class members had been prejudiced by the deficiency. Id. at 22, 577 S.E.2d at 201. In reversing the certification of

⁹ Respondents presented evidence estimating that every unit would be required to be vacated for a period of four months (R. 218, 674-75). However, there was also testimony that similar repair work at other projects in the area had not required residents to vacate the property at all, or that the units would be inaccessible for considerably less time than Respondents claimed. (R. 764, 1137, 1202, 1228)

the Gardner class, the Supreme Court held that this was “not a typical class action where minor factual differences exist among the individualized class members ” Id . Rather, the factual differences (whether the class members had been prejudiced) were “the crux” of a predominant issue, and “a representative class cannot exist where the court must investigate each plaintiff’s claim” because “such individualized examination negates the benefits of a class action suit ” Id .

In the case at bar, the “crux” of the Pope Class Action is the “lost use” of each class member . Properly determining those damages required an individualized examination of each class member’s actual use, actual loss of use, and actual damages suffered as a result . Just as in Gardner, commonality is lacking in the present action because individualized determinations for each class member on this key issue are necessary . Therefore, because the commonality prerequisite of Rule 23(a) is lacking, the class should not have been certified and the Panel erred in not reversing the certification Order of the Trial Court.

B The Pope Class should have been decertified because the claims of the class representatives are not typical of those of the class

Rule 23(a)(3) requires that the claims and defenses of the representative parties be “typical of the claims or defenses of the class ” Rule 23(a)(3), SCRPC . This requirement of “typicality” “limit[s] the class claims to those fairly encompassed by the named plaintiffs’ claims ” Gen. Tel. Co. of Nw., Inc. v. EEOC, 446 U.S. 318, 330 (1980) ¹⁰ . The typicality requirement is based on the premise, “as goes the claim of the named plaintiff, so go the claims of the class ” Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d

¹⁰ South Carolina’s courts will look to federal law for guidance when analyzing Rule 23 . See Gardner v. Newson Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (holding that “[s]ince [South Carolina’s] Rules of Procedure are based on the Federal Rules where there is no South Carolina law we look to the construction placed on the Federal Rules of Civil Procedure .”)

331, 340 (4th Cir 1998) See also McElhaney v Eli Lilly & Co., 93 F R D 875, 878 (D S D 1982) (internal quotation omitted) (“[I]n the course of proving her own claim, plaintiff must also prove the claims of the other members of the class. The claims and defenses of the class representative would not be typical if [they] would require substantially more or less proof than required for the other members of the class.”)

Here, the named plaintiffs, Tony and Lynn Pope, own a unit at Riverwalk which they use as a vacation home (R. 223). During trial, Mr. Pope admitted that unit owners use their units in different ways, with some living there full-time, others using them occasionally as vacation homes, and others renting them (R. 223-24). The “crux” of the Class’ claims is the lost use they allegedly will suffer during repairs. The Popes would suffer lost use only to the extent they would have used the vacation home during any time it is inaccessible due to repairs. Thus, the Popes’ “lost use” damages would be markedly different than the damages of a full-time residents or owners who rent their units full-time. Additionally, the Popes’ “lost use” damages also differ from the damages of others who use their units as vacation homes depending on the extent of each specific owner’s use of their respective units. Were damages properly calculated based on the class representative’s actual lost use, the class would be limited to the lost use damages of an owner who used his home only occasionally. Therefore, because the class members’ differing uses of the properties and the corresponding differing levels of “lost use” damages defeat Rule 23(a)(3)’s requirement of typicality, the class should not have been certified and the Panel erred in not reversing the certification Order of the Trial Court.

VII The Trial Court Should Have Granted Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict.

The Panel erred in not finding that Respondents were entitled to directed verdict and JNOV as to all of Respondents' claims because they failed to meet their burden of proof as to damages. In order for damages to be recoverable, the evidence should be such as to enable the jury to determine the amount thereof with reasonable certainty or accuracy. Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). While proof to a mathematical certainty is not required, the amount of damages can not be left to conjecture, guess or speculation. Id. As was illustrated in the testimony of their experts, Drew Brown and Albert Best, Respondents' damages were impermissibly speculative. Mr. Brown, who prepared Respondents' scope of repairs, admitted that there were numerous "unknowns" in his estimated repairs and that he did not know the actual extent of the alleged damage because they did not expose the various areas or inspect them using a bore scope. (R. 484, 490, 520, 534-39, 543-44). Similarly, Mr. Best, who prepared Respondents' estimate of repair costs, admitted that his estimate was based on "extrapolations" and "assumptions" as to "hidden damage" that had not been confirmed. (R. 653, 655, 658, 669-70, 745, 769).

Additionally, as to the Pope Class Action, Respondents failed to offer any proper evidence of their damages for loss of use. Respondents relied entirely upon the testimony of Francis DeSantis to establish the existence and amount of lost use damages for the class. As is discussed in Section V A, Mr. DeSantis' testimony should have been excluded, leaving Respondents with no evidence as to the lost use damages. The Panel erred in not reversing the Trial Court's ruling in this regard.

VIII The Punitive Damages Awards in Both Actions Were Improper

A Respondents failed to establish that each Appellant violated its respective standard of care and failed to establish punitive damages by clear and convincing evidence, and the Panel should have reversed on this ground

The Panel should have ruled that Appellants' motion for directed verdict and JNOV as to the negligence claims should have been granted because Respondents failed to establish by clear and convincing evidence that they were entitled to an award of punitive damages against each Appellant. In the context of construction litigation, the South Carolina Supreme Court has mandated that each defendant's individualized standard of care must be addressed. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 560-61, 658 S.E.2d 80, 88 (2008) (holding that a general contractor is not automatically liable where a subcontractor performs negligent work, but rather the general contractor's individualized standard of care must be addressed). No individualized determinations were ever made in this case as to the standards of care applicable respectively to HCI, HRI, and Buildstar, and it was error for the Panel not to have reversed on this basis. Instead, it improperly upheld the Trial Court's ruling that the Appellants were "amalgamated" and were properly treated as one entity. (R. 1384-85)

Correspondingly, the jury's award of punitive damages against all three Appellants also was not based on individualized determinations. "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (2005). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996).

In the POA Action, the claims for negligence and breach of fiduciary duty that went to the jury could have supported punitive damages. In the Pope Class Action only the claim for negligence could have supported an award of punitive damages. In order for the jury to determine that clear and convincing evidence existed as to these claims, it was necessary for them to be instructed as to the standard of care that was applicable to each defendant. Because this was not done, the Panel erred in failing to grant new trials.

B The punitive damages awards were inconsistent with the guidelines established in Gamble v. Stevenson

In Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991), the South Carolina Supreme Court set forth guidelines “to ensure that a punitive damages award is proper.” Specifically, the Court mandated that the trial court shall conduct a post-trial review and may consider the following:

(1) defendant’s degree of culpability, (2) duration of the conduct, (3) defendant’s awareness or concealment, (4) the existence of similar past conduct, (5) likelihood the award will deter the defendant or others from like conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant’s ability to pay, and finally, (8) “other factors” deemed appropriate.

Id. at 111-12, 406 S.E.2d at 354.

Several of these enumerated factors weigh in favor of reversal of the punitive damages award. First, the award of punitive damages has no deterrent effect in this case because Appellants all went out of business prior to the commencement of this litigation (R. 718, 874-75, 887). Additionally, since Appellants became insolvent, there was no ability for them to pay any award of punitive damages (R. 144, 154). Finally, the Trial Court’s approach to allowing Respondents to try the case by injecting large amounts of evidence as to other developments renders a fair analysis of many of the remaining

factors impossible. Taking these Gamble factors into consideration, the punitive damages awards in both actions should be reversed, or failing that, a new trial should be ordered in both actions.

C The jury was improperly permitted to render punitive damages for harm to non-parties to the litigation

As set forth above, the Trial Court improperly admitted evidence of alleged defects and related litigation at other Heritage developments. The admission of this evidence violated Appellants' due process rights because it resulted in the jury imposing punitive damages upon Appellants based upon alleged harm to non-parties to the litigation. "[T]he Constitution's Due Process clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." Phillip Morris USA v. Williams, 549 U.S. 346, 353 (2007). Otherwise, a defendant is denied "an opportunity to present every available defense." Id. Further, permitting "punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation." Id. at 354. As stated by the Supreme Court, in such situations "[t]he jury would be left to speculate" as to the number of victims as well as the extent of and circumstances surrounding their injuries, magnifying the risks of arbitrariness, uncertainty, and lack of notice with which fundamental due process is concerned. Id.

The admission of evidence relating to other Heritage condominium developments violated Rule 404(b), SCRE, and the requirement set forth in Whaley v. CSX Transportation, Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005), that a "special relation" be shown to exist and a factual foundation establishing substantial similarity in

order for ‘other occurrences’ evidence to be admissible. In addition, the admission of this evidence, and Respondents’ reliance on it in arguing to the jury that it should “send the message” to “these developers and contractors” by awarding “substantial punitive damages,” (R. 1477-78) violated Appellants’ Due Process rights. The allegations of defective conditions at other projects, and the references to the litigation surrounding those other developments, were used to inflame the jury and portray Appellants as “serial” bad developers. The sheer volume of references to the other projects illustrates that the jury’s award of punitive damages in this action was punishment not only for Appellants’ actions with regard to Riverwalk, but for every project in which Appellants were ever involved. This error warranted reversal of the punitive damages awards or, failing that, a new trial in both actions, and the Panel erred in not so holding.

CONCLUSION

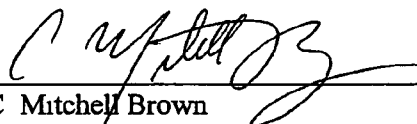
For the foregoing reasons, this Court should rehear this case and issue a new opinion reversing the Panel’s Opinion and entering judgment in favor of Appellants. Failing that, this Court should rehear this case and issue a new opinion reversing certification of the Pope Class and granting judgment to Appellants on punitive damages and ordering new trials as to liability and compensatory damages. Failing that, this Court should rehear this case, reverse certification of the Pope Class and grant Appellants new trials absolute.

Respectfully submitted,

[Signature block appears on following page]

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Heritage Riverwalk, Inc , and Buildstar Corporation

October 14, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005-CP-26-3289

RECEIVED

OCT 14 2011

SC Court of Appeals

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

Respondents,

v

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

Appellants

Case No 2003-CP-26-7169

Riverwalk at Arrowhead Country Club Property
Owners' Association, Inc

Respondents,

v

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

Appellants

PROOF OF SERVICE

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

Pleadings

**Petition for Rehearing and Suggestion for Rehearing
*En Banc***

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October 14, 2011

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

Clifton Newman Circuit Court Judge

Case No 2005 CP-26 3289

Tony L Pope and Lynn S Pope, Individually and
Representing as a Class All Unit Owners for Riverwalk At
Arrowhead Country Club Horizontal Property Regime,

Respondents,

v

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

Appellants

Case No 2003-CP-26-7169

Riverwalk At Arrowhead Country Club Property Owners
Association Inc ,

Respondents

v

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

Appellants

RETURN TO PETITION FOR REHEARING

Petitioner's Petition for Rehearing should be denied because it fails to present a proper basis for review of this Court's decision. In accordance with Rule 221(a) *SCRAP* to be entitled to a rehearing, Petitioner must state with particularity the points supposed to have been overlooked or misapprehended by the Court. The purpose of a petition for rehearing is not to give the Petitioner a second appeal. Kennedy v. South Carolina Retirement System, 349 S.C.

531 564 S E 2d 322 (2001)(The purpose of a petition for rehearing is not to present points which lawyers for losing parties have overlooked or misapprehended nor is it the purpose of the Petition for Rehearing to have the case tried in the Appellate Court a second time Jean H Toal Shahin Vafai and Robert Muckenfuss *Appellant Practice in South Carolina* 309 (1999) Contrary to the requirements of Rule 221(a) Petitioner restates and reargues the identical issues and arguments contained in its brief This Court addressed each of the issues set forth in the Petitioner s brief in its Petition, now restated for Rehearing and thus did not ‘overlook’ or ‘misapprehend’ any point In effect, the Petitioner is asking for a second appeal which is contrary to the intent of Rule 221(a) *SCRAP Kennedy, supra*

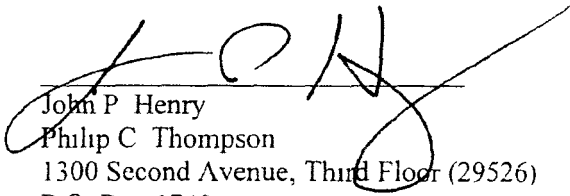
Because each of the issues raised in the Petition for Rehearing were briefed by the Petitioner and Respondent and properly addressed by the Court in its decision in this matter, Respondents therefore stand on their brief in response to this Petition, and respectfully request that the Petition for Rehearing be denied

Respectfully Submitted

Conway, South Carolina

THOMPSON & HENRY P A

October 19, 2011



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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

Clifton Newman, Circuit Court Judge

Case No 2005-CP 26-3289

Tony L Pope and Lynn S Pope Individually and
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Heritage Communities Inc Heritage Riverwalk, Inc
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Appellants

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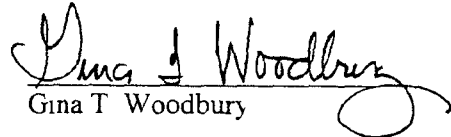
Appellants

PROOF OF SERVICE

I certify that I have served a copy of the **Return to Petition for Rehearing** on the Appellants Heritage Communities Inc Heritage Riverwalk, Inc and Buildstar Corporation by depositing a copy of it in the United States Mail postage prepaid on October 19 2011, addressed to their attorneys of record as follows

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Gina T Woodbury

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM HORRY COUNTY
Court of Common Pleas

OCT 24 2011

Clifton Newman, Circuit Court Judge

SC Court of Appeals

Case No 2005-CP-26-3289

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

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v

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

Appellants

Case No 2003-CP-26-7169

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

Respondent,

v

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

Appellants

**APPELLANTS' REPLY TO RESPONDENTS' RETURN TO THE PETITION
FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC***

Pursuant to Rules 219 and 240(f) of the South Carolina Appellate Court Rules,
Appellants Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar
Corporation hereby file this reply to Respondents' return to the petition for rehearing and
suggestion for rehearing *en banc*. Appellants respectfully submit that rehearing and/or
issuance of a new opinion reversing the trial court's decision is warranted. The grounds

for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. Additionally, this matter is of exceptional importance and is deserving of rehearing and *en banc* review as the Panel's opinion addressing "amalgamation of interests" represents a departure from South Carolina's established jurisprudence regarding disregarding corporate forms and the proper admission of "similar events" evidence.

In their return, Respondents' assert that Appellants have not "state[d] with particularity the points supposed to have been overlooked or misapprehended by the Court" {Resp. Return pp. 1-2 (emphasis in original)}. Respondents incorrectly claim that the petition merely "restates and reargues the identical issues and arguments" contained in Appellants' briefs, and that, because the Panel's opinion held against Respondents on these issues, the Panel "did not 'overlook' or 'misapprehend' any point" {Resp. Return p. 2}. This view ignores the purpose of a petition for rehearing and *en banc* review. The fact that the same issues and arguments raised in the appeal are now relevant to the issue of whether rehearing or rehearing *en banc* should be granted does not preclude rehearing.¹ Rather, the relevant inquiry is whether the Panel's opinion as to those issues overlooked or misapprehended some issues of fact or law.

Appellants contend that, in rendering the opinion in this matter, the Panel overlooked or misapprehended several matters of fact and law and the petition for rehearing and suggestion for rehearing *en banc* went into extensive detail as to these issues. Specifically, the issues raised in the petition are as follows:

¹ Should this Court deny the petition for rehearing and rehearing *en banc*, Appellants intend to file a petition for writ of certiorari with the South Carolina Supreme Court. Under Rule 242(d)(2), SCACR, no issue may be presented in a petition for writ of certiorari that has not also been raised in a petition for rehearing.

- The Panel misconstrued and overlooked established South Carolina law on the issue of piercing the corporate veil in affirming the “amalgamation” ruling, resulting in Appellants being improperly stripped of their separate corporate forms and Respondents being incorrectly freed from having to establish each element of the claims and damages as to each individual Appellant {App Pet. pp 15-22},
- The Panel erred by overlooking and misapprehending the fact that the Trial Court’s jury instruction, which incorrectly equated willful, wanton and recklessness with simple negligence, required the grant of a new trial, and that other correct statements contained in the charges did not overcome this error {App Pet pp 22-27},
- The Panel erred by overlooking and misapprehending the fact that the Trial Court’s jury instruction, which mandated that the jury award damages on the negligence charge, required a new trial because the directed verdict as to the negligence claim did not resolve the issue of whether all of the alleged defects were proximately caused by Appellants {App Pet pp 27-28},
- The Panel erred in concluding that Appellants’ objections to the jury instructions were not preserved by overlooking and misapprehending the fact that Appellants’ objection was obvious from its context, and that the charges as a whole compounded, rather than resolved, this error {App Pet pp 29-30},
- The Panel erred with regard to the “expert” testimony on the issue of “lost use” by overlooking and misapprehending the “gatekeeper” function of the courts where the subject matter and the proposed expert’s qualifications and methodology fail to meet the threshold under Rule 702, SCRE {App Pet pp 30-34},
- The Panel overlooked and misapprehended South Carolina’s jurisprudence on the issue of the admission of “similar events” evidence such as the extensive references to other Heritage projects, which were improperly used to paint Appellants as “bad developers” in violation of Rules 404 and 406, SCRE, and the Supreme Court’s mandate in Whaley v CSX Transportation, Inc., 362 S C 456, 600 S E 2d 286 (2005) {App Pet pp 34-41},
- The Panel misapprehended the law regarding class certification and overlooked the fact that certification in this matter was improper due to a lack of commonality and typicality {App Pet pp 41-46},
- The Panel erred in affirming the directed verdict on the negligence claim by misconstruing defense counsel’s acknowledgement that some defects exist as an admission that Appellants were negligence as to all alleged defects {App Pet pp 2-14},

- The Panel erred in failing to grant Appellants directed verdict and JNOV by overlooking the fact Respondents failed to establish their damages with reasonable certainty or accuracy and, instead, such damages were impermissibly based on speculation or improperly admitted expert testimony {App Pet p 47},
- The Panel erred in affirming the punitive damages awards by overlooking Respondents' failure to establish, by clear and convincing evidence that the applicable standard of care had been violated as to each individual Appellant {App Pet pp 49-49}, and
- The Panel erred in affirming the punitive damages awards by misapprehending the law regarding a post-judgment review of the propriety of punitive damages awards and overlooking the fact that the jury was improperly permitted to base its punitive damages awards on alleged harm to non-parties {App Pet pp 49-51}

Contrary to Respondents' assertion, these issues were misapprehended and/or overlooked by the Panel. Therefore, Appellants seek rehearing and rehearing *en banc* based on these errors, more thoroughly described in their petition.

CONCLUSION

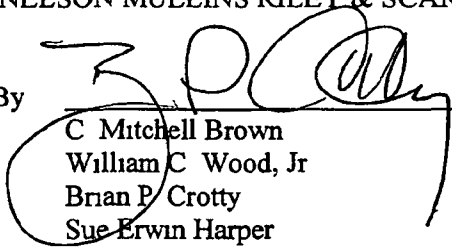
Based on the foregoing, and on the arguments in their petition for rehearing and suggestion for rehearing *en banc*, as well as in their appeal briefs filed in this matter, Appellants, respectfully request this Court grant rehearing or rehearing *en banc* as to the Panel's opinion in this matter. Rehearing *en banc* is particularly appropriate as the opinion in this matter constitutes a significant departure from the established jurisprudence in this state regarding the disregarding of corporate forms and the proper admission of "similar events" evidence.

Respectfully submitted,

[Signature block appears on following page]

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October 24, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman Circuit Court Judge

Case No 2005-CP-26-3289

RECEIVED

OCT 24 2011

SC Court of Appeals

Tony L Pope and Lynn S Pope, Individually and
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Respondents,

v

Heritage Communities, Inc , Heritage Riverwalk, Inc ,
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Appellants

Case No 2003-CP-26-7169

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

Respondents,

v

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

Appellants

PROOF OF SERVICE

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

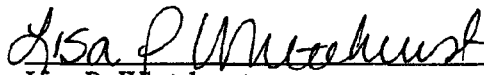
Pleadings

**Appellants' Reply to Respondents' Return to the
Petition for Rehearing and Suggestion for Rehearing
*En Banc***

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Lisa P Whitehurst
Administrative Assistant

October 24, 2011

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OCT 24 2011
SC Court of Appeals

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00470/01577



The South Carolina Court of Appeals

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December 12, 2011

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Re: Pope, Tony v. Heritage Communities

Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case.

Your Petition for Rehearing En Banc was distributed to the judges, but it has been rejected. See Rule 219, SCACR (amended April 28, 2011).

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S.C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,


Renee S. Johnson
Case Specialist II

APP_2350

 TAG/η

cc William L Howard, Esquire
Stephen L Brown, Esquire
Russell G Hines Esquire
John P Henry Esquire
Philip C Thompson, Esquire

The South Carolina Court of Appeals

Tony L. Pope and Lynn S.
Pope, Individually and
Representing As A Class All
Unit Owners for Riverwalk At
Arrowhead Country Club
Horizontal Property Regime,

Respondents,

v

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

Appellants,

Riverwalk At Arrowhead
Country Club Property Owner's
Association, Inc.,

Respondent,

v

Heritage Communities, Inc.,
Heritage Riverwalk, Inc., and
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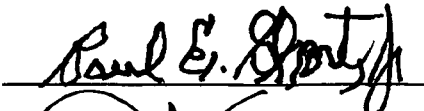
Appellants

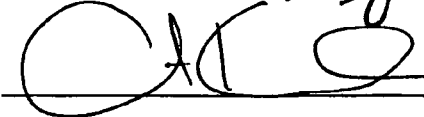
The Honorable Clifton Newman
Horry County
Trial Court Case No
2003-CP-26-03289
2003-CP-26-07169

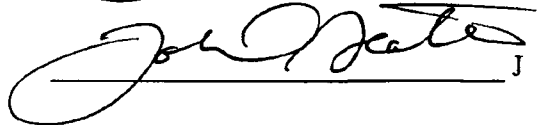
ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing the Court is
unable to discover that any material fact or principle of law has been either overlooked or

disregarded and hence, there is no basis for granting a rehearing It is, therefore, ordered that the
Petition for Rehearing be denied



J Short


J Konduros


J Geathers

Columbia, South Carolina

cc C Mitchell Brown, Esquire
William C Wood, Jr, Esquire
A Mattison Bogan, Esquire
Michael J Anzelmo, Esquire
William L Howard, Esquire
Stephen L. Brown, Esquire
Russell G Hines, Esquire
John P Henry, Esquire
Philip C Thompson, Esquire

FILED

December 12, 2011