(5)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Trial Case Nos. 2009-CP-08-1068, 2009-CP-08-3916,
2009-CP-08-1413, 2008-CP-08-2714
Appellate Case No. 2014-002390

THE OAKS AT RIVERS EDGE PROPERTY OWNERS ASSOCIATION, INC., JOHN E. ATKINSON, JOAN D. STRANDQUIST, JOSEPH E. CHIOVAROU, JR., PEYTON H. COOK, JR., BRENDA COOK, JOHN W. EDELEN, KAREN A. NELSON, ROBERT J. GRAHAM, MAUREEN S. GRAHAM, NANCY K. JOHNSON as trustee for the Nancy K. Johnson Revocable Trust, WILLIAM JUNG, CHARLES MARAZITI, PATRICIA MARAZITI, GEORGE S. POLLARD, ELEANOR J. POLLARD, ROBERT REECE, GERARD M. RUVO AND SUE S. RUVO as trustees for the Ruvo 2006 Living Trust, CAROLYN M. JENNINGS, THOMAS EDWARD KEANE, EDWARD WALLACE BARR, III, RICHARD B. PEKRUHN, PAULINE PEKRUHN, MATTHEW J. SEVERANCE, and ELIZABETH ASHLEY PHILLIPS SEVERANCE,

Respondents,

v.

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

Appellants.

BRIEF OF APPELLANTS

Charles S. Altman
Meredith L. Coker
Melissa A. Fried
ALTMAN & COKER, LLC
575 King Street, Suite A
Charleston, SC 29403
T: (843) 853-9907
F: (843) 853-9838

Roy P. Maybank
Amanda Maybank
MAYBANK LAW FIRM, LLC
531 Savannah Highway (29407)
Post Office Box 12579
Charleston, SC 29422
T: (843) 766-8101
F: (843) 766-8102

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES ON APPEAL

(1) Did the trial court err in awarding damages to the POA and Unit Owners when it failed to set-off the damages awarded by the settlement amounts previously received by the POA and Unit Owners from the settling defendants prior to trial and the evidence presented at trial established the damages were for items which were the responsibility of the settling defendants, thereby resulting in a double recovery to the POA and Unit Owners?

(2) Did the trial court err in finding CHAC and DIRD liable for $15,743,753.79 in total damages when the evidence at trial demonstrated CHAC and DIRD were not responsible for all of the claimed construction defects and the damages should have been apportioned among the settling defendants and CHAC and DIRD?

(3) Did the trial court err in awarding damages for loss of market access to the Unit Owners, when such damages were speculative and not supported by evidence at trial, in addition to awarding damages for cost of repair to the POA, without forcing the Unit Owners to elect their remedies, thereby resulting in a double recovery in favor of the Unit Owners?

(4) Did the trial court err in awarding damages to the Unit Owners for loss of value in addition to damages for loss of quiet enjoyment when loss of quiet enjoyment is included in the damages for loss of value and most of the Unit Owners did not reside in their respective units and did not actually suffer any loss of quiet enjoyment or inconvenience?

(5) Did the trial court err in awarding damages for acoustic repairs/sound remediation when the evidence at trial established that CHAC and DIRD's remediation not only met but exceeded the industry standard and the POA and Unit Owners' proposed sound remediation would not improve the acoustical/sound issues from its current state?

(6) Did the trial court err in awarding damages for the cost to remove and replace the stucco and brick as well as storage costs when such damages were excessive, not supported by the evidence, and most of the Unit Owners did not reside in their respective Units?

STANDARD OF REVIEW

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

STATEMENT OF THE CASE

This matter arises from a series of cases filed in Berkeley County, South Carolina relating to the construction of condominium units known as the Oaks at Rivers Edge (the "Oaks") located on Daniel Island. Numerous lawsuits were filed with regard to the matter. On January 12, 2007, A.C. Construction, Inc., ("AC") brought suit (CA No. 2007-CP-08-00101) against Daniel Island Riverside Developers, LLC, ("DIRD") and Travelers Casualty and Surety Company of America ("Travelers") related to a mechanics lien.[1] (R. p. 44). On April 9, 2007, DIRD filed its answer and counterclaims, alleging *inter alia* negligence as against AC for faulty workmanship. (R. p. 59). Travelers filed its

[1] Travelers was named as the bonding company used by DIRD with regard to the mechanics lien.

Answer and Counterclaim on November 1, 2007. (R. p. 67). On September 18, 2008, Geoffrey Cipkala and Samuel Agee, owners of a unit at the Oaks, brought suit (CA No. 2008-CP-08-02714) against DIRD, Carriage Hill Associates of Charleston, LLC ("CHAC"), and Carriage Hill Associates, Inc. ("CHNY") alleging *inter alia* negligence and breach of warranty.[2] That Complaint was amended on December 11, 2008. DIRD, CHAC, and CHNY filed Answers on February 20, 2009. (R. pp. 105, 115, 125). On January 20, 2009, the Oaks at Rivers Edge Property Owners Association, Inc. ("POA"),[3] and other unit owners, Bobby Reece, Joe Chiovarou, and William Jung, moved to intervene in CA No. 08-CP-08-2714. (R. p. 72). Thereafter, the POA, Reece, Chiovarou, and Jung filed a declaratory judgment action (CA No. 2009-CP-08-00453) against Cipkala and Agee with regard to the rights of the POA and individuals to bring suit. (R. p. 74). On March 11, 2009, the POA moved to consolidate CA No. 09-CP-08-453 and 08-CP-08-2714. (R. p. 146).

On February 16, 2009, DIRD and CHAC brought suit (CA No. 2009-CP-08-01068) against Weather Shield Manufacturing, Inc. ("WS"), The Muhler Company, Inc. ("Muhler") and AC, alleging *inter alia* breach of contract, breach of warranties, and negligence. (R. p. 132). WS, Muhler, and AC each answered the Complaint in May 2009. (R. pp. 148, 162, 175).

On December 3, 2009, the POA, Chiovarou, Reece, Jung, and Joseph Moran[4] brought suit (CA No. 2009-CP-08-03916, or "the POA Suit") against DIRD, CHAC,

---

[2] Cipkala and Agee also sought class certification on behalf of the other unit owners.
[3] Any references to the "Homeowners Association" or "HOA" in the Record on Appeal should be treated as references to the POA as they are the same entity.
[4] Hereinafter, unless otherwise specified, the individual unit owners will be referred to as "Unit Owners."

CHNY, WS, Muhler, AC, and Coastal Roofing, Co., Inc. ("Coastal") alleging myriad contract and tort claims relating to the construction of the Oaks. (R. p. 188). Subsequent thereto, the named Defendants answered said Complaint and various cross-claims were alleged as among the defendant parties. On April 12, 2010, by Order of the Honorable R. Markley Dennis, Jr., Civil Action Numbers 09-CP-08-1068; 09-CP-08-1413; 08-CP-08-2714; and 08-CP-08-3916 were consolidated. On May 5, 2010, the POA and the Unit Owners filed their First Amended Complaint, adding additional Unit Owners as Plaintiffs to the POA Suit.[5] (R. p. 213). Various Defendants to the POA Suit answered and cross-claimed. On December 20, 2010, the POA Suit Plaintiffs filed a Third Amended Summons and Complaint, adding Unit Owners Matthew Severance and Ashley Severance as Plaintiffs, naming additional Defendants Coastal Caulking, Inc. ("Coastal Caulk"), Mike Phillips d/b/a Mike Phillips Masonry ("Mason"), Gerald Rumplick and Edward D'Orazio (collectively, the "Architects") and Rich Behringer, and asserting additional causes of action. (R. p. 239). On May 11, 2012, Muhler brought a third-party complaint against Castle Siding, Inc. ("Castle") and CAOBA Doors ("Caoba"). On June 6, 2012, the POA Suit Plaintiffs filed a Fourth Amended Summons and Complaint, asserting additional factual allegations and causes of action. (R. p. 277). The POA Suit Defendants answered and cross-claimed among the various Defendants.

[5] The additional Unit Owners were: John E. Atkinson; Joan D. Strandquist; Peyton H. Cook, Jr.; Brenda Cook; John W. Edelen; Karen A. Nelson; Robert J. Graham; Maureen S. Graham; Kevin O. Hux; Nancy K. Johnson, as trustee for the Nancy K. Johnson Revocable Trust; Charles Maraziti; Patricia Mariziti; Donna Dee Moran; George S. Pollard; Gerard M. Ruvo and Sue S. Ruvo, as trustees for the Ruvo 2006 living trust; Robert Farina; Mary Ann Farina; Carolyn M. Jennings; Thomas Edward Keane; Edward Wallace Barr, III; Richard B. Pekruhn; Pauline Pekruhn; Gregory B. Nathan and Richard Jennings.

Various parties filed Motions for Summary Judgment and both substantive and procedural Motions in Limine in anticipation of trial, scheduled for April 8, 2013. Prior to the commencement of trial, a certain number of the parties to the case entered into settlement. (R. p. 612, lines 12-19). As a result of full settlement, Unit Owners Moran, Hux, Nathan and Jennings, and Farina were dismissed as Unit Owner Plaintiffs, as memorialized in the Order Memorializing Settlement filed March 26, 2013. Unit Owner Plaintiffs Cipkala and Agee settled their full claim and were also dismissed as Plaintiffs. The POA reached a partial settlement pre-trial for $7,702,552.00.[6] (R. p. 1803, line 9; R. p. 1610).

The POA and remaining Unit Owners proceeded with their claims against DIRD and CHAC. For purposes of trial, the parties were realigned, with the POA and remaining Unit Owners as Plaintiffs. A non-jury trial before the Honorable J.C. Nicholson, Jr., commenced on April 8, 2013. (R. p. 566). At the conclusion of the trial, the Court below granted leave to the parties to file motions and memoranda of law. (R. p. 1606, lines 23-25). The POA filed a Motion for Directed Verdict; DIRD and CHAC filed respective motions for directed verdict and a memorandum as to the damages claimed in the case in chief. (R. p. 1609)

The trial court entered judgment on October 25, 2013, in favor of Plaintiffs and against DIRD and CHAC as to all claimed causes of action.[7] (R. pp. 1-40). Thereafter, DIRD and CHAC filed post-trial motions, to wit: Motion for Set-Off (with regard to the

[6] As a result of the settlement, WS, Muhler, AC, Travelers, CHNY, Coastal Roofing, Coastal Caulking, Rumplick, D'Orazio and Rich Behringer were dismissed as parties, as set forth in the Stipulation of Dismissal filed July 10, 2013. (R. p. 551).

[7] The trial court entered Plaintiff's Proposed Order as drafted by Plaintiffs; the trial court struck "Proposed" from the caption of the Order by Form 4 entered November 4, 2013. (R. p. 41).

settlement proceeds previously negotiated by Plaintiffs); Motion for Allocation of Damages; Motion for Order Requiring Election of Remedies; Motion for Judgment Notwithstanding the Verdict, for New Trial Absolute for New Trial Nisi Remittitur, to Amend or Alter the Judgment, and for Relief From Order. (R. pp. 1661, 1666, 1672, 1677). A hearing was held on the post-trial motions on May 23, 2014. (R. p. 1794). After hearing the outstanding Motions, the trial court denied all of DIRD's and CHAC's motions by Order entered October 7, 2014. (R. p. 42). DIRD and CHAC filed the Notice of Appeal on November 4, 2014.

FACTS

This matter arises from the construction of a condominium project known as The Oaks at Rivers Edge. The Oaks at Rivers Edge is a horizontal property regime located on Daniel Island and comprised of six (6) buildings, with six (6) residential units in each building. (R. p. 654, line 17 – R. p. 655 line 3). Each building is actually four stories, with the first "floor" being parking and 2 units on each subsequent floor. The salient Common Areas as defined in the Master Deed include the windows, doors, and the area between the finished floors and ceilings between each unit.[8] The Oaks was constructed over a period from 2003 through 2006. (R. p. 1800, lines 10-12). DIRD was the developer of the Oaks, and contracted with CHAC to be the construction manager for the project. (R. p. 1800, lines 12-15). The units were sold by DIRD for an approximate average amount of $650,000.00, although several unit owners paid substantially more for their units as they purchased their units or contracts from intermediate third party

[8] The Master Deed of The Oaks at River's Edge Horizontal property Regime is a matter of public record, and was recorded on January 10, 2006, in Book 5287 at page 28 in the ROD Office for Berkeley County, South Carolina.

speculators. The purchases of the units from DIRD were consummated primarily in 2006 and the Board of the POA was turned over to the homeowners in December 2006. (R. p. 682, line 23 - R. p. 683, line 6).

The Oaks buildings contain a large number of windows, including fixed units which appear to be French doors. All of the windows on the Project were manufactured by WS, and purchased through Muhler. (R. p. 133, Paragraph 8). While the Project was ongoing, AC, retained to frame the buildings and install the windows, failed to properly install the windows. (R. p. 134, Paragraph 11). Muhler was instrumental in completing the installation of windows, as well as in assisting with the installation through the pendency of the Project. (R. p. 135).

Subsequent to the turnover of the POA to the homeowners, issues arose relating to sound transmission on the second and third floors from the above units. DIRD and CHAC undertook remediation efforts to resolve the problem, which both Plaintiff and Defendant expert sound engineers testified had been resolved to building code and to the best result possible. (R. pp. 1418-1421; R. p. 802, line 21- R. p. 803, line 19; R. p. 2496).

Issues also arose with regard to the windows and doors. Initially it was believed the issues with the windows arose as a result of WS's failure to properly assemble the windows by failing to glaze the window panes that were installed and by improperly nailing the mullions holding the glass such that the nails contacted the glass. As a result water infiltrated through the windows and many of glass panes cracked due to vibration. For a period of time CHAC was able to work with Muhler and WS to resolve this initial problem. In 2007, it became apparent that the windows and doors were leaking as a result of issues other than the initial problem. CHAC continued to work with the POA

and attempted to work with Muhler and WS to resolve these newly discovered issues. It became apparent through inspection and time that the French door units and other windows in the Project had large gaps both behind the factory-installed brick mold and within the window housing unit itself. Significant damage to the buildings resulted from these issues due to water intrusion. Because WS and Muhler refused to accept culpability for the issues, DIRD and CHAC were forced to bring suit against those contractors and AC, in order to address the POA and Unit Owner concerns and attempt to address the remediation necessary. (R. p. 132).

Multiple lawsuits were brought arising from the project, as more fully set forth in the Statement of the Case. As part of the litigation, in February 2011, the POA produced an estimate from Southeastern Construction for $11,807,884.00 to repair the six buildings, which repair estimate was proffered to the trial court. (R. p. 738, lines 2-19; R. p. 1877). Prior to the scheduled date of trial, several settlements occurred among and between the various parties. The total settlement amount paid to the POA was $7,702,552.00. (R. p. 1803). Of that amount, $3,700,000.00 was paid by CHAC, DIRD, Carriage Hill Associates, Inc., the architects on the project Rumplick and D'Orazio, and Behringer. (R. p. 1611). The other $4,002,552.00 was paid by Weather Shield, Muhler, AC Construction, and Coastal Caulking (R. p. 1611).[9]

At trial, DIRD and CHAC's expert testified that the removal of the bricks and stucco was due to water intrusion caused by defective windows and doors. (R. p. 1547,

[9] Additional settlement amounts were paid to certain Unit Owners for full settlement of their individual claims prior to trial. These included: Moran, Hux, Nathan and Jennings and Farina, as well as Cipkala and Agee.

lines 10-25; R. p. 1571, lines 2-3). He further testified there was no evidence of the stucco contributing to the water intrusion. (R. p. 1556, lines 21 – R. p. 1557, line 3).

Numerous Unit Owners testified that they did not reside in their respective units. (R. p. 832, lines 12-13; R. p. 837, lines 2-3; R. p. 862, lines 15-16; R. p. 878, lines 23-24; R. p. 880, lines 8-11; R. p. 894, lines 17-19; R. p. 975, lines 7-9; R. p. 1098, lines 3-8; R. p. 1120, lines 22-25; R. p. 1136, lines 8-10, 23-25; R. p. 1150, lines 19-20; R. p. 1176, lines 10-15; R. p. 1207, lines 14-15). Those with tenants testified they were renting their respective units for between $1,500.00 and $3,000.00 per month. (R. p. 835, line 21; R. p. 852, line 18; R. p. 853, line 7; R. p. 874, lines 9-15; R. p. 985, line 2; R. p. 1138; line 1; R. p. 1208, line 25). The POA and Unit Owners' expert testified if the problems were repaired then there would be no loss of value of the individual units. (R. p. 1278, lines 8-18).

After a bench trial, the trial court awarded judgment against DIRD and CHAC as to all remaining causes of action alleged: negligence, gross negligence, and negligent misrepresentation. (R. p. 32). Additionally, the trial court found DIRD liable for breach of fiduciary duty and breach of implied warranty of habitability, and CHAC liable for breach of implied warranty of workmanlike service. (R. p. 32). The POA was awarded judgment in the amount of $9,389,134.47, while the remaining Unit Owner Plaintiffs received awards from $374,825.00 to $468,265.00, for a total judgment amount rendered of $15,743,753.79. (R. pp. 32-35). The calculation of damages did not differentiate as to the Unit Owners who owned fourth floor units nor did it differentiate as to those Unit Owners who did not use their units as full-time residences (R. pp. 33-35).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO SET-OFF FROM THE TOTAL VERDICT THE AMOUNT PREVIOUSLY RECEIVED BY THE POA AND UNIT OWNERS THROUGH SETTLEMENT.

The trial court failed to consider any prior settlement monies received by the Unit Owners and POA and instead found CHAC and DIRD liable for the full amount, including amounts which the owners and POA received for defects from the defendants prior to trial. S.C. Code § 15-38-50 states, "[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury[,]. . . 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 . . . ." A set-off is mandated by statute and is not within the Court's discretion. See Ellis v. Ellis, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct.App. 1999); Vortex Sports & Entertainment, Inc., v. Ware, 378 S.C 197, 209, 662 S.E.2d 444,451 (Ct.App. 2008); see also Smith v. Widener, 297 S.C. 468, 473, 724, S.E.2d 188, 191 (Ct. App. 2012) ("[W]hen a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law."). Prior to trial, numerous defendants paid or agreed to pay the POA and Unit Owners in a confidential mutual settlement agreement for $7,702,552.00 (R. p. 1803, lines 9-16). This settlement amount included significant contributions from CHAC and DIRD, as well as Carriage Hill Associates, Inc., and individuals who had performed services for the Oaks project, Rumplick, D'Orazio, and Behringer. The trial court failed to take into consideration any prior settlements and instead awarded the POA and Unit Owners an amount which included damages the POA and Unit Owners had previously

received from the defendants. Accordingly, the trial court's order should be reversed and a new trial granted to account for the failure to set-off the verdict against the prior settlement amounts.

By way of example, the cost of repair included damages for replacement of windows and doors, brickwork, and damage to sheathing caused by water intrusion, along with general and administrative costs, overhead, and profit attributable to such work, among other items, all of which were part of the responsibility of the window manufacturer, installers, and framers at the project. (R. p. 12). "[T]here can be only one satisfaction for an injury or wrong." Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App. 1998) (internal quotation marks omitted). A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15-38-50(1) (2005). Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. Hawkins, 330 S.C. at 113, 498 S.E.2d at 406-07. "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Widener, 297 S.C. at 472, 724 S.E.2d at 190.

In the order entering judgment against both CHAC and DIRD, the trial court awarded the following amounts in favor of the POA and the Unit Owners:

POA	$9,389,134.47
Atkinson/Strandquist	$416,625.00
Chiovarou	$422,721.80
Barr/Keene	$422,721.80
Cook	$388,250.00
Edelen/Nelson	$446,625.00

Graham	$453,633.00
Jennings	$468,265.00
Johnson	$395,750.00
Jung	$418, 512.92
Maraziti	$422,721.80
Pekruhn	$374,825.00
Pollard	$425,896.80
Reece	$451,625.00
Ruvo	$422,742.00
Severance	$423,704.20[10]

The total amount of all the verdicts against DIRD and CHAC was $15,743,753.79. DIRD and CHAC were found liable for the entire cost of repair and engineering fees with no consideration of the settlement received from the defendants, including the window manufacturer and the window installer. At trial, DIRD and CHAC's expert, Mike Parker, testified that water intrusion caused by defective windows and doors and improperly installed windows and doors necessitated the removal of all the bricks and stucco. (R. p. 1571, lines 2-3). In fact, Parker offered two reasons as to why the window and door repair would necessitate a carte blanche removal and replacement of the stucco and brick. The first explanation was the leaking window allowed water into the wall cavity, both down the wall and out to the sides of the window, resulting in a "tremendous amount of rotten wood." (R. p. 1571, lines 11-18; R. p. 1572, lines 10-17). The second explanation was when performing a surgical repair it is very difficult to match brick color and mortar color. (R. p. 1571, lines 21-25; R. p. 1576, lines 16-23). The same problem exists for stucco. Parker testified that when tying old stucco to new stucco, issues arise from bonding the materials together to try to prevent splits in the future and putting different

[10] Of the listed Unit Owners, the testimony at trial established that only Chiovarou, Pekruhn, Pollard, and Reece lived in their units for any period of time. (See *infra* pp.21-22).

coats over the materials. (R. p. 1573, lines 11-14). Parker stated, "at the end of the day my recommendation, my opinion, is all of it should come off." (R. p. 1573, lines 15-16)

The POA and Unit Owners' expert Ted Padgett, PE, agreed, testifying that "surgical repairs in stucco are very difficult" (R. p. 1379, lines 22-24), and that "[s]urgical repairs in brick become a matching problem." (R. p. 1379, line 22 – R. p. 1380, line 1). Mr. Padgett testified he agreed the most economical way to deal with the problem is to reclad:

> Q: So that I bring that full statement all the way around: if we're going to remove the windows, remove the doors, instead of surgically trying to chip away each brick, wipe it clean, lets's do it all over again?
> A: We'll do it right this time.
> Q: But the answer is yes?
> A: Yes.

(R. p. 1380, lines 6-12). Awarding the POA the full cost of repair without consideration of the settlement received from the defendants constituted a double recovery and windfall to the POA. The trial court erred by not setting off the damages award by the prior settlement of $7,702,552.00 (R. p. 1803, line 9). Accordingly, the trial court's decision should be reversed.

II. THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE ALLOCATION OF DAMAGES AND ENTERED AN ORDER PRIOR TO THE POA AND UNIT OWNERS' ELECTION OF REMEDIES, THUS RESULTING IN A DOUBLE RECOVERY TO THE POA AND THE UNIT OWNERS.

The POA and Unit Owners were unfairly awarded a double recovery by the trial court's failure to force the POA and Unit Owners to properly elect their remedies during the trial of this matter. Further, the POA and Unit Owners were awarded a double recovery by the trial court's failure to allocate damages among the responsible parties and

instead held CHAC and DIRD liable for countless causes of action. S.C. Code § 15-38-15 states in pertinent part (emphasis added):

> (A) In an action to recover damages resulting from . . . damage to property . . . , if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. **A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact. . . ..**
>
> (C) **The jury, or the court if there is no jury, shall:**
>
> (1) **specify the amount of damages**; . . . and
>
> (2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and
>
> (3) **upon a motion by at least one defendant**, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible . . . damage to property, **specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible . . . damage to property . . . as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property**. . . .

The South Carolina Supreme Court has recognized that, in cases after 2005, S.C. Code §15-38-15 may be applied to defeat joint and several liability among joint tortfeasors:

> The current version of the Contribution Among Tortfeasors Act became effective for cases arising after July 1, 2005. The 2005 amendment to the Act provides that **a "less than fifty percent" at-fault defendant "shall only be liable for that percentage of the indivisible damages determined by the jury**." S.C.Code Ann. § 15–38–15(A) (Supp.2008).

Branham v. Ford Motor Co., 390 S.C. 203, 236, 701 S.E.2d 5, 22 (2010) (f.n. 21) (distinguishing cases that are filed before the 2005 amendment that do not provide for apportionment among joint tortfeasors from those filed after 2005 in which apportionment among joint tortfeasors is possible).

The trial court rendered its verdict as to liability and damages and entered a single Order on October 25, 2013, wherein the trial court failed to specify damages between CHAC and DIRD. (R. pp. 1-40). Further, damages were awarded for items for which other parties were responsible. The damages incurred should have been allocated to each party responsible for the damage to those respective items. Furthermore, the trial court issued an order without having the POA and the Unit Owners elect their remedies, further resulting in a double recovery for the POA and Unit Owners. As a result, the trial court's decision should be reversed and this Court should grant a new trial.

A. The Trial Court's Failure to Specify Damages Among the Other Defendants and CHAC and DIRD Amounts to a Double Recovery In Favor of the POA and Unit Owners.

The trial court's order awarded only damages against CHAC and DIRD. (R. pp. 1-40). Prior to trial, numerous named defendants settled with the POA and Unit Owners, while other named defendants did not appear at trial. This group of Defendants included Carriage Hill Associates, Inc.; Weather Shield Manufacturing, Inc.; the Muhler Co., Inc.; A.C. Construction, Inc.; Coastal Roofing, Co., Inc.; Coastal Caulking, Inc.; Mike Phillips d/b/a Mike Phillips Masonry; Gerald Rumplick; Edward J. D'Orazio; and Rich Behringer. Despite the prior settlement, and in the absence of any evidence at trial, damages were awarded to the POA and Unit Owners in the trial court's order for items that were not the responsibility of CHAC and DIRD, such as HVAC repair and garage

slab improvements. (R. p. 12). Pursuant to S.C. Code § 15-38-15(D), the evidence presented at trial supported a finding that the acts and omissions of the defendants "contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged." The defendants responsible for those damages should have been allocated a portion if not all of the damages incurred as to those respective items. Moreover, the trial court incorrectly held both entities liable for all causes of action when no evidence was presented with regard to DIRD, the developer, performing any construction services; likewise the record does not support any findings relating to CHAC performing any duties other than those as the construction manager.

Furthermore CHAC and DIRD were entitled to a set-off of the judgment attributable to each settling Defendant in an amount of $ 7,702,552.00, a substantial portion of which was actually paid by CHAC and/or DIRD. (R. p. 1803, line 9). Due to the trial court's failure to allocate the damages, and in turn set-off the damages based on the prior settlement, the trial court's decision should be reversed.

B. The Trial Court erred by Finding CHAC and DIRD Liable for all Causes of Action as well as Failing to Force the POA to Elect its Remedies, Thereby Resulting in a Double Recovery to the Unit Owners.

Prior to the entry of the trial court's order, the POA was required to elect its remedies. Instead, the trial court found CHAC and DIRD liable for countless causes of action, with each and every cause of action predicated upon the same evidence proffered by the POA. As this Court has held:

> The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. Its purpose is to prevent double redress for a single wrong. Use of the doctrine is limited to cases where a double recovery by the plaintiff is threatened. When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to

> either or both; however, the plaintiff may not recover both. The plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery.

Cowart v. Poore, 337 S.C. 359, 364, 523 S.E.2d 182, 185 (Ct.App. 1999) (internal citations omitted). See also Save Charleston Foundation v. Murray, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct.App. 1985) ("When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both."). Indeed, "there can be no double recovery for a single wrong." Inman v. Imperial Chrysler-Plymouth, Inc., 303 S.C. 10, 15, 397 S.E.2d 774, 777 (Ct.App. 1990). The trial court erred in not forcing the Unit Owners and POA to elect their remedies prior to the trial court's order.

a. **The Unit Owners Received a Double Recovery by the Trial Court Awarding Damages for Loss of Market Access to the Unit Owners as well as Awarding the Cost of Repairs to the POA.**

The trial court erred by awarding the POA damages to repair the buildings as well as damages to the Unit Owners for "loss of market access." Such award constitutes a double recovery. Moreover, the trial court defined "loss of market access" as damages attributed to the lost opportunity for the Unit Owners to sell their units from 2008 to 2011. The damages are speculative and insufficient evidence was presented at trial, if any, to support the trial court's finding. See Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 3346, 415 S.E.2d 384, 388 (1992) ("Findings of fact based upon a preponderance of the evidence are those supported by the greatest weight, amount, credibility or truth as reflected by the whole of the evidence before the court, or evidence which convinces as to its truth.") (internal quotation omitted). No evidence was presented by the Unit Owners regarding the specific damages, and as this Court has held,

in the absence of evidence of specific damages, the proper measure of damages to real property is diminution in value. Joyner v. St. Matthews Builders, 263 S.C. 136, 140, 208 S.E.2d 48, 50 (1974) (in the absence of evidence of specific damages, measure of damages to real property is diminution in value). Diminution in value was not awarded to the Unit Owners as to do so in addition to awarding the POA the cost of repair would, without a doubt, amount to a double recovery. Scott v. Fort Roofing & Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (S.C. 1989) ("Cost of repair or restoration is a valid measure of damages for injury to a building although compensation may be limited to the value of the building before the damage was inflicted."); New v. Max G. Crosby Const. Co., Op. No. 2004-UP-282 (S.C. Ct. App. filed April 27, 2004) ("[A]llowing recovery for both the cost of repairs and the diminution in value of the home prior to repairs would amount to double recovery."). The two measurements of damage are exclusive to one another, not complementary.

The POA and Unit Owners' expert, Christopher Donato, testified if the units are repaired then the value would revert back to market value. (R. p. 1277, lines 1-10). Mr. Donato further stated once the problems at the units were repaired, the problem of loss of value would disappear. (R. p. 1278, lines 8-18). The Unit Owners received the benefit of a fully repaired unit, plus an additional award for lost value, which by their own expert's testimony, would no longer exist once the unit is repaired. (R. p. 1278, lines 16-18). As such, the award to the POA for the cost to repair the units as well as the award to the Unit Owners for loss of value amounts to a double recovery that puts the Unit Owners in a position over and above being made whole.

Further, there is no recognized award for "loss of market access;" the Unit Owners merely renamed their purported damages for diminution in value. While damages do not have to be proven with a mathematical certainty, they cannot be based on speculation. See Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) ("Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required."); South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 122-23, 113 S.E.2d 329, 336 (1960); Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000) ("Neither the existence, causation nor amount of damages can be left to [the judge or jury's] conjecture, guess or speculation.").

Moreover, the Unit Owners had the burden of proving by the preponderance of the evidence that they are entitled to such damages. The Unit Owners argued they were denied access to the sales market due to the alleged defects. The evidence proffered at trial, however, was too scarce, too inconsistent, and too speculative to support any such finding, even if this "access" were a recognized element of damages. No testimony or evidence was presented by the Unit Owners of potential buyers who did not purchase the units due to the construction defects, or real estate agents who incurred difficulty in selling the units due to the construction defects. No purchase offers, contracts of sale, listing agreements, listings, or loan applications were proffered at trial. No Unit Owner presented any evidence that the sale of a unit fell through due to notification of

construction defects. Few Unit Owners proffered any evidence that they had made any attempt to sell or refinance the property; those that did agreed that at least some of their inability to do so was caused by the overall saturation and the bursting of the real estate bubble existing at the time. Furthermore, several Unit Owners did not testify at all. Nevertheless, each and every individual Unit Owner was awarded a substantial amount for the purported loss of market access.

While either the cost of repair or lost market value is, individually, an accepted measure of damages, the award of both resulted in individual Unit Owners who will, upon completion of the repairs, be the owners of real estate at full market value, in addition to monetary awards of approximately $400,000.00. As such, the trial court's award to the POA for cost of repairs in addition to an award to the Unit Owners for loss value is a double recovery and improper.[11] Further, the award for loss of market access is not a recognized measure of damages and is not supported by any evidence; it is speculative and therefore, not recoverable. As such, the loss of market access to the Unit Owners was unwarranted, and the trial court's order should be reversed.

b. **The Trial Court Awarded a Double Recovery to the Unit Owners by Awarding Damages for Loss of Quiet Enjoyment in Addition to Loss of Market Value.**

The trial court erred by awarding Unit Owners damages for the lost value of their respective units as well as the sum for loss of quiet enjoyment, thus amounting to a

[11] The double recovery and impropriety of such a windfall award is readily calculable. The POA was either paid in settlement or awarded a total amount of $17,091,686.00. If this amount is equally attributed to each of the units and added to the award to each Unit Owner Plaintiff (for purposes of illustration, approximated at $400,000.00), then the total award per unit is approximately $875,000.00, substantially in excess of the original cost of the Units; additionally the Unit Owners retain ownership of the repaired, full value units, leading to a virtual triple recovery.

double recovery. During the testimony of Mr. Donato, the Court recognized that there may be an element of damages relating to loss of quiet enjoyment, but that an award for "inconvenience" and an award for lost value again presented the issue of double recovery. (R. p. 1233, lines 11-14; R. p. 1243, lines 11-14; R. p. 1245, lines 1-6) In fact, quiet enjoyment has a value which would necessarily be included in Donato's valuation of lost market value. As such the trial court erred by awarding damages for both loss of quiet enjoyment and loss of market value. The right to quiet enjoyment is a matter of superiority and warranty of title and bears no relationship to noise levels or annoyances. Plaintiffs did not allege or proffer evidence relating to a cause of action for Nuisance.

The trial court's order provided for an award for loss of quiet enjoyment calculated at 1373 days (or fewer, if units were sold) at $125.00 per day. (R. pp. 33-35). The loss of quiet enjoyment and any related inconvenience must first be actually suffered in order to support an award of any damages. See generally Moore v. Weinberg, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009) ("In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and *(4) the plaintiff suffered an injury or damages.*") (emphasis added). Most of the Unit Owners did not actually suffer an injury or damages as they did not reside in the units for the duration of their ownership, if at all. For example, the Ruvos never spent one day in the unit, and live in San Francisco. (R. p. 832, lines 12-13; R. p. 837, lines 2-3); the Johnsons have not lived in their unit (R. p. 862, lines 15-16); the Atkinson/Strandquists live in Pennsylvania and visit about three (3) weeks per year (R. p. 878, lines 23-24; R. p. 880, lines 8-11; R. p. 894, lines 17-19); the

Jungs have never lived in their unit (R. p. 975, lines 7-9); the Marazitis own and reside in another house on Daniel Island (R. p. 1098, lines 3-8); the Cooks did not provide any evidence that they ever resided in the subject unit; the Nelson / Edelsons were only in their unit on occasion (R. p. 1120, lines 22-25); the Grahams did not reside in the unit (R. p. 1136, lines 8-10, 23-25); Mr. Barr testified he resides on Sullivans Island (R. p. 1150, lines 19-20); the Severances stayed in their unit for about one year (R. p. 1176, lines 10-14); and the Jennings live on Ashley Avenue in Charleston, South Carolina (R. p. 1207, lines 14-15).

Additionally, the award of loss of quiet enjoyment is part of the damages for lost of market value. Assuming *arguendo* that the award for quiet enjoyment was in effect an award for nuisance, "[n]o one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells. The location and surroundings must be considered, since noise which amounts to a nuisance in one locality may be entirely proper in another." Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 255-56, 125 S.E.2d 628, 633-34 (1962). The right to quiet enjoyment is just one of the "bundle of sticks" that make up the rights of property ownership; as such, the level of quiet enjoyment is necessarily a consideration in calculating the value of a piece of property. For the Unit Owners to receive awards for both loss of quiet enjoyment and lost value is, by definition, as double recovery. Accordingly, the trial court's decision should be reversed.

c. The Trial Court Erred in Awarding Damages for Loss of Quiet Enjoyment and Loss of Market Access When the Unit Owners Failed to Meet their Burden Of Proof and Establish They Were Entitled To Such Damages.

The trial court further erred in equating "quiet enjoyment" with any issues relating to inconvenience or noise attenuation.[12] The Unit Owners failed to present any evidence to support an award for loss of market access as well as loss of quiet enjoyment. "In civil cases, the burden of persuasion rests with the plaintiff to prove his or her case, usually, by a preponderance of the evidence." Smith v. Barr, 375 S.C. 157, 161, 650 S.E.2d 486, 489 (Ct. App. 2007). "Findings of fact based upon a preponderance of the evidence are those supported by the greatest weight, amount, credibility or truth as reflected by the whole of the evidence before the court, or evidence which convinces as to its truth." Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 346, 415 S.E.2d 384, 388 (1992)

As discussed more fully above, no evidence was presented at trial by the Unit Owners of potential buyers who did not purchase the units due to the construction defects, or real estate agents who incurred difficulty in selling the units due to the construction defects. (See *supra* p. 19). Moreover, no testimony was presented as to loss of quiet enjoyment and as discussed in the previous section most of the Unit Owners did not reside in their respective units and therefore did not experience any loss of quiet enjoyment. (See *supra* pp. 21-22). The Unit Owners failed to meet their burden of proof to establish their entitlement to damages for loss of quiet enjoyment and loss of market

[12] As used in this section, the term "quiet enjoyment" is used in the manner ascribed by the trial court. Unit Owner Plaintiffs proffered no evidence of "loss of quiet enjoyment" as that term is understood in title litigation.

access by the preponderance of the evidence. Accordingly, the trial court's order should be reversed.[13]

III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING DAMAGES TO THE POA AND UNIT OWNERS WHICH WERE EXCESSIVE, SPECULATIVE, NOT SUPPORTED BY THE EVIDENCE AND CONSTITUTED A DOUBLE RECOVERY.

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The trial court made several factual findings which were not supported by the evidence at trial.

First, no evidence supported the trial court's finding that the sound repairs performed by CHAC and DIRD "were not meant to achieve the sound attenuation results required by industry standards, but were meant to simply improve a bad situation." (R. p. 9). This finding was not supported by the testimony and evidence presented at trial, and thereby amounts to an abuse of discretion. See Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) ("An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusion."). Moreover, the Court overlooked evidence presented that (1) the remediation did in fact bring the acoustical issues up to or in excess of industry standard, and (2) The POA and Unit Owners' proposed sound remediation repair would do nothing to improve the current sound issues.

Second, the trial court's award of $7,934,704.06 specific to the cost of repairs was excessive and not supported by the evidence because it included the cost to remove

[13] Furthermore, no evidence was presented at trial regarding any loss of value due to the lowering of the ceilings in the Units.

and replace the stucco and brick ($1,091,971.50). The testimony at trial established that even if the installation of the stucco and brick was perfect, it would have to be removed and replaced due to water intrusion and damage caused by defective and leaky windows—an issue which was resolved through settlement before trial.

Lastly, the trial court awarded damages for "storage costs" and "upgrades" when most of the Unit Owners did not reside in their respective units. Accordingly, as discussed below, the trial court's factual findings are not supported by the evidence and testimony and the trial court's order should be reversed.

A. The Award of Damages for Acoustic Repairs/Sound Remediation is not Supported by the Testimony and the Evidence Presented at Trial.

At trial, a report prepared by the POA and Unit Owner's own acoustical expert, Quietly Making Noise, was admitted into evidence. (R. p. 809, lines 2-12; R. p. 2496). The report stated in pertinent parts:

> The ASTC ratings exceeded the minimum building code requirements for both the original and modified floor/ceiling systems designs.
>
> The FIIC rating with wood floor coverings was 41 for the original construction which falls below the minimum building code requirement. An increase of 8 points was realized for the modified construction, resulting in an FIIC rating of 49 which meets the applicable criterion.
>
> . . .
>
> The design modifications have clearly made a significant improvement. The improvements to the ceiling are consistent with the recommendations that QMN [Quietly Making Noise] would have made and further changes to the ceiling design are unlikely to result in much more of an increase in the ratings.

(R. p. 802, lines 21-R. p. 806, line 19; R. p. 2504). Further, Noral Stewart, Phd, CHAC and DIRD's witness who was qualified by the trial court as an expert in acoustical noise,

testified that the sound remediation repairs conducted by CHAC and DIRD not only complied with the code as required by the International Building Code but actually exceeded the code. (R. p. 1418, line 1; R. p. 1419, lines 2-7; R. p. 1420, lines 7-21).

Mr. Stewart also testified, in his opinion, the acoustical remediation proposed by Ted Padgett[14] would not provide "anything significantly better, and could in fact, run some risks of not getting as well." (R. p. 1421, lines 10-17.). Specifically, Mr. Stewart testified that he "would strongly disagree with any idea about trying . . . to redo the ceiling beyond what we have done. (R. p. 1421, lines 18-20). When asked by the POA and Unit Owners' counsel what the "goal" of the remediation was, Mr. Stewart stated "the absolute goal was to meet the code." (R. p. 1435, lines 9-11).

Nowhere in the record is there any testimony from Mr. Stewart that the goal of the remediation was "to simply improve a bad situation" rather than "achieve the sound attenuation results required by industry standards," as stated in the trial court order. (R. p. 9). Furthermore, there is no evidence to support the finding that any improvement would be gained if the acoustical repair recommended by Mr. Padgett was implemented. As such, the trial court's award for acoustical repairs in the amount of $1,973,134.98, was not supported by the evidence and therefore, should be reversed.[15]

---

[14] To the extent the trial court relied on Ted Padgett's testimony regarding the noise remediation, such reliance was improper. Mr. Padgett was not qualified as an expert in acoustical noise. Moreover, the Testimony at trial established that Mr. Padgett has never been retained to design acoustical plans; Mr. Padgett is not a member of any professional organization with regard to acoustical professionals; Mr. Padgett has never written any papers, or reviews on acoustical construction in buildings, nor has he ever been peer-reviewed by any engineers in South Carolina, or nationally, as to opinions as they relate to whether or not a building has been acoustically built in a sound manner. (R. p.1364, line 25 – R. p.1367, line 7)

[15] Joseph E. Chiovarou, Jr. was the only Unit Owner to decline sound remediation efforts.

B. The Damages Award of $7,934,704.06 to the POA for cost of repair was excessive and not supported by the evidence in that it erroneously included the cost to remove and replace the stucco and brick ($1,091,971.50).

The trial court erred in holding the brick and stucco had to be removed and replaced due to building code violations which were the fault of CHAC and DIRD. The trial court based this holding on the erroneous finding that (1) Michael Parker, PE, CHAC and DIRD's expert, "did not evaluate the stucco or brick veneer and offered no opinions thereon" and (2) that "Padgett's testimony is uncontradicted that the stucco and brick veneer contains defects in violation of industry standards . . ." (R. p. 11). These findings were not supported by the testimony at trial. Rather the testimony presented at trial supported a finding that even if the stucco and brick installation were absolutely perfect, the stucco and brick would still have to be removed and replaced due to water intrusion and damage caused by the defective and leaky windows, an issue that was resolved prior to trial via settlement with another party. As such, there is no evidence to support the trial court's finding and, therefore, the order should be reversed.

a. Michael Parker, PE testified that he evaluated the stucco.

Michael Parker, PE, was qualified as an expert in water source and water penetration. (R. p. 1547, lines 10-25). Parker testified that as part of his investigation into the buildings he also looked at "the field of wall stucco as part of [his] investigation." (R. p. 1556, lines 21-23). Parker stated, that they "did a lot of test cuts . . . just in the wall of the stucco to see if there was any evidence that the stucco was contributing to the leakage. And we didn't find any." (R. p. 1556, line 24 - R. p. 1557, line 3).

Parker further testified that as part of his window investigation, they removed all of the stucco, except for around three feet at the top of the roof to wall intersection to determine the extent of the window leakage. (R. p. 1557, line 18 – R. p. 1558, line 4). Again, when asked about field testing on the stucco, Parker testified, "Yes. During the - - as I said earlier, we cut D-ports in there . . . to see if there was leaks associated with the stucco. We didn't see any." (R. p. 1563, lines 11-16). He continued to explain that he cut through the Tyvek and that the sheathing was dry and fastened properly, and that he "didn't see a problem with the stucco."[16] (R. p. 1563, lines 21-24). Therefore, the trial court abused its discretion in finding that Parker did not evaluate the brick or the stucco.

b. Michael Parker, PE, testified that water intrusion from the windows and doors would necessitate the removal of all the stucco and brick.

The court erroneously held that removal and replacement of all the brick and stucco is necessary based on the POA and Unit Owners' expert's "uncontradicted testimony" that such removal and replacement is necessary to repair the damage caused by such defects. (R. p. 11)

Again, Michael Parker, PE, testified at trial that, "in [his] opinion, all the stucco and all the brick have got to come off these buildings." (R. p. 1571, lines 2-3). Parker offered two reasons as to why the window and door repair would necessitate a cart blanch removal and replacement of the stucco and brick. The first explanation was that the leaking window allowed water into the wall cavity both down the wall and out to the sides of the window resulting in a "tremendous amount of rotten wood." (R. p. 1571,

[16] Moreover, the POA and Unit Owners' expert, Ted Padgett, PE, testified no brick ties were installed; however, Mr. Parker testified that he observed brick ties during his investigation. Pictures proffered and admitted at trial showed brick ties were used on the buildings during original construction. (R. p. 1578, lines 9-23).

lines 11-18; R. p. 1572, lines 10-17). The second explanation was that when performing a surgical repair it is very difficult to match brick color and mortar color. (R. p. 1571, lines 21-25; R. p. 1576, lines 16-23). The same problem exists for stucco. Parker testified that when tying old stucco to new stucco, you have to worry about bonding the materials together to try to prevent splits in the future, and putting different coats over the materials to hide the crack. (R. p. 1573, lines 11-14). Parker stated, "at the end of the day my recommendation, my opinion, is all of it should come off." (R. p. 1573, lines 15-16).

The POA and Unit Owners' own expert agreed, testifying that "surgical repairs in stucco are very difficult" (R. p. 1379, lines 22-24), and that '[s]urgical repairs in brick become a matching problem." (R. p. 1379, line 25- R. p. 1380, line 1). Mr. Padgett testified that he agreed the most economical way to deal with the problem is to reclad:

> Q: So that I bring that full statement all the way around: if we're going to remove the windows, remove the doors, instead of surgically trying to chip away each brick, wipe it clean, lets's do it all over again?
> A: We'll do it right this time.
> Q: But the answer is yes?
> A: Yes.

(R. p. 1380, lines 6-12).

The POA and Unit Owners went to great lengths to stress upon the trial court that they paid for "luxury" when it came to their units. Based on this position, it is impossible to accept their argument that but for the claimed defects in the brick and stucco, they would have only removed a small percentage of the brick and the stucco in connection with the window repair. As such, $582,999.30 for replacement of the stucco and

$508,972.20, for a total of $1,091,971.50, should never have been included in the cost of repair award to the HOA. Accordingly, the trial court's order should be reversed.

C. The Trial Court Erred in Awarding Damages for Upgrades and Storage Costs when most Unit Owners did not Reside in Their Units and such an Award was Grossly Excessive.

The trial court erred in awarding damages for hotel, storage costs, and upgrades[17] when most of the Unit Owners did not live in their respective units and the award of the damages was grossly excessive and not supported by the evidence at trial. The trial court awarded the POA $250.00 a day for replacement housing, $500 a month for storage and $1,820.00 for moving costs for a total of $641,520.00 (R. p. 14; R. p. 32). Most of the Unit Owners testified that they did not live in their respective units, so no hotel or moving costs would have been necessary (See *supra* p. 22); furthermore, the trial court held the repairs will take sixteen months and construction would be performed sequentially, not concurrently, on the buildings. (R. p. 13). Even assuming all units were occupied, this means that each building, or six units, would be "moved out" for the course of two months. In other words, six condominiums, houses, or apartments could be rented for a year that were comparable to the square footage and location of the Oaks at Rivers Edge. At $250.00 per day (plus storage costs), this equates to six rental homes at close to $8,000.00 per month, *each*. While no evidence was offered other than rough assumptions at trial, certain Unit Owners testified they were currently renting their respective units for between $1,500.00 and $3,000.00 per month. (R. p. 835, line 21; R. p. 852, line 18; R. p. 853, line 7; R. p. 874, lines 9-15; R. p. 985, line 2; R. p. 1138; line 1;

[17] No evidence was presented by POA and Unit Owners at trial regarding the following repair items: garage slab repair ($67,812), parapet wall returns ($32,400), brick entry steps, ($60,630), French drain system, ($18,000), and the lobby HVAC ($85,200). No evidence was presented that any damages were the result of negligent construction.

R. p. 1208, line 25). Moreover, one Unit Owner testified he was currently renting a house on Sullivan's Island for $1,650.00 per month. (R. p. 1151, lines 5-8, 19-25). An award of $250 per day for replacement housing more than doubles the amount that most of the Unit Owners' tenants pay to rent their units and that certain Unit Owners are currently paying to rent elsewhere. Accordingly, no evidence was presented at trial to support the damages awarded to the POA for replacement housing, storage, and moving, and therefore the trial court's order should be reversed.

Likewise, the amounts awarded to the Unit Owners for "inconvenience" were excessive and not supported by the evidence. No credible evidence supported the finding the Unit Owners were inconvenienced in the amount of $125.00 per day, or $3,750.00 per month, nor was any evidence presented as to the value of "loss of quiet enjoyment."[18] As to certain Unit Owners who did not testify at trial, there is no evidence as to whether they lived in or ever visited the units—whether they were inconvenienced at all—and therefore whether they actually experienced any loss of quiet enjoyment. Of the Unit Owners who did testify, several did not now or ever live in their respective units; of those who had tenants renting their units, there is no evidence that each and every tenant suffered a loss of quiet enjoyment or any inconvenience. Therefore, because there is no evidence to support the award of damages, the trial court's order should be reversed.

[18] CHAC and DIRD additionally contend that the loss of quiet enjoyment is an element of the calculations provided by Donato as to diminution of value (See *supra* pp. 20-22).

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand the case for a new trial.

Respectfully submitted,

Charles S. Altman
Meredith L. Coker
Melissa A. Fried
ALTMAN & COKER, LLC
575 King Street, Suite A
Charleston, SC 29403
T: (843) 853-9907
F: (843) 853-9838

Roy P. Maybank
Amanda Maybank
MAYBANK LAW FIRM, LLC
531 Savannah Highway
Post Office Box 12579
Charleston, South Carolina 29422
T: (843) 766-8101
F: (843) 766-8102

Attorneys for Appellants

May 8, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge
Trial Case No.'s 2009-CP-08-1068, 2009-CP-08-3916,
2009-CP-08-1413, 2008-CP-08-2714
Appellate Case No. 2014-002390

THE OAKS AT RIVERS EDGE PROPERTY OWNERS ASSOCIATION, INC., JOHN E. ATKINSON, JOAN D. STRANDQUIST, JOSEPH E. CHIOVAROU, JR., PEYTON H. COOK, JR., BRENDA COOK, JOHN W. EDELEN, KAREN A. NELSON, ROBERT J. GRAHAM, MAUREEN S. GRAHAM, NANCY K. JOHNSON as trustee for the Nancy K. Johnson Revocable Trust, WILLIAM JUNG, CHARLES MARAZITI, PATRICIA MARAZITI, GEORGE S. POLLARD, ELEANOR J. POLLARD, ROBERT REECE, GERARD M. RUVO AND SUE S. RUVO as trustees for the Ruvo 2006 Living Trust, CAROLYN M. JENNINGS, THOMAS EDWARD KEANE, EDWARD WALLACE BARR, III, RICHARD B. PEKRUHN, PAULINE PEKRUHN, MATTHEW J. SEVERANCE, and ELIZABETH ASHLEY PHILLIPS SEVERANCE,

Respondents,

v.

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

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

May 8, 2015

Charles S. Altman
Meredith L. Coker
Melissa A. Fried
ALTMAN & COKER, LLC
575 King Street, Suite A

Charleston, SC 29403
T: (843) 853-9907
F: (843) 853-9838

Roy P. Maybank
Amanda Maybank
MAYBANK LAW FIRM, LLC
531 Savannah Highway
Post Office Box 12579
Charleston, South Carolina 29422
T: (843) 766-8101
F: (843) 766-8102

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Trial Case No.'s 2009-CP-08-1068, 2009-CP-08-3916,
2009-CP-08-1413, 2008-CP-08-2714
Appellate Case No. 2014-002390

THE OAKS AT RIVERS EDGE PROPERTY OWNERS ASSOCIATION, INC., JOHN E. ATKINSON, JOAN D. STRANDQUIST, JOSEPH E. CHIOVAROU, JR., PEYTON H. COOK, JR., BRENDA COOK, JOHN W. EDELEN, KAREN A. NELSON, ROBERT J. GRAHAM, MAUREEN S. GRAHAM, NANCY K. JOHNSON as trustee for the Nancy K. Johnson Revocable Trust, WILLIAM JUNG, CHARLES MARAZITI, PATRICIA MARAZITI, GEORGE S. POLLARD, ELEANOR J. POLLARD, ROBERT REECE, GERARD M. RUVO AND SUE S. RUVO as trustees for the Ruvo 2006 Living Trust, CAROLYN M. JENNINGS, THOMAS EDWARD KEANE, EDWARD WALLACE BARR, III, RICHARD B. PEKRUHN, PAULINE PEKRUHN, MATTHEW J. SEVERANCE, and ELIZABETH ASHLEY PHILLIPS SEVERANCE,

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

I certify that I have served the Brief of Appellants on Respondents by depositing a copy of it in the United Postal Service, overnight postage prepaid, on May 11, 2015, addressed to its attorneys

of record, W.H. Bundy, Jr., Esquire, and M. Brent McDonald, Esquire, Smith, Bundy, Bybee & Barnett, P.C., 1037 Chuck Dawley Blvd., Mt. Pleasant, South Carolina 29464.

May 11, 2015

Charles S. Altman
Meredith L. Coker
Melissa A. Fried
ALTMAN & COKER, LLC
575 King Street, Suite A
Charleston, SC 29403
T: (843) 853-9907
F: (843) 853-9838

Roy P. Maybank
Amanda Maybank
MAYBANK LAW FIRM, LLC
531 Savannah Highway
Post Office Box 12579
Charleston, South Carolina 29422
T: (843) 766-8101
F: (843) 766-8102

Attorneys for Appellants