THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-00652

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

Of Whom Stoneledge at Lake Keowee
Owners' Association, Inc. is the, ... Respondent,

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William C. Cox; Larry D. Lollis; Rick Thoennes; M. Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz, MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating; A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.; Southern Basements; Carl Catoe Construction, Inc.; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller Player & Associates, Defendants,

Of Whom IMK Development Co., LLC,
Integrys Keowee Development, LLC,
William C. Cox and Larry D. Lollis are the , ... Appellants.

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II. Did the Trial Court Err in Holding, as a Matter of Equity, That Mr. Lollis, Who Was a Member of an LLC, and Mr. Cox, Who Was a Member of an LLC and Who Served on the Board of the HOA Could Be Held Individually Liable for the LLC's Activities?

III. Did the Trial Court Err in Ruling That the Jury's Verdict Was a "Cumulative" Verdict and in Entering Judgment Against Mr. Cox, Mr. Lollis, IK and IMK, on That Basis Without Requiring Plaintiffs to Elect Their Remedy?

STATEMENT OF THE CASE

Plaintiff Stoneledge at Lake Keowee Owners' Association, Inc. ("the HOA") and numerous homeowners of Stoneledge townhomes (the "Project") sued a number of defendants, including Appellants IMK Development Co., LLC ("IMK"), Integrys Keowee Development, LLC ("IK"), William C. Cox, and Larry D. Lollis, alleging defective construction of certain townhomes. Plaintiffs asserted numerous claims for recovery, including breach of warranty, negligence, and breach of fiduciary duty. These claims were bifurcated according to two portions of the Project: Phase I and Phase II. This trial involved Phase I claims only. (Order of 8/28/13).

IMK, the second developer of the Project, is owned fifty percent (50%) by Defendant Marick Home Builders, LLC (Marick), the second builder on the project, and fifty percent (50%) by IK, which provided capital for IMK's development activities. IK is owned by Mr. Cox, Mr. Lollis, and Tim Roberson. Oddly, Roberson was never named as a defendant. IK was not a developer or builder, but was nothing more than an investor and a member of IMK, LLC.

In their third amended complaint, Plaintiffs named Cox and Lollis as defendants in their personal capacities:

> Upon information and belief, Defendants Larry D. Lollis ("Lollis") and William Cox ("Cox") were members, managers, owners, and/or principals of IMK, Integrys [IKD], or both of them at the time of development and construction of the Project and authorized, participated in and/or directed the tortious or otherwise wrongful acts of IMK, Integrys or both of them and are personally liable for the liabilities of IMK and/or Integrys. Unless specifically stated otherwise, references to IMK, Integrys, and/or Developers when used herein are defined to include Lollis and Cox.

(Third Amended Complaint, ¶ 17).

Plaintiffs alleged a claim for "alter ego" liability of IKD, Lollis and Cox. (Third Amended Complaint, ¶¶ 49-52) ("...IMK was the alter ego of Defendant Marick, M Group, Integrys, Lollis, Cox, and/or Thoennes in that Marick, M Group, Integrys, Lollis, Cox, and/or Thoennes totally dominated and controlled IMK and IMK manifested no separate interest of its own and functioned solely to achieve the goals of Marick, M Group, Integrys, the principals of same, as well as Lollis, Cox, and Thoennes."). Plaintiffs alleged further liability of IKD based on an amalgamation theory. See (Third Amended Complaint, ¶ 51 ("...IMK, Marick, M Group and/or Integrys are corporate relatives whose interests and activities are so amalgamated as to blur the distinction between the entities."). Plaintiffs also contended that Lollis and Cox were liable under a veil-piercing theory. See (Third Amended Complaint, ¶ 52 ("... because IMK and Integrys failed to observe corporate formalities and because fundamental unfairness wold result if the corporate entities are recognized, Lollis, Cox and Thoennes should be held personally liable for the liabilities of IMK, Integrys, or both."). These are the only reasons Plaintiff alleged for the liability of IK and personal liability of Lollis and Cox.

Plaintiffs settled with a number of the subcontractor Defendants prior to trial and during the trial. They recovered settlements related to liability on Phase I of the project totaling $2,855,911.77. (Letter of Lyles, 11/25/13). The trial began October 28, 2013 and on November 7, 2013, the jury found in favor of the Plaintiffs as follows:

Negligence as to Bostic Brothers, IMK, and Marick: $3,000,000.00

Breach of warranty of workmanlike service as to Bostic Brothers: $1,000,000.00

Breach of fiduciary duty as to IMK, IK Thoennes, Cox and Lollis: $1,000,000.00 (Verdict Form). On a second form, the jury apportioned the negligence for IMK and Marick at 40% and Bostic Brothers at 60%. The jury apportioned responsibility on the breach of implied warranty of workmanlike service 70% for IMK and 30% for Bostic Brothers. The trial court entered judgment on the verdicts on November 8, 2013.

Plaintiffs requested that the Court deem the verdict to be a "cumulative verdict" in accordance with *Keeter v. Alpine Towers International*, 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2014), thus rendering the verdict to be $5,000,000.00. (Letter of Lyles, 11/25/13). Plaintiffs requested that the Court set off their prior settlements in full, rendering the amount due on each cause of action to be $2,144,088.23. (Letter of Lyles, 11/25/13, p. 2).

Defendants IMK, IK, Cox, and Lollis made post-verdict motions for JNOV, New Trial, to Alter or Amend the Judgment, for Set Off, and for Election of Remedies. (Motion, 11/19/13; Motion, 2/18/15). The trial court denied the motions. However, the court agreed to enter the judgments as Plaintiffs suggested and in contradiction to the specific verdict the jury rendered.

This appeal follows.

FACTS

The Project is a community of townhouses located on Lake Keowee in Oconee County, South Carolina. Keowee Townhomes, LLC was the initial developer. The Project was built in two phases. Bostic Brothers, the general contractor, built Phase I consisting of buildings 1 through 8, along the west bank of Lake Keowee between 2002 and 2005. Bostic Brothers constructed and sold numerous units, and several units were in various stages of completion when Bostic ceased construction. (Order of 10/16/13).

In 2005, Keowee Townhomes sold the Project, including some unfinished units in Phase I, to IMK. IMK provided capital and Marick provided the general contractor services. Marick performed work on unfinished units in Phase I, as well as constructing Phase II from 2006 to 2007. Phase II consists of buildings 10 and 14 through 23. Buildings 9, 11, 12 and 13 were not built. Again, this litigation concerns Phase I only. (Order, 8/28/13).

Sometime in 2006, SDI Funding, a company owned and operated by John Ludwig, provided a loan to Marick for an unrelated real estate project. Marick was unable to repay the loan and transferred its interest in profits from the sale of Stoneledge units to Ludwig Properties as collateral. Later in April 2008, Ludwig acquired the remaining interest in IMK, and Stoneledge was transferred to Ludwig Corporation.

Nobody disputed that the Project suffered from some deficient construction and that the Stoneledge Owners wanted certain repairs made to the townhomes. Instead, the issues on appeal focus on:

(A) whether the trial court properly declared IK, Lollis and Cox were subject to individual liability for the liability of IMK, which was an LLC, not a partnership;

(B) whether the trial court properly treated IMK, IK, Mr. Lollis and Mr. Cox as "amalgamated" for purposes of imposing personal liability; and

(C) whether the trial court properly construed the jury's verdicts as "cumulative verdicts" totaling $5,000,000 instead of separate verdicts requiring Plaintiffs to elect their remedy.

Most of the testimony and evidence is related to the extent of the Project's alleged defects as well as the alleged costs of repair. The following testimony relates to the narrow issues in this appeal.

Rick Thoennes

Mr. Thoennes has been a licensed general contractor since the early 1970s. (Tr. p. 1139, ll. 1-7; p. 1158, ll. 10-13). He and his son Rick III started Marick Home Builders, LLC, and Thoennes was the license holder for Marick. (Tr. p. 1139, l. 23 - p. 1140, l. 6; p. 1143, ll. 3-5). Marick ceased its business operations in 2009 and was insolvent at the time. (Tr. p. 1141, 6-14; p. 1142, ll. 5-10).

Mr. Thoennes heard about the Project from a friend. (Tr. p. 1158, ll. 19-21). He was aware that Bostic was unable financially to complete the project. (Tr. p. 1162, l. 17 - 1163, l. 5). However, he had no reason to believe Bostic had not built the Project in compliance with applicable codes. (Tr. p. 1163, ll. 17-24). Eventually Marick joined a capital group to form IMK for the purpose of purchasing the distressed Project. (Tr. p. 1158, ll. 22-25). IMK bought the remaining townhomes and land at the Project. (Tr. p. 1163, l. 25 - 1164, l. 16). Amended HOA bylaws were prepared in November 2005. (Tr. p. 1164, l. 25 - p. 1165, l. 22; Pl. Exh. 3).

Mr. Thoennes agreed that Marick was a member of IMK as Mr. Cox described. (Tr.

p. 1143, l. 20 - p. 1144, l. 1). Marick performed the labor and general contracting services for the Project. (Tr. p. 1159, ll. 1-7). Marick would send its bill to IMK and IMK would write a check so that Marick could pay its subcontractors and suppliers. (Tr. p. 1144, l. 2 - p. 1145, l. 17).

Marick and IMK shared responsibility for managing the sales team, Chip Albert and Ty Savage. (Tr. p. 1145, l. 18 - 1146, l. 2). IMK was in the business of selling the units. (Tr. p. 1155, l. 17 - p. 1156, l. 4).

Marick began working on Phase I of the Project in 2005. (Tr. p. 1146, ll. 3-8). Thoennes pulled the permits for the work Marick was to perform. (Tr. p. 1147, l. 19 - 1148, l. 2). Thoennes also served on the HOA board of Stoneledge from 2005 to 2008. (Tr. p. 1155, ll. 17-18; p. 1165, l. 23 - p. 1166, l. 3; p. 1169, ll. 14-18). Mr. Thoennes stated that Bostic should be responsible for properly repairing the property. (Tr. p. 1157, ll. 2-17).

When asked about whether homeowners made complaints directly to the board, Mr. Thoennes stated:

> A. It depends on which hat I had on on that particular day. I've been -- Mr. Lyles said I sold them. Somebody else said I built them, and somebody else said I'm a director on the board.
>
> Q. And now you're on the board.
>
> A. So I guess it depends on which hat I had. You know, on some days I would go out and jump somebody's car, so I guess I was a mechanic too. But I just -- you know, I didn't have the pleasure of being able to say, I'm a director now. At seven o'clock, I'm a contractor. At eight o'clock, I'm a marketing person. I didn't have that luxury. So you're trying to put words in my mouth that I don't want you to do. It was very informal. I mean, this was not a multi-national company out there trying to build this complex. This was me and Steve Taylor or me and Jessie Grasso or me -- you know, it was a very informal thing.

> So I don't want people to think that this was a formal thing that people took to the board. It wasn't at that time. I can't speak to it after I left. I do know if somebody came to me with a complaint and I could fix it, I fixed it. It's that simple. It wasn't a matter of deciding yes or no.

(Tr. p. 1169, l. 21 - 1170, l. 17).

Mr. Thoennes agreed that once Marick ceased operations it ceased the ability to generate income and pay its bills. (Tr. p. 1186, ll. 13-20). Marick could not pay its bills because it did not have the income to do so. (Tr. p. 1186, ll. 22-24).

Larry Lollis

Mr. Lollis testified that Mr. Roberson told him about the Stoneledge project. (Tr. p. 1088, ll. 19-21). Mr. Roberson informed Mr. Lollis that an investor had pulled out of the project and asked Mr. Lollis if he was interested. (Tr. p. 1088, ll. 14-17). Mr. Roberson told Mr. Lollis that Stoneledge was unfinished and he thought it was a good investment. (Tr. p. 1088, l. 22 - p. 1089, l. 1).

Mr. Lollis did not understand the business of IMK but knew that Mr. Thoennes and his son, who were part of IMK, were in the construction business. (Tr. p. 1091, ll. 17-25). Mr. Roberson's plan was for Mr. Lollis to be "just an investor." (Tr. p. 1089, ll. 2-4). Mr. Lollis decided to invest. (Tr. p. 1088, ll. 17-18; p. 1089, ll. 5-6).

Mr. Lollis understood he was investing in an LLC called IK. (Tr. p. 1089, ll. 8-10). He owns 20% of IK, and Mr. Cox and Mr. Roberson own 40% each. (Tr. p. 1089, l. 24 - p. 1090, l. 11). In turn, IK owns 50% of IMK and Marick owns the other 50%. (Tr. p. 1090, l. 12 - p. 1091, l. 1). Mr. Lollis testified he was a minority investor in IK, IK was an investor in IMK, and Mr. Lollis had no control in IMK nor IK (Tr. p. 1087, l. 20 - p. 1088, l. 1; p.

1092, ll. 22-23). IMK is a manager-managed LLC. (Tr. p. 1088, ll. 2-11).

Mr. Lollis understood from Mr. Roberson that IMK was taking care of the business of selling the townhomes. (Tr. p. 1092, ll. 1-11). Mr. Lollis expected a return on his investment from the sale of the townhomes at Lake Keowee. (Tr. p. 1092, ll. 12-19).

Mr. Lollis was not familiar with and had no involvement with the day-to-day business of IK nor IMK (Tr. p. 1088, ll. 5-6; p. 1091, ll. 2-7). Mr. Lollis did not know Chip Albert or Ty Savage, and had no knowledge of whether IK was involved in sales of units to the public. (Tr. p. 1093, ll. 10-21). He was "simply an investor." (Tr. p. 1091, ll. 8-9). He saw the property two times, once before he invested and a second time after work had started. (Tr. p. 1091, ll. 10-16). Mr. Lollis only became aware of the alleged construction deficiencies with the Project after the lawsuit was filed. (Tr. p. 1093, l. 22 - p. 1094, l. 18).

Mr. Lollis received proceeds from the sale of IMK units in 2006 and 2007 and perhaps in 2008. (Tr. p. 1096, ll. 2-9; p. 1097, ll. 12-23; p. 1098, ll. 19-23; Pl. Exh. 38). He was unaware of the amount of money, if any, left in IMK since he was only a minority investor in IK. (Tr. p. 1098, l. 24 - p. 1099, l. 13).

Mr. Lollis recalled being told that Marick sold its interest in the Project in 2008, but was unaware of who S.D.I. was. (Tr. p. 1094, ll. 19-22; p. 1099, ll. 16-23). He was unaware that the buyer was someone named Ludwig. (Tr. p. 1094, l. 23 - p. 1095, l. 4). Mr. Lollis was not involved in the sale. (Tr. p. 1095, ll. 5-12; p. 1100, ll. 2-5). He also was unaware of what IK received from that sale. (Tr. p. 1095, ll. 13-24; p. 1100, ll. 6-15; p. 1101, ll. 8-16; p. 1102, ll. 1-14). He was aware that IK was due money on a note, but Mr. Lollis did not know who owed the funds. (Tr. p. 1101, ll. 17-25). He did not recall an agreement with Mr. Ludwig.

(Tr. p. 1102, l. 15 - p. 1103, l. 6; Pl. Exh. 39).

Mr. Lollis was unaware who the members were on the Stoneledge HOA board up until the time the board was turned over to the owners in September 2008. (Tr. p. 1103, ll. 7-24). He never attended any board meetings although he did receive copies of HOA Board minutes. (Tr. p. 1103, ll. 11-15).

Although Mr. Lollis agreed the buildings needed to be fixed properly, he did not feel personally responsible for the defects. (Tr. p. 1104, ll. 11-15). Instead, the construction company, the architect and the contractors should make the repairs. (Tr. p. 1104, ll. 15-19).

Bill Cox

Mr. Cox became involved in the project in 2005. (Tr. p. 1106, ll. 13-15; p. 1125, ll. 18-20). Mr. Roberson was a partner with Mr. Cox in Integrys Holdings, which was primarily a software business. (Tr. p. 1106, ll. 24-25; p. 1107, ll. 1-2).

Mr. Roberson was contacted from someone trying to sell the Stoneledge project (Tr. p. 1106, ll. 17-19) and he pitched the purchase of the project to Mr. Cox. (Tr. p. 1107, ll. 3-5). Mr. Roberson suggested they invest in the project. (Tr. p. 1107, ll. 6-9). One of the otehr partners in Integrys Holdings did not want to invest and Mr. Roberson suggested they invite Mr. Lollis, which they did. (Tr. p. 1107, ll. 13-16). Cox, Roberson and Lollis formed Integrys Keowee (IK) to provide investment capital for the project. (Tr. p. 1107, ll. 16-18). Mr. Cox and Mr. Roberson owned 40% each and Mr. Lollis owned only 20% of IK. (Tr. p. 1107, ll. 19-22).

Mr. Cox and Mr. Roberson each invested $300,000 in the project, while Mr. Lollis invested $150,000. (Tr. p. 1107, l. 23 - p. 1108, l. 6). They had to get loans to purchase the

property and the lender required an appraisal. (Tr. p. 1133, l. 22 - p. 1134, l. 24). They used the funds to purchase and fund the Project construction. (Tr. p. 1108, ll. 7-9). They created IMK as an LLC to hold title to the Project. (Tr. p. 1108, ll. 10-14). Marick Home Builders owns 50% of IMK while IK owns the other 50%. (Tr. p. 1108, ll. 15-17). Mr. Roberson brought Marick into the Project. (Tr. p. 1108, ll. 18-21).

IK had no other business other than being a 50% member of IMK. (Tr. p. 1109, ll. 7-9). IMK had no other business than developing Stoneledge. (Tr. p. 1109, ll. 10-13). Mr. Roberson "was the primary interface with the homeowners." (Tr. p. 1113, ll. 16-17; p. 1130, ll. 10-14).

Marick was to provide the construction services at their cost and IK provided the investment. (Tr. p. 1109, ll. 16-7, 20-22). The members did the books for IMK and they agreed to split the profits with Marick. (Tr. p. 1109, l. 17 - p. 1110, l. 1).

Mr. Cox was a managing member of both IK and IMK. (Tr. p. 1108, ll. 22-25). He understood this to mean being on the board of directors and "responsible for making the decisions of the business subject to the members' interest." (Tr. p. 1109, ll. 1-6).

IMK's purchase of the project basically pulled Townhomes of Keowee out of bankruptcy. (Tr. p. 1128, ll. 9-16). They bought the project for the balance on the bank note plus satisfaction of a couple of mechanics' liens. (Tr. p. 1128, l. 17 - p. 1129, l. 1).

Mr. Cox did not recall being on the Stoneledge HOA board until he saw the exhibits in the trial. (Tr. p. 1110, ll. 2-6). He agreed that he and Mr. Thoennes of Marick were on the HOA board until the time of turnover to the unit owners. (Tr. p. 1110, ll. 7-10; p. 1127, ll. 4-16). He sat on the board until 2008, when it was turned over to the homeowners. (Tr. p.

1127, ll. 21-25).

Mr. Cox walked the property and saw the conditions at the time he purchased his interest in the project. (Tr. p. 1110, ll. 11-23; p. 1129, l. 17 - 1130, l. 9). He purchased one of the units to help fund the project. (Tr. p. 1110, ll. 22-25). He expected Marick to repair or finish the units and make them ready for sale and occupancy. (Tr. p. 1111, ll. 1-11).

Mr. Cox recalled that although Chip Allen and Ty Savage, salespeople for IMK, the sales team on occasion had used Integrys email to communicate with purchasers, but the sales team did not work for Integrys or IK. (Tr. p. 1114, l. 9 - 1115, l. 8). Marick supervised the sales team. (Tr. p. 1115, ll. 6-15).

Mr. Cox negotiated the sale of IMK to Mr. Ludwig. (Tr. p. 1116, ll. 8-13). Marick owed Mr. Ludwig money and pledged Marick's profits from IMK as collateral. (Tr. p. 1116, l. 21 - p. 1117, l. 4). Mr. Cox was unaware of this debt arrangement until Mr. Ludwig asked for payment of sales proceeds. (Tr. p. 1117, ll. 5-8). IMK did not want to be partners with Ludwig and decided to sell IMK's interest to SDI (Mr. Ludwig's company), and Mr. Cox negotiated the terms of the sale to Ludwig. (Tr. p. 1117, l. 9-25; Pl. Exh. 34). The stated consideration was $1 million at closing plus 10% of gross sales for any townhome sold. (Tr. p. 1118, ll. 1-8).

IK was paid something less at closing, however. (Tr. p. 1118, ll. 11-19; p. 1119, l. 23 - p. 1120, l. 1). IK was to have received $639,000, but there were offsets leaving a net of about $580,000 paid to IK at closing. (Tr. p. 1120, ll. 2-16). IMK also received a promissory note from SDI to support payment of $300,000, which represented IK's consideration for its share of the assets of IMK. (Tr. p. 1121, ll. 22-25). IK also agreed to perform consulting

services for Ludwig's companies. (Tr. p. 1122, ll. 1-11).

The proposed agreement also provided that SDI would assume responsibility for the HOA until it was turned over to the owners. (Tr. p. 1118, ll. 20-24). However, they decided that IMK would remain in control of the board until it was turned over to the owners. (Tr. p. 1119, 3-10). The IMK board at the time included Mr. Cox, Mr. Roberson, Mr. Thoennes, Matt Smith and Rick Thoennes, III. (Tr. p. 1119, ll. 14-22).

IMK sold all of its assets to SDI except for two townhomes and the proceeds of the sale to SDI were proportionately distributed to IMK's owners. (Tr. p. 1120, ll. 20-25). Although IMK was not left insolvent by that distribution, IMK ultimately became insolvent. (Tr. p. 1121, ll. 1-5). IMK continues to pay its bills, but it owes more on its assets than they are worth. (Tr. p. 1121, ll. 8-9). IMK also had no cash available to satisfy any judgment. (Tr. p. 1121, ll. 10-13).

IMK sold the units to Mr. Ludwig at a very low price and was going to realize a profit from the future sales of those units by Mr. Ludwig's companies. (Tr. p. 1122, ll. 9-18). IK and its principals, Mr. Cox, Mr. Lollis and Mr. Roberson, could have made money on the sale of Stoneledge units after the lawsuit was filed, but they had the possibility of never being paid all they were owed. (Tr. p. 1122, l. 23 - 1123, l. 3).

Brad Seckinger, a new investor, ultimately obtained the project when Mr. Ludwig sold it. (Tr. p. 1123, ll. 4-5). Mr. Seckinger entered into an agreement with Mr. Cox and IK to pay commissions or proceeds from the units that were sold after the lawsuit began. (Tr. p. 1123, ll. 6-9). Not all of the sums were paid. (Tr. p. 1123, ll. 10-11).

Mr. Cox wanted the buildings fixed properly. (Tr. p. 1124, ll. 7-10). When IMK took

over the property IMK paid to have erosion and construction problems repaired any time they were reported. (Tr. p. 1132, l. 19 - 1133, l. 1). This included IMK building boat slips for the residents. (Tr. p. 1133, ll. 5-11). He was unaware of any unfinished construction when IMK sold the property. (Tr. p. 1133, ll. 2-4).

ARGUMENTS

I. The Trial Court Erred in Ruling That the Entities in the Case Acted as an Amalgamated Entity for Purposes of Liability for Negligence, Breach of Warranty, and Breach of Fiduciary Duty and in Entering Judgment Against All Entities Accordingly

Plaintiffs contended that IK, IMK, and the individual defendants Mr. Thoennes, Mr. Cox and Mr. Lollis were liable under an amalgamation of interest theory. (Tr. p. 1082, l. 25 - p. 1083, l. 8). The trial court ruled as a matter of law that IK, IMK, Mr. Thoennes, Mr. Cox and Mr. Lollis were liable under an "amalgamation" of entities. (Tr. p. 1540, ll. 20-22; p. 1557, l. 18 - p. 1558, l. 17; p. 1562, l. 1 - p. 1563, l. 21; p. 1593, l. 17 - p. 1595, l. 17; p. 1607, l. 22 - p. 1608, l. 1; p. 1619, ll. 12-15). This ruling is wrong as a matter of law and is not supported by the record. This Court should reverse.

Amalgamation Rules

In *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, this Court discussed the concept of "amalgamation of corporate interests" in a construction defect case involving Magnolia North, a condominium complex in Horry County. 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). Work began in 1998 and as of March 2000, Heritage Communities, Inc. (HCI) had sold 41 or more units. HCI was the parent corporation of both HMNI (the seller) and BuildStar (the general contractor supervising all construction). Prior to the construction, HCI and BuildStar developed numerous other properties in Horry County.

On January 29, 2001, HCI filed for bankruptcy protection. Twenty-one buildings, each with 12, 13, or 15 units, had been completed by the time HCI turned over control of the

property owners association (POA) to the unit owners on September 9, 2002. Some of the development's roads, as well as four buildings and four pools, were incomplete. Another developer completed the construction of the four buildings, and the POA completed the construction of the roads and pools.

The POA sued HCI, HMNI and BuildStar in one action. A jury found for the POA and the entities appealed. They contended the trial court erred in ruling that their entities were amalgamated because the concept of amalgamation did not apply to the facts of the case. This Court disagreed, stating:

> 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. In addition to sharing owners, the three companies shared a location. Furthermore, the management company was the entity called to remedy problems. Finally, the company's letterhead identified the management company as, "A Development, Construction, Sales, and Property Management Company." 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."
>
> Here, the trial court concluded that the facts of the instant case closely paralleled the facts in *Kincaid*. The trial court further concluded that the piercing of the corporate veil analysis did not apply to this case. The trial court stated: "The evidence has revealed an amalgamation of the corporate interest, the entities, and activities so as to blur the legal distinction between the corporation[s] and their activities."
>
> The evidence supports the trial court's ruling. Gwyn Hardister, chief operating officer and president of HCI, testified HCI was the parent corporation of HMNI and BuildStar. The other officers of HCI were Roger Van Wie and Jack Green. Van Wie also oversaw BuildStar, the general contractor supervising the construction at Magnolia North. Separate corporations were created for each HCI development for the purpose of

> operating as "cost centers," thereby containing each development's expenses and oversight as it applied to property management and construction cost allocation. All of these corporations shared officers, directors, office space, and a phone number with HCI. HMNI, the corporation HCI created to operate as a cost center for Magnolia North, created the POA; its officers were also officers for HCI. HCI officers controlled the POA until September 9, 2002, when the unit owners were given control of the POA.
>
> Hardister testified it could be assumed that the employees of BuildStar were also the employees of HCI. At the first annual meeting of the POA, Van Wie acknowledged construction problems and represented that the problems would be corrected. Moreover, the warranty manual distributed to the unit owners upon purchase was entitled: "Heritage Communities, Inc. Limited Warranty Manual," and it identified HCI as the corporation extending the warranty.
>
> Therefore, as in *Kincaid*, this case involves several indicia of an amalgamation of interests between HCI, HMNI, and BuildStar. The corporations shared a location, telephone number, board members, officers, and employees. In its warranty, HCI held itself out to the homeowners as the corporation responsible for construction defects. In light of these indicia, the trial court's ruling that Appellants' entities were amalgamated is supported by the law and the evidence.

397 S.C. at 358-359, 725 S.E.2d at 118 (pinpoint cites and citations omitted). Thus, this Court had before it several companies that shared the same location, employees, telephone number, and represented to the public that any one of them did the functions of the other. The companies were intrinsically immersed in each other's business, and were operating in a joint venture on various projects. HCI created HMNI to operate the condominium's cost center, and HMNI created the development's POA (which was controlled by HCI). All construction was controlled by BuildStar for the HCI projects. The interaction among these entities was critical to the operation of the entire enterprise. This was the basis for finding an amalgamation of companies for purposes of liability. *See also Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011) (case involved claims

against the same entities; this Court reached the same conclusion based upon the same facts).

The core of amalgamation is the notion that more than one entity has acted in such a blended fashion as to blur the legal distinctions between the entities and their activities. There is no evidence these defendants did anything to blur the distinctions among them such as sharing offices, board members, officers, employees or even phone numbers.

Furthermore, no case has ever held a private individual – someone like Mr. Cox or Mr. Lollis – to be amalgamated with a company, which makes sense. The concern being addressed by finding amalgamation is to prevent individuals from being misled or confused by blurred identities among corporate entities. There is no authority for holding individuals may be amalgamated with companies for purposes of liability. There is also no evidence in this case that anyone was confused by the identities or activities of the entities or individuals in this case. *See Mid-South Mgment. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007) (finding "alter ego" and "amalgamation" did not apply where there was no evidence in the record that Appellants could confuse the judgment defendant with its parent companies so as to make parent companies liable for defendant company's debt).

Furthermore, Appellant Lollis pointed out that there had never been a fiduciary duty claim made against Mr. Lollis. (Tr. p. 1622, ll. 8-10). The court overruled his objection and ordered him added to the verdict form because Mr. Lollis received a distribution from IMK. (Tr. p. 1622, ll. 15-17).

Finding Mr. Lollis, Mr. Cox, and Mr. Thoennes to be "amalgamated" with IMK and IK is a misapplication of the law, and this Court should reverse.

II. The Trial Court Erred in Holding, as a Matter of Equity, That Mr. Lollis, Who Was a Member of an LLC, and Mr. Cox, Who Was a Member of an LLC and Who Served on the Board of the HOA Could Be Held Individually Liable for the LLC's Activities

Mr. Lollis and Mr. Cox argued repeatedly at trial that as members of an LLC they could not be held individually liable for the LLC's torts. The trial court refused to dismiss the claims against them, ruling as a matter of equity that the court had pierced the veil of the entities so that the jury could render verdicts against Mr. Lollis and Mr. Cox as individuals. This was error.

There is no dispute that IK and IMK were properly organized LLCs. "A limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (2006). The official comment to the section states: "A limited liability company is legally distinct from its members who are not normally liable for the debts, obligations, and liabilities of the company. Accordingly, members are not proper parties to suits against the company unless an object of the proceeding is to enforce members' rights against the company or to enforce their liability to the company." S.C. Code Ann. § 33-44-303 (2006), cmt.

The Act provides further:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, *are solely the debts, obligations, and liabilities of the company.* A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.
>
> (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on

the members or managers for liabilities of the company.

> (c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> > (1) a provision to that effect is contained in the articles of organization; and
> >
> > (2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

S.C. Code Ann. § 33-44-303 (2006). The commentary of that section adds, "A member ... is responsible for acts ... to the extent those acts ... would be actionable in ... tort against the member ... if that person were acting in an individual capacity." S.C. Code Ann. § 33-44-303 cmt. (2006).

In this case there is no evidence Mr. Lollis did anything other than have the status as a member of an LLC and provide financing for the project. Although Mr. Cox also served on the HOA Board for the Project, there is no evidence that Mr. Cox engaged in any activity apart from his status as a member of the LLC that would be actionable in tort against him individually. Yet, the trial court held Mr. Lollis and Mr. Cox personally liable in this case and permitted the jury to return verdicts against them solely because of their status as members of IK or IMK, both LLCs. This is not permitted under South Carolina law.

In 2012, the Supreme Court held that the relevant provision of the LLC Act, section 33-44-303(a), "only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions." *16 Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338, 728 S.E.2d 448 (2012). However, following rehearing, the Court issued a new opinion in which it found it was "unnecessary to reach the

novel issue of whether the LLC Act absolves an LLC member of personal liability for negligence committed while acting in furtherance of the company business." *16 Jade Street, LLC v. R. Design Const. Co., LLC.*, 405 S.C. 384, 747 S.E.2d 770 (2013). This issue, therefore, remains unresolved in South Carolina.

Even so, there is simply no evidence that Mr. Lollis or Mr. Cox committed actionable negligence, breached any applicable warranty of workmanlike service, or breached a fiduciary duty owed when the HOA was turned over to the homeowners. Plaintiffs did not even assert a claim against Mr. Lollis based upon breach of fiduciary duty.

This Court should reverse the trial court's ruling that the jury could find Mr. Lollis and Mr. Cox individually liable for the actions of the LLCs.

Piercing the Corporate Veil

IK, Mr. Lollis and Mr. Cox contend that the rules governing piercing the corporate veil do not apply to them because they are members of an LLC instead of shareholders in a corporation. Even so, the trial court erred in using "alter ego" and piercing rules to permit the jury to award judgments against them individually.

"[A] corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (quoting *Sturkie v. Sifly*, 280 S .C. 453, 457, 313 S.E.2d 316, 318 (Ct. App.1984)). Generally, courts are reluctant to "disregard the integrity of the corporate entity." *Sturkie*, 280 S.C. at 459, 313

S.E.2d at 319.

In *Sturkie*, this Court set forth a two-pronged test to be used to determine whether to pierce the corporate veil. "The first part of the test, an eight-factor analysis, looks to observance of the corporate formalities by the dominant shareholders. The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." *Id.* at 457-58, 313 S.E.2d at 318.

The first eight factors were set out in *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 463 S.E.2d 641 (Ct. App.1995):

(1) whether the corporation was grossly undercapitalized;

(2) failure to observe corporate formalities;

(3) non-payment of dividends;

(4) insolvency of the debtor corporation at the time;

(5) siphoning of funds of the corporation by the dominant stockholder;

(6) non-functioning of other officers or other directors;

(7) absence of corporate records; and

(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

Dumas, 320 S.C. at 192, 463 S.E.2d at 644. "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." *Id.* (citing *Cumberland Wood Prods. v. Bennett*, 308 S.C. 268, 417 S.E.2d 617 (Ct. App.1992)).

The second part of the two-pronged test used to determine whether a corporate entity should be disregarded "requires that there be an element of injustice or fundamental

unfairness if the acts of the corporation be not regarded as the acts of the individuals." *Sturkie*, 280 S.C. at 457-458, 313 S.E.2d at 318. The burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property. *Sturkie*, 280 S.C. at 459, 313 S.E.2d at 319. "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." *Multimedia Pub. of S.C., Inc. v. Mullins*, 314 S.C. 551, 556, 431 S.E.2d 569, 573 (1993).

The trial court refused to dismiss Mr. Cox, Mr. Lollis and IK from this case. In so refusing, the court ruled as a matter of equity that each of these LLC members were to face individual liability for the damages the jury awarded against IMK and/or IK. The only evidence at trial, however, was that Mr. Cox and Mr. Lollis were members of IK (not IMK), and neither of them personally participated in the design, construction, repair or sale of the Project or any of the units. Mr. Lollis was simply an investor/member of IK, which was a member of IMK. Mr. Cox was an investor/member of IMK, one of several managers of IMK, and served on the HOA Board from 2005 through 2007.

IMK, not IK, contracted with Marick to complete the construction or repairs. Marick submitted its requests for payment to IMK, not IK, and IMK made payments to Marick for the builder's services. When IMK sold a unit, IMK distributed half of the sale proceeds to each of its two 50% members, Marick and IK. Each of IK's members then received his respective portion of IK's share of the proceeds in accordance with his respective ownership

interest in IK. There was also no evidence that Mr. Cox or any other member of the Board knew of any defects which had not been repaired as of 2008, the time Board control was transferred to the homeowners.

Because the trial court would not dismiss these individuals from the case, Appellants requested that the court charge the jury on the limitation of liability for members of an LLC found in S.C. Code Ann. § 33-44-303. As set forth above, this section would have precluded a verdict against Appellants since there was no evidence IK, Mr. Cox or Mr. Lollis personally participated in, authorized or directed any breach of duty by IMK.

This Court should reverse the trial court's decision to "pierce the veil" of the LLC to permit the jury to bring back verdicts against the members individually.

Alter-Ego Theory

The judge refused to dismiss Mr. Cox, Mr. Lollis and IK, finding they were liable as the "alter ego" of IMK.

The alter-ego theory is a means of piercing the corporate veil. *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101 n. 1, 668 S.E.2d 798, 800 n. 1 (2008). An alter-ego claim "requires a showing of total domination and control of one entity by another." *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). "Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity." *Id.* Regardless, "this theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice." *Id.*; *see also Baker v. Equitable Leasing Corp.*, 275

S.C. 359, 367-68, 271 S.E.2d 596, 600 (1980) (holding that the alter-ego theory should be used only when retaining separate "personalities would promote fraud, wrong, or injustice or contravene public policy").

There is no evidence that Mr. Lollis, Mr. Cox or IK exerted any control as a dominant entity over IMK or any other entity. Mr. Lollis was a passive investor, and Mr. Cox was an investor, manager and HOA board member. There is no evidence they made any decisions about how IMK operated or how construction or repairs were done on the Project.

This Court should reverse the trial court's ruling that permitted Mr. Cox, Mr. Lollis and IK to be found individually liable under an alter-ego theory.

III. The Trial Court Err in Ruling That the Jury's Verdict Was a "Cumulative" Verdict and in Entering Judgment Against Mr. Cox, Mr. Lollis, IK and IMK, on That Basis Without Requiring Plaintiffs to Elect Their Remedy

Appellants moved the trial court to require the Plaintiffs to elect their remedy among the verdicts the jury rendered. The trial court ruled, however, that the jury's verdict was a "cumulative" verdict and entered judgment against Mr. Cox, Mr. Lollis, IK and IMK, on that basis. This Court should reverse.

Election of Remedies

Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010); *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996); *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App.1999); *Brown v. Felkel*, 320 S.C. 292, 465 S.E.2d 93 (Ct. App.1995); *Jones v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App.1995); *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 397 S.E.2d 774 (Ct. App.1990); *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App.1985). Election of remedies is the act of choosing between different remedies allowed by law on the same set of facts. *Taylor v. Medenica*, 324 S.C. at 218, 479 S.E.2d at 44-45; *Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (Ct. App.1986). *See also Tzouvelekas v. Tzouvelekas*, 206 S.C. 90, 33 S.E.2d 73 (1945) (election of remedies involves a choice between different remedies afforded by law for the same injury).

The basic purpose behind the election of remedies doctrine is the principle that there

can be no double recovery for a single wrong. *Austin v. Stokes-Craven*; *Brown v. Felkel*, 320 S.C. at 294, 465 S.E.2d at 95; *Cowart*, 337 S.C. at 364, 523 S.E.2d at 185; *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 450 S.E.2d 112 (Ct. App.1994); *Adams v. Grant*, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1986). Use of the doctrine is limited to cases in which a double recovery by the plaintiff is threatened. *Adams v. Grant*.

When an identical 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. *Austin v. Stokes-Craven*; *Harper v. Ethridge*; *Adams v. Grant*; *Save Charleston Found. v. Murray*, at 176, 333 S.E.2d at 64; *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct. App.1983). In many instances, this means the case can go to the jury on all causes of action supported by the evidence at trial, with election required after verdict but before judgment is entered. *Adams v. Grant*; *Harper v. Ethridge*. The decision as to time of election rests within the sound discretion of the trial judge. *Harper v. Ethridge*.

The doctrine of election of remedies requires a plaintiff to choose between different remedies allowed by law upon the same set of facts. *Jones v. Winn-Dixie*, at 175, 456 S.E.2d at 431; *Barfield v. J.L. Coker & Co.*, 73 S.C. 181, 189, 53 S.E. 170, 173 (1906). Within this context, the facts refer to the defendant's wrongs or actions, so that when a plaintiff asserts only one primary wrong committed by the defendant, the plaintiff is entitled to only one recovery under the doctrine. *Jones v. Winn-Dixie*. *See also Brown v. Felkel* ("Where only one primary wrong forms the alleged basis for the legal and equitable remedies sought by the plaintiffs the court must require plaintiffs to elect between them," citing *Jacobson v. Yaschik*,

249 S.C. 577, 155 S.E.2d 601 (1967)).

Election of remedies is not applicable where there are two separate causes of action, each based on different facts. *Taylor v. Medenica*, 324 S.C. at 218, 479 S.E.2d at 45; *Jones*, 318 S.C. at 175, 456 S.E.2d at 432; *Robert Harmon and Bore, Inc. v. Jenkins*, 282 S.C. 189, 318 S.E.2d 371 (Ct. App.1984). When applying the doctrine of election of remedies, courts examine the underlying facts in the causes of action and determine if different conduct supports distinct injuries. *See Taylor*, 324 S.C. at 218, 479 S.E.2d at 45; *Creach v. Sara Lee Corp.*, 331 S.C. 461, 502 S.E.2d 923 (Ct. App.1998); *Jones v. Winn-Dixie Greenville, Inc.* The first inquiry in an election of remedies case is whether the causes of action involved different elements of proof, speak to facts occurring at different points in time, and are not simply two ways of describing a single wrong. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 45; *Creach*, 331 S.C. at 464, 502 S.E.2d at 924; *Jones*, 318 S.C. at 175, 456 S.E.2d at 432. "Remedy" is defined as "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated." *Austin v. Stokes-Craven* (citing Black's Law Dictionary 1163 (5th ed. 1979)).

A defendant may raise the issue of election of remedies at any stage of the case. *Cowart*, 337 S.C. at 364, 523 S.E.2d at 185. Indeed, to carry out the doctrine's purpose, the trial judge should *sua sponte* require election if he lets both causes of action go to the jury. *Id.*; *Brown*, 320 S.C. at 294, 465 S.E.2d at 95. To hold otherwise would result in an impermissible double recovery. *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 391 S.E.2d 249 (1990); *Inman*, 303 S.C. at 15, 397 S.E.2d at 777.

An examination of cases applying the doctrine illustrate its use. For instance, in

Williams v. Reidman, both the breach of contract and the breach of implied covenant of good faith and fair dealing arose from Ms. Williams's improper termination. The Court of Appeals noted that in each case she was only entitled to recover damages under the contract. Because the Court determined the covenant of good faith and fair dealing was an implied term of the employee manual, Riedman's breach of that term and breach of express terms of the contract resulted in the same damages. The Court held Williams therefore had to elect between the breach of contract damages and the breach of the covenant of good faith and fair dealing damages. The Court added that if Williams elected to recover under the breach of the covenant of good faith and fair dealing claim, she would be limited to the verdict for $179,440 in actual damages because punitive damages were not recoverable under this theory.

In *Jones v. Winn-Dixie Greenville, Inc.*, Jones brought an action against Winn-Dixie alleging slander, outrage, false imprisonment, and assault and battery after she had been forcibly detained at the store as a suspected shoplifter. The jury returned verdicts in the same amounts on the false imprisonment and assault and battery causes of action. The trial court eliminated one of the awards under election of remedies, reasoning that the failure to do so would result in double recovery because Jones had essentially suffered one wrong. In reversing that decision, this Court explained:

> The doctrine of election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same causes of action. Stated another way, election of remedies is the act of choosing between different remedies allowed by law on the same set of facts. Its purpose is to prevent double redress for a single wrong. Where a party has asserted only one primary wrong, he is entitled to only one recovery. However, the principle has no

application where two separate causes of action, each based on different facts, exist.

Jones, 318 S.C. at 175, 456 S.E.2d at 432. The *Jones* court focused on the distinct elements of the differing causes of action in finding that "distinctive injuries occurred at different times," thus supporting each separate award against Winn-Dixie.

In *Taylor v. Medenica*, the Supreme Court cited *Jones* in concluding the trial court erred in forcing an election of remedies. Taylor brought suit for medical malpractice, complaining about the manner in which Dr. Medenica had handled the treatment of Taylor's breast cancer. As a result of Dr. Medenica's actions, Taylor was ineligible for alternative forms of chemotherapy. At the time of trial, it was uncontested that her condition was terminal. Taylor sought to recover under both negligence and unfair trade practices. The jury returned substantial awards on both causes of action. The Court found that an election of remedies was not proper because the negligence cause of action was based on the provision of "reckless medical care," while the Unfair Trade Practices Act claim was premised on billing for useless and unnecessary tests. The Court recognized that, because different conduct supported the UTPA and negligence claims, no election was required.

Creach v. Sara Lee Corporation involved an action for negligence, breach of warranty, and strict liability for injuries suffered when Creach bit into a biscuit that contained a hard substance that injured her tooth. The jury found for Creach on all three causes of action and returned a verdict of $60,000 against Sara Lee. The defense argued the verdict represented triple recovery and moved that the verdict be reformed. This Court confirmed no election was required because only one recovery was sought and only one recovery was

awarded. Further, the trial court had instructed the jury: "Creach was not entitled to multiple redress for a single wrong." Id. at 464, 502 S.E.2d at 924.

In this case, the Plaintiffs sought recovery for a particular type of injury under several different theories. They were entitled to have the jury assess each cause of action, but they cannot recover their damages more than once. The judge's ruling permits Plaintiffs to obtain a recovery much greater than the jury decided.

For instance, the jury found IMK, IK, Mr. Thoennes, Mr. Lollis and Mr. Cox responsible for breach of fiduciary duty and assessed the amount of actual damages for that breach at $1,000,000.00. The trial court, however, adjusted the judgment against these defendants to $5,000,000.00, and then offset the Plaintiffs' recovery from other defendants to lower the judgment against each of these defendants to $2,144,088.23. This is an invasion of the jury's province, and amounts to an additur *sua sponte*. It is also not supported by the record, the instructions, or the verdict.

Plaintiffs should have been required to elect which remedy they felt gave them the best opportunity at recovery. As entered, these judgments permit a double recovery for the same losses. This Court should reverse and remand with instructions to the lower court to require Plaintiffs to elect among the remedies, and then apply the offsets for their prior recovery. The reasons supporting this conclusion are set forth below.

The Verdict Was Not a "Cumulative" Verdict

The jury returned verdicts against each defendant under the three theories of recovery. Plaintiffs argued the court should accept these verdicts as "cumulative," and add each number together to declare the verdict to be $5,000,000 total rather than forcing an election

of remedy. Plaintiff contended this procedure was permitted by the Court of Appeals decision in *Keeter v. Alpine Towers International*, 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2014), *cert granted* June 12, 2014 ("*Keeter I*"). The trial court agreed. This Court should reverse.

Plaintiffs sought one remedy – damages – to account for the defects in construction and the costs of repair. They used separate theories to advance their case for recovery, but the damages in this case involve one recovery for the amount of their losses and the amount necessary to put them in the position they would have been had they received the benefit of their bargain, i.e, their expectancy.

The trial court instructed the jury as to each cause of action and the nature of the recovery sought and permitted under each. The jury was permitted to consider each cause of action and assign a recovery to each, but that recovery is the same – payment for the repairs of the defects in the property, lost value of the property, and lost benefit of the bargain.

Plaintiff argued under *Keeter I*, the court did not require an election but, instead, should add the amounts together – stacking them upon each other – to arrive at the true verdict. The trial court agreed. This was error.

At the outset, the Supreme Court issued an opinion directing the Court of Appeals to "depublish" *Keeter I* and declaring this Court's decision "shall no longer have any precedential value." *Keeter v. Alpine Towers Intern., Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014) ("*Keeter II*"). *Keeter I*, then, does not control the result here.

Even so, the facts of *Keeter I* are distinct from this case in a meaningful way. Larry Keeter and his parents brought an action against Alpine Towers for strict liability, negligent design, and negligent training after Larry broke his back and became a paraplegic as a result

of a fall to the ground from a climbing tower Alpine Towers designed, manufactured, and installed. The jury awarded Larry actual and punitive damages and awarded his parents actual damages for Larry's medical bills. The trial court entered separate judgments in favor of Larry and his parents.

Alpine Towers appealed the trial court's denial of its post-trial motions. Larry cross-appealed the trial court's ruling requiring him to elect among his three causes of action. This Court affirmed the denial of Alpine Towers' motions. However, the Court held the trial court incorrectly interpreted the jury's verdict and erred in requiring Larry to elect.

The key to the case was the Court's interpretation of the verdict "based on all the matters that occurred in the course of the trial." *Keeter I*, at 202, 730 S.E.2d at 902, citing *Howard v. Kirton*, 144 S.C. 89, 101, 142 S.E. 39, 43 (1928). The Court identified those matters to be:

(1) The court's own conclusion that Larry sought only one remedy – damages – and that all of his damages flowed from the broken back resulting from his fall from the tower. Thus, it was not possible for the damages to vary from one cause of action to another. *Id.* at 199-200, 730 S.E.2d at 900.

(2) Use of an erroneous verdict form, which correctly fashioned the form to require the jury to write a verdict for each cause of action but, "because Larry sought only one remedy – damages – and because the amount of those damages could not vary from one cause of action to another, the trial court should have required the jury to write one amount for Larry's actual damages, and should not have permitted the jury to write a damages amount for each of the three causes of action. The use of the three

blanks for damages in the verdict form left the verdict ambiguous as to the amount of damages the jury intended to award." *Keeter I*, at 199, 730 S.E.2d at 900.

(3) After the jury returned the verdicts, Larry made a motion asking the court to inquire of the jury whether it meant for the damages awarded to be cumulative. Alpine Towers did not object to the request. While the jury was still in the courtroom, the judge asked the forelady if the jury intended the verdicts to be cumulative and, in response to specific questions, the forelady expressed that the jury intended the verdicts for both actual damages and punitive damages to be "cumulative" and added together. Both sides acquiesced in the inquiry. *Keeter I*, at 200, 730 S.E.2d at 901.

(4) During deliberations the jury sent a note to the court stating the jurors were deadlocked as to whether to award $4.5 million or $5 million and asking for suggestions. The trial court responded that it had no suggestions. The total amount of damages awarded, including the amount awarded to Larry's parents, was $4.75 million, which was between the two amounts listed in the note. *Keeter I*, at 201, 730 S.E.2d at 901-902.

(5) The court gave the jury no basis on which to find different damage awards on different causes of action. In fact, the only place in the damages instruction where the court differentiated between the causes of action at all was to explain to the jury it may award punitive damages only on the negligence theories of recovery. *Keeter I*, at 201, 730 S.E.2d at 902.

These factors do not support a similar result in this case. Plaintiffs below sought one remedy – damages for the repair of the defective construction of the townhomes and to place

them in the position they would have been in had they received the benefit of their bargain. All of their damages flow from their claims that the townhomes were shoddy, not built to requirements, and needing repair.

The verdict form in this case suffered the same defect as the one in *Keeter*. The jury should not have been permitted to enter different numbers under each separate cause of action. Rather, they should have indicated whether they found for the plaintiffs or the specific defendant, and then entered one figure at the end. While this form was submitted by agreement of all of the parties, it is one factor to consider in adjudging whether the jury intended a "cumulative" verdict or to simply enter a figure for the damages for repairs supported by that separate cause of action.

As to each cause of action, the court explained each claim and the measure of damages. The trial court instructed the jury as follows:

> In this case, the plaintiffs allege three causes of action against the defendants. First, the plaintiff claims that *certain defendants* were negligent in the construction of the townhouses at Stoneledge at Lake Keowee. Next, the plaintiff alleged that *certain defendants* breached an implied warranty of workmanlike service as to the construction of the townhouses at Stoneledge at Lake Keowee. The plaintiffs also claim that *certain defendants* breached a fiduciary duty owed to the plaintiffs. And in order to recover for these claims, the plaintiffs must prove the fault of the defendants by a preponderance or greater weight of the evidence.

(Tr. p. 1724, l. 17 - 1725, l. 4) (emphasis added). Thus, the judge advised the jury that the allegations of each cause of action were separate and limited to "certain defendants."

Regarding the **negligence** claim, the court stated:

> * * * The plaintiffs claim that the defendants were negligent and should compensate the plaintiffs for the damage the plaintiffs have suffered as a result of the defendants' negligence. In order to prove that the defendants

were negligent, the plaintiff must prove by a preponderance or greater weight of the evidence these three following things.

(Tr. p. 1725, ll. 5-14). The court charged the elements of negligence, including, "The plaintiffs must also prove by a preponderance or the greater weight of the evidence that they suffered damages as a result of the defendants' breach of duty." (Tr. p. 1726, ll. 3-5). With regard to negligent construction, the court stated:

> Now, the plaintiffs allege and contend that the construction or building work was undertaken by the defendants under an arrangement and agreement with the owners of the property at that time. One who undertakes and agrees to construct buildings is liable for any damages proximately caused from the negligence of the unskilled manner in which he constructs the building. In this regard, the contractors and subcontractors owe the duty to exercise and use due care in the construction of the home or building and in the work that they undertake.
>
> To establish negligent construction, the plaintiffs must prove four essential elements. One, that there was an undertaking to construct a building by the defendants. Two, that the defendants were negligent or careless in the performance of that construction work. Or stated in another way, that they did not perform the work in the good workmanlike manner. Three, that the negligence or carelessness of the defendants in performing the construction work was a proximate cause of the damages sustained by the plaintiffs. And, four, the resulting damages must be shown.
>
> It is -- excuse me. The degree of care which the defendants are called upon to exercise in this case is that degree of care which a person or entity of ordinary reason and prudence would exercise under similar circumstances and conditions in constructing the house or building of the kind in question. Any failure to exercise due care on the part of the defendants, their agents or servants or employees acting in the course and the scope of their employment in the house or building would constitute negligence or carelessness. If such negligence or carelessness on the part of the defendants did exist -- and that fact is totally for you, the jury, to determine -- your next question would be is the negligent carelessness -- excuse me -- the negligence and carelessness of the defendant a proximate cause of the damages sustained by the plaintiffs.
>
> Although a person may have no obligation or duty to another, once he undertakes to perform these certain tasks, such as construction of a house or

building, he is charged with the duty of properly planning, coordinating, and supervising the work. If he fails in the performance of this duty, he may be held liable for any damages to the person or injuries to the person which proximately resulted in such failure.

* * * There is a legal duty imposed on builders to undertake construction that is commensurate with existing industry standards. Even if a building code or industry standard does not apply, public policy demands that the imposition of a legal duty on a builder to refrain from constructing housing or a building that he knows or should know would impose serious risks of physical harm to persons or property. This duty extends to all foreseeable parties.

Building housing that one knows or should know will later be sold by a party to an innocent buyer is an act tantamount to placing the housing in the stream of commerce. And the builder who violates the duty to refrain from constructing defective housing should justly be held accountable for the losses that his breach caused.

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 certain subcontractors that work on the same project. The plaintiff still must prove that the general contractor breached the duty to supervise the construction of the project and that the alleged breach was the proximate cause of the plaintiffs' damage.

(Tr. p. 1727, l. 6 - 1729, l. 24).

Regarding the measure of damages for **negligence**, the court stated:

If you decide the plaintiffs are entitled to a verdict, your next step would be to decide how much money the defendants should be required to pay. Actual damages are to compensate the plaintiff for the plaintiffs' injuries or loss and to put the plaintiffs as near as possible in the same position that the plaintiffs were in before the wrongdoing occurred. In other words, actual damages would be the actual losses and expenses which the plaintiffs have suffered because of the defendants' negligence.

In this case, the general measure of damages for negligence is the difference in the value of the units and common elements of the townhomes had they been properly constructed and the value of the units and common elements in their defective condition. Items of elements of damage that may be shown by the plaintiffs are such things as cost and repairs, depreciation,

incidental damages and consequential damages.

(Tr. p. 1731, l. 23 - p. 1732, l. 15). This instructs the jury to award the plaintiffs their expected value of the construction as shown by cost of repair, depreciation, incidental damages and consequential damages.

The court charged the jury as follows on the claim for **breach of warranty of workmanlike service**:

> A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, and workmanlike manner. That is an implied warranty of workmanlike services, and it exists as a matter of law. The implied warranty or workmanlike manner is a duty to perform the work skillfully, carefully and diligently. The work need not be performed to absolute perfection or to the personal satisfaction of either party, but it must be performed to the satisfaction of the contract. The skill required of a person providing services is the same degree of skill, efficiency and knowledge of those of ordinary skill, competence and standing in the particular trade, profession or business in which the person is working.

(Tr. p. 1729, l. 15 - p. 1730, l. 13; p. 1752, ll. 3-17). Regarding damages for breach of warranty, the court stated:

> If you find that the construction was defective by reason of the builder's unworkmanlike performance, the breach of warranty gives a plaintiff a claim for damages for the loss of his expectancy.
>
> The plaintiffs allege that there has been a breach of the implied warranty of workmanlike service and a breach of implied warranty or habitability. An implied warranty is one which is presumed to be included in every sale, whether the defendant actually stated the promise or not. The proper measure of damages for the breach of an implied warranty is the actual damages shown to have been sustained by the plaintiff which are the natural, direct and proximate cause of the breach of the implied warranty and which may be reasonably regarded as within the contemplation of the parties at the time the warranty as a probable consequence of the breach of this warranty.
>
> Also, incidental damages resulting from a breach of an implied warranty may be recovered. This includes expenses which are reasonably

incurred as a direct and proximate result of the breach of the implied warranty. The applicable measure of damages may be shown by the cost of repairs. The plaintiff is not required to prove that the repairs have actually been made. A competent estimate of the cost for repairs is sufficient to create a factual issue for you, the jury, regarding damages.

Damages are awarded to place the party who has suffered damages in the same position it would have enjoyed had the condominium been as warranted. Damages give the injured party the benefit of its bargain.

(Tr. p. 1730, l. 14 - p. 1731, l. 17; p. 1752, l. 18 - p. 1753, l. 23). The court also charged:

Under either of the two theories of implied warranties, a proper measure of damage is the actual damages shown to have been sustained which are the natural, direct and proximate result of the breach of the implied warranty and which may be reasonably regarded as within the contemplation of the parties at the time of the warranty as a probable consequence of the breach of said warranty.

Incidental damages from a breach of implied [warranty] may be recovered. This includes expenses which are reasonably incurred as a direct and proximate result of the breach of the implied warranty. The applicable measure of damages may be shown by the cost of repairs. A plaintiff is not required to prove that the repairs have been actually made. A competent estimate of the cost of repairs is sufficient to create a factual issue for the jury regarding damages.

Damages place the injured party in the same position they would have been -- would have enjoyed had the building been as warranted. Damages give the injured party the benefit of this bargain.

(Tr. p. 1732, l. 15 - p. 1733, l. 10). This charge also instructs the jury to award the plaintiffs their expected value of the building as shown by cost of repair, incidental damages and consequential damages.

With regard to the third cause of action, **breach of fiduciary duty**, the court charged:

Now, the plaintiffs claim that the defendant developers are in a breach of fiduciary duty owed to them. A fiduciary duty relationship is found on the trust and competence of one entity and the integrity and fidelity of another. If a fiduciary relationship exists, 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 the breach of duty imposed by the relationship.

The developer owes a fiduciary duty to ensure that the common areas of the development are in good proper repair at the time the developer relinquished control of the homeowners association and turned the association over to the homeowners.

(Tr. P. 1735, l. 10 - p. 1736, l. 6; Tr. p. 1754, ll. 4-23). This charge instructs the jury to hold one in breach of a fiduciary duty responsible for the resulting "harm."

The Court then described the verdict form to the jury:

As you'll note, there are three separate questions. These are based on the causes of action alleged by the plaintiffs against the defendants.

On the first one, the cause of action for **negligence** as to the Defendant Bostic Brothers Constructions, Inc., we, the jury, unanimously find for the plaintiff or the defendant. Now, your verdict in each of these cases must be unanimous. Now, this is the first one as to the defendant Bostic Brothers Construction Inc. and also as to the defendants I.M.K. Development, L.L.C. and Marick Builders, L.L.C. So you've got a separate verdict as to each defendant. So if your verdict unanimously is for the plaintiff, you would check the block in front of plaintiff. Or if it is for the defendant, you would check -- if the unanimous verdict is for the defendant in the first, Bostic Brothers, you'd check the defendant.

Then you'd go to the next one. And on this cause of action for negligence as to the defendants I.M.K. Development Company, L.L.C. and Marick Home Builders, L.L.C., we, the jury, unanimously find for the plaintiff or the defendants. Whoever you find for is the one that you check. And if you find for the plaintiff on the negligence cause of action as to any of the above defendants, please set forth the amount of actual damages resulting to the plaintiff as a result of the negligence.

In other words, if you find for the plaintiff on either of those actions, even though you don't find against both the defendants, but you do -- by finding for the plaintiff on one, then you find against the plaintiff [sic] on that

action. So then you would write whatever damage figure you find on the negligence action out -- and it has to be a unanimous verdict as to the amount.

You'd write the verdict out, the amount out in words and not figures like you would do a check. Then you would go to the second page. Again, whatever verdict you have either as to the parties or to the amounts, if the amounts are applicable, has to be unanimous.

And the second question on the cause of action for **breach of warranty of workmanlike service** as to the defendant Bostic Brothers Construction Company, we, the jury, unanimously find for the plaintiff or the defendant, whichever is the verdict of the jury, you would check the appropriate blank.

On the cause of action of **breach of warranty of workmanlike services** to the defendant Marick Home Builders, L.L.C., we, the jury, unanimously find for either the plaintiff or the defendant, whichever one is checked. If you find for the plaintiff on the breach of warranty of workmanlike service cause of action as to either of the above defendants, then you would please set forth the amount of actual damage relating to the plaintiff as a result of that breach of warranty of workmanlike service. Again, you'd set it out in words and not figures. And then you can put in the parenthesis, you can put the figures.

And finally, on the third, on the cause of action for **breach of [fiduciary] duty** as to the following defendants, we, the jury, unanimously find as to defendant I.M.K. Development Company, L.L.C., either for the plaintiff or the defendant. Then again, as to the defendant Integrys Keowee Development, L.L.C., B, either for the plaintiff or the defendant.

And then finally as to the defendant plaintiff -- or the defendant Rick Thoennes, the blank that you find the unanimous verdict for that party would be the one that you would check. And then, D, as to the plaintiff or the defendant William C. Cox. And again, E, the plaintiff or the defendant, Larry D. Lollis. In other words, you find separate verdicts as to the defendants, but the plaintiff is the only one that you have to be concerned about the one time. If you find for the plaintiff as to any of the above defendants on the **breach of fiduciary duty** under this cause of action, you would please set forth the amount of actual damages to the plaintiff as a result of that breach cause of action, the breach of fiduciary duty cause of action. Again, words, not figures.

Once the verdict form is complete after the jury has reached a unanimous verdict as to each of the parts of the verdict form, you would sign

your name, and then we will return and receive your verdict. Just knock on the door.

(Tr. p. 1738, l. 10 - p. 1741, l. 15) (bold added).

The jury did as instructed. Under the negligence claim they found the amount of money required to award the plaintiffs their expected value of the building as shown by cost of repair, depreciation, incidental damages and consequential damages was $3,000,000.00. That is the extent of their losses and the amount required to make them whole (to give them the benefit of what they bargained for).

Next, the jury determined that $1,000,000.00 was the amount of losses based upon their finding of a breach of warranty of workmanlike service. Again, the elements of loss here are the same as the elements of loss for negligence – lost expectancy measured by the cost of repair and incidental damages intended to give the Plaintiffs the benefit of the bargain.

Finally, the jury found for Plaintiffs on the breach of fiduciary duty claim resulting from the "harm" suffered by the Plaintiffs and awarded $1,000,000.00. That "harm" is the same as under the other causes of action – lost expectancy, depreciation, and damages for defects, measured by the cost of repair.

Returning to *Keeter I*, there was no note from the jury in this case indicating a range of the damages it intended to award as there was in *Keeter I*. Nor was there a motion seeking clarity of the verdict while the jury was still assembled similar to the one in *Keeter I*. Instead, the jury found the Plaintiffs' damages were, at most, $3,000,000.00.

The trial court should not have found the verdicts in this case were "cumulative"

verdicts so that they were to be added together and entered as one total verdict against each defendant. By doing so, the court permitted the Plaintiffs to recover over and above the amount the jury found their damages to be. The court should have forced the Plaintiffs to elect their remedy and entered the judgment accordingly.

This Court should reverse the trial court's determination that the verdicts in this case were "cumulative" under *Keeter I*, and should remand with instructions for the court to require Plaintiffs to elect their remedy and enter judgment accordingly.

CONCLUSION

For the reasons stated the Court should reverse the trial court's decision. Neither Mr. Cox nor Mr. Lollis are personally liable for the jury's verdict, and if they somehow *are* liable, the verdict is not a cumulative verdict, and their maximum joint liability, exclusive of any rights to seek contribution against joint tortfeasors, must be determined by reducing the verdicts by the settlements obtained pre-trial and during the trial.

Respectfully Submitted,

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