

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No.: 2008-CP-10-7217

Meeting Street at Tennyson Row Horizontal Property Regime by Meeting Street at
Tennyson Row Homeowners Association, Inc.,.....Respondent/ Appellant,

v.

Meeting Street Builders, LLC; Meeting Street Companies, LLC; MS Tenn Towns, LLC;
and Builder Management Group, Inc.Appellants/ Respondents.

**INITIAL APPELLANTS' BRIEF OF MEETING STREET BUILDERS, LLC;
MEETING STREET COMPANIES, LLC; MS TENN TOWNS, LLC; AND
BUILDER MANAGEMENT GROUP, INC.**

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN AMALGAMATING MEETING STREET BUILDERS, LLC, MEETING STREET COMPANIES, LLC, MS TENN TOWNS, LLC, AND BUILDER MANAGEMENT GROUP, INC. FOR PURPOSES OF ASSESSING LIABILITY IN THIS ACTION WHERE THE EVIDENCE REFLECTED THE SEPARATE FUNCTIONS OF THESE PARTIES, DID NOT INDICATE ANYONE WAS MISLED, AND THE TESTS FOR PIERCING THE CORPORATE VEIL WERE NEITHER CONSIDERED BY THE TRIAL COURT NOR ESTABLISHED BY THE EVIDENCE?

2. DID THE TRIAL COURT INCORRECTLY ALLOW ARGUMENT ON VARIOUS THEORIES OF DAMAGES THAT ARE EITHER NOT VALID MEASURES OF DAMAGES OR WERE NOT SUPPORTED BY THE EVIDENCE, INCLUDING LOSS OF USE DAMAGES, PUNITIVE DAMAGES, EXPERT FEES, AND CONFUSING EXPERT TESTIMONY RELATING TO ASPECTS OF WINDOWS AND DOORS?

STATEMENT OF THE CASE

This action stems from alleged defects in the construction of Tennyson Row, an upscale condominium complex in Mt. Pleasant (the “Project”). Meeting Street at Tennyson Row Horizontal Property Regime by Meeting Street at Tennyson Row Homeowners Association, Inc. (“Homeowners”) initially filed a Summons and Complaint on December 18, 2008 against Advanced Gutter Solutions, LLC and Monzi, Inc., claiming problems with foam gutter inserts installed at the Project after its completion. (Complaint, R. at ____). On March 19, 2009, Homeowners filed an Amended Complaint naming Meeting Street Builders, LLC, Meeting Street Companies, LLC, MS Tenn Towns, LLC, and Builder Management Group, Inc. (the “Meeting Street Parties”), among others. (Amended Complaint, R. at ____). The operative complaint here is Homeowners’ Fifth Amended Complaint filed April 15, 2010, which lists in excess of sixty defendants in the caption. (5th Amended Complaint, R. at ____).¹

Each of the Meeting Street Parties is separately named and identified together with a description of its distinct business activities. (5th Amended Complaint at ¶¶ 7-9, 12, R. at ____). MS Tenn Towns, LLC is alleged to be “in the business of property development” (5th Amended Complaint at ¶7, R. at ____); Meeting Street Builders, LLC is alleged to be “in the business of constructing homes.” (5th Amended Complaint at ¶8, R. at ____); Meeting Street Companies, LLC is alleged to be “in the business of developing and constructing homes” (5th Amended Complaint at ¶9, R. at ____); and Builder Management Group, Inc. is alleged to have “managed, administered, and supplied the personnel” for the other Meeting Street Parties (5th Amended Complaint at

¹ Although Homeowners sought leave to file a Sixth Amended Complaint, leave was not formally granted, nor was the proposed pleading filed.

¶12, R. at ____). The complaint alleges causes of action against the Meeting Street Parties for negligent development and construction, breach of warranty, breach of fiduciary duty, unfair trade practices (“UTPA”), illegal distributions, declaratory judgment/ reformation of the master deed, and an accounting. In addition to the regime’s common area claims, Homeowners received an assignment from each of the individual unit owners to pursue claims relating to the construction of the units themselves. (Tr. 1068, R. at ____).

By stipulation of the parties (5th Amended Complaint at Introduction, R. at ____), the operative answer is the Answer of Meeting Street Builders, LLC, Meeting Street Companies, LLC, MS Tenn Towns, LLC, Builder Management Group, Inc., Joseph T. Roy, IV, and Nancy Roy to Plaintiff’s Fourth Amended Complaint with Cross-Claims filed March 12, 2010. (Answer to 4th Amended Complaint, R. at ____). The answer includes the following defenses: statute of limitations/ repose, comparative negligence, third party action, laches, acceptance, failure to assert claim within warranty period, failure to provide defendants the chance to cure and failure to comply with S.C. Code Ann. § 40-59-810 to -860, payment/ release, waiver and estoppel, actions of the plaintiffs, general denial, UTPA claim barred for lack of impact on the public interest and by operation of S.C. Code Ann. § 39-5-40, corporate immunity, failure to mitigate, lack of evidence to sustain punitive damages award, and lack of proximate cause.

Prior to trial, the Meeting Street Parties moved to sever and for a separate trial as to the claims against Builder Management Group, Inc. and Meeting Street Companies, LLC. (Motion to Sever, R. at ____). This request was denied.

This case was tried by a jury from September 19-26, 2011. At that time, the only remaining defendants present at trial were the Meeting Street Parties. Several defendants either defaulted or otherwise failed to appear. (Tr. 1312, R. at ____). Numerous other defendants settled. (Tr. 1414, R. at ____). For purposes of the trial, the trial court agreed not to refer to the remaining defendants as “the Meeting Street Entities” but rather as the “defendants.” (9/15 Tr. 107-08, R. at ____).

At the close of Homeowners’ case, the Meeting Street Parties moved for a directed verdict as to the UTPA claim, the negligence claim, and the breach of fiduciary duty claim. (Tr. 787-804, R. at ____). In addition, Meeting Street Companies, LLC and Builder Management Group, Inc. sought a directed verdict on the grounds that no evidence had been presented supporting the claims against each of them. (Tr. 798-803, R. at ____). The trial court denied all of these motions. (Tr. 803, R. at ____). These motions were renewed and denied at the close of evidence. (Tr. 1213-19, R. at ____).²

At the close of the evidence, the trial court granted a directed verdict in favor of the plaintiff on its negligence and breach of warranty causes of action. (Tr. 1183, R. at ____). The jury was tasked with determining damages on the negligence and breach of warranty claims, and assessing liability and damages on the breach of fiduciary duty claim and the claim for punitive damages. (Verdict Form, R. at ____). The verdict form and the trial court’s charge made no distinction between the Meeting Street Parties, nor did it include the full caption or any reference to other defendants in this action. (*Id.*, Tr. 1385-1409, R. at ____). The jury returned a verdict awarding Homeowners \$10,000,000 for their negligence claim, \$500,000 on their breach of warranty claim, \$1,000,000 on

² With respect to the UTPA, Homeowners withdrew that claim prior to the trial court’s ruling one way or the other. (Tr. 1296, R. at ____).

their breach of fiduciary duty claim, and \$1,000,000 in punitive damages. (Verdict Form; R. at ____). The clerk entered judgment on September 28 for \$6,617,500 (the jury verdict amount minus a setoff for the amount paid by previously settling defendants). (Entry, R. at ____).

On October 6, 2011, Meeting Street filed a timely motion for a new trial on the following grounds: (1) amalgamation/ nonsegregation of defendants on verdict form, (2) lack of other defendants on the verdict form, (3) lack of clear and convincing evidence to support a punitive damages award, (4) insufficient evidence of loss of use to support an award, (5) improper inclusion of expert costs as damages, and (6) improper testimony from Dr. Rhett Whitlock relating to windows and doors. (Motion, R. at ____). The Meeting Street Parties also sought a new trial nisi remittitur, judgment notwithstanding the verdict, and a new trial based on the thirteenth juror doctrine. (*Id.*). On October 7, 2011, the Meeting Street Parties filed another motion seeking to compel Homeowners to elect a remedy. (Motion, R. at ____). The motions were heard on October 28, 2011, and the trial court granted the motion to elect and denied the other motions filed by the Meeting Street Parties. These rulings are reflected in the judgment filed on December 19, 2011. (Order, R. at ____).

The Meeting Street Parties served a notice of appeal on January 6, 2012. Homeowners filed a cross-notice of appeal on January 12, 2012.

FACTS

This case arises out of the construction and maintenance of the Project, which is located within the Park West subdivision in Mount Pleasant, South Carolina. The Project was developed by MS Tenn Towns, LLC, which existed from 2003 until 2008. (Tr. 115,

R. at ____). Meeting Street Builders, LLC served as the general contractor for the Project. (Tr. 115, 117, R. at ____). Meeting Street Companies, LLC is a holding company, which owns several single purpose entities. (Tr. 114, R. at ____). Homeowners did not present any evidence showing this entity had any role with respect to the construction and sale of the units within the Project. Builder Management Group, Inc. is, essentially, a staffing company, which leases employees to the above entities. (Tr. 116, R. at ____). The building permits were issued to Meeting Street Builders. (Tr. 117, R. at ____).

Homeowners alleged construction and design deficiencies at the Project associated with nearly every single building component, including but not limited to roofs, foundations, siding installation, flashing, windows, doors, framing, hardwood floors, etc. Homeowners further alleged water intrusion resulting from these construction deficiencies as well as other related damages.

Generally, the trial focused on the scope and cost of the required repairs. Homeowners argued damages as follows: \$15.4 million for all desired repairs/improvements - \$2 million for improvements + 10% in design/ administration fees + \$189,000 in expert fees + 589,000 loss of use fees, for a total of \$15.44 million (exclusive of punitive damages). (Tr. 1347, R. at ____). The Meeting Street Parties presented evidence showing recovery should be limited to the estimates presented by their estimator, either \$8,013,489.38 or \$1,974,029.83 depending on the scope chosen by the jury. (Tr. 1082-93, Def. Exs. 787, 788, R. at ____). In addition, they argued there should be no recovery for expert fees or loss of use. (Tr. 1374, R. at ____). The Meeting Street Parties argued that Homeowners failed to mitigate and made things worse by

installing foam inserts inside the gutter system. (Tr. 1357-59, R. at ____). They also argued that there were other contractors involved with the construction of the Project. (Tr. 1357, R. at ____).

ARGUMENTS

I. The trial court improperly amalgamated the Meeting Street Parties in this case even though all of the Meeting Street Parties served separate functions and there was no evidence showing anyone was misled or confused by the distinctions between the Meeting Street Parties.

A. Standard of Review.

In South Carolina, a decision to disregard corporate formalities is in equity, and therefore, this Court may take its own view of the preponderance of the evidence. *See Dumas v. InfoSafe Corp.*, 320 S.C. 188, 192, 463 S.E.2d 641, 643 (Ct. App. 1995); *Sturkie v. Sifly*, 280 S.C. 453, 456-57, 313 S.E.2d 316, 318 (Ct. App. 1984). Our courts “are generally reluctant to disregard the corporate entity: If any general rule can be laid down, it is that 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.” *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007). “The burden of proof is on the party asserting that the corporate veil should be pierced.” *Id.*; *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101-03, 668 S.E.2d 798, 800 (2008).

B. Homeowners failed to adduce sufficient evidence in this case to support a finding of amalgamation.

Each of the Meeting Street Parties is a separate and distinct entity with a separate and distinct function with respect to the Project. Homeowners addressed the function and

role of each of these entities in their opening statement. (Tr. 98-100, R. at ____). Joseph T. Roy testified to the functions and structure of the companies. (Tr. 114-18, R. at ____). Roy was the principal of these entities and a former party to this action.

Meeting Street Companies, LLC is the holding company. (Tr. 114, R. at ____). Formed in 2003, MS Tenn Towns, LLC served as the developer for the Project. (Tr. 115, R. at ____). It was shut down in 2008, following the completion of the project. (*Id.*). Meeting Street Builders, LLC built the project, assisted by numerous subcontractors. (Tr. 115-16, R. at ____). Builder Management Group, Inc. provided staffing for the Project. (Tr. 116-17, R. at ____). Carol Blanchard, the only homeowner to testify in this action, did not testify to any confusion between the entities. (Tr. 1044-71 R. at ____).

At the close of evidence and over the strenuous objection of the Meeting Street Parties, the trial court found that the four Meeting Street Parties were amalgamated and would not be distinguished on the verdict form. The trial court stated as follows:

Based on the evidence that was put in in this case, and really through Mr. Roy during the plaintiff's case, these corporations were amalgamated. I mean, the fact that they shared computers. You know, Mr. Roy the one behind the veil, or, you know, he's the Wizard of Oz behind the whole machine. You know, it's Charlotte that everybody would go to. I know they met in Columbia one time, Singer, when they needed to meet to discuss according to Mark some problems, and he was basically told, according to his testimony, we're the minds up here, we'll figure it out, you just go do the building.

(Tr. 1197, R. at ____).

Homeowners had the burden of proving each element of their claims as to each defendant in this action. *Tucker v. Reynolds*, 268 S.C. 330, 336, 233 S.E.2d 402, 405 (1977) ("The burden to prove his case is always on the plaintiff, whether the defendant

introduces evidence or not.”); *Carter v. Columbia & Greenville R.R. Co.*, 19 S.C. 20, 28-29 (1883) (“It is a general rule that the burden of proof is upon the party who maintains the affirmative of the issue.”). Moreover, a plaintiff in a construction case must establish each defendant’s standard of care. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 560-61, 658 S.E.2d 80, 88 (2008). The trial court’s ruling absolved Homeowners of this burden by lumping all of the defendants together, even after Homeowners expressly denied that was what they were trying to do. (Tr. 1195). As a result, Homeowners did not have to argue the individual elements of proof as to each defendant.

The idea that affiliated companies may be considered amalgamated for purposes of liability is applied in three cases from the Court of Appeals. See *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App. 1986); and the related cases of *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011) (cert. pending) and *Magnolia North Property Owners’ Assoc., Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) (cert. pending) (collectively, “Heritage cases”). All of these cases stem from disputes relating to construction defects where multiple related parties remained as defendants in the action.

In *Kincaid*, the pertinent discussion is as follows:

The trial court ruled the evidence revealed “an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities.” We agree.

The record reveals Roger Van Wie is the Vice President of LDC, RMG, and RCC. He is also a shareholder in each corporation. The other shareholders of all three corporations are W. H. Van Wie, Roger’s father; Jeof Van Wie, Roger’s brother; and Ray Floyd, Roger’s brother-in-law. Floyd is also an officer in all three corporations. When the homeowners’ house was built, all three corporate

offices were located at the same place. Davidson testified she called RMG concerning problems with the house and someone would then come to the house to correct the problem. A letter was introduced into evidence notifying the homeowners RMG was the project developer and RMG's Vice President, Ray Floyd, would handle all construction questions. Another letter to the homeowners carries a letterhead, "Resort Management Group Inc.", with a notation, "A Development, Construction, Sales, and Property Management Company."

Id. at 96, 344 S.E.2d at 874. This discussion shows there was a wide variety of evidence presented in *Kinkaid* and that the lines between the parties were blurred such that it would be equitable to disregard the corporate formalities distinguishing them. This evidence included the overlap of people and resources as well as evidence that a purchaser could be confused between the entities, *i.e.* the joint letterhead and holding out of the developer as the party responsible for answering construction questions.

In the Heritage cases, the Court found the following indicia of amalgamation were present, "[t]he 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." *Pope* at 360, 725 S.E.2d at 116; *Magnolia North* at 359, 725 S.E.2d at 118. Again, the Court looked beyond common ownership and personnel to the evidence relating to representations to purchasers in the form of the warranty.

The evidence in this case falls far short of that listed in the above cases. The separateness of these entities was illustrated by Homeowners in their opening statement. (Tr. 98-100, R. at ____). Roy also testified to the function of each entity. (Tr. 114-19, R. at ____). There was no testimony as to shared officers and directors, shared phone numbers, or letterhead. Moreover, there was no evidence presented as to any written

warranty or disclaimer, nor were the purchase contracts or master deed admitted. (Tr. 1187, R. at ____). Further, there was no testimony that any party was confused or misled about the role of these entities.

This lack of evidence places this case more closely in line with *Mid-South Mgmt. Co.* at 596-605, 649 S.E.2d 139-46. In *Mid-South*, the Court declined to find the parties were amalgamated, reasoning as follows:

there is no evidence in the record that Spartanburg or the other Appellants could confuse Sherwood with its parent companies. At all times, Appellants dealt only with Sherwood and not Coastal Mortgage. Sherwood had separate letterhead and Myers testified she knew she was dealing only with Sherwood and not Coastal Mortgage. Accordingly, even if the Kincaid amalgamation of interest theory could be used to find a shareholder liable for debts of a corporation, we find Appellants failed to present sufficient evidence to find Sherwood's parent companies liable for its judgment.

Id. at 605, 649 S.E.2d at 145; *see also Babb v. Lee County Landfill SC, LLC*, 2012 U.S. Dist. LEXIS 15970, 6-8 (D.S.C. Feb. 9, 2012) (“Carolina LLC, and Republic Services are not blurred such that they are in effect one and the same as required under South Carolina law to find liability under the theory of amalgamation of interests.”).

As in *Mid-South*, Homeowners failed to present sufficient evidence to support a finding of amalgamation.

C. Homeowners failed to present evidence that would support disregarding the separate corporate existence of the Meeting Street Parties.

The finding of amalgamation in this case was inconsistent with South Carolina case law regarding the sanctity of the corporate form. “Although the corporate entity may be disregarded in some situations, piercing the corporate veil is not a doctrine to be

applied without substantial reflection.” *Mid-South Mgmt. Co.* at 605, 649 S.E.2d at 145. It should be noted that although there are different theories underlying efforts to reach beyond corporate formalities, “‘piercing the corporate veil’ refers to the relief itself.” *Drury Dev. Corp.* at 101, 668 S.E.2d at 800. Or, more simply, these other theories are ways to pierce the corporate veil. *Id.* Here, the trial court declined to apply a veil piercing analysis and simply jumped to the conclusion that the Meeting Street Parties were amalgamated. (See Tr. 1191, 1197-98, R. at ____). This was error.³

The veil piercing analysis has two parts, observation of corporate form and fundamental fairness. *Sturkie* at 456-57, 313 S.E.2d at 318; *Drury* at 101-03, 668 S.E.2d 800-01. The first part of the test requires consideration of the following factors:

- (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 directors;
- (7) absence of corporate records; and
- (8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

Sturkie at 456-57, 313 S.E.2d at 318. “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.” *Dumas* at 192-93, 463 S.E.2d at 644.

³ This argument was raised in *Pope*; however, the court there determined the argument was not preserved and failed to reach it. *Pope* at 772-73, 717 S.E.2d at 418-19. Similarly, the appellants in *Pope* were found not to have preserved their argument that amalgamation requires some showing of fraud, wrong, or fundamental unfairness. *Id.* In this case there are no preservation issues, these arguments were raised to and ruled on by the trial court.

Here, the evidence does not support either component of the veil piercing test. Homeowners did not present evidence relating to the eight factors above, and they did not make a showing that it would be fundamentally unfair for these entities to be considered as separate and distinct corporate entities. Accordingly, Homeowners failed to meet their burden on veil piercing.

D. There was no evidence supporting sending the claims against Meeting Street Companies, LLC and Builder Management Group, Inc. to the jury.

In the absence of any amalgamation, there was insufficient evidence to support liability against Meeting Street Companies or Builder Management Group. These entities did not build the Project, did not provide any warranties with respect to the Project, and did not make any representations to Homeowners. Thus, the trial court erred in failing to direct a verdict or grant JNOV on behalf of these entities. *See Jones v. Lott*, 387 S.C. 339, 345, 692 S.E.2d 900, 903 (2010) (“When considering a directed verdict motion, the trial court is required to view the evidence and the inferences that can be drawn from that evidence in the light most favorable to the nonmoving party. . . This Court will reverse the trial court’s rulings on these motions only where there is no evidence to support the rulings or where the rulings are controlled by an error of law.”).

II. The trial court incorrectly allowed argument on various theories of damages that are either not valid measures of damages or were not supported by the evidence.

A. The evidence did not support recovery of damages for loss of use.

In order to submit damages to a jury, the evidence supporting such an award must enable the jury to determine the amount of damages sought with a reasonable degree of certainty and not leave it up to conjecture. *Whisenant v. James Island Corp.*, 277 S.C.

10, 13, 281 S.E.2d 794, 796 (1981). Homeowners failed to meet this threshold with respect to loss of use damages. Therefore, the trial court erred in failing to issue a directed verdict or grant JNOV as to this element of possible damages. *See Jones* at 345, 692 S.E.2d at 903.

The sole testimony relating to the amount of damages for loss of use came from Carol Blanchard, the president of the homeowners' association at the Project and the owner of one unit within the Project. Counsel for Homeowners asked "Now, you're aware that the typical rental value of these houses out at Tennyson Row is \$1500 a month." She responded, "I've heard, yes." (Tr. 1070, R. at ____). She did not testify to the rental value of her own unit, nor did she agree with that number, she merely agreed she had heard it. There was no expert testimony on the point. There was no testimony that all of the units would command comparable rents.

Although the Meeting Street Parties recognize that an owner may testify as to the actual value of her property, there was no foundation for Blanchard's testimony as to rental value and no testimony that she thought her unit should or could rent for \$1,500 per month. The only testimony submitted to the jury was Blanchard's recounting of a hearsay statement by an unknown person. This statement alone, without foundation or some other basis, does not constitute evidence of loss of use.

B. The evidence did not support an award of punitive damages.

"On the issue of punitive damages, the highest burden of proof known to the civil law is applicable." *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's conduct was

willful, wanton, or in reckless disregard of the plaintiff's rights. S.C. Code Ann. §15-33-135. A conscious failure to exercise due care constitutes willfulness. *McCourt by & through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995). Directed verdict or JNOV is appropriate if the evidence does not lend itself to an inference that the defendants' actions were reckless, willful, or wanton. *See Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984).

Here, there was no evidence of the Meeting Street Parties' behavior rising to the level of willful, wanton, or reckless disregard of Homeowners' rights in this case and the issue was improperly presented to the jury. Homeowners contend the punitive damages award is supported by the alleged after-the-fact drilling of weep holes in brick masonry at a single unit and the installation of asphalt shingles on no more than fifteen low-sloped roofs.

However, the testimony on that subject does not show any reckless, willful, or wanton conduct. Roy testified he did not know if any weep holes were drilled without flashing behind them. (Tr. 138-39, R. at ____). Regarding the alleged after-the-fact drilling of weep holes in a single unit, a punch list was produced that called for drilling weep holes after the brick façade was installed. In fact, when reading the punch list in question, Roy stated, "I don't see where it says drill fake weep holes. I just see where it says drill weep holes." (Tr. 239, R. at ____). Simply stated, there is no evidence that weep holes were improperly drilled after the brick façade was installed anywhere in the Project.

With respect to the use of asphalt shingles on low-sloped roofs, the Project's builder, Marc Singer, testified that at the time of construction he was not aware that the

installation of asphalt shingles on the low-sloped roofs was allegedly problematic. (Tr. 473, R. at ____). In fact, Singer testified that he was not and is not aware of the manner in which the low-sloped roofs are shingled and, therefore, whether the low-sloped roofs are shingled improperly. (*Id.*). Roy provided similar testimony that he was not made aware that the manner in which the low-sloped roofs were constructed was allegedly problematic until this litigation was well underway. (Tr. 128, R. at ____).

The only two employees who worked for any of the Meeting Street Parties who provided testimony regarding the low-sloped roofs were not made aware that the manner in which the roofs were constructed is allegedly defective until after the Project was completed. The lack of knowledge concerning the shingle installation and whether there were fake weep holes effectively removes this case from any claim for punitive damages.

C. Expert fees are not a recoverable measure of damages.

Homeowners sought \$189,000 in “engineering investigation fees” to cover invoices submitted by their expert witnesses. (Tr. at 1347, R. at ____). In South Carolina, expert fees are generally unrecoverable costs of litigation.

Costs and expenses of actions and proceedings are allowed to be taxed against the losing party only by statute, . . . Further, costs have always been regarded in this state as in the nature of penalties; hence statutes allowing them are strictly construed, and the party who claims the right to tax them against another must be able to point to some statute which allows him to do so. [Plaintiff] contends statutory authority is provided by S.C. Code Ann. § 15-37-40 (1976) which refers only generally to the taxing of witness fees as a cost. This provision, however, does not address expert witness fees. Fees for expert witnesses, beyond the ordinary fees authorized for witnesses generally, are not taxable as costs unless there is a statute specifically allowing such an expense.

Oliver v. S.C. Dep't of Highways & Public Transp., 309 S.C. 313, 318-19, 422 S.E.2d 128, 131-32 (1992) (citations and quotations omitted). These costs as such are not a measure of damages. Accordingly, the trial court committed prejudicial error in overruling the Meeting Street Parties' objections both *in limine* and at trial to evidence relating to the expert fees being presented as a component of damages. (9/16 Tr. 39-45; Tr. 420-21, 568-71, 636, 712, R. at ____).

In this case, Homeowners tried to avoid this rule by characterizing the invoices in question not as litigation expert fees, but as related to "the investigation and recommendation of a solution." (9/16 Tr. 42, R. at ____). However, a review of the invoices show they were sent directly to Homeowners' counsel and the vast majority of the work followed the initiation of this lawsuit. (Pl. Exs. 1009, 1013, 1130, 1015. R. at ____). In addition, the invoices either do not reflect what specific services were performed or they show time for events like meetings and telephone calls with the Homeowners' attorneys in this matter. (*Id.*, R. at ____). These invoices were not costs of repair, but rather work prepared to assist a jury in determining the damages in this action by individuals retained as testifying experts. As such, they were standard expert fees and should have been treated as non-recoverable costs of litigation rather than a component of damages.

Given the nature and the timing of the invoices, the trial court erred in admitting this evidence and allowing testimony about these fees, and the Meeting Street Parties are entitled to a new trial. These are run-of-the-mill expert fees prepared in connection with prosecuting a construction defect case and are not recoverable costs of repair.

D. The trial court incorrectly permitted Homeowners' expert Whitlock to testify about certain aspects of the windows and doors used in the property, to the confusion of the jury and the prejudice of the Meeting Street Parties.

Whitlock should not have been permitted to testify regarding alleged defects in the windows and his testing of windows and doors. (*See* Tr. 361-420, R. at ____). The Meeting Street Parties objected to this testimony on these subjects, both *in limine* and at the time of offering. (9/15 Tr. 38-76, Tr. 273-74, 296-300, R. at ____).

The South Carolina Supreme Court has recently clarified the trial court's gatekeeping function with respect to the admissibility of expert testimony under Rule 702, SCRE. *Watson v. Ford Motor Co.*, 389 S.C. 434, 445-47, 699 S.E.2d 169, 174-75 (2010). In *Watson*, the Court directed that a party seeking to use expert testimony must show three things: (1) that the subject matter is one that is appropriate for expert testimony because it involves matters beyond the ordinary knowledge of the jury; (2) that the expert is qualified to give testimony as to the subject matter; and (3) that the substance of the testimony is reliable. *Id.* The trial court must determine all three elements are met before expert testimony may be submitted to a jury. *Id.*

Here, the Meeting Street Parties challenged Whitlock's qualifications relating to windows and doors and the helpfulness and reliability of the testimony given. Whitlock had very limited experience as a window or door expert, had never designed a window or a door, had never worked as an employee for a window or door manufacturer, had no educational history with window or door design, had not authored any materials or given any presentations on window or door design, had no experience with window glazing single-hung vinyl windows prior to this case, and had not attended any ASTM conferences relating to windows. (Tr. 274-80, R. at ____). Whitlock further agreed that

the ASTM standards were the appropriate standards to be applied to the windows in this case. (Tr. 280, R. at ____). In addition, he testified that he had not reviewed any weather data prior to conducting his testing. (Tr. 282, R. at ____). He further admitted that some of his testing was done pursuant to AAMA rather than ASTM standards. (Tr. 282-85, R. at ____). Notwithstanding this testimony during *voir dire*, the trial court qualified Whitlock to testify “as an expert in structural engineering and the investigation and correction of structural water intrusion.” (Tr. 293, R. at ____).

The trial court’s error in granting such a broad expert qualification is reflected in Whitlock’s testimony relating to the windows and doors used in the project. His testimony regarding the labels on the windows, specifically labels as to performance grade and design pressure, was improperly confusing and in direct contradiction to the standards governing said labeling. His testimony related to AAMA labels. (Tr. 419-20, R. at ____). However, as shown on cross-examination, it was unclear what those labels meant, whether he had performed the tests as specified in those standards, or whether the tests he performed complied with any standard accepted in the window industry. (Tr. 435-44, R. at ____). Further, Whitlock testified that he found no evidence that the doors had an adequate design pressure rating. (Tr. 377, R. at ____). This testimony was confusing and improperly before the jury because Whitlock did not have any evidence that the doors did not have an adequate design pressure rating.

For these reasons, the trial court erred in allowing Whitlock to testify regarding the windows and doors. The testimony he gave was unreliable, confusing, and prejudicial to the Meeting Street Parties. Therefore, it should have been excluded pursuant to Rules 702 and 703, SCRE.

CONCLUSION

As shown above, there were numerous errors in this trial. Homeowners did not present evidence showing it would be equitable to amalgamate the Meeting Street Parties, working to the particular detriment of the holding company (Meeting Street Companies, LLC) and the staffing company (Builder Management Group, Inc.), neither of whom built or marketed the Project. In addition, the trial court erred in failing to direct a verdict or grant JNOV with respect to loss of use and punitive damages. The trial court further erred in admitting evidence relating to expert fees and confusing expert testimony relating to windows and doors. For all of these reasons, the case should be reversed outright as to Meeting Street Companies, LLC and Builder Management Group, Inc., and reversed and remanded for a new trial as to the remaining Meeting Street Parties.

Respectfully submitted,

By:  _____

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