THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald

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;
Builder Management Group, Inc. ..... Appellants/Respondents.

INITIAL BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF THE CASE

This appeal arises from Respondent/Appellant's (hereinafter "the HOA") construction defect claims against Appellants/Respondents (hereinafter collectively referred to as "Meeting Street"), who comprise the developer and general contractor of the Tennyson Row townhomes at issue.

The HOA's Complaint was originally filed on December 18, 2008 against two (2) entities, which had allegedly caused water intrusion into the homes by virtue of various modifications to the gutter system installed at Tennyson Row. While investigating the gutter issues, the HOA learned of various latent construction deficiencies and, therefore, amended the suit to name the original developer/general contractor group, Meeting Street. Several months later, Meeting Street brought third-party claims against subcontractors, manufacturers, and other vendors, and the HOA amended again to assert direct claims against them.

On September 19, 2012, after settling or otherwise dismissing all other Defendants, the HOA proceeded with a jury trial solely against Meeting Street as to its claims for: 1) Negligence; 2) Breach of Warranties; and 3) Breach of Fiduciary Duty.[1] The trial lasted approximately six (6) days with both sides calling multiple expert witnesses, many of whom were professional engineers, testifying to technical opinions regarding the design and construction of the townhomes. On September 23, 2012, upon motion by the HOA, the Trial Court directed a verdict in favor of the HOA as to its Negligence and Breach of Implied Warranty causes of action.

[1] The HOA withdrew its fourth cause of action for Unfair Trade Practices prior to closing arguments and abandoned its claim against the few remaining defunct and non-participating Defendants.

Following closing arguments on September 26, 2011, the jury found for the HOA in the amount of $10,000,000.00 as to the Negligence cause of action, $500,000.00 as to the Breach of Warranty cause of action, $1,000,000.00 as to the Breach of Fiduciary cause of action, and $1,000,000.00 in Punitive Damages, for a total of $12,500,000.00. (Verdict Form; Trial Tr. 1411:21-1412:22).

Immediately following the verdict, upon agreement of the parties, Meeting Street was granted a set-off in the amount of $5,882,500.00 for settlements collected from dismissed parties. (Trial Tr. 1414:1-1415:3). At that time the Trial Court also conducted a post-verdict review of the jury's award of Punitive Damages under Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), and found that the award was appropriate in light of the evidence presented. (Trial Tr. 1415:12-1418:15). On September 28, 2012, a Form 4 Order executed by the Honorable Stephanie P. McDonald enrolling a total judgment of $6,617,500.00 against Meeting Street, representing the jury's entire verdict reduced by the appropriate set-off amount, was filed with the Court. (Final Order).

On October 10, 2011, Meeting Street filed a Notice and Motion for New Trial Absolute Or, In the Alternative, Motion for Trial *NISI Remittitur* or Judgment Notwithstanding the Verdict. Meeting Street additionally filed a Motion to Compel Plaintiff's Election of Remedies. On October 28, 2011, following hearings on these motions, the Trial Court denied Meeting Street's Motion for New Trial Absolute Or, In the Alternative, Motion for Trial *NISI Remittitur* or Judgment Notwithstanding the Verdict, and further compelled the HOA to elect its remedies.

A Form 4 Order encompassing the Trial Court's ruling on all post-trial Motions was filed on December 19, 2011, and a revised judgment in the amount of $5,117,500.00 was entered. (Am. Final Order).

On January 9, 2012, Meeting Street filed a Notice of Appeal as to the Trial Court's denial of post-trial Motions. The HOA filed a Notice of Cross-Appeal on January 13, 2012, based upon two grounds at issue in this brief: 1) the Trial Court's Order requiring the HOA to elect its remedies; and 2) the Trial Court's improper admission of expert testimony as to publications which were contrary to the applicable laws governing the case.[2]

STATEMENT OF FACTS

A. The Parties and Property at Issue.

The Meeting Street Group consists of MS Tenn Towns, LLC; Builder Management Group, Inc.; Meeting Street Companies, LLC; Meeting Street Companies, Inc., and Meeting Street Builders, LLC, all of which jointly conducted business in the trade name(s) of Meeting Street Homes and/or Meeting Street Homes and Communities. (Pl. Fifth Am. Compl. ¶¶ 7-21; Trial Tr. 114:7-119:13; 1179:14-16). Meeting Street is based out of Charlotte, North Carolina and has been developing and constructing homes for approximately fifteen (15) years.

Meeting Street Companies, LLC was a holding company that performed opportunity development work and then facilitated the financing for development;

[2] The HOA asserted another ground in its Notice of Cross Appeal related to the Trial Court's allowance of Meeting Street's reference to dismissed parties; however, that ground is being withdrawn.

Additionally, the portion of this Cross-Appeal as to expert testimony is only relevant if Meeting Street's Appeal of the verdict and judgment is sustained in whole or in part.

Meeting Street Builders, Inc. performed the construction, mostly through the use of subcontractors; MS Tenn Towns, LLC was a single-purpose entity that owned the property and sold the houses; and Builders Management Group, Inc. provided staffing to the other Meeting Street entities. (Trial Tr. 114:7-119:13).

In December of 2004, building permits for the construction of the Tennyson Row townhomes were issued to Meeting Street Builders. (Pl. Fifth Am. Compl. ¶ 3; Trial Tr. 134:8-12). Certificates of Occupancy were issued between December 2005 and October 2006. (Pl. Fifth Am. Compl. ¶ 23). The Tennyson Row community was Meeting Street's first coastal South Carolina construction project. (Trial Tr. 135:6-17). The property consists of twelve (12) buildings and is located in the Park West Community in Mount Pleasant, South Carolina. There are forty-nine (49) townhome- style condominium units in the twelve buildings, which were marketed by Meeting Street as luxury properties during and upon completion of construction. (Trial Tr. 239:8-240:2; Pl. Ex. 16).

The HOA was established by Meeting Street via Master Deed and is responsible for the common elements, which include the buildings' exteriors. (Pl. Fifth Am. Compl. ¶ 3). For the purposes of litigation, all of the forty-nine (49) individual unit owners assigned the HOA their individual claims for damages to the portions of the residential units they own, as well as claims for loss of use. (Trial Tr. 676:6-18).

B. Discovery of Damages and Defects.

The discovery of the defects and damages giving rise to the HOA's case began in 2006-2007 when early purchasers experienced washout in the back courtyards and various other leaks. By spring of 2008, many homeowners experienced water intrusion

through transom windows and doors. After Meeting Street led the homeowners to believe the water intrusion was attributable to foam inserts which had been placed in the gutters[3], the HOA brought suit against the manufacturer and installer of the foam for resultant damages on December 18, 2008. (*see* Trial Tr. 1045:9-24; 1064:17-1067:4).

Shortly thereafter, additional investigations by the HOA's experts, including Rhett Whitlock, P.E. Ph.D; Robert G. Sisnroy, P.E.; Robert Castles, P.E.; and Leonard Greene, P.E., revealed a plethora of building code and industry standard violations, as well as unworkmanlike conditions. Generally, these defects included unsuitable gutters, unsuitable and improperly installed windows; improperly installed attic framing; improperly installed roofing materials; improperly installed brick façades; improperly installed siding; improperly installed sealant joints; improper weather-lapping of the secondary moisture barrier; improperly installed flashing; improper water proofing; improperly installed insulation; improper drainage; improperly designed and sized HVAC systems; defective shutters; and various other building defects. (Pl. Fifth Am. Compl. ¶¶ 27). As a result, the HOA amended its Complaint on March 19, 2009 and added the Meeting Street entities as Defendants to the suit. Seven (7) months later, Meeting Street identified culpable subcontractors, manufacturers, and other vendors by way of Third-Party Complaint filed on October 21, 2009. On November 24, 2009, the HOA asserted direct claims against those named subcontractors through its Second Amended Complaint. At one point, there were approximately seventy subcontractors, manufacturers, and vendor Defendants involved in litigation.

[3] The foam protection had been placed in the gutters by the HOA to reduce gutter clogging and gutter maintenance costs.

During litigation and confirmed at trial, it was revealed that Meeting Street was made aware of several defects and building code violations during construction, but did nothing to remedy them or prevent them from occurring afterwards. (*e.g.* Trial Tr. 152:13-157:16, 652:6-665:22). Many of Meeting Street's own documents, which were admitted into evidence, demonstrate several mid-construction repairs related to courtyard washout, roof leaks, pierced plumbing lines from siding and cabinet nails, and various other problems. (*e.g.* Trial Tr. 130:3-25; 134:1; 171:4-174:24; Pl. Ex. 47 and 48). In at least once instance, Meeting Street engaged in the drilling of "retrofitted" or *fake* weep holes in at least one brick facade to pass building inspections. (Trial Tr. 138:25-139:14; Pl. Ex. 31). It was additionally confirmed that roofing materials known to violate the building code and certain to cause roof leaks, were used despite warnings to Meeting Street by subcontractors during construction. (Trial Tr. 665:12-18).

After construction was completed and after many of the units were sold, Meeting Street was put on notice by homeowners that units were experiencing problems. (*e.g.* Trial Tr. 161:21-164:5, 167:5-171:3, 196:88-198:23; Pl. Ex. 58,59, 88, and 138). Some of these problems were much of the same as those discovered during construction but never properly remedied (e.g. courtyard washout and door leaks). (*e.g.* Trial Tr. 160:21-161:15). Many of these problems were discovered and complained of during the period in which Meeting Street controlled the HOA and was in charge of maintaining the common elements in good repair. (*e.g.* Tr. Tran 162:22-164:2; 167:5-13). The HOA was turned over to the homeowners in November of 2007. (*e.g.* Trial Tr. 163:5-20).

Similarly, several of these post-close-out leaks and other problems were purportedly addressed by Meeting Street as warranty items in 2006-2008 and

homeowners believed these problems to have been resolved. (*e.g.* Trial Tr. 163:24-171:3). Many of these issues arose and were addressed after the HOA was tendered to the homeowners. (*e.g.* Trial Tr. 170:2-3). These also included washout, door leaks, and roof leaks. (*e.g.* Trial Tr. 160:21-24; 161:1-15).

C. Expert Testimony at Trial.

At trial, in support of its claims and damages, the HOA offered the testimony of several engineering experts including Rhett Whitlock, P.E. Ph.D; Robert G. Sisnroy, P.E., Robert Castles, P.E.; Leonard Greene, P.E., and expert contractor Gary Moore as to the cost to repair the defects and damages. As evidenced by the record, the HOA's experts testified extensively over several days as to the violations of the applicable building code (International Residential Code 2000) and industry standards with regard to various things including two major components, windows and roofs.

The HOA's lead engineering expert, Dr. Whitlock, testified that the installed windows did not meet the requisite design pressure rating to withstand the wind speed for coastal South Carolina, as prescribed by the IRC 2000, the building code in effect at the time the property was constructed. (Trial Tr. 380:3-14). As described by Dr. Whitlock, the pertinent window provision of the IRC 2000 incorporates by reference ASCE-7, the industry standard by which wind pressures are calculated. (Trial Tr. 381:4-20). In referencing both the IRC 2000 and ASCE-7, Dr. Whitlock determined that the performance rating required was between fifty and seventy pounds per square foot depending upon the location of the window in the building. (Trial Tr. 381:17-20). After determining the performance rating prescribed by the building code, the actual design pressure of the window must be compared to determine whether the window complies --

this is identified by the AAMA certification label affixed to the window. (Trial Tr. 386:23-387:15). Specifically, testing and labeling of windows must be done in accordance with AAMA 101 (1997 Edition), which is incorporated by reference in the IRC 2000. As testified by Dr. Whitlock, none of labels bore a rating which would be sufficient to comply with the requirements of IRC 2000, ASCE-7, or AAMA 101 (1997 Edition). (Trial Tr. 387:1-14; 390:19-23).

In an effort to rebut Dr. Whitlock's opinion and testimony, Meeting Street indicated it planned to post on foam board, in demonstrative form for the jury, a recent AAMA bulletin pertaining to AAMA 101 (2008 Edition) discussing confusion amongst industry professionals with regard to important terms which potentially changes the way some might calculate or otherwise evaluate performance ratings of windows. (Trial Tr. 813:17-20). The HOA objected to Meeting Street introducing the bulletin through expert Derek Hodgin as being (unreliable) hearsay information under the Rules of Evidence because it pertained to AAMA 101 (2008 Edition), which was a standard not adopted by this state, and additionally improper as more prejudicial than probative under Rule 403. (Trial Tr. 813:10-817:23). The Trial Court overruled the objection and the bulletin was shown to the jury and testified to in detail by Meeting Street's expert. (Trial Tr. 817:9-16; 818:11-13; 862:17-868:13).

In addition to the bulletin, Meeting Street also indicated that it also planned to post on foam board, portions of the IRC 2012 with regard to asphalt shingle installation. (Trial Tr. 817:21-820:13). Not only was the IRC 2012 not adopted by Mt. Pleasant, South Carolina at the time of trial, it has never been adopted, and the shingle extract at issue directly contradicted the IRC 2000 -- the applicable building code at issue. Given

the IRC 2012 was not adopted even at the time of the trial it would not even have any relevance in determining repair protocol. The HOA objected again based upon the fact that the IRC 2012 was (unreliable) hearsay, contradicted applicable law, and was more prejudicial than probative under Rule 403. (Trial Tr. 817:21-820:13). The Trial Court overruled the objection and the IRC 2012 extract was shown to the jury and testified to by Meeting Street's expert. (Trial Tr. 820:2).

D. Jury Verdict and Election of Remedies

Following the jury's verdict on September 26, 2011, and the Trial Court's enrollment of the judgment on September 28, 2012, Meeting Street filed several post-trial Motions. Included in its October 7, 2012, filing was Meeting Street's Motion to Compel Plaintiff to Elect its Remedies, which was strongly opposed by the HOA. (*see* Pl. Opp. and Suppl. Opp. to Defs. Motion to Elect Remedies). After hearing the arguments, the Trial Court granted Meeting Street's Motion and required the HOA to elect one verdict between the three verdicts for Negligence, Breach of Warranty, and Breach of Fiduciary Duty. The HOA selected the $10,000,000.00 on the Negligence cause of action and also retained the $1,000,000.00 in Punitive Damages, abandoning the $500,000.00 for Breach of Warranty and $1,000,000.00 for Breach of Fiduciary Duty, reducing the total to $11,000,000.00 from the $12,500,000.00 awarded by the jury.

A Form 4 Order encompassing the Trial Court's ruling on all post-trial Motions was filed on December 19, 2011, and a revised judgment in the amount of $5,117,500.00 was entered, accounting for set-offs for prior settlements. (Am. Final Order).

STANDARDS OF REVIEW

This appeal involves two (2) separate standards of review: 1) reversible error of an action at law regarding the issue of election of remedies; and 2) abuse of discretion with regard to evidentiary admissions.

A. Election of Remedies is Reviewed as an Action at Law.

While the HOA has not been able to find a specific case on point addressing the standard for review of a Trial Court's order regarding election of remedies, the pertinent cases indicate the standard is the same for an action at law. In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. *Erickson v. Jones Street Publishers, L.L.C.,* 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006); *R & G. Const. Inc., v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. 424, 431, 540 S.E.2d 113, 117 (Ct.App.2000) *cert. dismissed* (July 22, 2002) *rehearing denied* (Aug 21, 2002). *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

Likewise, the South Carolina appellate courts have repeatedly reviewed cases arising out of the election of remedies based upon whether the trial court "erred" as opposed to abused its discretion. *See e.g. Keeter v. Alpine Towers Intern., Inc.*, 2012 WL 2402892 (Ct. App. June 27, 2012)(stating "[H]e contends the trial court *erred* in interpreting the verdicts as "three awards" and requiring him to elect which cause of action would be his remedy. We agree. Election of remedies involves a choice between different forms of redress afforded by law for the same injury.... It is the act of choosing

between inconsistent remedies allowed by law on the same set of facts." *Taylor v. Medenica,* 324 S.C. 200, 218, 479 S.E.2d 35, 44–45 (1996). [Plaintiff] asserted three causes of action, but sought only one remedy—damages—for only one injury -- a broken back. When a plaintiff seeks only one remedy, there is nothing to elect); *See Adams v. Grant,* 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct.App. 1986) ("Where a plaintiff presents two causes of action because he is uncertain of which he will be able to prove, but seeks a single recovery, he will not be required to elect."); *Medenica*, 324 S.C. at 218 (stating "[M]rs. Taylor argues the trial judge *erred* by requiring her to elect between remedies. We agree. 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. It is the act of choosing between inconsistent remedies allowed by law on the same set of facts. Its purpose is to prevent double recovery for a single wrong. *Thompson v. Watts,* 281 S.C. 504, 316 S.E.2d 393 (1984). Election of remedies is not applicable where there are two separate causes of action, each based on different facts. *Jones by Robinson v. Winn-Dixie Greenville,* 318 S.C. 171, 456 S.E.2d 429 (Ct.App. 1995)").

B. <u>The Admission of Testimony is Reviewed for Abuse of Discretion.</u>

The admission of evidence is within the trial court's discretion, and the trial court's decision will not be reversed on appeal absent an abuse of discretion. *North Greenville College v. Sherman Constr. Co.*, 270 S. C. 553, 243 S. E. 2d 441 (1978). The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. *Payton v. Kearse,* 329 S.C. 51, 495 S.E.2d 205 (1998); *Means v. Gates,* 348 S.C. 161, 558 S.E.2d 921 (Ct.App.2001). A trial court's ruling to exclude or admit expert

testimony will not be disturbed on appeal absent a clear abuse of discretion. *Mizell v. Glover,* 351 S.C. 392, 570 S.E.2d 176 (2002); *Means,* 348 S.C. at 166, 558 S.E.2d at 923; *see also Lee v. Suess,* 318 S.C. 283, 457 S.E.2d 344 (1995) (admission of expert testimony is within sound discretion of trial judge and will not be overruled absent finding of abuse of discretion and prejudice to complaining party). An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. *Bayle v. South Carolina Dep't of Transp.,* 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001).

ARGUMENT

I. THE TRIAL COURT ERRED BY REQUIRING THE HOA TO ELECT ITS REMEDIES BECAUSE THE JURY AWARDED THREE DISTINCT SETS OF DAMAGES BASED ON SEPARATE FACTS FOR NEGLIGENCE, BREACH OF IMPLIED WARRANTY, AND BREACH OF FIDUCIARY DUTY.

At the conclusion of the trial, the parties discussed the proposed verdict form with the Trial Court at length. (Trial Tr. 1310:19-1317:25). As requested by *Meeting Street*, each cause of action for Negligence, Breach of Warranties, and Breach of Fiduciary Duty was listed separately and followed by the amount of the award for each, if any. (Verdict Form; Trial Tr. 1315:10-1316:4). Notably, while the HOA had alleged and presented evidence with regard to breach of express warranty and breach of multiple implied warranties,[4] the HOA had alleged a single, combined warranty cause of action in the Complaint, and there was a single breach of warranty question on the verdict form. (Pl. Fifth Am. Compl. ¶¶ 52-56; Verdict Form; Trial Tr. 1388:12). Following the question as to the Negligence claim on the verdict form, a comparative negligence choice was added

[4] As the Trial Court charged the jury, these included Implied Warranty of Workmanlike Service, and Implied Warranty of Habitability. (Tr. Tran. 1394:4-1395:17).

as it related to allocation of fault, if any, to the HOA. (Verdict Form). A provision for Punitive Damages was also separately included in the event the jury found unanimously, by clear and convincing evidence, that the HOA was entitled to such an award. (Verdict Form). Meeting Street's only substantive requests with regard to the verdict form was that comparative negligence as to the HOA needed to be included, and further requested that all seventy-plus dismissed Defendants be included on the form. (Trial Tr. 1310:19-1317:25). The Trial Court allowed the addition of the comparative negligence question, but denied Meeting Street's request to include the dismissed parties because there was not sufficient evidence introduced which would allow the jury to make a proper allocation of fault, if any, to any of the other parties. (Trial Tr. 1314:2-18). Meeting Street never requested a jury instruction that the jury should not award multiple sets of damages for causes of actions arising out of the same facts and injuries. (Trial Tr. 1317:20-25).

Following jury charges and verdict form instructions by the Trial Court, and after deliberation, the jury granted the HOA the following awards: on the cause of action for Negligence, the jury awarded Ten Million Dollars and No/100 ($10,000,000.00). On the cause of action for Breach of Warranty, the jury awarded Five-Hundred Thousand Dollars and No/100 ($500,000.00), and as for the cause of action for Breach of Fiduciary Duty, the jury awarded One Million Dollars and No/100 ($1,000,000.00). In addition, the jury awarded One Million Dollars and No/100 ($1,000,000.00) in Punitive Damages to Plaintiff. (Verdict Form; Trial Tr. 1411:21-1412:22).

On October 28, 2011, following the Court's granting of Defendants' Motion to Compel Plaintiff's Election of Remedies, Plaintiff elected its remedies which resulted in a verdict in the amount of Eleven Million Dollars and No/100 ($11,000,000.00), and a judgment in the amount of Five Million One Hundred Seventeen Thousand Five Hundred and No/100 ($5,117,500.00) after set-off for prior settlements. A Form 4 Order encompassing the Trial Court's ruling on all post-trial Motions was filed on December 19, 2011, and a revised judgment in the amount of $5,117,500.00 was entered. (Am. Final Order).

The HOA now appeals this order on the grounds that it should not be required to elect its remedies because the jury clearly awarded damages on three (3) separate and distinct causes of action arising out of differing sets of facts.

Black's Law Dictionary defines "remedy" as "[t]he means by which... the violation of a right... is compensated." *Black's Law Dictionary*, 1163 (5th ed. 1979). The violation of a single right, or injury, necessitates a single recovery, while the violation of multiple or various rights at various times allows for multiple and varied recoveries. *See Keeter,* 2012 WL 2402892 at *9. This "doctrine applies to the election of 'remedies,' not the election of 'verdicts.'" *Id.*

"Election of remedies" necessitates a choice between different forms of redress afforded by law for the same injury. "'It is the act of choosing between inconsistent remedies allowed by law on the same set of facts.'" *Keeter*, 2012 WL 2402892 at *9 (*quoting Medenica*, 324 S.C. at 218). The purpose behind the doctrine is to prevent double recovery based on a single wrong, and the doctrine's use is limited to cases where

double recovery is threatened. *Winn-Dixie Greenville, Inc.,* 318 S.C. at 171, 456 S.E.2d at 432 (Ct. App. 1995); *see also Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999). Double recovery only becomes an issue in cases where a plaintiff seeks a *single* remedy for a *single* injury, as a plaintiff may recover his actual damages only once. *Keeter*, 2012 WL 2402892 at *9; *Austin v. Stokes-Craven Holding Corp.,* 387 S.C. 22, 291 S.E.2d 135, 153 (S.C. 2010)("When an identical set of facts entitle plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both."). This principle, however, has no place where there exist separate causes of action based on distinct facts. *Id.*; *Harmon v. Jenkins*, 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984).

In deciding whether to apply the doctrine of election of remedies, courts examine the underlying facts in the causes of action and determine if different conduct supports different causes of action. *See Medenica*, 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); *Winn-Dixie Greenville, Inc.,* 318 S.C. at 171, 456 S.E.2d at 432. Pertinent inquiries include whether the causes of action involved different elements of proof, speak to facts occurring at different points in time, and whether the causes of action are simply two different ways to describe a single wrong. *Id.* In *Winn-Dixie Greenville, Inc.*, the court explained the principle as follows:

> 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 sets of facts, exist.

456 S.E.2d at 432. In *Winn-Dixie*, the patron of a grocery store brought claims of false imprisonment and assault and battery, where the first cause of action arose from facts occurring after the second. The jury awarded $25,000 actual and $50,000 punitive damages for false imprisonment, and $25,000 actual and $50,000 punitive damages for assault and battery. *Id.* at 430. The trial court compelled the plaintiff to elect his remedy, and the Court of Appeals reversed this decision finding that the claims were separate and distinct even though they arose from the same overall event. *Id.* at 432. In coming to this conclusion, the court methodically listed the elements involved in each cause of action to illustrate that each involved distinct elements of proof. *Id.* In addition, the court considered the jury's intent implicit in the award by considering the verdict form, holding that "[t]he jury returned the two verdict forms awarding [Plaintiff] $25,000 actual and $50,000 punitive damages on each cause of action. The jury therefore obviously considered [the Defendant's] action constituted two separate wrongs and determined the plaintiff was entitled to a total of $150,000 for his injuries." *Id.* at 433.

In Meeting Street's Motion for Relief from the Judgment and to Compel Plaintiff's Election of Remedies, Meeting Street addresses election of remedies and asserts that the Plaintiffs must be able to recover under only one cause of action because each cause of action arose from the "same set of facts...[which were] alleged construction defects as they exist at the Tennyson Row development." (Def.'s Mot. for Relief from Judgment, Oct. 7, 2011, at 2). This statement misconstrues both the

pleadings and the evidence presented at trial, and is a misunderstanding of the doctrine of election of remedies.

As mentioned above, "remedy" is defined as "[t]he means by which... the violation of a right... is compensated." *Black's Law Dictionary*, 1163 (5th ed. 1979). The violation of a single right, or injury, necessitates a single recovery, while the violation of multiple or various rights at various times allows for multiple and varied recoveries. An example of a true single injury existed in *Keeter*, where an adolescent fell from a tower constructed by the defendant. The causes of action were negligent design, negligent training, and strict liability. *Keeter*, 2012 WL 2402892 at *1 (Ct. App. June 27, 2012). While there existed three causes of action, the Plaintiff sought a single remedy –damages -- for a single injury -- the fall. *Id.* at *9.

In contrast, in the case at hand, Plaintiff sent three separate causes of action to the jury: Negligence; Breach of Warranties; and Breach of Fiduciary Duty. Each of the three causes of action arose from separate sets of facts, duties, and time periods. The jury returned separate damages on the Verdict Form for each of the three causes of action. The damages awarded for each cause of action appropriately constituted three separate components resulting in a single recovery for the Plaintiff, totaling $12,500,00.00. (*See* Final Order and Jury Verdict Form).

Just as the court illustrated in the *Winn-Dixie* case cited above, each cause of action in the case at hand required different elements of proof. In order to recover under a theory of negligence, the complainant must establish: (1) a duty on the part of the defendant; (2) a breach of that duty by an act of omission or commission; and (3) that

such breach of duty was the proximate cause of the plaintiff's injuries. *Newton v. South Carolina Pub. Rys. Comm'n*, 312 S.C. 107, 439 S.E.2d 285 (Ct. App. 1993), *rev'd* on other grounds, 319 S.C. 430, 462 S.E.2d 266 (1995). As demonstrated by the Trial Court's directed verdict in favor of the HOA, the HOA met the elements of Negligence and the jury's verdict, an award specific to this cause of action, was in the amount of $10,000,000.00. (Verdict Form). As the Trial Court pointed out in granting the HOA's directed verdict as to Negligence, the record is replete with admissions, some even from Meeting Street's expert witnesses, that the building code and industry standards were violated [*during*] the construction of the property. (Trial Tr. 1183:8-1185:6). Such examples again included roof leaks, courtyard erosion, and door leaks; much of this evidence was even admitted through the testimony of Meeting Street's owner Joseph Roy (*e.g.* Trial Tr. 136:15-16; 160:25-161:4; 652:6-665:18). Many of these defects were confirmed by Meeting Street's own expert, Derek Hodgin. (Trial Tr. 905:18-22). Moreover, the failure to properly supervise subcontractors *during* construction contributed to the numerous defects and damages, and was an additional breach of duty by Meeting Street. (Trial Tr. 142:21-143:5,155:19-156:4). All evidence supports a separate award on the cause of action for negligence and resulting award in the amount of $10,000,000.00 for conduct which occurred *during* construction.

In order to recover under a theory of breach of fiduciary duty, the complainant must establish: (1) the existence of a fiduciary duty; (2) a breach of that duty owed to the plaintiff by the defendant; and (3) damages proximately resulting from the wrongful conduct of the defendant. *See generally Moore v. Moore,* 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004). The breach of fiduciary damages awarded by the jury were

$1,000,000.00 and are attributable to Defendants' conduct *after* construction and through the act of failing to tender the common elements to the HOA in good repair[5]. Specifically, Meeting Street's actions by failing to investigate and remedy the known defective conditions, *after* construction and while Defendants were stewards of the HOA, was a breach of fiduciary duty. One example related to courtyard washout during this period was that from Joseph Roy, as follows:

> Q: You know that there were washouts at Tennyson Row while it was still *developer controlled*; correct?
>
> A: I recall some instances.

(Trial Tr. 158:16-18).

Compare to a later question on the same topic, but distinguished as arising *during* construction as follows:

> Q: You were aware of some of the alley washouts or walkway washouts *during construction*; correct?
>
> A: I recall some. I don't know what the particulars were for them.

(Trial Tr. 160:21-24).

Thus, the evidence revealed notice of problems arising from different time periods for which different duties were owed by Meeting Street to the homeowners. All evidence supports a separate award on the cause of action for negligence and resulting award in the amount of $1,000,000.00 for breach of fiduciary duty which occurred *after* construction when Meeting Street failed to tender the common elements in good repair.

[5] Meeting Street turned the HOA over to the homeowners on November 29, 2007. (Tr. Tran. 163:9-15).

Unlike the causes of action for negligence and breach of fiduciary duty, breaches of implied warranties spring from the contract and sale of the residence – post construction and irrespective of tendering the common elements to the HOA. An implied warranty of workmanlike services arises from a builder who "*contracts* to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Kennedy v. Columbia Lumber & Manufacturing Company, Inc.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989). The HOA also asserted Meeting Street breached the implied warranty of habitability. (Trial Tr. 1395:12-17). In accordance with, *Kirkman v. Parex, Inc.*, 369 S.C. 477, 482-83, 632 S.E.2d 854, 856-57 (2006), the Trial Court specifically charged the jury,

> When a new house is sold, the vendor impliedly warrants that the house is free from latent defects which would render if unfit for its intended purpose, its intended us as a dwelling. This warranty *springs from the sale itself*... Liability arises *not from fault*, but because the vendor, *by his initial sale*, has placed the *house in the stream of commerce* and has received a fair price for it.

(Trial Tr. 1395:16-1396:11)(emphasis added). Lastly, Plaintiffs assert Defendants breached the implied warranty of fitness for a particular purpose. "[A]n implied warranty of fitness for a particular purpose arises if the vendor knows when *the contract is formed* that the purchaser is relying on the vendor's skill or judgment in furnishing the goods." *See* S.C.Code § 36-2-315 (emphasis added).

Once again, the record is replete with evidence that Meeting Street breached warranties springing *after* construction and arising at the time of the *contract for the sale* of each home. As testified to by Joseph Roy, there were warranties owed to the homeowners that Meeting Street was aware of which arose from and followed the sale of

the homes. The testimony pertaining to Meeting Street's warranty procedure following the sale of a home was:

> Q: When a homeowner – I guess after they acquire the house, when they have an issue going on shortly after purchasing they would notify Meeting Street of what the issue was; correct?
>
> A: Yes, sir.
>
> Q: Meeting Street would enter that information their computer system; correct?
>
> A: Yes, sir.
>
> Q: And then they would assign a person to go out and address that particular issue; correct?
>
> A: Yes, sir.

(Trial Tr. 161:24-162:9).

The testimony following the above goes on to evidence multiple homeowner service requests made to Meeting Street related to damages occurring *after* construction, and both during the developer-controlled period and after the common areas were tendered to the HOA; thus, such evidence demonstrate that there were continued duties of warranty stemming from the sale of the home and arising from the discovery of defects and damages post-construction and post-tender of the common areas. (*e.g.* Trial Tr. 163:24-171:3). As succinctly summarized by the HOA President and homeowner, Carol Blanchard's testimony with regard to Meeting Street's failure to remedy problems in 2008, despite these warranties:

> A: ...at that point we had gotten experts in to try to figure out what was going on. We didn't know. And that was the time when we realized there were a lot of other problems. And Meeting Street was not helping us.
>
> My place was still under – my home was still under warranty and Meeting Street refused to help.

(Trial Tr. 1048:2-8).

All of the afore-described evidence of various breaches of warranty were submitted to the jury collectively, as one cause of action, and clearly supported a separate award for Breach of Warranty in the amount of $500,000.00. In other words, the evidence supports an award for the separate and independent *post-construction* failure to honor warranty obligations during the warranty period, which occurred post-construction and most post-tender of the common elements to the HOA.

During the course of the trial, and as exemplified by the above-cited testimony, Plaintiff consistently labored to divide the evidence being presented into three time periods related to separate duties breached by Meeting Street: the negligence that occurred during construction; the failures that occurred after construction while the HOA was "developer controlled;" and the failed and incomplete attempts by Meeting Street to fix the units after the Association was tendered. In addition, the differing natures of the causes of action are evidenced by the jury charges given by the Trial Court, which set forth proof of failure to use due care required for negligence claim *but not* for breach of warranty claim; warranty claim provides recovery for a home that is not free of latent defects, even if not a result of defendant's negligence (*see, e.g.*, Trial Tr. 1396:8-9);*Cf., Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 389 S.E.2d 155, 157 (Ct. App. 1989) (contributory negligence is a valid defense to a negligence cause of action but "It has no application to an action based upon breach of warranty or liability for a defective product.") Also, it is clear that the Trial Court itself considered each claim to be premised on distinct sets of facts as illustrated by the Trial Court's granting of a directed

verdict on the negligence and warranty claims but *denying* a directed verdict on the breach of fiduciary duty claim.

The jury implicitly found that the HOA proved a deviation from the standard of care as to most of the defects and awarded $10,000,000.00 in negligence; but that some work or components were unacceptable and required compensation under the warranty claim even though negligence as to these items had arguably not been proved, and awarded $500,000.00 for breach of warranty.

If a defendant seeks to avoid the same damages from being awarded multiple times on different causes of action predicated upon different facts/components, it is incumbent upon defendant to request a jury instruction to that effect. *Winn-Dixie Greenville, Inc.,* 318 S.C. at 171, 456 S.E.2d at 433. Here, *Meeting Street* requested that each cause of action be separated on the verdict form, but did not request an instruction from the Trial Court that the jury could only award one set of damages as to all three. As a result, the jury gave three separate and distinct awards for each cause of action submitted and, therefore, no election of remedies was required.

Furthermore, the Trial Court failed to consider that the election of remedies does not necessitate a complete election of every remedy, and even if an election between two causes of action was required, it did not require an election as to all three – particularly where certain claims were arising from distinct duties. In other words, the breach of a duty arising from a general negligent act or omission caused, is at least distinct from that of a breach of a fiduciary, born only from a special relationship prescribed by law and in this case, a developer's duty to transfer the common elements to the HOA. *See generally*

Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., et al., 397 S.C. 348, 374, 725 S.E.2d 112, 121 (Ct. App. 2012)(citing *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002) in support of the Court's denial of the developer's argument that the POA's claim for breach of fiduciary duty was barred by the statute of limitations because the breach occurred on the date the POA was turned over to the homeowners, and not any date prior thereto which may govern the statute of limitations as to another cause of action). The same can be said for the breach of warranty cause of action, which arose from the contract for the sale of the home and survives past the tender of the HOA to the homeowners. Accordingly, even if election of remedies was required as between two causes of action, it was not required as to all three, and therefore the HOA should be able to retain the award for Negligence, Punitive Damages, and either Breach of Fiduciary Duty or Breach of Warranty.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING MEETING STREET'S EXPERT TO TESTIFY TO HEARSAY EVIDENCE WHEN IT DID NOT MEET THE REQUIREMENTS OF RULES 702, S.C.R.E. AND WAS OTHERWISE IMPROPER UNDER RULE 403, S.C.R.E.

The Trial Court erred by permitting Meeting Street's expert, Derek Hodgin, P.E., to testify with regard to an industry bulletin and IRC 2012 which contradicted the applicable South Carolina law because: A) the testimony was unreliable and excluded by Rule 702; B) the information was more prejudicial than probative and thus also excluded by Rule 403, S.C.R.E.

A. Meeting Street's Expert's Testimony Was Unreliable and Excluded by Rule 702.

Rule 702, S.C.R.E, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 requires both that the testifying expert be qualified to testify, and that the subject matter be reliable. *Watson v. Ford Motor Co.,* 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010) (citing to *White v. State*, 382 S.C. 265, 676 S.E.2d 684 (2009) in dismissing respondents' argument that expert testimony as to technical subject matter did not have to meet reliability requirements). "Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord. *State v. Jones,* 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (finding error in the trial court's decision to admit "unreliable" expert evidence); *State v. Council,* 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (noting that before expert evidence is admitted the trial court must determine it is reliable)." *White*, 382 S.C. at 270, 676 S.E.2d at 686-687. The testimony of an expert must be valid and based upon "good grounds" because such testimony "establishes a standard of evidentiary *reliability*" to assist the trier of fact in determining an issue of fact. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 2795 (1993)(emphasis added). As such, the testimony of an expert which is unrelated to "any issue in the case is not relevant and, ergo, non-helpful." Id. (citing to 3 Weinstein &

Berger ¶ 702[02], p. 702–18; *United States v. Downing,* 753 F.2d 1224, 1242 (CA3 1985)).[6]

Here, the trial court abused its descretion by allowing Meeting Street's expert to testify as to the AAMA bulletin and IRC 2012 because neither was reliable. First, as discussed above, the IRC 2000 was the applicable building code at the time the property was constructed and mandates the minimum design pressure rating of windows based upon the wind zone of Mt. Pleasant, South Carolina. (Trial Tr. 381:17-20). With regard to testing and labeling requirements of the windows in the context of design pressure ratings, the IRC 2000 requires that the AAMA 101 (1997 Edition) standards be complied with. (Trial Tr. 387:23-388:20). This was testified to at length by the HOA's expert, Dr. Whitlock, as support for his opinion that the windows installed at the property were not code compliant. (Trial Tr. 387:1-392:11).

In rebuttal to Dr. Whitlock's testimony, Meeting Street called expert Derek Hodgin, P.E. who had prepared several foam boards with various publications, including an AAMA bulletin discussing confusion in the industry with regard to performance rating terms applicable to AAMA 101 (2008 Edition). (Trial Tr. 813:17-20). The 2008 Edition of AAMA 101 at issue in the bulletin was not in effect and was not incorporated by the applicable building code, the IRC 2000, at the time the property was constructed in 2004-2006. (Trial Tr. 444:4-13). Additionally, AAMA 101 (2008 Edition) and the subject bulletin contain statements contrary to AAMA 101 (1997 Edition), the standard which

[6] Also note that while an expert may offer testimony based upon hearsay, Rule 703 likewise dovetails into Rule 702 and likewise requires a standard of reliability. In other words, the hearsay must still be reliable and not blatantly contrary to the law or standards at issue. *See In re Agent Orange Product Liability Litigation*, 611 F.Supp.1223, 1245 (E.D.N.Y. 1985)(evaluating the reliability of an expert's testimony under F.R.E., Rule 703, the court stated that if "the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded).

governed the testing and labeling of the windows installed at the subject property. (Trial Tr. 444:4-13). As evidence of this, the HOA's expert, Dr. Whitlock, testified on cross-examination as follows:

> A: ...I would like to point out this document is dated July 27, 2011, and it came out after a definition change occurred in the standards.
>
> At the time construction of Tennyson Row, and up until recently, those two terms, performance grade and design pressure, were equal and the same, as indicated in the standard.
>
> And the first sentence of this bulletin is not even true.

(Trial Tr. 444:4-13; Def. Ex. 920).

The HOA stringently objected to the use of the bulletin even for demonstrative purposes because the un-adopted 2008 Edition of AAMA 101 contains provisions which are contrary to the one adopted by the applicable building code.[7] (Trial Tr. 813:17-814:6; 815:9-12). Acknowledging that the document was put into place after the property was built, the Trial Court overruled the objection, permitted the bulletin to be shown to the jury in demonstrative form, and testified to by Mr. Hodgin (because it purportedly was a document he relied upon in forming the basis of his opinion). (Trial Tr. 815:3-9). Accordingly, in support of his opinion that the windows were code compliant, Mr. Hodgin's testimony was as follows:

> A: And this is a – AAMA is the industry group that oversees window manufacturing and have their testing standard and so forth. And if you're an AAMA certified manufacturer, you subject yourself to quality control audits and they have labels that I was talking to you about. Apparently, there's confusion about these terms that I'm using: the design pressure, performance grade, and structure test pressures. That's a very important issue in this case, those terms.
>
> The design pressure is exactly what we talked about. It's what's required by the code only. In this case the design pressure required was

[7] AAMA 101 (2008 Edition) has never been adopted in South Carolina.

> forty pounds per square foot. And I'm going to show you that the windows met or exceed them.
>
> (Trial Tr. 866:9-22)

Clearly, Mr. Hodgin's opinion that the windows were code compliant was substantially based upon this document, which references a standard neither in place at the time the property was built, nor incorporated in the building code in effect at the time the property was constructed, and contrary to the applicable standard AAMA 101 (1997 Edition). Accordingly, Mr. Hodgin's testimony and the underlying data upon which he based his opinion were unreliable under Rule 702, and therefore improperly admitted. Such testimony was prejudicial to the HOA, as window replacement was a significant component of the HOA's damages, and the jury apparently pared some items from the HOA's damage estimate.[8]

Similarly, another publication that Meeting Street's expert, Mr. Hodgin, presented on foam board and testified to was the asphalt shingle installation instructions extracted from the International Residential Code 2012 ("IRC 2012"). (Trial Tr. 817:21-820:13). Like AAMA 101 (2008 Edition) referenced by the bulletin, the IRC 2012 was not in effect at the time the property was constructed, nor was it in effect at the time of trial, and clearly contradicted the provisions of the applicable provision of the IRC 2000 - again, the building code in effect at the time the property was constructed.[9] (Trial Tr. 817:21-820:13). Moreover, as the IRC 2006 was the building code in effect at the time of trial, the IRC 2012 would not even dictate how the property was to be repaired if the jury awarded the HOA damages. The HOA echoed its objection to the use of the IRC 2012

[8] Compare damages submitted to the jury in the amount of $15,400,000.00 to the jury verdict in the amount of $12,500,000.00 or $11,000,000.00 (if accounting for the election of remedies).

[9] The IRC 2012 has never been adopted in South Carolina.

provision as it had not been passed, was contrary to the law of this state, and further it could not be more speculative for an engineering expert to opine as to what the South Carolina legislature would pass in the future. (Trial Tr. 817:24-818:9; 820:6-12). The Trial Court, in overruling this objection, again relied upon Rule 703 in support of the position that an expert may testify as to anything he relied upon in forming his opinion. (Trial Tr. 819:8-16).

Initially Mr. Hodgin admitted that under the applicable building code, six nails per asphalt shingle were required for attachment to roof decking. (Trial Tr. 899:10-15). Despite such testimony, Mr. Hodgin later opined that although some shingles at the property had less than this requirement, they do not require repair or replacement because of subsequent building codes -- one of which, the IRC 2012 was not passed even at the time of trial. (Trial Tr. 900:8-19). His testimony on direct examination as to the number of nails per shingle required was as follows:

> A: ...They require four. So if you tore off the roof today – it's my understanding and my belief and opinion that there are more than four nails in most shingles, if not all shingles, at Tennyson Row; that you would be able to put the roof back today with the same shingles and only use four nails.
>
> What I copied here is the 2012 IRC, just to show that this new attachment requirement. It says...

(Trial Tr. 900:8-19).

The HOA again objected to the testimony and was overruled. (Trial Tr. 900:20-25). Mr. Hodgin's testimony that the IRC 2012 supported his opinion that the shingle attachment on the roofs of the townhomes did not need to be remedied, was based on a building code not yet passed and contrary to the IRC 2000 which governed the

construction of the property. In fact, Mr. Hodgin himself agreed that such data regarding the IRC 2012 was speculative:

> Q: You're not suggesting to the jury that you have a crystal ball and you're going to forecast what the State of South Carolina building committee is going to recommend to the legislature and how those hundred-odd legislators are going to vote, are you?
> A: Correct.

(Trial Tr. 1024:24-1025:4)

> Q: So it becomes extremely speculative as to whether or not 2012 code will ever be adopted or in what version; correct?
> A: I agree.

(Trial Tr. 1025:23-1026:1)

Accordingly, Mr. Hodgin's testimony and the underlying data upon which he based his opinion, at least in part, were admittedly speculative and therefore irrelevant and unreliable under Rule 702, and improperly admitted. Such testimony was prejudicial to the HOA ,as roof replacement was a significant component of the HOA's damages, and the jury apparently pared some items from the HOA's damage estimate

B. <u>Meeting Street's Expert's Testimony Should Have Been Excluded Under Rule 403.</u>

Even if Mr. Hodgin's testimony were relevant, it should have been excluded by Rule 403, S.C.R.E. because any probative value was substantially outweighed by the danger of confusing the issues or otherwise misleading the jury. Rule 403, provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Daubert, 509 U.S. at 595.

As the transcript reflects, the HOA additionally objected under Rule 403, to the AAMA bulletin and the IRC 2012 testimony based upon the danger of confusing the jury as to what the actual law is. (Trial Tr. 818:11-13). As described in detail above, both publications testified to by Meeting Street's *expert* were based upon law not in effect at the time the building was constructed, nor at the time of trial, and contradicted the actual laws that were applicable and in effect. Such evidence should not have been permitted to be transmitted to the jury via an engineering expert qualified to testify to technical matters such as windows and roofs, given the danger of confusing or otherwise misleading them as to what the actual law is. Therefore, the Trial Court abused its discretion by permitting testimony by which any probative value was substantially outweighed by the danger of confusing or misleading the jury.

CONCLUSION

The Trial Court erred by requiring the HOA to elect its remedies; therefore, such ruling should be reversed and the HOA permitted to reclaim the jury's verdict in the amounts of $1,000,000.00 for Breach of Fiduciary Duty, and $500,000.00 for Breach of Warranty.

Additionally, in the event this Court reverses the Trial Court's Final Order in whole or in part based upon arguments of the Appellants/Respondents Meeting Street, the Respondent/Appellant HOA requests that the evidentiary rulings regarding expert

testimony as to the AAMA bulletin and IRC 2012 also be reversed based upon the Trial Court's abuse of discretion.

Respectfully Submitted,

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RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Respondent/Appellant certifies that this Initial Brief of Respondent/Appellant complies with Rule 211(b), SCACR.

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