THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Lower Court Case No. 2009-CP-37-00652

Court of Appeals Case No. 2015-000417

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

Respondents,

v.

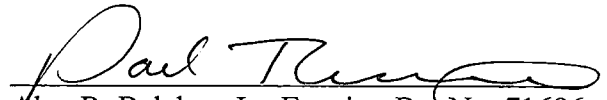
IMK Development Co., LLC, Keowee Townhouses, LLC, Ludwig Corporation, LLC, SDI Funding, LLC, Medallion at Keowee, LLC, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers

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

Appellants.

(Of Whom Bostic Brothers Construction, Inc., is the Appellant)

REPLY BRIEF OF APPELLANT



Alan R. Belcher, Jr., Esquire, Bar No. 71686
Elizabeth F. Wieters, Esquire, Bar No. 78064
Paul Trainor, Esquire, Bar No. 101405
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
Telephone: (843) 720-3460
Facsimile: (843) 720-3458

Attorneys for Appellant, Bostic Brothers Construction, Inc.

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BRIEF STATEMENT OF THE CASE[1]

After serving and filing Appellant's Initial Brief on December 3, 2015, Respondents filed a Motion to Consolidate multiple appeals, which was subsequently denied on March 4, 2016. Thereafter, Respondents filed two Motions for Extension of Time, allowing Respondents to serve and file their Initial Brief by May 13, 2016. Respondents served and filed their Initial Brief on May 13, 2016, and Appellant moved, and was granted, an extension to file its Reply Brief by June 2, 2016.

APPELLANT'S ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT AND JNOV BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE DENIAL, AND THE TRIAL COURT ERRONEOUSLY APPLIED MAGNOLIA NORTH IN REACHING ITS RULING.

"When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). A trial court's denial of a JNOV will be reversed "when there is no evidence to support the ruling or when the ruling is governed by an error of law." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999). "A matter may not be presented for the first time on appeal; rather, it must have been both raised to and ruled upon by the court below." Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 324, 713 S.E.2d 267, 273 (2011).

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[1] Appellant respectfully directs this Honorable Court to its Statement of the Case in Appellant's Initial Brief for a complete recitation of the procedural history of this case.

At the close of Respondents' case-in-chief, Appellant moved for a directed verdict specifically on the issue of the expiration of the three-year statute of limitations. (See Trial Tr. 1234:7–1243:12, Nov. 5, 2013.) Appellant specifically addressed the holding in Magnolia North, noting the critical distinction between that case and case at hand. (Trial Tr. 1240:4–25, Nov. 5, 2013.) The trial court denied Appellant's Motion for Directed Verdict, stating, "I'm going to deny the motion as to applying a three-year statute of limitations when the defendant was in control of everything . . . ." (Trial Tr. 1556:20–22, Nov. 7, 2013.) The trial court never addressed or otherwise indicated that the evidence was conflicting or not credible; rather, its ruling was based solely (and incorrectly) on the holding in Magnolia North. On November 21, 2013, Appellant timely filed a post-trial JNOV motion, which was ostensibly denied for the same reasons as those expressed at trial. (See Order Den. Def.'s Post-Trial Mot. p. 2, Jan. 22, 2015.)

A. Extensive and unrefuted evidence was presented at trial that the HOA knew of various defects in 2005, yet no notice or claim was presented to Appellant until 2010.

Respondents contend that there is conflicting evidence as to when the HOA knew or should have known of various defects. Specifically, Respondents suggest that Rick Thoennes, despite actual knowledge of the defects, only knew of these defects while wearing his "contractor's hat", but somehow not in his capacity as a HOA board member. Furthermore, Respondents argue that Mr. White and Mr. Taylor did not know that the conditions they reported to Mr. Thoennes "gave rise to the pursuit of a legal claim" and that they were unaware of "latent" defects until 2009.[2] Finally, Respondents suggest that,

[2] The statute of limitations began when the HOA had actual or constructive notice "that some claim against another party might exist." Graniteville Co. v. IH Servs., Inc., 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994) (emphasis added). It was undisputed at trial that water intrusion in several portions of numerous homes, known by the HOA in 2005, was something, in the words of Respondents' counsel, "that

because the HOA was unaware of the severity of the defects, the statute of limitations did not begin running until sometime after 2008.[3] The unrefuted testimonial evidence by numerous witnesses (all of whom were proffered by Respondents), coupled with South Carolina law governing the expiration of the statute of limitations, warrants remand and dismissal with prejudice of all claims against Appellant.

Mr. Taylor moved into Stoneledge in 2003, and during the time Marick/IMK[4] controlled the HOA, he noticed "a lot of water" coming into his lower level "since [he] moved in." (Trial Tr. 305:19–22, Oct. 29, 2013.) Mr. Taylor testified that he made several requests to HOA board members during this time to repair the water intrusion, and that there were repairs conducted during 2005, at the direction of the HOA. (Trial Tr. 305:25–307:2; 351:9–16, Oct. 29, 2013.) To be clear, Mr. Taylor was fully aware of who was on the HOA board in 2005, and relayed visible defects to those members at that time. (Trial Tr. 303:22–25, Oct. 29, 2013.)

Similarly, Mr. White moved into Stoneledge in 2006, and testified that he noticed water intrusion in various parts of the home "since day one." (Trial Tr. 1044:17–18, 1049:2–5, Nov. 4, 2013). He further testified that Marick/IMK was aware of three or four separate areas of water intrusion. (Trial Tr. 1048:11–18, Nov. 4, 2013.) Mr. White, during redirect examination by Respondents' counsel, testified as follows:

> Q: Mr. White, in the months following the purchase of your unit [in 2006], you indicated that there were some window leaks and whatnot?
> A: Correct.

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a normal, average, everyday person would understand could give rise to a claim . . . ." (Trial Tr. 1246:1–4, Nov. 5, 2013.)

[3] "Failure of the injured party to comprehend the full extent of damages . . . is immaterial." Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (citations omitted).

[4] Appellant continues to refer to Marick/IMK as one entity because they were deemed an amalgamated entity at trial, and considered as one party at Respondents' request. (Trial Tr. 1624:7–9, Nov. 7, 2013.)

Q: How did you respond or address those problems?
A: Well, when we discovered the first leak, we contacted Nathan [Hornaday] and his folks, and they came over to take a look at it.
Q: Did they try to fix it for you?
A: They did.

(Trial Tr. Tr. 1075:15–22, Nov. 4, 2013.) The "folks" to whom Mr. White referred were HOA board members Rick Thoennes and Tim Roberson. (Trial Tr. 1046:1–6, Nov. 4, 2013.)

Respondents submit the incredulous position that Rick Thoennes, while a member of the HOA board, only knew of the numerous defects while serving in his capacity as a "contractor" and not as a HOA board member.[5] Respondents' contention that Mr. Thoennes did not "report these conditions or requests to the board" is severely misguided because Thoennes was a member of the board at the time of discovery of these defects in 2005. In 2005, he was aware of cracks in several decks. (Trial Tr. 1175:16–25, Nov. 5, 2013.) "Early on" from Mr. Taylor's arrival (in 2003), Mr. Thoennes admitted he had knowledge of various leaks in Mr. Taylor's home. (Trial Tr. 1168:8–12, Nov. 5, 2013.) Notably, Mr. Thoennes admitted that notice of the defects was conveyed to members of the HOA from 2005-2006, well before suit was filed against Appellant in 2010:

Q: And so whether it went to you or to Tim [Roberson] or to Nathan [Hornaday], the information that the homeowners were complaining about was conveyed to members of the board, fair?
A: Yes, or to others.

[5] Ironically, in opposing a directed verdict motion by Mr. Thoennes, Respondents' counsel argued, "[Thoennes] was not only the general contractor who had the license who pulled the permits, but also was in charge of the sales staff. I mean, he was deeply implicated in this personally in all levels." (Trial Tr. 1282:2–18, Nov. 5, 2013). On appeal, however, Respondents submit that Mr. Thoennes had various roles, none of which were interrelated.

(Trial Tr. 1171:5–8, Nov. 5, 2013.) Conveniently, Respondents omit any reference to Nathan Hornaday's testimony regarding his observations upon arrival to the Project in 2005:

> Q: And was Mr. Thoennes aware of the decks and porches leaking.
> A: Yes.
> Q: And did you walk around with him and show him those conditions.
> A: I believe I did.
> . . .
> Q: Did you ever recommend to Mr. Thoennes that he hire some sort of expert to come and try to determine why those porches and decks were leaking?
> A: I think he took it and took care of that his self [sic].

(Trial Tr. 481:8–25, Oct. 30, 2013.) Mr. Hornaday continued:

> Q: And did Mr. Thoennes walk through [the damaged] units with you?
> A: I don't believe he walked through them at the same time. We did walk through some units together, but I'm not sure if he walked through all of them with me.
> Q: Did you report what you observed and what you saw in the phase one units to Mr. Thoennes.
> A: Yes.
> Q: And did you do that on a daily basis or a weekly basis?
> A: I can't remember. It could have been daily, or – it was at least every other day.

(Trial Tr. 469:3–14, Oct. 30, 2013.) Consistent with the testimony of all other witnesses regarding the HOA's knowledge of defects in numerous units in 2005, Mr. Hornaday stated:

> Q: All of the problems and conditions that you're referring to today, is it your belief that Mr. Thoennes was aware of all those conditions?
> A: Yes.

(Trial Tr. 495:11–14, Oct. 30, 2013.) It is critical to note that none of Mr. Hornaday's testimony relates to conditions discovered after February 2007, as Mr. Hornaday was no longer on the Project after that time. (Trial Tr. 469:25–470:7, Oct. 30, 2013.)

In sum, Respondents have not pointed to any "conflicting" evidence regarding the time at which the HOA learned of the defects, and when it knew a claim against another party might exist.[6] See Graniteville Co. v. IH Servs., Inc., 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994). As to Mr. Thoennes, Respondents risibly contend that he knew of the defects, but only in a "contractor" capacity, not his HOA-board member capacity.[7] As to the HOA and homeowners Mr. White and Mr. Taylor, Respondents only allege that they were unaware of the extent and severity of the damage, which is insufficient to toll the statute of limitations.[8] See Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998). Simply put, Respondents did not, and cannot, point to a single fact or piece of evidence, testimonial or otherwise, disputing that the HOA had actual knowledge of defects in numerous units at the Project as early as 2005,

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[6] Appellant again references Respondents' counsel's own statements at trial, where he stated that water intrusion was something "that a normal, average, everyday person would understand could give rise to a claim . . . ." (Trial Tr. 1246:1–4, Nov. 5, 2013.) Respondents now take the opposite position—that no one should have known that a claim arose in 2005. Quite clearly, the only conflict is Respondents' position on this issue.

[7] Respondents also allege that Mr. Cox, another HOA board member, "testified" that he was unaware of any construction defects. This, however, is a mischaracterization of his testimony, first because Mr. Cox never offered such testimony, and because Mr. Cox knew that the HOA commissioned a waterproofing company to repair various balconies. (Trial Tr. 1131:19–1132:12, Nov. 5, 2013.)

[8] Respondents cite Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) to support its contention that the HOA was excused from asserting a claim against Appellant between 2005 and 2009. However, Santee is vastly different from the present action because the defects presented in Santee were purely latent and undiscoverable by visual inspections. Id. at 274, 384 S.E.2d at 696. In the present action, Respondents had at least four witnesses testify that they observed significant water intrusion in numerous homes, and failed to hire an expert for several years after discovery. Furthermore, Santee was decided nine years prior to Barr, where this Honorable Court expressly stated that it was immaterial whether a party realized the full extent of the damage. Barr, 330 S.C. at 645, 500 S.E.2d at 160.

Furthermore, Respondents cite to Centex Homes v. S. Carolina State Plastering, LLC, 2010 WL 2998519 (D.S.C. July 28, 2010) for the proposition that whether a party should have known of defects is a question of fact. Like Santee, Centex is substantially different from the case at bar. There, Centex hired two independent experts to inspect various buildings, both of whom advised Centex that there were no defects. Id. at *5. Also, the court noted that there was no evidence of any "visible deficiencies." Id. at *7. In essence, the district court found a question of fact regarding when Centex had knowledge because it could justifiably rely on multiple experts' opinions that no defects existed, and the fact that the defects were not visible. The present case is immediately distinguishable because (1) the HOA never hired an expert between 2005 and 2007, and (2) the defects and water intrusion were visible to everyone. Moreover, Centex is not controlling on this Honorable Court, as it was a district court case.

and, therefore, the trial court erred in denying Appellant's Motions for Directed Verdict and JNOV.[9]

B. The trial court denied Appellant's Motion for Directed Verdict and JNOV based on an error of law by equitably tolling the statute of limitations under Magnolia North.

Respondents correctly recognize that this Honorable Court will reverse a trial court's ruling on a JNOV motion only "where there is no evidence to support the ruling or where the ruling is controlled by an error of law." Law v. S. Carolina Dep't of Corr., 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006). Somewhat tongue-in-cheek, Respondents argue that, even if the HOA knew of the defects, the statute of limitations was equitably tolled based on Magnolia North.[10] Even assuming that the trial court did not consider the factual evidence presented at trial with regards to the statute of limitations, the trial court denied Appellant's Motion specifically based on Magnolia North, which constitutes an error of law. (Trial Tr. 1556:11–1557:3, Nov. 7, 2013.) The entirety of Respondents' equitable tolling argument is premised upon the time at which the homeowners took control of the HOA—September 2008. In so arguing, Respondents severely misconstrue Appellant's position.

Respondents contend that, because the homeowners "had no right to control the affairs of the HOA, or file suit on its behalf", the statute of limitations was properly

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[9] Respondents' contention that Appellant waived the right to have the issue determined by the jury is patently false. Appellant, at trial, requested a special interrogatory be submitted to the jury asking whether the jury found that the HOA knew or should have known about the defects before February 2007, and marked the interrogatory as a court exhibit. (Trial Tr. 1756:16–1757:5, Nov. 7, 2013; see also Ct. Ex. 3.) The trial court refused to submit the interrogatory, concluding that it would violate Rule 606, SCRE. Appellant, in its Motion for a New Trial, cited this basis as a grounds for new trial. (See Defs.' Mot. For New Trial Absolute, Nov. 21, 2013.) It is without question that Appellant preserved this issue for appeal, and did, in fact, attempt to have this issue specifically answered by a jury, and the trial court erred in refusing to submit the interrogatory to the jury.

[10] Appellant respectfully directs this Honorable Court to Appellant's Initial Brief regarding the critical distinction between the present action and Magnolia North, as well as Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), generally.

tolled. (See Respondents' Initial Brief, May 13, 2016.) Appellant agrees, the HOA—as an entity, not the individual homeowners, and the same entity from 2005 to the time of trial—was specifically charged with seeking relief on behalf of the homeowners. (See Am. and Restated Bylaws of Stoneledge at Lake Keowee Owners' Association, Inc. §6.1, ¶¶ (e), (h), Nov. 1, 2005; Pls.' Ex. P–3.) Even at the time of trial, the individual homeowners did not have the power to file suit against anyone—that power always remained with the HOA. Respondents concede this very fact in their brief, noting that the homeowners could only bring a claim once they assumed control of the HOA.

Moreover, Respondents attempt to separate the knowledge held by Mr. Thoennes, Mr. Roberson, and Mr. Cox, as HOA board members, from their knowledge as developers. To suggest that these individuals could have actual knowledge of numerous defects in one capacity, and then plead ignorance in another, is untenable, bordering on ludicrous. Respondents argue that it would be "manifestly unfair" to hold the HOA to its actual knowledge of defects in 2005 because Marick/IMK's interests were adverse to the owners who comprise the current board. Respondents fail to recognize that neither Marick/IMK, the HOA, nor the homeowners had any adverse interests to Appellant. To the contrary, all of them, with actual knowledge that a claim might exist in 2005, had every opportunity and incentive to pursue a claim against Appellant. The HOA, at that time, had the most incentive, particularly as they continued to spend funds on band-aid repairs, rather than notifying Appellant until five years later.

Respondents have made every effort to convolute the issue at hand. The HOA, regardless of by whom it was controlled, was an entity charged with maintenance, upkeep, and taking all actions to protect the homeowners, which expressly included any

legal recourse.[11] In 2005, several HOA board members had actual knowledge of various defects in numerous homes. Despite this knowledge, they undertook to make minor repairs, rather than ever notifying or asserting a claim against Appellant until 2010. At all times from 2005 through 2006, the HOA had every incentive, and indeed, the obligation, to assert a claim against Appellant, but chose not to. Respondents now seek an equitable remedy (equitable tolling) when they had a legal remedy (damages for breach of fiduciary duties), and actually recovered pursuant to that legal remedy.[12]

II. APPELLANT DOES NOT DISPUTE THE CUMULATIVE VERDICT, BUT RATHER THE APPLICATION OF SETOFF AND ENTRY OF JUDGMENT BASED UPON THE JURY'S VERDICTS.

Respondents contend that Appellant received the full benefit of all settlement proceeds, and argues that the trial court properly applied the cumulative award to each cause of action in its January 30, 2015 judgment. Respondents further contend that Appellant has waived its opportunity to contest the cumulative award. In its Post-Trial Motion for Entry of Judgment, Respondents relied upon Keeter v. Alpine Towers Int'l, Inc. for the proposition that a cumulative award requires entry of the entire award, for multiple causes of action among all defendants equally. (See Pls.' Post-Trial Mot. For Entry of Judgment, served Nov. 18, 2013.) Appellant does not dispute the cumulative

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[11] Surely, Respondents do not contend that the HOA, with current members different from those in 2013, is somehow a completely different entity with different obligations and responsibilities.

[12] The jury awarded $1 Million for the breach of fiduciary duties of various HOA board members. Although Respondents contend that was not the basis for asserting that cause of action, Respondents were permitted to argue that the individual members breached their fiduciary duty by not timely notifying Appellant or filing a claim, but chose not to. Respondents' argument constitutes the proverbial "have your cake and eat it too" whereby they asserted breach of fiduciary duty against representatives of the HOA, but subsequently attempt to qualify what that cause of action meant to Respondents. The breach of fiduciary duty claim encompasses the HOA's failure to timely bring a lawsuit on behalf of the homeowners, yet at the same time, Respondents seek to toll the statute of limitations by claiming the HOA representatives did not know of the defects.

nature of the awards; rather, it disputes the application of setoff and entry of judgment in the January 30, 2015 Form 4.

A. The trial court awarded a cumulative award only to the extent that the three jury verdicts for each cause of action would be added together, but erred by entering judgment against Appellant for causes of action not asserted against Appellant and misapplying the setoff as to all causes of action.

A cumulative award is merely the addition of multiple verdicts for multiple causes of action. See Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 179, 730 S.E.2d 890 (2012) (holding that a cumulative award—adding multiple verdicts for multiple causes of action against one defendant—was the proper award, rather than an election of remedies). In Keeter, the plaintiff proceeded to trial against one defendant, alleging three causes of action against that defendant. Id. After a jury awarded a verdict for each cause of action, the trial court required the plaintiff to elect its remedy and choose which cause of action under which he would recover. Id. at 184, 730 S.E.2d at 893. The South Carolina Supreme Court rejected the election of remedies approach, stating, "[b]ecause [the plaintiff] sought only one remedy, the doctrine of election of remedies does not apply." Id. at 198, 730 S.E.2d at 900. The Supreme Court found that the jury intended the three verdicts to constitute a cumulative award, and remanded for entry of judgment against the sole defendant for the total of the three verdicts. Id. at 202, 730 S.E.2d at 902.[13]

Appellant did preserve the issue of the cumulative award for appeal because the issue was raised and clarified by the trial court prior to the jury verdict. Prior to closing

[13] Respondents relied upon Keeter in their Post-Trial Motion for Entry of Judgment for the proposition that all awards should be added cumulatively and entered against each defendant. However, Keeter is immediately distinguishable because there was only one remaining defendant at trial, and all three causes of action were asserted against that single defendant. Here, Respondents readily admit that they never asserted a claim against Bostic for breach of fiduciary duty, as no such claim existed. (Trial Tr. 1555:6–10, Nov. 10, 2013.)

arguments, the trial court selected a verdict form containing three blanks—one blank for each cause of action—for the jury to enter an award for each. See (Verdict and Apportionment Form (November 18, 2013)). Appellant's counsel requested clarification regarding the cumulative award, specifically asking whether "it [is] going to be cumulative that [the verdicts for each cause of action] will all add up to the total of plaintiffs' damages?" (Trial Tr. 1609: 2–3, Nov. 7, 2013.) Appellant's counsel did not seek to have Respondents elect a remedy, nor did the trial court intend to do so. Rather, the only issue about which Appellant was concerned was that the three verdicts—one for each cause of action—would be added up such that "plaintiffs' damages [would not] exceed the amount that he [sic] puts on a blackboard and asks for." (Trial Tr. 1609:7–8, Nov 7, 2013.) This was also previously addressed by the trial court when discussing the verdict form with all parties. (See Trial Tr. 1555: 18–24 Nov. 7, 2013.) Appellant specifically addressed these issues during trial with the understanding that the nearly $3 Million in setoff funds would be applied to the negligence claim only, and ensuring that the trial court would have a specific verdict for that cause of action.

Subsequently, the jury awarded $3 Million for the negligence cause of action; $1 Million for the breach of warranty cause of action; and $1 Million for the breach of fiduciary duty cause of action, for a cumulative $5 Million award. The trial court subsequently entered judgment against Appellant in the amount of $2,144,088.23 as to the negligence cause of action, and $643,226.47 as to the breach of warranty cause of action. The $2,144,088.23 judgment was also entered against Marick for the breach of warranty cause of action, and against IMK, Integrys, Thoennes, Lollis, and Cox for the

breach of fiduciary duty cause of action. Subsequently, Appellant timely filed a Motion to Alter or Amend the Judgment on February 19, 2015, which was also ostensibly denied.

In essence, the trial court entered judgment against Appellant for the entire $5 Million, less the full amount paid by settling defendants. In doing so, the trial court's judgment includes the $1 Million breach of fiduciary duty award, which was never asserted against Appellant, nor did Respondent's counsel ever seek to recover from Appellant for such cause of action. (See Trial Tr. 1555:6–10, Nov. 7, 2013.) ("I do not have a claim against Bostic for a breach of fiduciary duty."). Thus, it is abundantly clear that Appellant did not receive the full benefit of the setoff—the trial court improperly included the $1 Million award for breach of fiduciary duty, and then applied the setoff to all three causes of action, creating only an approximately $1.8 Million setoff.

The trial court improperly entered judgment against Appellant in the amount of $2,144,088.23 because such judgment includes the $1 Million award for breach of fiduciary duty, which was not asserted against Appellant. Rather, the trial court should have entered a $4 Million cumulative award against Appellant, and then applied the setoff to the negligence claim only. (See Appellant's Initial Brief pp. 21–28, Dec. 3, 2015). This application would have resulted in judgment, as to Appellant, as follows:

Cause of Action	**Total Judgment**
Negligence (60%)	$144,088.23 ($3M - $2,855,911.77)
Breach of Warranty (30%)	$300,000.00 (30% of $1M)

As previously addressed in Appellant's Initial Brief, the SCCATA expressly limits its application to tort claims, excluding both breach of warranty and breach of fiduciary duty causes of action. See S.C. Code Ann. § 15-38-10 *et seq.*; Kennedy v. Columbia

Lumber & Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989); (see also Pls.' Post-Trial Mot. For Entry of Judgment, served Nov. 18, 2013) ("The warranty claims are not tort claims and, thus, are not subject to the Contribution Among Joint Tortfeasors Act."). The trial court erred in entering judgment against Appellant for $5 Million, given that there was never a claim for breach of fiduciary duty against Appellant. Furthermore, the trial court applied the setoff to the entire $5 Million award, which was erroneous in that it set off awards for breach of warranty and breach of fiduciary duty.

B. There is no basis for equitable setoff because the South Carolina Contribution Among Tortfeasors Act expressly prohibits setoffs to awards for breach of warranty and breach of fiduciary duty causes of action.

"[T]he right to setoff arises as an operation of law." Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). A setoff is "statutorily mandated." Broome v. Watts, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995). There is no need to file a motion to apply a setoff. Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App. 1999). "The legislature's intent should be ascertained primarily from the plain language of the statute." Enos v. Doe, 380 S.C. 295, 303, 669 S.E.2d 619, 622 (Ct. App. 2008). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Id. at 303, 669 S.E.2d at 622–23 (citing Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005)).

Respondents contend that a setoff can apply to other causes of action based upon equitable principles, not any "statute or fixed rule of court." Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 376, 71 S.E. 992, 995 (1911). To the contrary, the SCCATA (which was not enacted prior to 1911) explicitly excludes awards for non-tort

and breach of fiduciary duty causes of action from receiving a setoff. S.C. Code Ann. § 15–38–10 *et seq*. While there may be causes of action sufficient to warrant equitable setoffs, the SCCATA statutorily prohibits such application in the present case, and Respondents' argument flies in the face of longstanding principles of statutory interpretation, having no merit in the context of the SCCATA.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S POST-TRIAL MOTIONS FOR A NEW TRIAL ABSOLUTE AND NEW TRIAL NISI.

A. The trial court erred in admitting into evidence Plaintiff's exhibit of an Excel spreadsheet purporting to show emergency repair expenses.

Appellant respectfully stands on the arguments espoused in its Initial Brief regarding the admission of the emergency repair spreadsheet, as the document constitutes inadmissible hearsay, there was no proper foundation laid for its admission, and the admission of the same prejudiced Appellant.

B. The trial court abused its discretion in denying Appellant's request for a comparative negligence charge because there was evidence that the HOA failed to mitigate its damages, and such refusal was constitutes reversible error.

"[C]omparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide." Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000). "Generally, under a less than or equal to comparative negligence rule, determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn." Trivelas v. S. Carolina Dep't of Transp., 357 S.C. 545, 550–551, 593 S.E.2d 504, 506 (Ct. App. 2004). "Comparative negligence is an affirmative defense." Youmans ex rel. Elmore v. S. Carolina Dep't of Transp., 380 S.C. 263, 281, 670 S.E.2d 1, 10 (Ct. App. 2008). "The defendant asserting an affirmative defense bears the burden of

its proof." Id. "When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). "A trial court should instruct the jury on the definitions of [various terms related to comparative negligence], in addition to ordinary negligence, when so requested by a party . . . ." Berberich v. Jack, 392 S.C. 278, 293, 709 S.E.2d 607, 616 (2011). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." Ross v. Paddy, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). "Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." Id.

Appellant properly pled comparative negligence as an affirmative defense. (See Defs.' Ans. to Pls.' Third Am. Compl., Aug. 17, 2012). At trial, Appellant argued for a comparative negligence charge and provided a specific basis for the same—there was evidence that the HOA failed to bring a claim or otherwise notify Appellant of a claim for five years, which necessarily caused extensive damage about which Appellant had no knowledge.[14] In fact, Respondents' counsel summarized witness testimony by stating, "the testimony in this case is uncontroverted that [the units] were not in good condition at the time the control of the homeowners association was given . . . in September 2008."

[14] Respondents' allegation that Appellant failed to preserve this issue for appeal is, again, patently false. Appellant pled comparative negligence in its Answer, argued the legal and factual basis for a comparative negligence charge, and the trial court specifically denied such request. (Trial Tr. 1518:12–1522:20, Nov. 6, 2013.) The trial court stated, "that's all preserved for every defendant and their friends on appeal that I found no evidence of negligence on behalf of the homeowners association." (Trial Tr. 1522:15–18, Nov. 6, 2013.)

(Trial Tr. 1569: 5–9, Nov. 7, 2013.) In denying Appellant's request for a comparative negligence charge, the trial court took it upon itself to weigh the evidence and unilaterally determine that there was no factual basis for such a charge. (See generally Trial Tr. 1518:12–1522:20, Nov. 6, 2013.)

This Honorable Court has specifically found erroneous a trial court's refusal to give a requested charge on a legal principle raised by a party. See, e.g., Ross, 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000). Appellant properly preserved this affirmative defense in its Answer and at trial when it requested a comparative negligence charge. There was evidence sufficient to create a question of fact whether the HOA's failure to timely assert a claim or make adequate repairs constituted a failure to mitigate its damages, and was therefore comparatively negligent. Respondents, in their brief, have taken on the role of judge and jury by asserting that Appellant "failed to prove" duty, breach, or proximate cause. However, Respondents have no basis for this allegation because the jury was never presented with a charge of the applicable law, or the burden of proof, regarding comparative negligence. As such, Appellant respectfully requests this Honorable Court to find that the refusal to submit a comparative negligence charge was reversible error and remand with instructions for a new trial.

CONCLUSION

The overwhelming evidence, provided through Respondents' own witnesses, yields only one inference—that, in 2005, the HOA had actual knowledge of defects sufficient to assert a claim against Appellant. See Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999). The testimony of Steve Taylor, Robert White, Nathan Hornaday, and Rick Thoennes, among others, conclusively

demonstrated knowledge attributable to the HOA in 2005, and the trial court erroneously denied Appellant's Motion for Directed Verdict and JNOV. Moreover, the trial court's ruling was governed by an error of law—relying on Magnolia North in equitably tolling the statute of limitations. See Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010). As such, Appellant respectfully requests this Honorable Court to remand with instructions to dismiss with prejudice all claims against Appellant .

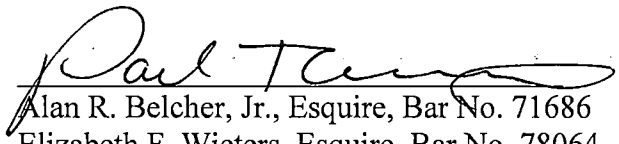
Alternatively, if this Honorable Court is not persuaded that Respondents' claims against Appellant were time-barred, Appellant is entitled to a statutory setoff of $2,855,911.77, pursuant to the South Carolina Contribution Among Tortfeasors Act. This setoff must be applied only to the negligence award, and the trial court erred in applying it across all awards, including the breach of warranty and breach of fiduciary duty awards. Therefore, Appellant respectfully requests that this matter be remanded with instructions to amend the judgment such that the setoff amount is applied only to the negligence award, and judgment entered as to the negligence claims against Marick/IMK and Appellant in the amount of $144,088.23, to be apportioned according to the jury verdict form. Furthermore, Appellants respectfully request that any award for breach of fiduciary duties be stricken from the judgment against Appellant, as this cause of action was never asserted against Appellant.

Finally, Appellant respectfully requests this Honorable Court to grant a new trial on the aforementioned grounds. Specifically, the admission of the emergency repair spreadsheet improper in that the document was inadmissible hearsay, there was no foundation for its admission, and its admission was prejudicial to Appellant.

Furthermore, the trial court's refusal to submit a comparative negligence charge (of which Appellant bore the burden of proof), constitutes reversible error.

Respectfully submitted,

HALL BOOTH SMITH, P.C.



Alan R. Belcher, Jr., Esquire, Bar No. 71686
Elizabeth F. Wieters, Esquire, Bar No. 78064
Paul Trainor, Esquire, Bar No. 101405
40 Calhoun Street, Suite 550
Charleston, SC 29401
Telephone: (843) 720-3460
Facsimile: (843) 720-3458

Attorneys for Appellant, Bostic Brothers Construction, Inc.

Dated: June 2, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge, Seventh Judicial Circuit

Case No. 2009-CP-37-00652
Ct. App. No. 2015-000417

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

v.

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

Of Whom Bostic Brothers Construction, Inc. is the Appellant.

PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant upon the Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on June 2, 2016, addressed to Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, PO Box 773, Charleston, SC 29402.

Also served by the same means are the following: Cynthia Buck Brown, Esquire and R. Patrick Smith, Esquire of Harper Lambert & Brown, PA, P.O. Box 908, Greenville, SC 29602 (attorneys for IMK Development Co., LLC, Integrys Keowee Development, LLC, William C. Cox, and Larry Lollis), Jason M. Imhoff, Esquire and Chad M. Graham, Esquire of The Ward Law Firm, P.A., P.O. Box 5663, Spartanburg, SC 29304 (attorneys for Marick Home Builders, LLC and Rick Thoennes).

Alan R. Belcher, Jr., Esquire, Bar No. 71686
Elizabeth F. Wieters, Esquire, Bar No. 78064
Paul B. Trainor, Esquire, Bar No. 101405
40 Calhoun Street, Suite 550
Charleston, SC 29401
Telephone: (843) 720-3460
Facsimile: (843) 720-3458

Attorneys for Appellant, Bostic Brothers Construction, Inc.

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29402
843-577-7730
Attorney for Respondents

Cynthia Buck Brown, Esquire
R. Patrick Smith, Esquire
Harper, Lambert & Brown, PA
PO Box 908
Greenville, SC 29602
864-235-5535

Attorneys for IMK Development Co., LLC, Integrys Keowee Development, LLC, William C. Cox, and Larry Lollis

Jason M. Imhoff, Esquire
Chad M. Graham, Esquire
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304
843-582-3075
Attorneys for Marick Home Builders, LLC and Rick Theonnes