

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-000247

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SC Court of Appeals

Lake Estates Property Owners Association, Inc.,.....Appellant,

v.

Lake Estates, LLC; Estate Builders, Inc.; Estate Home Builders, LLC; Arkiteknic, Inc.; David Sladek Engineering Company; Jenkins Plumbing Company, LC; American Paving Design, LLC; American Paving Design, Inc.; Miller Construction of the Low Country, Inc.; Whitaker Laboratory, Inc.; Heritage Plastering & Stucco, LLC; CMC Steel Works, Inc., Savannah Hardscapes, Inc., Superior Heating & Air, Inc., Michael Stoghill d/b/a Advanced Residential Plumbing; Warren Flick Associates, LLC; Warren Flick; Russell Miller; Russell Miller, Jr.; and Robert Miller

Of Whom Lake Estates, LLC; Estate Builders, Inc.; and
Miller Construction of the Low Country, Inc.; are.....Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err when it granted Miller Construction of the Low Country, Inc. a directed verdict and held there was no evidence that Miller Construction was negligent or breached the implied warranty of workmanlike service even though there was evidence that Miller Construction's work violated industry standards during construction?
- II. Does the trial court's error in granting Miller Construction of the Low Country, Inc.'s a directed verdict require a new trial against all defendants because there is no way to be sure how the wrongful dismissal of a co-defendant affected the jury's deliberation on the assignment of fault against the remaining defendants?

STATEMENT OF THE CASE

This appeal arises from the trial courts directed verdict in favor of Miller Construction of the Low Country, Inc. ("Miller Construction") and the jury verdict in favor of Lake Estates, LLC ("Lake Estates") and Estate Builders, Inc. ("Estate Builders").

The Summons and Complaint was filed by Lake Estates Property Owners Association, Inc. ("POA") in this matter on June 11, 2012, alleging causes of action against the Defendants related to defective construction work. A jury trial was held before the Honorable Brooks P. Goldsmith from January 11 through 14, 2016. After the close of the Plaintiff's case in chief, the trial court directed a verdict in favor of Miller Construction by reason that there was no evidence of Miller Construction's negligence or that they breached an implied warranty of workmanlike service. Trial Tr. 571:3-9. Plaintiff moved twice for the court to reconsider its directed verdict in favor of Miller Construction. Trial Tr. 722:5-22; 813-21. The trial continued against Lake Estates and Estate Builders.¹ The jury found for Lake Estates and Estate Builders on all causes of action. Trial Tr. 921:13-18. Notice of Intent to Appeal was timely filed. This appeal

¹ Miller Construction remained in the trial due to the cross claim of Lake Estates until those claims were resolved the morning of the last day of trial.

revolves around whether the decision of the trial court to direct a verdict for Miller Construction was correct.

STATEMENT OF FACTS

During the construction of a condominium development in Bluffton, South Carolina, the developer, general contractor, and subcontractor failed to have a grading and drainage plan for the site, set the exterior grade to close to the finished floor, and failed to properly grade the site to prevent standing water. Because of those failures, the homeowners in the development have suffered damage to their homes and the common area. Through the POA, these homeowners brought this suit.

In 2006, Warren Flick, Russell Miller, and Spain Kelly formed Lake Estates, LLC to build multifamily luxury condominiums, called coach homes, in the Hampton Lake development in Bluffton, South Carolina. Trial Tr. 583:1-584:2. Spain Kelley left the LLC at the end of 2006 leaving Flick and Miller as the remaining partners. Mr. Flick was to supply the customer service portion of the business while Mr. Miller would provide the construction through his two companies, Estate Builders, Inc. and Miller Construction of the Low Country, Inc.. Trial Tr. 607:17-608:3; 760:15-761:5.

Lake Estates LLC proposed building the coach homes on a piece of land adjacent to the Hampton Lake amenities center and the main lake in the larger development. During the initial design stages of the development, Flick and Miller were the only partners and the only employees of the LLC. Lake Estates, LLC purchased the land from Hampton Lake after presenting their subdevelopment ideas. The entire project was broken down into phases where a smaller portion of the entire project would be

purchased and developed before Lake Estates would purchase the next phase of the overall subdivision project.

The building design and blueprints for the Lake Estates subdivision was borrowed from a condominium development in Florida. Trial Tr. 583:12-584:6; 737:8-19. Lake Estates hired Thomas & Hutton to perform due diligence work at the subdivision in the first step of the site development. Trial Tr. 586:14-17; 809:18-811:8. The due diligence work consisted of "site evaluation and assistance for the purchaser of the property, their initial review of the property." Trial Tr. 809:25-810:2. Thomas & Hutton performed this due diligence work from July 2006 through October 2008.² Trial Tr. 783:13-784:9; 785:17-19.

After the start of the due diligence phase, Thomas & Hutton sent a proposal to do the engineering work at the site as part of its development. Trial Tr. 810:3-811:8. Flick and Miller never accepted or responded to Thomas & Hutton's proposal. Trial Tr. 765:14-766:2; 778:6-20; 783:13-784:9. Thomas & Hutton withdrew the proposal for engineering work and recommended that Flick and Miller hire an engineer to do the necessary design work at the site. *See* 790:9-791:24; 810:12-811:8.

During trial, Flick and Miller testified that Thomas & Hutton performed engineering work at the site, including creating a site grading and drainage plan. Trial Tr. 586:14-17; 607:17-608:3; 739:1-14; 755:25-758:18. On rebuttal, Thomas & Hutton testified that they were hired only to do due diligence work and never entered into a contract to perform engineering services at the Lake Estates development. Trial Tr.

² Thomas & Hutton only billed Lake Estates and Estate Builders under the due diligence phase since no engineering services agreement was ever signed. Trail Tr. 785:17-23; 801:12-16.

811:17-21; 809:18-811:8. To do engineering work at the site, Thomas & Hutton required Lake Estates, LLC to enter into an engineering contract. Trial Tr. 810:3-16. Lake Estates never entered into an engineering agreement with Thomas & Hutton. Trial Tr. 810:12-16. Thomas & Hutton asked numerous times whether Lake Estates needed engineering work done at the site without any response from Lake Estates, LLC. Trial Tr. 765:14-766:2; 778:6-20; 783:13-784:9 (email from Thomas & Hutton that any drawings are for due diligence and not for construction).

The structural plans for the coach homes show David Sladek, PE, as the engineer of record for the structural engineering design, but those drawings do not include design or engineering drawings for the grading and drainage at the development. Robert Norman was the architect of record for the architectural drawings of the coach homes. Both individuals were deceased prior to the filing of the lawsuit.³ Trial Tr. 738:2-8.

During the construction phase, problems with standing water manifested themselves around the development. Lake Estates made repairs to multiple units that exhibited standing water and observed other locations within the development that had the same standing water problem. Trial Tr. 598:24-600:1; 616:10-617:7. As home owners started to move into the development, they noticed problems with standing water, drainage issues, and overflowing gutters and reported to these problems to Lake Estates. Trial Tr. 279:3-11; 293:9-302:21; 304:2-304:7; 479:6-19; 483:19-488:18; 492:1-500:15.

By mid-2010, homeowners sought to transfer control of the POA from Flick. The first step was requesting the approval of a transition committee which was approved in late 2010. 269:13-274:23. The transition committee specifically sought funding for a

³ Both Mr. Sladek and Mr. Norman were deceased prior to the initiation of this lawsuit.

third party engineer to certify the development constructed to code and free of defective construction. Trial Tr. 279:16-280:5. The owners of the coach homes sought control of the Property Owners Association from Lake Estates and Flick. Flick resisted turning control of the POA to the home owners. Trial Tr. 282:1-284:20. One of the requirements for turning over control of the POA was for the homeowners to sign a hold harmless agreement. Trial Tr. 305:22-306:5; 649:18-20. This agreement would have limited any liability Flick or Lake Estates would have to the home owners or the development. Trial Tr. 305:22-306:5.

During the transition process, the homeowners hired an engineer, Mr. John Kern, P.E., to review the development and identify areas of concern and deficiencies in the construction of the development. Trial Tr. 274:1-8. The engineer was given a list of items that the homeowners thought were concerns and was asked to produce his own list of deficiencies that needed to be addressed prior to the developer turning over control of the POA. Trial Tr. 273:19-274:19. From his inspection of the site, Mr. Kern found the site grading to be flat and lacking the proper drop off or drainage mechanisms and not enough drop from the finished floor elevations to the exterior grade. Trial Tr. 361:23-364:22; 367:22-369:22; 373:1-14.

The homeowners passed along the engineering deficiency report to Lake Estates in late 2010. Trial Tr. 280:18-281:4. Lake Estates did not perform any repairs to the site grading and drainage after it received the engineering report detailing these construction defects. Trial Tr. 282:1-17. In the spring of 2011, the homeowners filed a lawsuit to force Lake Estates to hand over control of the POA. Following the bankruptcy of Lake

Estates and a new developer purchasing the land, that lawsuit was settled and control of the POA was placed into the hands of the homeowners by the new developer.

In the subsequent years, the POA took many steps to mitigate the problems at the site to lessen the long term damage to the development from the grading and drainage problems. Trial Tr. 293:9-298:12; 304:2-7; 304:16-18; 498:25-499:11. But, the problem of the standing water, poor drainage, and flat grade remain. Trial Tr. 498:22-24 (mitigation work did not change the general grade).

STANDARD OF REVIEW

“When upon a trial the case presents only questions of law the judge may direct a verdict.” Rule 50(a), SCRPC. In ruling on a motion for directed verdict, a trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *S.C. Fed. Credit Union v. Higgins*, 394 S.C. 189, 193-94, 714 S.E.2d 550, 552 (2011). A trial court must deny a motion for directed verdict where either the evidence yields more than one inference or its inference is in doubt. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). “A motion for a directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability.” *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 415, 697 S.E.2d 558, 562 (2010). The trial court should be concerned only with the existence or nonexistence of evidence, and not with the credibility or weight of the evidence. *Higgins*, 394 S.C. at 194, 714 S.E.2d at 552. The standard of review likewise requires this court to view the evidence in a light most favorable to the non-moving party. *Id.*

ARGUMENT

This should not be a difficult case. Although the evidence is contested, it ought to be apparent that there is at least some evidence of Miller Construction's negligence and that they breached the implied warranty of workmanlike service. The law seems to plainly establish that a defendant who constructs a new home without a specific grading and drainage plan or who relies on others who do not use this plan during construction breaches the industry standard of care and a reasonable jury could agree. The trial court said that there was "no" evidence that Miller Construction was negligent or that they breached the implied warranty of workmanlike service. Respectfully, this reasoning was wrong.

This error by the trial court requires a new trial as to all the defendants. Without Miller Construction as part of their deliberation, the jury could not evaluate the level of fault between the defendants. The presence of Miller Construction during deliberation could allow the jury to assign a majority of the fault to them while assigning a smaller percentage to Lake Estates and Estate Builders. Without Miller Construction as part of the deliberation process, the jury may have felt it was inequitable to place 100% of the blame on the combination of Lake Estates or Estate Builders. No equation can tell us how much liability the jury would have assigned to the empty chair at the defendants' table. When multiple defendants could be liable on the same claim, in the interest of justice, this case requires a new trial granted as to all the defendants.

- I. **The trial court erred when it held that there was no evidence of Miller Construction's negligence or breach of implied warranty. Evidence of Miller Construction's violation of industry standards during construction is evidence of Miller Construction's negligence and breach of implied warranty of workmanlike service.**

If a defendant violates an industry standard during construction of residential homes, that violation constitutes evidence of negligence and a breach of the implied warranty of workmanlike service. A successful negligence claim requires the defendant to have breached the standard of care, and the standard of care in a given case can be established by the common law, by statutes, by industry standards, or by a defendant's own policies and guidelines. *Madison ex rel. Bryant v. Babcock Ctr.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) (citing *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005)). Additionally, a successful breach of implied warranty of workmanlike service claim requires evidence that a residence was not "constructed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 61, 71 (2008).

A. Testimony of Mr. John Kern, P.E.

Plaintiff's expert, John Kern, P.E., was asked by the homeowners, prior to them taking control of the POA, to inspect the site and identify issues in its construction. He was given a list of items identified by the homeowners as areas of concern, but was asked to make any observations independent of that list regarding potentially defective construction at the development. Trial Tr. 281:5-25 (Tommy Kendall - homeowner); Trial Tr. 360:10-361:22 (Kern). Mr. Kern was qualified as an expert in civil and structure engineering in construction defects at trial. Trial Tr. 353:1 to 358:18. From his inspection of the site, he found the site grading and drainage to be defective and that the work violated industry standards. Trial Tr. 361:23-364:22; 367:22-369:22; 373:1-14.

At trial, Mr. Kern testified regarding the industry standard of care for the installation of site grading and drainage at a residential development. Mr. Kern's opinion

stated the defendants violated the industry standard of care by not having the finished floor elevation 8 inches above the exterior grade, not having a site grading and drainage plan, and the development did not have the required grading slope and additional drainage mechanisms to prevent standing water near the buildings. Trial Tr. 361:23-364:22; 366:25-367:5; 370:24-371:5; 371:21-372:4; 373:1-14; 401:7-17.

Mr. Kern stated there could not have been a site grading and drainage plan done at the site based on his observations of the development. Trial Tr. 364:15-22; 370:24-371:5; 371:21-372:4; 373:1-14. This statement was supported by the defendant's failure to produce a site grading or drainage plan during discovery. Trial Tr. 364:9-22; 369:15-22; 372:16-22 (Kern); 294:15-21; 304:8-18 (Kendall); 497:12-22 (Robert Kimmig - homeowner). As the case progressed, the defendants failed to produce the site grading and drainage plan during trial and pointed the finger to other entities who may have the site grading and drainage plan. Trial Tr. 606:2-21; 607:17-609:7; 625:14-626:25; 627:7-16; 644:1-23 (Flick - no site plan, but thought Thomas & Hutton did that plan); 757:1-25; 780:1-25; 790:9-24 (Russell Miller - no site plan, but Thomas & Hutton did that plan); 701:2-4; 703:8-22 (Schweickhardt, defense engineering expert, agreeing it was essential to have a site grading and drainage plan and stating he never saw a site grading and drainage plan for this development). On reply, a witness from one of those entities, Lamar Mercer of Thomas & Hutton, testified that Thomas & Hutton did not perform any engineering services for the Lake Estates development, which would include providing a site grading and drainage plan for the development. Trial Tr. 810:17-811:8.⁴

⁴ Thomas & Hutton repeatedly asked Lake Estates, Flick, and Miller about starting the engineering portion of the site development, but failed to receive one reply regarding these services. Thomas & Hutton finally terminated their efforts to secure the

In addition to failing to have a site grading and drainage plan, Mr. Kern testified that the finished floor of the residential buildings was not eight inches above the exterior grade. Trial Tr. 366:25-367:5; 401:7-17. Mr. Kern testified the eight inches was industry standard, Trial Tr. 401:7-17, and that the structural drawings from the architect and structural engineer called for the eight inch distance between the finished floor and exterior grade. Trial Tr. 265:14-266:11.

Mr. Kern on cross examination verified that the finished floor elevations, as set by Thomas & Hutton, were accurate. Trial Tr. 403:19-24. On further cross examination, Mr. Kern testified that the defect in the construction by Miller Construction was “the grading away from the buildings was not there,” Trial Tr. 416:4-5; not the finished pad elevations.

B. Testimony of Kendall and Kimmig

Mr. Kendall testified that he never saw a site grading and drainage plan for his entire time living in the development. Trial Tr. 304:8-15. The only drainage plan the POA has was when the homeowners attempted map the existing drainage and gutter system themselves. Trial Tr. 294:9-295:16.

Mr. Kimmig testified that he never saw a site grading and drainage plan, he has seen the architectural and structural drawings, but the site grading plan is missing. He also testified that the finished floor was not eight inches above the exterior grade, for his unit and a couple others around the development. Trail Tr. 497:15-498:6.

C. Testimony of Robert Miller, 30(b)(6) designee of Miller Construction

Plaintiff designated portions of Miller Construction’s 30(b)(6) deposition that establish the work Miller Construction performed at the site. This work included digging

engineering services for the Lake Estates development and recommended Flick and Miller hire another engineer.

out the adjacent lake and relocating the soil to build up the development area at Lake Estates prior to vertical construction, digging the buildings foundations, rough grading the site, and installed the drainage piping. Trial Tr. 458:25-460:7.

Miller Construction then designated portions of the same deposition to support their reliance on Thomas & Hutton, who developed the finished pad elevation drawing, and Coastal Surveying for setting the stakes for Miller Construction to grade too. Trial Tr. 462:4-463:13. Robert Miller, as designee of Miller Construction, testified there was a site plan at the job trailer “and it had the elevations on there.” Trial Tr. 463:24. He testified that Miller Construction set the grade “plus or minus one or two inches,” Trial Tr. 463:19, and that their work was the subgrading.⁵

D. Directed verdict argument

In support of its directed verdict motion, Miller Construction said it followed the site grading and drainage plan as designed by the engineer and the surveying company. Since it followed the plan from the engineer and the surveying company, Miller Construction did not violate an industry standard and it could not be held liable for any defects in the site grading plan. Trial Tr. 563:23-568:24. The trial court granted Miller Construction’s directed verdict finding it agreed with the arguments of counsel. Trial Tr. 571:3-9. The trial court denied Plaintiff’s motions to reconsider the ruling twice. Trial Tr. 722:5-22; 813-21.

E. The trial court erred by weighing and determining the credibility of witnesses rather than the existence or nonexistence of evidence when granting Miller Construction a directed verdict

⁵ Robert Miller later testified during the defendants case in chief that and on cross examination testified that the rough grade sets the slope, swales, and other mechanisms for diverting water. Trial Tr. 665:23-666:12.

The evidence presented to the trial court during the Plaintiff's case in chief shows a violation of the industry standard while setting the exterior grade for the coach homes at Lake Estates. The evidence also shows that Miller Construction violated the industry standard by not using a site grading and drainage plan while installing the rough grade at the development. Finally, the work that was done setting the rough grade was defective according to Mr. Kern.

Miller Construction's evidence showed that Thomas & Hutton set the finished pad elevation and that Coastal Surveying set those pads at the site. What is missing from their testimony is that Thomas & Hutton designed the grading at the site and Coastal Surveying physically set that grade from that site grading and drainage plan. At the time of the directed verdict motion, there was no evidence of a site grading and drainage plan in evidence. In fact, there was testimony that Mr. Kern didn't even think a site grading and drainage plan existed for the site and testimony that a site grading and drainage plan had never been produce or seen by anyone other than an employee of Miller Construction. Trial Tr. 364:15-22; 370:24-371:5; 371:21-372:4; 373:1-14.

Mr. Kern testified that the defect in the construction by Miller Construction was "the grading away from the buildings was not there." Trial Tr. 416:4-5. Defense counsel then asked if Miller Construction should rely on the finished pad elevations as designed by Thomas & Hutton and if they should rely on the staking of those finished pads by Coastal Surveying. Mr. Kern was clear he did not find the finished pad elevations defective since they were designed by the engineering firm. Trial Tr. 415:23-416:12; 417:7-418:6. The work of Miller Construction that Kern found defective was the grading away from the finished pads. Trial Tr. 416:4-5; 361:25-362:10; 362:16-24; 367:22-368:2.

As testimony in trial would later show, the Defendants claimed Thomas & Hutton was the engineering firm that designed the site grading and drainage plan, and Coastal Surveying was the surveying company who set the grade contours. The documentary and testimonial evidence from those two companies shows that Thomas & Hutton did not provide engineering services (designing a site grading and drainage plan) to Lake Estates and Coastal Surveying set the finished pad elevations (including having diagrams for each concrete pad). Since Thomas & Hutton never designed a site grading and drainage plan, Coastal Surveying could not have set the grading contours since there was not a site grading and drainage plan to guide them.

Miller Construction's reliance on a site grading and drainage plan that did not exist does not resolve them of the POA's claims of negligence and breach of implied warranty of workmanlike service. Plaintiff's expert testified that the work done by Miller Construction setting the exterior grade to close to the finished floor and the failure to properly grade the site violated industry standards. Because there was a breach of standard as stated by Mr. Kern, the trial court erred in directing a verdict for Miller Construction.

In granting the directed verdict, the trial court resolved conflicts in the testimony and decided witness credibility issues. The trial court found that the testimony of Miller Construction's employee, Robert Miller, credible in regards to the existence of a site plan. In doing that, the trial court did not view the evidence in the light most favorable to the party opposing the motion since it conflicted with the testimony of Kern, Kendall, and Kimmig regarding the absence of a site grading and drainage plan. Miller Construction's entire directed verdict argument resolved around the argument that Coastal Surveying set

the correct grade from a site grading plan that was never produced, and because Miller Construction justifiably relied on others to set the correct grade, it could not be liable for the defective grading.⁶ The site grading plan was the key evidence to support that argument and the trial court erred when it decided credibility issues and resolved conflicts in the testimony and evidence in favor of Miller Construction. *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 38–39, 664 S.E.2d 83, 86 (Ct. App. 2008).

There was evidence in the record to draw a reasonable inference in the light most favorable to the Plaintiff that Miller Construction's work at the site was negligent and breach the implied warranty of workmanlike service since it violated industry standards. This Court should reverse the trial court's ruling.

II. This error requires a new trial against all defendants because there is no way to know how much fault the jury would have assigned to the empty chair.

South Carolina's Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to 70, determines apportionment of percentage of fault among defendants to be determined by the jury. A straightforward application of this Act leads to the conclusion that if three defendants have potential liability on the same claims, the wrongful dismissal of one defendant will require a new trial as to all defendants. There is

⁶ As the case progressed, it was shown in the testimony of the defendants that Coastal Surveying could not produce a site grading and drainage plan when it's records were subpoenaed. Trial Tr. 719:9-25 (Schweickhardt testifying that Coastal's records should have a grading map if they set the grade at the development); 643:15-644:23; 757:20-24; 804:12-21. In fact, in the records of Thomas & Hutton, Coastal Surveying, the S.C. Department of Natural Resources, and Beaufort County for this development, not one entity produced a site grading and drainage plan for the Lake Estates development. Trial Tr. 804:12-21. Defendants expert even testified that a site grading and drainage plan was essential for the construction of a development. Trial Tr. 701:2-4; 703:8-22.

no formula that would tell us the share of liability that the jury would have allocated to Miller Construction if Miller Construction had been in its rightful place at the defendants table. That determination is for the jury. The South Carolina Supreme Court in *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 592, 784 S.E.2d 670, 677 (2016), *reh'g denied* (May 5, 2016), recognized this principle when reversing a directed verdict and ordering a new trial for all defendants even though the jury found in favor of the defendants.

Cases from other jurisdictions also recognize this principle. Some of them describe the situation as a dismissal of one defendant that nevertheless "infected" the verdict against the others. *Buffett v. Vargas*, 914 P.2d 1004, 1011 (N.M. 1996); *Williams v. Slade*, 431 F.2d 605, 608 (5th Cir. 1970). New York seems to prefer to say that "the interests of justice" require the wrongful dismissal of one defendant to demand a retrial as to all defendants with potential liability. *Robinson v. Terminal Freight Transp., Inc.*, 2 A.D.2d 510, 512, 156 N.Y.S.2d 856 (1956); *Gadani v. Dormitory Auth.*, 856 N.Y.S.2d 268, 270 (N.Y. App. Div. 2008) (listing several cases with this language). The underlying rationale of these decisions appears to be the same. When a defendant is erroneously excluded from trial, there is no way to be sure how that exclusion impacted the jury's determination of the remaining defendant's negligence. The wrongful exclusion left the jury with an "all or nothing" choice. *Williams*, 431 F.2d at 609. Limiting the retrial to one defendant makes the same error. *Id.*

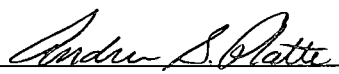
Roddey instructs that there must be a new trial of the causes of action alleged by Appellant against Miller Construction. To require Miller Construction to be the sole defendant at this trial would throw the case out of proper perspective. Appellant has alleged, *inter alia*, that the defendants defectively constructed the site grading and

drainage at their development. In the interests of justice, the case against the defendants other than Miller Construction should be re-evaluated by the same jury who pass upon the case against Miller Construction. Miller Construction's right to seek contributions from Lake Estate and Estate Builders in a separate trial will not sufficiently protect their rights. Further, a separate trial on apportionment of the jury verdict between the Lake Estates and Estate Builders would deprive those defendants of the opportunity to challenge the amount of damages. Under these circumstances, the verdict against Lake Estates and Estate Builders must be set aside and a new trial ordered against all three defendants.

CONCLUSION

The evidence is contested, but it ought to be apparent that there is enough evidence of Miller Construction's negligence and breach of implied warranty of workmanlike service when its construction work at the Lake Estates development violated industry standards. Following the holding in *Roddey*, this Court should reverse the trial court and it should remand this matter for a new trial against Lake Estates, Estate Builders, and Miller Construction.

Respectfully Submitted,


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-000247

Lake Estates Property Owners Association,.....Appellant
Inc.,

v.

Lake Estates, LLC; Estate Builders, Inc.; Estate Home Builders, LLC; Arkiteknic, Inc.; David Sladek Engineering Company; Jenkins Plumbing Company, LC; American Paving Design, LLC; American Paving Design, Inc.; Miller Construction of the Low Country, Inc.; Whitaker Laboratory, Inc.; Heritage Plastering & Stucco, LLC; CMC Steel Works, Inc., Savannah Hardscapes, Inc., Superior Heating & Air, Inc., Michael Stoghill d/b/a Advanced Residential Plumbing; Warren Flick Associates, LLC; Warren Flick; Russell Miller; Russell Miller, Jr.; and Robert Miller, Defendants

Of Whom Lake Estates, LLC; Estate Builders, Inc.; Miller Construction of the Low Country, Inc.; Warren Flick, and Russell Miller are.....Respondents.

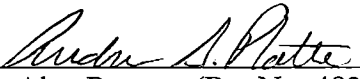
PROOF OF SERVICE

This is to certify that Appellant Lake Estates Property Owners Association, Inc.'s Initial *Appellant Brief* was served on Respondents in the above-referenced case by placing a copy of said document in the United States Mail on this the 26th day of July, 2016, addressed as follows:

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