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.

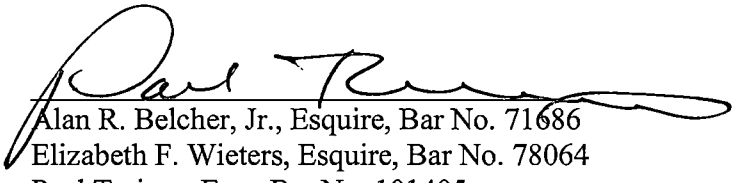
IMK Development Co., LLC, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Rick Thoennes,

Defendants.

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

FINAL BRIEF

Respectfully submitted,



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STATEMENT OF THE CASE

This action was originally brought by Stoneledge at Lake Keowee Owners' Association, Inc. (hereinafter "HOA") and various individual homeowners on May 29, 2009. Plaintiffs filed this construction defect suit against Bostic Brothers Construction, Inc. (hereinafter "Appellant") on February 9, 2010. (R. pp. 120–144). In Plaintiffs' Third Amended Complaint, Plaintiffs asserted the following causes of action: (1) Breach of Warranty of Developers[1]; (2) Negligence of Developers; (3) Breach of Fiduciary Duty of Developers; (4) Breach of Warranty of Contractors and Subcontractors[2]; (5) Negligence of Contractors and Subcontractors; (6) Negligence of Miller/Player and Associates (hereinafter "MPA")[3]; and (7) Breach of Express and Implied Warranty of MPA. (R. pp. 172–178).

This matter went to a jury trial on October 28, 2013. At trial, Plaintiffs sought damages totaling $6.5 Million for construction defects against Defendants. During the trial, Defendants Marick and IMK were deemed an amalgamated entity, and treated jointly for purposes of trial (hereinafter "Marick/IMK"). At the close of Plaintiffs' case, Appellant moved for a directed

[1] "Developers" identified in Plaintiffs' Third Amended Complaint included IMK, Keowee, Ludwig, SDI, Medallion, Integrys, Marick, Appellant, Larry Lollis, William Cox, Bradford Seckinger, John Ludwig, and Rick Thoennes, collectively and individually. (R. p. 170).

[2] "Contractors" identified in Plaintiffs' Third Amended Complaint included Marick, M Group, Thoennes, Appellant, Mel Morris, Jeff Bostic, Joe Bostic, and IMK, both collectively and individually. (R. p. 170).

[3] MPA was the architect for various townhomes at the Project. (R. p. 167).

verdict as to the issue of the expiration of the statute of limitations, which was denied. (See R. p. 1526, line 7–p. 1547, line 10; p. 1594, line 4–p. 1595, line 5). Appellant renewed its motion for directed verdict at the close of Defendants' case, which was also denied. (See R. p. 1844, line 8–p. 1849, line 3). On November 7, 2013, the jury returned a verdict as follows:

(a) $3 Million for negligence against Marick/IMK and Appellant;

(b) $1 Million for breach of implied warranties against Marick and Appellant; and

(c) $1 Million for breach of fiduciary duty against Defendants IMK, Integrys, Rick Thoennes, Larry D. Lollis, and William C. Cox, individually.

(R. pp. 33–35). The jury allocated 60% of the negligence award to Appellant and 40% to Marick. The jury allocated 30% of the breach of implied warranties to Appellant and 70% to Marick. (R. p. 36). The trial court ostensibly applied a setoff of $2,855,911.77[4] to the entire $5 Million verdict, entering judgment for $2,144,088.23, and in the instances of breach of implied warranties and negligence, the trial court then reduced the $2,144,088.23 by the percentage of apportionment. (See R. pp. 284–292) (determining the trial court's applied set-off by subtraction). The trial court entered the entire amount of the judgment as to Appellant, presumably under a joint and several liability theory based on Appellant's negligence.

The undersigned counsel timely filed four Post-Trial Motions on November 18, 2013.[5] Appellant filed a Motion for Judgment Notwithstanding the Verdict, pursuant to Rule 50, SCRCP, arguing that the Court erred in failing to grant Appellant's Motion for Directed Verdict

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[4] This figure was calculated by subtracting the judgment amount of $2,114,088.23 from the $5 Million verdict. At the time Appellant submitted its Post-Trial Motions, it was under the belief that settlement funds totaled $2.908 Million. Plaintiffs submitted to the trial court in their Motion to Alter or Amend Judgment dated November 18, 2013 that their settlements with other parties prior to trial totaled $2,800,000, which is likely a rounded number. (R. p. 13). Due to this discrepancy, Appellant relies on the trial court's Transcript of Judgment demonstrating a setoff of $2,114,088.23 for this Initial Brief.

[5] November 17, 2013 was a Sunday, allowing Appellant to timely file its Post-Trial Motions on Monday, November 18, 2013.

based upon the applicable statute of limitations. Appellant also filed a Motion requesting an Order granting a setoff of all funds recovered pre-trial by Plaintiffs. Appellant's third Motion requested a new trial absolute, pursuant to Rule 59, SCRCP. Appellant's fourth Motion requested a new trial *nisi remittitur*, also pursuant to Rule 59, SCRCP.

The trial court entered an Order Denying Defendants' Post-Trial Motions on January 22, 2015, noting the court was "unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered." (R. p. 18). The undersigned counsel did not receive written notice of the Entry of Judgment until February 4, 2015.

Curiously, the trial court's Order only addressed motions submitted by Defendants Marick, Theonnes, IMK, Integrys, Cox, and Lollis, but omitted reference to Appellant's motions. Out of an abundance of caution regarding the court's omission of any ruling on the motions, on February 19, 2015 the undersigned filed a Motion to Alter or Amend Judgment Entered on January 30, 2015 Pursuant to Rule 59(e), SCRCP. (R. pp. 2188–2191). Appellant received an Order from the trial court filed March 13, 2015, denying its motion. (R. pp. 3–4).

On March 3, 2015 and March 20, 2015, Appellant timely filed its Notice of Appeal and Second Amended Notice of Appeal, respectively, in regards to the following Orders of the trial court:

(1) Order Denying Appellant's Motion for Directed Verdict at the close of Plaintiffs' case during trial;

(2) Order Denying Appellant's Motion for Directed Verdict at the close of Defendants' case during trial;

(3) Final Judgment, Apportionment Form, and Jury Verdict Form filed November 8, 2013;

(4) Form 4 and accompanying Order Denying Defendants' Post-Trial Motions filed on January 22, 2015, ostensibly denying Appellant's Post-Trial Motions previously identified;

(5) Form 4 Judgment filed January 30, 2015, amending prior Form 4 Judgment filed November 8, 2013; and

(6) Order Denying Bostic Brothers Construction Inc.'s Rule 59 Motion to Reconsider filed March 13, 2015.

(R. pp. 44–119).

The undersigned counsel received the complete trial transcript on September 3, 2015, and subsequently submitted a Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter on September 8, 2015, requesting a 30-day extension. Appellant was granted an extension to submit its Initial Brief and Designation of Matter until November 4, 2015. Appellant requested, and received, a second 30-day extension to file its Initial Brief and Designation of Matter no later than December 4, 2015 by Order dated October 29, 2015.

FACTS

This construction defect action stems from a multi-family townhome project located on Lake Keowee in Oconee County, South Carolina, with multiple phases of development at Stoneledge of Lake Keowee (hereinafter "the Project"). Appellant served as the initial general contractor of record and obtained building permits to construct the initial 37 units as part of Phase I of the Project in August 2002. (See R. p. 1467, line 5; pp. 2365–2406). Appellant's principals, Jeff and Joe Bostic, had an ownership interest in Defendant Keowee Townhouses, LLC, which operated as the developer of the Project. (R. p. 926, lines 15–22). After

commencement of the Project as general contractor, Appellant ultimately entered into bankruptcy proceedings. (R. p. 708, lines 1–9). At the time Appellant entered into bankruptcy proceedings, it had completed construction of approximately twelve homes.

On the brink of foreclosure, Defendant Keowee Townhouses, LLC sold the remaining, partially-completed 25 units in Phase I of the Project in lieu of foreclosure. These partially-completed units were sold to Defendant IMK Development Co., LLC (hereinafter "IMK"), a development company comprised of Defendants Marick Home Builders, LLC (hereinafter "Marick") and Integrys Holdings, LLC (hereinafter "Integrys"). (R. p. 1420, lines 6–16). At a considerable discount, the sale was completed on March 30, 2005. At the time IMK purchased the units, Rick Thoennes was the license holder and managing member for Marick. (R. p. 1431, lines 23–25). Shortly thereafter, Marick assumed the role of general contractor, obtained new building permits on the 25 partially-completed units, and began work on the Project in 2005. (R. p. 1438, lines 3–8). At that time, Rick Thoennes assigned Nathan Hornaday as the superintendent for the Project. (R. p. 756, lines 7–14).

After assuming control of the Project in mid-2005, Marick/IMK created an HOA, established bylaws, and elected HOA board members including Rick Thoennes, William Cox, and Tim Roberson. (R. p. 508, line 23–p. 509, line 8). Marick/IMK remained in control of the HOA until September 2008. (R. p. 604, lines 9–21). In September 2008, Marick/IMK transferred control of the HOA to the individual homeowners. (R. p. 604, lines 9–14). It is important to note that neither Appellant nor Defendant Keowee Townhouses, LLC had any active involvement in the HOA.

APPELLANT'S ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND JNOV AS TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

OPERATIVE FACTS

At trial, Plaintiffs called numerous homeowners to testify as to their observations of the defects in various homes of Stoneledge as early as 2003. Steven Taylor moved into a home in Stoneledge in 2003, when Appellant was still working on the Project, and testified that he noticed water intrusion in the lower level of his home from the time he moved in, more than six years prior to Appellant being named as a Defendant. (R. p. 585, lines 19–20; p. 587, lines 16–21; p. 597, lines 19–22). Mr. Taylor further testified that he observed water intrusion in various parts of the home, including the outside porch and crawlspace, both before and after Marick/IMK assumed control of the Project and created the HOA. (R. p. 597, lines 15–25). From 2003 through 2005, Mr. Taylor made several requests to HOA Board members to remedy the defective areas of the home. (R. p. 598, lines 3–7). In fact, the HOA, through its Marick Board members, made repairs to nearly all of the homes' porches/decks in 2005 to correct cracks that leaked water to the lower levels. (R. p. 600, lines 1–14; p. 601, lines 17–20). Moreover, Mr. Taylor stated that he notified Marick/IMK, and specifically Rick Thoennes, a member of the HOA in 2005, of the defects, and that upon notice of the defects, Marick, at the instruction of HOA members, attempted several times to fix the issues. (R. p. 620, lines 21–24; p. 643, lines 9–16). There is no evidence in the record that Appellant received notice of any defects causing damage during this time or at any time prior to being served with the lawsuit against it in February 2010.

Another homeowner, Robert White, moved into Stoneledge in June of 2006, three years and eight months before Appellant was sued, and noticed water intrusion in his crawlspace

"since day one." (R. p. 1336, lines 17–18; p. 1341, lines 2–5; see also R. p. 1367, lines 15–22) (testifying that he was aware of window leaks in the months following his purchase). Upon taking control of the property, Mr. White identified a "hefty list" of punch items, and "continued to deal with the I.M.K. folks for those." (R. p. 1338, lines 12–18). Pursuant to documents executed prior to closing, Mr. White was aware that the HOA, controlled by Marick/IMK, was responsible for maintaining the exterior of the building. (R. 1355, lines 1–5). Mr. White testified that the "I.M.K. folks" he regularly dealt with in regards to the alleged defects were Rick Thoennes and Tim Roberson, both members of the HOA in 2006. (R. p. 1338, lines 1–6). Mr. White testified that he notified HOA members and Nathan Hornaday, the project superintendent hired by Mr. Thoennes, of the roof leaks, numerous window leaks, crawlspace leaks, and a door leak. (R. p. 1340, lines 11–16; p. 1367, lines 19–24). Like Mr. Taylor, Mr. White testified that upon notice to the HOA, the HOA assigned Nathan Hornaday to assist in repairing the various defects. (R. p. 1339, lines 9–21; p. 1367, lines 23–24).

Additionally, Plaintiff called several representatives of Marick/IMK, as well as Nathan Hornaday, to testify about the defects that they observed in 2005. Mr. Thoennes confirmed Mr. White's testimony that the HOA was responsible for the exterior maintenance of the homes. (R. p. 1459, lines 11–15). Although Mr. Thoennes did not specifically recall when he learned of various defects, he acknowledged that Mr. Hornaday or a homeowner likely informed him of the problems. (R. p. 1442, lines 16–25). In fact, Mr. Thoennes specifically testified that Mr. Taylor informed him "early on" about various leaks in Mr. Taylor's home. (R. p. 1460, lines 8–12). By all accounts, the defects complained of by various homeowners were conveyed to the HOA members. (R. p. 1463, lines 5–8).

In 2005, five years before Appellant was named as a Defendant, Mr. Thoennes was fully aware that several decks had cracks in the concrete. (R. p. 1467, lines 16–25). In response to the homeowners' complaints, Mr. Thoennes, as managing member of Marick and an HOA member, undertook to correct those defects without notifying Appellant of the defects any time prior to Plaintiffs naming Appellant as a Defendant in February 2010. (R. p. 1464, lines 1–6).

Nathan Hornaday testified that, upon his arrival at Stoneledge as superintendent in 2005, the majority of the units were completed except for three or four. (R. p. 759, lines 12–23). Mr. Hornaday was instructed to walk through all of the 25 partially-completed, unsold units to identify any potential problems or defects, and testified that he and Rick Thoennes walked through several of the units together. (R. p. 760, lines 16–20; p. 761, lines 5–10).

Upon arrival to the site, Mr. Hornaday observed that the porches and decks were leaking, creating water stains on the rock and ceilings. (R. p. 770, lines 21–24; p. 771, lines 2–6). Mr. Hornaday also observed water intrusion inside the homes, independent of the leaking porches and decks, leading to water stains around the corners of windows and on the floors. (R. p. 772, lines 6–11; p. 781, lines 13–25). Furthermore, Mr. Hornaday testified that these issues were not present in only one unit, but rather several separate units. (See R. p. 780, lines 3–11) (testifying of various window leaks among five or six units). Mr. Hornaday further testified that Rick Thoennes was aware of the leaking decks and porches, and that he conducted walkthroughs with Rick Thoennes to show him the various defects. (See R. p. 773, lines 8–13; p. 781, lines 13–25) (testifying that Rick Thoennes personally observed the water stains on windows and floors). Mr. Hornaday specifically recalled reporting all of his observations in the Phase I units to Mr. Thoennes. (R. p. 761, lines 5–10). Most telling, Mr. Hornaday responded affirmatively when

asked whether he believed that Mr. Thoennes was aware of all of the conditions about which Mr. Hornaday testified. (R. p. 787, lines 11–14).

Plaintiffs also called an engineering expert, Derek Hodgin, who testified that any reasonably prudent general contractor who saw the conditions in Unit 33 when Marick re-permitted the Project in 2005—water intrusion around the windows and doors, inadequate flashing, and other defects—would be on notice of several construction defects and impose upon it an obligation to conduct further investigation and make repairs. (R. p. 1042, line 5–p. 1044, line 24; p. 1046, line 5–p. 1049, line 3). Notably, Mr. Hodgin's testimony was not refuted by any other experts. Despite the obvious defects, at no time thereafter did the HOA notify Appellant of any defects or potential claim.

A. Appellant's Motion for Directed Verdict as to the issue of expiration of the statute of limitations should have been granted by the trial court because Plaintiffs failed to assert a claim against Appellant within the three-year statute of limitations.[6]

The applicable statute of limitations for causes of action sounding in negligence and breach of implied warranties after 1988 is three years. S.C. Code Ann. § 15–3–530 (Supp. 1997). "A cause of action accrues under South Carolina law the moment the defendant breaches a duty owed to the plaintiff." Barr v. City of Rock Hill, 330 S.C. 640, 644, 500 S.E.2d 157, 159–160 (Ct. App. 1998) (quoting Grooms v. Med. Soc'y of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989)). S.C. Code Ann. § 15–3–530 provides a "discovery" rule exception to the general three-year statute of limitations, effectively tolling the statute of limitations until a person "knows or by the exercise of reasonable diligence should . . . know[] that he has a cause of action." Barr, 330 S.C. at 644, 500 S.E.2d at 159–160 (citing S.C. Code Ann. § 15–3–530).

[6] Appellant, in its Post-Trial Motion for a New Trial Absolute, moved for a new trial on the grounds that the verdict was against the greater weight of the evidence, and that the verdict was against applicable law. (R. p. 2233–2243). As this Motion relied upon the same facts and arguments contained in Section IA of this Brief, Appellant hereby preserves its Post-Trial Motion by reference, and incorporates the same herein.

"The statute starts to run upon discovery of such facts, as would have led to the knowledge thereof, if pursued with reasonable diligence." Barr, 330 S.C. at 644–65, 500 S.E.2d at 160 (quoting Grayson v. Fid. Life Ins. Co. of Philadelphia, 114 S.C. 130, 135, 103 S.E. 477, 478 (1920)). The statute of limitations, therefore, begins to run at the time a person has actual or constructive notice "that some claim against another party might exist." Barr, 330 S.C. at 645, 500 S.E.2d at 160 (Ct. App. 1998) (quoting Graniteville Co. v. IH Servs., Inc., 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994)) (emphasis added).

In Barr, the plaintiffs purchased a home from the defendant in February 1985. In May 1987, and for three years thereafter, annual termite inspections revealed excessive moisture under the plaintiffs' home. Barr, 330 S.C. at 642–43, 500 S.E.2d at 158. Despite the inspector's recommendation to address the excessive moisture, the plaintiffs did not report the issues to defendant or hire an engineer to inspect the home until March 1992. Id. at 642–43, 500 S.E.2d at 159. Plaintiffs filed suit against defendants in 1994, nearly nine years after purchasing the home. Id. at 643, 500 S.E.2d at 159. At trial, plaintiffs admitted that they were aware of the problems but characterized them as "nothing of great concern." Id. at 645, 500 S.E.2d at 160.

This Honorable Court held that "[a] party has constructive notice if the party knows of 'facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party might exist.'" Id. (quoting Graniteville, 316 S.C. at 148, 447 S.E.2d at 228). This Honorable Court further held that the "[f]ailure of the injured party to comprehend the full extent of damages . . . is immaterial." Barr, 330 S.C. at 645, 500 S.E.2d at 160 (citations omitted).

At the time numerous defects were originally discovered in 2005, the HOA owed various duties to the homeowners established through the covenants and bylaws. The covenants and

bylaws empowered the HOA to "employ attorneys . . . to advise, serve and represent the Association when deemed necessary []" and to "do anything necessary or desirable . . . which the Association deems necessary to carry out the purposes of the Association . . . ." (R. p. 2295). Additionally, the covenants and bylaws bound the HOA to manage and maintain the Common Area and the Service Facilities. These areas included all real property and buildings, including the building envelopes. (R. p. 514, lines 4–22; p. 2280; pp. 2738–39). These covenants and bylaws make abundantly clear that the responsibility to maintain, repair, and seek relief, if necessary, rested solely on the HOA in 2005. (See generally pp. 2272–2363) (HOA governing documents identified or admitted into evidence at R. p. 512, line 21–p. 514, line 24). In 2005, the HOA had both the power and obligation to assert a claim against Appellant. Nothing precluded the HOA from notifying Appellant of a potential claim, or from filing suit against Appellant. To the contrary, the HOA, from 2005 through the time of trial, had every ability, and was charged with, asserting a claim against Appellant, but chose not to do so until 2010.

During the trial in the case at bar, many of Respondents' own witnesses testified that the HOA received actual notice of various construction defects as early as 2005, approximately five years before naming Appellant as a Defendant. Both Mr. Taylor and Mr. White made abundantly clear that, between 2003 and 2006, they notified employees and representatives of Marick/IMK—and specifically members of the HOA—that their respective homes were suffering from numerous defects leading to water intrusion and damage. During that time, and in response to the homeowners' complaints, the HOA undertook to repair various homes, including waterproofing all but one of the homes' porches. These repairs were done at the express instruction of HOA members Rick Thoennes and Tim Roberson. Moreover, the HOA undertook these repairs of the defects without notifying Appellant at any time prior to February 2010.

Despite considerable testimony to the contrary, Respondents now submit to this Honorable Court the untenable position that the HOA had no knowledge, actual or constructive, of any possible defects until 2008, when the HOA was turned over to the homeowners.

Additionally, the testimony of Rick Thoennes and Nathan Hornaday unequivocally demonstrates actual knowledge by the HOA of numerous defects as early as 2005. The two inspected many of the units upon arrival to the Project in 2005, and both personally observed several areas of concern, both inside and outside the units. Although Mr. Thoennes testified that he could not recall when he received notice of the defects, Mr. Hornaday's testimony makes clear that Mr. Thoennes—an HOA Board member—was fully aware of leaking porches, decks, and windows causing visible damage in 2005. Moreover, Mr. Hornaday testified that he engaged subcontractors, at the direction of Mr. Thoennes, to make repairs to various units, while never once notifying Appellant of the defects. Most telling, Plaintiffs' own expert testified that a reasonably prudent contractor would have been on notice of the defects due to the extensive water intrusion in several of the homes.

While many of Plaintiffs' witnesses, including Rick Thoennes and Robert White, testified that they were unaware of the pervasiveness of the defects until sometime in 2008 when the homeowners assumed control of the HOA, such unawareness is irrelevant as to the expiration of the statute of limitations. As this Honorable Court made clear in Barr, "[f]ailure 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 (Ct. App. 1998) (citations omitted). The evidence presented at the trial in this case is nearly identical to that presented in Barr; namely, that the Plaintiffs realized there were issues with the homes, but that they viewed those issues as "nothing of great concern." Id. The plaintiffs in Barr were found to have knowledge of defects, and found to have

failed to institute an action within the statute of limitations despite being unaware of the extent of their damages. Here, the HOA had actual knowledge of the defects, yet failed to file its claims against Appellant within the three-year statute of limitations. As such, the trial court should have followed the holding in Barr and granted Appellant's Motion for Directed Verdict on this issue.

B. The holdings in Magnolia North and Graniteville do not operate to toll the applicable statute of limitations in this action because Appellant never controlled the HOA at Stoneledge, nor was an expert required to establish Plaintiffs' claim.

In response to Appellant's Motion for Directed Verdict, Respondents argued that the three-year statute of limitations should be equitably tolled under Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). Specifically, Respondents contend that Magnolia North stands for the proposition that the statute of limitations is tolled during the time a developer controls the HOA where the HOA has an actionable claim. (R. p. 1532, lines 4–19). Respondents also contend, if only by reference, that the statute of limitations should be tolled because some of the defects were not observable until an expert investigation in 2010 by Derek Hodgin. (R. p. 1537, line 20–1538, line 6).

Magnolia North was a construction defect case where the developer, Heritage Communities, Inc. (HCI), began work on a condominium complex in 1998. Magnolia North, 397 S.C. at 356, 725 S.E.2d at 116. Four years later, in 2002, HCI turned over control of the property owners' association (POA) to the homeowners. Id. at 356, 725 S.E.2d at 117. A second developer completed the construction of the units, and the POA completed construction of the roads and pools. Id. In May 2003, the POA filed suit against HCI, among others, alleging construction defects of the Magnolia North project. Id. at 357, 725 S.E.2d at 117. HCI moved for a directed verdict and JNOV as to all of the POA's causes of actions based on the expiration

of the three-year statute of limitations. Id. at 357–58, 725 S.E.2d at 117. HCI appealed a denial of both motions. Id.

On appeal, this Honorable Court held that the statute of limitations was equitably tolled, and upheld the trial court's denial of HCI's motion for directed verdict and JNOV. In so holding, this Honorable Court stated that equitable tolling is intended to effectuate fairness and is "adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Id. at 371, 725 S.E.2d at 125 (citing Hooper v. Ebenezer Senior Servs. and Rehab. Ctr., 386 S.C. 108, 115–17, 687 S.E.2d 29, 32–33 (2009)). Notably, this Honorable Court stated, "We find unpersuasive Appellants' claim that an organization they controlled would have initiated an action against itself during [the period it controlled the POA.]" Magnolia North, 397 S.C. at 371, 725 S.E.2d at 125 (emphasis added). This Honorable Court continued, "after the property owners gained control over the POA, they exercised due diligence by filing this action on May 28, 2003, approximately eight months after assuming control." Id.

The facts in Magnolia North are readily distinguishable from those in the present action. Appellant was never in control of the HOA at Stoneledge, nor was it ever actively involved in the HOA; it was merely the initial general contractor and developer for the Project. Upon assuming the Project, Marick/IMK created and controlled the HOA from 2005 to 2008, at which time it turned over control to the homeowners. The HOA, during the aforementioned period, had both opportunity and incentive to pursue claims against Appellant for the construction defects, but chose not to. In fact, it had an obligation to do so under its own bylaws. Moreover, the HOA Board members had notice of these defects almost immediately upon Marick assuming control of the Project, but actively undertook remedial action without once notifying Appellant of any

potential claims. The rationale underlying the decision in Magnolia North—that the developer, while in control of the POA, could not have been expected to initiate an action against itself during its time of control—does not apply here because Marick/IMK, not Appellant, controlled the HOA and had ample incentive to pursue claims against Appellant within three years after notice of the defects. Instead, the HOA attempted repairs on its own initiative through 2008 while refusing to notify Appellant of the defects in any manner. Appellant received notice of these claims in February 2010, over five years after the HOA received notice of the defects, and nearly two years after the statute of limitations had expired.

During oral arguments regarding Appellant's Motion for Directed Verdict, Respondents also urged the court to equitably toll the statute of limitations based on Graniteville Co., Inc. v. IH Servs., Inc., 316 S.C. 146, 447 S.E.2d 226 (Ct. App. 1994). In Graniteville, the plaintiff's textile mill was destroyed by a fire on July 5, 1989. Id. at 147, 447 S.E.2d at 227. On July 13, 1989, the plaintiff retained a fire investigator to determine the cause of the fire. Id. The plaintiff filed its Complaint on July 13, 1992, three years and eight days after the fire. Id. This Honorable Court concluded that the plaintiff filed its Complaint within the applicable statute of limitations, reasoning that the plaintiff required expert investigation to determine the cause of the fire, particularly since there was no reason to suspect negligence on the part of the defendant. Id. at 148, 447 S.E.2d at 228. This Honorable Court stated, "When the injury requires an expert to make a determination of the cause of the injury and an expert is retained, this, in and of itself, is evidence of reasonable diligence in determining whether or not the injury is attributable to a wrong inflicted by someone else." Id. In so holding, this Honorable Court found that the plaintiff could not know the cause of the fire, and therefore could not identify a defendant, without an expert investigation. Id.

In the present case, Respondents readily admitted that the defects leading to water intrusion "can certainly be things that a normal, average, everyday person would understand could give rise to a claim or water infiltration problems . . . ." (R. p. 1538, lines 1–4). Respondents contend that several defects, such as improperly constructed firewalls, were not readily observable without expert investigation, which was conducted by Mr. Hodgin in 2010, and maintains the untenable position that because at least one defect was not readily observable, equitable tolling should be applied to all of Respondents' claims. The present action is immediately distinguishable from Graniteville in that the HOA Board members personally observed, and were notified by numerous homeowners of, numerous defects, including window, door, porch, deck, and patio leaks in 2005. By Respondents' own admission, these defects do not require expert investigation. Moreover, this is not the situation presented in Graniteville where the plaintiff needed an expert to determine who or what caused the damage. To the contrary, the HOA (through Mr. Thoennes's and Marick/IMK's involvement) knew, upon assumption of the Project, that Appellant was the only prior general contractor of the Project, and could have named Appellant as a Defendant anytime through late 2008, well within the statute of limitations.

Moreover, our courts have limited the application of equitable tolling, and have refused to apply equitable tolling in situations where the plaintiff has not alleged any misconduct by a defendant (here, Appellant) in actively misleading the claimant. See State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013); Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009); Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009); Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989); Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011); Ross v. Ross, 394 S.C. 261, 715 S.E.2d 359 (Ct. App. 2011); Am. Legion

Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009); and Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008) ("Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations.").

In Pelzer, the court outlined the circumstances that give rise to equitable tolling relief:

> Equitable tolling has been deemed available where—
>
> — extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> — the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
>
> — the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

Pelzer, 378 S.C. at 521, 662 S.E.2d at 620–21 (emphasis added).

Pelzer makes clear that equitable tolling should be applied only where a defendant has actively misled a plaintiff about a cause of action, or the plaintiff is somehow prevented from asserting his or her rights. Id. No party has alleged misconduct on behalf of Appellant that would give rise to tolling the statute. Moreover, nothing prevented the HOA, on behalf of the homeowners, from asserting its rights (clearly delineated in its own bylaws) against Appellant from 2005 through early 2008.

In sum, Respondents argue that, under Magnolia North, the statute of limitations should be tolled from 2005 to 2008, when control of the HOA was turned over to the homeowners.

Alternatively, Respondents contend that the court should apply equitable tolling under Graniteville and Pelzer to allow Respondents a means to recover for the negligence of a third party. Respondents fail to acknowledge that they had recourse, and actually recovered from several third parties. Respondents asserted a breach of fiduciary duty action against three members from the Marick/IMK HOA—Larry Lollis, William Cox, and Rick Thoennes. In asserting these causes of action, Respondents implicitly recognize that the Marick/IMK HOA did not act timely to assert a claim against Appellant, and that such delay resulted in substantial property damage. However, Respondents attempt to then argue that the HOA had no ability to pursue a claim on behalf of the homeowners against Appellant because the homeowners did not control the HOA. This is not a situation where the Respondents will be left without a means of recovery if they are unable to recover from Appellant. To the contrary, Respondents obtained a significant judgment under their breach of fiduciary duty claims. Not a single factor espoused in Pelzer is applicable in the case at bar, particularly where Respondents were successful on a cause of action that alleged failure of HOA Board members to perform their duties.

Respondents' reliance on Magnolia North and Graniteville to support the application of equitable tolling is misplaced in the present matter. The evidence at trial readily demonstrates that the HOA had ample opportunity and incentive to assert a claim against Appellant any time between 2005, when it learned of the defects, and late 2008, when the three-year statute of limitations expired. This factual scenario is vastly different from Magnolia North, where the developer/POA would have had to assert a claim against itself to preserve its rights. Moreover, by Respondents' own admission, the various defects resulting in water intrusion were readily observable without the need of expert inspection, in stark contrast to the facts presented in Graniteville. Finally, South Carolina law demands a limited application of equitable tolling, and

suggests applicability only where a defendant's misconduct has led to the expiration of the statute of limitations, which has never been alleged in this case.

As such, the trial court erred in denying Appellant's Motions for Directed Verdict and JNOV, and Appellant respectfully requests this Honorable Court to remand this matter to the lower court with instructions to vacate the judgment against Appellant, and to dismiss Appellant from the action with prejudice based upon the expiration of the statute of limitations.

II. THE TRIAL COURT ERRED IN APPLYING THE SETOFF TO THE ENTIRE $5 MILLION VERDICT.

The jury in this matter returned a verdict as follows: (1) $3 Million for Negligence as to Appellant and Marick/IMK; (2) $1 Million for Breach of Implied Warranty as to Appellant and Marick; and (3) $1 Million for Breach of Fiduciary Duty as to Defendants IMK, Integrys, Rick Theonnes, Larry D. Lollis, and William C. Cox, individually. Appellant submits to this Honorable Court that only the negligence award of $3 Million is subject to a setoff of $2,855,911.77, representing the amount of recovery by Respondents received from various settling tortfeasor-Defendants prior to entry of judgment. (See supra note 4 and accompanying text). Appellant additionally contends that the aforementioned setoff should not have been applied to reduce Respondents' awards for breach of implied warranty and breach of fiduciary duty.

If a plaintiff has received, or is to receive, payment from another tortfeasor-defendant, a motion should be made to provide the other tortfeasor-defendants a setoff of any amounts paid by the other tortfeasor-defendants toward any judgment entered. See, e.g., Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967). This setoff shall be kept from jury consideration and applied by the court. Id. The underlying rationale for such setoff is avoiding a plaintiff's

double recovery from multiple tortfeasor-defendants. See, e.g., Smith v. Widener, 397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012).

> [T]here can be only one satisfaction for an injury or wrong. A settlement by a joint tortfeasor reduces the claim against the others to the extent of any amount stipulated by the release or covenant. Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the nonsettling defendant's rights to a setoff arises by operation of law.

Id. (emphasis added) (internal citations and quotations omitted). This Honorable Court elaborated, "[S]ection 15–38–50 grants the court no discretion . . . in applying a set-off." Id. (quoting Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271–72 (Ct. App. 1999)). South Carolina Code § 15–38–50 provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15–38–50 (emphasis added).

A. The settled tortfeasor-defendants' aggregate settlement in the amount of $2,855,911.77 should apply to offset only the $3 Million verdict for negligence against Appellant and Marick.

Respondents, in their Complaint, allege that they have suffered and will continue to suffer damages as a result of the various Defendants' alleged negligence. (See generally R. pp.

120–143). Prior to the entry of judgment, Plaintiffs received $2,855,911.77 from settling tortfeasor-Defendants. (See supra note 4 and accompanying text).

South Carolina's Contribution Among Tortfeasors Act (hereinafter "SCCATA"), codified in South Carolina Code § 15–38–10 *et seq.*, requires the trial court to apply a setoff of any amounts paid by joint tortfeasors to plaintiffs in exchange for a Release. S.C. Code Ann. § 15–38–50. "[T]he court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." Smith v. Widener, 397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012). Although the jury awarded a different measure of damages among three causes of action, only one "injury" was sustained by Respondents. See Ellis v. Oliver, 335 S.C. 106, 112–113, 515 S.E.2d 268, 272 (Ct. App. 1999) (concluding the use of "injury" under S.C. Code § 15–38–50 was broad enough to include all damages, including those attributable to multiple causes of action "[arising] out of the same factual scenario," resulting from the joint negligence of various parties). On its face, Respondents' Complaint does not distinguish between the damages in relation to any particular cause of action, making clear that the funds paid by settling Defendants were paid to compensate Respondents for the same injury.

Appellant timely filed a Post-Trial Motion requesting the Court to offset the $2,855,911.77 previously received by Plaintiffs against the jury verdict.[7] The trial court subsequently denied all Defendants' Post-Trial Motions, which ostensibly denied Appellant's Motions, even though not specifically identified in the Order. (R. pp. 17–18). Appellant then timely filed a Motion to Alter or Amend the Judgment out of an abundance of caution,

[7] At the time of submitting its Post-Trial Motion, Appellant was under the belief that settlement funds totaled $2.908 Million, but subsequently recognized the correct setoff amount reflected in the Transcript of Judgment.

requesting the trial court to specifically rule on each of Appellant's Post-Trial Motions, which was denied by the trial court.

The Transcript of Judgment was filed January 30, 2015, entering judgment against Appellant in the amount of $2,144,088.23 in regards to the negligence claim, and $643,226.47 in regards to the breach of warranty claim. The full judgment amount was also entered against Defendants IMK, Integrys, Thoennes, Cox, and Lollis for breach of fiduciary duties.

B. The trial court erred in applying the settled tortfeasor-defendants' aggregate settlement to offset the $1 Million verdict for breach of fiduciary duties.

The trial court applied the setoff to the entire $5 Million judgment, which included a $1 Million award for breach of fiduciary duties against Defendants IMK, Integrys, Rick Thoennes, William C. Cox, and Larry D. Lollis. This allocation stands in stark contrast to South Carolina law and would unquestionably lead to an inequitable result not contemplated by the legislature.

S.C. Code § 15–38–20(G) states: "This chapter does not apply to breaches of trust or of other fiduciary obligation." S.C. Code Ann. § 15–38–20(G) (emphasis added). By its clear and unambiguous language, SCCATA prohibits its application to breach of fiduciary duties. Respondents may attempt to argue that the language of S.C. Code § 15–38–20(G) is limited to the section of which it is a subpart, titled "Right of Contribution." However, this argument has no merit, as the Code clearly states "chapter" and not "section."

Respondents may also argue that the aforementioned setoff applies to all breaches of fiduciary duties in the present action by relying on Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 662. S.E.2d 444 (Ct. App. 2008). In Vortex Sports, the plaintiff filed suit against CSMG and Ware, among others, asserting causes of action of aiding and abetting breach of fiduciary duty and tortious interference with a contract against CSMG, and asserting breach of fiduciary duty against Ware. Id. at 201, 662 S.E.2d at 447. Ware settled prior to trial, and a jury

awarded damages against CSMG for both causes of action. Id. at 203, 662 S.E.2d at 447–48. There, the trial court reduced Vortex's award by the settlement received from the other defendants, including Ware. Id. at 203, 662 S.E.2d at 448. Vortex appealed, arguing that the settlement with Ware was based on different causes of action than those asserted against CSMG, and thus the injury caused by CSMG was different than the injury caused by Vortex. Id. at 209, 662 S.E.2d at 451.

This Honorable Court found no trial court error in applying Ware's pretrial settlement to offset the final award. Id. at 209–10, 662 S.E.2d at 451. This Honorable Court concluded that, because the claims against CSMG and Ware arose out of the same factual scenario, "Section 15–38–50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." Id. at 210, 662 S.E.2d at 451 (quoting Ellis v. Oliver, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). This Honorable Court did not address the issue of whether any portion of the pretrial settlement operated as an offset to damages awarded for the aiding and abetting breach of fiduciary duty asserted against CSMG.

S.C. Code § 15–38–20(G) is unambiguously clear in prohibiting SCCATA's application to breaches of fiduciary duties. Vortex does nothing to abrogate or otherwise modify SCCATA—it merely confirms that a defendant is entitled to an offset of funds previously paid to a plaintiff for the same injury, regardless of what cause of action for which the prior settlement funds were paid to compensate. It does not stand for the proposition that a tortfeasor found liable for a breach of fiduciary duty is entitled to an offset of prior settlement funds.

C. The trial court erred in applying the settled tortfeasor-defendants' aggregate settlement to offset the $1 Million verdict for breach of implied warranties.

The trial court applied the setoff to the entire $5 Million judgment, which also included a $1 Million award for breach of implied warranties against Appellant and Defendant Marick. Because a cause of action for breach of implied warranties is an action in contract—and not in tort—no portion of the setoff can be applied to the breach of implied warranty award.

In regards to setoffs, S.C. Code § 15–38–50 provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15–38–50 (emphasis added). This section expressly provides for setoffs only to (1) tortfeasors who are (2) liable in tort.

Negligence is a cause of action in tort, and SCCATA permits setoffs for such causes of action. Breach of express or implied warranties, on the other hand, are causes of action in contract. See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) ("A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie."). In fact, Respondents conceded during trial that our Supreme Court has established that breach of implied warranty claims are not tort claims. (R. p. 1569, line 24–p. 1570, line 8). In the present case, the settling tortfeasors' contribution totals $2,855,911.77. The jury awarded $1 Million

against Appellant (30%) and Defendant Marick/IMK (70%) for breach of implied warranty. As this cause of action is an action in contract, no setoff should be applied to the damages awarded for breach of implied warranty.

In conclusion, the trial court erred in applying the setoff of $2,855,911.77 to the entire $5 Million judgment, and Appellant respectfully requests this Honorable Court to remand this matter to the trial court with instructions to apply the setoff as follows: setoff of $2,855,911.77 to the judgment of $3 Million entered as to the negligence claims against Appellant and Marick, reducing the total judgment as to the negligence claims to $144,088.23. Appellant further respectfully requests this Honorable Court to remand with instructions prohibiting application by the trial court of the setoff to any awards or judgments as to the breach of implied warranty and breach of fiduciary duty claims. Appellant further respectfully requests this Honorable Court to remand with instructions to enter judgment in accordance with Form 4 Jury Verdict Form—60% apportioned to Appellant in the amount of $86,452.94, and 40% apportioned to Defendant Marick in the amount of $57,635.29.

In the event this Honorable Court concludes that the setoff applies to both the breach of warranty and negligence claims, the setoff should apply only to those awards, totaling $4 Million. In this scenario, Appellant would respectfully request this Honorable Court to remand this matter to the trial court with instructions to apply the setoff as follows: setoff of $2,855,911.77 to the judgment of $4 Million entered as to the negligence and breach of warranty claims against Appellant and Marick, reducing the total judgment to $1,144,088.23. Appellant would further request this Honorable Court to Honorable Court to remand with instructions to enter judgment in accordance with Form 4 Jury Verdict Form—60% apportioned to Appellant in the amount of $686,452.94, and 40% apportioned to Defendant Marick in the amount of

$457,635.29 as to the negligence claims. As for the breach of warranty claims, 30% would be apportioned to Appellant, totaling $300,000.00, while 70% would be apportioned to Marick, totaling $700,000.00.

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

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

During the trial of this matter, Respondents admitted evidence, over the objection of Appellant, of payments by the HOA for emergency repairs at Stoneledge in the form of an Excel Spreadsheet, which was introduced into evidence during the testimony of Michael Furnari, a homeowner at Stoneledge. (R. p. 1512, line 14–p. 1513, line 15). Appellant objected on the grounds that the spreadsheet constituted inadmissible hearsay. (R. p. 1497, lines 6–17; p. 2714). In overruling Appellant's objection, the trial court referenced Rule 1806 (presumably intended to be Rule 1006, SCRE) relating to summaries and Rule 803(6) relating to hearsay exceptions. (R. p. 1512, lines 19–25). Specifically, the trial court opined that Mr. Furnari was the custodian of the document, and that he, along with his wife, prepared the document. (R. p. 1512, lines 19–25).

Rule 803(6) states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE. Mr. Furnari was asked to identify the spreadsheet showing the cost of emergency repairs incurred by the HOA, and further testified that he and his wife, Donna Furnari, prepared the document on behalf of the HOA. (R. p. 1496, line 1–p. 1497, line 9).

However, the spreadsheet itself, as well as the foundation laid for its improper admission, are flawed for several reasons. The spreadsheet introduced into evidence only identifies monetary amounts, and fails to identify specific emergency repairs, making this document unreliable. Moreover, Mr. Furnari did not profer testimony or other evidence indicating that the spreadsheet was kept in the course of a regularly conducted business activity, nor did he offer testimony that it was the regular practice of the HOA to make the spreadsheet. (See R. p. 1496, line 1–p. 1497, line 9). Finally, it was Donna Furnari, and not Michael Furnari, who testified about the emergency repairs, and therefore Mr. Furnari's testimony did not lay a proper foundation for admitting the evidence, nor was he the appropriate witness to admit the evidence, as he did not testify to its truthfulness and accuracy. (See R. p. 526, lines 5–13; p. 558, line 20–p. 559, line 6).

B. The trial court erred in failing to submit a comparative negligence charge to the jury.[8]

Near the close of trial, the trial court was presented with a verdict form that, in form and substance, proposed a comparative negligence apportionment between the Plaintiff HOA and Defendants. (See R. p. 1810, lines 12–24). Appellant argued in favor of this verdict form, and for a comparative negligence charge, arguing that the HOA did nothing to notify Appellant or otherwise seek a remedy until 2010. (R. p. 1811, lines 2–8). The trial court rejected the verdict

[8] Appellant, in its Post-Trial Motion for a New Trial Absolute, moved for a new trial on the grounds that the verdict established that the jury failed to properly consider the evidence and applicable law on mitigation of damages. (R. pp. 2232–2245). As this Motion relied upon the same facts and arguments contained in Section III(B) of this Brief, Appellant hereby preserves its Post-Trial Motion by reference, and incorporates the same herein.

form purporting to apportion fault to the HOA, and ruled there was "no evidence of negligence on behalf of the homeowners association, the plaintiffs in this case." (R. p. 1814, lines 9–19). Based on this ruling, the trial court declined to charge the jury with a comparative negligence charge. (R. p. 1864, lines 6–10).

It is well-settled law that the negligence of a party is a question of fact for the jury. See, e.g., Thompson v. Michael, 315 S.C. 268, 433 S.E.2d 853 (1993); Felder v. K–Mart Corp., 297 S.C. 446, 377 S.E.2d 332 (1989); and Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). "[A]pportionment of negligence, which determines both whether a plaintiff is barred from recovery or can recover some of his damages and the proportion of damages to which he is entitled, is usually a function of the jury." Brown v. Smalls, 325 S.C. 547, 559, 481 S.E.2d 444, 451 (Ct. App. 1997). "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." Ross v. Paddy, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000) (citing Brown, 325 S.C. 547, 481 S.E.2d 444). "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." Id. "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.

In ruling no comparative negligence existed in the case at bar, the trial court appeared to have adopted the rationale espoused in Magnolia North, concluding that the Marick/IMK-controlled HOA could not have sued itself. (See R. p. 1811, lines 20–23). The trial court further refused to "attribute anything to the homeowners association until they got control, which would be 2008." (R. p. 1812, lines 11–13). The trial court concluded that Mr. Cox, Mr. Roberson, and

Mr. Thoennes were "principles of I.M.K" and not members of the HOA, but only members of the board of directors of the HOA. (R. p. 1813, line 22–p. 1814, line 2).

The HOA board members and IMK funded repair efforts of the HOA because the HOA, at that time, had minimal funds. (R. p. 1476, lines 10–17). Respondents' own witness, Robert White, admitted that Mr. Thoennes and Mr. Cox were board members of the HOA. (R. p. 450, lines 1–2; p. 1343, lines 1–13) ("[Marick/IMK] controlled the Stoneledge H.O.A. from the period of 2005 to 2008. That is, they sat on the board. They made decisions for the H.O.A."); (testimony indicating that Rick Thoennes, Tim Roberson, and Bill Cox were HOA board members). Subsequent board members Donna Furnari, Steve Taylor, and Robert White all testified that they, as board members, acted on behalf of the HOA to fund repairs. (See, e.g., (R. p. 516, lines 1–23; p. 628, lines 8–13; p. 647, lines 21–22). In fact, the only change in the HOA was its members, not the entity itself. (R. p. 1342, lines 8–18). The rights and responsibilities of the HOA were, in form and substance, the same in 2008 as they were when Marick/IMK controlled the HOA in 2005.

The trial court misguidedly attempted to distinguish between the Board of Directors of the HOA and the HOA as an entity. This distinction is wholly irrelevant to the issue of comparative negligence. The HOA, whether it was controlled by Marick/IMK or by the individual homeowners, had duties to repair the defects that were observed as early as 2005. The HOA failed to make any significant repairs, and failed to pursue a legal remedy against any contractor or builder until 2009, only asserting a claim against Appellant in February 2010. This inaction constitutes a failure to mitigate its damages, and the delay unquestionably resulted in additional damage, which was due to the omissions of the HOA, regardless of who was in control.

Based on the foregoing, Appellant respectfully requests this Honorable Court to remand this case to the trial court for a new trial.

CONCLUSION

The evidence at trial unquestionably demonstrated that the HOA, and its board members Rick Thoennes and Tim Roberson, had actual and constructive knowledge of numerous defects in several of the homes in Stoneledge as early as 2005, when Marick assumed control of the project. Upon notice of these defects and damage, the HOA voluntarily undertook the responsibility of making repairs to various units without once notifying Appellant of any potential defects. Marick/IMK then turned control of the HOA over to the homeowners in 2008. Two years later, and five years after discovery of the defects and property damage, the HOA brought suit against Appellant. Based on the testimony of several homeowners, Marick/IMK HOA members, and Marick employees, the trial court incorrectly denied Appellant's Motions for Directed Verdict and Motion for Judgment Notwithstanding the Verdict as to the expiration of the statute of limitations. Based on this error, Appellant respectfully requests that this matter be remanded with instructions to dismiss Appellant with prejudice and to vacate the judgment entered against Appellant for both the negligence and breach of warranty claims.

Even if this Honorable Court is not persuaded that the statute of limitations had expired, Defendants are statutorily entitled to an offset of all funds paid to Respondents by all settling tortfeasor-defendants, totaling $2,855,911.77, as to the negligence claims only. This figure should be applied to offset only the $3 million negligence award against Marick/IMK and Appellant, as the setoff does not apply to claims of breach of fiduciary duty and breach of express or implied warranty. As a result, Appellant respectfully requests that this case be

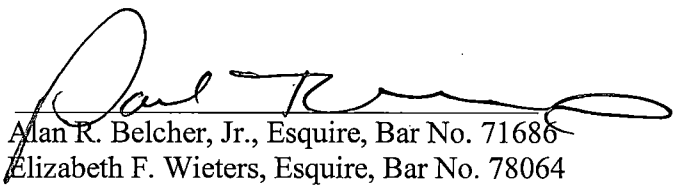
remanded with instructions that the $3 million judgment against Marick/IMK and Appellant be reduced to $144,088.23, to be apportioned according to the jury verdict form.

In the alternative, Appellant respectfully requests this Honorable Court to remand with instructions for a new trial based on several, independent grounds. First, the trial court erred in allowing Respondents to admit an Excel Spreadsheet purporting to show emergency repairs. This spreadsheet was admitted in error because it was unreliable due to the absence of any description of repairs; no proper foundation was laid for its admission; there was no testimony that such document was kept in the regular course of business; and because Mr. Furnari did not testify as to the documents truthfulness and accuracy, all resulting in the document constituting inadmissible hearsay. Additionally, the trial court erred in failing to charge the jury as to comparative negligence of the Plaintiff HOA. Extensive testimony by many of Respondents' own witnesses demonstrated that the HOA had the ability and obligation to pursue a claim against Appellant, yet took no action to notify Appellant of any defect or potential claim until 2010, five years later. The evidence unquestionably demonstrated that the HOA failed to mitigate its damages by conducting inadequate repairs rather than pursuing a claim against Appellant within the three-year statute of limitations. The trial court erred in applying the rationale espoused in Magnolia North, and Appellant respectfully requests this Honorable Court to remand to the trial court with instructions for a new trial.

{ Signature to Follow }

Respectfully submitted,

HALL BOOTH SMITH, P.C.



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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, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Rick Thoennes,

Defendants.

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

ACCEPTANCE OF SERVICE

The undersigned hereby certifies that on this 18 day of August, 2016, a true copy of the Final Brief was served upon counsel of record via hand delivery at the office of Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, 342 E Bay St, Charleston, SC 29401.

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief upon the Respondents via hand delivery, on August 18, 2016, at the office of Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, 342 E Bay St, Charleston, SC 29401. (See Exhibit A)

Respectfully submitted,

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