THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY

Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate 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, PLAINTIFFS,

V.

IMK DEVELOPMENT CO., LLC, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARRICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., RICK THOENNES, DEFENDANTS,

OF WHOM BOSTIC BROTHERS CONSTRUCTION, INC. IS THE .....APPELLANT

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Cases

Statutes

STATEMENT OF THE ISSUES

1. Was the trial court's denial of Bostic's directed verdict motion and JNOV proper, when conflicting evidence existed as to whether the owner controlled HOA knew or should have known it had a cause of action against Bostic, and when under any circumstances equity supported tolling the statute until the owners gained control of the HOA?

2. Did the trial court properly apply the set-off?

3. Did the trial court properly deny Bostic's motion for a new trial based on the admission of a spreadsheet summary of emergency damages, when Bostic did not dispute the damages?

4. Did the trial properly deny Bostic's motion for a new trial on the grounds that the court did not charge comparative negligence, when evidence of Plaintiff's negligence was admitted?

STATEMENT OF THE CASE

This construction defect case arises from pervasive defects and resulting damage at an 80-unit townhome project on Lake Keowee in Oconee County (the "Project" or "Stoneledge"). Plaintiff and Respondent Stoneledge at Lake Keowee Owners' Association, Inc. ("the HOA") instituted this lawsuit on May 29, 2009, and subsequently amended the complaint to add Appellant Bostic Brothers Construction, Inc. ("Bostic"), alleging negligence and breach of warranty causes of action. Bostic was served on March 29, 2010. Bostic and the other defendants were the developers, contractors, and subcontractors responsible for the development, construction and sale of Stoneledge units

and also the management of the HOA Board of Directors until September 2008, when control was turned over to the homeowners.

On August 28, 2013, Judge Macaulay, upon the motion of certain subcontractor defendants, issued an Order for Separate Trials and Scheduling Order, which contemplated separate trials for Phase I and Phase II of the Project. (R. pp. 21-28). The basis of that order was that the phases were developed by different developers (Bostic was not involved in Phase II), that different codes and even different law applied to the two phases, and that separate trials would prevent undue prejudice to certain subcontractors who performed work solely on one phase or the other. The Bifurcation Order set a Phase I trial to begin on October 28, 2013, and scheduled a Phase II trial to begin within a few months.

The trial relating to the HOA's claims for Phase I began on October 28, 2013, and resulted in a jury verdict against Bostic in the amount of $5,000,000. The trial judge determined the verdict was cumulative, and the jury was dismissed without objection. (R. p. 2055, line 8-p. 2056, line 18; R. p. 2090, line 5-p. 2093, line 8). On November 8, 2013, the Court entered a Form 4 order of judgment. (R. pp. 29-32). Bostic filed post-trial motions including a Motion for Judgment Notwithstanding the Verdict, a Motion requesting an Order granting a set-off, a Motion for a New Trial Absolute, pursuant to Rule 59; *SCRCP*, and a Motion for a New Trial Nisi Remittitur, also pursuant to Rule 59.

Plaintiff filed a Motion to Alter or Amend Judgment seeking to have the full amount of the cumulative judgment award, $5,000,000, assigned to each of the causes of action. (R. pp. 2194-2197; R. pp. 2757-2759). By letter dated November 25, 2013,

Plaintiff clarified the prior settlement amounts $2,855,911.77 received from defendants for Phase I and asked that the full set-off be applied to each cause of action, reducing the amount awarded for each cause of action to $2,144,088.23. (R. pp. 2757-2759). No defendants objected to the amount of prior Phase I settlements as set forth in the letter.

Judge Macaulay presided over a hearing on all post-trial motions on April 10, 2014. (R. pp. 2076-2156). Defendants' motions were not ruled on until January 22, 2015, at which point they were denied. (R. pp. 17-20).

As requested in Plaintiff's Motion to Alter or Amend and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts recovered by the Plaintiff from the settling defendants. (R. pp. 41-43).

STATEMENT OF FACTS

The HOA is responsible for maintenance, repair, and replacement of the building envelopes, roofs, porches, and decks of all Stoneledge units. (R. p. 0903, lines 6-11). The Project was developed in two phases. Phase I consists of eight (8) buildings representing thirty-seven (37) individual units. Bostic served as the original general contractor, and was also an owner of the initial development company, Keowee Townhomes, LLC. (R. p. 0926, lines 15-22). Bostic constructed and sold numerous units, and several units were in various stages of completion when Bostic ceased construction and ultimately entered into bankruptcy. (R. p. 0708, lines 1-9; R. p. 0615, lines 5-10; R. p. 0759, line 12-p. 0760, line 11).

On or about March 30, 2005, Keowee Townhomes, LLC sold the Project, including 25 unfinished units in Phase 1, to Defendant IMK Development, Co., LLC ("IMK"), a development company comprised of Defendants Marick Home Builders, LLC ("Marick") and Integrys Keowee Development, LLC ("IK"). (R. p. 1438, lines 3-8). IK is comprised of William Cox, Tim Roberson and Larry Lollis. At that point, Marick assumed the role of general contractor for the completion of Phase I and the entire development of Phase II. (R. pp. 0634, line 25-p. 0635, line 2). Rick Thoennes was the managing member for Marick. (R. p. 1431, line 23-p. 1432, line 25).

IMK created a homeowner's association and filed a Declaration of Covenants and bylaws in November 2005, and named Rick Thoennes, William Cox, Tim Roberson as board members. (R. p. 0508, line 23-p. 0514, line 1; R. p 0595, line 1-p. 0597, line 1; R. p. 1402, lines 2-10; R. p. 2271-2272; R. pp. 2323-2359; R. p. 2363). IMK remained in control of the board of the homeowner's association until September 26, 2008. (R. p. 2271).

On October 28, 2013, a jury trial commenced on the Phase I claims only. The HOA offered only one damages figure, which was comprised of the costs the HOA incurred to temporarily make repairs and the estimated future cost to repair. The HOA claimed damages totaling $6,309,197.00. In response, Bostic offered evidence of a scope of repair developed by its expert, Rick Moore, and a price to implement that scope totaling $2,200,130.93.

At trial, the Plaintiff's witnesses included homeowners Robert White, Steve Taylor, Donna Furnari, and Michael Furnari. Each testified about their knowledge of the

problems at Stoneledge. Steve Taylor testified that when Bostic left the project, he did not know anything about the quality of construction in the unfinished units. (R. p. 0590, lines 5-14). Mr. Taylor also testified that he had various problems in his unit. Marick repaired, or attempted to repair these problems. (R. p 0597, line 15-p. 0600, line 20).

Mr. Taylor became president of the HOA board when it was first turned over to the homeowners in 2008. According to his testimony, in late 2008, heavy rains followed a long drought, and multiple Phase I units began showing significant water infiltration problems. (R. p. 0603, line 9-p. 0606, line 3; R. p. 0620, line 21-p. 0621, line 12.). Steve Taylor and Robert White, another homeowner, both testified certain latent deficiencies were not discovered until 2009, when a report of a handrail problem in the unit of owner Jim Logan revealed severe rot and deterioration behind the stone facade. (R. p. 0606, line 14-p. 0607, line 19; R. p. 0624, line 10-p. 0625, line 12).

Mr. Thoennes, a licensed general contractor and managing member of Marick, which was also a member of IMK, sat on the board of the association until September of 2008, and made a number of repairs in response to owner complaints. (R. p. 1460, line 25, p. 1462, line 17). Mr. Thoennes specifically testified that during the operative time, he was wearing a number of hats, including contractor, head of the sales department for IMK, and, to some degree, a member of the board. (R. p. 1161, line 21- p. 1162, line 17). Mr. Thoennes refused to admit that he communicated information regarding the repairs requested of him while wearing his "contractor hat" to the homeowners' association board. (R. p. 1457, line 23-p. 1458, line 22; R. p. 1459, line 20-p 1460, line 7).

Plaintiff's expert Derek Hodgin provided expert testimony about the various construction defects at the Project. (R. pp. 0820-0919; R. pp. 2407-2685). Plaintiff presented evidence of repair damages totaling $6,309,197.

Bostic's own expert Rick Moore admitted that the Project had pervasive water infiltration, rot, and deterioration resulting from the contractor's failure to properly construct the Project. (R. p. 1677, line 15-p. 1688, line 13; R. p. 1735, lines 18-22; R. p. 1752, line 23-p. 1754, line 24). Bostic's expert Steve Watkins estimated a cost of $3,995,106.34 to implement Hodgin's scope of work (not including the cost of contract administration services, which Watkins were necessary) and $2,200,130.93 to implement the defendants' reduced scope of work (which was increased at trial to $2,470,000). (R. p. 1312, line 20-p. 1318, line 7; R. p. 2712; R. p. 1779, line 13-p. 1782, line 6; R. p. 1792, line 5; R. pp. 1804-1805; R. p. 2717). Further, Bostic's principals, Joe and Jeff Bostic and Mel Morris, acknowledged defects at the Property and testified that the owners were entitled to a proper and full repair. (R. p. 0926, line 23-p. 0927, line 16; R. p. 0924, line 4-5; R. p. 0925, Lines 1-10; R. p. 0932, lines 11-24; R. p. 0933, lines 12-20; R. p. 0683, line 21-p. 0694, line 1).

When the Phase I verdict was rendered, the only remaining Defendants were the contractors for Phase I (Bostic and Marick) and the developers of Phase I (IMK, IK, Cox, Lollis and Thoennes). On November 8, 2013, the jury returned a verdict in favor of the Plaintiff in the amount of $5,000,000 on three causes of action: negligence ($3,000,000.00), breach of warranty of service ($1,000,000.00), and breach of fiduciary duty ($1,000,000.00). (R. pp. 29-35). At the request of Defendants, the Court allowed

apportionment of the awards under the negligence and breach of warranty causes of action. After deliberating, the jury allocated sixty percent (60%) of the negligence award to Bostic and forty percent (40%) to Marick and allocated seventy percent (70%) of the breach of warranty award to Marick and thirty percent (30%) to Bostic. (R. p. 36). No allocation of any kind was requested with respect to the breach of fiduciary duty award, nor would that have been appropriate.

After the jury rendered its verdict, but before allocation and while the jury was still empanelled, counsel for the HOA asked the Court if the award was cumulative. In response, with no objection or inquiry from counsel for any defendant, the Court ruled as follows:

> Well, the way the Defendants have been treating it, yes, it is cumulative because they've been treating them all as separate little things that they want – what is it? – apportionment on this one and apportionment on that one.

(R. p. 2055, line 8-p. 2056, line 18; R. p. 2090, line 5-p. 2093, line 8). Again, no Defendant objected to that ruling or requested that an inquiry be made of the jury on that issue while the jury was empanelled. Instead, the defendants merely argued their positions with respect to apportionment. The jury was released after deciding the apportionment issue was decided without anything further being requested by any defendant.

On November 8, 2013, the Court entered a Form 4 order of judgment. (R. p. 29-36). Plaintiff filed a Motion to Alter or Amend Judgment seeking to have the full amount of the cumulative judgment award, $5,000,000, assigned to each of the causes of action. (R. pp. 2194-2197; R. pp. 2757-2759). By letter dated November 25, 2013, Plaintiff

clarified the prior settlement amounts $2,855,911.77 received from defendants for Phase I damages and asked that the full set-off be applied to each cause of action, reducing the amount awarded for each cause of action to $2,144,088.23. (R. pp. 2757-2759). None of the defendants objected to the amount of prior Phase I settlements as set forth in the letter.

As requested in Plaintiff's Motion to Alter or Amend and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts recovered by the Plaintiff from the settling defendants. (R. pp. 41-43).

STANDARD OF REVIEW

JNOV

"A motion for a judgment notwithstanding the verdict (JNOV) is merely a renewal of the directed verdict motion." *Jamison v. Hilton*, 413 S.C. 133, 139, 775 S.E.2d 58, 61 (Ct. App. 2015). The trial court must deny a motion for a directed verdict or JNOV if there is conflicting evidence, or the evidence yields more than one reasonable inference, or its inference is in doubt. *Id.* Neither the trial court nor the appellate court has the authority to weigh or resolve conflicts in the evidence. *Id.* This Court will reverse the trial court's ruling on a JNOV motion only "when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Law v. S. Carolina Dep't of Corr.,* 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006).

MOTION FOR NEW TRIAL

Since the trial court has sound discretion in deciding whether to admit or exclude evidence, the trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. *Sullivan v. Davis*, 317 S.C. 462, 465, 454 S.E.2d 907, 909 (Ct. App. 1995); *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 242, 616 S.E.2d 431, 435 (Ct. App. 2005).

To establish that the judge's refusal to give the requested charge deprived one of a fair trial, the refusal must have been both erroneous and prejudicial. *Miller v. City of W. Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 686 (1996). When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). The trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved. *Id.* Moreover, even if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal. *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED BOSTIC'S MOTION FOR DIRECTED VERDICT AS TO THE STATUTE OF LIMITATIONS BECAUSE A QUESTION OF FACT EXISTS AND THE STATUTE WAS PROPERLY TOLLED UNTIL THE OWNERS CONTACTED THE HOA.

In substance, Bostic's Motion for JNOV, pursuant to Rule 50, is based upon its contention that the Plaintiff's claims are barred by the statute of limitations. Bostic's argument fails for two reasons. First, the evidence at trial was conflicting as to when the

HOA, or the individual owners, knew or should have known that any one or more causes of action against Bostic existed for the host of defects and different resulting damages that all parties agreed existed at Stoneledge. The evidence created a question of fact and was not subject to a ruling as a matter of law.

Second, Bostic's arguments relative to the statute of limitations rest upon two false premises that are both unsupported by law and contrary to established principles of fairness and equity protecting homeowners. Bostic's first false premise is that when control of the HOA is turned over from a developer to the owners, the HOA comes burdened with the developer's knowledge of potential defect claims. Bostic's second false premise is that equitable tolling of the statute only applies in certain limited circumstances not present here.

For the reasons discussed below, Bostic's appeal based upon the trial court's proper denial of its motion for JNOV should be denied.

A. Conflicting evidence as to whether the HOA or homeowners had sufficient knowledge of problematic conditions precluded the trial court from finding that the statute of limitations had run as a matter of law.

Section 15–3–535 of the South Carolina Code provides that, "Except as to [medical malpractice actions], all actions initiated under Section 15–3–530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 5-3-535 (1976). When the evidence is conflicting or is capable of more than one reasonable inference, whether the plaintiff knew or should have known that it had a cause of action is a jury question. *See McAlhany v. Carter*, 415 S.C. 54, 66-67, 781 S.E.2d 105, 112 (Ct.

App. 2015), reh'g denied (Jan. 28, 2016). Moreover, a jury must also resolve factual issues when there is a dispute as to whether an owner may have known about certain defects and damages and not others. *Id.*; *see also Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011).

In arguing that the HOA's claims are time-barred as a matter of law, Bostic relies upon testimony at trial that after Bostic abandoned the project, in 2004, and during the period when the second developer, IMK, controlled the homeowners' association, two Phase I owners, Steve Taylor and Bob White, reported certain problems with their units to Rick Thoennes (principal of Marick and also IMK). Bostic asserts that the HOA was then charged with Thoennes's knowledge of defects, and such knowledge was sufficient to commence the running of the three-year statute of limitations as a matter of law.

To the contrary, Mr. Thoennes specifically testified that during the operative time, he wore number of hats, including contractor, head of the sales department for IMK, and, to some degree, a member of the board. Despite a vigorous cross-examination by Bostic's counsel, Mr. Thoennes refused to admit that he communicated information regarding the repairs requested of him to the homeowners' association board while wearing his "contractor's hat." (R. p. 1457, line 23-p. 1458, line 22; R. p. 1459, line 20-p. 1464, line 8). Marick and Mr. Thoennes made repairs as requested and did not report these conditions or requests to the board. (The sum spent by Marick to effect those repairs is not part of the claim of the HOA.) (R. p. 1457, line 23-p. 1458, line 22; R. p. 1459, line 20-p. 1464, line 8).

Regarding the knowledge of the owners requesting those repairs, in addition to the facts set forth above, Mr. White and Mr. Taylor consistently testified that neither of them believed, until 2009, that any of the conditions reported to Mr. Thoennes gave rise to the pursuit of a legal claim. (R. p. 1367, line 25-p. 1368, line 13; R. p. 1345, line 4-p. 1346, line 3). Mr. White and Mr. Taylor also both testified that certain latent deficiencies were not discovered until 2009, when a report of a handrail failure in the unit of owner Jim Logan, revealed severe rot and deterioration behind the stone facade. (R. p. 0606, line 14-p. 0607, line 19; R. p. 1345, line 4-p. 1346, line 3). It was at that point, for the first time, that anyone from the homeowners' association testified that they were aware of the extent of the deficiencies. (R. pp. 0606, line 14-p. 0607, line 19; R. pp. 1345, line 4-p. 1346, line 3). In support of the contention that the owners first learned of the severity of latent deficiencies after discovery of the problem at Logan's unit, at that time the HOA, controlled by the owners for a mere six or seven months, retained the services of an engineering firm, the Warren Group, to investigate what they believed at that point to be a structural problem at Phase I. This action was commenced on May 29, 2009, just six months after control of the HOA was turned over to the owners.

Further, while there were reports of problems from the early owners of Phase I units before 2009, those problems were addressed by Marick, to the apparent satisfaction of the owners, based upon what they knew at the time. Mr. Taylor testified that while Marick was onsite from 2005 to 2008, he was not aware of defects to deck columns; roofing defects; foundation leaks; problems with the stonework; or problems with the windows. (R. p. 0624, line 13- R. p. 0625, line 14).

He also testified that Marick was responsive to his requests for repairs:

Q: Did Marick have someone that would respond to repair requests?
A: Yeah. There was a gentleman by the name of Nathan who was on site.
Q: And they also had an email address and phone numbers, didn't they?
A: Yeah
Q: Okay. So if you're a homeowner between 2005 and 2008 at Stoneledge, you could call or you could email or you could grab Nathan, you could grab Rick?
A: Yeah.

(R. p. 0625, lines 15-25).

Mr. Taylor went on to say that he never reported problems to the HOA while it was controlled by IMK. (R. p. 0626, lines 17-25).

Marick's willingness to address repair requests to the satisfaction of the owners was confirmed by Rick Thoennes, Marick's principal:

Q: And when the homeowners, Mr. Taylor and everybody else, would come to you, did you repair their units or instead of making repair to their units, hire someone to repair their units?

A: Yes. I can only think of a rare instance where we didn't, and that would have been some kind of cosmetic thing inside the unit that we probably would not have tackled. But even inside, we did warranty work. We fixed doors and sump pumps and those kinds of things. It was more the cosmetic stuff that we didn't feel like we should fix.

(R. p. 1466, lines 3-13). Finally, Mr. Cox, also on the HOA board but not a contractor, testified that he was unaware of any construction defects when the property was sold. (*See* R. pp. 1424-1425).

All of this testimony, taken in the light most favorable to the Plaintiff, clearly suggests that neither the HOA or the individual owners were aware of systemic and pervasive construction defects, or the severe damages located behind the stone and wood siding in Phase I, or the need to bring suit against Bostic for those problems until the

reality of the situation became clear to them in 2009, after turnover of control of the HOA.

In *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), the Supreme Court ruled on the statute of limitations in a case involving latent defects. In *Santee*, the plaintiff had a cement storage complex installed in 1965 that included twelve concrete silos and three bins. *Id.* at 693. In 1969, a small crack was discovered in one of the bins, which was repaired. *Id.* In 1975, another crack appeared in the same bin. *Id.* at 694. The complex was inspected at this point, and the bin was again repaired at a relatively small cost. *Id.* In 1980, two individuals were killed when a second storage bin collapsed. *Id.* A subsequent investigation revealed that the bin, as well as the twelve silos, were structurally unsound because steel reinforcement rods had been improperly spaced and tied together. *Id.*

The plaintiff brought suit against the general contractor responsible for the construction of the cement plant. The trial court concluded that the plaintiff knew or should have known that it had a cause of action against the contractor when the first crack appeared in 1969, or at least when the second crack appeared in 1975. *Id.* at 695. The South Carolina Supreme Court rejected this conclusion, noting that the plaintiff had introduced expert testimony as to the latency of defects in the silos, noting that the rods were inside concrete walls, and hence undiscoverable. *Id.* at 696. Moreover, there was evidence that repairs were performed. *Id.* The South Carolina Supreme Court concluded that the evidence introduced "went to the reasonableness of [the plaintiff's] actions, which

was an issue to be decided by the jury." *Id.* (*citing Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962)).

More recently, the *Santee* case is cited in support of *Centex Homes v. S. Carolina State Plastering, LLC,* No. 4:08-CV-2495-TLW, 2010 WL 2998519 (D.S.C. July 28, 2010). In *Centex Homes*, Judge Wooten held that although the question was close, the record contained questions of material fact regarding when Centex should have known, through the exercise of reasonable diligence, that a cause of action existed against several of its subcontractors for alleged construction defects associated with a condominium complex. *Id.* On June 20, 2001, Building 3 was the first building to be completed at the condominium complex, and Building 1 was completed on April 29, 2002. In 2002, Centex discovered water damage to Building 3, which was thought to have been caused by water intrusion at the intersection of the deck and outside walls. Two subcontractors participated in repairs performed in 2002 to address the damage, which included the installation of kickout flashing at the intersections. Centex did not add the kickout flashing to Building 1, which was a similar building. In 2006 Centex discovered water damage in Building 3 and in Building 1. Again it was thought to be caused, at least in part, by water intrusion at the decks. Between 2006 and 2007 Centex made repairs and filed suit against several subcontractors. The subcontractors moved for summary judgment on the statute of limitations.

Centex argued the water damage to Building 1 could not be attributed in total to the lack of kickout flashing, and that damage to Building 3 continued despite the addition of kickout flashing. Thus, Centex argued there were multiple factual issues: the causes of

the damage; the existence of latent defects prevented discovery; and evidence that investigation required certain reassemble steps. The Court held that a conclusion that Centex was barred from bringing an action to recover for water intrusion damage that was discovered in 2006 because it did not take steps to insure the kickout flashing was properly installed in 2002 would require the court to infer that the damage could have been prevented if the flashing had been properly installed, which it found was a jury question. *Id.* at *7. The Court found that the determination of whether Centex, through the exercise of reasonable diligence, should have discovered these alleged deficiencies prior to 2006 was an issue properly resolved by the finder-of-fact. *Id.* at *8.

In this case, at most, a question of fact existed as to when the HOA, through Thoennes or the individual owners, was on notice of defects sufficient to commence the statute of limitations. Another question of fact existed as to which, if any, of the defects and damages for which the HOA asserted claims may have been known or could have been known to the HOA more than three years prior to the filing of the lawsuit. Because of the questions of fact, the trial court properly denied Bostic's motion since it could not rule, as a matter of law, that the statute of limitations had expired more than three years before the claim was filed. *See Law*, 368 S.C. at 434–35, 629 S.E.2d at 645. (stating this court will reverse the circuit court's ruling on a directed verdict or JNOV motion only "when there is no evidence to support the ruling or where the ruling is controlled by an error of law"). Further, Bostic failed to submit the question of when the HOA knew or should have known of a claim to the jury and has thereby waived any right to have the

issue determined by the trier of fact. The questions of fact clearly preclude a finding on that issue as a matter of law.

B. Regardless of the level of notice, the limitations period should be equitably tolled since these owners were not in control of the association until September of 2008.

In addition, regardless of the level of notice, the limitations period should be equitably tolled since these owners were not in control of the association until September 2008. Bostic argues that equitable tolling only applies in a situation where a defendant has directly done something to give rise to the tolling. Since there is no evidence that Bostic controlled the HOA board during the operative timeframe (indeed the HOA did not exist until well after Bostic left the site), Bostic argues that equitable tolling does not apply to the statute of limitations relating to the HOA's claims against it. That, however, is a misreading of equitable tolling. The fact that the owners had no right to control the affairs of the HOA, or file suit on its behalf, until at least September 2008, is sufficient reason to support the trial judge's finding that the statute was tolled until developers transferred control to the homeowners. The evidence from trial indicates clearly that the owners, once in control, acted with dispatch and comported with any applicable standard of due diligence.

Bostic essentially argues that the statute of limitations began to run as to the HOA upon its creation in November 2005. At that time, Bostic argues, any defect known by the developers was chargeable to the HOA for purposes of the statute of limitations, meaning that the second developer, IMK, let the statute of limitations all but expire, thus precluding the claims of the owners who now control the HOA. This is so, Bostic argues, notwithstanding the fact that the owners who now control the HOA had no ability to

assert those claims until September of 2008, and acted with clear dispatch and due diligence upon assuming control of the HOA at that time.

The result urged by Bostic is anathema to the public policy of South Carolina, as established through its construction defect law, which clearly seeks to protect owners of residential units from defective construction and shady developers and contractors, and ensures that they are armed them with the rights necessary to protect themselves.

Unlike typical corporations, homeowners associations are unique and are treated as unique by the courts. Prior to the turnover of control, the homeowners of a condominium or townhome development are without the right or ability to control the affairs of the HOA, and do not have the ability to bring suit on its behalf. Thus, the homeowners are in a precarious position wherein they have financial responsibility for the obligations of the HOA, but no way to protect themselves in relation to the operation of the HOA. For that reason, the courts of South Carolina have protected homeowners from harmful conduct and conditions that result when a developer fails to properly manage the affairs of the HOA by imposing fiduciary obligations upon developers, including requirements that common areas be in good condition at the time of turnover. The same concerns have also given rise to the elimination of privity as a defense, as well as the development of warranties implied in law for the sale of residential units and for the quality of construction. *See Kennedy v. Columbia*, 299 S.C. 335, 384 S.E.2d 730 (S.C. 1989) (providing a thorough discussion of the history of South Carolina's considerable judicial efforts to "expand our rules to provide the innocent buyer with protection.") *Id.*at 736.

There is no authority supporting Bostic's position that the law of South Carolina imposes on owners of residential units, who are responsible for the funding and operation of a homeowners association, constructive knowledge of defects that may have been acquired by an adversarial developer over a period of years prior to turnover of control. As noted, such a concept is repugnant to South Carolina's policy to provide protection of innocent buyers.

There is authority, however, which provides that the court has the equitable power to toll the statute to prevent a gross injustice like the one Bostic seeks. As noted by the Court of Appeals in *Magnolia North v Heritage Communities*, 397 S.C. 348, 725 S.E. 2d 112 (Ct. App 2012): "The equitable power of the court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies." *Id.*at 125.

It would be manifestly unfair to rule that the statute of limitations began to run years before the owners assumed control of the association — during which time the board was controlled by IMK, whose interests were actually adverse to the owners who comprise the current board. The trial court, applying the equitable power it possessed, correctly held that the statute of limitations did not begin to run before these owners were given control of the HOA. This suit was filed less than a year after turnover and is not time-barred.

II. THE TRIAL JUDGE PROPERLY APPLIED THE SET-OFF IN THE FORM 4 JUDGMENT DATED JANUARY 30, 2015.

Bostic argues that the trial court erred in applying a set-off for the amounts the Plaintiff recovered from settling defendants prior to trial. In the January 30, 2015

Judgment, the Court in fact did apply a set-off of all funds the Plaintiff recovered; giving Bostic, and every other defendant, the full value of the set-off.

A. Bostic received the full benefit of a set off of all amounts the Plaintiff recovered from the settling defendants.

In Plaintiff's post-trial motion to alter or amend, Plaintiff asked the trial court to apply the full amount of the cumulative jury award, $5,000,000, to each of the three causes of action, and the trial court did apply the full amount of the cumulative jury award, $5,000,000, to each cause of action in its January 30, 2015 Form 4 Judgment. (R. pp. 41-43). The January 30, 2015 Judgment amended the prior Form 4 Judgment dated November 8, 2013 and dated back to the November 8, 2013 Judgment. (R. pp. 41-43).

After assigning the full amount of the cumulative verdict, $5,000,000, to each cause of action, the court reduced the verdict as to each cause of action by the amount of the entire set off ($2,855,911.77) and then applied the Apportionment Act, as reflected in the Apportionment Form signed by the jury. (R. p. 36; R. pp. 41-43).

In making its argument, Bostic seems to ignore the trial court's January 30, 2015 order. Once that Order is considered, Bostic's arguments are irrelevant and nonsensical. There is no scenario under which Bostic could receive more than 100% of the set-off, which is what it got in the trial court's January 30, 2015 Order.

B. A set-off is equitable in nature and properly determined by the trial court.

Further, Bostic's motion for set-off erroneously seeks to have the set-off applied only to the negligence cause of action apparently based upon Bostic's belief that the South Carolina Contribution Among Joint Tortfeasors Act (SCCAJA) provides the only

basis for application of set-off. However, although the SCCAJA provides for reduction of the verdict to account for amounts paid by settling tortfeasors, a set-off can also apply to other causes of action. *Smalls v. S.C. Dep't of Educ.,* 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct.App.2000) ("A set-off is not necessarily founded upon 'any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction' of the court; therefore, such motions are 'addressed to the discretion of the court ...." (*quoting Rookard v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 376, 71 S.E. 992, 995 (1911)). Here, the trial court applied the full amount of the set-off to all of the causes of action so that each defendant enjoyed in full the right to the reduction in the amount of the verdict to ensure that the HOA did not recover twice.

III. EVIDENCE SUPPORTS THE TRIAL COURT'S DENIAL OF A NEW TRIAL.

A. Admission of a summary of emergency repair costs, if error, was not prejudicial.

Bostic moves for a new trial on the basis that the Plaintiff was allowed to admit a summary of emergency repairs. Since the trial court has sound discretion in deciding whether to admit or exclude evidence, the trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. *Seabrook Island Prop.Owners' Ass'n v. Berger*, 365 S.C. 234, 242, 616 S.E.2d 431, 435 (Ct. App. 2005). The repair summary established that the association paid $139,800.00 for emergency repairs to Phase I. Bostic does not dispute that the cost of emergency repairs are recoverable. Rather, Bostic disputes the document, which it says was inadmissible as hearsay.

Not only does Bostic fail to dispute the damages, counsel for Bostic told the jury in his closing arguments that the emergency repair damages should be included, thereby making the admission of the document harmless error, if was error at all. (R. p. 1986, lines 3-19).

> ...there's one other number, I think, that they need to take care of. And that's the emergency repairs, which are a hundred thirty-nine eight hundred eighty-one. We owe them that. I don't know – well, you know, that's up to you. You don't have to award those. I don't know what they're for. It's just a spreadsheet. It could be fixing windows with balls knocked through them. I don't know. But they put them on the list. We don't know what they are, duty they've been submitted as evidence. We'll take their word for it...

In addition, admission of the emergency repair summary if error was harmless for another reason. Plaintiff's total damages at trial were $6,309,197.00, which included the emergency repair number and the future cost to repair. The jury awarded the sum of $5,000,000, well below what Plaintiff requested. Any mistake in inclusion of emergency repairs does not detract from the strength of other evidence of damages. Even if the court improperly submitted the summary, there was sufficient evidence of other damages to support the award. *See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.,* 397 S.C. 348, 376, 725 S.E.2d 112, 127 (Ct. App. 2012) (inclusion of mistaken maintenance records was deemed harmless error since the jury did not award Plaintiff's full damages).

Bostic was also given every opportunity to fully cross-examine Mr. Furnari, who submitted the summary. Bostic also had the right to recall Donna Furnari as a witness if Bostic believed that the summary was somehow inaccurate or unsubstantiated by the evidence. Indeed, Bostic never made that argument at trial nor did Bostic ask either Mr.

Furnari or Ms. Furnari for or about the documents which served as the basis of the summary. (R. p. 1499, line 20-p. 1501, line 24). Finally, contrary to Bostic's contention, Mr. Furnari testified at length that it was he, not Ms. Furnari, who was directly involved in accessing the appropriateness of the emergency repairs, developing the scope of those repairs, hiring the contractors to effect those repairs, and actually being on site while those repairs were being made. (R. pp. 1479-1663). Thus, the admission affords no basis for reversal. *See Allegro, Inc. v. Scully,* 409 S.C. 392, 411,762 S.E.2d 54, 64 (Ct. App. 2014), reh'g denied (Aug. 26, 2014), cert. granted (Apr. 22, 2015) (admission of inadmissible hearsay affords no basis for reversal where the out-of-court declarant testifies at trial and is available for cross-examination).

B. It was proper not to charge compared to fault of the HOA since Bostic offered no proof of HOA Negligence and failed to preserve the issue for appeal.

Finally, Bostic moves for a new trial on the grounds that the Court failed to charge the jury on comparative negligence. To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. *Fairchild v. S. Carolina Dep't of Transp.*, 385 S.C. 344, 351, 683 S.E.2d 818, 822 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012). Jury instruction should be confined to the issues supported by the evidence. *Id.*

First, Bostic has not preserved that issue for appeal because it failed to proffer the charge or make it a part of the trial record. "An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below." *Greenville Mem'l Auditorium v. Martin,* 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990).

Further, while Bostic now asserts that the HOA was negligent, Bostic failed to submit any testimony or evidence establishing the standard of care for the owner controlled HOA or the developer controlled HOA. Correspondingly Bostic did not offer any evidence that that standard of care had been breached or was the proximate cause of any of the damages claimed by Plaintiff. (R. p. 1813, line 3-p. 1814, line 2). Counsel for Bostic never argued to the jury that the owners or the Plaintiff HOA did anything wrong or that they caused the harm for which they sought relief. (R. pp. 1971-2002). In fact, counsel for Bostic argued just the opposite in his closing:

> Nobody wants to keep these people at risk for these buildings any longer than they already have been. Rick Moore, licensed, credible, an engineer, knows how to fix buildings is going to bear the risk with his scope...He will contract with these people. He will make sure that their buildings are fixed.

(R. p. 1976).

Because Bostic failed to prove duty, breach or proximate cause relating to claimed negligence of the HOA, submission of that issue to the jury would have been wholly improper.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court affirm the jury verdict and the orders on appeal.

Respectfully submitted,

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August 22, 2016
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RECEIVED
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Appellate 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, PLAINTIFFS,

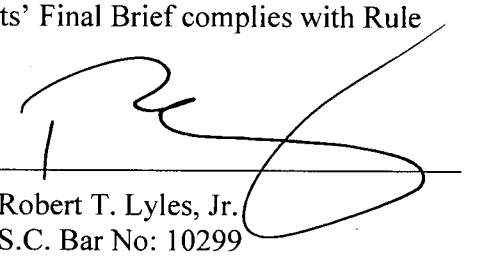
v.

IMK DEVELOPMENT CO., LLC, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARRICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., RICK THEONNES, DEFENDANTS,

OF WHOM BOSTIC BROTHERS CONSTRUCTION, INC. IS THE .....APPELLANT

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondents' Final Brief complies with Rule 211(b), SCACR



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I certify that I have served Final Brief of Respondents Stoneledge at Lake Keowee Owners' Association, Inc. on all counsel of record by depositing a copy of it in the United States Mail, First Class postage prepaid, this 22th day of August, 2016, addressed to the following:

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