THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-000247

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

v.

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

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

INITIAL BRIEF OF RESPONDENT LAKE ESTATES, LLC

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly grant Miller Construction of the Low Country, Inc. directed verdict when The Lake Estates Property Owners Association, Inc. failed to provide any evidence in its case-in-chief that Miller Construction was liable for construction defects?

2. If not, was that granting of directed verdict due to a legal error such that not only should there be a new trial as to Miller Construction of the Low Country, Inc., but there should be a new trial as to all Defendants including those Defendants that tried their case through to jury verdict and who the jury determined were not liable to The Lake Estates Property Owners Association, Inc.?

STATEMENT OF THE CASE

The Lake Estates Property Owners Association, Inc. ("POA") brought this action against Lake Estates, LLC ("Lake Estates"), Warren Flick Estate Builders, Inc. ("Estate Builders"), and Miller Construction of the Low Country, Inc. ("Miller Construction"), among other Defendants, alleging various construction defect related claims.

The parties tried the case before a jury from January 11 to 14, 2016 with the Honorable Brooks P. Goldsmith presiding. At the close of the POA's case-in-chief, Miller Construction moved for and Judge Goldsmith granted a directed verdict because the POA had failed to meet its burden of proving Miller Construction's liability. Trial Tr. 563:24-568:24; 571:3-571:9. Trial continued against Lake Estates and Estate Builders, with the jury granting a defense verdict to both on all causes of action. Trial Tr. 921:13-18; Jury Verdict Form.

On February 9, 2016, the POA served the Notice of Appeal on Lake Estates, Estate Builders, and Miller Construction.

FACTS

This appeal arises from the trial court's grant of directed verdict in favor of Miller

Construction and the subsequent jury verdict in favor of the then-remaining Defendants, Lake Estates and Estate Builders. Brief of Appellant, p. 1.

Appellant POA represents the interests of homeowners in the Lake Estates condominium complex in Bluffton, South Carolina. Second Amended Complaint, ¶¶ 1, 28. Lake Estates developed the condominium complex, and Estate Builders constructed the condominiums between 2006 and 2009 with the assistance of subcontractor Miller Construction, among others. Trial Tr. 249:2-3; 466:4-5. Thomas & Hutton, an engineering firm, performed due diligence work at the site. Trial Tr. 468:20-25; 638:9-12.

By 2010, construction was complete and the units sold. 613:24-614:7. In 2011, Lake Estates' representative transitioned control of the POA to the homeowners. Trial Tr. 274:16-17. In preparation, the homeowners retained John Kern, P.E. to inspect the complex. Trial Tr. 278:10-13. Mr. Kern issued a report outlining alleged construction defects at the complex. Second Amended Complaint, Transition Deficiency Report; Trial Tr. 280:18-281:1. Of relevance to this appeal, Mr. Kern opined that the site grading lacked proper elevation, lacked proper drainage systems, and lacked sufficient finished floor to exterior grade elevations. Second Amended Complaint, Transition Deficiency Report.

The POA proffered, and the court accepted, Mr. Kern as their expert witness at trial. Trial Tr. 358:9 to 358:18. Mr. Kern testified to his "eyeballed" observations of the grading issues. Trial Tr. 361:23-364:22; 366:25-367:5; 370:24-371:5; 371:21-372:4; 373:1-14; 401:7-17.

Mr. Kern also testified that he was never provided a site grading and drainage plan. Trial Tr. 369:15-22. Two homeowners in the POA also testified that they had not seen a copy of any such plans. Trial Tr. 304:8-18 (Tommy Kendall); 497:12-22 (Robert Kimmig). Robert Miller, Miller Construction's 30(b)(6) designee, said that there *had* been a site plan in his deposition testimony that

was read into the record. Trial Tr. 463:21-464:3.

At the close of the POA's case-in-chief, Miller Construction moved for a directed verdict. Trial Tr. 563:24-25. Counsel for Miller Construction argued, *inter alia*, that Mr. Kern had testified that Miller Construction had properly relied on and followed site grading and drainage plans from Thomas & Hutton and the surveyor. Trial Tr. 565:12-18; 566:22-567:5. As such, counsel argued, Mr. Kern testified that Miller Construction did not "do anything wrong." Trial Tr. 565:19-21. The trial court agreed, granting Miller Construction a directed verdict. Trial Tr. 571:3-571:9.

The trial continued against Lake Estates and Estate Builders, whereupon the jury unanimously found they were not liable for the POA's claims. Trial Tr. 921:13-18. As Miller Construction had been dismissed from the case, Miller Construction was not listed on the verdict form as an entity to which the jury could apportion liability, if any. Jury Verdict Form, p.1.

STANDARD OF REVIEW

I. ON A TRIAL COURT'S GRANT OF DIRECTED VERDICT

When ruling on a motion for a directed verdict, the trial court must view the evidence and reasonable inferences drawn from that evidence in a light most favorable to the opposing party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor." *Estate of Carr ex rel. Bolton v. Circle S Enter., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008) (citing *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002)).

"When reviewing the trial court's ruling on a motion for a directed verdict, this Court must apply the same standard as the trial court." *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 34-35, 737 S.E.2d 857, 859-860 (Ct. App. 2013). Neither the trial court nor the appellate court has

authority to consider witness credibility or testimonial conflicts when considering directed verdict motions. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

II. ON A JURY VERDICT

The standard of review of a jury verdict is restricted to corrections of legal error. *Pope v. Heritage Communities., Inc.*, 395 S.C. 404, 411, 717 S.E.2d 765, 769 (Ct. App. 2011). "A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." *Id.* (internal citations omitted).

ARGUMENTS

Appellant POA is correct: this should not be a difficult case. The POA tried to prove that Lake Estates, Estate Builders, and Miller Construction were liable for construction defects at a condominium complex. The POA failed to do so. This appeal is the POA's bid for a second bite at the apple – a new trial as to all Defendants. The POA should not be permitted another bite.

At the outset of trial, the POA attempted to prove, by way of expert testimony, that the site grading lacked proper slope, lacked proper drainage systems, and lacked sufficient finished floor to exterior grade elevations. Yet, their expert's trial testimony did not support these conclusions. Now, the POA points to a missing site grading and drainage plan as evidence of Miller Construction's negligence and breach of the implied warranty of workmanlike service. Brief of Appellant, p. 7. The POA has failed to prove that lack of a site grading and drainage plan is evidence of negligence or a breach of the implied warranty of workmanlike service.

Nonetheless, if this Court determines that granting Miller Construction a directed verdict was reversible error, Lake Estates should not be a required party to the retrial. A jury has found Lake Estates not liable for the POA's alleged damages (if any). Neither the POA nor Miller Construction

would be prejudiced by Lake Estates' absence. Rather, Lake Estates would bear prejudice by having to re-litigate claims against it that have already been resolved by a fully informed jury.

I. BECAUSE APPELLANT FAILED TO PROVIDE EVIDENCE IN ITS CASE-IN-CHIEF OF MILLER CONSTRUCTION'S LIABILITY FOR CONSTRUCTION DEFECTS, THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT AS TO MILLER CONSTRUCTION.

A contractor has a legal duty to (a) build according to applicable building code, (b) build according to industry standards, and (c) refrain from constructing housing that poses a serious risk of physical harm. *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989). Violation of these duties is proof of negligence; violation of applicable building code is proof of negligence *per se*. *Id.*; *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 93, 344 S.E.2d 869, 872 (Ct. App. 1986). Failure to construct a dwelling in a "careful, diligent, workmanlike manner" can also result in a claim for breach of the implied warranty of workmanship. *Kennedy*, 299 S.C. at 344.

The POA sought to prove the Defendants' liability for these claims in four ways via the testimony of their expert Mr. Kern. First, the POA claimed Defendants violated industry standard and applicable building code by not implementing the required grading slope. Trial Tr. 361:23-362:10; 362:16-365:1; 367:22-368:9; 369:23-370:4; 370:13-20; 373:1-14. Second, the POA claimed Defendants violated industry standard and the applicable building code by failing to install sufficient drainage mechanisms. Trial Tr. 367:16-21; 369:3-14. Third, the POA claimed Defendants violated industry standard and the applicable building code by failing to ensure the finished floor elevation was eight inches above the exterior grade. Trial Tr. 366:19-367:5. Fourth and finally, the POA claimed Defendants violated industry standard by not having a grading and drainage plan. Trial Tr. 369:15-22; 370:21-372:4; 372:16-25.

On cross-examination, Mr. Kern first admitted that he had only "eyeballed" the grading slope and that he did not take any measurements to determine whether the slope was compliant with the building code. Trial Tr. 373:1-11; 389:4-9. He also admitted that he was unaware of any damage to the complex as a result of the grading condition. Trial Tr. 405:11-22. Thus, there is no evidence to prove the POA's first claim. Second, Mr. Kern disclosed that he had not investigated the underground drainage system, which was installed to provide an alternative drainage mechanism. Trial Tr. 400:22-401:6. Thus, there is no evidence to prove the POA's second claim. Third, Mr. Kern conceded that the industry standard requiring eight inch finished floor to exterior grade elevation applied only to wood-frame buildings, not metal-framed and concrete-sheathed buildings like the condominiums. Trial Tr. 387:9-388:9; 402:10-403:9. Nonetheless, Mr. Kern maintained that eight inches is the industry standard regardless of framing. Trial Tr. 416:1-5. However, when advised that the finished pad elevations were set by Thomas & Hutton, the engineer, Mr. Kern agreed that Miller Construction's reliance on Thomas & Hutton's plans was justifiable and that he would not "take any issue with what Miller Construction did on this job." Trial Tr. 417:21-418:12. Thus, there is no evidence to prove the POA's third claim.

In the face of its expert's concessions, Appellant POA now hangs its hat on the fourth and final alleged violation of industry care – failure to have a site grading and drainage plan. Trial Tr. 556:3-6; 558:8-12; 569:11-16; 570:16-20; Brief of Appellant, pp. 7, 12-14. Yet, Mr. Kern's testimony does not establish that the building code requires a site grading and drainage plan, that having such a plan is industry standard, nor that failure to have a plan poses a serious risk of physical harm. He said the lack of a plan "boggle[d his] mind." Trial Tr. 369:15-22. But, he ultimately agreed that a contractor could competently grade a site without a site grading and drainage plan. Trial Tr. 372:16-25.

Even if there was evidence that the lack of a site grading and drainage plan was a breach of the implied warranty of workmanship, which Mr. Kern's testimony was insufficient to prove, the POA could not bring that claim against Miller Construction. "[T]he warranty of workmanlike service arises out of the construction contract." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E2d 67, 71 (2008). As the homeowners did not contract with any subcontractor, they cannot sustain a claim for a breach of the implied warranty of workmanlike service against subcontractor Miller Construction.

Appellant is correct that there is a fact question as to whether such a plan existed for this site. Mr. Kern and two homeowners testified they had never seen a copy of any plans. Trial Tr. 369:15-22; 304:8-18; 497:12-22. Mr. Miller testified that there had been a site grading and drainage plan. Trial Tr. 463:21-464:3. Regardless, the trial court did not need to determine the credibility of any witness as to the existence of a site plan; there is no testimony in the record nor case law cited for the proposition that failure to have a site grading and drainage plan is evidence of negligence, negligence *per se* or breach of the implied warranty of workmanship. Thus, whether a site plan actually existed is not determinative of liability.

As there was no competent evidence provided by the POA of Miller Construction's liability, the trial court properly granted directed verdict to Miller Construction.

II. BECAUSE A JURY FOUND THAT LAKE ESTATES AND ESTATE BUILDERS WERE NOT LIABLE TO APPELLANT, THEY SHOULD NOT BE PARTY TO ANY RETRIAL.

Even if this Court concludes that the trial court's grant of directed verdict to Miller Construction was reversible error, the remedy is not a new trial that includes Lake Estates and Estate Builders. A jury has determined that Lake Estates and Estate Builders were not liable for the POA's alleged damages. To permit a retrial would improperly give the Appellant POA another bite at the apple.

A. Lake Estates' presence at any retrial is not necessary for a just result.

Appellant POA states that "A straightforward application of [South Carolina's Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to 70] leads to the conclusion that if three defendants have potential liability on the same claims, the wrongful dismissal of one defendant will require a new trial as to all defendants," citing *Roddey v. Wal-Mart Stores E. LP*, 415 S.C. 580, 784 S.E.2d 670 (2016). Brief of Appellant, p. 14-15.

This statement – whether or not a correct assessment of the General Assembly's legislative intent – and the *Roddey* case are inapposite to the situation here. In *Roddey*, a woman attempted to shoplift clothing from Wal-Mart. *Roddey*, 415 S.C. at 583. A Wal-Mart employee noticed her and alerted the store's on-duty security guard, who worked for an independent security contractor. *Id.* There was conflicting testimony as to what the Wal-Mart employees instructed the security guard to do next. *Id.* What he did do was engage in a high-speed chase beyond the store's parking lot with the plaintiff, who was driving the "get-away" car, ending in the plaintiff's fatal car accident. *Id.* at 584-589.

The plaintiff's estate filed suit against the security guard, his employer, and Wal-Mart. *Id.* at 584. At the conclusion of the estate's case-in-chief, Wal-Mart moved for a directed verdict, which the trial court granted. *Id.* at 587. The trial continued against the remaining defendants. The jury found that the plaintiff herself was sixty-five percent at fault and that the security guard and his employer collectively were thirty-five percent at fault. *Id.* at 587. Thus, the estate was unable to recover against the remaining defendants as a result of the plaintiff's own comparative negligence. *Id.*; S.C. Code Ann. § 15-38-15(A).

The South Carolina Supreme Court reversed the directed verdict against Wal-Mart and ordered a retrial with all defendants, including the security guard and his employer. *Roddey*, 415 S.C.

at 592. But the retrial was not ordered, as Appellant POA claims, "even though[] the jury found in favor of the [remaining] defendants." Brief of Appellant, p. 15. The jury had found that the remaining defendants liable for the plaintiff's injury, just not enough to overcome the plaintiff's own comparative negligence as required by S.C. Code Ann. § 15-38-15(A). *Roddey*, 415 S.C. at 587-88.

The Supreme Court justified the order for a retrial, despite the jury's appropriation of greater than 50% of the negligence to plaintiff, because "it is impossible to know what would influence the jury's comparison if the jury was permitted to consider Wal-Mart's [the defendant improperly granted the directed verdict] liability." *Id.* at 592, n.4; but see, *id.* at 593 (Pleicones, C.J., dissenting).

In *Roddey*, the presence of all defendants was necessary in a retrial to figure out how to "cut the pie." Here, there is no pie. The jury did not find that Lake Estates or Estate Builders was liable for the POA's alleged damages at all, and there was no jury charge or space on the special verdict form for contributory negligence. Jury Verdict Form; Trial Tr. 898:11-916:3. Since a jury has determined that Lake Estates and Estate Builders are not liable, a jury cannot apportion damages to them. S.C. Code Ann. § 15-38-15(C) ("The jury . . . shall . . . where there is a verdict . . . for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict . . . the percentage of liability that proximately caused the indivisible injury, death, damage to property . . .") (Emphasis added.). A comparative negligence situation like in *Roddy*, is very different from this situation where no liability at all was put on the remaining defendants. Thus, the presence or absence of Lake Estates and Estate Builders would have no influence on the jury's apportionment of fault, as they bear no fault at all.

B. Lake Estates' absence in any retrial would not limit or mislead the jury.

Because Miller Construction was not at its "rightful place at the defendants table," Appellant POA claims that the jury was left with an "all or nothing" choice. Brief of Appellant, p. 15; *Williams*

v. Slade, 431 F.2d 605, 609 (5th Cir. 1970). The crux of Appellant's argument is that a jury "may have felt it was inequitable to place 100% of the blame on the combination of Lake Estate or Estate Builders." Brief of Appellant, p. 7. This is a false dichotomy that misleads as to the facts of this case and underestimates a jury's options.

Miller Construction was still a party to the lawsuit when the POA presented its case-in-chief, so the jury heard all of the evidence the POA intended to present against Miller Construction. If the jury had felt Miller Construction should have borne most of the liability but was unable to assess that liability since Miller Construction was no longer a party to the lawsuit, the jury could have assessed liability to Lake Estates and Estate Builders but only awarded minimal, *pro forma* damages. Juries can and do exercise this option. See *Cartin v. Keller Bldg. Prod. of Charleston*, 299 S.C. 152, 154, 382 S.E.2d 922, 923 (1989) (jury found defendant liable in slip-and-fall case, but only awarded $1 in damages; Supreme Court upheld the award as evidence that the jury found "a close intertwining of the issues involving liability and damages"). Alternatively, the jury could have awarded only a portion of the damages to the remaining defendants. Yet the jury here did not elect those options; the jury found Lake Estates and Estate Builders entirely without liability. The absence of "protest damages" indicates that the jury did not feel Miller Construction's absence at the defense table affected their ability to assess Lake Estates' and Estate Builders' liability.

C. Lake Estates' absence in any retrial would not prejudice Miller Construction.

Furthermore, to the extent Appellant POA argues that Miller Construction would be prejudiced if Lake Estates and Estate Builders are not a party to any retrial, the apportionment statute provides sufficient redress. Pursuant to S.C. Code Ann. § 15-38-15(D), Miller Construction would retain the right to assert that non-parties contributed to the POA's alleged damages. See *Fagnant v. K-Mart Corp.*, 2013 WL 6901907 at *5 (D. S.C., Dec. 31, 2013) (interpreting subsection (D) as a

codification of a defendant's right to assert an "empty chair" defense at trial). Thus, Lake Estates' and Estate Builders' actual presence in the litigation is not necessary to ensure Miller Construction is not held liable for any act or omission by Lake Estates or Estate Builders. This result does not erode the common law tenet that "a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010). The POA determined Lake Estates and Estate Builders should be parties to this case when it filed suit against them.

Appellant POA's true goal in seeking a retrial is to get a second bite at the apple – to again try to prove that Lake Estates and Estate Builders are liable for the POA's damages. Yet the POA has already had a full and fair opportunity to do so. Lake Estates and Estate Builders should now be able to avoid the harassment of relitigation. Judicial economy will also be served by omitting Lake Estates and Estate Builders from an order for retrial, if any. If retrial is required to assess Miller Construction's liability (which Lake Estates expressly objects to), the inclusion of innocent co-defendants would needlessly complicate and elongate that action.

Finally, Appellant POA argues that allowing Miller Construction to stand as the sole defendant in any retrial would "throw the case out of proper perspective [for the jury]." Brief of Appellant, p. 15. Appellant POA underestimates a jury's competence. We often call upon juries to assess liability when there is an empty chair defendant, when a joint tortfeasor settles before trial, or when a joint tortfeasor has some affirmative defense or enjoys sovereign immunity. See, e.g., *O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 495-96, 309 S.E.2d 776, 780 (Ct. App. 1983) ("There is no reason to believe the jury was confused on the point [that one who is injured by the wrongful act of two or more joint tortfeasors has the option of bringing an action against either one or all of them]. . . We do not believe a jury of ordinary understanding would have missed the

point.") This situation is no more complex, and a South Carolina jury is certainly capable of putting any retrial in the "proper perspective."

D. The justifications for allowing a retrial that includes defendants who had been found not liable at trial do not apply here.

To be sure, Appellant POA does cite to case law, albeit from foreign jurisdictions, in which courts, finding reversible error in the dismissal of one defendant, permitted a retrial that included defendants who had been found not liable at trial. See *Gandi v. Dormitory Auth.*, 856 N.Y.S.2d 268, 50 A.D.3d 1303 (N.Y. App. Div. 2008); *Buffet v. Vargas*, 1996-NMSC-012, 121 N.M. 507, 914 P.2d 1004; *Williams*, 431 F.2d 605; *Robinson v. Terminal Freight Transp., Inc.*, 2 A.D.2d 510, 156 N.Y.S.2d 856 (N.Y. App. Div. 1956).

Yet we need not look outside the State of South Carolina for guidance on this issue as there is applicable South Carolina Supreme Court case law. In *S.C. Fed. Credit Union v. Higgins*, the Court found that it was permissible to order a retrial as to all defendants except for Higgins, who was dismissed at the conclusion of evidence. 394 S.C. 189, 191 n. 1, 714 S.E.2d 550, 552 (2011). This was true even though the remaining parties would be required to litigate the issue of Higgins' capacity in the contractual dispute. *Id.* Granted, Higgins' dismissal was not challenged on appeal as Miller Construction's directed verdict is challenged in this appeal, but the *Higgins* decision illustrates that a just retrial need not include all defendants.

Indeed, some other jurisdictions hold, as a matter of law, that "when one defendant is not found negligent by the jury, and an appeals court leaves that finding intact, remand is improper for the defendant whose liability in negligence has been determined." *Methodist Hosp. of Dallas v. Sullivan*, 714 S.W. 2d 302, 303 (Tex. 1986); see also, *Samuelson v. McMurtry*, 1996 WL 507314 at *10 (Tenn. Ct. App., Sept. 6, 1996), *aff'd* 962 S.W.2d 473 (Tenn. 1998) ("courts have held that

plaintiffs should not receive a second bite at the apple and that exonerated defendants should not be part of the second trial if a new trial is granted"; adopting this view).

Even those cases cited by Appellant POA to support a full retrial do not grant retrial automatically as to all defendants. The *Buffet* court adopted the following test, which best summarizes the over-arching standard for retrial: "the test for determining whether a party can be excluded from an order for a new trial is whether there is a clear showing that the issues in the case are so distinct and separable that a party may be excluded without prejudice." *Buffet*, 914 P.2d at 1010 (citing *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 683, 827 P.2d 656, 682 (1992)).

In fact, South Carolina courts apply this same "distinct and separable" analysis to determine the appropriateness of a retrial on different issues: "where there are distinct jury issues, and the issue as to which a new trial is required is separate from all other issues, and the error requiring new trial does not affect the determination of any other issue, the scope of new trial may be limited to the single issue." *Industr. Welding Supplies, Inc. v. Atlas Vending Co., Inc.*, 276 S.C. 196, 201, 277 S.E.2d 885, 887 (1981) (allowing retrial of damages issue after question of liability already resolved), overruling *S.C. Elec. & Gas Co. v. Aetna Ins. Co.*, 233 S.C. 557, 106 S.E.2d 276 (1958). It follows, then, that a South Carolina court would apply this test to determine whether the acts of non-liable defendants are separate and distinct from all others such that those defendants are not required to be a party to retrial.

If so, the next question is what acts are "separate and distinct" such that they do not require all defendants to be retried because of an error in dismissing one of them? One category is clearly not: all the cases cited by Appellant POA are personal injury cases wherein the actions of multiple tortfeasors – or the plaintiffs themselves – cause one single injury to the plaintiff's person. See *Gandi*, 856 N.Y.S.2d at 270 (slip-and-fall against multiple defendants); *Buffet*, 914 P.2d 1004

(automobile accident wherein the plaintiff's estate brought a wrongful death action against owner of the vehicle she collided with, the owners of a bar where the defendant driver had been drinking, and an off-duty police officer); *Williams v. Slade*, 431 F.2d 605 (automobile accident wherein plaintiff passenger alleged negligence of her driver and driver of the auto they collided with); *Robinson*, 2 A.D.2d 510 (automobile accident implicating proximate cause as to two defendant drivers and contributory negligence of the plaintiff).

In a recent case, the Eleventh Circuit Court of Appeals summarized the reasoning behind these cases, considering *Williams v. Slade* specifically, and distinguished them from its case at bar:

> *Williams* involved one claim against two defendants, either one of whom, or both of whom, could have been held liable as to that claim. In that case, the district court granted a directed verdict in favor of one of the defendants, and the jury then rendered a verdict in favor of the remaining defendant.
>
> On appeal, this Court held that the district court erred in granting the directed verdict. This Court determined that a retrial as to both defendants had to be held because the jury verdict in favor of the remaining defendant could have been infected by the directed-verdict error. This Court determined that "the jury was deprived of the opportunity to adjudge the responsibility of both [defendants] together and was left with only an all or nothing choice as to [the remaining defendant].
>
> Unlike *Williams*, the instant case involved two independent claims against two defendants. Edwards's excessive-force claim against Shanley did not rise or fall with whether Lovett was held liable on the failure-to-intervene claim. And, there was no risk of the jury being faced with the all or nothing choice described in *Williams* because only Shanley could be held liable for the excessive-force claim: not Lovett. Because Shanley's liability was not dependent on Lovett's liability, Edwards has not shown that the claimed error infected the jury verdict in favor of Shanley.

Edwards v. Shanley, 580 Fed. Appx. 816, 829 (11th Cir. 2014) (internal citations omitted).

The situation here is similarly distinguishable from the line of cases cited by Appellant POA.

Lake Estates, Estate Builders, and Miller Construction all had separate and distinct roles in the construction and development of the complex. They contractually delineated their relationships such that each party was responsible for a separate scope of work. Trial Tr. 459:3-460:7; 462:2-464:13; 467:2-15; 641:8-10. Nor did the POA plead amalgamation between these entities. Second Amended Brief; Trial Tr. 862:3-12.

While, arguably, there could be some overlap in the work of Estate Builders and Miller Construction since both were involved in the actual construction of the complex, the same cannot be said for Lake Estates. Lake Estates was the complex's developer and did not perform construction work. As counsel for Estate Builders argued at trial, in support of his motion for a special verdict form, "[t]he developer is responsible for the plans; the builder is responsible for building.... And so they have to stand as separate legal entities, and they have different duties. One is for the development of the plans, and one is for the actual construction work." Trial Tr. 862:5-17.

Counsel did concede that "if the jury decides they can't tell the difference, then they can do 50/50, if they want," referring to apportionment. Trial Tr. 862:18-20. Yet his earlier argument is better reasoned. Developers, general contractors, and subcontractors are commonly understood to have different duties on a jobsite.

In addition, the POA's alleged injuries are not an indistinguishable whole, as they are in a garden-variety personal injury claim. The POA's Second Amended Complaint alleged specific areas of defects that are distinguishable from one another. Second Amended Complaint. The parties had different scopes of work, so the "actor" on any one area of the complex can be easily identified. Since Lake Estates was not involved in the actual construction of the complex, its role – and any injury as a result of its performance – in the development is even easier to distinguish.

Lake Estates maintains, and the jury verdict confirms, that it is not liable for the POA's

alleged damages. If a retrial is ordered by this Court, Lake Estates need not be a party to that lawsuit for a just result. Lake Estates' role in the construction and development of the complex is distinct and separable from Miller Construction's role. A jury has already determined that, in its role, Lake Estates did not damage the POA. Ordering a retrial that includes Lake Estates would improperly give the Appellant POA another bite at the apple to try again to prove Lake Estates' liability and resulting damages. And there is no reason to do so here.

E. Lake Estates would be prejudiced by a retrial.

Thus far, we have addressed how the POA and Miller Construction would not be prejudiced by Lake Estates' absence at any retrial. But how would Lake Estates be prejudiced if it was required to be a party at a retrial?

This lawsuit has been going on since June 11, 2012. Lake Estates and its counsel have expended great time and energy in its defense. All to their ultimate benefit, as a jury found in Lake Estates' favor after a four day trial. Lake Estates has run the gauntlet successfully, and should not be required to do so again because of an error outside of its control. In fact, should the Court determine a retrial is appropriate, Lake Estates would bear the brunt of that prejudice as a previously determined non-responsible defendant forced to prove its case once again through no fault of action of its own. At a certain point, defendants are entitled to closure. For Lake Estates, that time has come.

CONCLUSION

As the POA failed to prove Miller Construction's liability in its case-in-chief, this Court should uphold the directed verdict as to Miller Construction. If this Court instead decides to overturn the directed verdict and remand the case for retrial, Lake Estates should not be a required party to

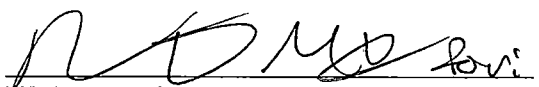
that retrial as it had a separate and distinct role in the construction and development of the complex from Miller Construction. The issues on appeal should therefore be answered as follows and the trial court should be AFFIRMED.

1. Did the trial court properly grant Miller Construction of the Low Country, Inc. directed verdict when The Lake Estates Property Owners Association, Inc. failed to provide any evidence in its case-in-chief that Miller Construction was liable for construction defects?

2. If not, was that granting of directed verdict due to a legal error such that not only should there be a new trial as to Miller Construction of the Low Country, Inc., but there should be a new trial as to all Defendants including those Defendants that tried their case through to jury verdict and who the jury determined were not liable to The Lake Estates Property Owners Association, Inc.?

Respectfully submitted,

This 26th day of September, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **BRIEF OF RESPONDENT LAKE ESTATES, LLC** by depositing a true copy of same in the U. S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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