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., ... Appellant,

v.

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

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

BRIEF OF RESPONDENT ESTATE BUILDERS, INC.

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STATEMENT OF ISSUES ON APPEAL

I. If the trial court erred in granting Miller Construction of the Low Country, Inc.'s directed verdict, does this error require a new trial against Estate Builders, who was exonorated by the jury?

STATEMENT OF THE CASE

The Plaintiff/Appellant, Lake Estates POA ("POA") brought suit against many Defendants alleging various construction defects at the Lake Estates coach home project (the "Project"). By the time of trial, the remaining Defendants were the developer, Lake Estates, LLC ("Developer"); the builder, Estate Builders, Inc.("Estate Builders"); and the the rough grading subcontractor, Miller Construction of the Lowcountry, LLC ("Miller Construction"). The case was tried for four days from January 11-14, 2016. At the conclusion of the Plaintiff's case, all of the remaining Defendants moved for directed verdicts. The trial judge denied the motions of the Developer and Estate Builders, and granted Miller Construction's motion. At the conclusion of the trial, the jury returned a verdict for the Developer and Estate Builders. The POA's notice of appeal appealed the jury verdict, the granting of summary judgment to several individuals, and the directed verdict in favor of Miller Construction. However, the POA's initial brief appeals only Miller Construction's directed verdict. As the other issues were not briefed, they have been abandoned. The sole remaining issue for Estate Builders is the POA's argument that if the Court reverses the directed verdict as to Miller Construction, then the court must also set aside the jury verdict in favor of Estate Builders.

STATEMENT OF FACTS

The Plaintiff's representative Tom Kendall testified that in 2009 and 2010, several of the homeowners began to have concerns about the Project.[1] The two main concerns were the site grading and drainage, and roof truss issues.[2] The owners retained an engineer, John Kern, to perform an evaluation of the common areas and prepare a report on the deficiencies.[3] Mr. Kern produced a report in October or November, 2010.[4]

I. ROOF TRUSSES

The Plaintiff's Engingeer, John Kern, testified on direct examination that there was inadequate truss bracing in the attic, and additional bracing was needed to make the buildings safe.[5] He reviewed the truss drawings and inspected the attic, and the bracing he witnessed in the attic was "not even close" to matching the truss shop drawings he reviewed.[6] He said that if the as-built conditions make the required bracing impossible, then the builder should contact the truss manufacturer about alternatives to provide bracing.[7]

On cross-examination, Mr. Kern was shown construction documents that memorialized a meeting with the construction crew and the truss manufacturer. Mr. Kern changed his previous opinion, and testified that based on those documents, it appears as if the trusses in the attic might have been installed properly.[8]

II. GRADING AND DRAINAGE

A. Code Violations

[1] Tr. P.267, l.17-21.
[2] Tr. P.279, l.5-11.
[3] Tr. P.274, l.8-12.
[4] Tr. P.280, l.21-281, l.1.
[5] Tr. P.378, l.3-20.
[6] Tr. P.377, l.14-P.378, l.2.
[7] Tr. P.378, l.21-P.379, l.1
[8] Tr. P.413, l.24-P.415, l.1.

Mr. Kern believed the grading and drainage at the Project violated two building code sections.[9] One was that the finished floors of the buildings were not eight inches above grade, and the other was that there was not six inches of slope in the first ten feet of grade away from the buildings.[10]

1. Finished Floors not above Grade

Mr. Kern testified that code section 2304.11.2.2 of the IBC requires the eight-inch differential between the height of the finished floors and the height of the exterior grade.[11] He acknowledged the code section applied to wood framing and sheathing only, and he testified he believed there was wood sheathing on these buildings.[12] Mr. Kern was shown a photograph taken during construction that showed the sheathing on the buildings was actually gyp board, not wood. He then changed his opinion and testified that this code section was not applicable to this project.[13]

2. Six Inches of Slope Over Ten Feet

Mr. Kern testified that IBC code section 1084.3 prescibes a slope of six inches over the first ten feet away from the buildings, "unless there's an approved alternative method to divert water away from structures."[14] Mr. Kern did not investigate the underground drainage system.[15] Mr. Kern was not involved in the extensive grading and drainage work that took place from 2012 to 2014.[16] Mr. Kern did not give an opinion on whether the drainage system that existed on this project would constitute and "approved alternate method" under the code section.

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[9] Tr. P.386, l.20-23.
[10] Tr. P.386, l.24-P.387, l.25
[11] Tr. P.387, l.9-25.
[12] Tr. P.401, l.18-25.
[13] Tr. P.403, l.2-6.
[14] Tr. P.386, l.24-P.387, l.8.
[15] Tr. P.401, l.4-6.
[16] Tr. P.340, l.21-P.341, l.6.

The Defendants' expert, Al Schweickardt, testified that to a reasonable degree of engineering certainty, the drainage pipes installed on this project are an "approved alternative method" under code section 1084.3.[17] The builder, Estate Builders, the developer, Lake Estates, LLC, the master developer, Reed Development, and the master developer's engineering firm, Thomas & Hutton, were involved in determining the location of the drainage pipes, and Mr. Shcweichardt opined that when all of these people are involved in a decision on a project, he would not expect there to be a drawing showing the change in location of the pipes. If all of them agreed based on oral discussions, this would constitute an "approved alternate method" for the purposes of the code.[18] He also testified that by involving all of the people on the email in the decision about the drainage pipes, Estate Builders met its duty of care.[19]

B. Kern's Visual Inspection Methodology

Mr. Kern testified that he did not take any measurements at the site.[20] Based off of his visual inspection of the site alone, he recommended as a repair scope removing all of the landscaping, driveways, courtyards, and sidewalks, as well as twelve inches of soil, and re-grading the entire project.[21]

Mr. Schweickhardt testified that a visual observation was not a valid investigation methodology to recommend a complete re-grade of the site, and he said, at a minimum, an engineer should use a contractor's level to take some initial measurements.[22] Mr. Schweickhardt opined that before a valid repair scope could be produced, a topographic survey must be done to determine what areas had sufficient slope and where problems

[17] Tr. P.681, l.24-682, l.4.
[18] Tr. P.682, l.5-P.684, l.16.
[19] Tr. P.684, l.5-13.
[20] Tr. P.389, l.4-9.
[21] Tr. P.380, l.10-13.
[22] Tr. P.679, l.4-16; Tr. P.681, l.4-23.

existed.[23] Mr. Schweickhardt testified that standing water and soggy grass is not a construction defect in the Lowcountry of South Carolina.[24] He admitted that some isolated areas may need repairs, but he had not seen any evidence to suggest that the entire site needed to be re-graded.[25]

C. Drainage System

From 2012 to 2014, the board did "major work" on the drainage issues.[26] The POA did not claim any of this work as damages in the case. Some of the gutter downspouts were overflowing.[27] Mr. Kendall did not record which gutters had problems and which did not, but he believed the gutter mapping the POA performed would have these numbers.[28] He was shown the mapping documents indicating only four downspouts were backing up, and he did not have any documents showing additional propblems.[29]

During the repairs, the POA discovered some of the underground drain pipes had been crushed, some did not have pop-ups, some pop-ups that had been covered by grass and dirt, the outlet of some drain pipes couldn't be located, and the French drains had been covered over with sod, but Mr. Kendall did not know how many of these conditions existed, where they were, or who caused these problems.[30] Mr. Kendall could not identify any specific areas that were still experiencing problems after the repair work.[31] He admitted that after the work, "In most areas, (the drainage system) is functioning."[32] The POA's other representative, Bob Kimmig, testified that the water pooled in his

[23] Tr. P.679, l.4-16; Tr. P.681, l.4-23.
[24] Tr. P.687, l.16-24.
[25] Tr. P.706, l.4-P.707, l.4.
[26] Tr. P.295, l.5-22.
[27] Tr. P.310, l.23-P.311, l.2.
[28] Tr. P.311, l.3-P.
[29] Tr. P.315, l.22-P.316, l.4.
[30] Tr. P.318, l.7-18; P.319, l.8-24; Tr. P.320, l.12-P.321, l.13.
[31] Tr. P.332, l.6-18; Tr. P.336, l.22-23.
[32] Tr. P.342, l.4-15

courtyard before the repairs, but the repairs corrected this.[33] Mr. Kimmig was aware of one building in twelve that was still having some gutter problems at the time of trial.[34] He admitted that grass over the pop-ups was a maintenance issue.[35]

Mr. Kendall could not state what landscaping died from overwatering versus from other problems.[36] He said his landscaper could state what plants died from excessive water, but he admitted the landscaper was not present to testify.[37] The POA installed a good amount of landscaping in 2012 by and large, that landscaping was still alive at the time of Mr. Kendall's deposition in 2013.[38]

Mr. Kimmig admitted that he did not take any pictures showing standing water at the project.[39] Mr. Kendall testified he did not have any pictures of the dead and dying plants.[40] He did not have any pictures to present to the jury showing standing water.[41] Mr. Kendall testified that if a person visited the property after a significant rainfall, the person would understand the issues. He acknowleged that if he had taken pictures of the issues, a person would understand the issues too, but he didn't take any pictures of the issues.[42] Mr. Kern did not have any pictures or other documentation of dead landscaping either.[43] The POA put into evidencr eight black and white pictures of puddles in the driveways during the cross examination of Mr. Flick.[44] Theres photographs were taken

[33] Tr. P.497, l.1-11
[34] Tr. P.509, l.5-10.
[35] Tr. P.506, l.8-P.507, l.17
[36] Tr. P.331, l.3-8.
[37] Tr. P.331, l.3-8.
[38] Tr. P.327, l.3-12.
[39] Tr. P.516, l.5-10.
[40] Tr. P.320, l.4-6
[41] Tr. P.320, l.4-11
[42] Tr. P.338, l.8-20
[43] Tr. P.405, l.11-19.
[44] Tr. P.614, l.8-24., Plaintiff's Exhibit 18.

in 2009, before any repairs were performed. Mr. Schweickhardt testified that the puddles in the pictures did not constitute a construction defect.[45]

Mr. Kendall testified that the board was not going to tear out everything to make the repairs.[46] This contradicts the scope of repairs. Mr. Kendall testified the board wanted protection from the problems that still existed and future problems, but he did not know what problems still existed.[47]

D. Elevator Shafts

Mr. Kendall knew two elevator shafts leaked while he was board president from 2012 to 2014, and they had both been fixed.[48] Mr. Kendall took pictures of the elevator shafts, but he did not introduce them at trial.[49] Mr. Kimmig testified that in total, three elevator shafts had leaked, and all three had been repaired.[50] There has never been a report of watere entering into the main living area of the homes.[51]

E. Repair Estimate

Mike Collins provided produced a repair estimate to re-grade the entire project according to Mr. Kern's scope. When he first emailed the estimate to Mr. Kern, he stated in his email, "Please note that the site grading estimate was done without the benefit of a topographic survey. This could seriously affect the cost and this estimate must be carefully reviewed one final engineering is completed."[52] Mr. Collins would not do the grading work without a topo, and the estimate was not "reasonably certain" without a

[45] Tr. P.696, l.7-12.
[46] Tr. P.335, l.9-22
[47] Tr. P.336, l.16-24.
[48] Tr. P.333, l.11-15.
[49] Tr. P.333, l.21-25.
[50] Tr. P.512, l.6-12.
[51] Tr. P.514, l.12-14
[52] Tr. P.444, l.2-7

topo.[53] This testimony supported Mr. Schweickhardt's testimony that a topo was necessary to determine the repair scope, and it called into question the validity of the repair estimate. Mr. Kendall's testimony that the board did not intend to rip out everything also casted doubt on both the scope and the repair estimate.

F. Site Plan

The evidence showed that Developer was solely responsible for the plans on this project, including the site plan. The design guidelines between the developer, and Hampton Lakes, the master developer, specified that the developer was responsible for providing a site plan.[54] Several documents were marked indicating ongoing discussions between the developer and Hampton Lakes concerning the grading plan, including emails from the Developer's representative, Warren Flick, indicating that Gary Sandor with Hampton Lakes had the grading plan in its possession.[55] Mr. Flick was shown a stack of invoices from Coastal Surveying indicated that Coastal Surveying charged the Developer for "Stake-Out for Grade" for eleven of the twelve lots on the project.[56] Mr. Flick testified that Lake Estates paid these invoices, and account ledgers showed the check numbers for the payments.[57] Russell Miller, who was a member of the Developer at the time of the grading and the owner of Estate Builders, testified that the Developer was responsible for the design and plans and Estate Builders was responsible for the construction.[58]

[53] Tr. P.447, l.24-P.448, l.23
[54] Tr. P.585, l.14-24.
[55] Tr. P.591, l.21-P.595, 1.1; Def. Ex. 11.
[56] Defendants' Exhibit 16.
[57] Tr. P.631, l.21-P.637, l.10.
[58] Tr. P.740, l.6-11.

The Plaintiff presented evidence to the jury that there should have been a site plan for this project, and the Plaintiff presented evidence that no site plan existed. This evidence is well-summarized in the Plaintiff's brief.

Robert Miller, the representative for Miller Construction, testified that a surveying company, Coastal Surveying, set grade stakes at the project, Miller Construction pushed the dirt to within a few inches of the stakes, and then Coastal Surveying came back out and set the final grade with a gps.[59] Invoices admitted through Warren Flick showed that Miller Construction paid Coastal Surveying for "CAD operator" and "stake out for fill" on the lots.[60] Robert Miller said that Miller Construction would slope the dirt from the slab down to the road in the front and from the slab to the lake in the rear.[61] Miller Construction relied on Coastal Surveying to set the grade heighth.[62] Miller Construction was not responsible for the final grade.[63] The final grade sets the final flow of the water.[64]

Russell Miller testified the Estate Builders was responsible for overseeing the subcontractors, including Miller Construction.[65] Russell Miller testified that to meet this duty, Estate Builders relied on Coastal Surveying to use their lasers and computers to make sure that the grade was correct.[66] Coastal Surveying had a licensed engineer on staff.[67] Coastal Surveying was on the job once a week during the rough grading checking everything.[68] Mr. Flick testified that the upstream developer, Hampton Lakes, was involved in re-routing the gutter drain pipes, and they signed off on the new location of

[59] Tr. P.655, l.14-P.656, l.1.
[60] Defendants' Exhibit 15.
[61] Tr. P.661, l.7-25.
[62] Tr. P.662, l.17-21.
[63] Tr. P.664, l.8-11.
[64] Tr. P.666, l.13-14.
[65] Tr. P.742, l.4-8.
[66] Tr. P.742, l.9-P.743, l.1.
[67] Tr. P.743, l.3-8.
[68] Tr. P.744, l.3-11.

the pipes.[69] Mr. Schweickhardt opined that the drain system was an alternate approved method of diverting water away from the site, which is allowed by code instead of the minimum slope.[70]

During the cross-examination of the Defendants' expert engineer, Al Schweickhardt, Plaintiff's counsel represented to Mr. Schweickhardt that he subpoenaed DHEC, Beaufort County, and the surveyor, Coastal Surveying, and none of them had the site plan.[71] There was no testimony in the case that Plaintiff's counsel sought to get a site plan from the upstream developer, Hampton Lakes, and during deliberations, the jury specifically asked if the Plaintiff went to Hampton Lakes and requested a copy of the site plan.[72]

STANDARD OF REVIEW

Rule 59(a) of the South Carolina Rules of Civil Procedure provides, "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State."

"The Trial Judge has inherent power to award a new trial and is necessarily vested with wide discretion in deciding whether the verdict of the jury should be permitted to stand. However, the exercise of such discretion is not absolute and it is the duty of this Court, in a proper case, to review and determine whether there has been an

[69] Tr. P. 598, l.18-P.600, l.6.
[70] Tr. P.682, l.5-P.684, l.16.
[71] Tr. P.703, l.16-P.704, l.11.
[72] Tr. P.917, l.19-20.

abuse of discretion, amounting to error of law." Williams v. Williams, 246 S.C. 158, 161, 142 S.E.2d 858, 860 (1965). "The discretionary power of granting new trials should always be exercised so that injustice will not be done, if it can be avoided. Williams v. Williams, 246 S.C. 158, 162, 142 S.E.2d 858, 860 (1965).

South Carolina has never addressed the precise issue presented here. However, when deciding whether to order a new trial as to damages alone, "This Court has succinctly articulated the rule by which the trial court is to be guided in granting a new trial on a single issue as follows: '... 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 a new trial does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue'." Cartin v. Keller Bldg. Prod. of Charleston, 299 S.C. 152, 153, 382 S.E.2d 922, 923 (1989) (citing Industrial Welding Supplies, Inc. v. Atlas Vending Co., Inc., 276 S.C. 196, 277 S.E.2d 885 (1981)). When deciding whether to whether to allow a verdict to stand against one co-defendant when the other co-defendant was dismissed by post-trial motion, South Carolina has held, "Absent special circumstances... the general rule of modern law is as follows: 'Although the early common-law rule was different, in most jurisdictions today, a judgment against multiple tortfeasors may be reversed as to one such defendant without affecting the judgment as to the others...'." Gray v. Green Const. Co. of Indiana, 263 S.C. 554, 558–59, 211 S.E.2d 871, 874 (1975).

ARGUMENT

I. If the Court reverses the directed verdict in favor of Miller Construction, the Court should remand the case to the trial judge to decide whether to grant a new trial absolute or a partial new trial

The trial court has discretion to determine whether a new trial absolute or a partial new trial is proper. As stated above, "The Trial Judge has inherent power to award a new trial and is necessarily vested with wide discretion in deciding whether the verdict of the jury should be permitted to stand." Williams v. Williams, 246 S.C. 158, 161, 142 S.E.2d 858, 860 (1965). Additionally, "The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court should grant him broad deference on this issue." State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (Citing State v. Johnson, 248 S.C. 153, 149 S.E.2d 348 (1966) (the question of the impartiality of the juror is addressed to the discretion of the trial judge); State v. Loftis, 232 S.C. 35, 100 S.E.2d 671 (1957) (refusing to interfere with the discretion of a trial judge in matters involving the jury because the trial judge has the opportunity to consider the credibility of the jurors)).

If the Court of Appeals determines that the directed verdict was granted in error, then the case should properly be remanded to the trial court to decide whether to grant a partial new trial or a new trial absolute. The trial judge would be in the best position to make this determination, and then that ruling would properly be evaluated under the abuse of discretion standard. The Plaintiff is asking the Court of Appeals to substitute its evaluation of the jury for that of the trial judge, and this should not be done in this instance. The decision to grant a new trial absolute or a partial new trial hinges on whether it appears that the jury verdict in favor of Estate Builders was influenced by the dismissal of Miller Construction, and the trial judge is in the best position to make this ruling.

II. The standard that should be applied to deciding whether to grant a partial new trial or a new trial absolute

Rule 59(a) of the South Carolina Rules of Civil Procedure allows the Court of Appeals, at its discretion, to order a new trial against one defendant or against all defendants. When addressing this rule, all of the cases in South Carolina and in other jurisdictions have applied a similar standard. In South Carolina and elsewhere, "The common thread which runs through these decisions [to grant a new trial absolute] is that in each case the court thought as a result of a totality of the circumstances that the issue sought to be excluded by a partial new trial had not been properly determined initially even though the obvious error complained of related to the other issue or issues." Williams v. Slade, 431 F.2d 605, 609 (5th Cir. 1970).

A. The South Carolina Contribution Among Joint Tortfeasors Act

The Plaintiff takes the position that because apportionment is possible under S.C. Code Ann. §15-38-10 to 70, "a straightforward application of this Act leads to the conclusion that if three defendants have potential liability on the same claims, the wrongful dismissal of one defendant will require a new trial as to all defendants." [73] A straightforward application of the Act requires no such thing. SC Code Ann. §15-28-15(A) provides, "if indivisible damages are determined to be proximately caused by more than one defendant...." In this case, the jury determined that Estate Builders was not responsible for the Plaintiff's damages. The Act does not apply to this situation at all. If the jury had found one of the remaining Co-Defendants liable, then perhaps a new trial should be granted as to all at-fault parties, but when the two remaining Co-Defendants are absolved of liability, the Contribution statute has no applicability.

B. South Carolina Cases

[73] Appellant's initial brief, Argument section II, P.14.

The South Carolina courts have never addressed the specific scenario presented here, but the courts have applied Rule 59(a) in other instances, and these cases provide guidance. The key determination is whether there is reason to believe the error of law as to one defendant or issue affected the outcome of an unrelated defendant or issue.

1. Gray v. Green Const. Co.

In Gray v. Green Const. Co., the issue was whether a joint verdict against DOT and Green Construction could stand as to Green after DOT was dimissed by JNOV. Green argued on appeal that the jury would not have rendered the verdict it did if the Highway Department had not been a defendant at trial. Gray v. Green Const. Co. of Indiana, 263 S.C. 554, 556, 211 S.E.2d 871, 872 (1975). Green cited several cases in which the Court granted a new trial to all Defendants because of an error of law as to one. The court addressed each of these cases, and pointed out that in each case, there was reason to believe that the verdict was larger because of the presence of the Co-Defendant who was subsequently dismissed than it would have been had the case been tried against the remaining Defendant alone. For example, the Gray court analyzed a case in which a verdict was entered against a large corporation and a individual employee. See Gray at 558–59, 874 (citing Courtney v. American Railway Express Co., 120 S.C. 511, 113 S.E. 332 (1922)). Gray held, "The Courtney case is readily distinguishable from the instant case, we think, because there was a substantial verdict against a large corporation and an individual employee, which included damages which were largely discretionary, and possibly, if not probably, punitive damages. If the individual defendant had not been granted a new trial he would have been held liable for a verdict which the jury most probably would not have returned against him, alone." Id. at 558, 873.

Turning to the case before it, the Gray Court then held:

> [I]t appears that there was evidence from which the damages allegedly sustained by the plaintiff to his land and crops were capable of reasonable, accurate calculation by the jury and the verdict was for only actual damages. The case is, we think, clearly distinguishable from all of the cases relied upon by the appellant in that there are no special circumstances which would give rise to the probability that the verdict would have been any less had the appellant Green been sued alone. Absent special circumstances, none of which are present in the instant case, the general rule of modern law is as follows: 'Although the early common-law rule was different, in most jurisdictions today, a judgment against multiple tortfeasors may be reversed as to one such defendant without affecting the judgment as to the others....'."

Id. at 558–59, 874. It is clear that the key determination is whether the facts of the case present a reason to believe the verdict would have been different if the dismissed defendant had not been at trial.

2. Industrial Welding Supplies v. Atlas Vending Co., Inc.

In the case of Industrial Welding Supplies, Inc. v. Atlas Vending Co., Inc., the South Carolina Supreme Court first allowed a new trial on damages instead of a new trial absolute. See 276 S.C. 196, 277 S.E.2d 885 (1981). The Court set forth the test for whether a court may grant a new trial on a single issue, holding, "[W]here 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." Id. at 201, 888.

3. Cartin v. Keller Bldg. Products of Charleston

In the case of Cartin v. Keller Bldg. Products of Charleston, the Court applied the Industrial Welding test, but found that a new trial was necessary on both liability and damages because the verdict showed that the damages issue likely infected the jury's liability determination. See 299 S.C. 152, 382 S.E.2 922 (1989). In Cartin, the Plaintiff

tripped on carpet sold by Keller, and the issue was whether the installer was Keller's employee or an independent contractor. The jury found that Keller was liable but awarded one dollar in damages. The Plaintiff moved for a new trial on damages only, and the Defendant moved for a new trial absolute. The trial judge granted the Plaintiff's motion for a new trial on damages only. The Supreme Court reversed because the damages award was grossly inadequate and because during the deliberations, the jury requested definitions of "independent contractor" and "agent," but the request was denied. The Court held "While a grossly inadequate award of damages by itself does not require retrying the liability issue, suspicion should be aroused if the jury awards only nominal damages, disregarding uncontested and obvious damages," and, "This Court finds that the allegation of construction defects and the jury's request for definitions of agent and independent contractor connote a close intertwining of the issues involving liability and damages in this case and directly affects the determination of damages. Therefore, we conclude that the appellant is entitled to a new trial absolute." Id. at 154, 923.

The three cases above show that the specific facts and circumstances of each case determine whether a new trial absolute is appropriate. When the Court found evidence that indicated that an error of law as to one issue or defendant affected the outcome as to another issue or Defendant, then it ordered a new trial absolute. When the Court did not believe the error affected an unrelated issue or defendant, then it did not order a new trial absolute.

4. Roddey v. Wal-Mart

The Plaintiff cites one South Carolina case, Roddey v. Wal-Mart, for the proposition that if the directed verdict in favor of Miller Construction is reversed, the Plaintiff should also get a new trial against the Defendant Estate Builders. Roddy does not support this proposition. In Roddy, the Plaintiff was the estate of a getaway driver who drove a suspected shoplifter away from Defendant Wal-Mart. She was pursued by a security guard employed by Defendant USAA. Walmart was granted a directed verdict. At the conclusion of the trial, the jury apportioned fault between the Plaintiff and USAA, assigning 65% to the Plaintiff and 35% to USAA. See Roddey v. Wal-Mart Stores E., LP, 415 S.C. 580, 592, 784 S.E.2d 670, 676–77 (2016), reh'g denied (May 5, 2016). The Court reversed, finding, "Considering Wal–Mart's potential liability, it is conceivable that a jury could find that the collective fault of the defendants was over fifty percent and that Hancock was less than fifty percent at fault. In light of the reversal of the directed verdict as to Wal–Mart's liability, the only appropriate remedy in this situation is a new trial." Id.

The situation in Roddy is easily distinguishable from the case at hand. Roddy was a comparative negligence case where one of the parties against whom the jury must apportion fault was improperly dismissed, and the Co-Defendant, USAA, was found to be at fault by the jury. In order to determine whether the Plaintiff was more than 50% at fault against both defendants, both defendants would have to be in the trial.

In the case at hand, Estate Builders was exonorated by the jury, and comparative fault is not at issue. The jury can determine whether Miller Construction is liable to the Plaintiff without Estate Builders in the case. Therefore, Roddy does not mandate a new

trial against Estate. Additionally, Roddy does not state any test for determining how to decide the issue at hand.

C. Cases from other jurisdictions

The cases cited by the Plaintiff from other jurisdictions support looking at the specific facts of the case to determine whether there is evidence that the dismissal of Miller Construction somehow affected the verdict in favor of Estate Builders.

1. Buffett v. Vargos

The Plaintiff cites the New Mexico case of Buffett v. Vargas to support its position that a new trial should be granted as to all Defendants, but Buffett actually undercuts the Plaintiff's reliance on Roddey to support granting a new trial against an exonorated Defedant. In Buffet, fault was apportioned between the plaintiff, a non-party, and one of four defendants. The other three defendants were exonerated. The Plaintiff appealed the admission of certain evidence, and the Court of Appeals held the evidence should have been surpressed and awarded a new trial against all of the defendants. The Supreme Court reversed the Court of Appeals on the evidence issues, remanded the case to the Court of Appeals to consider other issues raised in the appeal but not ruled upon, and gave the Court of Appeals guidance on the issue of a new trial against the exonorated defendants. The Court held, "Apparently the Court [of Appeals] reasoned that the doctrine of comparative negligence requires retrial of all defendants, even when error is found only as to one. We agree that, when the jury has apportioned fault between several negligent parties and error infects the verdict as to one [the situation in Roddey], retrial may be appropriate as to the other negligent party. However, when the jury has found one of the parties not to be negligent, that party should not automatically be subject to

retrial with respect to apportioning fault." Buffett v. Vargas, 1996-NMSC-012, 121 N.M. 507, 512–13, 914 P.2d 1004, 1009–10 (1996). The Court adopted a similar test to Industrial Welding Supplies, holding, "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." Id. at 513, 1010.

2. Williams v. Slade

The Plaintiff cites the Federal case of Williams v. Slade for the proposition that the Court can order a new trial against an exonorated defendant. See 431 F.2d 60 (1970). As noted in Williams, the US Supreme Court has held, "Where the practice permits a partial new trial, it may not be resorted to unless it clearly appears that the issue to be retried is so distinct and speparable from the others that a trial of it alone may be had without injustice." Id. at 608 (citing Gasoline Products Co. v. Champlin Refinig Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931)). This rule is exactly the same as the New Mexico standard, and it is substantially similar to the South Carolina standards set forth in Gray and Industrial Welding Supplies.

Williams then examines how to apply this test. The Court cites several cases where "Partial new trials as to damages alone have been rejected when it appeared that the error on the damage issue affected the determination of liability," and "[l]ikewise, when it appeared that the damage issue had been resolved in a purely academic atmosphere because the liability issue had already been decided adversely to the Plaintiff, courts have refused to grant a partial new trial as to liability alone when error was committed regarding that issue." Id. at 608-609. The Williams court holds, "The

common thread which runs through these decisions is that in each case the court thought as a result of a totality of the circumstances that the issue sought to be excluded by a partial new trial had not been properly determined initially even though the obvious error complained of related to the other issue or issues." Id. at 609 (5th Cir. 1970). This statement applies equally to all of the standards above, and states well the analysis involved in applying the standards.

In Williams, the Plaintiff Williams was a passenger in one vehicle that collided with another vehicle in an intersection controlled by a traffic signal. During the Plaintiff's case in chief, Ms. Williams and the driver of her vehicle, Mrs. Treadwell, both testified that Mrs. Treadwell had the green light. The driver of the other vehicle, Mr. Slade, did not testify during the Plaintiff's case, and Mrs. Treadwell was dismissed at directed verdict. Mr. Slade testified in his case-in-chief that he had the green light, and the jury exonorated him.

The Williams court reversed the directed verdict as to Treadway, and then ordered a new trial against both defendants, holding:

> Here the subtle subjectiveness of jury determination leaves this court in doubt as to the propriety of the jury's determination that defendant Slade was not negligent. We cannot ignore the inter-relatedness of the automobile tactics of both Slade and Treadwell. There is no suggestion of unavoidable accident or of contributory negligence. As a result, we would need blinders not to see that the plaintiff was injured by the negligence of either Slade or Treadwell or both in tandem. The jury no doubt also perceived this fact. The problem is that we cannot be sure what effect it had upon the jury's determination as to Slade's negligence when the jury was deprived of the opportunity to adjudge the responsibility of both Treadwell and Slade together and was left with only an all or nothing choice as to defendant Slade. Consequently, we are not sure under the circumstances of this case that Slade's liability for the accident was properly determined at the first trial. Slade must therefore stand trial again so that this issue may be properly determined. The jury should have been given the opportunity to view the accident comprehensively, taking into its

> vista the acts and omissions of both Treadwell and Slade. We see no need to repeat the error by giving the jury on retrial the all or nothing choice as to defendant Treadwell alone. Such procedure would be unjust to Treadwell, who may or may not be solely responsible for the entire accident. On remand, therefore, the jury must be given a binocular rather than a monocular view of the accident, with the hope that in this manner it may properly apportion the responsibility between the two parties to the accident, Treadwell and Slade.

Williams v. Slade, 431 F.2d 605, 609 (5th Cir. 1970).

The facts of Williams are distinguishable from the case at hand. In Williams, the court specifically noted that there was no dispute that at least one driver had breached the standard of care, there was no dispute that the accident caused the Plaintiff's injuries, and there was no dispute that the Plaintiff had suffered damages as a result of the accident, yet after trial, the Plaintiff was left with no recovery. In the case at hand, liability, causation, and damages were all contested. Williams provides valuable guidance on how to determine whether a new trial as to a single defendant is appropriate, the extremely unusual facts of Williams are simply not present in the case at hand.

3. Robinson v. Terminal Freight

The 1956 New York case of Robinson v. Terminal Freight is antiquated and does not reflect the modern law. In Robinson, an eighteen wheeler lost power and stopped without lights in a road at night. A vehicle coming from the opposite direction stopped in the opposing lane to assist. The Plaintiff was a passenger in a vehicle that crashed into the rear of the truck. As the Plaintiff's vehicle was approaching, the driver who stopped to assist flashed his high beams at it to attempt to get them to slow or stop. The Plaintiff alleged this distracted her from seeing the truck. The Plaintiff sued the two men with the truck and the driver of the other vehicle. The driver of the other vehicle was dismissed by nonsuit at the end of trial, and the "judgment in favor of the other defendants rests on

the jury's verdict of no cause of action." At the time, any contributory negligence on the part of the Plaintiff was a total bar. See Dole v. Dow Chemical Co., 30 N.Y. 2d. 143, 282 N.E.2d 288 (1972) (overturning contributory negligence as a total bar years later). In the light of the total bar of contributory negligence, the court held that an injustice would result in allowing a trial against the other driver without the truck defendants. The ruling here is not instructive on the case at hand.

4. Gadani v. Dormitory Auth. of NY

Gadani presents a much different scenario than the case at hand, and it is not instructive. In Gadani, one of the defendants, DeBrino, cross-claimed against two co-defendants, Dormitory Authority of New York ("DASNY") and BBL, and the co-defendants were granted summary judgment as to all causes of action before trial. See Gandani v. Dorm. Auth. of NY, 856 N.Y.S.2d 268 (2998). The jury awarded damages against DeBrino, and DeBrino appealed the granting of summary judgment on its cross-claims against DASNY and BBL. The Supreme Court, Appellate Division, reversed the summary judgments on the cross-claims and ordered a new trial as to all three defendants, holding, "in the interest of justice, a verdict rendered against a sole defendant where the case should have been tried against multiple defendants cannot stand." Id. at 270. This rule has no applicability here. No verdict was rendered against the remaining Defendants in the case at hand.

D. Standard to be Applied

The Gray test and the Industrial Welding Supplies test are both substantially similar to the tests set forth in other jurisdictions. These tests drive at a common conclusion: did the error of law as to one issue or defendant affect the jury's

determination as it relates to the other issues or defendants? If it did, then injustice would result if the verdict were allowed to stand. If it did not, then a partial trial is appropriate. Estate Builders would request that this test be applied here.

III. The directed verdict in favor of Miller Construction did not affect the jury vedict.

A. It is unlikely the jury refused to find against the target defendants because of the absence of a subcontractor.

Miller Construction was the grading contractor, and it was the only subcontractor in the case at trial. Estate Builders was the general contractor, and Lake Estates, LLC was the developer. In Gray, the Court noted that when a target defendant is released from a judgment because of an error of law and the smaller defendant is left responsible, there is a likelihood that the verdict is unfair to the smaller defendant, and a new trial against all Defendants is appropriate. Gray at 263 S.C. at 558, 211 S.E.2d at 873. Here, we have the opposite scenario, and under the analysis of Gray, it is likely that the jury was unaffected by the dismissal of a subcontractor when Estate Builders and the Developer were still in the case. Common sense and logic dictate that the jury is unlikely to have released the target Defendants because of the absence of a smaller Defendant. This is especially true in the case at hand, where the Plaintiff chose not to sue other subcontractors potentially liable for the grading work, including the landscaper, who performed the finish grade, and Coastal Surveying.

B. Mere speculation that the jury could have reached a different result is insufficient to justify a new trial.

subcontractor is responsible for the site plan, but that is not Miller Construction's duty. Obtaining a site plan was the Developer's duty. It would be inequitable to allow the Plaintiff a new trial against Estate Builders based on the Plaintiff's theory that a subcontractor, Miller Construction, not the Developer, was responsible for ensuring there was a site plan on this project.

D. The construction of the buildings and alleged code violations are Estate Builders' responsibility, the evidence would not have been different with Miller in the case

Estate Builders and Miller Construction had different duties on the job, and Estate Builders could have been found liable whether or not Miller Construction was liable. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 560, 658 S.E.2d 80, 88 (2008) (holding that a general contractor is not automatically liable for the negligence of a subcontractor). Estate Builders was responsible for the construction on this project and for overseeing the work of the subcontractors. There was a question of whether or not there were any code violations at the project, and if there were, this could have been the responsibility of Estate Builders regardless of whether or not one particular subcontractor was at fault. For example, the jury could have concluded Miller Construction properly graded the dirt to the stakes, but the stakes must have been set wrong because Estate Builders did not properly supervise Coastal Surveying on the job. The jury could have concluded that Estate Builders was responsible for the problems with sod being placed over the French drains by the landscapers. The jury could have concluded the finish grade, which was not performed by Miller, created the problems. Therefore, the liability of Estate Builders and the liability of Miller were distict jury issues.

The evidence at trial of negligent construction was fully litigated against Estate Builders, and there is no evidence that the jury's verdict was affected by the absence of Miller Construction. The record shows there was substantial evidence that no code violations existed on this project, that the Plaintiff's expert's visual inspection was invalid, that the scope of work was excessive, that the repair estimate was unreliable, and that the Plaintiff did not have damages after the 2012-2014 repairs, which were not claimed in the case.[78]

The jury had all of the evidence before them, and they absolved Estate Builders of any liability for any alleged code violations or construction defects. This could have been done for any number of reasons, but there is no evidence suggesting that the jury ruled in Estate's favor because of the absence of Miller Construction. All of the arguments raised above benefitted all of the Defendants, and Miller joined in all of them. Because Miller joined in the defenses, there is no way that the jury's determination was affected by the absence of Miller. In the cases discussed above, either the defendants were at odds with each other, as in Williams and Gadani, or the jury would have to assign fault between the Plaintiff and the Defendants, as in Roddey and Buffett. Here, even though the Defendants owed separate and distinct duties, their defenses were the same and there was no issue of the Plaintiff being liable.

Additionally, Miller Construction remained in the case on the Defendant Lake Estates cross-claim beyond the close of the Plaintiff's case. Robert Miller testified during the Defendants' case on behalf of Miller Construction, so the jury heard all of the evidence available. Miller Cosntruction was not released from the cross-claim until after Mr. Flick, Robert Miller, and Mr. Schweickhardt had testified in the Defendants' case.

[78] See supra, Statement of Facts, P.2-10.

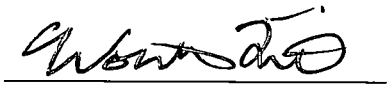
When Miller was released counsel discussed what the jury would be told, and all counsel agreed to instruct the jury that Miller was no longer in the case. This was done to avoid any prejudice to either side.[79] This was the instruction the judge gave.[80] In light of all of this, the record clearly shows that the jury heard all of the evidence, and it could have held Estate Builders responsible for the lack of oversight of any of the subcontractors, including Miller Construction. There is no indication that the absence of Miller Construction for the final defense witness, Russell Miller, affected the verdict in any way.

CONCLUSION

If the directed verdict in favor of Miller Construction is reversed, the Court should properly remand the case to the trial court for a determination on whether there is reason to believe that the jury verdict in favor of Estate Builders was affected. If the Court disagrees and decides to address the issue, then after evaluating all of the facts and circumstances, the Court should properly find that there is no reason to doubt the jury's verdict in favor of Estate Builders, and the Court should properly remand for a new trial against Miller Construction only.

[79] Tr. P.721, l.2-P.730, l.24.
[80] Tr. P.732, l.13-19.

Respectfully Submitted,



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Dated: September 26, 2016

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.,.....Appellant,

v.

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

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

PROOF OF SERVICE

This hereby certifies that Respondent Estate Builders, Inc. has served a copy of its Brief of Respondent Estate Builders, Inc. in the above-referenced matter pursuant to Rule 5 SCRCP by depositing it in the United States, mail, with postage prepaid, and addressed as follows:

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September 26, 2016
Beaufort, South Carolina

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September 26, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Lake Estates Property Owners Association, Inc. v. Estate Builders, Inc., et al.
Appellate Case No: 2016-000247
GS&L File No: 1020-009

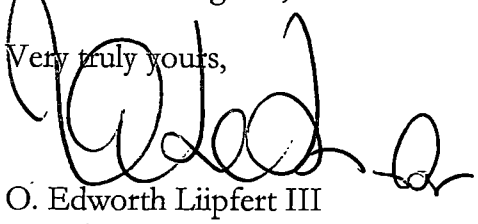
Dear Ms. Kitchings:

Please find enclosed the original and one copy of Respondent Estate Builder, Inc.'s Initial Brief in this case. I would appreciate you filing the original and returning the clocked copy to me in the enclosed envelope. By copy of this letter and enclosures, I herewith serve all counsel of record with the same.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,



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Enclosures
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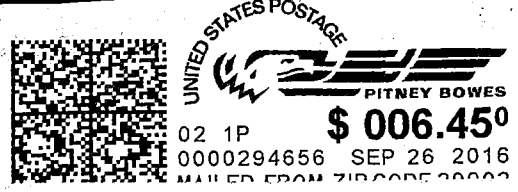

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