

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Horry County  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Case No. 2011-CP-26-08314

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**RECEIVED**

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**SC Court of Appeals**

Chester S. Hejna and Mary Ann Henja, Individually and  
Representing as a class, All Unit Owners of Magnolia  
North Horizontal Regime as that class is defined below,

Respondents,

v.

Heritage Communities,nc., Heritage Magnolia North, Inc.  
and Buildstar Corporation,

Appellants.

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**INITIAL BRIEF OF APPELLANTS**

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## STATEMENT OF ISSUES ON APPEAL

**I. Did the trial court err in holding on summary judgment the Appellants are collaterally estopped from relitigating whether its conduct was willful, wanton, or grossly negligent?**

**II. Did the trial court err in holding on summary judgment the Appellants are collaterally estopped from relitigating the issue of negligence?**

## STATEMENT OF THE CASE

This appeal involves a loss of use class action which arises out of the construction of twenty-one (21) multistory buildings in the Magnolia North Horizontal Property Regime (“Magnolia North”) near Myrtle Beach, South Carolina. Two lawsuits were originally filed against Heritage Communities, Inc. (“HCI”), Heritage Magnolia North, Inc. (“HMN”), and Buildstar Corporation (“Buildstar”) (collectively “Appellants”).

The first lawsuit, Magnolia North Property Owners’ Association, Inc. v. Heritage Communities, Inc. et al., C/A No. 2003-CP-26-3230, was a construction defects lawsuit (“defects lawsuit”), filed on May 28, 2003, by the Magnolia North Property Owners’ Association (“POA”). (Comp. filed May 28, 2003) The POA sought to recover repair costs related to alleged defective conditions at Magnolia North. (*Id.*) The complaint in the defects case asserted the following claims: (1) negligence against HCI, HMN, and Buildstar; (2) breach of express warranty against HCI; (3) breach of the implied warranty of workmanlike service against Buildstar; and (4) breach of fiduciary duty against HCI and HMN. (Eighth Am. Comp. dated Feb. 24, 2009) In its prayer for relief, the POA sought repair costs and punitive damages. (*Id.* at 7)

The second case, James G. McCartney as Trustee of the McCartney Revocable Living Trust, individually and representing as a class All Unit Owners of Magnolia Horizontal Property Regime, C/A No. 2005-CP-26-0044, was filed on January 5, 2005. (Comp. filed Jan. 5, 2005) This lawsuit is a putative class action against the Appellants for loss of use damages brought by a

representative of the individual homeowners. On March 28, 2006, the Honorable Paula H. Thomas certified the putative class action and consolidated both cases for trial. (Order filed Mar. 28, 2006) The consolidated cases commenced trial on May 11, 2009. During the course of the consolidated trial, the Honorable Clifton B. Newman decertified the class action finding the named representative's claim for loss of use was barred by the statute of limitations. (Trial Trans. pp. 657–685) On September 22, 2009, a formal order was entered decertifying the class and dismissing the claims of the named plaintiff in that action because they were barred by the statute of limitations. (Order filed Sept. 22, 2009) Accordingly, the trial proceeded solely on claims which could properly be brought by the POA. No issues related to loss of use or causation for alleged loss of use were placed before, much less decided, by the jury.

At the close of the POA's case, the Appellants moved for directed verdict as to all claims. (Trial Trans. pp. 899–916) Judge Newman granted Appellants' motion as to the claim for breach of express warranty and denied it as to the other claims. (Trial Trans. pp. 915–16) Additionally, at this time, the trial judge ruled the Appellants were "amalgamated" such that they were to be treated as one and the same and the actions of any one of the Appellants applied to the others. (Trial Trans. pp. 883–99) At the close of all the evidence, both parties moved for directed verdicts on all remaining claims. (Trial Trans. pp. 119–145) Judge Newman denied Appellants' motions and denied the POA's motion as to the breach of fiduciary duty claim, but granted the POA's directed verdict as to the claims for negligence and breach of implied warranty of workmanlike service. (Trial Trans. pp. 145–48) Following the directed verdict motions at the close of trial, the only issues remaining for jury determination were the claim for breach of fiduciary duty, and the damages under the negligence and breach of implied warranty of workmanlike service claims. On May 20, 2009, the jury found for the POA on the breach of

fiduciary duty claim, and awarded a general verdict of six million five hundred thousand dollars (\$6,500,000) in actual damages and two million dollars (\$2,000,000) in punitive damages. (Verdict Form dated May 20, 2009)

Following the jury verdict in the defects case, a motion for an amended complaint naming a new class representative and a motion for class certification was filed. (Motion to Amend dated Jan. 6, 2010) The Honorable J. Michael Baxley granted the motion certifying the class before Appellants even had time to file an answer. As such, he gave no consideration to the defenses ultimately raised by Appellants including, *inter alia*, statute of limitations. The case was thereafter dismissed under *South Carolina Rule of Civil Procedure* 40(j), and stayed until resolution of the defects case in the Court of Appeals and Supreme Court. (Orders dated Feb. 22, 2010, Mar. 28, 2011, & Aug. 20 2013) The trial court's decision in the defects case was affirmed by the Court of Appeals, and the Supreme Court granted certiorari, but dismissed the petition for certiorari as improvidently granted.<sup>1</sup>

The class action on behalf of the individual homeowners was restored by order of the court and is under a scheduling order dated January 6, 2016. (Consent Order dated Jan. 6, 2016) Chester S. Hejna and Mary Ann Henja, individually representing the class ("Respondents"), allege causes of action against the Appellants for negligence, breach of warranty of workmanlike service, breach of fiduciary duty, amalgamation of corporate entities, and grossly negligent, willful and wanton conduct. (Fifth Amend. Comp. dated Jan. 6, 2010) On November 18, 2015 the Respondents filed a motion for summary judgment asking the court to rule that the Appellants are estopped from relitigating the issues of negligence; willful, wanton, and gross negligence; breach of warranty of workmanlike service; breach of fiduciary duty; and

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<sup>1</sup> See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmty., Inc. et al, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012); Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmty., Inc. et al, 414 S.C. 198, 777 S.E.2d 831 (2015).

amalgamation. (Motion for Sum. Judg't dated Nov. 17, 2015) Respondents' motion was based on the verdict in the defect case and the legal doctrine of offensive nonmutual collateral estoppel. (Id.) The Appellants filed a response in opposition to the motion for summary judgement. (Resp. in Opp. dated Feb. 5, 2016)

On February 16, 2016, a hearing was held before the Honorable R. Lawton McIntosh. (See Hearing Trans. Feb. 16, 2016) On March 16, 2016, Judge McIntosh issued an order granting the motion for summary judgment. (Order dated Mar. 16, 2016) As described in his order, the Appellants are precluded from relitigating the following issues in the present lawsuit: (1) whether the corporations were amalgamated; (2) whether the Appellants' conduct constituted negligence; (3) whether the Appellants' conduct constituted willful, wanton and grossly negligent conduct; (4) whether the Appellants breached its warranty of workmanlike services; and (3) whether the Appellants breached its fiduciary duty. (Id. at pp. 4) Judge McIntosh further instructed that his order does not preclude proof of proximate cause for actual damages or proof that the Respondents are entitled or not entitled to punitive damages. (Id.) The Appellants filed a motion to alter or amend pursuant to *South Carolina Rule of Civil Procedure 59(e)*. (Motion to Alter/Amend dated Apr. 15, 2016) Without holding a subsequent hearing, Judge McIntosh denied the Rule 59(e) motion. (Order dated May 16, 2016). The Appellants thereupon filed a timely appeal to this Court. (Notice of Appeal dated July 13, 2016).

### **STANDARD OF REVIEW**

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under South Carolina Rule of Civil Procedure 56(c): summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 344 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267,

269–70, 603 S.E.2d 629, 631 (Ct. App. 2004); Redwend Ltd. P’Ship v. Edwards, 354 S.C. 459, 467, 581 S.E.2d 496, 500–01 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004); McNair v. Rainsford, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg’l Med. Ctrs., 352 S.C. 271, 280, 573 S.E.2d 830, 835 (Ct. App. 2002); Young v. South Carolina Dep’t of Corrections, 333 S.C. 714, 717, 511 S.E.2d 413, 415 (Ct. App. 1999). “In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.” Id. (citing Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

“The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Richardson v. The State Record Co., Inc., 330 S.C. 562, 565, 499 S.E.2d 825–26 (Ct. App. 1998). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by “showing”—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party’s case.” Id. at 825. “The moving party need not ‘support its motion with affidavits or other similar materials negating the opponent’s claim.” Id.; see Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 480, 443 S.E.2d 381–82 (1994) (noting that where the record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). “Once the party moving for summary judgment meets this initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations

or denials contained in the pleadings.” Singleton v. Sherer, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008). “It is not that one create an inference which is not reasonable or an issue of fact that is not genuine.” Thompkins v. Festival Centre Group I, 306 S.C. 193, 194, 410 S.E.2d 593, 593 (Ct. App. 1991).

## ARGUMENTS

I. **The trial court erred in finding the Appellants are estopped from relitigating whether its conduct was willful because that finding imposes a duty on the jury to award punitive damages in violation of the Due Process Clause of the United States and South Carolina Constitution.**

The trial court order precludes the Appellants from “relitigating whether [its] conduct constituted . . . willful, wanton or grossly negligent conduct,” but “do[es] not preclude the requirement of proof . . . that the plaintiff is entitled or not entitled to punitive damages.” (Order dated Mar. 16, 2016, p. 4) These two findings are paradoxical and in violation of the Appellants’ due process rights. Thus, this Court should reverse the trial court’s order granting summary judgment.

Under South Carolina law, punitive damages may be awarded to punish only tortfeasors who have acted in a “reckless, willful or wanton” manner. Taylor v. Medemca, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). “In South Carolina, unlike most jurisdictions [22 Am. Jur. 2d Damages § 240 n. 15 at 328 (1965)], the award of punitive damages does not rest in the jury’s discretion, but is recoverable as a matter of right.” Broom v. Se. Highway Contracting Co., 291 S.C. 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986). In Sample v. Gulf Ref. Co., the South Carolina Supreme Court explained:

[U]nder the settled rule prevailing in this state punitive damages are awarded not only as punishment for a wrong, but also a vindication of a private right, and when under proper allegations a plaintiff proves a willful, wanton, reckless, or malicious violation of his rights, *it is not only the right but the duty of the jury to award punitive damages.*

183 S.C. 399, 410, 191 S.E. 209, 214 (1937) (emphasis added). Undoubtedly, the concept of a “duty to” award clearly equates to “have to” which does not comport with controlling constitutional precedent that a jury has the discretion to decline to award punitive damages. See Smith v. Wade, 461 U.S. 30, 52, 103 S. Ct. 1625, 75 L.Ed.2d 632 (1983) (holding that a finding of recklessness or malice or conscious disregard does not mandate an award of punitive damages); see also State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 417, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) (expressing its concerns over the lack of protections given to civil defendants regarding punitive damages); See also 22 Am. Jur. 2d Damages § 550 (2003) (“[T]he decision whether to award exemplary or punitive damages rests in the discretion of the jury or the court as trier of fact. Because the decision is discretionary, the trier of fact is not required to award punitive damages, even if it finds that the defendant’s acts were oppressive or malicious or the evidence otherwise warrants punitive damages.”).

South Carolina’s concept of a *duty* to award punitive damages upon a finding of willfulness is exponentially more problematic where, as here, the trial court permits the use of offensive nonmutual collateral estoppel to preclude relitigation of a finding of willfulness in a subsequent case. In effect, and seemingly contrary to the trial judge’s intent,<sup>2</sup> the trial court’s order automatically imposes a duty on the jury to award punitive damages to the Respondents in this lawsuit. As explained below, a jury cannot award punitive damages when it has heard no evidence of the Appellants’ conduct that forms the basis for a punitive damages award. To permit a jury to do so, without any knowledge of the character or quality of the conduct on which

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<sup>2</sup> See Order dated March 16, 2016; Compare Subsection (A) with Subsection (C) (“The Defendants are estopped from relitigating whether the Defendants’ conduct in the construction of the Magnolia North Condominiums constituted . . . willful, wanton and grossly negligent conduct . . .” with “The above findings do not preclude the requirements of proof . . . that Plaintiff is entitled or not entitled to punitive damages.”)

the punitive damages claim is based, violates the requirements of the Due Process Clause of the United States and South Carolina Constitution.

The practice of awarding punitive damages originated in principles of common law “to deter the wrongdoer and others from committing like offenses in the future.” Mitchell, Jr. v. Fortis Ins. Co., 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009) (citing Laird v. Nationwide Ins. Co., 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964)). “Punitive damages may properly be imposed to further a state’s legitimate interests in punishing unlawful conduct and deterring its repetition.” Fortis Ins. Co., 385 S.C. at 584, 686 S.E.2d at 183 (citing BMW of North America v. Gore, 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)). However, the state’s interest in awarding punitive damages must remain consistent with the principle of penal theory that “punishment should fit the crime.” Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting Mathias v. Accor Economy Lodging Inc. & Motel 6 Operating L.P., 347 F.3d 672, 676 (7<sup>th</sup> Cir. 2003)). Thus, while states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. State Farm v. Campbell, 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

To meet minimum threshold requirements of constitutional due process, an award of punitive damages must be based on a thorough analysis of the defendants’ conduct, and, if made, reviewed by the court. See BMW of North America v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991); see also Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991); Kinard v. Crosby, 315 S.C. 237, 433 S.E.2d 835, 839 (1993). Due process requires that a jury consider evidence concerning the nature, i.e., reprehensibility, of a defendant’s conduct, before

awarding punitive damages. In Haslip, the United States Supreme Court recognized that unless a jury evaluating punitive damages “take[s] into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrongs,” trial court procedures cannot accommodate a defendant’s due process “interest in rational decision making and [the state’s due process] interest in meaningful individualized assessment of appropriate deterrence and retribution.” 499 U.S. at 19–20.

In addition to these constitutional restraints, in BMW of North America, the United States Supreme Court recognized that, under the common law, evaluating the degree of reprehensibility of a defendant’s conduct is essential to determining whether a punitive damages award is reasonable:

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect ‘the enormity of his offense’ . . . This principle reflects the accepted view that some wrongs are more blameworthy than others.

517 U.S. at 575. In short, the Supreme Court in BMW of North America recognized that a threshold finding of conduct that could subject a defendant to liability for punitive damages does not eliminate the need for a knowledgeable assessment of the degree of reprehensibility of a defendant’s conduct in order to determine the appropriate amount of punitive damages, if any.

As such, a punitive damages award must be based on a knowledgeable assessment of the degree of reprehensibility of the Appellants’ conduct. To permit the use of offensive nonmutual collateral estoppel to impose an automatic duty to award punitive damages creates a blindfolded jury burdened with an impossible task. The jury simply cannot make a reasoned decision on the amount of punitive damages to award if it is prevented from evaluating the degree of wrongfulness of the Appellants’ conduct. Due process and fundamental justice demands that the

jury be provided with the whole story in order to fairly determine the extent of any injury to the Respondents. Exclusion of such evidence clearly violates the Appellants' due process rights by depriving the jury of evidence on the most important factor regarding the appropriate amount of punitive damages. See Haslip, 499 U.S. at 19–20. A due process violation, like the one here, which entirely precludes jury consideration of an element of liability and automatically imposes an award of punitive damages, is prejudicial and reversible error. See Anderson v. Elliot, 228 S.C. 371, 376, 90 S.E.2d 367, 369 (1995) (an error is reversible if it is material and prejudicial to the substantial rights of the appellant).

In addition, successive awards of punitive damages for the same conduct bear no relation to the Appellants' culpability or the actual injuries suffered by the Respondents. A jury is simply inept to assess the economic impact of a second punitive damage award and to permit successive punitive damage awards violates that sense of fundamental fairness which lies at the heart of constitutional due process. In theory, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times a defendant may be punished for the same course of conduct.

For the foregoing reasons, the trial court erred in finding the collateral estoppel doctrine precludes the Appellants from relitigating whether its conduct was willful, wanton, or grossly negligent. Accordingly, this Court should reverse the trial court's order granting the Respondents' motion for summary judgment.

**II. The trial court erred in finding the Appellants are collaterally estopped from relitigating the issue of negligence because genuine issues of material fact exist as to whether the Appellants' conduct proximately caused loss of use damages.**

**a. The trial court erred in finding the Appellants are estopped from relitigating negligence because Respondents failed to establish essential elements of the collateral estoppel doctrine.**

For summary judgment to have been proper on offensive collateral estoppel grounds, the Respondents had to establish each element of the doctrine as a matter of law and prove the absence of genuine issues of material fact. The party invoking the doctrine bears the burden of establishing it. Carolina Renewal, Inc. v. S.C. Dep't of Trans., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The Respondents have not met their burden. Their motion fails to even identify the acts of negligence they have in mind.<sup>3</sup>

“Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based on a different claim.” Anchor Point, Inc. v. The Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992). Thus, collateral estoppel applies only if the issues in question were, in a prior action, (1) “actually litigated,” (2) “directly determined,” and (3) “necessary to support the prior judgment.” Carolina Renewal, Inc., 385 S.C. at 554, 684 S.E.2d at 782; see also Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997) (noting collateral estoppel or issue preclusion prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action). “Even where all elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it.” Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) (citing State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998) (holding that in a

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<sup>3</sup> See Memorandum in Support of Motion for Sum. Jdgm't dated Feb. 2, 2016 & Hearing Trans. pp. 6 ¶ 21–25.

subsequent criminal action for driving under the influence, collateral estoppel did not apply to issues decided at a prior administrative hearing held pursuant to the implied consent statute)).

The Respondents have failed to prove that the issues of proximate cause and loss of use damages were “actually litigated” and “directly determined” in the defects case. An issue is “actually litigated” when there is testimony on the issue in the previous litigation. See e.g., Carolina Renewal, Inc., 385 S.C. at 557–58, 684 S.E.2d at 783–84 (finding contract damages issue “actually litigated” where party testified on damages at earlier trial). This Court has turned to the Restatement for guidance as to when an issue is “actually litigated.” See Smith v. Hastie, 367 S.C. 410, 420, 626 S.E.2d 13, 18 n. 15 (Ct. App. 2005) (citing Restatement (Second) of Judgments § 27)). The Restatement indicates that an issue is “actually litigated” when it is “properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.” Restatement (Second) of Judgments § 27 cmt. d.

None of these indicators are present here. The loss of use claim is a personal claim of the individual owners of the condominiums seeking damages for the loss of use of their property. The defects case was a construction defects action brought by the POA for repair damages to the common elements of the condominiums. No evidence was produced at or before summary judgment that the Appellants’ had a full and fair opportunity to previously litigate the loss of use claim. See Hearing Trans. pp. 4–20. The Respondents were unable to produce such evidence because the issues are, in fact, not the same in both cases. See Nat’l Wine & Spirits, Inc. v. Ernst & Young, LLP, 976 N.E.2d 699 (Ind. 2012) (explaining that ‘identity of the issues’ is required in order to establish collateral estoppel, which requires that ‘the issue’ be the exact, same, issue). Further, in the defects case, the jury returned a general verdict, which was limited to evidence related to the common elements of the condominiums. (Jury Verdict Form dated May 20, 2009)

A jury simply checking “yes” next to a question inquiring whether “the [Appellants] were negligent in the construction of the Magnolia North Condominiums” fails to establish any particular fact so as to permit collateral estoppel.

In finding the elements of the collateral estoppel doctrine were met, the trial court failed to recognize the actual issue in effect was not litigated in the defects case. Specifically, in order for the jury to properly determine whether there has been a recoverable loss of use, the Respondents must establish the specific act of negligence, the scope of repair, the costs associated with such repair, proximate cause, and any mitigating factors. Issues such as mitigation by each homeowner, specific use or loss thereof of each homeowner, and the knowledge of each homeowner of the negligence in issue when they purchased their units are all issues the Appellants have a right to explore at trial. This is especially true when one considers this is a class action in which there are some respondents who signed purchase agreements which waived their rights to seek loss of use damages, some respondents were fully aware of the issues with the condominiums at the time of purchase and decided to purchase anyways, some respondents knew of the issues and used them as a negotiating tool to obtain a better deal, and some respondents who, to this day, have little or no knowledge as to the damages or alleged loss of use which they are claiming.

Courts consistently caution that the efficiency and finality associated with collateral estoppel must yield if its application could result in a miscarriage of justice. In South Carolina, the Supreme Court has warned that, even if all elements of the doctrine are met, the doctrine “should not be rigidly or mechanically applied” if unfairness, unjustness, or public policy demands otherwise. Carrigg, 347 S.C. at 81, 552 S.E.2d at 770; Carolina Renewal, Inc., 385 S.C. at 555, 684 S.E.2d at 782. An obvious reason for reversing the trial court’s order here is the unclear and

ambiguous state of the verdict in the defects case. Since the defects case resulted in a general verdict, it is entirely unclear what acts of the Appellants the jurors determined were negligent. To make matters worse, the damages awarded in the defects case did not determine the scope of repairs needed, and the amount awarded was less than the scope of repairs set forth by POA's expert. (Compare Trial Trans. pp. 581 ¶ 6–16 with Jury Verdict Form dated May 20, 2009) Thus, even if this Court were to find that all elements of the collateral estoppel doctrine were met, it is fundamentally unfair to allow the Respondents to proceed to a damages hearing on its negligence cause of action when it is entirely unclear what conduct is attributed to the Appellants as negligent. Accordingly, the circuit court erred in granting summary judgment on the basis of collateral estoppel.

**b. The trial court erred in finding the Appellants are estopped from relitigating negligence because proximate cause and damages are necessary elements to the negligence cause of action.**

This Court should reverse the trial court's order granting summary judgment on the issue of negligence because genuine issues of material fact exist as to whether the Appellants' conduct proximately caused loss of use damages. The trial court's order precludes the Appellants from relitigating "negligence," but permits "proof of proximate cause for actual damages." (Order dated Mar. 16, 2016) These findings are inconsistent with one another and contrary to law.

In any action premised on negligence, in order to establish the essential elements of her claim, a litigant must demonstrate: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered injury or damages. Jackson v. Swordfish Invs., L.L.C., 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole

function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence.” Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 409, 563 S.E.2d 109, 113 (Ct. App. 2002) (reversing grant of summary judgment). Causation and damages are two necessary elements of these causes of action. See, e.g., Daniel v. Days Inn of America, Inc., 292 S.C. 291, 295, 356 S.E.2d 129, 131 (Ct. App. 1987).

In the defects case, the jury rendered a general verdict for the POA on the negligence cause of action. Presumably, the jurors concluded the Appellants committed some act of negligence that proximately caused damages to the common elements of the condominiums, thus entitling the POA to an award of damages. It is not clear, however, what conduct the jurors attributed to the Appellants as negligent. Simply put, a jury may determine the negligence which occurred as to the POA did not cause the Respondents any loss of use of their property. In this lawsuit, the Respondents must establish they have a loss of use of their property, and that the Appellants’ conduct is the proximate cause of that loss of use. To bootstrap a finding of negligence without addressing causation entirely is simply contrary to law. Accordingly, the trial court erred in granting summary judgement in favor of the Respondent class, and the Appellants respectfully request that this Court reverse the trial court’s order.

### **CONCLUSION**

For the foregoing reasons, the Appellants respectfully request that this Court reverse the trial court’s erroneous order granting the Respondents’ motion for summary judgment.

SIGNATURE PAGE TO FOLLOW

Respectfully Submitted,

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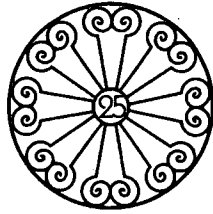
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Dated: 12/28/2016



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December 28, 2016

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**SC Court of Appeals**

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Chester S. Hejna and Mary Ann Henja, Individually and Representing as a Class,  
All Unit Owners of Magnolia North Horizontal Regime as That Class is Defined  
Below v. Heritage Communities, Inc., Heritage Magnolia North, Inc. and  
Buildstar Corporation  
Case No.: 2011-CP-26-8314  
Appellate Case No.: 2016-001280  
YCR File: 1952-20061504

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced matter please find the original and one copy of the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal, along with a Proof of Service regarding the same. Please file these documents and return one clocked copy to me in the envelope provided.

Always, thank you for your assistance. If you have any questions, please do not hesitate to contact me. With kindest regards, I am

Sincerely,

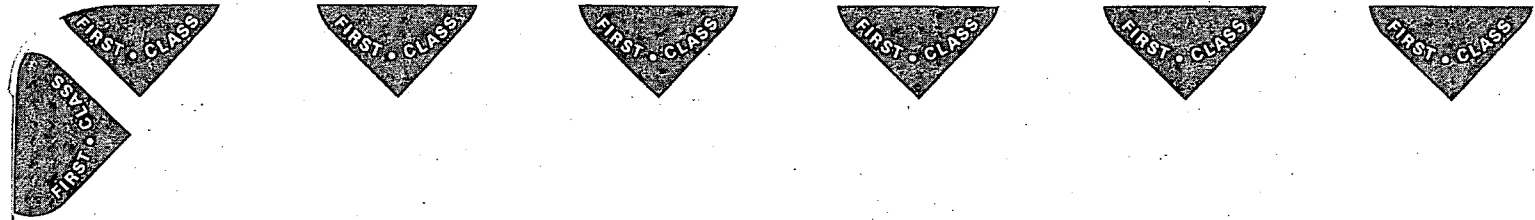
YOUNG CLEMENT RIVERS, LLP

Mary S. Willis

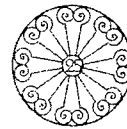
MSW/tlb

Enclosures

cc (w/enc., via email and U.S. Mail): Philip C. Thompson, Esquire, Thompson & Henry, P.A.  
John P. Henry, Esquire, Thompson & Henry, P.A.

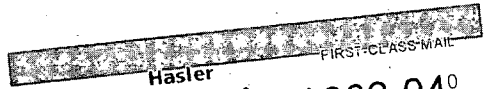


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