THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2011-CP-26-08314

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

Respondent,

v.

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

Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 5

STANDARD OF REVIEW 7

ARGUMENTS 7

I. THE TRIAL COURT'S RULING THAT APPELLANTS ARE COLLATERALLY ESTOPPED FROM RELITIGATING WHETHER APPELLANTS' CONDUCT WAS WILLFUL, WANTON OR GROSSLY NEGLIGENT WAS NOT IN ERROR SINCE THE JUDGE ALSO HELD THAT RESPONDENTS MUST PROVE ENTITLEMENT TO PUNITIVE DAMAGES.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE APPELLANTS ARE COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF APPELLANTS' NEGLIGENCE WHILE PRESERVING THE REQUIREMENT OF PROVING PROXIMATE CAUSE FOR ACTUAL DAMAGES.

a. THE TRIAL COURT DID NOT ERR IN FINDING APPELLANTS ARE ESTOPPED FROM RELITIGATING THEIR NEGLIGENCE IN LIGHT OF THE FACT THAT ALL ELEMENTS NECESSARY TO FIND COLLATERAL ESTOPPEL ARE PRESENT.

b. THE TRIAL COURT DID NOT ERR IN FINDING APPELLANTS ARE ESTOPPED FROM RELITIGATING THEIR NEGLIGENCE BECAUSE THE TRIAL COURT LEFT THE REQUIREMENT OF PROXIMATE CAUSE FOR THE JURY.

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006) 7

Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (1984) 10

Broom v. Southeastern Hwy Contracting Co., Inc., 291 S.C. 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986) 8

Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015) 6

Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) 9

Goldstein v. Consolidated Edison Co. of N.Y., Inc., 462 N.Y.S. 2nd 646, 93 A.D.2d 589 (1983) 8

Gunnels v. Roach, 249 S.C. 248, 133 S.E.2d 757 (1963) 11

Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977) 11

James G. McCartney as Trustee of the McCartney Revocable Living Trust, individually and representing as a class All Unit Owners of Magnolia North Horizontal Property Regime, C/A No. 2005-CP-26-0044 1

Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc. et al., 397 S.C. 348, 725 S.E.2d 348, (Ct. App. 2012) cert dismissed 415 S.C. 198, 777 S.E.2d 831 (2015) 1, 4, 7, 8, 9

Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008) 9

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2nd 1 (1991)8

Palm v. General Painting Co. Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)............ 7

Pye v. Aycock, 325 S.C. 426, 480 S.E.d 455 (Ct. App. 1997) 7

RULES

Rule 40(j) 3

Rule 59(e)... 5

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL JUDGE ERR IN RULING THAT APPELLANTS ARE ESTOPPED FROM RELITIGATING THE ISSUE OF WHETHER THE APPELLANTS CONDUCT WAS WILLFUL, WANTON OR GROSSLY NEGLIGENT, ESPECIALLY IN LIGHT OF THE FACT THAT THE JUDGE ALSO REQUIRED THE RESPONDENTS TO PROVE ENTITLEMENT TO PUNITIVE DAMAGES?

II. DID THE TRIAL JUDGE ERR IN RULING THAT APPELLANTS ARE COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF APPELLANTS' NEGLIGENCE, ESPECIALLY IN LIGHT OF THE FACT THAT THE TRIAL JUDGE REQUIRED THE RESPONDENTS TO PROVE PROXIMATE CAUSE?

a. DID THE TRIAL COURT ERR IN FINDING APPELLANTS WERE ESTOPPED FROM RELITIGATING THEIR NEGLIGENCE IN LIGHT OF THE FACT THAT ALL ELEMENTS NECESSARY TO FIND COLLATERAL ESTOPPEL ARE PRESENT?

b. DID THE TRIAL COURT ERR IN FINDING APPELLANTS ARE ESTOPPED FROM RELITIGATING THEIR NEGLIGENCE EVEN THOUGH THE TRIAL COURT LEFT THE REQUIREMENT OF PROXIMATE CAUSE FOR THE JURY?

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 N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc. et al., 397 S.C. 348, 725 S.E.2d 348, (Ct. App. 2012) Cert. dismissed 415 S.C. 198, 777 S.E.2d 831 (2015) ("POA case"), was a construction defects lawsuit ("POA case"), 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 and punitive damages for negligent and defective construction of the Magnolia North Condominiums. (Id.) The complaint in the POA case asserted the following claims: (1) negligent construction 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 and punitive damages 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) These identical claims are being made in the Class Action, the only difference being the type of actual damages, i.e., loss of use.

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 North 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 their individual claim was 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. Although no damages for loss of use were litigated, the same issues of liability asserted by the POA are now being asserted by the Class representative against the same defendants, the only difference being the type of damages sought, i.e., loss of use.

In the POA and Class Complaints, the following was/is alleged:

POA	CLASS
HCI, HMN and Buildstar were negligent, grossly negligent, willful and wanton in the construction of the Magnolia North buildings (8th Amended Complaint, para 8)	HCI, HMN and Buildstar were negligent, grossly negligent, willful and wanton in the construction of the Magnolia North buildings (5th Amended Complaint, para 9)
Breach by Buildstar of the warranty of workmanlike services in the construction of the Magnolia North Buildings (8th Amended Complaint, para 9)	Breach by Buildstar of the warranty of workmanlike services in the construction of the Magnolia North Buildings (5th Amended Complaint, para 20)
Breach of Fiduciary Duty against HCI and HMN for actual and punitive damages (8th Amended Complaint, paras 24-25)	Breach of Fiduciary Duty against HCI and HMN for actual and punitive damages (5th Amended Complaint, paras 25-26)

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 motion 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 left for jury determination were the breach of fiduciary duty, and actual and punitive damages. 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) These verdicts were reduced pursuant to post-trial motions alleging a set-off.

Following the jury verdict in the POA case, a motion in this class action 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. The case was thereafter dismissed under *South Carolina Rule of Civil Procedure* 40(j), and stayed until resolution of the POA case in the Court of Appeals and Supreme Court. (Orders dated Feb. 22, 2010, Mar. 28, 2011, & Aug. 20 2013)

The verdict in the POA case was affirmed by the Court of Appeals and the Supreme Court granted certiorari, but dismissed the petition for certiorari as improvidently granted.[1]

This 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. Compo 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 collaterally estopped from relitigating the issues of negligence; willful, wanton, and gross negligence; breach of warranty of workmanlike service; breach of fiduciary duty; and amalgamation. (Motion for Sum. Judg't dated Nov. 17, 2015) Respondents' motion was based on the verdict in the POA 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 Appellants were amalgamated; (2) whether the

[1] Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc. et al., 397 S.C. 348, 725 S.E.2d 348, (Ct. App. 2012) Cert. dismissed 415 S.C. 198, 777 S.E.2d 831 (2015)

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 p. 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 Rules 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).

STATEMENT OF FACTS

As noted in the Statement of the Case, in the POA case, in which the Appellants were defendants, the Trial Judge directed a verdict on the negligence cause of action finding that, as a matter of law, Appellants were guilty of negligence and breached the warranty of workmanlike service in the construction of the Magnolia North Condominiums. The jury found for the POA on its fiduciary duty claim and awarded actual and punitive damages. (Verdict Form) The Appellants were represented by counsel and fully participated in the POA Trial. The POA sought repair costs for the common elements as opposed to loss-of-use damages. The Class seeks loss-of-use damages (which are personal to the individual condominium owners) based upon the same causes of action asserted in the POA case.

The findings by the Trial Judge in the POA case of negligent construction and breach of warranty of workmanlike service, and the finding by the jury of breach of

fiduciary duty were all upheld by the Court of Appeals and Supreme Court which is uncontested by the Appellants. (Appellants' Brief p. 3)

The findings by Judge McIntosh on the issues of nonmutual offensive collateral estoppel for breach of warranty of workmanlike service, breach of fiduciary duty and amalgamation have not been appealed, and therefore, are the law of the case. Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015) (Under the law-of-the-case doctrine, a party is precluded from relitigating after an Appeal, matters that were either not raised on Appeal, but should have been, or raised on Appeal and rejected by the Appellate Court)

Appellants do not contend that they did not have a fair and full opportunity to litigate their negligence, willful, wanton or grossly negligent conduct; breach of warranty of workmanlike service or breach of fiduciary duty. Appellants point to no special circumstance that should preclude the application of the doctrine of nonmutual offensive collateral estoppel on these issues. Appellants' Brief is confusing because the foundation of their argument is that somehow the trial judge's rulings have taken away proximate cause and require the jury to award punitive damages. (App. Brief, pp. 10-11) But in fact, the judge's Order specifically reserves for trial proof of proximate cause, actual damages and entitlement to punitive damages. (Order, p. 4)

One of the important purposes of collateral estoppel is to put an end to litigation. S.C. Public Interest Foundation v. Greenville Cty., 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013) The trial of the POA case spanned numerous days. In the POA action, there was overwhelming evidence of Appellants' failure to meet industry standards of care. Appellants merely contested the extent of damages. Even Appellants' experts testified to

the existence of Appellants' own negligence in the construction of the Magnolia North Condominiums. Magnolia North, *Supra, at* 123, 396. Appellants would have this Court allow them to retry all of these issues which have already been tried and found against their position. Such would defeat the purpose of collateral estoppel and would unnecessarily extend litigation and burden the Court and these Respondents.

STANDARD OF REVIEW

The question of whether to allow the use of offensive collateral estoppel so as to bar a party from relitigating an issue in a subsequent action is one addressed to the broad discretion of the trial court. Palm v. General Painting Co. Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988) Therefore, the Court's standard of review is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the Judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006)

ARGUMENTS

I. THE TRIAL COURT'S RULING THAT APPELLANTS ARE COLLATERALLY ESTOPPED FROM RELITIGATING WHETHER APPELLANTS' CONDUCT WAS WILLFUL, WANTON OR GROSSLY NEGLIGENT WAS NOT IN ERROR SINCE THE JUDGE ALSO HELD THAT RESPONDENTS MUST PROVE ENTITLEMENT TO PUNITIVE DAMAGES.

The trial judge ruled that the Appellants are collaterally estopped from relitigating whether the Appellants' conduct in the construction of Magnolia North Condominiums was... willful, wanton and grossly negligent. (Order p. 4, para "A") This ruling is not without precedent. Pye v. Aycock, 325 S.C. 426, 480 S.E.d 455 (Ct. App. 1997) (Defendant held to be collaterally estopped from relitigating whether his conduct amounted to willful

and malicious acts since that issue was determined in a previous action); Goldstein v. Consolidated Edison Co. of N.Y., Inc., 462 N.Y.S. 2nd 646, 93 A.D.2d 589 (1983) (Utility company precluded from relitigating the issue of whether it was grossly negligent, in that that issue was decided in a prior action in which the company had full opportunity to litigate gross negligence) Judge McIntosh also held that his ruling did not preclude proof that Respondent Class was or was not entitled to punitive damages (Order p. 4, para "C")

Appellants' assertion that the estoppel as to the findings by the jury in the POA case of willful, wanton and grossly negligent conduct places a "duty" to award punitive damages upon the jury is misplaced. Broom v. Southeastern Hwy Contracting Co., Inc., 291 S.C. 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986) (Upon a finding by the jury of willful, wanton, reckless or malicious violation of the defendant's rights, it is not only the right, but the duty of the jury to award punitive damage.) The Trial Judge clearly left in the hands of the jury the right to evaluate the evidence and determine, in spite of his estoppel ruling, whether the Respondent is entitled to an award of punitive damages. This cured any constitutional concerns. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2nd 1 (1991) (As long as the discretion [of the jury] is exercised within reasonable constraints, due process is satisfied.) Appellants and the Class will have full opportunity to litigate punitive damages. As the Court held in the POA case, "only after the jury has evaluated the evidence and concluded the Plaintiff is entitled to punitive damages does it become the jury's "duty" to impose such damages on the Defendant." Magnolia North, *Supra, at* 122, 366. The court can instruct the jury that although it has been determined in a prior lawsuit that the Appellants' conduct in the construction of the Magnolia North Condominiums was willful, wanton and grossly negligent, it remains up to them to determine whether, under

all the circumstances, Respondent Class is entitled to an award of punitive damages. Even upon a finding that the Appellants' conduct was a deliberate act which was willful, wanton, reckless and malicious, it is still within the discretion of the trier of fact to deny a punitive damages award. Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008) (Even though the Judge found the defendants' conduct was intentional willful, wanton, reckless, and malicious, it was completely within his discretion to deny a punitive damage award) Appellants conclude that the judge's finding of willful conduct automatically imposes a "duty" to award punitive damages is wrong. This same argument was rejected by the Appellate Court in the POA case. Magnolia North, *Supra.*, *at* 122, 366 (The "duty" to award punitive damages arises only after the jury has evaluated the evidence and concluded the Plaintiff is entitled to punitive damages.) The Court noted this is exactly what the trial judge charged the jury. Magnolia North, *Supra.*, *at* 122, 366. A finding of willful, wanton and grossly negligent conduct by a defendant is only the first step in the jurys' inquiry. The jury must then determine: (1) the defendant's degree of culpability; (2) duration of the conduct; (3) Defendant's awareness or concealment; (4) the existence of past similar conduct; (5) likelihood the award will deter the Defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) Defendants' ability to pay; and finally, (8) other factors deemed appropriate. Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) By leaving it up to the jury to determine entitlement to punitive damage leaves the jury free to consider all circumstances including the Gamble factors.

Appellants had a full and fair opportunity to litigate whether their conduct was willful, wanton or grossly negligent and the jury determined that it was all three (Verdict Forms). Any claims of a due process violation are without merit and should be dismissed.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE APPELLANTS ARE COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF APPELLANTS' NEGLIGENCE WHILE PRESERVING THE REQUIREMENT OF PROVING PROXIMATE CAUSE FOR ACTUAL DAMAGES.

a. THE TRIAL COURT DID NOT ERR IN FINDING APPELLANTS ARE ESTOPPED FROM RELITIGATING THEIR NEGLIGENCE IN LIGHT OF THE FACT THAT ALL ELEMENTS NECESSARY TO FIND COLLATERAL ESTOPPEL ARE PRESENT.

In finding nonmutual offensive collateral estoppel appropriate, the Trial Judge found each element of collateral estoppel necessary to apply the doctrine:

1. The issues were actually litigated in the POA case;
2. They were directly determined in the POA action;
3. The issues litigated were necessary to support the POA judgment;
4. Appellants had a full and fair opportunity to fully litigate all the issues upon which the Respondents base their claim of estoppel. Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (1984)

Nowhere in their Brief do Appellants point out any instance where one of these elements are not met.

Although Judge McIntosh collaterally estopped the Appellants from attempting to relitigate these issues, proof of proximate cause was left in place as a requirement for the Class to recover actual damages.

The Appellants apparently believe that since proximate cause and loss-of-use damages were not "actually litigated" in the POA case, estoppel on the issue of negligence is error. (Appellants' Brief, p. 12) Respondents agree that proximate cause for loss-of-use damages and loss-of-use damages were not litigated in the POA action. This is precisely the reason Judge McIntosh did not apply collateral estoppel to these issues, but instead left the determination on proximate cause and actual damages for the trier of fact. (Order, p. 4, para "C") Proximate cause for actual damages on the Class loss-of-use claim was not pursued in the POA action since these damages are personal to the individual condominium owners; the very reason for this Class Action. Appellants are not estopped from contesting proximate cause and loss-of-use damages and thus their claim on this issue has no merit.

b. **THE TRIAL COURT DID NOT ERR IN FINDING APPELLANTS ARE ESTOPPED FROM RELITIGATING THEIR NEGLIGENCE BECAUSE THE TRIAL COURT LEFT THE REQUIREMENT OF PROXIMATE CAUSE FOR THE JURY.**

The Appellants contend that the Trial Court's ruling estopping them from relitigating negligence is tantamount to making this Class Action into a damage hearing because proximate cause is necessary to a finding of negligence. This is incorrect. Negligence is not inclusive of proximate cause. There can be negligence without proximate cause. A person can act negligently and cause no damage, in which case the negligence is not actionable. Liability arises from a negligent act only if the negligent act is the proximate cause of the damage. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977) (Negligence is not actionable unless it is a proximate cause of the injuries) It is generally for the jury to determine whether defendants' negligence is a concurring, proximate cause of Plaintiff's injuries. Gunnels v. Roach, 249 S.C. 248, 133 S.E.2d 757

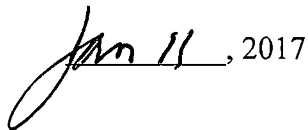
(1963). Appellants will be free at trial to litigate whether their negligence in the construction of the Magnolia North Condominium caused any loss-of-use damages. They will not, however, be allowed to relitigate whether or not they were negligent in the construction of the Magnolia North Condominiums. That has already been determined with finality.

CONCLUSION

For the foregoing reasons, the Court should uphold Judge McIntosh's Order applying nonmutual offensive collateral estoppel.

Respectfully submitted,

Conway, South Carolina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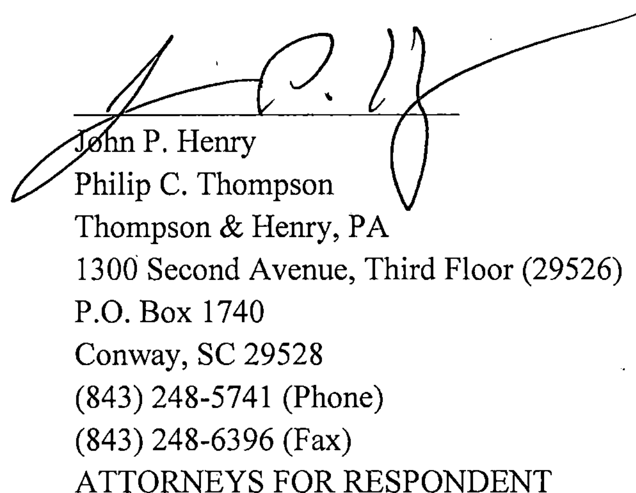

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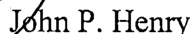
RE: *Chester S. Hejna and Mary Ann Hejna, Individually and Representing as a Class, All Unit Owners of Magnolia North Horizontal Regime as That Class is Defined Below v. Heritage Communities, Inc., Heritage Magnolia North, Inc. and Buildstar Corporation*
Appellate Case Number: 2016-001280
Civil Action No.: 2011-CP-26-8314

Dear Ms. Kitchings:

Please find enclosed herewith for filing in the above referenced matter the original and one copy of Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal, along with Proof of Service. Please file these documents and return the clocked copy to me in the self-addressed, stamped envelope also enclosed herewith.

With kindest regards, I am

Sincerely,
THOMPSON & HENRY, P.A.



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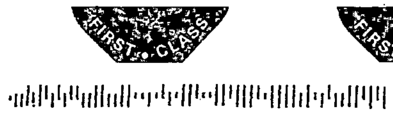
PCT/sbh
cc: Steven L. Brown, Esquire
Marry S. Willis, Esquire
Enclosures as noted.



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