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S C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005-CP-26-0044

Magnolia North Property Owners' Association, Inc , Respondent,

v

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

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APPENDIX - VOLUME VI

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The South Carolina Court of Appeals

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Re Magnolia North v Heritage Communities

Dear Counsel

Enclosed is the opinion of the Court of Appeals in this case Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Clerk of Court for Greenville County after fifteen (15) days, exclusive of the date of filing of this opinion

No extension for a Petition for Rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice

Sincerely,

Tonisha E Fuller

Tonisha E Fuller
Administrative Assistant

TAG/tf

cc The Honorable Clifton Newman

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Magnolia North Property
Owners' Association, Inc , Respondent,

v

Heritage Communities, Inc ,
Heritage Magnolia North, Inc ,
and BuildStar Corporation, Appellants

Appeal From Horry County
Clifton Newman, Circuit Court Judge

Opinion No 4943
Heard December 5, 2011 – Filed February 15, 2012

AFFIRMED

C Mitchell Brown and A Mattison Bogan, of Columbia, Stephen L Brown and Jeffrey J Wiseman, of Charleston, for Appellants

John P Henry and Philip C Thompson, of Conway, for Respondent

GEATHERS, J Appellants, Heritage Communities, Inc (HCI), Heritage Magnolia North, Inc (HMNI), and BuildStar Corporation

(BuildStar) (collectively, Appellants), seek review of the jury's verdict in this construction defect action [1] Appellants assign error to the trial court's (1) finding of an amalgamation of Appellants' corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities, (2) admitting evidence of construction defects at other HCI projects, (3) instructing the jury regarding actual and punitive damages, (4) granting of a directed verdict for Respondent Magnolia North Property Owners' Association, Inc (the POA) on its claims for negligence and breach of the warranty of workmanlike services, (5) denying Appellants' motions for a directed verdict and a judgment notwithstanding the verdict (JNOV), and (6) upholding the jury's punitive damages award We affirm

FACTS/PROCEDURAL HISTORY

Construction on Magnolia North, a condominium complex in Horry County, began in 1998, as of March 2000, HCI had sold 41 or more units [2] On January 29, 2001, HCI filed for protection under Chapter 11 of the United States Bankruptcy Code Twenty-one buildings, each with 12, 13, or 15 units, had been completed by the time HCI turned over control of the POA to the unit owners on September 9, 2002 At this time, some of the development's roads, as well as four buildings and four pools, were incomplete Another developer completed the construction of the four buildings, and the POA completed the construction of the roads and pools

On May 28, 2003, the POA filed this action against Appellants alleging defects in the construction of Magnolia North The POA's eighth Amended Complaint included the following causes of action (1) negligence, (2) breach

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[1] This court recently issued an opinion in a similar action against Heritage Communities, Inc and BuildStar Corporation brought by the property owners' association at the Riverwalk development in Myrtle Beach See Pope v Heritage Cmtys , Inc , 395 S C 404, 717 S E 2d 765 (Ct App 2011)

[2] HCI was the parent corporation of both HMNI (the seller) and BuildStar (the general contractor responsible for supervising all construction) Prior to the construction, HCI and BuildStar developed numerous other properties in Horry County, South Carolina

of express warranty, (3) breach of the warranty of workmanlike services against BuildStar, and (4) breach of fiduciary duty against HCI and HMNI

The case went to trial on May 11, 2009 [3] After the close of the POA's evidence, the trial court directed a verdict for HCI on the express warranty cause of action At the close of all evidence, the trial court granted the POA's motions for a directed verdict as to liability on the causes of action for negligence and breach of the warranty of workmanlike services The jury returned a verdict in favor of the POA for $6 5 million in actual damages and $2 million in punitive damages

On May 29, 2009, Appellants filed the following post-trial motions (1) motion for a new trial based on the thirteenth juror doctrine, (2) motion for a JNOV, (3) motion for a new trial absolute, (4) motion for a new trial nisi remittitur, and (5) motion to set aside the punitive damages verdict This appeal followed

ISSUES ON APPEAL

I Did the trial court err in ruling that Appellants' entities were amalgamated?

II Did the trial court err in admitting evidence of construction defects at other Heritage projects?

III Did the trial court err in instructing the jury (1) it must award the POA damages proximately caused by the negligent construction, and (2) if it found the POA entitled to recover punitive damages, it would have a duty to include such damages in its verdict?

IV Did the trial court err in granting a directed verdict for the POA on its causes of action for negligence and breach of the warranty of workmanlike services?

[3] Prior to trial, HCI went out of business

V Did the trial court err in denying Appellants' motions for a directed verdict and JNOV?

VI Did the trial court err in upholding the jury's punitive damages award?

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law " Felder v K-Mart Corp , 297 S C 446, 448, 377 S E 2d 332, 333 (1989) A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the finding Id

LAW/ANALYSIS

I Amalgamation

Appellants maintain the trial court erred in ruling that their entities were amalgamated because (1) a court cannot disregard the corporate form when the requirements for "piercing the corporate veil" have not been met, and (2) the concept of amalgamation does not apply to the facts of this case We disagree

In Kincaid v Landing Development Corp , 289 S C 89, 91, 344 S E 2d 869, 871 (Ct App 1986), three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty The management corporation argued the court should have directed a verdict in its favor because it was merely the marketing and sales company Id at 96, 344 S E 2d at 874 In addition to sharing owners, the three companies shared a location Id Furthermore, the management company was the entity called to remedy problems Id Finally, the company's letterhead identified the management company as, "A Development, Construction, Sales, and Property Management Company " Id This court affirmed the trial court's finding that the evidence revealed "an amalgamation of corporate interests,

entities, and activities so as to blur the legal distinction between the corporations and their activities " Id (quoting the trial court), see Mid-South Mgmt Co v Sherwood Dev Corp , 374 S C 588, 597-605, 649 S E 2d 135, 140-44 (Ct App 2007) (discussing Kincaid as one of three theories raised for holding a parent corporation liable in place of a subsidiary, i e (1) piercing the corporate veil, (2) alter-ego or instrumentality theory, and (3) the amalgamation of interests or blurred identity theory)

Here, the trial court concluded that the facts of the instant case closely paralleled the facts in Kincaid The trial court further concluded that the piercing of the corporate veil analysis did not apply to this case The trial court stated "The evidence has revealed an amalgamation of the corporate interest, the entities, and activities so as to blur the legal distinction between the corporation[s] and their activities "

The evidence supports the trial court's ruling Gwyn Hardister, chief operating officer and president of HCI, testified HCI was the parent corporation of HMNI and BuildStar The other officers of HCI were Roger Van Wie and Jack Green Van Wie also oversaw BuildStar, the general contractor supervising the construction at Magnolia North Separate corporations were created for each HCI development for the purpose of operating as "cost centers," thereby containing each development's expenses and oversight as it applied to property management and construction cost allocation [4] All of these corporations shared officers, directors, office space, and a phone number with HCI HMNI, the corporation HCI created to operate as a cost center for Magnolia North, created the POA, its officers were also officers for HCI HCI officers controlled the POA until September 9, 2002, when the unit owners were given control of the POA

Hardister testified it could be assumed that the employees of BuildStar were also the employees of HCI At the first annual meeting of the POA, Van Wie acknowledged construction problems and represented that the problems would be corrected Moreover, the warranty manual distributed to the unit owners upon purchase was entitled "Heritage Communities, Inc

[4] HCI developments included Magnolia Place, Riverwalk, The Gardens, Azalea Lakes, Avian Forest, and Magnolia North

Limited Warranty Manual," and it identified HCI as the corporation extending the warranty

Therefore, as in Kincaid,[5] this case involves several indicia of an amalgamation of interests between HCI, HMNI, and BuildStar The corporations shared a location, telephone number, board members, officers, and employees In its warranty, HCI held itself out to the homeowners as the corporation responsible for construction defects In light of these indicia, the trial court's ruling that Appellants' entities were amalgamated is supported by the law and the evidence

II Other Heritage Projects

Appellants assert that this court should order a new trial because the trial court allowed the POA to repeatedly present evidence of construction defects at other Heritage projects Appellants argue that the admission of this evidence violated Rule 404 of the South Carolina Rules of Evidence as well as the limitation on admission of similar events evidence set forth in Whaley v CSX Transportation, Inc , 362 S C 456, 483, 609 S E 2d 286, 300 (2005) We disagree

Rule 404(b), SCRE states "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith " Rule 404(b), SCRE In Whaley, our supreme court recognized that similar acts are admissible if they tend to prove or disprove some fact in dispute See Branham v Ford Motor Co , 390 S C 203, 230, 701 S E 2d 5, 19 (2010) (discussing Whaley) Evidence of similar acts has the potential to be exceedingly prejudicial Branham, 390 S C at 230, 701 S E 2d at 19 Accordingly, a plaintiff must present facts showing the other acts were substantially similar to the event at issue Whaley, 362 S C at 483, 609 S E 2d at 300 Further, other acts may be admissible for the purpose of establishing the facts necessary to prove entitlement to punitive damages Judy v Judy, 384 S C 634, 642-43, 682 S E 2d 836, 840-41 (Ct App 2009), aff'd on other grounds, 393 S C 160, 712 S E 2d 408 (2011)

[5] This court reached the same conclusion in Pope v Heritage Communities, Inc , 395 S C 404, 717 S E 2d 765 (Ct App 2011)

(affirming when the trial court admitted evidence of a similar prior lawsuit) The admission of evidence is within the trial court's discretion, and the trial court's decision will not be reversed on appeal absent an abuse of discretion Whaley, 362 S C at 483, 609 S E 2d at 300 (applying the abuse of discretion standard of review to the admissibility of evidence of similar accidents)

In the present case, Gwyn Hardister, HCI's chief operating officer and president, testified that after his first month of employment with HCI, it became apparent that Magnolia Place had issues with water intrusion, including window leaks, and water issues on the decks and breezeways, before construction had begun at Magnolia North Hardister admitted that the construction defects were virtually identical across all developments Other testimony setting forth the details of defects in projects other than Magnolia North supports Hardister's admission Drew Brown, the POA's expert in general contracting, estimating, and building diagnostics, testified that he investigated other HCI projects that used the engineered wood trim, just as Magnolia North did, and that the trim was inherently defective as an exterior trim He also stated that, as with Magnolia North, there was improper flashing and a lack of engineered sealant joints in the other projects Additionally, three of the other projects used the same brand of windows as Magnolia North, and Brown tested several of these windows at the four projects Brown indicated that he tested the windows in over 20 units, and they consistently failed to meet the water intrusion resistance requirement that the labeling had represented

Brown also found sheathing damage beneath the windows and improper weight bearing of lintels at window heads in Magnolia Place and in other HCI projects [6] Other defects common to Magnolia Place and the other projects were improper sloping on bricks, improper waterproofing, improper installation of trim products, and improper installation of brick veneer

[6] A lintel is a horizontal architectural member spanning and usually carrying the load above an opening Merriam-Webster's Collegiate Dictionary at 725 (11th ed 2003)

Based on the foregoing, the construction defects at the other HCI developments were substantially similar to those experienced by Magnolia North Further, the evidence is admissible to prove many of the elements required for a punitive damages award See Mitchell v Fortis Ins Co , 385 S C 570, 584-89, 686 S E 2d 176, 183-86 (2009) (listing guideposts to consider in conducting a review of a punitive damages award)[7], Gamble v Stevenson, 305 S C 104, 111-12, 406 S E 2d 350, 354 (1991) (listing factors to consider in conducting a review of punitive damages) [8] The evidence was relevant to the Mitchell element of the reprehensibility of the defendant's conduct and the Gamble elements of the duration of the conduct, Appellants' awareness, and similar past conduct For example, HCI was aware of water issues in other projects as early as 1998, before construction on Magnolia North had begun

In sum, the trial court did not abuse its discretion in admitting the challenged evidence

III Jury Instructions

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[7] The Mitchell guideposts are (1) the reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm to the plaintiff and the amount of the punitive damage award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases Mitchell, 385 S C at 584-89, 686 S E 2d at 183-86 In Mitchell, our supreme court announced that its previous opinion in Gamble remained relevant to the post-judgment due process analysis only insofar as it added substance to the guideposts in BMW of North America v Gore, 517 U S 559 (1996) and adopted in Mitchell The supreme court decided Mitchell on September 14, 2009, after the trial court had already conducted a punitive damages review in the present case

[8] The Gamble factors are (1) defendant's degree of culpability, (2) duration of the conduct, (3) defendant's awareness or concealment, (4) existence of similar past conduct, (5) likelihood of deterring the defendant or others from similar conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant's ability to pay, and (8) other factors deemed appropriate Gamble, 305 S C at 111-12, 406 S E 2d at 354

Appellants maintain they should receive a new trial because the trial court gave the jury two erroneous instructions regarding (1) actual damages on the POA's negligence claim, and (2) punitive damages We address each of these issues in turn

a Standard for Jury Instructions

The trial court is required to charge only the current and correct law of South Carolina Clark v Cantrell, 339 S C 369, 389, 529 S E 2d 528, 539 (2000) In reviewing jury charges for error, this court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial Welch v Epstein, 342 S C 279, 311, 536 S E 2d 408, 425 (Ct App 2000) If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error Keaton ex rel Foster v Greenville Hosp Sys , 334 S C 488, 497-98, 514 S E 2d 570, 575 (1999) A jury charge that is substantially correct and covers the law does not require reversal Id at 496, 514 S E 2d at 574

b Actual Damages on Negligence Claim

Appellants maintain the trial court instructed the jury that it had granted a directed verdict to the POA on its negligence claim, and, therefore, the jury must award the POA damages on this claim Appellants argue the trial court improperly gave the jury the impression it had already determined the POA had established proximate cause We disagree with Appellants' interpretation of the trial court's jury instruction

At the close of evidence, the trial court directed verdicts for the POA on their claims for negligence and breach of warranty of workmanlike services As to the negligence claim, the trial court instructed the jury, in pertinent part

> Now I charge you that as a matter of law, I have determined that the defendants were negligent and breached the implied warranty of workmanlike services in the construction of these condominiums and as a result of [sic] you must award the plaintiff

property owners['] association damages proximately caused by the negligent construction

(emphasis added)

Appellants argue the trial court's inclusion of the phrase "proximately caused by the negligent construction" following its statement that the jury must award damages did not remedy the error We disagree The trial court's statement sufficiently qualified the requirement to award damages by describing the damages as those "proximately caused by the negligent construction " See Stevens v Allen 342 S C 47, 51, 536 S E 2d 663, 665 (2000) (setting forth the prerequisites to an award of damages on a negligence claim)

Because the challenged jury instruction accurately reflected all elements required to be established for a damages award on the POA's negligence claim, the trial court did not commit error in giving its charge See Stewart v Richland Mem'l Hosp , 350 S C 589, 595, 567 S E 2d 510, 513 (Ct App 2002) (stating a jury charge that is substantially correct does not require reversal)

c Punitive Damages

Appellants contend their due process rights were violated by the trial court's instruction advising the jury it had a duty to award punitive damages if it found the plaintiff entitled to such Appellants argue it no longer is appropriate for South Carolina to require the imposition of punitive damages after the jury determines the plaintiff's entitlement because a judicial evaluation of a punitive damages award is required, pursuant to State Farm Mutual Automobile Insurance Co v Campbell, 538 U S 408 (2003) and Mitchell v Fortis Insurance Co , 385 S C 570, 584-89, 686 S E 2d 176, 183-86 (2009) We disagree

Appellants challenge the following portion of the trial court's jury instruction on punitive damages

> If you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances

(emphasis added)

This court has previously held that in South Carolina, 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), abrogated on other grounds, Davenport v Cotton Hope Plantation Horizontal Prop Regime, 333 S C 71, 508 S E 2d 565 (1998) (citing Sample v Gulf Ref Co , 183 S C 399, 410, 191 S E 209, 214 (1937)) In Sample, our supreme court held there was no error in charging the jury that it would have a duty to award punitive damages if it found that the plaintiff's rights "had been consciously, willfully, and recklessly violated " 183 S C at 410, 191 S E at 214 In that case, the court stated

> [U]nder the settled rule prevailing in this state punitive damages are awarded not only as punishment for a wrong, but also as 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

Id at 410, 191 S E at 214 (emphasis added) Appellants argue Broom and Sample are no longer controlling in light of the concerns expressed in Campbell and Mitchell We disagree

In Campbell, the United States Supreme Court acknowledged the existence of procedural and substantive constitutional limitations on punitive damages awards 538 U S at 416 It explained "The Due Process Clause of

the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor " Id (citations omitted), see also BMW of N Am v Gore, 517 U S 559, 568 (1996) ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment "), Pacific Mut Life Ins Co v Haslip, 499 U S 1, 22 (1991) (holding that the Alabama Supreme Court's post-verdict review ensured that punitive damage awards were not grossly out of proportion to the severity of the offense and had some understandable relationship to compensatory damages) In this context, Campbell primarily addressed the excessiveness of punitive damages awards, and it imposed limits on whether to include any punitive damages in a verdict only to the extent that the conduct on which the award is based does not have a nexus to the plaintiff's harm or is not sufficiently reprehensible to justify such an award Id at 419, 422-23 Otherwise, states retain discretion over the imposition of punitive damages Id at 416 ("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 The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor ") (citations omitted)

In Mitchell, our state supreme court implemented the constitutional limitations set forth in Campbell, Gore, and Haslip The Mitchell opinion confirmed that Gore and Haslip addressed the excessiveness of punitive damages awards and that Campbell prohibited any punitive damages award for conduct unrelated to the plaintiff's harm or conduct that was insufficiently reprehensible 385 S C at 584-86, 686 S E 2d at 183-84 Further, in Campbell, the United States Supreme Court stated

> [P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence

Campbell, 538 U S at 419 This language dovetails with Sample's requirement that "when 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 at 410, 191 S E at 214 (emphasis added)

In other words, 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 This is precisely what the trial court in the present case instructed "If you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances " This instruction communicated to the jury that it had the discretion to determine the POA's entitlement to punitive damages, and, if entitlement were so determined, the duty to award punitive damages

Appellants argue that Haslip prohibits states from requiring the imposition of punitive damages We do not interpret Haslip as Appellants suggest First, in Haslip, the issue of whether states may require the imposition of punitive damages was not squarely before the Court Rather, the Court in Haslip analyzed the adequacy of Alabama's method for assessing punitive damage awards, which included a jury instruction explaining the nature, purpose, and basis for the award, a post-trial review enabling the trial court to scrutinize the award, and an appellate review process ensuring that the award was reasonable and rational 499 U S at 19-23 Rather than expressing a need to increase the jury's discretion in the imposition of punitive damages, the Haslip opinion expressed a need to limit the jury's discretion

> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages But that discretion was not unlimited It was confined to deterrence and retribution, the state policy concerns sought to be advanced And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong " The instructions thus

> enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory
>
> As long as the discretion is exercised within reasonable constraints, due process is satisfied

Id at 19 (citations omitted) (emphasis added) Thus, Appellants' interpretation of Haslip is unfounded The Court did not prohibit states from requiring the jury to impose punitive damages after evaluating the evidence and determining the plaintiff's entitlement

In Campbell, which post-dates Haslip, the United States Supreme Court clearly recognized the discretion of the state to establish policies on punitive damages, within the constitutional limits of excessiveness and arbitrariness Campbell, 538 U S at 416 South Carolina imposes a duty on the jury to award punitive damages only after it determines the plaintiff is entitled to such an award based on its characterization of the conduct harming the plaintiff as willful, wanton, malicious, or reckless Therefore, the dictum in Haslip, on which Appellants rely, cannot justify a departure from South Carolina precedent on the jury's duty to award punitive damages upon the determination of entitlement See Clark v Cantrell, 339 S C 369, 390, 529 S E 2d 528, 539 (2000) ("[T]he trial court is required to charge only the current and correct law of South Carolina ")

Based on the foregoing, the trial court's punitive damages instruction as a whole falls within the limits of due process and does not constitute reversible error

IV Directed Verdict

Appellants assert the trial court should not have directed a verdict for the POA on its claims for negligence and breach of warranty of workmanlike

services Appellants argue the trial court misconstrued counsel's acknowledgment that defects existed as an admission that Appellants were "negligent as to, and were the proximate cause of, all of the alleged defects " Appellants further argue (1) the factual issues as to whether certain defective conditions existed, and the extent of such defects, should have been left for the jury to decide, and (2) these factual issues go to the question of liability We disagree

In ruling on motions for directed verdict, the trial court must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motions Law v S C Dep't of Corr , 368 S C 424, 434, 629 S E 2d 642, 648 (2006) The trial court should deny the motions when either the evidence yields more than one inference or its inference is in doubt McMillan v Oconee Mem'l Hosp , Inc , 367 S C 559, 564, 626 S E 2d 884, 886 (2006) "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury " Proctor v Dep't of Health & Envtl Control, 368 S C 279, 292-93, 628 S E 2d 496, 503 (Ct App 2006)

In order to establish a claim for negligence, a plaintiff must show (1) the defendant owes 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 an injury or damages Doe v Marion, 373 S C 390, 400, 645 S E 2d 245, 250 (2007) Further, to establish a claim for breach of the implied warranty of workmanlike services, the plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner Smith v Breedlove, 377 S C 415, 422, 661 S E 2d 67, 71 (2008) (holding that a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, and workmanlike manner)

Here, there was overwhelming evidence of Appellants' failure to meet the industry standard of care in several aspects Viewing the trial in its entirety, Appellants merely contested the extent of damages The POA's and Appellants' experts testified to conflicting estimates of the extent of the damages The reports differed primarily in the scope of work necessary to

repair the defects and the cost of the repairs Gwyn Hardister, HCI's chief operating officer and president, also acknowledged the construction problems

Further, during opening arguments, Appellants' counsel conceded liability As to Appellants' argument that their counsel acknowledged only some, and not all, of the alleged defects, the existence and extent of specific defects bear on the issue of damages proximately caused by Appellants' negligence An admission of counsel or evidence supporting less than all of the complaint's specifications of negligent conduct is sufficient to support a directed verdict for the POA Cf Deason v Southern Ry Co , 142 S C 328, 336, 140 S E 575, 577 (1927) ("The Code requires the construction of pleadings in aid of substantial justice, and it is the rule that the proof of one specification of negligence and wantonness will entitle plaintiff to a verdict, if the jury sees that a case has been made out ") Appellants claim that our supreme court's opinion in Guffey v Columbia/Colleton Reg'l Hosp , Inc , 364 S C 158, 612 S E 2d 695 (2005), requires an evidentiary showing or admission that the defendant was negligent as to each and every specification in the complaint before the trial court may direct a verdict for the plaintiff as to the defendant's breach of the duty of due care We find Appellants' assertion misapprehends the Guffey opinion

In Guffey, our supreme court held "A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability On review, we will affirm a directed verdict [for the defendant] where there is no evidence on any one element of the alleged cause of action " 364 S C at 163, 612 S E 2d at 697 (citation omitted) (emphasis added) The court was referring to the required showing of duty, breach, causation, and damages to establish a cause of action for negligence The court further held the trial judge properly granted a directed verdict for the defendant on one of the complaint's specifications of negligence, i e , that a hospital was negligent in giving aftercare instructions that conflicted with the emergency room physician's instructions, because there was no evidence the conflicting instructions proximately caused the decedent's death 364 S C at 164, 612 S E 2d at 697

Appellants also argue the trial court erred in granting a directed verdict on the claims for negligence and breach of warranty of workmanlike services because BuildStar, as the general contractor, was not responsible for the work performed by its subcontractors This argument has no merit Although a general contractor is not automatically responsible for the negligence of a subcontractor, a builder who undertakes to supervise the construction of a building has a duty to exercise reasonable care See Fields v J Haynes Waters Builders, Inc , 376 S C 545, 561, 658 S E 2d 80, 88-89 (2008) (rejecting the argument that a general contractor is automatically responsible for the negligence of a subcontractor, but approving jury instructions that included the law imposing a duty on a general contractor to use due care in supervising a subcontractor)

Based on the foregoing, the trial court properly directed a verdict for the POA on its causes of action for negligence and breach of warranty of workmanlike services

V Appellants' Directed Verdict Motion

Appellants contend the trial court erred in denying their motions for a directed verdict and JNOV on all of the POA's causes of action Appellants argue (1) they were not equitably estopped from asserting the statute of limitations as a defense, and (2) the POA failed to establish damages as to its claims Appellants also contend the trial court erred in denying their directed verdict and JNOV motions as to negligence and punitive damages because the POA failed to establish (1) each Appellant violated its respective standard of care, and (2) punitive damages by clear and convincing evidence as to each Appellant We disagree

When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court Elam v S C Dep't of Transp , 361 S C 9, 27-28, 602 S E 2d 772, 782 (2004) The court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party Sabb v S C State Univ , 350 S C 416, 427, 567 S E 2d 231, 236 (2002) An appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law Steinke v S C

Dep't of Labor, Licensing & Regulation, 336 S C 373, 386, 520 S E 2d 142, 148 (1999)

In the instant matter, the trial court held

> I find that equitable tolling applies and that based on when the suit was filed and the property turned over to the homeowners['] association that the, the defense is estopped from raising the statute of limitations defense

We address the theories of equitable tolling and equitable estoppel in turn

a Equitable Tolling

The POA's claims are governed by a three-year statute of limitations See S C Code Ann § 15-3-530 (2005) (establishing three years as the limitation for filing an action on a contract, obligation, or liability, except those provided for in section 15-3-520) Appellants maintain that the statute began to run on March 8, 2000, the date of the POA's first meeting Thus, they argue, the statute expired prior to the filing of this action on May 28, 2003 We agree with the trial court's ruling that equitable tolling is justified in this case

In Hooper v Ebenezer Senior Services and Rehabilitation Center, our supreme court stated

> Equitable tolling is judicially created, it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness

> The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use
>
> It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control
>
> The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other Equitable tolling may be applied where it is justified under all the circumstances

386 S C 108, 115-17, 687 S E 2d 29, 32-33 (2009) (citations and quotation marks omitted) (emphasis added) Unlike equitable estoppel, equitable tolling does not require a showing that the defendant has made a misrepresentation to the plaintiff See Hooper, 386 S C at 115, 687 S E 2d at 32 ("Equitable tolling is judicially created, it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it ")

In the present case, the POA board consisted of Appellants' officers until the date of "turnover," September 9, 2002 We find unpersuasive Appellants' claim that an organization they controlled would have initiated an action against itself during this period Further, after the property owners gained control over the POA, they exercised due diligence by filing this action on May 28, 2003, approximately eight months after assuming control Therefore, we affirm the trial court's ruling on this issue

b Equitable Estoppel

The law on equitable estoppel also supports the trial court's ruling In South Carolina,

> [a] defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct
>
> The doctrine is, of course, most clearly applicable where the aggrieved party's delay in bringing suit was caused by his opponent's intentional misrepresentation, but deceit is not an essential element of estoppel It is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire
>
> The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue Some courts hold that repairs by a defendant may toll the statute of limitations One's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation

Dillon Cnty Sch Dist No Two v Lewis Sheet Metal Works, Inc , 286 S C 207, 218-19, 332 S E 2d 555, 561 (Ct App 1985), overruled on other grounds, Atlas Food Sys & Serv , Inc v Crane Nat'l Vendors Div of Unidynamics Corp , 319 S C 556, 462 S E 2d 858 (1995) (citations and quotation marks omitted) (emphasis added)

Here, until the turnover, Appellants assured the unit owners the construction defects would be repaired, and, as a result, the owners were justified in relying on those assurances At the time these representations

were made, a reasonable owner could have believed that it would be counter-productive to file suit before giving Appellants the opportunity to honor the representations, especially given Appellants' efforts to make some repairs Therefore, the trial court properly held that Appellants were equitably estopped from asserting the statute of limitations as a defense

c Statute of Limitations as to Breach of Fiduciary Duty

Appellants argue that the trial court erred in its conclusions regarding equitable tolling and equitable estoppel, and, as a result, the trial court should have granted Appellants' motion for a directed verdict on the ground of the statute of limitations However, the POA asserts that, even if neither equitable tolling nor equitable estoppel apply to this case, the statute of limitations did not begin to run on the breach of fiduciary duty claim until HCI turned over its control of the POA to the owners on September 9, 2002, because this was the date that the breach occurred We agree

In Concerned Dunes West Residents, Inc v Georgia-Pacific Corp , our supreme court held

> [T]he developer has a fiduciary duty to the POA to transfer common areas that are in good repair, if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas up to standard, is liable to the POA for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas

349 S C 251, 260, 562 S E 2d 633, 638 (2002) (emphasis added) Therefore, in the present case, the breach occurred on September 9, 2002, the date HCI turned over control of the POA to the unit owners Because the POA filed its

breach of fiduciary duty claim approximately eight months later, the three-year statute of limitations had not yet expired See S C Code Ann § 15-3-530 (2005) (establishing three years as the limitation for filing an action on a contract, obligation, or liability, except those provided for in section 15-3-520)

d Damages

Appellants also assert the POA failed to establish its damages as to any of its claims We disagree

To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy Whisenant v James Island Corp , 277 S C 10, 13, 281 S E 2d 794, 796 (1981) However, "proof with mathematical certainty of the amount of loss or damage is not required " Id The determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is provided, allowing a reasonably close estimate of the loss Piggy Park Enter , Inc v Schofield, 251 S C 385, 391-92, 162 S E 2d 705, 708 (1968)

Here, the POA's expert in building diagnostics testified that in his investigation of buildings, he often finds hidden damages He also testified that it is common for buildings like those at Magnolia North to look great on the outside, but to reveal rot "when you peel the onion[ ]" Further, the POA's expert in estimating construction repair testified that usually, hidden damage in condominium projects is approximately twenty percent of the contract price, and he had included a hidden damage allowance in his estimate to repair Magnolia North [9] This evidence provides a sufficiently reasonable

[9] Appellants argue this expert's estimate of hidden damage was speculative because his past experience in assessing hidden damage included some buildings with stucco siding, while Magnolia North's buildings had Hardie Plank siding above a brick veneer However, the fact that this expert's past experience with assessing hidden damages included buildings with stucco siding would go to the weight of the evidence rather than its existence Cf Dep't of Transp v Rogers, 259 S E 2d 775 (N C Ct App 1979) (holding that there was no error in admitting into evidence the testimony of the

basis of computation of damages to support the trial court's submission of damages to the jury See May v Hopkinson, 289 S C 549, 559, 347 S E 2d 508, 514 (Ct App 1986) (affirming the award of damages based on the contractor's repair estimate even though the exact repairs needed could not be determined because the removal of defective wood was expected to reveal additional problems)

Appellants also argue that as to the breach of fiduciary duty claim, the POA failed to offer evidence of its damages at the time of the transfer of control In response, the POA contends the construction defects in question existed at the time of the transfer of control We agree with the POA that the evidence of construction defects, combined with Prime South's estimate for repair costs, was sufficient to allow the jury to determine the resulting damages from Appellants' breach of fiduciary duty

> [T]he developer has a fiduciary duty to the POA to transfer common areas that are in good repair, if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas up to standard, is liable to the POA for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas

Concerned Dunes West Residents, Inc v Georgia-Pacific Corp , 349 S C 251, 260, 562 S E 2d 633, 638 (2002) (emphasis added) Therefore, Prime South's estimate for repair costs properly included the current cost to repair the construction defects

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defendant's expert regarding the value of the defendant's condemned property because the fact that the expert had not observed the property at the time of the taking went to the weight given his testimony by the jury)

Appellants further maintain that general maintenance items were improperly included in the damages total, citing Jennifer Harmon's testimony regarding the amount the POA spent on repairs after the turnover of control to the unit owners [10] However, any mistaken inclusion of general maintenance items in Harmon's repair records does not detract from the strength of other evidence of damages Chris Cooper estimated the total cost of repairs, not including an owners' contingency or contract administration fee, as $7,793,468 After the owners' contingency and contract administration fee were added, the total contract price was $9,310,902 Id The POA also sought reimbursement for the total amount it had to spend on repairs since the transfer of control from Appellants to the unit owners Jennifer Harmon testified this amount was over $500,000 However, the jury awarded the POA only $6,500,000 in actual damages Thus, even if Harmon's repair records included some general maintenance items, there was sufficient evidence of other damages to support the $6 5 million award for actual damages

Based on the foregoing, the trial court properly denied Appellants' directed verdict and JNOV motions [11]

VI Punitive Damages Award

Finally, Appellants contend the admission of evidence of defects at HCI projects other than Magnolia North violated their due process rights

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[10] Jennifer Harmon worked for the Noble Company, which managed the Magnolia North property for the POA

[11] Appellants also argue (1) the POA failed to establish that each Appellant violated its respective standard of care, and (2) the jury's award of punitive damages was not based on individualized determinations that clear and convincing evidence supported such damages against each Appellant Because the trial court did not err in finding Appellants' entities were amalgamated, it is unnecessary to address this issue See Futch v McAllister Towing of Georgetown, Inc , 335 S C 598, 613, 518 S E 2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive)

because it resulted in the imposition of punitive damages based on alleged harm to non-parties to this litigation Appellants also argue the punitive damages award was inconsistent with the guidelines established in Gamble v Stevenson, 305 S C 104, 406 S E 2d 350 (1991), and Mitchell v Fortis Insurance Co , 385 S C 570, 584-89, 686 S E 2d 176, 183-86 (2009) [12]

a Non-parties

Appellants contend the admission of evidence of defects at HCI projects other than Magnolia North violated their due process rights because it resulted in the imposition of punitive damages based on alleged harm to non-parties to this litigation We need not address this issue because we have previously determined the trial court properly admitted evidence of defects at other HCI developments [13] See Futch v McAllister Towing of Georgetown, Inc , 335 S C 598, 613, 518 S E 2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive)

b Gamble/Mitchell factors

Appellants maintain that the Gamble and Mitchell factors require the award in this case to be set aside In particular, Appellants argue (1) the award of punitive damages has no deterrent effect because Appellants went out of business prior to the commencement of this litigation, and (2) Appellants have no ability to pay punitive damages

Assuming, arguendo, the lack of a deterrent effect on Appellants, neither this consideration nor the absence of evidence of Appellants' ability to pay punitive damages precludes such an award if the trial court's findings on other relevant factors are sufficient to uphold the award See Miller v City

[12] See supra n 7 & n 8

[13] As stated earlier in this opinion, the evidence of other HCI projects was relevant to the Gamble elements of the duration of the conduct, Appellants' awareness, and similar past conduct For example, HCI was aware of water issues in other projects as early as 1998, before construction on Magnolia North had begun

of W Columbia, 322 S C 224, 231-32, 471 S E 2d 683, 687-88 (1996) (rejecting Appellant's argument that the trial court erred in failing to strike the punitive damages award because the record did not establish that he had an ability to pay and holding the trial court was not required to make specific findings of fact for each Gamble factor), id at 232, 471 S E 2d at 687 ("[E]ven if the record did not establish that [Appellant] had an ability to pay, the judge's findings on the remaining factors are sufficient to uphold the jury's award of punitive damages ") Here, the trial court conducted a post-trial review of the punitive damages award using the factors outlined in Gamble and Mitchell and properly set forth its findings on the record Considering the factors in both Gamble and Mitchell, the evidence supports the trial court's post-trial review of the punitive damages award

Based on the foregoing, the trial court properly upheld the jury's punitive damages award

CONCLUSION

Accordingly, the jury's verdict is

AFFIRMED

SHORT and WILLIAMS, JJ , concur

rec'd 4/23/12
00470/01576

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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April 20, 2012

C Mitchell Brown, Esquire, A Mattison Bogan, Esquire
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P O Box 11070
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Re Magnolia North v Heritage Communities

Dear Counsel

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case

Your petition for rehearing en banc was distributed to the judges, but it has been rejected See Rule 219 SCACR (amended April 28, 2011)

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b)

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case Also enclose a check payable to the S C Court of Appeals in the amount of $7 50 to cover mailing costs If we have not heard from you within ten (10) days the Record on Appeal and briefs will be disposed of

Sincerely,

Tonisha E Fuller

Tonisha E Fuller
Administrative Assistant

VBCA/tf

cc Stephen L Brown, Esquire,
Jeffrey J Wiseman, Esquire
John P Henry, Esquire
Phillip Coleman Thompson Esquire

The South Carolina Court of Appeals

Magnolia North Property Owners' Association, Inc , Respondent,

v

Heritage Communities, Inc , Heritage Magnolia North, Inc , and BuildStar Corporation, Appellants

The Honorable Clifton Newman
Horry County
Trial Court Case No 2003 CP-26-03203
2005-CP-26-00044

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and hence, there is no basis for granting a rehearing It is, therefore, ordered that the Petition for Rehearing be denied

Paul G. Short, Jr. J Short

J Williams

John D. Geathers J Geathers

FILED
April 30, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman Circuit Court Judge

Case No 2005-CP-26-0044

Magnolia North Property Owners' Association, Inc , Respondent,

v

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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Appellants Heritage Communities, Inc ("HCI"), Heritage Magnolia North, Inc ("HMN"), and Buildstar Corporation ("Buildstar") hereby file this petition for rehearing and suggestion for rehearing *en banc*

INTRODUCTION

In Opinion No 4943, filed February 15, 2012, a Panel of this Court affirmed the Trial Court's directed verdict entered against Appellants on the claims for negligence and breach of the warranty of workmanlike service affirmed the breach of fiduciary duty verdict entered by the jury against HCI and HMN, and upheld the jury's damages awards Appellants respectfully submit that rehearing, rehearing *en banc* and/or issuance of a new opinion reversing the Trial Court's decision is warranted

because the Panel's Opinion in this matter overlooked or misapprehended several matters of fact and law and represents a significant departure from the South Carolina Supreme Court's established jurisprudence Additionally, rehearing *en banc* is appropriate because the rulings in the Panel's Opinion, particularly with regard to the "amalgamation" of the Appellants and with regard to the admission of "similar events" evidence, involve questions of exceptional importance and, if left uncorrected, will result in a lack of uniformity among South Carolina's appellate decisions on these issues

STATEMENT OF THE CASE AND OF THE FACTS[1]

This appeal involves a construction defect action arising from the construction of the Magnolia North Horizontal Property Regime ("Magnolia North") in Myrtle Beach, South Carolina HCI was Magnolia North's overall developer HMN was the project specific developer for Magnolia North, and Buildstar was the general contractor for the Magnolia North project [2]

This action was filed on May 28, 2003, by the Magnolia North Property Owners' Association ("POA") seeking to recover repair costs related to alleged defective conditions at Magnolia North (R 19) The Complaint in this action asserted the following claims (1) negligence against all defendants, (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 (R 38)

Prior to the start of the trial, the Trial Court ruled that Appellants were estopped from raising the defense of the statute of limitations as to the POA's action

[1] This section is set forth for the benefit of those Judges considering the *en banc* suggestion
[2] HCI is the parent corporation of both HMN and Buildstar

because equitable tolling applied during the time the Magnolia North Property Owners' Association was controlled by the developer (R 52-73) At the close of Respondent's case the Appellants moved for directed verdict as to all claims (R 676-693) The Trial Court granted Appellants' motion as to the claim for breach of express warranty and denied it as to the other claims (R 692-693) Additionally, at this time the Trial Court ruled that 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 (R 660-676) At the close of all evidence, both Respondent and Appellants moved for directed verdicts on all remaining claims (R 1014-1040) The Trial Court denied Appellants' motions and denied Respondent's motion as to the breach of fiduciary duty claim, but granted the Respondent directed verdicts as to the claims for negligence and breach of implied warranty of workmanlike service

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 the implied warranty of workmanlike service claims On May 20, 2009, the jury found for the Respondent on the breach of fiduciary duty claim, and awarded a general verdict of $6,500,000 00 in actual damages and $2,000,000 00 in punitive damages (R 16) Appellants then timely served and filed a Notice of Appeal

The Magnolia North condominium complex consists of twenty-five buildings containing between twelve and fifteen units per building (R 79, 38) Construction of the twenty-one buildings that were the subject of this litigation began in 1997 and the last certificate of occupancy was issued in 2000 (R 1603, 246)

Respondent alleged defects in the design and construction of Magnolia North primarily asserting that, due to these defects, water was permitted to intrude into the buildings causing rot, deterioration and other damage (R 225-538) Magnolia North's POA was formed by the developer as a separate legal entity (R 2023, 2033-2034) HCI and HMN personnel were initially officers of the POA until time came for control to be turned over to the subsequent purchasers of units in Magnolia North (R 2035-2036) The POA held its first annual meeting on March 8, 2000 (R 1565) At this meeting issues relating to defective construction were raised Specifically, issues relating to water intrusion at balconies and windows were discussed (R 1565) Copies of the minutes from this meeting were mailed to the property owners (R 111, 707) Later, in December of 2000 the firm of Kimley-Horn and Associates, Inc conducted a building condition assessment and delivered a detailed report identifying various defective conditions to the Noble Company of South Carolina, LLC, which was the property management company that managed the Magnolia North and the POA from its inception (R 134-136, 1512)

The second annual meeting of the POA was held on March 26, 2001 At that meeting, the property owners were told that Dr Jack Green was now president of HCI and the POA (R 1570) They were further informed that on January 29, 2001 Dr Green, acting on behalf of HCI, filed for Chapter 11 bankruptcy on January 29, 2001, and that it was Heritage's plan to use the bankruptcy process to reorganize and to ultimately "build [its] way out of" the situation (R 1570)

On May 29, 2002, during a meeting of the Board of Directors of the POA, potential legal action against subcontractors for the defective conditions existing at

Magnolia North was discussed Specifically, Dr Green, who was still both a Director of the POA and the president of HCI, instructed the Noble Company to contact the subcontractor involved and then take legal action if necessary (R 186-187) By July of 2002 the POA had retained John P Henry, Esquire as counsel for the POA, and Mr Henry had contacted R V Buric Construction Consultants to identify and assess defective conditions at Magnolia North (R 187-189, 1648) On September 13, 2002, control of the POA was transferred to the unit owners (R 1595) Mr Henry was retained and eventually brought this action for the POA

The evidence at trial established that while Appellant Buildstar was the general contractor at Magnolia North, all construction work was actually performed by subcontractors (R 2021-2022, 2074-2075) Evidence was submitted refuting the contention that Appellants, as opposed to the subcontractors who actually performed the construction, caused the defective conditions as well as the extent of the alleged defects (R 727-837) With respect to the ABTCO trim product used at Magnolia North both Appellants' and Respondent's witnesses testified that the product is now known to be unsuitable in this environment but the defective nature of this product was unknown at the time Magnolia North was constructed, and there was no deviation from the manufacturer's standards for its installation at Magnolia North (R 280 367, 515 529, 732-733, 808, 2077) Additionally, numerous property owners at Magnolia North testified they had no issues with defective construction or that any issues they had were already remedied (R 694-696, 703-706, 711-716, 718-720, 723, 725-726)

ARGUMENT

I The Panel's Opinion misapprehended and misapplied the "amalgamation of interests" theory in contravention of longstanding South Carolina law respecting the separateness of different corporate entities and requiring a clear finding of injustice or unfairness to justify disregarding separate corporate forms

After the close of Respondent's case, the Trial Court ruled that HCI, HMN, and Buildstar were "amalgamated " (R 675-676) The basis for this ruling, as explained by the Trial Court, was

> Well I find as a matter of law that the facts in this case closely parallel with the facts in the Kincaid case the Kincaid case and that the piercing of the corporate veil issue raised in the Sherwood, not Sherwood, Mid-South Mortgage v Sherwood Development Corporation, the piercing the corporate veil ruling in the amalgamation ruling in that case and the analysis applied in that case is inapplicable to that in this case, that the corporate officers here in the same place, the entities were so intertwined that they should be amalgamated, that the corporate interest amalgamation should be ordered in this case because the evidence has revealed an amalgamation of the corporate interest, the entities, and activities so as to blur the legal distinction between the corporation and their activities I think that s pointed out through Mr Hardester's testimony as well as the evidence in the case and that's the order of the Court

(R 675-676) This erroneous ruling, as affirmed by the Panel, not only improperly stripped HCI, HMN and Buildstar of their separate corporate forms, but also improperly freed Respondent from the requirement that each claim, including the requirements for an award of punitive damages, be proved as to each individual Appellant If allowed to stand, the Panel's opinion will create a drastic new form of corporate veil piercing that will allow courts to disregard critical aspects of a corporation's identify without any showing of misrepresentation or confusion, elements that courts in this state and elsewhere have always required before the corporate form

may be disregarded See "Corporate Justice An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil," 45 WAKE FOREST L REV 931, 962 (Fall 2010) ("Our data revealed that a lack of misrepresentation resulted in refusal to pierce [the corporate veil] in 100% of the cases ")

The stripping of Appellants separate corporate forms was based solely upon the fact that HCI was the parent corporation of both HMN and Buildstar and the three entities shared officers, directors and the same office space (R 2001, 2019-2024, 2029-2030, 2033) The record is clear that each entity was properly formed as a separate corporation under South Carolina law, and that they operated as separate entities with separate roles (R 2023 2030) Specifically, HCI was the overall developer of Magnolia North, while Buildstar was the general contractor and HMN held title to the Magnolia North properties and served as the seller of the units to homeowners (R 2019-2024, 2029-2033, 956) While there was cross-over among the people involved, each was operated as a separate entity with separate responsibilities The emphasis placed by the panel on the fact that Appellants separate corporate forms also allowed them to operate as "cost centers" is misplaced The fact that using separate corporate forms for entities with differing purposes also helps provide clarity in accounting is not an adequate basis for ignoring corporate separateness Significantly, there was **no evidence** of any confusion, inequitable conduct, or fraud in the operation of these three distinct entities, and there was no indication that either Trial Court's ruling, or the Panel's Opinion was based on such a finding The Trial Court s "amalgamation" ruling, and the Panel's affirmance of it, misconstrued South Carolina's

well established law on corporate separateness and the limited circumstances under which the corporate form may be disregarded

A The Panel's Opinion misapplied the amalgamation of interests theory in this case because the requisite consumer confusion the theory requires was missing in this case

The Panel erred when it affirmed the Trial Court's ruling that the act of one corporate Appellant was the act of all based upon South Carolina's unique "amalgamation of interests" or "blurred identity" theory See Mid-South Mgmt Co Inc v Sherwood Dev Corp , 374 S C 588 604-05, 649 S E 2d 135, 144 (Ct App 2007) [3] This is an equitable theory thus the appellate court's scope of review of this issue is broad Id

Prior to the Panel's Opinion, South Carolina courts had referenced this theory only five times [4] The name appears to be unique to South Carolina The first mention of this theory occurred in Kincaid v Landing Development Corp 289 S C 89, 344 S E 2d 869 (Ct App 1986) That case involved three sister corporations, all owned by the same individual shareholders Id The three corporations were involved in developing, building and marketing the plaintiff's subdivision Id When one corporation tried to deny liability for faulty construction by its sister corporation because it was only the marketer, this Court found that the marketing company had

[3] Appellants have found no cases in any other jurisdictions that have discussed a theory by these names in the context of disregarding corporate form

[4] One such reference is in Schenk v National Healthcare, Inc 322 S C 316 319, 471 S E 2d 736 737 (1996) in a footnote The South Carolina Supreme Court in Kennedy v Columbia Lumber and Manufacturing Company, Inc 299 S C 335 384 S E 2d 730 (1989) also alluded to the "blurring of legal distinction" theory in a lender liability situation The most recent reference to this theory is the case of Pope v Heritage Cmtys , Inc 395 S C 404 717 S E 2d 765 (Ct App 2011) A petition for a writ of certiorari in the Pope case is currently pending before the South Carolina Supreme Court

blurred the legal distinction between it and its sister corporations, and thus it, too, was liable Kincaid, 289 S C at 96, 344 S E 2d at 874

The Panel misapplied Kincaid, because it failed to recognize that the amalgamated interests theory was applied only after the plaintiffs testified they had been confused by the representations made by the defendants, one of which identified the marketing company as the "project developer" and the other of which was written on the marketing company's letterhead which identified it as "A Development, Construction, Sales, and Properly Management Company " Id From this evidence the appellate court held the trial court properly denied the marketing company's motion for directed verdict Id The Panel failed to recognize that the Court's adoption of the amalgamation theory in Kincaid was based not only on the sharing of corporate officers, directors, and offices, but also on evidence that the marketing company defendant had held itself out to the plaintiffs as the "project developer" that would respond to construction complaints and concerns Id

The requirement that the claimants be confused by misrepresentations of a defendant who is trying to avoid liability by hiding behind a sister corporation was confirmed in Mid-South 374 S C at 605, 649 S E 2d 145 It was the absence of any misrepresentation or confusion among the related corporations that led the Court to reject the application of the amalgamation of interests theory in Mid-South The Panel here mentioned Mid-South, but overlooked its importance The Court of Appeals specifically addressed the "amalgamation of interests" theory and pointed out the significance of evidence in Kincaid that established, from the plaintiff's perspective, confusion as a result of the marketing company's misrepresentation that it was the

equivalent of the developer and the general contractor Id (refusing to apply the "amalgamation of interests" theory, in part, because there was no evidence that the parties were confused as to the separate nature of the corporate entities)

Absent some showing of confusion, fraud or the like, it was error for the Panel to hold that Appellants' separate corporate forms were properly disregarded This error severely prejudiced Appellants because, inter alia, it improperly relieved Respondents of their burden of establishing both the elements of each cause of action and the standard for punitive damages as to each individual Appellant South Carolina's jurisprudence illustrates that regardless of the theory used the corporate form may be disregarded only where retention of separate corporate personalities would promote misrepresentation confusion, fraud, or injustice or would otherwise contravene public policy As the Panel did not require or mention any such requirement, its "amalgamation" ruling was incorrect

B The Panel's Opinion misapprehends the limited circumstances under which the equitable relief of disregarding separate corporate forms or "piercing the corporate veil" may be granted

Both the Trial Court and the Panel erred in concluding that "the piercing of the corporate veil analysis did not apply to this case " Op No 4943 at p 5 The phrase "piercing the corporate veil" refers to the ***relief itself*** – that is, the in remedy of a court disregarding the corporate form Drury, at 101 n 1, 668 S E 2d at 800 n 1 There are several theories or rationales which may serve as the basis for a party obtaining this equitable relief See id (explaining that the "alter ego" doctrine is merely a theory or means of obtaining the procedural relief of piercing the corporate veil), Wilson v Friedberg, 323 S C 248, 257, 473 S E 2d 854, 859 (Ct App 1996) (discussing the

"instrumentality rule" within the concept of piercing the corporate veil) Whatever the theory, including the "amalgamation" theory used here, the limitations on piecing the corporate veil still apply, however

It is a well settled principle of South Carolina law that "a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears " Drury Dev Corp v Foundation Ins Co , 380 S C 97, 101, 668 S E 2d 798, 800 (2008) Where the corporate entity is used to "protect fraud, justify wrong, or defeat public policy" it will be disregarded Sturkie v Sifly, 280 S C 453, 457, 313 S E 2d 316, 318 (Ct App 1984) The disregarding of the corporate form by the courts is referred to as "piercing the corporate veil " Id This equitable doctrine is not applied by the courts "without substantial reflection" and it is the party seeking to pierce the corporate veil that has the burden of proving the doctrine should apply Id

In South Carolina, the analysis of whether a corporate veil should be pierced consists of a two-prong test Drury, at 102 668 S E 2d at 800 The first prong is an eight factor analysis that examines to the observance of corporate formalities Sturkie at 457, 313 S E 2d at 318 The eight factors considered are (1) the capitalization of the corporation (2) the observation of corporate formalities, (3) the payment of dividends, (4) the solvency of the corporation, (5) whether corporate funds were siphoned by a dominant shareholder, (6) whether other officers or directors are functioning (7) the maintenance of corporate records and (8) whether the corporation is a facade for the operations of a dominant shareholder Wilson, at 252, 473 S E 2d at 856 "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all " Dumas v InfoSafe Corp 320 S C 188,

192, 463 S E 2d 641, 644 (Ct App 1995) The second prong of the analysis requires that there be an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the individual Id

The Panel failed to apply this analysis, particularly the second prong requiring the presence of injustice or fundamental unfairness Regardless of the theory used, disregarding of the corporate form has ***always*** been limited to situations were there is some fraud, wrong or fundamental unfairness that justifies this drastic remedy Drury, 380 S C at 101-02, 668 S E 2d at 800, Jones v Enter Leasing Co , 383 S C 259, 267-68, 678 S E 2d 819 824 (Ct App 2009) (requiring a showing that retention of corporate form would promote fraud, wrong or injustice before applying alter ego theory), Wilson, 323 S C at 257, 473 S E 2d at 859 (noting that the instrumentality rule does not apply unless the retention of separate corporate personalities would promote fraud, wrong or injustice) Absent this essential showing, Appellants separate corporate forms should not have been disregarded

The amalgamation ruling resulted in significant prejudice to Appellants Additionally the ruling suggested to the jury that Appellants had engaged in some form misconduct and were deserving of being stripped of their corporate entity status Most significantly, the amalgamation ruling opened the door for the application of punitive damages against all three Appellants without the requirement that Respondent prove by clear and convincing evidence that each Appellant deserved such punishment The Panel erred in not granting Appellants a new trial due to this error

II **The Panel's Opinion misapprehended the application of Rule 404(b) and the rule set forth in Whaley v CSX Transportation limiting the admission of "similar events" evidence**

In addition to the Magnolia North condominium project, Appellant HCI was the developer of, and Appellant Buildstar was the General Contractor for, several other condominium projects in Myrtle Beach and the surrounding area [5] Throughout the course of the trial, Respondent repeatedly elicited testimony and introduced evidence of alleged construction defects at these ***other*** projects, as part of an overall strategy to support their claims of defective construction at Magnolia North The admission of this evidence violated Rule 404 of the South Carolina Rules of Evidence, as well as the Supreme Court's mandate in Whaley v CSX Transportation, Inc 362 S C 456 609 S E 2d 286 (2005) limiting the admissibility of "similar events" evidence The Panel s Opinion failed to find that the admission of this "similar events" evidence constitutes clear error entitling Appellants to a new trial

The references to other projects and the myriad of different defective conditions alleged to exist at those other projects was numerous The resulting confusion played into Respondent's clear theme that the jury should punish Appellants not only for alleged defects at Magnolia North, but for every project in which Appellants had ever been involved, because Heritage was a bad developer In his closing argument and reply arguments, Respondent's counsel made this point by imploring the jury with the following message

[5] HMN was involved in only the Magnolia North project The other projects included Avian Forest Riverwalk, Magnolia Place the Gardens at Cypress Bay, Azalea Lake Sea Dunes and Heatherstone Each of these projects was a separate and distinct undertaking

> You can send a message to the developers over there in Myrtle Beach or wherever in this State so we ask you to consider punitive damages that will send a message to these people we're not going to tolerate this kind of conduct
>
> We didn't have to test many windows, we knew what was wrong with the windows to begin with Avian Forest was Mr , Mr Lewis referred to the mold farm, I call it the mold palace, they, they wrecked this community with condominium after condominium that they sold to the public and they ought to be punished for that

(R 937, 951) Respondent's strategy of repeatedly referencing the defects of other projects to establish that such defects exist at Magnolia North and the corresponding theme that Appellants should be punished for *all* of their projects, was in clear violation of the South Carolina Rules of Evidence and South Carolina's jurisprudence on the limitations of such "prior event" evidence

Rule 404(b), SCRE, provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith " The evidence of alleged defects at other projects and the existence of other litigation as to the other projects is precisely the type of "other acts" evidence that is prohibited by Rule 404(b)

In addition to the prohibition set forth in Rule 404(b), the South Carolina Supreme Court has established the rule that evidence of similar events is not admissible unless "there is some special relation between them tending to prove or disprove some fact in dispute " Whaley v CSX Transp , Inc , 362 S C 456, 483, 609 S E 2d 286, 300 (2005) "Because evidence of other [events] may be highly prejudicial, '[a] plaintiff must present a factual foundation for the court to determine that the other

[events] were substantially similar to the [event] at issue '" Id (quoting Buckman v Bombardier Corp , 893 F Supp 547, 552 (E D N C 1995))

Thus, under Whaley, in order for the evidence relating to other Heritage projects to be admissible, Respondent was required to show the existence of a "special relation" between Magnolia North and the other projects and that the alleged defects at the other projects stemmed not only from similar circumstances, but from "substantially similar circumstances" as the alleged defects at Magnolia North Respondent failed to meet this strict standard

The Panel s Opinion incorrectly concludes that substantial similarity was established by pointing to a few examples of defective conditions that were common to the various Heritage developments Op No 4943 p 7 This, however, is an oversimplification of the Whaley test, and the examples cited, which are common to all construction, are insufficient to allow the admission of similar events evidence Significantly, there was no evidence that the common design of the projects in any way related to the alleged defective conditions Additionally, Respondent did not show that the subcontractors, who did all of the actual construction at Magnolia North, were the same ones used at each of the other projects referenced The commonality of the general defects found to exist at Magnolia North is insufficient to establish the level of substantial similarity required Water intrusion around exterior trim and windows and similar construction issues is common to nearly all construction

It was Respondent's burden to establish a clear factual foundation not only of the existence of substantially similar defects, but that they were caused by the same conduct and by the same actors See JKT Co , Inc v Hardwick, 274 S C 413, 416,

265 S E 2d 510, 511-12 (1980) (noting that evidence of a similar defective product was admissible where there was testimony that the manufacturing process used in the other shipments was "identical" to the process used to produce the materials at issue) This burden was not met

III The directed verdict on the negligence and warranty claims was improper because Appellants did not concede liability as to all of the alleged defects and there was ample evidence in the record to require this issue to be submitted to the jury

The Trial Court's decision granting Respondent a directed verdict as to the negligence and breach of workmanlike service claims was based upon the mistaken assumption that defense witnesses conceded that the buildings were defectively constructed and that defense counsel had "acknowledged that the jury should return a verdict for cost and repair " (R 1031-1032) This ruling misconstrued an acknowledgement that some defects exist as an admission that Appellants were negligent as to, and were the proximate cause of, ***all*** of the alleged defects, and failed to take into consideration the high standard for directed verdict The Trial Court should not have granted such blanket directed verdicts and the Panel should have reversed this ruling

A Both the Trial Court and the Panel's Opinion incorrectly conclude that Appellants conceded liability for all of the alleged defects

The Panel s Opinion incorrectly concludes that Appellants admitted liability for the defective conditions, and "merely contested the extent of damages " Op No 4943 p 15 Under this erroneous view, Appellants were held to have made a judicial admission of liability as to ***all*** of the defects alleged merely because they offered

alternative damages evidence and made statements acknowledging the mere existence of *some* of the defective conditions at Magnolia North

The statements of Appellants' counsel cited by the Panel, and the testimony of Appellants witnesses regarding defective conditions and the estimated costs to remedy those defects, do not constitute admissions of liability They merely acknowledge that defective conditions exist at Magnolia North, and ***not*** that Appellants are liable for those, or at minimum, **for all of those**, defective conditions Appellants offered evidence at trial on the issue of causation which would have allowed the jury to conclude that the defective conditions were the result of the negligence of subcontractors or the result of defective materials for which Appellants were not responsible It was entirely permissible for Appellants to defend this action by challenging causation while simultaneously challenging and offering alternative computations of Respondent s damages Additionally, Appellants' counsel specifically refuted the contention that Appellants were conceding liability or damages During the directed verdict argument, the Trial Court posed the question "[s]o are you contending that you have not conceded liability to some extent?" and Appellants' counsel responded

> "Judge I, I think that I have tried to walk that line as tightly as I could, but, I believe your Honor, at the end whether or not there was reasonable care with regard to a general, if they hire a sub they have to use reasonable care What is reasonable?

(R 1032-1033)

South Carolina's courts have acknowledged the common view that judicial admissions must be clear, deliberate, unequivocal statements of fact, and not

conclusions of law or expressions of opinion Lytle v Reagan, 256 S C 269, 274, 182 S E 2d 302, 305 (1971) (agreeing with the majority view of other jurisdictions that where a party's testimony is adverse to himself and consists mainly of estimates, opinions and conclusions, it is not the equivalent of a judicial admission and is not conclusive) As there was no judicial admission by Appellants, rehearing should be granted and the Trial Court should be reversed

B The grant of directed verdict in favor of Respondent as to all of the alleged defects in their entirety was error where the evidence established the existence of factual issues as to multiple separate specifications within the claims

The Panel's Opinion states that "there was overwhelming evidence of Appellants' failure to meet the industry standard in ***several*** aspects " Op No 4943 p 15 (emphasis added) Thus, even the Panel Opinion acknowledges that liability was not established as to ***all aspects*** of the claims "In ruling on motions for a directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt " Strange v S C Dep't of Hwys & Pub Transp , 314 S C 427, 429-30, 445 S E 2d 439, 440 (1994)

This suit alleged numerous, and different, defective conditions at Magnolia North, *i e* , improper trim installation, improper masonry work, improper sheathing, improper installation of decks, and improper installation of windows, all of which were disputed by Appellants through the presentation of evidence that warranted submission of the particular defects to the jury For example, one of the clearly disputed issues

related to the use of ABTCO trim throughout the project Respondent's contention was that this trim was improperly installed and that it was an inherently defective product (R 280, 732 785) However, Respondent's expert acknowledged that this specific type of trim was commonly used in this manner "up and down the coast" at the time of construction, and that during the 1997-1999 time frame it was not known that it was an inappropriate product for this use (R 395-396) The testimony at trial established that Appellants were not aware that the trim product was inappropriate for this environment (R 2077) Additionally, Appellants' expert testified that, with respect to the trim, he found no deviation from the manufacturer's installation standards (R 808) Thus, there was ample evidence that would allow a jury to find that Appellants' use of this trim product was neither negligent nor the basis for a breach of the warranty of workmanlike service Other examples of factual issues relating to the alleged construction defects include testimony as to the following

- Mr Pegram testified that deficient work by subcontractors occurs even where an architect such as himself performs contract administration on a project and it is speculation that contract administration would have avoided the defective conditions (R 220, 223-224),
- Respondent's expert acknowledged that areas of the trim appear to be fine (R 403-404),
- there was testimony that it was common to **not** have a separate contract administration firm oversee the work of subcontractors (R 545),
- the use of construction administration is not required by the building code (R 770),
- variation from the architect's plans is not a violation of the building code (R 771)

- the wall system in the buildings' attics met the building code requirements (R 773-774),

- whomever installed the carpeting on the walkways cut the waterproofing during installation of the carpets (R 898),

- Respondent's expert acknowledged there is always mortar that gets into the cavity of any building he has inspected and that the existence of such mortar in the cavity is not a code violation or a violation of any industry standard (R 414),

- there was no evidence of damage related to the trim in covered areas (R 741),

- there was no evidence of defects in the large expanses where no test cut was performed (R 735),

- the decks had a Sealoflex membrane coating which would have been applied by an applicator approved by Sealoflex (R p 748-749),

- where balconies were subsequently screened in by individual owners, the weatherproofing had been penetrated in some locations (R 762)

The Trial Court's ruling that Appellants negligently constructed the condominiums erroneously established that ***each one of the defects disputed above had already been decided in Respondent's favor as a matter of law*** The Panel was wrong to affirm this ruling This error is illustrated by the Panel's misinterpretation of Guffey v Columbia/Colleton Regional Hosp , Inc 364 S C 158, 612 S E 2d 695 (2005) In Guffy, the court held that a directed verdict may be granted as to one specification of negligence if there is no evidence to support that specification Id , at 164-65, 612 S E 2d at 697-98 The opposite is necessarily equally true Where a claim is based on multiple specifications alleging distinct defects, directed verdict, if granted at all, should be limited to only the specifications where no factual issue exists, and must be

denied as to the separate specifications where there is conflicting evidence See Bailes v Southern R Co , 231 S C 474, 482, 99 S E 2d 195, 199 (1957) (holding that directed verdict for entire case was improper where there was evidence regarding one of the specifications of negligence requiring its consideration by the jury) Hunter v Dixie Home Stores 232 S C 139 144, 101 S E 2d 262, 265 (1957) (holding that the existence of testimony as to any one or more of the specifications of negligence requires the denial of a motion for directed verdict as to entire case), see also Wilkerson v Williams, 141 S W 3d 530 Mo Ct App 2004) (affirming the trial court s grant of partial directed verdict for defendant as to one of plaintiffs specifications of negligence), Ciarlelli v Romeo, 699 A 2d 217, 219 (Conn Ct App 1997) (trial court granted defendant directed verdict on all but two of plaintiff's specifications of negligence) The grant of directed verdict to the Respondent as to all of the alleged defects ***in their entirety*** erroneously removed the numerous factual disputes as to the separate specifications from the province of the jury The Appellants easily met their minimal burden of introducing a scintilla of evidence to contest certain of the specifications of defective conditions The Trial Court and the Panel nevertheless disregarded this evidence for the apparent reason that the Appellants conceded ***certain*** defective conditions and even liability as to ***certain*** of those conditions This was plain error A blanket directed verdict ruling in favor of the Respondent as to ***all*** of the specifications of defective conditions was utterly inappropriate This Court should grant rehearing and reverse this ruling

Additionally the Panel incorrectly concluded that the directed verdict as to Appellant Buildstar was appropriate because general contractors have a duty to

supervise subcontractors Op No 4942 p 17 A general contractor is not "automatically" liable for the negligent work of subcontractors Fields v J Haynes Waters Builders, Inc 376 S C 545, 560-61, 658 S E 2d 80, 88 (2008) Rather, a general contractor must only exercise the degree of care reasonably expected in the industry in constructing and supervising the construction of the home Id Respondent did not establish that Buildstar failed to properly supervise under this standard At trial Respondent focused on the fact that Buildstar did not utilize a separate entity to perform contract administration services supervising and inspecting the work of the subcontractors However it was acknowledged throughout the trial that such contract administration is not required, and its existence does not guarantee proper construction (R 220, 223-224, 545, 770) Rehearing should thus be granted and *en banc* review granted, if necessary

IV The Panel should have granted Appellants a new trial because the Trial Court committed reversible error in its instructions to the jury

The Trial Court committed a key error while instructing the jury in this matter which require a new trial It incorrectly instructed the jury that it had a ***duty*** to award punitive damages in the event it found that such damages were recoverable (R 971-972) The Panel affirmed this erroneous instruction Rehearing should be granted

In charging the jury as to punitive damages the Trial Court gave the following instruction over Appellants' objection

> Accordingly, if you should find that the Plaintiff is entitled to recover punitive damages in addition to actual damages, ***it would be your duty to include such damages in your verdict*** and award such an amount as you may deem reasonable and proper in light of the facts and circumstances

(R 971-972, 975, 1046-1047) (emphasis added) Such an instruction to the jury that it had a duty to award punitive damages violated Appellants' due process rights

The Trial Court based its inclusion of this charge, and the Panel based its affirmance, on language from the case of Broom v Southeastern Highway Contracting Co , Inc , 291 S C 93 98-99 352 S E 2d 302, 305 (Ct App 1986) In Broom, the Court of Appeals stated "[i]n 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 discretion of the jury but is recoverable as a matter of right " Id However, in the subsequent case of BMW of North America v Gore, 517 U S 559, 575 (1996), the United States Supreme Court has outlined necessary guideposts for punitive damages due to "[e]lementary notions of fairness enshrined in our constitutional jurisprudence " Further, in State Farm Mutual Automobile Ins Co v Campbell, 538 U S 408, 417 (2003), the Court expressed its concerns over the lack of protections given to civil defendants regarding punitive damages Since a judicial evaluation of a jury's punitive damages award is necessary, it logically follows that a punitive damages award is under no circumstances mandatory The South Carolina Supreme Court's jurisprudence is in accord Mitchell v Fortis Ins Co , 385 S C 570, 686 S E 2d 176 (2009)

As it lies with our courts to determine if punitive damages are proper after the jury awards such damages, it is nonsensical that a jury be instructed that it is ***required*** to award punitive damages Rather, the award of such damages should be discretionary, and, if made, reviewed by the court to protect due process concerns See 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 "), accord Pacific Mut Life Ins Co v Haslip, 499 U S 1, 18-20 (1991) (approving jury instruction from Alabama wherein jury charged that it had the discretion whether to award punitive damages) Thus, the Trial Court's charge that the jury would have a duty to award punitive damages was in error, and this Court should grant rehearing to correct this error

V **Appellants' motions for directed verdict and judgment notwithstanding the verdict should have been granted as to the negligence and warranty claims based on the statute of limitations**

The Trial Court erred in failing to grant Appellants directed verdict and JNOV because Respondent's negligence and warranty claims were barred by the applicable statute of limitations The Trial Court held that the statute of limitations was equitably tolled, and that Appellants were estopped from raising it as a defense and the Panel affirmed these rulings (R 48-72) Op No 4943 pp 17-21 Both the Trial Court and the Panel misapprehend the application of equitable tolling and equitable estoppel, and, when the statute of limitations is properly applied, the negligence and warranty claims are barred

The longest applicable statute of limitations for these claims is three years S C Code Ann § 15-3-530 (2005) The evidence at trial established that as of March 8, 2000 if not earlier, Respondent was on notice of the alleged construction deficiencies at Magnolia North March 8, 2000 was the first annual meeting of the POA, and issues relating to the alleged construction deficiencies were discussed then (R 1565) The minutes from that meeting were mailed to all unit owners (R 111) The initial

Complaint in this matter was not filed until May 28, 2003, more than three years later Accordingly, but for the Trial Court's equitable tolling ruling, this negligence and warranty claims are time barred

South Carolina s courts rarely apply the doctrine of equitable tolling to halt the running of the statute of limitations American Legion Post 15 v Horry County, 381 S C 576, 582-83, 674 S E 2d 181, 184 (Ct App 2009) Rather, this doctrine is reserved for extraordinary circumstances where such tolling is necessary to prevent unfairness to a diligent plaintiff and the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine Id The party claiming the statute of limitations should be tolled bears the burden of establishing facts sufficient to justify equitable tolling Hooper v Ebenezer Senior Servs Rehab Ctr , 386 S C 108, 115, 687 S E 2d 29, 32 (2009)

The Panel's affirmance of the Trial Court's equitable tolling ruling was based upon the fact that prior to September 13 2002, the POA was controlled by persons associated with the Heritage entities On September 9 2002 the property owners assumed full control of the POA (R 1594) Thus, the Panel concluded that the statute of limitations should be equitably tolled until the time that non-Heritage officers assumed control of the POA, September 13, 2002 Op No 4943 p 8

The Panel's equitable tolling ruling is based on the unsupported assumption that the Heritage officers who also served on the POA's Board prevented the POA from taking any action adverse to the Heritage entities, such as the initiation of construction defect litigation This assumption is refuted by the record in this case The evidence at trial established that despite his controlling interest in the Heritage entities in May of

2002, Dr Green directed the property management company to contact the subcontractors to resolve construction defects, including pursuing litigation if necessary (R 1587) More significantly, it was Dr Green, in his capacity as President of the POA, who retained Mr Henry around that time as counsel for the POA for the apparent purpose of investigating and initiating litigation on behalf of the POA for construction deficiencies (R 149) By July of 2002, Mr Henry, as counsel for the POA, retained the services of R V Buric Construction Consultants to conduct an analysis of the construction deficiencies at Magnolia North (R 1648)

All of these actions took place ***months before*** Dr Green tendered control of the POA to the unit owners Thus, contrary to preventing the POA from taking action against the Appellants, Dr Green had taken the appropriate steps as president of the POA to ensure the POA could take all appropriate actions, including litigation (R 187-89, 1648, 1595) When that transfer of control took place on September 13, 2002, Mr Henry was present at that meeting and the newly formed POA Board voted to continue his services (R 1595) At that time, approximately six months remained before the statute of limitations would bar an action Thus, the evidence overwhelmingly shows that despite Dr Green's involvement with the Heritage entities, he took steps to protect the property owners' interests This contradicts the Panel's conclusion that the developer's control of the POA necessitated equitable tolling of the statute of limitations

Under South Carolina law on equitable tolling, the mere control of the POA by the developer does not, in and of itself justify the tolling of the statute of limitations While other jurisdictions have specifically enacted statutes that toll the statute of

limitations during the period where a property owners' association is controlled by the developer [6] the South Carolina legislature has deemed this unnecessary Here, Respondent failed to meet its burden of establishing "extraordinary circumstances" justifying the application of equitable tolling, and the Panel overlooked this fact

Even if the developer controlled POA Board had not taken all of the steps it did to prepare for and ultimately initiate a lawsuit on behalf of the POA, any failure or refusal to act is not a proper basis for the tolling of the statute of limitations Rather, such a failure by a POA Board member would constitute a breach of his or her fiduciary duty to the POA As such the proper remedy for the POA would be to initiate an action against the derelict Board members for breach of that duty Thus, the Panel's application of the doctrine of equitable tolling was in error and Respondent's negligence and warranty claims should have been barred under the statute of limitations

The Panel also incorrectly concluded that Appellants were equitably estopped from asserting the statute of limitations defense This ruling was based upon representations made by HCI that it was planning to remedy the defective conditions Op 4943 pp 20-21 The Panel overlooked the fact that there is no evidence that these statements were made to dissuade litigation The Heritage entities in no way deterred the POA from filing suit Instead Respondent was propelled forward toward this

[6] See FLA STAT § 718 124 (2010) ("The statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration ") ALA CODE § 35 8A 311 (Supp 2010) ("Any statute of limitation affecting the association s right of action under this section is tolled until the period of declarant control terminates ") NEV REV STAT ANN § 116B 555 (Supp 2009) ("Any statute of limitation affecting the association s right of action under this section is tolled until the period of declarant s control terminates ") WASH REV CODE § 64 34 344 (Supp 2010) ("Any statute of limitations affecting the association s right of action under this section is tolled until the period of declarant control terminates ")

litigation by the actions of Dr Green and the POA's Board while it was under the HCI's control Hence, Rehearing should be granted

VI Appellants are entitled to directed verdict and JNOV because Respondent failed to establish its damages as to any of the causes of action

Appellants were entitled to directed verdict and JNOV as to all of Respondent's claims because Respondent failed to meet its burden of proof as to damages In order for damages to be recoverable, the evidence should be such as to enable the jury to determine the amount thereof with reasonable certainty or accuracy Whisenant v James Island Corp 277 S C 10, 13, 281 S E 2d 794, 796 (1981) While proof to a mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess or speculation Id As was illustrated in the testimony of Respondent's expert, Drew Brown, Respondent's damages were speculative

Mr Brown, who prepared Respondent's scope of repairs, admitted that there were numerous unknowns in his estimated repairs and that he did not know the actual extent of the alleged damage because they did not expose the various areas to conduct a full inspection Rather his diagnostic testing was done only on a "sampling " (R 243) Elevated moisture readings were **not** found at each location probed, and these readings indicated that there were no problems in some buildings (R 273-274, 513) His estimates for sheathing, framing band board and stud replacement were described as "just our best estimate " (R 375) The test cuts he performed focused on window and trim locations, and did not include cuts in the field of any walls to identify what, if any, damage was present in these large areas (R 451-452) He also acknowledged that the trim product, which he considered to be inherently defective, showed no

problems in covered areas (R 516-517) Finally, with respect to the decks on Buildings One through Five, which had already been repaired when he did his work and about which there are no complaints, he concluded they should be replaced anyway [7] (R 456-458, 761) With regard to the windows, which were a significant component of Respondent's damages only four windows from a total of two different units at Magnolia North were tested (R 496-497) In inspecting this "sampling" of windows, the brick was not removed down to the base (R 328) Significantly, no moisture readings were conducted as to ***any*** upper level windows (R 445)

Respondent s expert Chris Cooper also speculated as to the possible "hidden damage" in the buildings (R 553-554 612-616) This speculation was based upon past jobs in which he was involved (R 554) Those comparison cases, however, involved EIFS cladding (commonly referred to as synthetic stucco) for termite infestation (R 665) It was based on this experience that he estimated the "hidden damage" he was likely to find at Magnolia North (R 554, 655-656) However, he acknowledged that there have been no evidence or reports whatsoever of termite issues at Magnolia North (R 655-656) Additionally, EIFS is not present at Magnolia North Thus, his basis for comparison and estimation as to "hidden damage" was improper

With respect to the claim for breach of fiduciary duty, Appellants are entitled to directed verdict and JNOV based upon Respondent's failure to offer evidence of its damages *at the time of the transfer of control* of the Property Owner's Association

[7] The decks on Building One through Five were previously replaced by the Property Owner s Association who retained BTS Construction to perform this work (R 457-458) The cost of these repairs was included in Respondent s damages (R 159-160 456) Mr Brown testified that the decks on these building still needed to be replaced because they were not properly sloped (R 456-457) However BTS Construction s proposal provided that they would provide a one inch slope on the decks (R 458)

The fiduciary duty claim is based upon the rule set forth in Concerned Dunes West Residents, Inc v Georgia-Pacific Corp , 349 S C 251, 562 S E 2d 633 (2002) and Goddard v Fairways Dev Gen Partn , 310 S C 408, 426 S E 2d 828 (Ct App 1993) Specifically, a "developer has a responsibility to insure that the common areas are in good repair at the time they are conveyed to the property owners association or to provide the association with funds sufficient to effectuate any needed repairs to those areas " Dunes West, 349 S C at 256, 562 S E 2d at 636, Goddard 310 S C at 414 426 S E 2d at 832 Control of the Property Owners' Association was transferred in September 2002 Respondent, however, failed to offer evidence of the funds that would have been necessary *at that time* to repair defective conditions that were present *at that time* Rather Respondent's damages evidence focused instead on the *current* (at the time of trial) costs to remedy defective conditions, including conditions that may not have existed in September 2002 Absent any evidence of the repairs costs at the time the common areas were conveyed, the jury was left to speculate on this point

In addition, Respondent sought the recovery of over $500,000 in Property Owners' Association funds expended on repairs between 2003 and 2009 (R 160-163) This sum, however, included items such as the repair of electrical outlets toilet leaks loose light fixtures, fire sprinkler issues removal of dirt from an electrical outlet, and issues with appliances such as washers and dryers (R 172-178) Such general maintenance items were improperly included in the damages total The speculative nature of Respondent's damages, and the inclusion of general maintenance items in its damages resulted in Respondent failing to properly establish its damages with the requisite level of certainty or accuracy As such, the Trial Court should have granted

Appellants' motion for directed verdict and JNOV as to all of Respondent's claims and the Panel should not have affirmed the Trial Court's refusal to grant those motions

VI The punitive damages award was improperly based on alleged harm to non-parties to the litigation

As set forth above, the Trial Court improperly admitted evidence of alleged defects and related litigation at ***other*** Heritage developments The admission of this evidence also violated Appellants' due process rights because it resulted in the jury imposing punitive damages upon Appellants based upon alleged harm to non-parties to the litigation "[T]he Constitution's Due Process clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i e* , injury that it inflicts upon those who are, essentially, strangers to the litigation " Phillip Morris USA v Williams, 549 U S 346, 353 (2007) Otherwise, the defendant is denied "an opportunity to present every available defense " Id Further, "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation " Id at 354 As stated by the Supreme Court, in such situations "[t]he jury would be left to speculate" as to the number of victims as well as the extent of and circumstances surrounding their injuries, magnifying the risks of arbitrariness, uncertainty, and lack of notice with which fundamental due process is concerned Id

The Panel incorrectly concluded that it need not address this issue because it "previously determined the trial court properly admitted evidence of defects at other HCI developments " Op No 4943 p 25 That prior determination, as well as the

Panel s refusal to confront this issue, is in error The relevance of such evidence in a Gamble/Mitchell analysis does not overcome the clear prohibition in Phillip Morris

Respondent s reliance on this evidence in arguing to the jury that it should "send a message to the developers" by awarding punitive damages to "punish" them for having "wrecked this community with condominium after condominium," such as the "mold palace" at Avian Forest, violated Appellants' Due Process rights (R 937, 951) The sheer volume of references to the other projects illustrates that the jury s award of punitive damages in this action was punishment not only for Appellants' actions with regard to Magnolia North but for every project in which Appellants were ever involved This error warrants reversal of the punitive damages award and the Panel erred in not so holding

CONCLUSION

For the foregoing reasons this Court should rehear this case and issue a new opinion reversing the Panel's Opinion and entering judgment in favor of Appellants Failing that this Court should rehear this case and grant Appellants new trials absolute

Respectfully submitted,

[Signature block appears on following page]

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Attorneys for Appellants Heritage Communities, Inc Heritage Magnolia North, Inc and Buildstar Corporation

Columbia, South Carolina
March 16, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No 2005-CP-26-0044

Magnolia North Property Owners' Association, Inc , Respondent,

v

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

---

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es)

Pleadings

Petition for Rehearing and Suggestion for Rehearing
En Banc

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March 16, 2012

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March 21, 2012

The Honorable Jenny Abbott Kitchings
SC Court of Appeals – Clerk of Court
P O Box 11629
Columbia S C 29211

RE Magnolia North Property Owners Association, Inc vs Heritage Communities Inc et al
Civil Action No 05-CP-26-0044
SC Court of Appeals Tracking No 2009147806

Dear Ms Kitchings

Please find enclosed herewith the original and 15 (fifteen) copies of the Return to Petition for Rehearing in regards to the above named matter We would ask that you please file the original and return a clocked copy to our office in the envelope provided Per instructions from your office there is no fee required for this filing

By copy of this letter, we are serving a copy of the Return to Petition for Rehearing on all parties of record

With kindest regards, I remain

Yours very truly,

THOMPSON & HENRY PA

John P Henry

JPH/gtw

Encl

cc C Mitchell Brown Esq
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A Mattison Bogan Esq
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RETURN TO PETITION FOR REHEARING

Petitioner's Petition for Rehearing should be denied because it fails to present a proper basis for review of this Court's decision In accordance with Rule 221(a) *SCRAP*, to be entitled to a rehearing, Petitioner must "state with particularity the points supposed to have been overlooked or misapprehended by the Court' The purpose of a petition for rehearing is not to give the Petitioner a second appeal Kennedy v South Carolina Retirement System, 349 S C 531 564 S E 2d 322 (2001)("The purpose of a petition for rehearing is not to present points which lawyers for losing parties have overlooked or misapprehended, nor is it the purpose of the Petition for Rehearing to have the case tried in the Appellate Court a second time' Jean H Toal Shahin Vafai and Robert Muckenfuss, *Appellant Practice in South Carolina* 309 (1999) Contrary to the requirements of Rule 221(a), Petitioner restates and reargues the identical issues and arguments contained in its brief This Court addressed each of the issues set forth in the Petitioner's brief, in its Petition, now restated for Rehearing and thus did not "overlook" or

"misapprehend' any point In effect, the Petitioner is asking for a second appeal, which is contrary to the intent of Rule 221(a) *SCRAP* Kennedy, *supra*

Because each of the issues raised in the Petition for Rehearing were briefed by the Petitioner and Respondent and properly addressed by the Court in its decision in this matter, Respondents therefore stand on their brief in response to this Petition, and respectfully request that the Petition for Rehearing be denied

Respectfully Submitted,

Conway, South Carolina

THOMPSON & HENRY, P A

March 21, 2012

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THE STATE OF SOUTH CAROLINA
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Clifton Newman Circuit Court Judge

Case No 2005-CP-26-0044

Magnolia North Property Owners' Association, Inc Respondent,

v

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

PROOF OF SERVICE

I certify that I have served a copy of the **Return to Petition for Rehearing** on the Appellants Heritage Communities Inc Heritage Magnolia North Inc and Buildstar Corporation by depositing a copy of it in the United States Mail, postage prepaid on March 21, 2012 addressed to their attorneys of record as follows

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THE STATE OF SOUTH CAROLINA
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APPELLANTS' REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rules 219 and 240(f) of the South Carolina Appellate Court Rules, Appellants Heritage Communities, Inc , Heritage Magnolia North, Inc and Buildstar Corporation hereby file this reply to Respondent's return to the petition for rehearing and suggestion for rehearing *en banc*

In their return Respondent asserts that Appellants have not "state[d] with particularity the points supposed to have been overlooked or misapprehended by the Court " {Resp Return p 1 (emphasis in original)} Respondent incorrectly claims that the petition merely "restates and reargues the identical issues and arguments" contained in Appellants' briefs, and that, because the Panel's opinion held against Appellants on these issues, the Panel "did not "overlook' or 'misapprehend' any point " {Resp Return pp 1-2} This view ignores the purpose of a petition for rehearing and *en banc*

review The fact that the same issues and arguments raised in the appeal are now relevant to the issue of whether rehearing or rehearing *en banc* should be granted does not preclude rehearing [1] Rather, the relevant inquiry is whether the Panel's opinion as to those issues overlooked or misapprehended some issues of fact or law

Specifically, the issues raised in the petition are as follows

- The Panel misconstrued and overlooked established South Carolina law on the issue of disregarding Appellants separate corporate forms in affirming the "amalgamation" ruling, resulting in Appellants being improperly stripped of their separate corporate forms and Respondent being incorrectly freed from having to establish each element of the claims and damages as to each individual Appellant {App Pet pp 6-12},

- The Panel overlooked and misapprehended South Carolina's jurisprudence on the issue of the admission of "similar events" evidence such as the extensive references to other Heritage projects, which were improperly used to paint Appellants as "bad developers" in violation of Rule 404, SCRE, and the Supreme Court's mandate in Whaley v CSX Transportation, Inc , 362 S C 456, 600 S E 2d 286 (2005) {App Pet pp 13-16},

- The Panel erred in affirming the directed verdict on the negligence and warranty claims by misconstruing defense counsel's acknowledgement that some defects exist as an admission that Appellants were negligence as to all alleged defects and by overlooking the evidence which established the existence of factual issues as to multiple separate specifications within the claims {App Pet pp 16-22},

- The Panel erred by overlooking and misapprehending the fact that the Trial Court's jury instruction, which incorrectly instructed the jury that it had a *duty* to award punitive damages in the event it found such damages were recoverable {App Pet pp 22-24}

- The Panel erred in failing to grant Appellants directed verdict and JNOV on the negligence and warranty claims by misconstruing the application of the statute of limitations as to those claims and by overlooking the fact Respondent failed to establish their damages with reasonable certainty or

[1] Should this Court deny the petition for rehearing and rehearing en banc, Appellants intend to file a petition for writ of certiorari with the South Carolina Supreme Court Under Rule 242(d)(2), SCACR, no issue may be presented in a petition for writ of certiorari that has not also been raised in a petition for rehearing

accuracy and, instead such damages were impermissibly based on speculation {App Pet p 24-31},

- The Panel erred in affirming the punitive damages awards by overlooking Respondent's failure to establish, by clear and convincing evidence that the applicable standard of care had been violated as to each individual Appellant {App Pet p 12}, and

- The Panel erred in affirming the punitive damages awards by overlooking the fact that the jury was improperly permitted to base its punitive damages awards on alleged harm to non-parties {App Pet pp 31-32}

Contrary to Respondent's assertion, these issues were misapprehended and/or overlooked by the Panel Therefore, Appellants seek rehearing and rehearing *en banc* based on these errors, more thoroughly described in their petition

CONCLUSION

Based on the foregoing, and on the arguments in their petition for rehearing and suggestion for rehearing *en banc*, as well as in their appeal briefs filed in this matter, Appellants, respectfully request this Court grant rehearing or rehearing *en banc* as to the Panel s opinion in this matter Rehearing *en banc* is particularly appropriate as the opinion in this matter constitutes a significant departure from the established jurisprudence in this state regarding the disregarding of corporate forms and the proper admission of "similar events" evidence

[signature page attached]

Respectfully submitted,

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Attorneys for Appellants Heritage Communities Inc , Heritage Magnolia North Inc and Buildstar Corporation

Columbia, South Carolina
March 27, 2012

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March 27, 2012